Intelligence Agencies, Law Enforcement, and the Prosecution Team

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In November 1996, a hijacked Ethiopian Airlines jet crash landed in Indian Ocean waters near the Comoro Islands. Among the casualties were several American citizens.

Following the collapse of the Soviet Union, rogue states and international terrorist groups commenced efforts, which continue today, to acquire nuclear warheads and fissionable material from the successor nations.

On April 19, 1995, the most destructive domestic terrorist attack in American history was committed in Oklahoma City.

These and similar crimes plague the world in which we live. Efforts by the United States government to prosecute international crime in U.S. courts have inadvertently caused the erosion of the jurisdictional firewall traditionally dividing domestic law enforcement agencies from the intelligence community in the United States. Crimes abroad may violate American law, and the investigation of domestic offenses may draw from intelligence collected overseas. Both law enforcement and the intelligence community may gather information about such crimes, and, as a result, significant discovery issues may arise if the suspects are eventually brought to trial.

I. COMMON TARGETS: THE GROWING CONVERGENCE OF SUBJECT MATTER INTERESTS AMONG U.S. LAW ENFORCEMENT AND INTELLIGENCE AGENCIES

For millennia, criminals have plotted in one country, committed crimes in another, and fled to sanctuary in a third. For almost as long,

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The author wishes to acknowledge research assistance provided by Joëlle E. Polesky, Class of 1997, University of Pennsylvania Law School.

and with varying degrees of success, nations have cooperated in finding and apprehending those fugitives, and have extradited or rendered them to justice.[1] States also have reserved the right to apprehend and try offenders against the law of nations, such as pirates and war criminals, regardless of the locations of the crimes or the nationalities of the offenders.[2]

But international crime now has gone wholesale. Asian triads engage in unlawful commerce on a worldwide scale, as do South American narcotics traffickers. Rogue states try to obtain nuclear expertise, biological weapons, or chemical agents, and terrorist groups operate across hemispheres.

These changes stem from a number of factors, including increased capital mobility; the extraordinary sophistication of international terrorists and narcotraffickers; the continuing demand in the West for controlled substances, and the economic advantages of their cultivation in supplier nations; advances in the technology of counterfeiting and communications; the collapse of the Soviet Union and the perceived availability of its nuclear materials and military hardware; the continuing hostility between nations and peoples; and the simple greed of those engaged in criminal enterprises. And, just as some criminal organizations infiltrate national institutions and governments, others benefit from calculated direction and support provided by rogue states.

In response, the United States has asserted criminal jurisdiction over a wide range of actions that previously had been considered the responsibility of the respective nations in whose territories the offenses occurred. For example, Congress has asserted jurisdiction over narcotics trafficking activities abroad, where the United States is the intended destination;[3] terrorist activities on foreign aircraft overseas, so long as even

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1. *See, e.g.*, 18 U.S.C. §§ 3181-3196 (1994) (providing statutory guidelines by which persons both within and without the United States may be subject to extradition).

2. *See, e.g.*, *id.* § 1651 (providing that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life").

3. *See, e.g.*, 21 U.S.C. § 952 (1994) (prohibiting the importation of controlled narcotics into the United States); *cf.* 22 U.S.C. § 2291-4(a) (1994), which provides that:

> it shall not be unlawful for authorized employees or agents of a foreign country . . . to interdict or attempt to interdict an aircraft in that country's territory or airspace if—
> (1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and
> (2) the President of the United States, before interdiction occurs, has determined with respect to that country that—
> (A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and
> (B) the country has appropriate procedures in place to protect against the innocent loss of life . . . .

Id.

one American is on board;[4] and the illicit transfer of fissionable materials between two foreign nations.[5]

Complementing these statutes is a broadened assertion of unilateral U.S. authority to search suspects and their effects abroad, to arrest and detain offenders outside the United States, and to apprehend suspects from the territory of foreign countries without the host nation's consent, even where extradition treaties or international law may suggest otherwise.[6]

With proper preparation, therefore, the United States can apprehend and prosecute transnational criminals. In recent years, for example, the United States has asserted jurisdiction over, brought to this country, and placed on trial several defendants whom it has arrested abroad on charges of international terrorism.[7] When operating abroad, U.S. law en-

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4. *See, e.g.*, 18 U.S.C. §§ 2331-2339A (1994) (addressing the problem of terrorism and the legal sanctions that attach to those who engage in terrorist activity); Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203 (making it a crime to take a hostage if either the hostage or the terrorist is an American citizen, or if the purpose of the hostage-taking is to coerce the U.S. government); and the Aircraft Sabotage Act, 18 U.S.C. §§ 31-32 (making it a crime to damage planes or injure passengers, regardless of where the act occurs).

