THE MOYER GROUP

October 15, 2012

Merit Systems Protection Board
Western Regional Office
201 Mission Street Suite 2310
San Francisco, CA 94105-1831

Attention: Administrative Judge Benjamin Gutman

TRANSMITTED VIA FAX AND PRIORITY MAIL

Re: Joseph W. Bottini and James A. Goeke v. U.S. Department of Justice
Docket No. SF-0752-12-0600-I-1 and SF-0752-12-0598-I-1

Dear Judge Gutman:

Pursuant to your order, dated September 18, 2012, the National Association of Assistant United States Attorneys files the attached *amicus curiae* brief in the above-captioned matter.

This will confirm that a copy of this brief has been sent by electronic mail to the parties' representatives.

Sincerely,

Bruce L. Moyer

Bruce L. Moyer
Counsel to the National Association of Assistant United States Attorneys

Enclosure

6907 WESTMORELAND AVENUE TAKOMA PARK, MD 20912-4408 (301) 270-8115 FAX: (301) 270-8255
EMAIL: bruce@moyergroup.net

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JOSEPH W. BOTTINI, Appellant,	DOCKET NUMBER SF-0752-12-0600-I-1
JAMES A. GOEKE, Appellant,	DOCKET NUMBER SF-0752-12-0598-I-1
v.	ADMINISTRATIVE JUDGE BENJAMIN GUTMAN
U.S. DEPARTMENT OF JUSTICE, Agency.	DATE: October 15, 2012

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS

The National Association of Assistant United States Attorneys hereby submits its *amicus curiae b*rief in the above-referenced appeals before the Merit Systems Protection Board. Permission to file the brief was granted by order of the Administrative Judge, dated September 18, 2012.

TABLE OF CONTENTS

I. STATEMENT OF *AMICUS CURIAE*

The National Association of Assistant United States Attorneys (NAAUSA) is a national professional association, headquartered in Lake Ridge, Virginia, representing the interests of the 5,600 Assistant United States Attorneys (AUSAs) employed by the United States Department of Justice. Assistant United States Attorneys are the career-level federal law enforcement officers in the 94 United States Attorneys' Offices responsible for federal criminal prosecutions and civil cases involving the United States Government.

NAAUSA is a non-labor organization representing federal employees, as defined in 5 C.F.R. § 251.103, and is officially approved as such by the Department of Justice. Founded in 1993, NAAUSA's mission is to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice, and encouraging the just enforcement of the laws of the United States.

NAAUSA possesses a substantial and common interest in ensuring that the due process rights and privileges of all AUSAs are duly protected. NAAUSA believes that the issues raised in this appeal involve broad concerns affecting the due process rights and privileges of all AUSAs, the correctness of penalties imposed by the Department of Justice upon AUSAs for discovery violations, the liability of members of prosecutorial teams for discovery violations, and the underlying process within the Department of Justice (Agency) for the investigation of discovery violations and

the determination of sanctions. Because a central issue in this appeal is the process by which the Agency judged and sanctioned Appellants as AUSAs for their discovery violations, NAAUSA is especially appreciative of this opportunity to contribute its views. These views reflect the accumulated experience of a significant number of AUSAs and their understanding of the challenges of exercising judgment under the real-world circumstances of a high-profile prosecution.

II. SUMMARY OF ARGUMENT

This appeal presents an issue of exceptional importance for the efficiency of the civil service and the delivery of justice. It arises in the context of a botched, high-profile criminal prosecution brought by the government against an elected public official, and the Agency's efforts to assign blame for the pretrial and trial errors that caused the prosecution to implode.

The Agency's decision to apply discipline upon two line attorneys on the prosecution trial team failed to appropriately acknowledge the collective responsibility of the trial team and the exceptional circumstances that led to the prosecution's discovery-related errors. Each of these circumstances--dysfunctional management of the trial effort, uncoordinated division of responsibilities, a compressed time frame and combative defense tactics--created the conditions that spawned the government's mistakes in its fulfillment of its discovery-related responsibilities. While these conditions are not excuses for the errors that took place, they contributed to the unique set of circumstances that led to the errors, and were not sufficiently considered by the Agency in assessing blame and imposing

punishment upon Appellants. Judicially-appointed and Agency-internal investigative efforts documented these circumstances and their key relationships to the government's violation of its discovery-related obligations.

In addition, the trial team leader and higher-level management officials within the Agency failed to provide the requisite direction and supervision over strategic decisions associated with the government's disclosure obligations. The trial team leader attempted to minimize her role and shift responsibility for critical decisions arising in the fast-paced, intense pre-trial setting. Higher-level officials within the Department actively oversaw, and even dictated at times, the strategic thrust and details of the prosecution, given its headline-generating prominence. Some became enmeshed in the strategy and details of the trial effort, but mostly were ineffective or too late. Ultimately, the Agency refrained from taking any disciplinary action against the trial team supervisor or these higher-level officials.

When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. Appellants in this appeal have met their burden to demonstrate that similarly-situated employees were treated differently. The Agency has failed to prove by a preponderance of evidence a legitimate reason for this difference in treatment.

In addition, the Agency has failed to take into account several distinct factors enumerated by the Merit Systems Protection Board in its framework for the review of Agency-imposed penalti*es*. Had the Agency correctly taken those factors into

account, a different conclusion would have resulted -- the same conclusion reached through careful and thorough analysis by the Agency official originally responsible for determining whether and how much punishment should be imposed on Appellants. He concluded that Appellants should not be made scapegoats for discovery-related failures that were caused by the prosecution team's overall lack of leadership, planning, unwise delegation of responsibilities and disorganization. The Board should give due deference to his findings and conclusions.

