THE RIGHT TO INTER-SOVEREIGN DISCLOSURE IN CRIMINAL CASES

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Courts across the country have found that criminal defendants have no right to the disclosure of exculpatory material across state-federal sovereign boundaries. In other words, state defendants have no right to federally held exculpatory evidence, and federal defendants have no right to material held by state governments.

These rulings contravene the principles of the Supreme Court's seminal decision *Brady v. Maryland*, which held that the suppression of favorable, material evidence by the prosecution violated due process. *Brady* marked a shift in due process doctrine and reflected an emerging theory of American criminal justice that emphasized the truth-seeking function of criminal trials. *Brady*'s theoretical framework appeared to support a right to inter-sovereign disclosure, and some early jurisprudence suggested that such a due process right exists. But over the last several decades, most courts addressing the issue have found that the due process obligation to disclose exculpatory material does not cross sovereign boundaries. For state defendants, these rulings have particularly harsh effects because state courts are unable to compel the federal government to disclose evidence under alternative legal theories, like the Compulsory Process Clause or statutory subpoena power. In state proceedings, therefore, the federal government effectively enjoys a blanket privilege against disclosure, no matter how plainly exculpatory the information may be.

This Article is the first to analyze the reasoning behind these decisions and the first to argue that the rationales offered by the state courts are doctrinally unsound. More broadly, this Article concludes that the larger framework of modern constitutional criminal procedure, and its application to a dual sovereign system of government, directly supports a due process right to inter-sovereign disclosure of exculpatory evidence.

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* Forrester Fellow, Tulane Law School. My sincere thanks go out to Adam Babich, Ben Cohen, Aliza Cover, Tessa Davis, Brittany Dunton, Adam Feibelman, Kelly Gleason, Catherine Hancock, Randy Hertz, Jancy Hoeffel, Saru Matzambadzo, Pam Metzger, Shu-Yi Oei, Sally Richardson, Amy Stein, Tony Thompson, Keith Werhan, and the members of the Tulane Faculty Workshop. I am especially grateful to Josh Perry for his support and insight.

INTRODUCTION

Michael Dale Rimmer is facing the death penalty in Tennessee state court for a murder that was once investigated by the FBI.[1] In 2010, the presiding state court made a factual finding that the FBI was withholding documents that appeared to exculpate Rimmer.[2] The federal government refused to disclose the documents.[3] Rimmer filed suit in federal court to compel disclosure, and in 2012, the Sixth Circuit Court of Appeals found that Rimmer had no right to exculpatory information in the hands of the federal government.[4]

If Rimmer had been prosecuted by the federal government, his right to exculpatory information in the hands of the FBI would be clear. *Brady v. Maryland*[5] requires that the government disclose evidence that is both favorable to the defendant and material to the issue of guilt or punishment in a criminal case.[6] In Rimmer's case, the FBI had information that an eyewitness to the murder identified someone else as the killer, and Rimmer sought disclosure of critical details surrounding this identification.[7] If the case had been prosecuted in federal court, this information would fall under *Brady*, as it is both favorable and material

1. *Rimmer v. Holder*, 700 F.3d 246, 249–50 (6th Cir. 2012).

2. Order Denying Discovery of Materials in the Possession of the Federal Government at 2–3, *Rimmer v. State*, No. 98-01034 (Tenn. Crim. Ct. July 12, 2010) [hereinafter Order Denying Discovery].

3. *Rimmer*, 700 F.3d at 251–52.

4. *Id.* at 259.

5. 373 U.S. 83, 87 (1963).

6. *Id.*

7. Order Denying Discovery, *supra* note 2, at 1–2.

to the issue of guilt.[8] But because Rimmer's case is in Tennessee state court, rather than in federal court, the federal government challenged his right to know the details of the FBI investigation, including the details concerning the identification of another suspect.[9] According to the federal government, Rimmer and other criminal defendants in state courts have no right under *Brady* specifically or the Due Process Clause generally to information held by the federal government, no matter how plainly exculpatory it might be.[10] The vast majority of jurisdictions that have addressed the issue agree with the federal government.[11]

This Article examines the issue of inter-sovereign disclosure in the context of *Brady* and concludes that the Due Process Clause requires otherwise.[12] The Supreme Court's decision in *Brady* represented a shift in due process doctrine and reflected a transformative moment in the history of American criminal justice, when scholars and courts promoted a theory of justice based on truth and fairness, even within a system that remained adversarial in structure. Accordingly, the *Brady* rule established a new constitutional doctrine governing defendants' access to information.[13] But however grand its promise fifty years ago, the courts have not seen fit to apply *Brady* to cases involving inter-sovereign disclosure.

The question of whether there exists a due process right to the disclosure of information by an alternate sovereign has widespread

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8. *See Brady*, 373 U.S. at 87.

9. *See Rimmer*, 700 F.3d. at 249–51.

10. Motion to Dismiss at 11–12, *Rimmer v. Holder*, No. 3:10-1106, 2011 WL 3565224 (M.D. Tenn. July 14, 2011).

11. *See infra* Part III.A.

12. This Article analyzes only the disclosure of federal materials to state criminal defendants. However, courts largely find that a federal defendant likewise has no due process right to inter-sovereign disclosure under the theory that the obligation extends only as far as the prosecution team. *See, e.g.*, *United States v. Risha*, 445 F.3d 298, 299 (3d Cir. 2006) (finding that to establish a *Brady* violation based on a state's nondisclosure, a defendant must show that federal government constructively possessed the material in question). Nevertheless, the impact of the rule on federal defendants is usually *de minimis*, given a federal defendant's ability to issue enforceable subpoenas for state-held records. There are, however, some circumstances under which a federal defendant is prejudiced by a rule that rejects a due process basis for inter-sovereign disclosure. *See Thor v. United States*, 574 F.2d 215, 220–21 (5th Cir. 1978). While the argument that there exists a due process right to inter-sovereign disclosure is equally applicable to federal defendants seeking state materials, this Article focuses on state defendants seeking federal materials because of the widespread nature of the problem and the disproportionately severe impact of an anti-disclosure rule on state defendants.

13. *Brady*, 373 U.S. at 87. *See also Arizona v. Youngblood*, 488 U.S. 51, 55 (1988); *California v. Trombetta*, 467 U.S. 479, 480–81 (1984); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (discussing "what might loosely be called the area of constitutionally guaranteed access to evidence").

implications.[14] As federal governmental activity has expanded over the course of the twentieth century, so too has grown the need for civil and criminal litigants to access materials in the hands of the federal government.[15] The federal government's reach is increasingly broad, and its capacity to store information in a digital age is virtually limitless.[16] The government's expanding role in law enforcement means that the overlap between federal and state investigations in the most serious state cases is at an historic peak.[17] Especially in criminal cases, it is increasingly common for the federal government's law enforcement activities to uncover evidence relevant to state prosecutions, even where the federal government's investigation is conducted entirely independently of any state investigation.[18] The federal government may either inadvertently unearth evidence against alternative suspects or deliberately pursue a different target entirely, and as a result, evidence held by the federal government can often contradict the theory and goals of the state prosecution or support the theory of the defense.[19] In an era

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14. *See* cases cited *infra* Part II.A.

15. *See* Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2072 (2006) (citing the preceding twenty-five years as "a time of the largest growth in federal enforcement activity in history"); Note, *Executive Immunity from Judicial Power to Compel Documentary Disclosure*, 51 COLUM. L. REV. 881, 881 (1951).

16. *See, e.g.*, Siobhan Gorman & Jennifer Valentino-DeVries, *NSA Reaches Deep into U.S. to Spy on Net*, WALL ST. J. (Aug. 21, 2013), http://online.wsj.com/news/articles/SB10001424127887324108204579022874091732470?KEYWORDS=NSA+Reaches+Deep+into+US+to+Spy+on+Net; Glenn Greenwald, *How NSA Can See 'Nearly Everything You Do Online': Secret Tool Searches Email, Chat and Social Media Use*, THE GUARDIAN, Aug. 1, 2013, at 1; Dan Roberts & Spencer Ackerman, *US Admits Secret Surveillance of Phone Calls Has Gone on for Years: Anger Grows over Scale of Operation: Seized Data Vital for Security, Obama Says: Surveillance of Calls Has Gone on for Years*, THE GUARDIAN, June 7, 2013, at 1; *see also* Gabriel Debenedetti, *Factbox: History of Mass Surveillance in the United States*, REUTERS (June 7, 2013), http://www.reuters.com/article/2013/06/07/us-usa-security-records-factbox-idUSBRE95617O20130607.

17. For a discussion of the scope of the activities of federal investigative agencies, see Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 44–45 (1996).

18. *See, e.g.*, *Rimmer v. Holder*, 700 F.3d 246, 259 (6th Cir. 2012); *Kwan Fai Mak v. FBI*, 252 F.3d 1089, 1090 (9th Cir. 2001); Complaint for Injunctive Relief at 3, 7–8, *Taplin v. United States Dep't of Justice*, 1:12-CV-01815 (D.D.C. Nov. 8, 2012).

19. *See, e.g.*, *Rimmer*, 700 F.3d at 249–50; *Bright v. Ashcroft*, 259 F. Supp. 2d 502, 502 (E.D. La. 2003); *State v. Andrews*, 250 So. 2d 359, 361 (La. 1971); *State v. Parker*, 661 So. 2d 603, 606–08 (La. Ct. App. 1995); Complaint for Injunctive Relief at 3–8, *Taplin v. United States Dep't of Justice*, 1:12-CV-01815 (D.D.C. Nov. 8, 2012). Where state and federal agencies are coordinating efforts in an investigation, the cooperation may be so involved that information technically in the hands of the federal government is deemed to be in the constructive possession of the state prosecutor. *See United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006). In such cases, the court may

of federal expansion and a growing capacity for governments to maintain records, even non-investigative federal agencies frequently accumulate information relevant to state prosecutions.[20] In short, cases in which the federal government refuses to disclose information to state defendants are hardly isolated. On the contrary, the federal government regularly refuses to disclose information that is potentially exculpatory for state criminal defendants, even (and maybe especially) in the most serious cases.[21]

In cases where the federal government has evidence that undermines the state's theory of prosecution, the state prosecution teams have neither the incentive nor the wherewithal to gather the same information.[22] If state agents did gather and possess such information, the state's due process obligation to disclose it would be clear under *Brady*; but a state prosecution team cannot disclose what it does not itself possess and cannot access. Without a corresponding due process obligation on the part of the federal government to disclose information that it knows is vital to a state-level criminal prosecution, the state defendant has no vehicle for accessing this evidence.[23]

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find that there is no jurisdictional bar to remedies for non-disclosure. *See id.* However, the level of coordination required is significant, and few cases meet this standard.

20. *See, e.g.*, *Johnson v. Evans*, No. CIV S-05-1223, 2009 WL 5030661 at *7–8 (E.D. Cal. Dec. 16, 2009) (state defendant sought recorded calls from federal prison); Memorandum of Law in Opposition to Motion to Quash and in Support of Cross-Motion for Remand to D.C. Superior Court, *In re Subpoena Duces Tecum to Carlton Edwards* at 1–2, No. 1:07-MC-000291 (D.D.C. July 20, 2007) (seeking probation supervision records of government witness in local murder case).

21. Several federal cases in which the due process right to inter-sovereign disclosure has been litigated are, like *Rimmer*, capital cases. *See, e.g.*, *Roth v. United States Dep't of Justice*, 642 F.3d 1161, 1180–82 (D.C. Cir. 2011); *Louisiana v. Sparks*, 978 F.2d 226, 228 (5th Cir. 1992); *Bright v. Ashcroft*, 259 F. Supp. 2d 502 (E.D. La. 2003); *Johnson v. Reno*, 92 F. Supp. 2d 993, 994 (N.D. Cal. 2000). *See also* Milton Hirsch, *"The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years after* United States ex rel. Touhy v. Ragen, 30 FLA. ST. U. L. REV. 81, 84 (2002) ("The reported opinions confirm what experienced criminal trial practitioners know: criminal defendants routinely seek, and are routinely denied, evidence and testimony cloistered behind the all-but-impregnable barrier of executive agency ukase.").

22. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 551, 555–56 (2007) ("Clearly, a claim of ignorance offers a prosecutor a convenient opportunity to engage in gamesmanship to avoid compliance with *Brady*."). Setting aside the disproportionate investigative resources of the federal government, state prosecutors often maintain that the federal government refuses to provide them with materials relevant to a state prosecution. *See, e.g.*, *People v. Parham*, 384 P.2d 1001, 1001–03 (Cal. 1963); *People v. Kronberg*, 672 N.Y.S.2d 63, 77 (N.Y. App. Div. 1998); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862–63 (N.Y. App. Div. 1989).

23. *See infra* Part II.A.2(b) (discussing the inability of a state defendant to secure federal records or witnesses via compulsory process).

The reasoning used by state courts to deny defendants remedies where the federal government has withheld information can be distilled into two primary categories. First, the state courts find that there is no right to federally held exculpatory information under the theory that *Brady* applies only to members of the prosecution team.[24] Unless the federal custodian of the requested information is acting on behalf of the state or working jointly with the state prosecution team, the courts reason, there can be no due process obligation to disclose the materials.[25] This rationale is rooted in Supreme Court language that makes clear that the *Brady* obligation extends to all individuals and entities acting on behalf of the prosecutor.[26] But nothing in *Brady* or the Supreme Court's extensive line of *Brady* cases suggests that the due process obligation is limited to the prosecution team or that other government agents may knowingly withhold favorable, material evidence in a criminal case. The state courts thus extract the language that the Court used to expand the scope of *Brady* obligations and use this language instead to restrict it.

Second, the state courts appear to accept the federal government's assertion of a blanket privilege against disclosure.[27] The components of this argument, as argued by the federal government and recited in state decisions, are part sovereign immunity, part privilege, and part federal regulation. State courts reason that, because federal regulations reserve the discretion to disclose materials, and because those regulations have been found constitutional,[28] it cannot be unconstitutional for the federal government to withhold information no matter how exculpatory.[29] Because principles of sovereign immunity make it impossible for a state court to enforce any subpoena against the federal government, and any order by the state court to disclose federal materials is therefore

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24. *See infra* Part II.A.1.

25. *See, e.g.*, *People v. Santorelli*, 741 N.E.2d 493, 497–98 (N.Y. 2000) (finding no *Brady* violation where defendant tried to subpoena FBI reports prior to trial and was rebuffed by federal government because such obligation extended only to those working cooperatively or jointly with the prosecutor); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (N.Y. App. Div. 1989) ("[T]he prosecutor could not be held responsible for not producing a file which he had never possessed or seen, and which neither he nor the state courts could gain access to without the consent of the appropriate federal agency.").

26. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

27. *See infra* Part II.A.2.

28. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 463 (1951).

29. *See, e.g.*, *People v. Parham*, 384 P.2d 1001, 1002–04 (Cal. 1963) (finding that regulations were valid and had force of law but no due process violation occurred because federal government had not transmitted information to the state); *State v. Andrews*, 250 So. 2d 359, 361–68 (La. 1971) (finding that regulations were valid and thus the court could not order the FBI agent to testify and denying the alternative remedy of continuance); *State v. Rice*, 335 N.W.2d 269, 276–77 (Neb. 1983) (finding that *Touhy* established that the federal government may refuse to produce documents).

unenforceable, no due process right to such information can exist.[30] These overlapping rationales add up to an unrestricted and absolute federal privilege when it comes to the release of federal materials in state litigation.[31] A closer examination of these state rulings, however, reveals that the theoretical bases for the existence of a federal privilege has largely been discredited, and that even the federal government has acknowledged that the federal regulations create no general federal privilege.[32]

But it is not just that the primary grounds offered by the state courts are doctrinally unsound; more significant to the analysis of inter-sovereign disclosure is the broader context of constitutional criminal procedure. In other words, the courts' general approach to issues of dual sovereignty in other contexts seriously undermines the notion that exculpatory evidence may be withheld merely because it is in the hands of the federal government rather than the state.

Part I of this Article examines the issue of inter-sovereign disclosure in the context of the historical shift in criminal justice theory that gave rise to *Brady v. Maryland*. Part II places the issue in modern context by discussing the development of the law in state courts and the reasoning of these decisions, and it argues that a rule against inter-sovereign disclosure is inconsistent with other applications of constitutional criminal procedure. Finally, Part III lays out a new framework for recognizing a right to inter-sovereign disclosure and identifies a path in the federal courts for establishing the right to inter-sovereign disclosure of exculpatory information.

I. *BRADY V. MARYLAND* AND EARLY VIEWS ON INTER-SOVEREIGN DISCLOSURE

In the years preceding and immediately following the *Brady* decision, scholars and courts reevaluated the underlying theories of criminal trials.[33] Criminal trials, the new logic went, were no longer played as a sport of skill and tactical advantage as in the past, regulated only when the prosecutor's zeal overstepped the bounds between contest and fraud.[34] In the modern era, against a backdrop of civil rights expansion, the criminal justice system embraced a loftier mission to seek

30. *See infra* Part II.A.2(b).