5. *See, e.g., id.* § 175 (prohibiting the use, transfer, development, etc., of biological weapons); *id.* § 831 (same for nuclear materials).

6. *See, e.g.*, Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163 (1989), citing 28 U.S.C. § 533 and 18 U.S.C. § 3052 (concluding that the FBI may investigate and arrest fugitives in a foreign state, even without the consent of the host government); United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992) (holding that the U.S.-Mexican extradition treaty does not provide an exclusive means by which the United States may acquire custody of a suspect within Mexico in a case in which the respondent had been apprehended in Mexico by persons acting on behalf of the United States without regard to the treaty provisions); United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (holding that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country, at least where that nonresident alien "has had no previous significant voluntary connection with the United States"); United States v. Yunis, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) (observing that the defendant, who was wanted in connection with a terrorist incident abroad, was lured into international waters, arrested, and transported to the United States); *see also* the Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293, § 814 (1996) (amending Title I of the National Security Act of 1947, 50 U.S.C. §§ 402-404h, to permit law enforcement agencies to ask the intelligence community to collect "information outside the United States about individuals who are not United States persons.... notwithstanding that the law enforcement agency intends to use the information collected for purposes of a law enforcement investigation," *id.* § 403-5a). For further discussion of the Intelligence Authorization Act, see *infra* text accompanying notes 149-52.

7. Recent examples include the apprehensions of Ramzi Yousef, Omar Rezaq, and Mahmoud Abouhalima on charges of international terrorism directed against American citizens. Yousef had been indicted in connection with the February 26, 1993 bombing of the World Trade Center, among other charges. On February 7, 1995, he was arrested by Pakistani authorities; turned over to the FBI, he was flown to the United States the next day. *See* David Johnston, *Fugitive in Trade Center Blast Is Caught and Returned to U.S.*, N.Y. TIMES, Feb. 9, 1995, at A1. Rezaq hijacked an Egyptian airplane to Malta on November 23, 1985, where he murdered two of its passengers and attempted to kill three others. He was sentenced to 25 years in a Maltese prison, but released in February 1993, at which time he boarded a plane to Sudan, routed via Ghana, Nigeria, and Ethiopia. Upon his arrival in Nigeria he was met by Nigerian authori-

forcement agencies normally–although not always–operate pursuant to the laws of the host country, and may work closely with foreign governments to apprehend suspected offenders and secure their extradition or rendition to the United States.[8] They may share critical information with the host nation's police and security services, and in exchange receive cooperation in locating a fugitive or obtaining evidence to support a prosecution.

Accordingly, in order to enforce its criminal laws the United States may need to collect evidence throughout the world, in a manner that ensures its admissibility in a U.S. courtroom. At the same time, the Department of State may need to defend the American actions, U.S. diplomatic and commercial installations overseas may need to be secured, and the nation may need to guard against potential retaliation both at home and abroad. Finally, once the prosecution is underway, the Government must ensure that there are no surprises, that the necessary evidence is available, and that notwithstanding the transnational nature of the investigation, the strictures of *United States v. Toscanino*[9] and *Brady v. Maryland*[10] have been met.

But this expanded assertion of international criminal jurisdiction has not occurred in a vacuum, as the United States also maintains an expansive global network of intelligence collection activities. While the Central Intelligence Agency (CIA) is perhaps the best-known component of that apparatus, its espionage and covert action activities are complemented by the signals intelligence operations of the National Security Agency (NSA), the satellites orbited by the National Reconnaissance Office, the

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ties, who turned him over to the FBI. *See* United States v. Rezaq, 908 F. Supp. 6 (D.D.C. 1995). Abouhalima, another suspect in the World Trade Center bombing, was apprehended in Egypt in March 1993. Some reports state that Egyptian authorities turned him over to U.S. authorities, *see, e.g.*, David Van Biema, *So Glad to See You*, TIME, Apr. 5, 1993, at 32, while others say that he voluntarily turned himself over to the United States, *see, e.g.*, Zina Hemady, *Egypt: World Trade Center Bombing Suspect Declares Innocence*, ASSOCIATED PRESS, Mar. 25, 1993.

8. "Law enforcement agencies," for purposes of this Article, include the Department of Justice (DOJ) and its constituent components, such as the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and the U.S. Attorneys' Offices; the Department of the Treasury and its law enforcement arms, such as the Secret Service, Customs Service, and Bureau of Alcohol, Tobacco, and Firearms; and other federal, state, and local agencies with law enforcement authority.