Finally, the fundamental soundness of the civil service and the merit system rests upon the even-handed treatment of all employees, whether at the lowest or highest levels of government. Uneven treatment of any government agency's employees can lead to the degradation of morale, a loss of trust, and the decline of commitment to the fulfillment of the agency's mission. In a democracy, these consequences can become profound, especially within government components responsible for the administration and delivery of justice.

For these reasons, the Board should find reversible error in the Agency's punishment of Appellants and set aside those sanctions.

III. STATEMENT OF BACKGROUND AND FACTS

A. THE ROLE OF AUSAs

It is important to first note that AUSAs represent the federal government in litigation involving the interests of the United States. They are career-level attorneys responsible for the performance of investigation, litigation and

enforcement-related duties assigned by the United States Attorney in each federal judicial district.[1] The United States Attorneys, as Senate-confirmed political appointees under the direction and supervision of the Attorney General, serve as the chief law enforcement officers in each judicial district and are responsible for coordinating multiple agency investigations within each district.[2]

There are approximately 5,600 AUSAs serving in 94 United States Attorney's Offices, based throughout the United States, Puerto Rico, the Virgin Islands, Guam and the Northern Mariana Islands. Appellants in this case served during the period in question in the United States Attorney's Office in Anchorage, Alaska, within the federal judicial District of Alaska.

B. THE STEVENS PROSECUTION, ITS ORIGINS AND APPELLANTS' ROLE

Criminal prosecutions are conducted by AUSAs, on behalf of the United States Attorney, in cases involving violations of the federal criminal laws, including organized crime, drug trafficking, tax evasion, fraud, bank robbery, civil rights offenses and political corruption. The underlying disciplinary charges in this appeal arose because of Appellants Bottini and Goeke's alleged misconduct involving errors in trial discovery that occurred in the prosecution of Senator Ted Stevens, a long-

[1] United States Attorney Manual 3-2.210.

[2] United States Attorney Manual 3-2.100. The United States Attorneys represent the federal government, and thus the American people, in any trial in which the United States is a party. Under Title 28 of the United States Code, the United States Attorneys have three main responsibilities: prosecution of criminal cases brought by the federal government; prosecution and defense of civil cases in which the United States is a party; and collection of money owed to the government which cannot be collected administratively.

time Congressional lawmaker representing the state of Alaska.[3] The nature of the prosecution of Senator Stevens, an elected public official, caused the case to be taken over by the Department of Justice's Public Integrity Section, which is within the Department's Criminal Division. The Public Integrity Section "oversees the federal effort to combat corruption through the prosecution of elected and appointed public officials at all levels of government."[4] The Section's offices are located within "Main Justice," the headquarters of the Department of Justice in Washington, D.C.

The prosecution of Senator Ted Stevens was the outgrowth of a string of prosecutions brought by the Public Integrity Section against a number of Alaska state and local officials through a federal public corruption investigation called "Operation Polar Pen." Appellants Bottini and Goeke participated in the Operation Polar Pen investigation in various respects. As the Polar Pen investigation expanded, so did the components of the Department of Justice working on the probe. The Anchorage-based U.S. Attorney's Office started receiving assistance in June 2004 from the Justice Department's Public Integrity Section, principally through the involvement of Section trial attorneys Nicholas Marsh and Edward Sullivan. The Public Integrity Section soon came to direct all the prosecutions growing out of the Polar Pen probe -- including the prosecution of Senator Ted Stevens. During all times relevant to this appeal, officials and lawyers within the Public Integrity Section directed and supervised the Stevens prosecution. Appellants

[3] The Agency issued a 40-day suspension to Appellant Joseph W. Bottini and 15-day suspension to Appellant James A. Goeke on May 23, 2012.
[4] United States Department of Justice website, http://www.justice.gov/criminal/pin/.

Bottini and Goeke as Assistant United States Attorneys remained subordinates on the investigation and trial team throughout this period.

The Polar Pen investigation focused primarily on bribes of Alaska state lawmakers and resulted in the conviction of a number of Alaska state legislative and business officials.[5] Among those convicted was Bill Allen, co-founder and CEO of VECO Corporation, an Alaska oil pipeline services and construction company. On May 7, 2007, Allen pleaded guilty in U.S. District Court in Anchorage to charges, brought by the Public Integrity Section, of extortion, bribery, and conspiracy to impede the Internal Revenue Service.[6] Bill Allen was sentenced to 3 years in prison and fined $750,000.00.

As a result of the federal government's prosecution of Bill Allen, evidence surfaced concerning alleged favors Allen had provided to Senator Ted Stevens through repairs and improvements Allen paid for to a mountain lodge owned by Senator Stevens in Girdwood, Alaska. Ultimately, the Public Integrity Section determined to prosecute Senator Stevens in the United States District Court for the District of Columbia for the violation of federal ethics laws as a result of Stevens' failure to report on his Congressional financial disclosure statements the monetary value of the improvements and other favors he received from Allen and VECO

[5] David Hulen and Richard Mauer, *The Alaska Political Corruption Investigation*, Anchorage Daily News, posted September 24, 2009, http://community.adn.com/adn/node/112569.

[6] The charges involved bribing Alaska lawmakers to vote in favor of an oil tax law favored by VECO that was the subject of vigorous debate during the regular and two special sessions of the Alaska Legislature in 2006.