31. *See infra* Part II.A.2(c).

32. *See infra* Part II.A.2(a).

33. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279; Albert C. Garber, *The Growth of Criminal Discovery*, 1 CRIM. L.Q. 3, 6 (1962).

34. Brennan, *supra* note 33, at 282.

truth and to advance the cause of justice for the defendant.[35]

Enhancing the truth-seeking mission of the criminal justice system meant equipping defendants with the tools to defend their cases.[36] One scholar noted in 1960:

> Increased reliance upon the trial as the principal device for protecting the accused makes it imperative that the defense come to trial as well equipped as the prosecution to raise "doubt in the minds of any one of the twelve" men in the jury box. Particularly in a system based, as is ours, upon a single trial held on a single occasion, the parties must come to trial prepared to make the most of their presentation on that occasion.[37]

For the criminal defendant, improved preparation meant greater discovery. In the same year that *Brady* was decided, then-Justice William Brennan wrote, "Discovery, basically a tool for truth, is the most effective device yet fashioned for the reduction of the aspect of the adversary element to a minimum."[38] While earlier scholars had expressed the prevailing notion that "the accused has every advantage" in American criminal procedure,[39] this idea that the system tipped sharply in favor of an accused gave way to an understanding that the balance of information

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35. *See generally* Brennan, *supra* note 33 (calling for further criminal discovery reforms in accordance with an evolving theory of criminal justice).

36. *See* Garber, *supra* note 33, at 3–6.

37. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172 (1960) (footnotes omitted).

38. Brennan, *supra* note 33, at 291. In 1990, Justice Brennan reflected on the lecture of 1963 and noted that it occurred at a time when the very existence of criminal discovery was still a controversial topic:

> When I gave this lecture in 1963 the prevailing view was still that there were good reasons not to allow discovery in criminal cases. Let me give you a brief outline of the state of criminal discovery at that time. The picture is quite a bleak one, and it may surprise those of you who have studied present-day criminal procedure, so rapid has been the transformation of the law in this area.

William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 4 (1990).

39. Scholars believed that the privilege against self-incrimination, which protected the defendant from making any number of disclosures to the government, and the reasonable doubt standard itself undermined the truth-seeking function of the system. *See* Brennan, *supra* note 33, at 293–94 (1963); Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 218–19 (2005–06); Goldstein, *supra* note 37, at 1181–82. *See also United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (decision of Judge Learned Hand).

weighed heavily in favor of the government. Calls for discovery reform were strident.[40]

But while criminal discovery reforms lagged behind the reforms in civil discovery and fell short of the academy's call for free-flowing discovery,[41] the movement toward greater discovery in criminal cases was historically important. Changes in discovery rules, both statutory and constitutional, were moving forward.[42] States passed codes of criminal procedure for the first time,[43] the federal rules of criminal procedure were amended to include discovery provisions,[44] and the Supreme Court's ruling in *Jencks v. United States*[45] began to suggest a constitutional right to information.[46] These changes were modest in many respects, but the incremental movement toward increasing discovery reflected the more radical shift in criminal justice philosophy taking place.

The shift toward a truth-seeking mission of criminal justice was an important one for the context of inter-sovereign disclosure. One early Alabama case, *Parsons v. State*,[47] invoked ideals of truth and fairness in

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40. Brennan, *supra* note 33, at 285–86; Garber, *supra* note 33, at 4; Goldstein, *supra* note 37 at 1151–52.

41. Brennan, *supra* note 33, at 279, 282; Garber, *supra* note 33, at 3; Goldstein, *supra* note 37, at 1152.

42. The Federal Rules of Criminal Procedure took effect in 1946. Historical Note, FED. R. CRIM. P. While scholars lamented that the criminal discovery rules provided for far less discovery than the civil rules, it was said that the rules reflected the most liberal practices of the most liberal courts at the time. *See* Note, *The Scope of Criminal Discovery against the Government*, 67 HARV. L. REV. 492, 493 (1954); *see also Bowman Dairy Co. v. United States*, 341 U.S. 214, 218–21 (1951); Garber, *supra* note 33, at 10 (noting significant changes in criminal discovery at the state level in the decade preceding *Brady*). *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Pyle v. Kansas*, 317 U.S. 213 (1942), paved the way for constitutional changes in criminal discovery. *See also* Garber, *supra* note 33, at 6 (arguing that defense counsel should always argue that the denial of discovery is a denial of a fundamental right).

43. *See* Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 229 (1964).

44. *See id.* at 235 (discussing proposed amended Rule 16); FED. R. CRIM. P. 16 advisory committee notes (1966 Amendment) (explaining that Rule 16 was amended to "expand the scope of pretrial discovery").

45. 353 U.S. 657 (1956). The Supreme Court's decision in *Jencks* was perceived to be the watershed discovery ruling of that era; its impact was later sharply limited when (1) the Court clarified that the holding was not a constitutional rule of due process, see *Palermo v. United States*, 360 U.S. 343 (1959), and (2) Congress passed the Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified at 18 U.S.C. § 3500 (1958)). In the wake of these developments, therefore, *Brady* became the Warren Court's major discovery case for criminal defendants. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 685–86 (2006).

46. *See Jencks*, 353 U.S. at 667–71.

47. 38 So. 2d 209 (Ala. 1948).

order to find that a state defendant had a due process right to pursue efforts to obtain exculpatory information from the federal government.[48] In reaching this conclusion, the Alabama Supreme Court cited earlier due process cases and noted that, "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled."[49] After finding that the materials sought were material to the defense, the Alabama Supreme Court held:

> Neither the State court nor the Department of Justice is the final arbiter of the applicability of the Fifth Amendment. But the primary duty and power in respect to the control of its agents is with the department, with a superior right in the judiciary to determine whether the Constitution is violated . . . . Whether the refusal of the Attorney General to give the evidence or release it would violate the Fifth Amendment to the Federal Constitution would first be subject to his determination, but reviewable by proper judicial authority.[50]

This 1948 decision foreshadowed the reasoning that would appear in the *Brady* decision itself. Whereas previous due process cases in the Supreme Court had focused on the conduct of unscrupulous prosecutors, the rhetoric in *Brady* was grounded instead in notions of fairness and truth.[51] Earlier United States Supreme Court cases had found due process violations where prosecutors obtained convictions through fraud;[52] *Brady*, by contrast, involved a prosecutor whose failure to disclose exculpatory evidence was entirely "without guile."[53] As in *Brady*, there was no evidence that the prosecutor in *Parsons* acted "with guile," or even that the state prosecution played any role in the withholding of federal evidence.[54] The operative factors in *Parsons* turned instead on the defendant's need for the information, the tendency of the withheld evidence to "vindicate the innocence of the accused," and the centrality of the information to a just result.[55] The shift toward a theory of criminal

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48. *Id.* at 213, 215–16.

49. *Id.* at 213 (quoting *inter alia Wilson v. United States*, 59 F.2d 390, 392 (3d Cir. 1932)).

50. *Id.* at 215–16 (citation omitted).

51. *See* Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 143–45 (1964).

52. *See, e.g.*, *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam).

53. *Brady v. State*, 174 A.2d 167, 169 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

54. *See Parsons*, 38 So. 2d at 213–16.

55. *Id.* at 213.

justice that sought truth and fairness, therefore, laid the groundwork for the courts to find a due process violation in *Brady*, despite the apparent absence of any fraudulent intent or guile on the part of the prosecution.[56]

The ruling in *Brady* thus shifted the rhetoric under due process to focus on just outcomes rather than on individual fault by the prosecution. Specifically, *Brady* announced that, when the prosecution fails to disclose evidence that is both favorable and material, a due process violation may be found irrespective of the good faith or bad faith of the prosecutor.[57] The key question in such cases is not whether the prosecutor acted unethically but rather whether the failure to disclose made a fair trial impossible.[58] In support of this rule, the Court reasoned that the critical goal of the Due Process Clause was "avoidance of an unfair trial," rather than responding to the "misdeeds of a prosecutor."[59] And while *Brady* dealt only with the prosecutor's conduct, the Court's reasoning raised the possibility of a broader principle of due process that extended to other government actors.[60] The no-fault rule of *Brady* suggests, in other words, that relief may be available to a defendant whose state prosecutor complies with her constitutional disclosure obligation, but where the federal government makes a fair trial impossible by withholding critical evidence from the accused.

This very question came before the Supreme Court less than a year after *Brady* was decided. The issue of the state defendant's due process right to inter-sovereign disclosure was presented to the Supreme Court by the facts and arguments in *Smith v. Pennsylvania*,[61] following the Pennsylvania Supreme Court's ruling that no due process right existed[62]—a decision seemingly rendered without any awareness of the *Brady* decision handed down less than two months earlier. Smith had been convicted of assault and battery in state court while his accusers, Pennsylvania police officers, were the targets of a civil rights prosecution

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56. *See* Gershman, *supra* note 45, at 692–95, 707–09.

57. *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

58. *See* Note, *supra* note 51, at 142–44.

59. *See Brady*, 373 U.S. at 87. Later cases confirmed this bedrock principal that the moral culpability of the prosecutor played no role. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97, 110 (1976) (finding that constitutional error is found "because of the character of the evidence, not the character of the prosecutor"). In *Agurs*, the prosecutor had inadvertently overlooked evidence that was critical to the defendant's case. *Agurs*, 427 U.S. at 102, 106–08. In *Kyles*, the prosecutor had failed to disclose evidence known to the police but not to the prosecutor. *Kyles*, 514 U.S. at 421–22. In short, it mattered little to the *Brady*, *Agurs*, and *Kyles* Courts which governmental entity suppressed or withheld the favorable, exculpatory evidence—only that the defendant was forced to undergo trial without it.

60. *Brady*, 373 U.S. at 90–91.

61. 376 U.S. 354, 354–55 (1964) (per curiam).

62. *Commonwealth v. Smith* (*Smith I*), 192 A.2d 671, 672 (Pa. 1963).

in federal court for conduct stemming from the very same incident.[63] Smith subpoenaed investigative records from the FBI, looking specifically for the FBI statements of the two state witnesses, both of whom had provided inconsistent statements to state law enforcement on the critical issue of who struck the first blow.[64] The FBI refused to disclose the statements in the course of the state prosecution; Smith was convicted, and he appealed to the United States Supreme Court.[65]

In a short and unusual opinion granting certiorari and remanding the case to the Pennsylvania Supreme Court, the *Smith* Court noted that the Solicitor General had indicated in its Supreme Court brief that it was never informed of the specific request for witness statements and had not, in fact, opposed disclosing the requested statements after all.[66] The Supreme Court issued no holding on the question of Smith's due process right to inter-sovereign disclosure, and instead simply remanded the case to the Pennsylvania courts in light of the federal government's implicit concession that it would produce the FBI's witness statements.[67]

The Supreme Court's remand order was odd given that the federal government's belated decision to disclose seemed to have no bearing on the issue before the Supreme Court. If there were no due process right to inter-sovereign disclosure, the trial court's refusal to issue the subpoena to the FBI would have been correct, and the Supreme Court would have simply denied certiorari or upheld the conviction. But in this case, the Court granted certiorari and remanded in light of a factor that would have no relevance if, in fact, no due process violation had occurred. While a remand order from the Supreme Court is not considered to be tantamount to a ruling on the merits, such a procedure can carry some substantive meaning and appears to do so in this case.[68] The Court will remand a case whenever there are "recent developments that [the Court has] reason to believe the court below did not fully consider [which] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ."[69] In fact, in the same term that the Court remanded the *Smith* case, the Court strongly suggested that a remand order carries

63. *Smith*, 376 U.S. at 354–55.

64. Petition for Writ of Certiorari at 4–5, *Smith*, 376 U.S. 354 (No. 561).

65. *Id.* at 5–6.

66. Memorandum for the United States at 8–9, *Smith*, 376 U.S. 354 (No. 561).

67. *Smith*, 376 U.S. at 355.

68. *See* Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 516–17 (2004).

69. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

with it an implied direction to the lower court.[70] The only intervening event in *Smith* was a representation by the federal government that, in fact, it might have complied with a subpoena had the trial court issued one.[71] The remand to the lower court "for reconsideration of petitioner's requests in light of the representations of the Solicitor General"[72] therefore seemed to carry a mandate. After all, there would be no point in ordering the Pennsylvania Supreme Court to reconsider its denial of relief unless intervening events suggested that the earlier decision was wrong.

The Pennsylvania Supreme Court appeared to understand the order from the Supreme Court to be a mandate for reversal, but with no majority agreeing on the grounds.[73] A minority of the court took the remand order as a cue to reverse course entirely, understanding the Supreme Court's order to require it to resolve the issue as one of due process.[74] According to these justices, the expanding Due Process Clause could not tolerate the state-federal line drawing that the Commonwealth insisted on.[75] "It is simply unthinkable," the minority reasoned, "that in a government of the people, the government should withhold from one of the people evidence which could prove him innocent of a crime against all the people."[76] The plurality, however, found only that under the court's supervisory authority a new trial was warranted because the state should have endeavored to obtain the materials from the federal government, and, if it failed to do so after trying, the courts could expect nothing more.[77] The plurality expressed "little doubt that, even beyond questions of privilege, the federal government could refuse to reveal, in state court proceedings, material in its possession."[78]

The divergent *Commonwealth v. Smith* (*Smith II*)[79] opinions thus reflected not only a deep debate about the meaning of the Supreme

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70. *Henry v. City of Rock Hill*, 376 U.S. 776, 776–77 (1964) (per curiam) (noting that cases would be remanded where the Court was "not certain that the case was free from all obstacles to reversal on an intervening precedent").

71. *Smith*, 376 U.S. at 355.

72. *Id.*

73. *Commonwealth v. Smith* (*Smith II*), 208 A.2d 219 (Pa. 1965) (plurality opinion).

74. *Id.* at 228–29 (plurality opinion). This minority opinion determined first that the Sixth Amendment right to compulsory process applied, and second that the federal government's refusal to comply with the subpoena violated the right to due process. *Id.* at 223, 228.

75. *Id.* at 224–25.

76. *Id.* at 225.

77. *Id.* at 230–31 (Roberts, J., concurring in part, dissenting in part).

78. *Id.* at 230 (Roberts, J., concurring in part, dissenting in part).

79. 208 A.2d 219 (Pa. 1965).

Court's decision to grant certiorari and remand the case, but also a larger debate about the outer boundaries of the Due Process Clause in the context of an emerging theory of American criminal justice as a search for truth. The opinions of the Pennsylvania Supreme Court thus framed the debate on inter-sovereign disclosure in an era of expanding due process and set the stage for courts to take sides.

II. INTER-SOVEREIGN DISCLOSURE AND ITS MODERN CONTEXT

A. The Courts' Rejection of a Right to Inter-Sovereign Disclosure

Any early suggestions that the *Brady* rule applies to inter-sovereign disclosure were short lived. A court in Alabama—the only jurisdiction that suggested some level of early acceptance of an inter-sovereign obligation of disclosure—stepped back from its original position,[80] and other courts then followed suit and fell into a slow trend against the right to inter-sovereign disclosure.[81] The rationales for these decisions were multifaceted, sometimes hinting at a doctrinal basis rather than elaborating on one,[82] and several courts disposed of any issues related to inter-sovereign disclosure by rejecting constitutional claims on the grounds that the defendants had failed to follow the procedures outlined

80. *See Parsons v. State*, 38 So. 2d 209 (Ala. 1948); *Strange v. State*, 197 So. 2d 437 (Ala. Ct. App. 1966).