Corporation.[7] Because Allen directed the remodeling project by hiring workers and providing the materials, he became the government's principal trial witness against Stevens. Allen testified that he never billed Stevens for work on his house, and that Stevens knew he was getting special treatment.

Senator Stevens was indicted, as the result of an indictment presented to a grand jury by the Public Integrity Section, on July 29, 2008.[8] However, prior to that time and throughout the spring of 2008, Appellants Bottini and Goeke had little inkling whether officials at Justice Department Headquarters in Washington would seek to indict Stevens, despite their repeated inquiries to the Public Integrity Section. They were only advised of the decision to proceed to indictment on the eve of the indictment[9] – and at the same time were informed that the entire prosecution team (already headed by Public Integrity Section attorneys) would be reshuffled, at the insistence of Matthew Friedrich, Assistant Attorney General for the Criminal Division. Friedrich pressed Brenda Morris, who was then serving as the Deputy Chief of the Public Integrity Section, into taking over the leadership of the

[7] Richard Mauer, *Feds Eye Stevens' Home Remodeling Project*, Anchorage Daily News, May 29, 2007. http://community.adn.com/node/107762.

[8] On July 29, 2008, a District of Columbia grand jury returned an indictment charging Senator Stevens with violations of 18 U.S.C. §§ 1001(a)(1), (a)(2), (c)(1) and (2), for failing to report gifts and liabilities as required on his U.S. Senate Public Financial Disclosure Form.

[9] "Department of Justice Press Release, *U.S. Senator Indicted on False Statement Charges*, July 29, 2008. http://www.justice.gov/opa/pr/2008/July/08-crm-668.html.

prosecution team. Friedrich's decision was at odds with the views of Morris' direct supervisor, William Welch, the director of the Public Integrity Section. [10]

C. THE STEVENS PROSECUTION TEAM, ITS DISCOVERY-RELATED ERRORS AND TRIAL CONSEQUENCES

As a result of the aforementioned realignment, there were six members of the trial team: William M. Welch, Chief of the Public Integrity Section; Brenda K. Morris, Principal Deputy Chief of the Public Integrity Section, who served as "First Chair" or supervisor of the team; Nicholas A. Marsh, Public Integrity Section trial attorney; Edward Sullivan, Public Integrity Section trial attorney; Appellant Joseph W. Bottini, Assistant United States Attorney, Alaska United States Attorney's Office; and Appellant James A. Goeke, Assistant United States Attorney, Alaska United States Attorney's Office. In addition, two Justice Department officials provided oversight of the case: Rita Glavin, Principal Deputy Assistant Attorney General of the Criminal Division; and Matthew Friedrich, Assistant Attorney General for the Criminal Division.

In negotiations before trial, Senator Stevens and his defense team refused a plea agreement and opted for their right to a speedy trial in the hopes that Stevens' name could be cleared in time for him to return to Alaska and win reelection in a pitched campaign. Stevens' exercise of his rights under the Speedy Trial Act, and the government's acquiescence to an even earlier trial date than required by law, meant

[10] Welch stated: "I did not agree with the decision to add Ms. Morris to the prosecution team. I thought that the addition would have a very detrimental and explosive impact on the team, and in fact that's exactly what happened." Deposition of William Welch, Feb. 5, 2010. Henry F. Schuelke, Special Counsel, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, April 7, 2009.

that there were only 55 days between indictment and trial, which considerably compressed the ability of the prosecutorial trial team to prepare for trial, prepare witnesses and distill and manage reams of evidence.

Stevens was convicted by a trial jury on seven counts of making false statements on October 27, 2008.[11] The jury verdict against Stevens came eight days before Election Day. Subsequently, Stevens lost to Democrat Mark Begich in an extraordinarily close contest.[12]

After the jury convicted Stevens, the Justice Department discovered potentially exculpatory evidence in its possession that had not previously been disclosed to the Stevens defense team in the course of discovery. In addition, a prosecution witness and an agent from the Federal Bureau of Investigation came forward alleging prosecutorial misconduct.

As a result, Judge Emmet G. Sullivan, who had presided over the Stevens trial, inquired into the handling of the case and the prosecution's disclosure of exculpatory evidence and issued an order to the Justice Department to turn over documents relating to the charges. In February 2009, Judge Sullivan held three high-level Justice Department officials in contempt of court for failing to follow the court order to turn over documents. Those officials were: William M. Welch, III, Chief, Public Integrity Section; Brenda Morris, Principal Deputy Chief, Public Integrity

[11] John Bresnhan and Martin Kady II, *Messy Trial Ends with a Decisive Verdict*, Politico, October 27, 2008. http://www.politico.com/news/stories/1008/14819.html.
[12] Thereafter, on August 9, 2010, Senator Stevens died in a plane crash in Alaska while en route to a private fishing lodge.

Section; and Patricia Stemler, Chief, Appellate Section of the Criminal Division. Judge Sullivan's contempt order did not reach to Appellants Bottini and Goeke. At this point, the Justice Department removed its entire team of prosecutors from the case and assigned a new team of Department attorneys, which found additional evidence that had never been handed over to the defense.

D. JUDICIAL-APPOINTED AND AGENCY INVESTIGATIONS IN THE AFTERMATH OF THE STEVENS CONVICTION

On April 1, 2009, newly-installed U.S. Attorney General Eric H. Holder Jr. announced that the Justice Department would move to dismiss the indictment against Senator Stevens "in the interest of justice." On April 7, 2009, Judge Sullivan dismissed Stevens' conviction and appointed a Special Prosecutor, Henry F. Schuelke, III, to investigate alleged abuses by the prosecutorial team. Attorney General Holder also directed the Office of Professional Responsibility (OPR), the internal ethics office within the Department, to begin an internal probe of the alleged abuses.

Special Prosecutor Schuelke provided his report to Judge Sullivan on March 15, 2012.[13] Significant Congressional and public interest awaited the report, and the Special Prosecutor testified publicly about his findings and conclusions before

[13] Henry F. Schuelke, Special Counsel, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order of April 7, 2009, March 15, 2012, hereinafter referred to as the "Special Prosecutor's Report."

committees of the United States Senate [14] and House of Representatives [15] responsible for oversight of the Justice Department.

The Agency's Office of Professional Responsibility issued its report[16] five months later, on August 15, 2011, finding that, although Appellants Bottini and Goeke had not engaged in any intentional misconduct, they had caused the government to violate its obligations under constitutional *Brady* and *Giglio* principles[17] and Department of Justice policy.[18] Specifically, OPR found that both Appellants had committed professional misconduct in "reckless disregard" of their disclosure obligations with respect to certain pieces of evidence.[19] OPR also found that Public Integrity Section Principal Deputy Chief Brenda Morris exercised poor judgment rather than reckless disregard.

---

[14] Hearing on the Special Prosecutor's Report on the Prosecution of Senator Ted Stevens, Senate Committee on the Judiciary, March 28, 2012. http://www.judiciary.senate.gov/hearings/hearing.cfm?id=29e372210b7a3f21ab163e62375568c4

[15] Prosecution of Former Senator Ted Stevens, Hearing before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee, April 19, 2012, Serial No. 112-106.

[16] Department of Justice, Office of Professional Responsibility Report, Investigation of allegations of prosecutorial misconduct in *United States v. Theodore F. Stevens, Crim. No. 08-231, (D.D.C. 2009) (EGS)*, August 15, 2001, hereinafter referred to as "the OPR Report."

[17] The Government is required pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), to disclose certain information to the defendant, in particular that which is exculpatory in nature or that which is useful to the defendant.

[18] United States Attorney Manual, Section 9-5.001.

[19] The involvement of these officials and their mismanagement were extensively documented and found instrumental by judicial and Department of Justice review bodies, including the Special Prosecutor appointed by Judge Sullivan and the Office of Professional Responsibility.

E. AGENCY IMPOSITION OF DISCIPLINE UPON APPELLANTS

Because of the "reckless disregard" findings applicable to Appellants, OPR Report forwarded its report to the Agency's Professional Misconduct Review Unit (PMRU) for consideration of disciplinary action. Kevin Ohlson, Chief of PMRU, assigned the matter to PMRU Attorney Terrence Berg for consideration of disciplinary action.[20] Following extensive review and analysis of the OPR Report, PMRU Attorney Berg disagreed substantively with OPR's conclusion that Appellants Bottini and Goeke had committed professional misconduct and communicated those findings in a draft memorandum.[21] Berg found the record had *not* demonstrated by a preponderance of the evidence that Appellants Bottini and Goeke had each acted in "reckless disregard" of their professional responsibilities, but rather had exercised "poor judgment."[22] As a result of that finding, Berg declined to recommend discipline against Appellants. Consequently, PMRU Chief Ohlson sought and received authorization from the Deputy Attorney General (DAG) to remove Berg and serve as the proposing official.

---

[20] Attorney Berg previously had served as a federal prosecutor for eight years and for two years as an interim United States Attorney for the Eastern District of Michigan. He currently is a nominee for United States District Judge for the United States District Court for the Eastern District of Michigan.

[21] Undated Memorandum of Terrence Berg, Attorney, Professional Misconduct Review Unit, to Joseph A. Bottini, Assistant United States Attorney regarding OPR Investigation of Joseph A. Bottini (August 15, 2011), Memorandum In Support of Finding of Poor Judgment, hereinafter referred to as "the Berg Report."

[22] Similarly, OPR had concluded that Public Integrity Section Principal Deputy Chief Brenda Morris had exercised poor judgment – not reckless disregard – by failing to supervise the *Brady* review, delegating the redaction of interview reports to the FBI Agent involved in the underlying investigation, and failing to ensure that the team attorneys reviewed the FBI Agent's redactions. OPR Report, *supra*, at 670.

On December 3, 2011, the DAG authorized Ohlson to issue a disciplinary proposal, but also directed that Chief Ohlson provide PMRU Attorney Berg's report to Appellants if Ohlson issued a disciplinary proposal. On December 9, 2011, Chief Ohlson issued a proposal that Appellant Bottini be suspended for a period of 45 days, and that Appellant Goeke be suspended for a period of 15 days. No punishment was proposed against any other attorney involved in the Stevens prosecution, despite their involvement in distinctive ways that contributed to the major developments that up-ended the case.

In decision letters dated May 23, 2012, Scott N. Schools, Associate Deputy Attorney General, sustained the charges against both Appellants of reckless disregard of their disclosure obligations under *Brady*, *Giglio*, and Department of Justice policy.[23] Schools further mitigated the penalty against Appellant Bottini to a period of 40 days after consideration of the factors enumerated in *Douglas v. Veterans Administration*, 5 MSPR 280 (1981).