81. *See, e.g.*, *Jimenez v. State*, 128 S.W.3d 483, 488–89 (Ark. Ct. App. 2003); *People v. Parham*, 384 P.2d 1001, 1002–03 (Cal. 1963); *Navarro v. Super. Ct.*, No. 02NF3143, 2006 WL 2766147 (Cal. Ct. App. Sept. 27, 2006) (renumbered No. G036954); *In re Pratt*, 170 Cal. Rptr. 80, 130–31 (Ct. App. 1980); *Saulter v. Mun. Ct.*, 142 Cal. Rptr. 266, 273, 275 (Ct. App. 1977); *State v. Miranda*, 777 So. 2d 1173, 1173–74 (Fla. Dist. Ct. App. 2001); *Al-Amin v. State*, 597 S.E.2d 332, 345 (Ga. 2004); *People v. Hanks*, 569 N.E.2d 205, 208 (Ill. App. Ct. 1991); *State v. Andrews*, 250 So. 2d 359, 366 (La. 1971); *State v. Parker*, 661 So. 2d 603, 611–12 (La. Ct. App. 1995); *State v. Velez*, 588 So. 2d 116, 130 (La. Ct. App. 1991); *Diallo v. State*, 994 A.2d 820, 841 (Md. 2010); *State v. Roan*, 532 N.W.2d 563, 570–72 (Minn. 1995); *State v. Rice*, 335 N.W.2d 269, 276–77 (Neb. 1983); *People v. Santorelli*, 741 N.E.2d 493, 497–98 (N.Y. 2000); *People v. Kronberg*, 672 N.Y.S.2d 63, 76 (N.Y. App. Div. 1998); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (N.Y. App. Div. 1989); *State v. Lawson*, 595 N.E.2d 902, 909 (Ohio 1992); *Commonwealth v. Smyth*, 369 A.2d 300, 303 (Pa. Super. Ct. 1975); *Alexander v. State*, 450 S.W.2d 70, 72 (Tex. Crim. App. 1970); *Commonwealth v. Rasnake*, 7 Va. Cir. 521, 530–31 (Cir. Ct. 1978); *State v. Jones*, No. 32198-0-II, 2005 WL 2858885, at *3 (Wash. App. Div. 2, Nov. 1, 2005).

82. *See, e.g.*, *Strange*, 197 So. 2d at 443 (hinting at the doctrine of sovereign immunity and the rule regarding the prosecution team). *See also Jimenez*, 128 S.W.3d at 489 (suggesting no disclosure obligation for any entity outside of an Arkansas state agency); *Velez*, 588 So. 2d at 129–30 (not reaching issue of materiality where information was not within possession of state prosecutor).

in federal regulations when requesting the material.[83] Among the more perfunctory opinions on the issue, one decision simply found, with no reference to legal authority or even a rationale, that state defendants were not entitled to federal files.[84]

Massachusetts stands alone as the only state that expressly recognizes the right to inter-sovereign disclosure, but it recognizes that right only in limited circumstances. In *Commonwealth v. Liebman*,[85] the defendant sought access to the grand jury minutes relating to the testimony of two witnesses who testified against him in his state prosecution.[86] The testimony of these two witnesses was the only evidence against Liebman, and at trial both admitted that they had given different stories to the grand jury.[87] The federal grand jury investigation of Liebman concluded without an indictment.[88]

The Massachusetts Supreme Court declined to decide Liebman's claim as a *Brady* issue and instead ruled in Liebman's favor under the Due Process Clause only because disclosure of grand jury minutes would have been required as a matter of course if the grand jury investigation had been in state court.[89] "The introduction of two sovereignties," the court wrote, "creates a potentiality for unfairness which would need correction if realized in practice."[90] Acknowledging that it had no power to enforce an order to disclose, the court crafted the only state remedy available in remanding the case to the trial court and ordering dismissal if the government continued to refuse to disclose the grand jury minutes.[91]

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83. *See, e.g.*, *Strange*, 197 So. 2d at 441 (The court noted that no subpoena had been issued in support of its finding that there was no obligation of disclosure.); *Cronin v. State*, No. 62A01-0904-CR-186, 2010 WL 271354, at *7 (Ind. App. Jan. 25, 2010) (defense failed to abide by regulatory procedures and was thus barred from cross-examining federal agent regarding matters outside of the scope of direct examination); *State v. Hudson*, 2009-Ohio-6454, at ¶¶ 30, 32 (Ct. App.) (defendant did not submit affidavit/statement summarizing testimony desired and its relevancy); *State v. O'Neal*, Cuyahoga App. No. 44551, 1985 WL 8571, at *4 (Ohio Ct. App. July 25, 1985) (citing *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981)) (agent was prohibited from answering any questions by the defense, but was permitted to answer state's questions because defendant had not followed regulatory procedures). *See also Kronberg*, 672 N.Y.S.2d at 76 (finding that burden falls on the defendant to show that statements actually existed where testifying agents simply said they did not know); *State v. Cisternino*, Nos. 39894 and 39916, 1980 WL 354386, at *17–18 (Ohio Ct. App. July 10, 1980) (citing *United States v. Allen*, 554 F.2d 398, 406 (9th Cir. 1977)).

84. *See State v. Tauzier*, 397 So. 2d 494, 505 (La. 1981).

85. 400 N.E.2d 842 (Mass. 1980).

86. *Id.* at 844.

87. *Id.* at 843–44.

88. *Id.* at 844.

89. *See id*.

90. *Id*.

91. *Id*. at 844–45.

The rule adopted in Massachusetts is far narrower than the *Brady* right, and the Massachusetts Supreme Court circumscribed it even further in a later case setting out several factors to be analyzed when the federal government knowingly withholds exculpatory materials from a state defendant.[92] Finding that the suppression of "material and exculpatory evidence without more" does not give rise to a due process violation, the Massachusetts Supreme Court laid out factors such as the general "unfairness" of withholding evidence from the defendant, and the degree of state and federal cooperation in the investigation.[93] To the extent that Massachusetts recognizes a state defendant's *Brady*/due process right to inter-sovereign disclosure, therefore, the right is so diluted as to be almost indistinguishable from the basic rule of *Brady* that all information in the constructive possession of the state prosecution team must be disclosed.[94]

To the extent that distinct lines of reasoning are discernible in the state cases addressing inter-sovereign disclosure, two legal theories take shape: (1) the theory that there can be no due process right to inter-sovereign disclosure because the *Brady* obligation extends no further than the members of the "prosecution team;"[95] and (2) the theory

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92. *Commonwealth v. Donahue*, 487 N.E.2d 1351, 1355–56 (Mass. 1986).

93. *Id.*

94. *See supra* note 12 and accompanying text. To the extent that courts have recognized a right to inter-sovereign disclosure, they do so only when the federal government is so closely aligned with the state that it can be said that the state constructively possessed the material. This rule is less a rule of inter-sovereign disclosure and more generally a fundamental principle of *Brady* doctrine. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

95. This approach is framed either by explicitly alluding to the "prosecution team" as a doctrine or by discussing whether materials are in the possession, custody, or control of the state prosecutor. *See, e.g.*, *Strange v. State*, 197 So. 2d 437, 443 (Ala. Ct. App. 1966) (requiring that defendant "at least establish that this State official has such [a] document or a copy thereof in his possession before the trial court will be put in error"); *Jimenez v. State*, 128 S.W.3d 483, 489 (Ark. Ct. App. 2003) (no *Brady* violation where the state had no possession of the files); *Navarro v. Superior Court*, No. G036954, 2006 WL 2766147, at *2 (Cal. Ct. App. Sept. 27, 2006) (finding that the *Brady* obligation extends only to those "*acting on the government's behalf*" (quoting *In re Steele*, 85 P.3d 444, 453 (Cal. 2004))); *State v. Miranda*, 777 So. 2d 1173, 1174 (Fla. Dist. Ct. App. 2001) (emphasizing that the state had no possession of the information and had in fact tried to get it, but the federal agencies refused to disclose it); *People v. Hanks*, 569 N.E.2d 205, 206–08 (Ill. App. Ct. 1991) (declining to reach issue of whether Secret Service tapes contained impeachment material because, although Secret Service refused prosecutor's request for information, prosecutor satisfied due diligence obligation); *Diallo v. State*, 994 A.2d 820, 841–42 (Md. 2010) (analyzing the relationship between the State Department and local law enforcement to determine whether state had constructive possession of information that would have granted the defendant derivative diplomatic immunity); *State v. Roan*, 532 N.W.2d 563, 571 (Minn. 1995) (discussing *Brady* obligation in terms of statutory terms governing possession and control); *Wade v. State*

that no due process right exists because the federal government enjoys an absolute substantive privilege against disclosure.[96] In support of the first, the decisions rely on principles imported from the context of statutory discovery and/or language adopted from the Supreme Court's *Brady* jurisprudence;[97] in support of the second, the cases rely on the federal regulations, the common-law principles of privilege, the law of sovereign immunity, or a combination of one or more of these components.[98]

(*Wade II*), 986 P.2d 438, 442 (Nev. 1999) (correcting as a factual matter the portion in *Wade I* that indicated that the DEA was not an agent of the state, given that the state routinely obtains potentially exculpatory material from the DEA, and the court did not wish to discourage that agency relationship); *Wade v. State* (*Wade I*), 966 P.2d 160, 163 (Nev. 1998) (distinguishing case from earlier Nevada decision in which federal agent was deemed agent of the state and thus material was discoverable); *Homick v. State*, 913 P.2d 1280, 1287–88 (Nev. 1996) (finding no materiality for purposes of *Brady* but noting that FBI notes at issue were not in possession of the state, and the federal investigation was not conducted jointly with the state); *People v. Santorelli*, 741 N.E.2d 493, 497–98 (N.Y. 2000) (finding no *Brady* violation where defendant tried to subpoena FBI reports prior to trial and was rebuffed by federal government because such obligation extended only to those working cooperatively or jointly with the prosecutor); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (App. Div. 1989) ("[T]he prosecutor could not be held responsible for not producing a file which he had never possessed or seen, and which neither he nor the state courts could gain access to without the consent of the appropriate federal agency."); *State v. Lawson*, 595 N.E.2d 902, 909 (Ohio 1992) (finding *Brady* obligation applies only where evidence is within possession of state prosecution); *State v. Jones*, No. 32198-0-II, 2005 Wash. App. LEXIS 2774, at *8–9 (Ct. App. Nov. 1, 2005) (noting that state had no control over FBI materials).

96. *See, e.g.*, *Strange*, 197 So. 2d at 443 ("How can a state court, in comity and constitutional harmony, attach the person of a Federal agent?"); *In re Pratt*, 170 Cal. Rptr. 80, 130–31 (Ct. App. 1980) (acknowledging that a subpoena issued to a federal agent would be futile, noting that courts do not engage in acts that are futile, and finding that federal regulations have the force of law); *Saulter v. Municipal Court*, 142 Cal. Rptr. 266, 275 (Ct. App. 1977) (finding that prosecution is relieved of any sanction if federal government ultimately decides to withhold materials); *State v. Andrews*, 250 So. 2d 359, 363–64, 366 (La. 1971) (citing DOJ regulations and concluding, "Under the circumstances of this case, we find that the Order of the Attorney General had the force and effect of law and that the trial judge properly obeyed it"); *State v. Parker*, 27-417 (La. App. 2 Cir. 9/27/95), 661 So. 2d 603, 610–11 (accepting "blanket privilege" by the FBI); *People v. Kronberg*, 672 N.Y.S.2d 63, 77 (App. Div. 1998) (noting that federal government had consistently refused to give materials to state prosecution team); *Rodriguez*, 546 N.Y.S.2d at 862–63 (finding that state courts are without authority to compel production of such files without the federal government's consent); *Commonwealth v. Rasnake*, 7 Va. Cir. 521, 530 (1978) (finding that federal regulations barred production of documents).

97. *See infra* Part II.A.1.

98. *See infra* Part.II.A.2.

1. THE "PROSECUTION TEAM" JUSTIFICATION

The "prosecution team" approach provides the primary rationale for the federal government's arguments and the state courts' decisions finding that there is no due process right to inter-sovereign disclosure.[99] This approach draws upon principles derived from federal and statutory provisions that regulate discovery in criminal cases.[100] Specifically, under many discovery statutes, if records and materials are not within the "possession, custody, or control" of the prosecutor, they are not generally discoverable by the defense.[101] In the context of *Brady* generally and inter-sovereign disclosure specifically, courts import this statutory definition of access in order to determine whether a failure to disclose evidence gives rise to a constitutional violation.[102] In particular, where the state prosecutor cannot obtain such evidence, the courts reason, the information is not in the possession, custody, or control of the prosecutor.[103] Because the *Brady* obligation extends only to agents of the prosecutor, the federal government has no obligation to the state defendant unless it acts jointly and cooperatively with the state prosecution.[104]

Some courts also understand the prosecution team restriction on *Brady* obligations to derive from the Supreme Court's language in *Kyles v. Whitley*,[105] in which the Supreme Court clarified that the obligation of disclosure extended not merely to the prosecutor but to all government agents "acting on the government's behalf."[106] In *Kyles*, the prosecution argued before the Supreme Court that there had been no *Brady* violation because the material at issue had been in the hands of the police rather than in the hands of the prosecutor handling the case.[107] The prosecution urged a rule that obligated only the prosecutor—and not the various state

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99. *See* Robert Hochman, Comment, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1680 (1996).

100. *See id.* The concepts of "possession, custody, or control" here are derived from the statutory language in federal discovery provisions. FED. R. CR. P. 16(a)(1)(E). This phrase is not contained in any of the Supreme Court's *Brady* decisions. *See Roan*, 532 N.W.2d at 571 (relying on Minnesota's discovery statute to find that neither the state nor the federal government owed a duty of disclosure under *Brady*).

101. *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(E).

102. *See United States v. Grace*, 401 F. Supp. 2d 1069, 1076 (D. Mont. 2005) (using terms "possession," "custody," and "control" to describe both *Brady* obligations and Rule 16 discovery).

103. *See, e.g.*, *People v. Parham*, 384 P.2d 1001, 1002 (Cal. 1963) (noting that the prosecution had attempted to obtain the documents and failed).

104. *See, e.g.*, *People v. Santorelli*, 741 N.E.2d 493, 497–98 (N.Y. 2000).

105. 514 U.S. 419 (1995).

106. *Id.* at 437.

107. *Id.* at 438.

entities involved in the investigation and prosecution of the criminal case—to disclose favorable, material evidence.[108] The Supreme Court rejected this position as "a serious change of course from the *Brady* line of cases."[109]

The state decisions generally invoke the prosecution team rule either by explicitly referring to the prosecution team—and finding the federal government to be outside that circle of agents actively involved in investigating and bringing the case to trial—or by finding that the material was simply not in the state prosecutor's possession, constructive or actual.[110] Some decisions hold that the *Brady* obligation extends only to those "acting on the government's behalf"[111] or that "the prosecutor could not be held responsible for not producing a file which he had never possessed or seen, and which neither he nor the state courts could gain access to without the consent of the appropriate federal agency."[112] Despite the no-fault aspect of the *Brady* rule, many of the decisions focus on the prosecutor's lack of culpability, requiring only that the prosecutor act with due diligence once it knows of the existence of potential *Brady* material in the hands of the federal government.[113] Several decisions evince a reluctance to find a violation where the prosecutor acted in good faith,[114] and in the end, the reasoning against a rule of inter-sovereign disclosure largely turns on fact-based analyses of whether the activities of the state prosecution team and the federal government are so closely aligned that it could be said they acted jointly and cooperatively such that the information was constructively in the hands of the prosecutor.[115]

This analysis of constructive possession is undoubtedly relevant to the question of whether the prosecutor was obligated to discover and then disclose the information. The question of constructive possession is, after all, a central theme of *Brady* litigation when questions arise as to materials that are in the actual possession of private non-governmental parties or when the material is in the hands of a governmental entity that had no actual knowledge of its possession of exculpatory information or

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108. *Id.*

109. *Id.*

110. *See supra* note 95 and accompanying text.

111. *Navarro v. Superior Court*, No. G036954, 2006 WL 2766147, at *2 (Cal. Ct. App. Sept. 27, 2006).

112. *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (App. Div. 1989).

113. *See, e.g.*, *People v. Hanks*, 569 N.E.2d 205, 207–08 (Ill. App. Ct. 1991) (declining to reach issue of whether Secret Service tapes contained impeachment material because, although Secret Service refused prosecutor's request for information, prosecutor satisfied due diligence obligation).

114. *See id.* at 207.

115. *See supra* note 95 and accompanying text.

the exculpatory value of the information it knew about.[116] But the question of constructive possession and the related question of which individuals comprise the prosecution team are irrelevant to the issue of whether or not a state defendant has a right to obtain material directly from the federal government.

On this latter question, neither *Kyles* nor the broader concept of constructive possession is helpful. *Kyles*, after all, found only that, where information was held by an agent of the prosecution, the *Brady* obligation was triggered regardless of whether the prosecutor personally knew of the information.[117] It says nothing about the circumstances raised in cases of inter-sovereign non-disclosure, where the federal government knowingly withholds material that would be subject to disclosure if held by the state prosecutor, and the tenor of the *Kyles* decision does not suggest that the Court was proposing such a restriction on *Brady* obligations. The language employed in *Kyles*, after all, was designed to clarify that the *Brady* obligation was more expansive than the rule urged by the prosecution, not that it was so restrictive as to extend only to the prosecution team.[118]

Indeed, the rule that *Brady* applies only to the prosecution team is found nowhere in Supreme Court jurisprudence.[119] Undoubtedly, the language of *Brady* itself imposes the obligation of disclosure specifically on the prosecutor.[120] But the *Brady* Court was not presented with the issue of whether defendants have a due process right to materials held by

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116. *See* Carole Gordon Rapoport, Note, *Dream Team or Evidentiary Nightmare? Defining When a Government Agency Is Part of the Prosecution Team*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 81 (2004); Memorandum from Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery, at 7–8 (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.pdf (discussing prosecutors' obligations with regard to information in the possession of lay witnesses).