IV. ARGUMENT

A. THE APPEAL PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE EFFICIENCY OF THE CIVIL SERVICE AND THE DELIVERY OF JUSTICE

The government's prosecution of Senator Ted Stevens became one of the highest-profile public corruption prosecutions brought by the Department of Justice

[23] As to Appellant Bottini, the charge specified: failure to disclose information from the April 15 and 18, 2008 interviews with government witness Bill Allen; failure to turn over statements made by Bill Allen that were contained in an FBI 203 and an IRS memorandum of investigation; and failure to disclose information from trial preparation sessions with government witness Robert "Rocky" Williams. As to Appellant Goeke, the charge specified failure to disclose information from trial preparation sessions with government witness Williams.

in decades. Although Appellants Bottini and Goeke, as Assistant United States Attorneys out of the Alaska United States Attorney's Office, were members of the Stevens prosecution team, the prosecution effort was pursued, directed, supervised and tried by officials and attorneys within the Public Integrity Section at Main Justice.

Prior to the dismissal of the Stevens case and over the course of several years, a series of high-profile scandals involving high-level Justice Department officials and attorneys had erupted. None of these developments resulted in disciplinary charges brought by the Department against a single employee. For example, during the tenure of Attorney General Alberto Gonzales, the Department faced widespread public scrutiny and Congressional outrage over the decision-making of Justice officials in the firing of certain U.S. Attorneys and the hiring practices for attorney positions within the Department of Justice. In addition, the Department received heightened scrutiny over the role of the Department's Office of Legal Counsel in the drafting of the so-called "torture memos" dealing with the legality of the extraction of information from al Qaeda suspects abroad. Furthermore, some federal judges raised questions about aggressive prosecutorial tactics that played fast and loose with the evidence. Despite substantial evidence that implicated professional wrongdoing or, at the very least, unsound judgment by those involved at Main Justice in these multiple developments, no sanctions were ever brought, not even letters of warning, against any Department of Justice

employee. Ultimately, some perceived the evidentiary errors in the Stevens case as arising in a public institution that had developed a "total indifference to ethics."[24]

These embarrassing developments, climaxing in the dismissal of the Stevens conviction in April, 2009, led to the decision of the Department of Justice to plot a course dramatically different from the past, one that began with the imposition of punishment against those responsible for the discovery errors in the Stevens trial.[25] But punishment for the Stevens discovery errors was limited only to the line attorneys on the trial team – not the entire trial team, nor to those at Main Justice who oversaw and became enmeshed in the strategy and details of the trial effort. The involvement of these officials and their mismanagement were extensively documented and found instrumental by judicial and Department of Justice review bodies, including the Special Prosecutor appointed by Judge Sullivan and the Office of Professional Responsibility.

In all complex, fast-moving prosecutions brought by the government, the outcome of the prosecutorial effort rests upon the combined performance and mutual support of a team of lawyers. Their collective efforts ultimately lead to success or failure. The Agency's decision to apply discipline to only Appellants in

[24] "This has built up over the years—the people at [the Justice Department] have come to believe that they are immune, that nobody can touch them, and that judges will ignore their prosecutorial misconduct," Joseph E. diGenova, a former U.S. Attorney for the District of Columbia, told the magazine of the District of Columbia Bar Association in 2009. Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, Washington Lawyer, October, 2009.

[25] Additional remedial efforts by the Department of Justice included the implementation of discovery training by all AUSAs on a yearly basis, as well as the requirement that all U.S Attorney's Offices adopt written discovery policies that met certain baseline standards.

this case downplays or ignores the failure of the entire trial team and their supervisors. PMRU Attorney Berg, in writing his report, clearly recognized this. Berg's career included experience both as a supervising prosecutor and a line attorney within the Agency. He personally understood the challenges and difficulties arising in complicated, high-pitched cases like the Stevens prosecution. His conclusion – that Agency punishment of Appellants would lead to disparate treatment – should be given due deference.

B. THE BOARD SHOULD GRANT THE APPEAL AND FIND REVERSIBLE ERROR IN THE AGENCY'S DISPARATE PENALTY TREATMENT OF APELLANTS

When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Ellis v. Dept. of Defense*, 114, MSPR 407, 411 (2010), *citing Lewis v. Dept. of Veterans Affairs*, 111 MSPR 338 (2009); *Woebcke v. Department of Homeland Security,* 114 MSPR 100 (2010).

To establish disparate penalties, the appellant must show that the charges and the surrounding circumstances are substantially similar so that a reasonable person would conclude that the agency treated similarly-situated employees differently. *See Lewis v. Dept. of Veterans Affairs*, 113 MSPR 657 (2010); *see also Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009); *Archuleta v. Dept. of Air Force*, 16 MSPR 404, 407 (1983). If the appellant does so, the agency must prove a legitimate reason for the difference in treatment by a

preponderance of the evidence. *Lewis*, *supra*. To trigger the agency's burden, there must be a great deal of similarity, not only between the offenses committed by the Appellant, and a proposed comparator, but as to other factors, such as whether the employees were in the same work unit, had the same supervisor and/or deciding official, and whether the events occurred relatively close in time. *Id*.

In the present appeal, Appellants Bottini and Goeke clearly have met their burden to demonstrate that similarly-situated employees were treated differently. No punishment was undertaken against other members of the trial team, nor against higher-level officials who oversaw, and even dictated, the strategic details and thrust of the prosecution.

Even if an agency's action is sustained, the Board will review an agency-imposed penalty for the limited purpose of determining if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Stuhlmacher v. U.S. Postal Service*, 89 MSPR 272 (2001); *Fowler v. U.S. Postal Service*, 77 MSPR 8, 12, *review dismissed*, 135 F.3d 773 (Fed. Cir. 1997); *Douglas*, 5 MSPR at 306. In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. *Stuhlmacher*, 89 MSPR 272; *Fowler*, 77 MSPR at 12; *Douglas*, 5 MSPR at 306. The Board recognizes that its function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum

limits of reasonableness. *Stuhlmacher*, 89 MSPR 272; *Fowler*, 77 MSPR at 12; *Douglas*, 5 MSPR at 306. However, the Board will modify a penalty if it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness.