117. *See Kyles v. Whitley*, 514 U.S. 419, 421, 437–38 (1995).

118. *See id.* at 437–38.

119. One article traces the concept to *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979), also involving inter-sovereign disclosure under the Due Process Clause. *See* Mark D. Villaverde, Note, *Structuring the Prosecution's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1493–95 (2003). In *Antone*, the court found that the state agents who paid for a prosecution witness's attorney fees were members of the "prosecution team" for purposes of *Brady*. *Antone*, 603 F.2d at 570. But this case and the line of cases that it started dealt with the imputation of knowledge across sovereign lines where state and federal entities were acting in concert in prosecuting a case. *Id.* Neither *Antone* nor subsequent federal cases that developed this line of analysis addressed the issue of the federal government's independent obligation to disclose exculpatory information.

120. "We now hold that the *suppression by the prosecution* of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added).

non-prosecution government entities, and none of the Supreme Court's later *Brady* cases relying on this specific language have involved such facts. Aside from *Smith v. Pennsylvania*, in which the Supreme Court's remand order was understood by the Pennsylvania Supreme Court to address inter-sovereign disclosure as a due process issue, the Supreme Court has never addressed the issue of inter-sovereign disclosure itself.[121]

If anything, the Court's *Brady* jurisprudence strongly suggests that the *Brady* obligation is not limited to the prosecution team and that state agents may not knowingly withhold exculpatory information regardless of their lack of affiliation with the prosecution. In *Pennsylvania v. Ritchie*,[122] a child protection services agency conducted an investigation of allegations of sexual abuse that were the subject of a criminal prosecution.[123] The agency was not part of the prosecution team, and the prosecutor had no possession or knowledge of the contents of the agency's files.[124] The defense had subpoenaed the agency's files for potential impeachment information related to the agency's interviews with the child, and the question addressed by the Court was whether and to what extent the Constitution required the Court to conduct an *in camera* inspection of the agency files to determine whether impeachment information existed.[125]

The *Ritchie* Court declined to address the issue under the Compulsory Process Clause, opting instead to conduct the analysis as a *Brady* claim.[126] At no point in the case did the Court discuss the fact that the government agency in possession of the requested records was not part of the prosecution team and was not acting as an agent of the prosecution. Indeed, the language of the Court's opinion—noting that "[i]t is well settled that the *government* has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment"[127]—suggests that the obligation exists

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121. *See supra* notes 61–78 and accompanying text.

122. 480 U.S. 39 (1987).

123. *Id.* at 43.

124. *Id.* at 44 n.4.

125. *Id.* at 42–43.

126. *Id.* at 56.

127. *Id*. at 57 (emphasis added) (citations omitted). It may be suggested that *Ritchie* stands for a more limited proposition—but one that would still encompass many circumstances involving inter-sovereign disclosure—in that it applies only to arms of the government that are involved in investigating the unlawful conduct, regardless of whether that arm was acting in concert with the prosecutor as part of the "prosecution team." *See* Villaverde, *supra* note 119, at 1491. However, nothing in *Ritchie* suggests even this middle-ground approach. If it were critical to the holding that the agency was involved in investigating the crime separately from the prosecutor, it almost certainly would have been discussed as an issue in the case. Rather, it seems that the *Ritchie* Court presumed the broader rule to be the case—that any arm of the government has an obligation to

for all government entities when those entities are placed on notice, not solely members of the prosecution. Were the obligation limited to the prosecution team, the state's argument against the defendant's right to the information would have easily prevailed, and the courts would have readily disposed of the case. Instead, the Court redirected the litigants' focus from the Compulsory Process Clause toward due process and found that, under *Brady*, Ritchie was entitled to a review of the government agency's withheld materials.[128] The Court issued this ruling not only without regard to the question of whether the agency was a member of the prosecution team, but also seemingly with the full knowledge that it definitively was not.[129]

In short, there is no Supreme Court support for the proposition that a defendant may be barred from obtaining favorable, exculpatory information in the hands of a governmental entity simply because that entity is not part of the prosecution team; on the contrary, the Court's decision in *Ritchie* strongly suggests the opposite rule. The Court's decision in *Ritchie* can have no meaning unless it is true that, where a governmental entity outside of the prosecution team is on notice that it possesses favorable, material evidence for the accused, the Due Process Clause requires disclosure. The line-drawing between state and federal custodians of information is therefore unjustified under the Due Process Clause, and the "prosecution team" rationale offers little doctrinal support for the rule that defendants have no right to inter-sovereign disclosure of exculpatory evidence.

2. THE "FEDERAL PRIVILEGE" JUSTIFICATION

Several courts addressing the issue of inter-sovereign disclosure have found or, in some cases, presumed, that the federal government bears an absolute privilege against disclosure.[130] This theory of federal privilege has several inter-related and overlapping components. Primarily, the courts look to the federal regulations and the Supreme Court's 1951 decision, *United States ex. rel. Touhy v. Ragen*,[131] finding that a low-level employee could not be held in contempt for abiding by those federal regulations that required him not to comply with a

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disclose exculpatory material when it is on notice that it has such material in its possession.

128. *Ritchie*, 480 U.S. at 56–58

129. *Id.* at 44 n.4.

130. *See, e.g.*, *Saulter v. Municipal Court*, 142 Cal. Rptr. 266, 275–76 (Ct. App. 1977); *State v. Andrews*, 250 So. 2d 359, 366 (La. 1971); *State v. Parker*, 661 So. 2d 603,611–12 (La. Ct. App. 1995) (accepting "blanket claim of privilege" by the FBI).

131. 340 U.S. 462 (1951).

subpoena.[132] Secondarily, some courts invoke the doctrine of sovereign immunity, which holds that no action (including proceedings to enforce a subpoena) may be maintained against the federal government absent the government's consent.[133] Finally, courts invoke a general federal privilege seemingly based on the common law executive privilege.[134] These three components of the federal privilege theory are inextricably intertwined in the reasoning of these decisions. For example, the theory that the federal government enjoys a general and absolute common-law privilege against disclosure can often be traced via case citations to a decision finding such a privilege but on the grounds that the federal regulations have created a federal privilege.[135] Similarly, courts discussing sovereign immunity may inadvertently refer to it as a federal privilege rather than an immunity against suit.[136] The boundaries between these three components of the federal privilege theory are therefore indistinct. Here, I treat each separately in order to place these

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132. *Id.* at 468. *See, e.g.*, *Andrews*, 250 So. 2d at 366 (citing the DOJ regulations and concluding that "the Order of the Attorney General had the force and effect of law and that the trial judge properly obeyed it"); *see also In re Pratt*, 170 Cal. Rptr. 80, 130–31 (Ct. App. 1980) (finding that federal regulation "is valid and has the force of federal law"); *Parker*, 661 So. 2d at 610–11 (issue analyzed under Compulsory Process Clause).

133. *See, e.g.*, *Strange v. State*, 197 So. 2d 437, 443 (Ala. Ct. App. 1966) (asking rhetorically, "How can a state court, in comity and constitutional harmony, attach the person of a Federal agent?"); *People v. Kronberg*, 672 N.Y.S.2d 63, 77 (App. Div. 1998) (noting that no procedural mechanism existed to compel federal government to disclose); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862–63 (App. Div. 1989) (finding that state courts are without authority to compel production of such files without the federal government's consent).

134. *See United States v. Lee*, 106 U.S. 196, 204–05 (1882); *Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir. 1992).

135. For example, many courts have relied on *Boske v. Comingore*, 177 U.S. 459 (1900), for the proposition that there is a general federal privilege, but that decision was itself based on the federal regulations. *See* Hirsch, *supra* note 21 at 112–14; Note*, supra* note 15, at 888 ("Probably as a result of confusing the concept of privilege with the fact that, under the *Boske* rule, most subordinate officers are immune from process compelling the production of documents, several courts have assumed that a shadowy privilege attaches to federal records merely because they are federal records.").

136. *See, e.g.*, *Cronin v. State*, No. 62A01-0904-CR-186, 2010 WL 271354, at *1 (Ind. Ct. App. Jan. 25, 2010) (framing the question as whether "the trial court abuse[d] its discretion by denying Cronin's motion for mistrial following its enforcement of federal agents' sovereign immunity testimonial privilege"); *see also Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir. 1998) (referring to the "governmental privilege of sovereign immunity"). *But see Smith v. Cromer*, 159 F.3d at 885–86 (Phillips, J., dissenting) (discussing the difference between the immunity and the privilege and explaining that "[t]he sovereign immunity claim prevails, 'jurisdictionally' barring access, unless the withholding is unconstitutional, which depends in turn upon whether the asserted constitutional right of access overrides the privilege").

components in a coherent conceptual framework that fairly captures the panoply of rationales offered in support of a general federal privilege.

a. United States ex. rel. Touhy v. Ragen

A primary source of the federal privilege theory comes from the federal regulations issued by each federal department and agency, establishing procedures designed to guide governmental employees on how to respond to subpoenas, whether civil or criminal. The Supreme Court's decision *United States ex. rel. Touhy v. Ragen* interpreted those regulations to mean that a low-level employee could not be held in contempt for following federal regulations which required him or her to refuse to comply with any subpoena in the absence of consent from the department or agency head.[137] Courts have come to rely on *Touhy* as a stand-alone principle that the Supreme Court has exempted the federal government from obligations of disclosure, sometimes citing *Touhy* without any additional reference to the federal regulations that were central to the decision in *Touhy*.[138] Understanding how the state courts came to rely on *Touhy* as creating a federal privilege requires a close look at the case itself.

Roger Touhy was a state inmate in federal post-conviction proceedings who sought to issue a subpoena *duces tecum*[139] to an FBI agent, arguing that the requested materials would establish that his conviction was obtained fraudulently.[140] The FBI agent in charge of the Chicago office that received the subpoena refused to comply, and the lower court found the agent guilty of contempt.[141]

The central issue in the case before the Supreme Court was the legality of the contempt finding against the FBI agent.[142] Although the respondent in that case made the substantive argument that the Constitution afforded a defendant no due process rights to the materials,[143] the Supreme Court declined to address that particular

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137. 340 U.S. at 468.

138. *See, e.g.*, *State v. Rice*, 335 N.W.2d 269, 276–77 (Neb. 1983); *People v. Kronberg*, 672 N.Y.S.2d 63, 77 (App. Div. 1998); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (App. Div. 1989).

139. Subpoena *duces tecum* is defined as: "A subpoena ordering the witness to appear and to bring specified documents, records, or things." Subpoena *duces tecum* definition, BLACK'S LAW DICTIONARY 1467 (8th ed. 2004).

140. *See Touhy*, 340 U.S. at 464–66; Hirsch, *supra* note 21, at 83.

141. *Touhy*, 340 U.S. at 464–65.

142. *Id.* at 467.

143. *See* Brief for the Respondent at 44, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (Nov. 22, 1950) (No. 83).

question.[144] It focused instead on the constitutionality of the departmental regulations that authorized the subordinate FBI employee to withhold the documents and analyzed the question of whether employees were thus protected from sanctions for noncompliance.[145] The departmental regulation in place at the time that *Touhy* was decided established a default position that all documents held by the Department of Justice were "to be regarded as confidential" and forbade any employee from disclosing documents without the approval of the Attorney General or an Assistant Attorney General on his behalf.[146] The regulations further instructed that all employees, FBI agents included, were required to refuse to comply with a subpoena.[147] The *Touhy* Court found this regulation, and the orders issued pursuant to this regulation, to be constitutional.[148]

The *Touhy* Court declined to address the issue of the Attorney General's prerogative to withhold the requested materials altogether, and the Court's ruling that the FBI agent could not be subjected to sanctions rested on the narrowest grounds possible.[149] Emphasizing the narrowness of the Court's holding, Justice Frankfurter in his concurrence dismissed the notion that the ruling could be construed so broadly as to allow the federal government to claim an absolute privilege with respect to materials subpoenaed in a state proceeding:

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144. *See generally Touhy*, 340 U.S. 462.

145. *Id.* at 467.

146. *Id.* at 463 n.1.

147. 11 Fed. Reg. 4920 (May 4, 1946).

> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of The Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Wherever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by The Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

Id.

148. *Touhy*, 340 U.S. at 470.

149. *Id.* at 467 ("The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers."). *See also* Brief for Petitioner at 7, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (Nov. 6, 1950) (No. 83).

> To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.[150]

Frankfurter's concurrence hinged on the assumption that, had the Attorney General been properly served and properly brought before the court, the United States would not have been beyond the reach of process.[151] Nothing in the majority opinion itself suggested that the Court intended to permit the agency regulations to create an absolute privilege for federal documents.[152] On the contrary, the *Touhy* Court merely found that (1) the regulations promulgated by the federal government in order to process subpoenas were constitutional and that (2) low-level employees could not be penalized for abiding by those regulations and refusing to disclose materials absent consent of the head of the agency.[153]

Under this narrow construction, *Touhy* itself merely approved a procedural mechanism put in place to send a subpoena issued by a state criminal court up the chain of command to the head of the agency; the *Touhy* Court did not afford that agency the ultimate, untempered discretion to withhold any materials requested by a state court subpoena.[154] That the regulation was purely administrative in nature is evidenced by the name of the federal statute that authorized such regulations in the first place.[155] The regulations at issue in *Touhy*, and similar regulations applicable to other federal agencies,[156] were

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150. *See Touhy*, 340 U.S. at 473 (Frankfurter, J., concurring).

151. *See id.* at 472 (Frankfurter, J., concurring).

152. Before the Court decided *Touhy*, the federal government invoked *Touhy*'s precursor, *Boske v. Comingore*, 177 U.S. 459 (1900), as standing for the proposition that a federal privilege existed. *See* Hirsch, *supra* note 21 at 112–14.

153. *Touhy*, 340 U.S. at 469–70.

154. *See Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994).

155. 5 U.S.C. § 22 (1946) (current version at 5 U.S.C. § 301 (2012)).

156. Such regulations, vesting ultimate authority on the issue of disclosure with the department head are currently in place for every federal department. *See, e.g.*, Department of Justice regulations, 28 C.F.R. §§ 16.21–29 (2010); State Department regulations, 22 C.F.R. §§ 172.1–5 (2003). For example, the DOJ regulations make clear that no subordinate employee may make decisions with regard to subpoena compliance unless designated by the Attorney General:

> No employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's

promulgated pursuant to the Federal Housekeeping Statute, which authorized the departments to establish regulations governing the "custody, use, and preservation of the records, papers, and property appertaining to it."[157] Its purpose, therefore, was entirely organizational. It was never intended to create a substantive privilege that exempted the federal government from court orders to disclose evidence.

Nevertheless in the years after *Touhy*, the federal government relied on the case to argue that such an absolute privilege existed.[158] In order to dispel any confusion on the issue, Congress amended the Housekeeping Statute in 1958 to make clear that any regulation promulgated under the statute did not create an absolute privilege for federal documents that were subpoenaed by any court, state or federal.[159] The United States Attorney General even conceded in Congressional hearings in 1958 that the federal government had no such substantive privilege under the regulations.[160] Even after the amendment of the Housekeeping Statute and the Attorney General's concession, however, the federal government persisted in misusing *Touhy*. In 1981, one state court noted:

> The *Touhy v. Ragen* case, supra, has spawned a quarter century of confusion, ever since that case held in 1950 that a Department of Justice employee cannot be compelled to produce, or be held in contempt for refusal to produce requested material. Our study has shown that government agencies have for decades employed these regulations to avoid disclosure to courts and for thirty years have used *Touhy v. Ragen* as authority for doing so . . . . However, we do not perceive that such federal regulations prevent courts of this

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> official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

28 C.F.R. § 16.22.

157. 5 U.S.C. § 22 (1946) (current version at 5 U.S.C.A. § 301 (2009)).

158. *United States v. Oller*, 107 F. Supp. 54, 56 (D. Conn. 1952) (reversed on other grounds); *United States v. Schniederman*, 106 F. Supp. 731, 733–34 (S.D. Cal. 1952). *See generally* Gregory Coleman, Note, Touhy *and the Housekeeping Privilege: Dead But Not Buried?*, 70 TEX. L. REV. 685 (1992).

159. The text of the statute was amended to add the last sentence:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. *This section does not authorize withholding information from the public or limiting the availability of records to the public.*

5 U.S.C. § 301 (emphasis added).

160. Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960*, 29 GEO. WASH. L. REV. 623, 895 (1961).