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas*, 5 MSPR at 306. While not purporting to be exhaustive, the Board identified twelve factors, six of which are particularly relevant in this appeal and were not properly considered by the Agency. They include the following: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (4) the notoriety of the offense or its impact upon the reputation of the agency; (5) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (6) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

If the agency failed to appropriately consider the relevant factors, the Board need not defer to the agency's penalty determination. *Stuhlmacher*, 89 MSPR 272;

Omites v. U.S. Postal Service, 87 MSPR 223 (2000); *Wynne v. Department of Veterans Affairs*, 75 MSPR 127, 134 (1997). The agency here clearly failed to take into account several distinct factors enumerated in *Douglas*, whose consideration would have led to a different outcome.

"[W]hile the principle of 'like penalties for like offenses' does not require perfect consistency, agencies may not knowingly treat employees differently in a way not justified by the facts." *Berkey v. U.S. Postal Service*, 38 MSPR 55, 59 (1988). *See Rychen v. Dept. of Navy*, 51 MSPR 179, 185 (1991). *See Gage v. Dept. of Air Force*, 11 MSPR 147, 149 (1982); *Bivens v. TVA*, 8 MSPR 458, 463 (1981) (the penalty was reduced on charges of misuse of government equipment by managers; the agency failed to rebut or explain evidence showing that other managers received more lenient penalties for substantially similar offenses).

The Special Prosecutor's report and the Berg report document two critical management errors that led to the trial team's disclosure errors: (1) the lack of appropriate supervision of the case by Public Integrity Section leadership; and (2) as a result, the disruptive management decision by the head of the Criminal Division of the Department of Justice to inject new leadership into the trial team at the eleventh hour before trial. Any fair analysis of the penalties imposed by the Agency upon Appellants should take full account of these errors.

Errors by the supervisor of the trial team created a substantial likelihood that *Brady* obligations by the government would be violated, PMRU Attorney Terrence Berg found in his report. Berg found that the imposition of blame upon

only two attorneys on the trial team was objectively unreasonable under all the circumstances and a gross deviation from what an objectively reasonable attorney supervisor would do.[26]

This is because discovery violations by Appellants were linked to a very short term for preparation for the Stevens criminal trial. The trial team had less than two months to prepare for trial from the date of the indictment to the start of the trial. The compressed timeframe was the result of the Criminal Division's decision to indict Senator Stevens only four months before the November election, Senator Stevens' request for a prompt trial under the Speedy Trial Act, and the trial team leader Brenda Morris' agreement, in open court, to a trial date even sooner than the defense requested. This acceleration of time from indictment to trial created burdens upon a trial team that was already disorganized.

During this frenzied time in August and early September, numerous trial preparation responsibilities loomed. The trial team worked relentlessly on the case day and night, meeting twice a day over lunch and dinner. The prosecutors had to meet with witnesses, create examination outlines, draft opening and closing statements, draft and argue pretrial motions and responses, and compile and organize over 1000 trial exhibits. They also had to compile and produce voluminous discovery (comprising some 750 gigabytes of data) and conduct the extensive *Brady* and *Giglio* review that resulted in the government's August 25 and September 9 disclosure letters to the Stevens defense team.

---

[26] Berg Report, *supra*, at 24, fn. 97.

The situation was compounded by relentless attacks by the defense team on the prosecutors and their motives, with defense motions that alleged gross misconduct and required the prosecutors to respond and defend, shifting attention away from their trial preparation and making it even more difficult for them to deal with a patch-work, dysfunctional situation created, in part, by their supervisors. The operational and management defects inherent in the trial team only worsened as the trial progressed.

Criminal Section Chief Matthew Friedrich' s assignment of Brenda Morris to lead the trial team was one of the critical actions that led to the discovery errors that lie at the heart of the underlying disciplinary actions against Appellants. Public Integrity Section Deputy Chief Brenda Morris was inserted as lead counsel of the trial team just prior to Stevens' indictment, but adopted a hands-off approach to the job. The lack of centralized supervision caused the prosecution's trial preparation to become increasingly compartmentalized. Public Integrity Section Chief William Welch initially deferred to Ms. Morris, but then asserted himself mid-trial, to perform triage on the prosecution's problems, but too late to avoid or correct them.

The job of lead trial counsel on a Department of Justice trial team is not only to direct and allocate responsibility among other team members, but also to ensure that all of the government's pre-trial and trial responsibilities are met. Yet Ms. Morris exerted little leadership over the trial team, despite being selected expressly for that purpose. The Special Prosecutor found that Ms. Morris abdicated her responsibilities; she in fact acknowledged that she tried to make herself "as little as

possible," refraining from "really [taking] a supervisory role").[27] The Office of Professional Responsibility found that Ms. Morris acknowledged that she was not "focused" on critical elements of witness cross-examination in the case because the "primary responsibility" for cross-examining Bill Allen, the government's chief witness, rested with Appellant Bottini and she was "exhausted" by that point in the trial. Morris even acknowledged that had she been more aware of what was happening, she would have considered it "her obligation to correct the record."[28] Nevertheless, OPR concluded that Ms. Morris did not engage in "reckless behavior" by saying nothing because Allen was not her witness.[29]