> state from requiring that such evidence be produced where the evidence is material to the defense and therefore necessary to due process.[161]

Despite the seeming clarity of the Housekeeping Statute and the *Touhy* opinion itself, state courts have largely accepted the federal government's blanket assertions of privilege based on *Touhy*.[162] The Louisiana Supreme Court's decision in *State v. Andrews*[163] is representative of the more in-depth analyses in the state courts, referring to and citing extensively the federal regulations, the Housekeeping Statute, the governmental privilege protecting state secrets, and *Touhy* itself.[164] The *Andrews* Court grappled with the question of the proper role of the judiciary in evaluating the federal government's assertion of privilege and credited the notion that the ultimate decision-making authority regarding the federal government's assertion of privilege lay with the courts and not the executive branch.[165] But after acknowledging the judiciary's role in governing federal disclosure, the court noted simply that the trial judge had found that the FBI agents properly invoked that privilege by doing nothing more than asserting it and citing the regulations.[166] In other words, although the court gave credence to the belief that the courts play some role in evaluating the government's assertion of privilege, the mere assertion by the FBI agents in this case was sufficient to trigger the *Touhy*-based privilege against disclosure. Ultimately, the court found that the federal regulations have the "force and effect of law and that the trial judge properly obeyed [the regulations]."[167]

While the *Andrews* decision correctly described the holding of *Touhy*[168] (concluding, however, from that holding that a federal privilege

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161. *Buford v. State*, 282 S.E.2d 134, 136–137 (Ga. Ct. App. 1981) (reversing conviction and ordering that defendant not be retried without the requested material). In 2004, the Georgia Supreme Court implicitly rejected the *Buford* Court's position by announcing that, where the federal government withholds potentially material evidence relating to a state criminal case, the defendant's sole remedy is to seek to compel production in federal courts. *See Al-Amin v. State*, 597 S.E.2d 332, 345 (Ga. 2004).

162. *State v. Rice*, 335 N.W.2d 269, 276–77 (Neb. 1983) (finding that *Touhy* established that the federal government may refuse to produce documents).

163. 250 So. 2d 359 (La. 1971).

164. *Id.* at 363–65.

165. *Id.* at 366 ("The above jurisprudence holds that where a government head or employee invokes a privilege and refuses to make disclosure or to testify, the ultimate determination of the privilege remains with the court.").

166. *See id.*

167. *Id*. *See also People v. Parham*, 384 P.2d 1001, 1001–02 (Cal. 1963); *In re Pratt*, 170 Cal. Rptr. 80, 130–31 (Ct. App. 1980).

168. *Andrews*, 250 So. 2d at 365.

exists), other state cases more clearly distort both the issue and holding of *Touhy*. One state decision, for example, mischaracterized the issue in *Touhy* as "the question of the right of a state prisoner to secure the records of the Federal Bureau of Investigation," finding that the case established that no such right existed.[169] Another case asserted that the Supreme Court had stated in *Touhy* that "where authority to produce documents has been withheld, the refusal to produce such materials by the local agents is permissible," without specifying that the refusal was permissible only as it related to sanctions against the agent, and not with regard to any due process right the state defendant may have to such evidence.[170]

These state court decisions notwithstanding, the Department of Justice now regularly concedes in federal courts that *Touhy* creates no substantive privilege against disclosure, and federal courts largely agree that the *Touhy*-based theory of federal privilege has been discredited.[171] Nevertheless, the rulings of the state courts that have in the past misconstrued *Touhy* to create a broad privilege remain in place with precedential effect, allowing the federal government to continue to invoke *Touhy* in state proceedings in order to argue that information subpoenaed in a state criminal proceeding is not subject to disclosure.[172] But a plain reading of the Housekeeping Statute leaves little doubt that Congress in no way intended to create an absolute privilege, and the very name makes clear that the statute is intended purely to organize the federal government's administrative tasks.[173] *Touhy* therefore operates functionally as a complete bar to any state court litigant's ability to secure materials from the federal government, even though federal courts

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169. *Alexander v. State*, 450 S.W.2d 70, 72 (Tex. Crim. App. 1970) (stating that *Touhy* "held that an agent of the Federal Bureau of Investigation might lawfully decline to answer questions in reliance upon the instructions of the Attorney General of the United States").

170. *State v. Rice*, 335 N.W.2d 269, 277 (Neb. 1983).

171. *Kwan Fai Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001); *Beckett v. Serpas*, No. 12-910, 2013 WL 796067 at *3 (E.D. La. Mar. 4, 2013).

172. *See State v. Strange*, 197 So. 2d 437, 443 (Ala. 1966); *People v. Parham*, 384 P.2d 1001, 1001–02 (Cal. 1963); *In re Pratt*, 170 Cal. Rptr. 80, 130–31 (Ct. App. 1980); *State v. Andrews*, 250 So. 2d 359, 364 (La. 1971); *State v. Parker*, 661 So. 2d 603, 610 (La. Ct. App. 1995); *Rice*, 335 N.W.2d at 277; *People v. Kronberg*, 672 N.Y.S.2d 63, 77 (App. Div. 1998); *People v. Rodriguez*, 546 N.Y.S.2d 861, 862 (App. Div. 1989); *State v. Cisternino*, Nos. 39894 and 39916, 1980 WL 354386, at *17 (Ohio Ct. App. July 10, 1980); *Alexander*, 450 S.W.2d at 72.

173. "Most, if not all, commentators agree that the amendment was intended to abrogate the de facto privilege that had arisen under various housekeeping regulations. The proposition for which *Touhy* is often cited—that a government agency may withhold documents or testimony at its discretion—simply is not good law and hasn't been since 1958." Coleman, *supra* note 158, at 689 (1992) (footnote omitted).

have recognized and made clear that *Touhy* itself creates no substantive privilege.[174]

b. Sovereign Immunity

In addition to the theory that *Touhy* and the federal regulations create a substantive federal privilege against disclosure, some courts invoke the doctrine of sovereign immunity in order to find that, where a trial court is powerless to enforce a subpoena against the federal government, state defendants have no right to the information at issue.[175] The doctrine of sovereign immunity holds that an action may not be maintained against the federal government absent its consent, and state courts follow the general rule that a subpoena enforcement action against the federal government violates these principles.[176] The issue was framed somewhat dramatically by one court proclaiming that "an attempt to compel compliance with either subpoena by the Attorney General founders like the Titanic on the hard rock of sovereign immunity"[177] and more prosaically in other decisions that simply note that any attempt to force disclosure would be futile.[178] Thus, even if the state courts did not regard the *Touhy* doctrine as establishing a substantive privilege, the doctrine of sovereign immunity forecloses the possibility of any state court ever enforcing a subpoena against the federal government.[179] Because the federal government has claimed a privilege or otherwise refused to disclose the information, and because the state court is disempowered to order them to do otherwise, courts conclude that there must be no due process violation where the federal government suppresses favorable, exculpatory information in a state criminal case.[180]

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174. *See, e.g.*, *Kwan Fai Mak*, 252 F.3d at 1092.

175. *See Strange*, 197 So. 2d at 443 ("How can a state court, in comity and constitutional harmony, attach the person of a Federal agent?"); *Saulter v. Municipal Court*, 142 Cal. Rptr. 266, 273 (Ct. App. 1977); *Pratt*, 170 Cal. Rptr. at 130–31 (acknowledging that a subpoena issued to a federal agent would be futile, noting that courts do not engage in acts that are futile, and finding that federal regulations have the force of law); *Kronberg*, 672 N.Y.S.2d at 77 (noting that federal government had consistently refused to give materials to state prosecution team); *Rodriguez*, 546 N.Y.S.2d at 862–63 (finding that state courts are without authority to compel production of such files without the federal government's consent).

176. *See, e.g.*, *Civiletti v. Municipal Court*, 172 Cal. Rptr. 83, 86 (Ct. App. 1981).

177. *Id.* (ruling only on the issue of the court's authority to compel production without reaching the applicability of the Due Process Clause).

178. *See supra* note 175 and accompanying text.

179. *Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012) (quoting *Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1211–12 (D.C. Cir. 1996).

180. *See supra* note 175 and accompanying text.

But the state decisions' invocations of sovereign immunity conflate notions of privilege and immunity and err in their underlying premise that the doctrine of sovereign immunity trumps constitutional concerns.[181] Indeed, the doctrine of sovereign immunity against the federal government was never intended to create a free pass for what would otherwise be considered unconstitutional conduct by the federal government. "[W]henever a government entity transgresses the limits of its delegation by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative 'sovereign' immunity it might otherwise possess. Simply put, governments have neither 'sovereignty' nor 'immunity' to violate the Constitution."[182] While defendants in state prosecutions may be unable to compel disclosure, therefore, it does not follow that there was no constitutional violation to begin with.

c. Common-law Principles of Privilege

Finally, courts that reject the right to inter-sovereign disclosure also allude to a general privilege presumed to exist in the common law.[183]

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181. *See supra* note 136. *See also* 5 U.S.C. § 702 (2012); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (establishing "a specific application of the constitutional exception to the doctrine of sovereign immunity"); Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 900 (2010) (submitting that there is a constitutional exception to the doctrine of sovereign immunity and that by passing the Administrative Procedure Act Congress waived sovereign immunity with respect to constitutional violations). Courts have found that this waiver applies in proceedings other than civil actions brought under the Administrative Procedure Act. *See, e.g.*, *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005). Even if this statutory waiver is not interpreted to allow a state court to enforce a subpoena against the federal government, this statutory waiver should, at minimum, preclude a state court from finding that sovereign immunity forms the basis of a federal privilege against disclosure.

182. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427, 1429 (1987) (arguing that invocations of sovereign immunity have allowed state and federal governments to avoid constitutional liability where no such immunity was imagined by the founders). "By allowing both federal and state governments to invoke 'sovereign immunity' from liability for constitutional violations, the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth." *Id.* at 1466.

183. *See, e.g.*, *State v. Andrews*, 250 So. 2d 359, 365–66 (La. 1971) (discussing general governmental privilege). At least one court has also located a privilege within the federal Freedom of Information Act, which exempts from disclosure broad categories of information. *Saulter v. Municipal Court*, 142 Cal. Rptr. 266, 275–76 (Ct. App. 1977). That federal statute, however, contains an exception to those materials that are barred from disclosure, where disclosure is made pursuant to an "order of a court of competent jurisdiction." 5 U.S.C. § 522(a)(11). Arguably, a state court is not a "competent" court within the meaning of the statute because any order to disclose would be unenforceable because of the federal government's sovereign immunity. In this circumstance, the

One case, for example, refers to "the government's privilege against disclosure of its secrets of state," citing case law involving a party's efforts to obtain CIA intelligence in a civil case,[184] but it cites no support for the proposition that the state secrets privilege is broad enough to encompass the types of evidence most often sought by state criminal defendants.[185]

The proposition that the federal government enjoys a general privilege against disclosure is highly questionable,[186] and the proposition that this general privilege would prevail over a criminal defendant's due process rights is unsupported. Although courts have long recognized an executive privilege against disclosure of purported state secrets,[187] this privilege is designed to "protect military, diplomatic, or sensitive national security secrets."[188] Moreover, the federal government's position that it enjoys a blanket privilege against disclosure—particularly where the purported privilege conflicts with a criminal defendant's constitutional rights—was roundly rejected in 1807 by the Supreme Court in connection with the prosecution of Aaron Burr.[189] In that case, Chief Justice John Marshall rejected the executive's claim that it was exempt from disclosing, in response to a subpoena, a letter that would

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"privilege" claimed is conceptually no different from the privilege claimed under general principles of sovereign immunity described above.

184. *Andrews*, 250 So. 2d at 365. *See also Cronin v. State*, No. 62A01-0904-CR-186, 2010 WL 271354, at *1–2, *7 (Ind. App. Jan. 25, 2010) (referring inconsistently to an "ATF agent's testimonial privilege" and a "sovereign immunity testimonial privilege," as well as to the federal regulations).

185. *Andrews*, 250 So. 2d at 365–66.

186. *See* Note*, supra* note 15, at 882.

187. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953).

188. *United States v. Nixon*, 418 U.S. 683, 706 (1974).

189. *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14,692d). The argument of Luther Martin, Burr's attorney, remains relevant to the context of federal disclosure today:

> The president has undertaken to prejudge my client by declaring that "of his guilt there can be no doubt." He has assumed . . . the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this president of the United States, who has raised all this absurd clamour, pretend to keep back the papers which are wanted for this trial, where life itself is at stake? It is a sacred principle, that in all such cases, the accused has a right to all the evidence which is necessary for his defence. And whoever withholds, willfully, information that would save the life of a person, charged with a capital offence, is substantially a murderer, and so recorded in the register of heaven.

Hirsch, *supra* note 21, at 87 (quoting PAUL S. CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND 248 (1970)).

have provided critical impeachment for Burr in his criminal case.[190] Despite this precedent, the federal government has continued to claim a general, absolute privilege against disclosure, and the value of the Burr case "was virtually unappreciated in our country for almost a century and a half."[191] Almost until the point the Attorney General conceded in a congressional hearing that no substantive privilege exists, the official position of the federal government was that it possessed a general federal privilege against disclosure.[192]

The Supreme Court's decision in *United States v. Nixon*[193] denying former President Nixon's claim of privilege in the face of grand jury subpoenas further undercuts the federal government's general claim of privilege.[194] Although the case involved a prosecution subpoena, rather than a defense subpoena which may be supported by the constitutional rights to compulsory process and due process, the Court nevertheless engaged in a general discussion of the role of federal privilege in the context of these constitutional rights in a criminal trial.[195] Affirming the district court's order for production of executive materials, the Supreme Court reasoned that "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."[196] The Court then found that, when the federal government's assertion of privilege is based "only on the generalized interest in confidentiality"—as opposed to a specific claim that the subpoenaed material contains "military, diplomatic, or sensitive national security secrets"—that claim "cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."[197] Even setting aside a criminal defendant's constitutional right to access

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190. *Burr*, 25 F. Cas. at 37.

191. Brennan, *supra* note 33, at 285.

192. The federal government asserted this position in litigation. *See Boske v. Comingore*, 177 U.S. 459, 469 (1900). The federal government also asserted this position in advisory opinions asserting a general privilege against disclosure. Note*, supra* note 15, at 882, 885 (citing 25 Op. Att'y Gen. 326 (1905); 40 Op. Att'y Gen. 45, 49 (1941)). The government's position in its advisory opinions appears to be based on a misreading of *Boske*, which in turn was based on the federal regulations governing disclosure by governmental agencies and not on any general authority to withhold documents beyond a state secrets privilege. *Id.* at 884. *See also Parsons v. State*, 38 So. 2d 209, 213 (Ala. 1948) (recognizing that inducements to witnesses do not "rise to the dignity of state secrets").

193. 418 U.S. 683 (1974).

194. "[T]he legitimate needs of the judicial process may outweigh Presidential privilege . . . ." *Id.* at 707.

195. *Id.* at 687–88, 703–13.

196. *Id.* at 712.

197. *Id.* at 706, 713.

information, therefore, a generalized claim of federal privilege must "yield to the demonstrated, specific need for evidence in a pending criminal trial."[198]

The fact that *Nixon* was decided in the context of a federal criminal prosecution rather than a state prosecution should not matter if the justification for withholding evidence is based solely on a generalized federal privilege. Where a case is tried in federal court, the defendant's right of access to exculpatory evidence in the hands of the federal government is clear; but a general common-law claim of privilege should not have different applications in state and federal court. On the contrary, the only reason that the federal government's claims of general privilege can succeed in state court is that a trial court that disagrees with that claim of privilege is powerless to act.[199] A general claim of privilege that applies only in proceedings conducted under state authority seems not to be a "general" one at all, and is certainly not one that is grounded in the general common-law power of the executive to protect its state secrets.

3. THE FLAWED PREMISES OF THE RULE AGAINST A RIGHT TO INTER-SOVEREIGN DISCLOSURE: A SUMMARY

The rationales described above fail to provide a doctrinally sound basis for a rule against inter-sovereign disclosure. The argument that the *Brady* obligation in a state prosecution cannot extend to the federal government because it extends no further than the prosecution team is unsupported by *Brady's* Supreme Court progeny and is seriously undermined by the Court's decision in *Pennsylvania v. Ritchie*.[200] The argument that a general federal privilege exists likewise has no support: the argument that the regulations, and/or the Court's decision in *Touhy*, create a substantive privilege has long been discredited among scholars,[201] and in the federal courts, and no common-law executive privilege applies.[202] Finally, the doctrine of sovereign immunity provides no support for a rule against a right to inter-sovereign disclosure. While the doctrine of sovereign immunity creates a procedural barrier for the state defendant seeking access to federal materials, the immunity itself

198. *Id.* at 713.

199. At least one court has recognized the applicability of *Nixon* to the issue of inter-sovereign disclosure. *See Buford v. State*, 767, 282 S.E.2d 134, 137 (Ga. Ct. App. 1981). *But see State v. Cisternino*, Nos. 39894 and 39916, 1980 WL 354386, at *17–18 (Ohio Ct. App. July 10, 1980) (rejecting argument that *Nixon* supports compelled disclosure on the grounds that defense counsel failed to abide by federal regulations that govern issuance of a subpoena to the federal government).

200. *See supra* Part II.A.1.

201. *See supra* Part II.A.2.

202. *See supra* Part II.A.2.

neither creates a privilege nor carves out an exception to the constitutional rule mandating disclosure of favorable, material evidence.[203]

To the extent that the state court decisions rely on the reasoning described above, they misapprehend the doctrines they invoke. In short, the proposition that the state defendant has no right to inter-sovereign disclosure of exculpatory materials stands on premises that are shaky at best, or, according to many, entirely discredited.

B. Inter-Sovereign Disclosure in Constitutional Context

In the case of Michael Dale Rimmer, the Sixth Circuit emphasized that the federal government did not have any due process obligations to a state defendant and that the state alone bore the burden of ensuring due process.[204] The natural extension of this assertion is that the federal government as an alternate sovereign is no different from a third party when it comes to due process obligations. Under this line of reasoning, the fact that the entity withholding materials is not the same sovereign as the prosecuting entity should matter; after all, the federal government in this analysis is no different from any third party that asserted grounds for withholding materials subpoenaed in a criminal case.

But an examination of the wider field of constitutional criminal procedure reveals that the federal government is qualitatively different from a private party in a dual system of government. In this broader context, the rule against inter-sovereign disclosure fails not only because the rationales provided in the state cases are untenable, but also because the existing framework for analyzing federal-state relationships in other areas of constitutional criminal procedure supports the opposite rule; that is, the existing structure of modern constitutional criminal procedure directly supports a *Brady*-based right to inter-sovereign disclosure.

Courts have looked at three primary areas in which the American system of dual sovereignty may affect whether or not a particular governmental action violates the constitution: (1) unreasonable searches and seizures under the Fourth Amendment,[205] (2) the privilege against self-incrimination under the Fifth Amendment,[206] and (3) the prohibition

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203. *See supra* Part II.A.2.

204. *Rimmer v. Holder*, 700 F.3d 246, 259 (6th Cir. 2012).

205. U.S. CONST. amend. IV. *See Elkins v. United States*, 364 U.S. 206, 223–24 (1960) (finding that Fourth Amendment exclusionary rule applies equally to actions by state and federal actors); *Byars v. United States*, 273 U.S. 28, 32–34 (1927); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing exclusionary rule for materials seized by federal agents but not for materials seized by state agents).

206. U.S. CONST. amend. V. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77–79 (1964) (overruling *Hale* to find that one sovereign may not compel testimony that

against double jeopardy under the Fifth Amendment.[207] In each of these areas, the Supreme Court has analyzed principles of dual sovereignty in order to determine whether federal action can give rise to a constitutional violation in state courts and vice versa.[208] In the context of unreasonable searches and seizures and the privilege against self-incrimination, the Supreme Court has found that the existence of a constitutional violation does not turn on whether the governmental actor is a state or federal entity; a defendant's rights are violated regardless of which sovereign's actions are at issue, and regardless of which sovereign is prosecuting the case.[209] Only in the context of double jeopardy has the Supreme Court continued to draw a line between the state and federal governments for purposes of finding a constitutional violation.[210] This federal-state line drawing has become known as the dual sovereignty doctrine.

Under the dual sovereignty doctrine, state and federal governments are treated as distinct entities for purposes of finding a constitutional violation, and the finding of a violation turns on the question of whether the acting party is a state agent or a federal agent.[211] Before the passage of the Fourteenth Amendment, and before the incorporation of several of the enumerated rights in the Bill of Rights,[212] it was axiomatic that the

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could lead to prosecution by the other sovereign); *Hale v. Henkel*, 201 U.S. 43, 68 (1906) (rejecting the argument that the Fifth Amendment allows individuals to invoke the privilege against self-incrimination where testimony compelled by federal grand jury could be used in state prosecution).

207. U.S. CONST. amend. V. *See United States v. Lanza*, 260 U.S. 377, 385 (1922) (holding that successive federal and state prosecutions do not violate the Double Jeopardy Clause).

208. *See generally Murphy*, 378 U.S. 52 (privilege against self-incrimination); *Elkins*, 364 U.S. 206 (unreasonable searches and seizures); *Lanza*, 260 U.S. 377 (double jeopardy).

209. *Murphy*, 378 U.S. at 77–78; *Elkins*, 364 U.S. at 223.

210. *Lanza*, 260 U.S. at 382.

211. The "dual sovereignty doctrine" usually refers to the double jeopardy rule that allows successive prosecutions by different sovereigns:

> The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences" [for double jeopardy purposes].

Heath v. Alabama, 474 U.S. 82, 88 (1985) (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)). However, the term is also used by scholars to refer more broadly in criminal procedure to the treatment of federal and state governments as distinct sovereigns for purposes of determining whether government action violates the constitution. *See, e.g.*, Akhil Reed Amar & Johnathan L. Marcus, *Double Jeopardy Law after Rodney King*, 95 COLUM. L. REV. 1 (1995); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 294–95 (1992).

212. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784 (1969) (incorporating prohibition against double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating

state and federal governments were treated differently when it came to violations of Fourth and Fifth Amendment rights.[213] Because the state was not bound by the Bill of Rights, the state's actions could never give rise to a constitutional violation, and therefore, certainly in state courts, no constitutional violation would be found.[214] But where there was state action at issue in a federal prosecution, the issue was more complicated. The problem raised by these circumstances was that the federal courts recognized the rights, and federal agents were bound by the Bill of Rights, but the government agent supposedly violating the rights was a state agent not bound by these constitutional principles. Courts found in such cases that where the government actor was a state agent, there could be no constitutional violation, even when the "violation" concerned a criminal defendant in federal court.[215] Thus, the state agents could unreasonably search a defendant, and the evidence would be admissible in a federal court;[216] a state agent could compel a witness to incriminate himself or herself, and the statement would be admissible in a federal court;[217] and a state could prosecute a defendant through the attachment of jeopardy, and that defendant could nevertheless subsequently be prosecuted in federal court.[218]

The passage of the Fourteenth Amendment changed the framework for thinking about dual sovereignty and paved the way for a uniform state/federal approach to constitutional criminal procedure. Under the Supreme Court's doctrine of selective incorporation, various rights enumerated in the Bill of Rights apply equally to the state and federal governments via the Due Process Clause of the Fourteenth Amendment.[219] As a result, the introduction of unlawfully seized evidence and compelled, incriminating testimony in federal courts became more problematic: Why could the state do to federal defendants that which it could not do to state defendants, and why could the federal

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privilege against self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating exclusionary rule of the Fourth Amendment).

213. *See* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 74–75 (1963).

214. *See* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 417 (1986).

215. *See* Dawson, *supra* note 211, at 294–95.

216. *See Weeks v. United States*, 232 U.S. 383, 398 (1914).

217. *See Knapp v. Schweitzer*, 357 U.S. 371, 379–80 (1958) (upholding contempt conviction where witness refused to testify in state court on grounds of federal criminal exposure); *Feldman v. United States*, 322 U.S. 487, 491–92 (1944) (testimony compelled by state court was admissible in federal prosecution).

218. *See United States v. Lanza*, 260 U.S. 377, 382 (1922).

219. *See McDonald v. Chicago*, 130 S. Ct. 3020, 3029–36 (2010) (recounting history of selective incorporation).

government do to state defendants that which it could not do to federal defendants?[220]

Recognizing the inherent tension caused by incorporation on one hand and dual sovereignty on the other, the Supreme Court abolished the dual sovereignty doctrine as it applied to unreasonable searches and seizures and the privilege against self-incrimination in two critical cases.[221] Under *Elkins v. United States*[222] and *Murphy v. Waterfront Commission*,[223] a constitutional violation will be found regardless of whether the government actor is a state or federal agent and regardless of whether the defendant is prosecuted in state or federal court.[224] But in the context of double jeopardy, the Supreme Court has curiously retained the doctrine of dual sovereignty, under which the federal government may bring a criminal prosecution regardless of whether the exact same criminal activity has been prosecuted through jeopardy in state court, and vice versa.[225]

The question under *Brady* then is whether a dual sovereignty approach makes sense in a regime where the dual sovereignty doctrine has been abolished for certain constitutional criminal provisions but not for the Double Jeopardy Clause. At first blush, the Supreme Court's retention of the dual sovereignty approach in the context of double jeopardy may seem to provide some justification for treating the state and federal government as distinct in the context of *Brady*. But on closer inspection, the dual sovereignty approach to *Brady* obligations is entirely inconsistent with the Court's rejection of dual sovereignty for the Fourth Amendment and the privilege against self-incrimination, and the very rationale that justifies a dual sovereignty approach to double jeopardy weighs against its use in the *Brady* context.

When the Supreme Court abolished the dual sovereignty doctrine for unreasonable searches and seizures, it did not expressly limit its reasoning to the Fourth Amendment context:

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220. *See generally* Amar & Marcus, *supra* note 211 (examining the same question in the context of double jeopardy).

> In light of the Court's 1969 decision that the Fourteenth Amendment incorporates the Double Jeopardy Clause against the states, it seems anomalous that the federal and state governments, acting in tandem, can generally do what neither government can do alone—prosecute an ordinary citizen twice for the same offence.

Id. at 2 (footnote omitted).

221. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77–79 (1964); *Elkins v. United States*, 364 U.S. 206, 223 (1960).

222. 364 U.S. 206 (1960).

223. 378 U.S. 52 (1964).

224. *Murphy*, 378 U.S. at 77–78; *Elkins*, 364 U.S. at 223.

225. *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985); *United States v. Lanza*, 260 U.S. 377, 382 (1922).

> If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of the *Fourth Amendment* and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. *To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer*.[226]

The following year, the Supreme Court reinforced the notion that the criminal justice system had a growing need for constitutional standards that were equally applicable to state and federal sovereigns when it held that the exclusionary rule of the Fourth Amendment was applicable to the states.[227] There, the Court reasoned that "[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."[228]

Similarly, the *Murphy* Court's rejection of dual sovereignty in the context of the privilege against self-incrimination rested on its recognition of an emerging "cooperative federalism," according to which "the Federal and State governments are waging a united front against many types of criminal activity."[229] This increasing cooperation, the Court suggested, was enough to justify "applying the privilege across state-federal lines," even where other policies underlying the privilege had little or nothing to do with the inter-sovereign application of the rule.[230]

The reasoning used by the Court in the context of the Fourth Amendment and the privilege against self-incrimination applies to *Brady* obligations of disclosure. As with the Fourth Amendment, it matters not at all to a state defendant that the entity withholding exculpatory materials is an agent of the federal government rather than the state.[231]

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226. *Elkins*, 364 U.S. at 215 (emphasis added). The rhetoric of the *Elkins* Court presaged the incorporation of the Fourth Amendment into the Fourteenth Amendment the following year in *Mapp v. Ohio*, 367 U.S. 643 (1961).

227. *Mapp*, 367 U.S. at 655–56.

228. *Id*. at 658.

229. *Murphy*, 378 U.S. at 55–56.

230. *Id.* at 56 n.5.

231. *See Elkins*, 364 U.S. at 215; *Feldman v. United States*, 322 U.S. 487, 497 (1944) (Black, J., dissenting); Amar & Marcus, *supra* note 211, at 16 ("Indeed, *Elkins* and *Murphy* stand for the propositions that (1) the Fourteenth Amendment's emphasis on individual rights against all government trumps abstract notions of federalism, and (2) the federal and state governments should not be allowed to do in tandem what neither could do alone.").

And just as the emergence of cooperative federalism required greater uniformity among state and federal obligations under the Fourth Amendment and the privilege against self-incrimination, so too does this increasing cooperation require uniform standards of disclosure.[232] Imposing different standards of disclosure on state and federal governments that knowingly suppress exculpatory information in connection with a criminal case undermines public perceptions of fairness and rewards prosecutors who deliberately choose not to seek information from the federal government for fear of having to disclose it.[233] Such outcomes are inconsistent with the fundamental structure of the rights incorporated under the Fourteenth Amendment and with the desired policy incentives of constitutional criminal procedure.[234] The rejection of the dual sovereignty approach to the Fourth Amendment and the privilege against self-incrimination therefore provides strong support for a uniform disclosure rule under the Due Process Clause.

The connection between the dual sovereignty doctrine and the right to inter-sovereign disclosure is not an entirely new concept. The Pennsylvania Supreme Court's decision in *Smith II* implicitly referred to the federal-state analyses in *Elkins*, *Mapp*, and *Murphy* in order to conclude that a dual sovereignty approach is inapplicable to the issue of due process disclosure.[235] Undoubtedly referring to the recent Supreme Court cases, the *Smith II* court noted that the issue of federal-state relations in constitutional criminal procedure had received much attention and stated that it "is clear for everyone to see that the towering walls which at one time separated federal from state guarantees are being methodically lowered, where 'fundamental rights of our citizens' are involved."[236] The court observed that the FBI materials would clearly be subject to disclosure in federal court and that the materials would likewise be subject to disclosure if they were in the possession of state police rather than the FBI, stating "[w]ith this irrefutable premise, it can only be a paradox beyond compare to say that, because this case adds up

232. For a discussion of the increasing role of the federal government, see *supra* notes 14–21 and accompanying text.

233. *See* Gershman, *supra* note 22, at 555.

234. The Massachusetts Supreme Court noted in its decision upholding a limited right of access to federal materials that the defendant's due process right to disclosure was like the Fourth Amendment right and the privilege against self-incrimination. *Commonwealth v. Liebman*, 400 N.E.2d 842, 844 (Mass. 1980). Citing both *Murphy* and *Elkins*, the court observed that, "[i]n a variety of situations such unfairness has been avoided by assimilation of State and Federal proceedings." *Id.*

235. *See Smith II*, 208 A.2d 219, 223–24 (Pa. 1965).

236. *Id.* at 224–25.

the guarantees of both Federal and State governments, that the total is less than the individual parts."[237]

The retention of the dual sovereignty doctrine for double jeopardy seems on its face to raise questions about the premise that a uniform rule of disclosure is required. After all, if state and federal governments may successively prosecute a defendant for the same crime, might they not each be entitled to withhold exculpatory information for an individual prosecuted by the alternative sovereign? But the justifications put forth in support of a dual sovereignty approach to double jeopardy are inapplicable to *Brady*, and, if anything, the same rationale used to retain the dual sovereignty doctrine for double jeopardy supports the opposite rule for *Brady*.[238]

Courts have rationalized the dual sovereignty approach to double jeopardy in a variety of ways. They have looked to the text of the Fifth Amendment itself for support, finding that the term "offense" has historically been read as an offense against a particular sovereign.[239] Offenses against the state and federal governments, therefore, even if for the same conduct, are not the same "offense" under the Clause. The Supreme Court has also found support for the dual sovereignty doctrine in the particular power of sovereign entities to create and enforce criminal codes.[240] Denying one sovereign the power to enforce its criminal laws because "another State has won the race to the courthouse would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines."[241] A more modern justification for the dual sovereignty doctrine looks to the passage of the Fourteenth Amendment.[242] A rule permitting successive state and federal prosecutions "provides a vital federal check on state abuse of power, in keeping with the overall structure of the Fourteenth Amendment."[243] That federal check on state abuse of power is entirely in keeping with the intent behind the passage

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237. *Id*. at 225.

238. The dual sovereignty doctrine as applied to double jeopardy has been widely criticized by a number of scholars. *See* Amar & Marcus, *supra* note 211; Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in an Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Murchison, *supra* note 214. Such a critique is beyond the scope of this Article, which concludes that even under the existing framework, the retention of the dual sovereignty doctrine for double jeopardy does not undermine the argument that a dual sovereignty approach is inappropriate in the *Brady* context.

239. *Bartkus v. Illinois*, 359 U.S. 121, 131–32 (1959).

240. *Heath v. Alabama*, 474 U.S. 82, 93 (1985).

241. *Id.* (citing *Bartkus*, 359 U.S. at 137).