Equally consequential to the commission of discovery errors was the fact that neither Ms. Morris nor any of the prosecutors on the trial team actually supervised the identification and collection of *Brady* information in *Stevens*. The Special Prosecutor noted that:

> Ms. Morris, the Principal Deputy Chief of PIN and lead prosecutor, testified that she did not supervise the prosecution in *Stevens*, that she "was trying to make herself as little as possible" on the trial team, and that she played no role in the *Brady* review or the composition of the *Brady* disclosure letters.[30]

Mr. Welch, the Chief of the Public Integrity Section, similarly exerted little leadership over the trial team. He appeared to defer to Ms. Morris because of the direct reporting relationship she enjoyed with the Criminal Division Front Office. The Special Prosecutor found that "Ms. Morris developed a direct reporting

---

[27] Special Prosecutor's Report, *supra*, at 3, 74, 76.
[28] OPR Report, *supra*, at 198, fn. 767.
[29] *Id.*
[30] *Id.* at 74.

relationship with A.A.G. Friedrich and Rita Glavin, his Principal Deputy, which interfered with the ability of William Welch, the Chief of PIN, to supervise Ms. Morris and the conduct of the prosecution, including the government's approach to pretrial discovery."[31]

The insertion of Ms. Morris as lead counsel less than two months before the trial began understandably led to the difficulty she experienced in asserting control over trial preparation and discovery compliance. The resulting vacuum of leadership meant that trial preparation became disjointed and compartmentalized, and aggravated the government's discovery efforts, particularly in connection with the government's review of *Brady* evidence and its decision-making over what needed to be disclosed to the defense.

The Public Integrity Section organized the *Brady* review, choosing to delegate document review responsibilities to FBI agents. Standard record-keeping procedures in the Alaska United States Attorney's Office governing discovery production were swept aside and, instead, Public Integrity Section procedures were installed. The Public Integrity Section kept score of what was turned over.

In addition, instead of the conventional practice of lodging responsibility for both witness preparation for trial and review of that witness' statements for *Brady*

[31] *Id.* at 4. "The mistakes flowed directly from the very explicit decisions and explicit directions that the supervisors gave," Robert Luskin, attorney for the late prosecutor Nicholas A. Marsh, wrote in a letter to Special Prosecutor Schuelke that was released with the Special Investigator's report. Mary Jacoby, *In Post-Mortem on Stevens Trial, Prosecutors Point Fingers at Criminal Division Leaders*, MainJustice.com, March 15, 2012,http://www.mainjustice.com/2012/03/15/in-post-mortem-on-stevens-trial-prosecutors-point-fingers-at-criminal-division-leaders/.

information, the Public Integrity Section bifurcated the witness preparation responsibilities and document review, delegating responsibility for document review to FBI agents, while limiting responsibility for witness preparation, in the case of Bill Allen, to Appellant Bottini.

Inadvertently compounding the problems, the Criminal Division Front Office made increasingly disruptive management decisions to fill the breach left by Brenda Morris as the trial team leader. The Front Office exerted control over the prosecution's trial preparation, the content of their pretrial motions, the assignment of witnesses to trial team members, and even the questions prosecutors were to ask certain witnesses. Even under normal circumstances, these last-minute directives would have burdened most prosecution teams, and they were especially aggravating to the Stevens prosecution team, given the magnitude of the case and the accelerated trial preparation schedule. For example, Appellant Bottini was instructed, three days after he arrived in Washington, to deliver the government's summation at trial, in addition to his responsibilities for arguing a number of critical pretrial motions, along with preparation of approximately ten trial witnesses (including Rocky Williams, whom Public Integrity Section Chief Welch had just assigned to him because Mr. Marsh did not have enough time).

The failure of the team leader to provide active supervision of the Stevens trial team generated uncertainty as well over strategic decisions in the government's obligation to meet its discovery obligations under the law. That uncertainty produced the need to make rapid-fire decisions about volumes of

information by all members of the team, which brought into play the errors of judgment committed by Appellants.

A core, overarching decision that affected the satisfaction of that obligation was the team leader's failure to decide how to exercise the government's discretion in complying with defense counsel's request for FBI agent interviews of witnesses questioned in the underlying investigation. Indecision over the discovery protocol, whether through production of the FBI agents' reports (the so-called 302s), or production of the reports in redacted form, or summarization in letter form, affected the ultimate quality and content of the information that was provided. The leader of the trial team bore primary responsibility for that delay. Responsibility also fell to the foremost leaders of the Criminal Division to provide sufficient clarity over the management of the case regarding whether the trial team should "play it close to the vest" or consider an "open file" approach on discovery matters.

The testimony of those involved in these decisions by members of the trial team as to their own statements and recollections of others on the team is often contradictory, and OPR could not verify who made the decision to send a letter summarizing the *Brady* material rather than simply producing the documents containing Brady material, and in fact "[n]o one OPR interviewed recalled anyone making a decision to provide *Brady* disclosures via summary letters." Berg Report, *supra,* at 17.

This underscores the lack of leadership, involving all those above appellants who were part of the trial team -- the Chief of the Public Integrity Section, the

Principal Deputy Chief of the Public Integrity Section, the Public Integrity Section attorneys assigned to the case, as well as even higher-level officials in the Criminal Division. In the absence of a clear decision by management, the default approach involving the use of a summary Brady letter became the government's response. All of the trial team attorneys, including the supervisors, acquiesced in this approach. Under these circumstances, all of the attorneys on the trial team were jointly responsible for ensuring that the Brady letter was accurate. They all failed in that regard. Berg Repor*t*, *supra*, at 18.