242. Amar & Marcus, *supra* note 211, at 2–3.

243. *Id.*

of the Fourteenth Amendment which lay the groundwork for the incorporation of the various constitutional rights.[244] A dual sovereignty exception to double jeopardy, therefore, is necessary in order to keep the states from thwarting the prosecution of civil rights violations by the federal government.[245]

No such rationales apply in the context of *Brady*. Indeed, the same fundamental principle of the Fourteenth Amendment that justifies a dual sovereignty approach to the Double Jeopardy Clause—the protection of citizens from state-sanctioned abuses—supports a defendant's right to federal investigatory materials. The only Supreme Court case to address the issue of inter-sovereign disclosure was *Smith v. Pennsylvania*—a case that involved exculpatory material held by the federal government in connection with a civil rights prosecution of the same officers who arrested Smith.[246] Applying the dual sovereignty approach in such a case would allow states to prosecute and convict defendants like Smith who were themselves victims of federal civil rights violations, even while these defendants are barred from accessing the very materials that might exonerate them. In other words, under dual sovereignty, state prosecutors would reap the benefits of law enforcement misconduct, and a criminal defendant who was the victim of this misconduct would have no remedy. It would be ironic if a defendant were denied access to exculpatory evidence in a criminal trial engineered by police officers who targeted and beat him and were themselves then prosecuted by a federal government that withheld that evidence.

More broadly, allowing the federal government to withhold exculpatory materials insulates wrongful convictions obtained by state governments and allows an untold number of miscarriages of justice within the state system to stand. The current rule, rejecting an inter-sovereign right to disclosure, sets up the exact system that *Elkins* and *Murphy* opposed, one in which each sovereign is allowed to do together that which they could not do individually—suppress information that is exculpatory to a criminal defendant.[247]

The fact that courts maintain a dual sovereignty approach in the context of *Brady* is particularly inexplicable given that the original justification for the dual sovereignty doctrine is wholly inapplicable to

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244. *Id.* at 4–20.

245. *Id.* at 18–19. *See also Heath*, 474 U.S. at 99 (Marshall, J., dissenting) (noting that the dual sovereignty doctrine as applied to successive state and federal prosecutions is justified in that states should not be permitted to preclude federal prosecution).

246. *Smith*, 376 U.S. at 354.

247. *Cf.* Amar & Marcus, *supra* note 211, at 13, 16 (discussing how state and federal government should not be allowed to use the dual sovereignty doctrine to maneuver around constitutional protections).

the *Brady* rule. The dual sovereignty doctrine was a relic of the pre-incorporation era, under which the Bill of Rights was inapplicable to the states and a dual approach was therefore necessary.[248] But there never was any question of *Brady*'s applicability to the states; *Brady* itself involved a state criminal prosecution; the decision was handed down long after the passage of the Fourteenth Amendment; and there is obviously no question under the Fourteenth Amendment that the Due Process Clause applies to the states.[249] So unlike the Fourth Amendment, the privilege against self-incrimination, and the Double Jeopardy Clause, the original justification for the dual sovereignty doctrine—the general inapplicability of the rights to the states—never existed under *Brady*. Thus the original basis for a dual sovereignty approach in these areas of constitutional criminal procedure is irrelevant to the *Brady* rule. On the contrary, the evolution of the dual sovereignty doctrine over time, and the courts' development of a modern framework for analyzing dual sovereignty, directly support rather than undermine a uniform application of *Brady* across federal-state boundaries.

III. TOWARD A RECOGNITION OF THE RIGHT TO INTER-SOVEREIGN DISCLOSURE

Constructing a *Brady* rule in favor of inter-sovereign disclosure and a prescription for remedies raises particular challenges. Some federal courts find that the remedy for non-disclosure lies solely in state court,[250] but some state courts have made the opposite finding, urging the defendant to seek redress in federal court.[251] But neither the state courts nor the federal courts have engaged in a reasoned analysis that justifies either sovereign's failure to enforce the right to exculpatory information.

Relief for an aggrieved defendant should be available in either forum. In Part A of this Section, I rely on the existing *Brady* framework and the guidance it provides concerning the particular challenges involved in establishing a *Brady* test where the content of the undisclosed evidence is unknown, and I offer two potential tests for analyzing non-disclosure in the inter-sovereign context. In Part B, I examine the remedy of compelled disclosure in the federal courts and

248. *Id.* at 16 (arguing that "incorporation undermined a central justification for the dual sovereignty doctrine"); Murchison, *supra* note 214, at 417.

249. *See Brady v. Maryland*, 373 U.S. 83 (1963).

250. *See United States v. Fears*, 789 F. Supp. 2d 166, 171 (D.D.C. 2011); *State v. Rodarte*, No. 09-CV-02912, 2010 WL 924099, at *2 (D. Colo. Mar. 9, 2010).

251. *In re Pratt*, 170 Cal. Rptr. 80, 130 (Ct. App. 1980); *Al-Amin v. State*, 597 S.E.2d 332, 345 (Ga. 2004).

identify a path for establishing a due process right to inter-sovereign disclosure of exculpatory materials.

A. Relief in State Courts

The dilemma of the state courts is clear. If courts were to recognize a right to inter-sovereign disclosure of exculpatory materials, the desired remedy—compulsion—would remain unavailable, and alternative remedies are less satisfying. Courts could grant unlimited continuances, but there would be no guarantee that the federal government may one day choose to comply with the subpoena so that the prosecution could proceed.[252] They could exclude a portion of the prosecution's evidence from the trial itself, but this remedy applies only where the requested information concerns impeachment of a particular witness.[253] Or, they could dismiss the case, a remedy that state courts may believe actually undermines the truth-seeking mission of the criminal justice system.[254] Moreover, if the state courts were to recognize the due process right, they would be forced to make determinations about remedies without ever knowing what the requested material actually contains.

Despite the obvious concerns of the state courts, the status quo is untenable. The majority rule in the state courts rests on reasoning that fundamentally misapprehends the *Brady* right specifically, and the Due Process Clause generally, as well as the relationship between the state and federal governments. But while announcing the due process right is easy, identifying a test for disclosure and a prescription for remedies is far more difficult.[255] If the right to inter-sovereign disclosure of

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252. *See, e.g.*, *Parsons v. State*, 38 So. 2d 209, 216 (Ala. 1948). In *Parsons*, the Alabama Supreme Court found that the proper decision of the trial court would be to continue it, but the court did not indicate what would happen when the federal government continues to refuse to comply with the subpoena. *Id.*

253. *See, e.g.*, *State v. Tascarella*, 580 So. 2d 154, 157 (Fla. 1991) (upholding the trial court's exclusion of testimony where federal government refused to authorize FBI agents to testify at depositions but nevertheless intended to call them at trial). *But see Caplan v. State*, 23 So. 3d 1230, 1232 (Fla. Dist. Ct. App. 2009) (no error where the trial court refused to bar testimony of DEA agent who did not produce DEA reports in the custody of the federal government).

254. *See* Hirsch, *supra* note 21, at 128. In *Buford v. State*, 282 S.E.2d 134 (Ga. Ct. App. 1981), for example, a Georgia court approved dismissal as a remedy for the federal government's non-disclosure. *But see Al-Amin*, 597 S.E.2d at 345.

255. The challenges involved in constructing a remedial scheme for inter-sovereign disclosure violations bring to light the larger theoretical issues involved in defining constitutional rights according to the contours of their respective remedies. *See* Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1011–13 (2010) (discussing the pragmatist and decision rules approaches to constitutional interpretation). Particularly in

exculpatory materials is, in fact, a rule of *Brady*, then it would be logical to adopt the test and remedies set out in *Brady* and its progeny. Under *Brady*, a single pre- and post-trial standard defines the disclosure obligation: any information that is favorable and material to the issue of guilt or innocence must be disclosed before trial.[256] Before trial, the "remedy" is to order disclosure; after conviction, a finding of a violation necessarily requires a new trial, because the requirement of materiality obviates the need for a harmless error analysis.[257]

But this general scheme under *Brady* is a poor fit for non-disclosure in the inter-sovereign context. First, while *Brady* may apply a no-fault rule regardless of the knowledge or willfulness of any particular government actor, it is unclear to what extent that no-fault rule applies to individuals outside of the prosecution team whose knowledge of the contents of records cannot be imputed to the state prosecutor. After all, a strict application of the *Brady* rule would require federal entities to know both the entire contents of their archive of records as well as the potential relevance of these records to any state prosecution in order to comply. But the scenario in which a governmental entity unwittingly fails to disclose information connected to a state prosecution is a qualitatively different kind of non-disclosure than that which occurs when a federal entity is on notice that it possesses exculpatory information and knowingly, willfully refuses to disclose. As explained above, the Supreme Court in *Pennsylvania v. Ritchie* indicated that, at a minimum, a due process obligation to disclose would exist where the governmental entity is on notice that it possesses information that is potentially favorable and material to a criminal defendant.[258] But the scope of the obligation beyond this minimal duty to disclose when placed on notice remains unclear.[259]

A second challenge in applying the *Brady* doctrine to the inter-sovereign context is that, in most cases, a court analyzing the due process right to disclosure of materials will not know the precise contents of the suppressed materials. After all, absent a waiver of sovereign immunity, no participant in the state litigation—prosecutor, defendant,

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the *Brady* context, the substantive right is closely tied to the remedy because the *Brady* right is exclusively procedural in nature.

256. *See Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

257. *See Kyles v. Whitley*, 514 U.S. 419, 435–36 (1995).

258. *See supra* Part II.A.1.

259. An exploration of the duty of non-prosecution government agents to search for *Brady* is outside the scope of this Article, but one can imagine a sliding scale of obligations. For example, the obligation of a prosecutor to search its own files and the files of its agents could easily apply to federal entities that are involved in or otherwise aware of a state prosecution, even if they are not aware prior to searching that the federal government possesses exculpatory information.

judge—can compel the federal government to disclose information that it chooses to withhold. Crafting a remedy where the degree of prejudice is ultimately unknown by everyone except the federal government is a difficult task for state courts hoping to strike a balance between creating incentives for disclosure and avoiding a windfall for a guilty defendant. *Brady*'s materiality requirement, therefore, offers little guidance to state courts trying to assess prejudice from non-disclosure by the federal government.

If the federal government voluntarily submits the disputed material for an *in camera* inspection by the state court, the state court's task in assessing materiality is easy, and the traditional *Brady* standard for materiality should apply. A reviewing court in these circumstances has all of the information it needs in order to make the materiality determination. But where the federal government refuses to disclose information solely for the purpose of an *in camera* review, the calculation must change. Neither the state prosecutors nor the federal government should be allowed to benefit in these circumstances from a materiality standard that rewards non-disclosure; in other words, where the federal government refuses to provide *in camera* the very information that might allow a judge to make a finding of materiality, the defendant cannot then be penalized for failing to make a showing that the suppressed material meets the *Brady* test.

Brady's successor cases offer some guidelines for formulating a test and a prescription for remedies when the precise nature and value of the potentially exculpatory information is unknown. In a cluster of decisions concerning "what might loosely be called the area of constitutionally guaranteed access to evidence," the Supreme Court has laid out some general principles.[260] "Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."[261] It is clear in these cases that a defendant need not make a showing that information is exculpatory in order to be entitled to judicial review of the materials *in camera*.[262] But when even an *in camera* inspection is unavailable, the Supreme Court has allowed that there are circumstances under *Brady* that "may well support a relaxation of the specificity required in showing

260. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *see also Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984); *United States v. Lovasco*, 431 U.S. 783, 796 (1977).

261. *Trombetta*, 467 U.S. at 485.

262. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987) (defendant is "entitled" to *in camera* inspection of materials).

materiality."[263] In cases where government conduct has made it simply impossible to determine whether material that is clearly relevant would have been exculpatory, the defendant may obtain relief by showing either (1) that the evidence was "potentially useful" and the government acted in bad faith in destroying or barring access to evidence;[264] or (2) when there is no indication that the government acted in bad faith, that the evidence had apparent exculpatory value.[265]

Where the federal government refuses to submit potentially useful material for an *in camera* inspection, the state defendant should be able to obtain relief under either of these two standards. First, a defendant will be able to show that potentially exculpatory material is suppressed in "bad faith" anytime the federal government knowingly refuses to disclose it. The term "bad faith" is drawn from contexts in which the government destroys evidence that is "potentially useful," and it refers to either the knowledge that the evidence is potentially useful or the intent

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263. *Valenzuela-Bernal*, 458 U.S. at 870 (denying relief where the defendant made no showing of materiality at all regarding the testimony of witnesses whom the government had deported before defense counsel could interview them). The Court discussed in detail what the defense's presentation on the issue of materiality might look like in such a case:

> Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony . . . . Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witness would have been material and favorable to the defense, in ways not merely cumulative to the testimony of available witnesses. In some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported would have been material and favorable to the defense. Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney . . . . In making such a determination [of materiality], courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself.

Id. at 873–74.

264. *Youngblood*, 488 U.S. at 58.

265. *Trombetta*, 467 U.S. at 489 (finding that in order for a due process violation to be found following destruction of evidence, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

to destroy that evidence.[266] Here, both conditions—knowledge and intentionality—exist when the federal government knows that the evidence is potentially useful and intentionally withholds it.[267]

Second, even if courts were to determine that the federal government's willful refusal to disclose material falls short of "bad faith," the defendant should nonetheless enjoy the benefit of a "relaxation" of the materiality requirement. Under a relaxed standard, a "plausible showing" of materiality should suffice.[268] In *California v. Trombetta*,[269] the Supreme Court dealt with the difficult task of establishing a due process test for the destruction of evidence whose contents were unknown.[270] The *Trombetta* Court held that where the government destroyed evidence in connection with a criminal case, the *Brady* materiality standard would be met if the evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed" and was "of such a nature that the defendant would be unable to obtain

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266. *See* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 289–90 (2008):

> Central to *Youngblood* is the meaning of bad faith. Even on such a fundamental issue, jurisdictions have formulated an assortment of definitions. The two most common definitions equate bad faith with knowledge or wrongful intent. Some jurisdictions focus on the Court's statement that bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Other jurisdictions equate bad faith with wrongful intent or official animus. The federal courts of appeals are no more consistent than the states; they offer a mix of definitions as well.

While some jurisdictions use terms such as "official animus" or "moral obliquity" to modify the term "intentional," these terms are often used in the disjunctive with a broader description of intentionality, such as "conscious effort to suppress exculpatory evidence." *See id*. at 290 n.377. *See also Trombetta*, 467 U.S. at 488 (suggesting that "a conscious effort to suppress exculpatory evidence" would meet the standard of bad faith).

267. *See* Bay, *supra* note 266, at 290. Some of the Supreme Court's cases discuss "bad faith" as an effort to obtain a "tactical advantage" over a defendant. *Youngblood*, 488 U.S. at 57; *Valenzuela-Bernal*, 458 U.S. at 869; *United States v. Marion*, 404 U.S. 307, 325 (1971). But this aspect of bad faith has also been understood as one example of conduct that rises to the level of bad faith, in conjunction with other possible definitions, such as a "conscious effort to suppress exculpatory material" and "knowledge" on the part of the government. *United States v. Gonzales*, 436 F.3d 560, 578 (5th Cir. 2006) (quoting *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000)). In *Trombetta*, the Supreme Court equated bad faith with "a calculated effort to circumvent the disclosure requirements established by *Brady v. Maryland* and its progeny." *Trombetta*, 467 U.S. at 488. The federal government's conduct falls into this category of "bad faith" when it knows that the suppressed information would have to be disclosed if held in connection with a federal prosecution. *Id.* at 486.

268. *Valenzuela-Bernal*, 458 U.S. at 867, 870, 873.

269. 467 U.S. 479 (1984).

270. *Id.* at 486.

comparable evidence by other reasonably available means."[271] The use of the term "exculpatory value" here connoted something less than the more stringent, outcome-based standard of materiality that applies in *Brady* cases where the content of the undisclosed information is known to the reviewing court.[272] The materiality standard for evidence whose content is unknown is therefore a minimal one.[273]

The federal government's decision to withhold potentially useful materials from a state defendant presents a compelling case for relaxing the materiality standard. A relaxed standard of materiality would redress not only past government misconduct—the initial suppression of the evidence—but also the current and ongoing conduct of the federal government in disregarding orders to disclose by state courts whose vested interests in the accuracy of state convictions is undermined by the non-compliance of the federal government. Even more so than in cases in which the government has destroyed evidence in the past (either in good faith or in bad faith), the federal government's ongoing suppression of information threatens the integrity of the trial process itself. It undermines principles of comity between the state and federal governments in the conduct of state criminal prosecutions[274] and diminishes the public's perception of fairness.[275] The federal government's conduct in this regard is evocative of the due process cases

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271. *Id.* at 489.

272. *See* Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1146–47 (1987) (promoting a reading of the *Trombetta* rule which "would overturn convictions based on evidence destroyed by the state unless the evidence was much more likely to have been inculpatory than exculpatory").

273. *See id.* Evidence that is much more likely to be inculpatory than exculpatory would not satisfy the materiality requirement under *Trombetta*, but a "plausible showing" that the evidence has exculpatory value would suffice.

274. The Supreme Court has made clear that principles of comity frequently require that the federal government defer to the states in the conduct of their prosecutions of criminal cases in other circumstances. *See, e.g.*, *Younger v. Harris*, 401 U.S. 37, 43–44 (1971). Where the federal government refuses to obey an order by a state court to disclose information that may exculpate a state criminal defendant, the federal government's conduct violates the "fundamental policy against federal interference with state criminal prosecutions" described by the *Younger* Court. *See id*. at 46. However, the courts have not applied these principles of comity to the context of inter-sovereign disclosure. In *FBI v. Superior Court*, for example, the state prosecutors argued to the district court that *Brady* required inter-sovereign disclosure and expressed concern that, if the FBI were not compelled to disclose, the state court would dismiss the case as a sanction. *FBI v. Superior Court*, 507 F. Supp. 2d 1082, 1087 (N.D. Cal. 2007).

275. The public's perception of the integrity of criminal proceedings is not merely a policy argument in favor of the due process principle but is, rather, part and parcel of the due process right itself. *See* Tracey L. Meares, *What's Wrong with* Gideon*?,* 70 U. CHI. L. REV. 215, 218–20 (2003) (advancing a "public-regarding notion of due process" that turns on the public's perception of fairness).

that speak broadly to the public perception of the legitimacy of the American criminal justice system even in the absence of actual prejudice.[276] Insofar as either the *Arizona v. Youngblood*[277] or *Trombetta* tests described above include a significantly relaxed form of the materiality requirement, it is therefore wholly appropriate and consistent with other applications of the Due Process Clause to impose these much more lenient standards on a defendant seeking inter-sovereign disclosure.

B. Relief in Federal Courts

Unlike the state courts, the federal courts have the power to compel the federal government to act. Indeed, federal courts have granted such relief in a small number of cases in which state defendants have sued the federal government in order to obtain exculpatory material.[278] Unlike state courts, federal courts face no barriers under sovereign immunity;[279] therefore, assuming the due process right to inter-sovereign disclosure exists, federal courts are constitutionally and jurisdictionally authorized to enforce orders against the federal government.

The question, then, for state litigants seeking assistance from the federal courts is what vehicle gives them the ability to seek redress in federal court. State defendants have had little success on this issue in federal habeas proceedings, not because federal courts uniformly reject the notion that a due process right to inter-sovereign disclosure exists, but because the right is not so clearly established by the Supreme Court that habeas relief is warranted.[280] The Freedom of Information Act[281]

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276. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 543 (1965) ("[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'") (alteration in original) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *Turner v. Louisiana*, 379 U.S. 466, 473–74 (1965) (reversing conviction where testifying deputies had custody of jury and fraternized with them, because "potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality"); *In re Murchison*, 349 U.S. 133, 136 (1955) (finding due process requires the "appearance of justice" even in the absence of actual bias on the part of a judge) (quoting *Offut v. United States*, 348 U.S. at 14).

277. 488 U.S. 51 (1988).

278. *See, e.g.*, *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1176 (D.C. Cir. 2011) (granting relief under the Freedom of Information Act); *Bright v. Ashcroft*, 259 F. Supp. 2d 502 (E.D. La. 2003) (granting partial relief under the Administrative Procedure Act and the Freedom of Information Act); *Johnson v. Reno*, 92 F. Supp. 2d 993 (N.D. Cal. 2000) (granting mandamus relief and relief under the Administrative Procedure Act).

279. *Exxon Shipping v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994).

280. Under the Anti-Terrorism and Effective Death Penalty Act, the state court's denial of relief must be "contrary to or an unreasonable application of federal law, as determined by the Supreme Court" in order to warrant federal habeas relief. *See Kasi v. Angelone*, 300 F.3d 487, 504 (4th Cir. 2002). Because the Supreme Court has never ruled on this issue, therefore, it is unlikely to be resolved in a defendant's favor in habeas.

(FOIA) creates a cause of action for non-disclosure by the federal government, but courts have almost uniformly rejected FOIA as a vehicle for remedying a *Brady* violation.[282]

Several federal courts have, however, suggested in dicta that a due process right to inter-sovereign disclosure exists, and that this right is enforceable through avenues such as the Administrative Procedure Act (APA).[283] Under the APA "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[284] The court in such a lawsuit is entitled to do what the state cannot—compel a particular arm of the federal government to act.[285] A state criminal defendant bringing such a suit will prevail when the reviewing court finds the federal government's suppression of evidence to be "contrary to constitutional right, power, privilege, or immunity."[286] Thus, a state criminal defendant can sue the federal government for violating his or her due process rights to inter-sovereign disclosure. More specifically, a state defendant can sue the federal government under the APA for withholding materials in violation of *Brady*.

However, few such lawsuits have produced decisions that squarely address the question of whether a due process right to inter-sovereign disclosure exists, and among the few there is sharp disagreement. In

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281. Freedom of Information Act, 5 U.S.C. § 552 (2012).

282. *Marshall v. FBI*, 802 F. Supp. 2d 125, 136 (D.D.C. 2011); *Lewis v. U.S. Dep't of Justice*, 609 F. Supp. 2d 80, 84–85 (D.D.C. 2009); *Thomas v. U.S. Dep't of Justice*, 531 F. Supp. 2d 102, 108–09 (D.D.C. 2008); *Baez v. FBI*, 443 F. Supp. 2d 717, 728 (E.D. Pa. 2006); *Kansi v. U.S. Dep't of Justice*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998); *Johnson v. U.S. Dep't of Justice*, 758 F. Supp. 2, 5 (D.D.C. 1991); *Stimac v. U.S. Dep't of Justice*, 620 F. Supp. 212, 213 (D.D.C. 1985). *But see Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1180–82 (D.C. Cir. 2011) (Without considering the *Brady* claim, the court found that the federal government's possession of information that could corroborate the claim of innocence for a death row prisoner was a legitimate issue for the public interest.); *Ferri v. Bell*, 645 F.2d 1213, 1218 (3d Cir. 1981) (assertion of *Brady* violation may be one factor for court to consider under FOIA).

283. Many cases involving a state court's attempt to enforce a subpoena against the federal government are ultimately heard in federal court because the federal government removes the action to federal court once enforcement proceedings are under way in the state court. *See, e.g.*, *United States v. Williams*, 170 F.3d 431, 434 (4th Cir. 1999); *see also McClure v. United States*, No. 93-35835, 1995 WL 299849, at *1 (9th Cir. May 17, 1995) (noting that defendant may be correct that FBI is not authorized to withhold exculpatory materials but that state criminal defendant was required to pursue the matter under the Administrative Procedure Act); *Louisiana v. Sparks*, 978 F.2d 226, 235 n.15, 236 n.18 (5th Cir. 1992).

284. 5 U.S.C. § 702 (2012).

285. *Id.* § 706(1).

286. *Id.* § 706(2)(B).

Bright v. Ashcroft,[287] a district court ordered the FBI to produce exculpatory documents that it had intentionally withheld throughout Bright's capital trial and for years after the verdict while he pursued his claim from death row.[288] The *Bright* Court assumed with little analysis that the suppression of these materials violated due process:

> The failure by law enforcement agencies to disclose the statement before his murder trial raises the stakes of the public interest and pays little currency to any claim of private interest. Whether Bright is or is not guilty, the failure of law enforcement to act as it was constitutionally obliged to do cannot be tolerated in a society that makes a fair and impartial trial a cornerstone of our liberty from governmental misconduct.[289]

By contrast, in *Rimmer v. Holder*,[290] the Sixth Circuit assumed—again with little analysis—the opposite:

> In this case, Rimmer argues that the FBI withheld and is still withholding exculpatory information relating to his conviction for Ellsworth's murder. It is true that, if the *federal* government had prosecuted Rimmer, it would have had an obligation under *Brady v. Maryland*, to provide him with any exculpatory information in its possession. Here, however, the FBI declined to prosecute Rimmer, who was prosecuted by Tennessee only. Thus, while the state may have breached its *Brady* obligations by failing to provide Rimmer with evidence of Darnell's FBI interview and photo-lineup identification, Rimmer presents no evidence that the FBI had any similar obligation.[291]

Neither *Rimmer* nor *Bright* cites any authority for their position that *Brady* does or does not apply, nor do these cases engage with any analysis of the prosecution team, the field of federal privilege, sovereign immunity, or *Touhy*.[292]

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287. 259 F. Supp. 2d 502 (E.D. La. 2003).

288. *Id.* at 502–03.

289. *Id.* (relying on *Brady*).

290. 700 F.3d 246 (6th Cir. 2012).

291. *Id.* at 259.

292. Ironically, if Bright had known of the federal government's suppression of exculpatory information before filing his appeal, the Louisiana State Supreme Court would have almost certainly found that he had no due process right to the material in any event. *See State v. Andrews*, 250 So. 2d 359, 367–68 (La. 1971); *State v. Parker*, 661 So. 2d 603, 609–11 (La. Ct. App. 1995).

Notwithstanding the Sixth Circuit's decision in *Rimmer*, several federal cases touching on the issue seem to suggest, however obliquely, that a due process right to inter-sovereign disclosure exists and that the right is enforceable in a civil lawsuit filed in federal court.[293] In *United States v. Williams*,[294] the Fourth Circuit Court of Appeals suggested that a due process right to the information may exist, noting that the federal government never argued that it was generally entitled to withhold information that was exculpatory for a state defendant.[295] In an unpublished opinion, the Ninth Circuit Court of Appeals noted that a state defendant urging a right to inter-sovereign disclosure "may very well be right."[296] And in the Eleventh Circuit, the Court of Appeals upheld a balancing test conducted by the lower court to determine whether the state defendant's interest in the requested materials outweighed the federal government's interest in keeping the information classified.[297] Other federal courts have acknowledged the issue of the due process right to inter-sovereign disclosure but have expressly reserved for another occasion the opportunity to determine whether such a right exists.[298]

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293. *See United States v. Williams*, 170 F.3d 431, 434, 434 n.3 (4th Cir. 1999); *McClure v. United States*, No. 93-35835, 1995 WL 299849, at *1 (9th Cir. May 17, 1995); *Florida v. Cohen*, 887 F.2d 1451, 1454–55 (11th Cir. 1989) (recognizing that a balancing under *Roviaro* is appropriate, thus implicitly recognizing a defendant's due process right to favorable evidence as part of the analysis); *Johnson v. Reno*, 92 F. Supp. 2d 993 (N.D. Cal. 2000). In *Al-Turki v. FBI,* the court noted the "constitutional frailty" of the Classified Information Procedures Act as it related to state defendant's request for documents, and described the "Orwellian reality we face when one branch of government defines and redefines concepts of secrecy until no facts are discernible and then shields that dither with a ferocity that reduces the judicial function to a mere ceremonial rite." *Al-Turki v. FBI*, No. 06-cv-1076-JLK, 2007 WL 3195129, at *1 (D. Colo. Oct. 26, 2007). *Cf. Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 315–17 (7th Cir. 1994) (without directly identifying the claim as either a *Brady* or a due process claim, rejecting argument that plaintiff was entitled to documents that would assist with post-conviction claim).

294. 170 F.3d at 434.

295. The court stated:

> By requiring that a state criminal defendant comply with the Justice Department's regulations as a prerequisite to obtaining potentially exculpatory information, we in no way authorize the FBI to withhold such information where it has participated in the investigation of the alleged crimes at issue. Nor do we deprive the state criminal defendant of meaningful judicial review of the FBI's response to such a request.

Id. at 434 (footnote omitted).

296. *McClure*, 1995 WL 299849, at *1.

297. *Cohen*, 887 F.2d at 1454–55.

298. *See, e.g.*, *Kwan Fai Mak v. FBI*, 252 F.3d 1089, 1093–94 (9th Cir. 2001); *Smith v. Cromer*, 159 F.3d 875, 881 (4th Cir. 1998); *see also In re Gray*, No. 97–6385, 1998 WL 712663, at *1 (10th Cir. Oct. 13, 1998**)**.

Even successful cases like *Bright*, however, demonstrate the limitations of using the federal courts to enforce a state defendant's due process right to inter-sovereign disclosure.[299] Federal courts hearing APA actions are not bound by the timelines of the state prosecution, nor can they stay the state-level proceedings to allow full consideration of the issues in federal court.[300] In fact, there is no reliable mechanism in this type of litigation to ensure that meritorious claims are processed quickly for the benefit of the criminal court timelines.[301] In Bright's case, the ruling in favor of disclosure came at least seven years after the federal government first knew it possessed exculpatory information, and in the interim, Bright had been sentenced to death, and his conviction had been upheld on direct appeal.[302] Without a state-level recognition of a due process right to disclosure, therefore, vindication of the right will come far too late for most litigants in federal court. Moreover, the chances that the issue will be litigated in federal court in a non-capital criminal case are slim, given the resources required for affirmative federal litigation. In *Exxon Shipping v. U.S. Department of Interior*,[303] a non-criminal case in which federal civil litigants sought to compel disclosure of federal materials, the Ninth Circuit Court of Appeals noted that the issue could be litigated under the APA, but the court was not willing to require that litigants follow that course of action in order to obtain relief.[304] The court "acknowledge[d] that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate[]' any right to the requested testimony."[305] If affirmative

299. *See* Hirsch, *supra* note 21, at 128–29.

300. *See Younger v. Harris*, 401 U.S. 37, 49, 53 (1971).

301. *See, e.g.*, *Edmond v. U.S. Att'y*, 959 F. Supp. 1, 4 (D.D.C. 1997) (rejecting claim that process must be expedited to allow for review within the timelines for filing post-conviction claims). In *Edmond*, the district court denied the request for expedited review of a request for records because "it is well accepted by the District of Columbia Courts that a mere challenge to a conviction which *might* subsequently release prisoner from incarcerative status does not warrant an expedited process." *Id*. *But see Cleaver v. Kelly*, 427 F. Supp. 80, 81–82 (D.C. Dist. 1976) (expediting FOIA action so that issue would not be rendered moot by completion of state-level prosecution).

302. *See State v. Bright*, 776 So. 2d 1134 (La. 2000) (modifying conviction for first degree murder to second degree murder on unrelated grounds); Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 1–4, *Bright v. Ashcroft*, 259 F.Supp.2d 502 (E.D. La. 2003) (No. 02-cv-1225-MLCF). Moreover, some courts like *Rimmer* make an end run around the APA by finding that the APA precludes relief where relief is available under FOIA, and then find that relief is unavailable under FOIA as well. *Rimmer v. Holder*, 700 F.3d 246, 261–62 (6th Cir. 2012); *see also Kenney v. U.S. Dep't of Justice*, 603 F. Supp. 2d 184, 190 (D.D.C. 2009).

303. 34 F.3d 774 (9th Cir. 1994).

304. *Id.* at 780 n.11.

305. *Id.* (alteration in original) (citation omitted).

federal litigation is unduly burdensome for Exxon, then it is wholly unrealistic to expect that individual criminal defense attorneys would be equipped to pursue relief in this manner.[306]

Insofar as a few federal courts have recognized a right to inter-sovereign disclosure of exculpatory materials, therefore, it remains a right without a remedy. Given the difficulty of securing relief in a timely fashion in federal court and the absence of any relief available in state courts, the solution lies in bringing about a rule change through strategic and targeted litigation in the federal courts toward the goal of setting precedent rather than vindicating rights individually on a case-by-case basis. To the extent that several federal jurisdictions have evinced an openness to recognizing the due process right to inter-sovereign disclosure, well-resourced litigation in the federal courts has the capacity to produce federal court rulings that undertake a full analysis of the right, engage with the reasoning of the state courts, and announce a well-reasoned rule of law in favor of a right to inter-sovereign disclosure. Such litigation has the potential to create a tension with the state courts and to apply pressure on state courts to reexamine their long-standing position that state defendants have no right to inter-sovereign disclosure. If federal courts then adopt the due process principles applied in *Bright* and suggested in other federal cases, the tension between these cases and the state decisions rejecting a right to inter-sovereign disclosure may well give rise to a reevaluation of the majority rule.

CONCLUSION

Despite a shift in the theory of criminal trials fifty years ago toward truth and fairness, and despite the application of these evolving principles to the defendant's due process right to information, courts across the country have failed to recognize a defendant's right to inter-sovereign disclosure of favorable, material evidence. And despite the remarkably unstable reasoning of these state court opinions, defendants are routinely denied any remedy where the federal government knowingly withholds such evidence. This position, now adopted by the majority of state courts reaching the issue, undermines the truth-seeking function of the criminal courts.

The due process principle is simple, but the simplicity of the issue is obscured in the state court decisions by the procedural issues created by *Touhy*, the federal regulations, and sovereign immunity. The federal courts provide a path for state criminal defendants to affirmatively

306. *See id.*

litigate the issue of a defendant's due process right to inter-sovereign disclosure and to destabilize the state court decisions that reject the right. Until they do, the truth-seeking mission of the American criminal justice system will suffer, and *Brady* will remain a hollow right for defendants seeking exculpatory information in the hands of the federal government.