Each of these circumstances—dysfunctional management, uncoordinated division of responsibilities, a compressed time frame and combative defense tactics—created the conditions where mistakes were likely. While they are not excuses for the errors that took place, they contributed to the collective circumstances that led to the errors, and were not sufficiently considered by the agency in assessing blame and imposing punishment upon Appellants.

The Agency has failed to prove by a preponderance of evidence a legitimate reason for the difference in treatment of members of the trial team. Appellants should not be made scapegoats for *Brady* failures that were caused by the prosecution team's overall lack of leadership, planning, unwise delegation of responsibilities and disorganization.

To establish disparate penalties, the appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar. *Archuleta v. Department of the Air Force*, 16 MSPR 404, 407 (1983). Where an

employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *See Lewis v. Department of Veterans Affairs*, *supra*; *Woody v. General Services Administration*, 6 MSPR 486, 488 (1981).

Under the circumstances of this case, the Appellants have raised an allegation of disparate penalties in comparison to specified employees and the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence. *See Lewis*, *supra*.

Finally, the likelihood of a severe penalty may be greater for a supervisor. PMRU Attorney Berg in his report found that the preferable approach toward assessment of blame in the case involved the expectation of a higher standard of performance by the supervisor. Berg stated:

> An alternative approach might be to hold a lead attorney to a higher standard, as the chief trial counsel, responsible for overseeing and scrutinizing the presentation of evidence and questioning of witnesses being conducted by the members of the trial team to ensure that it met exacting professional standards.[32]

An agency has a right to expect a higher standard of performance from a supervisor than from a non-supervisory employee. *Waldman v. Dept. of Treasury* (Fed. Cir. 1984 *nonprecedential* No. 83-1324); *see Meneese v. U.S. Postal Service* (Fed. Cir. 1998 nonprecedential No. 97-3485) (the agency acted reasonably in holding a supervisor charged with misuse of a government credit card to a higher standard of

[32] Berg Report, *supra*, at 43, fn. 86.

conduct); *See Brown v. U.S. Postal Service*, 64 MSPR 425, 433 (1994) (agencies entitled to hold supervisors to a higher standard of conduct than non-supervisors because they occupy positions of trust and responsibility).

Thus these expectations of higher performance should apply here to the professional conduct of Ms. Morris when judging the penalties imposed upon Appellants.

V. CONCLUSION

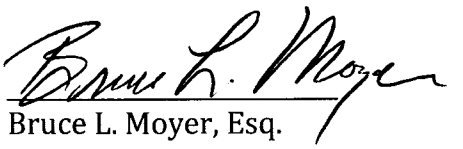
Government prosecutors understand that their jobs involve analyzing facts, discerning responsibility, and deciding how and whether to assign blame. They recognize that every error is not a punishable crime, and that it is the prosecutor's duty to examine all the relevant circumstances and carefully distinguish between mistake and misconduct before concluding that someone is guilty of a crime. The Agency failed to uphold that duty in this case. It leveled charges against Appellants without fully considering the circumstances that caused the Agency to fail to uphold its constitutional duties. Moreover, it leveled charges against Appellants without also taking punitive measures against others who were similarly involved, including other members of the trial team, and especially its leader, as well higher-level officials in the Agency whose decisions led to the environment in which the discovery errors occurred.

The Agency's decision to cause responsibility to rest only upon two attorneys, against whom the Agency may be seen as limiting its public exposure for

blame, should not be permitted to stand. The fundamental soundness of the civil service merit system rests upon the even-handed treatment of all employees, whether at the lowest or highest levels of government. Uneven treatment of any government agency's employees can lead to the degradation of morale, a loss of trust, and the decline of commitment to the fulfillment of the agency's mission. In a democracy, these consequences can become profound, especially within government components responsible for the administration and delivery of justice.

For these and other reasons, the Board should find reversible error in the Agency's punishment of Appellants Bottini and Goeke and set aside those sanctions.

Respectfully submitted,



Bruce L. Moyer, Esq.
THE MOYER GROUP
6907 Westmoreland Avenue
Takoma Park, MD 20912
301-452-1111
Attorney for National Association
of Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that the attached Document was sent by to each of the following:

Appellants' Representatives

Electronic Mail — Kenneth L. Wainstein, Esquire
Caldwalader, Wickersham, & Taft, LLP
700 Sixth Street, NW
Washington, DC 20036

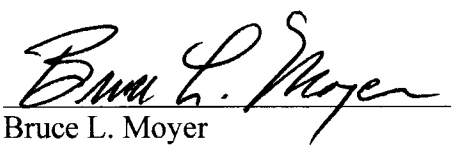
Electronic Mail — Jeffrey Nestler, Equire
Electronic Mail — Sara Zdeb, Esquire
O'Melveny & Myers, LLP
1625 Eye Street, NW
Washington, DC 20006

Electronic Mail — Bonnie Brownell, Esquire
Electronic Mail — Robert DePriest, Esquire
The Brownell Law Firm, PC
1050 17th Street, NW, Suite 700
Washington, D.C. 20036

Agency's Representatives

Electronic Mail — Evan Harry Perlman
Electronic Mail — Joanne Fine
Department of Justice
Executive Office for United States Attorneys
Bicentennial Building
600 E Street, NW, Suite 5100
Washington, DC 20530

Electronic Mail — Robin M. Fields
Department of Justice
Office of General Counsel
501 3rd Street, N.W. Room 5500
Washington, DC 20530



Bruce L. Moyer
Attorney for National Association of
Assistant United States Attorneys