The "intelligence community" comprises those agencies of the federal government with intelligence collection responsibilities, such as the Central Intelligence Agency (CIA), Defense Intelligence Agency (DIA), National Security Agency (NSA), and the FBI (with respect to its counterintelligence authorities), as well as those other agencies enumerated in section 3(4) of the National Security Act of 1947, as amended, 50 U.S.C. § 401a(4) (1994).

9. 500 F.2d 267 (2d Cir. 1974) (stating that courts may divest themselves of jurisdiction over a defendant apprehended abroad and brought to the United States, where U.S. agents involved have treated the defendant in a manner that shocks the conscience).

10. 373 U.S. 83 (1963) (requiring production to the defendant of material exculpatory evidence). *Brady* is discussed *infra* Parts II & III.

human intelligence collected by the Defense Intelligence Agency (DIA), and the operations of a dozen other U.S. intelligence organizations. Of special note in this respect is the dual role played by the Federal Bureau of Investigation (FBI), which combines in one organization responsibility to enforce U.S. law worldwide and to conduct counterintelligence activities both at home and, in some cases, overseas.

During most of the Cold War, the lines were clearly drawn between the work of the intelligence community and the law enforcement community. U.S. law enforcement agencies, whether the FBI, the Bureau of Alcohol, Tobacco, and Firearms, the Customs Service, or the Department of Justice concentrated primarily on crimes that had occurred and could be investigated within U.S. territory.[11] This domestic focus followed naturally from the statutory responsibilities of the law enforcement agencies and the structure of U.S. criminal law.

The intelligence agencies could not have been more different, in terms of both geographical responsibility and subject matter. Unlike the FBI, Department of Justice, and the other federal law enforcement agencies, the CIA was expressly prohibited by the National Security Act from exercising any "police, subpoena, or law enforcement powers or internal security functions" from the moment of its creation in 1947.[12] The primary reasons for that "law enforcement" proviso were twofold. First, the nation had recently witnessed in Hitler's Germany, and was continuing to observe in Stalin's Soviet Union, the abuses that can arise from the combination of intelligence collection activities and law enforcement authority. And second, the FBI was jealous of its own prerogatives: Although the Bureau did close its Latin American field offices in the late 1940s in deference to the nascent CIA, the FBI was not prepared to accept any challenge to its own core function of domestic law enforcement.

The strict delineation between intelligence and law enforcement was facilitated by the fact that, simply stated, there was relatively little overlap between the two in 1947. Such overlap as there might be was addressed primarily by the FBI, which continued to exercise its counterespionage functions within the United States as it had done during the Second World War. Espionage *within* the United States and *against* the United States clearly was a criminal offense and, therefore, a matter for law enforcement, and so the Bureau (or, in appropriate instances, the military) would continue to address it. Events *abroad*, however, were an-

11. To be sure, the FBI for decades has maintained Legal Attaches at selected U.S. diplomatic outposts, and in recent years the Drug Enforcement Administration has undertaken a largely transnational role, in some ways foreshadowing the issues that now arise with greater frequency.

12. Section 103(d)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-3(d)(1) (1994).

other matter, for there the primary U.S. concern normally was not crime, but Communism, against which American activities consisted primarily of military and intelligence operations.

This paradigm served well, at least for the first three Cold War decades. The basic distinction remained between law enforcement and intelligence activities, even as press revelations during the 1970s shed light upon U.S. military, intelligence, and law enforcement abuses.[13] But other events were intruding that rendered the established separation less tenable. The 1960s already had witnessed the spread of international airline terrorism, and although some claimed to see the Kremlin's hand behind the gun, not all such acts could be traced to Soviet control. The use of controlled substances in the West expanded, and foreign suppliers developed sophisticated production and distribution networks to meet the demand. By the 1980s, the international proliferation of weapons of mass destruction had joined international terrorism and narcotics trafficking as issues of significant U.S. concern.

The United States met these challenges on the field of law enforcement as well as that of intelligence. That two-track approach was reinforced by the twin collapses of the Berlin Wall in 1989 and the Soviet Union in 1991, which rattled the very foundations that had impelled the creation of the postwar U.S. intelligence apparatus. Moreover, the ramifications of those collapses undermined one of the functional rationales for maintaining the separation between intelligence and law enforcement: nuclear, biological, and chemical weapons proliferation now complement international terrorism and narcotics as areas of overlap between the law enforcement and intelligence communities, just as other interests, such as tracking Russian missile stockpiles, or investigating domestic bank robberies, still retain their primary identification with one or the other arena.

Today, there is no clear primacy for either the law enforcement or intelligence communities in the realms of international terrorism, narcotics, proliferation (as well as, in some cases, counterintelligence).[14] Still, the

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13. During that time, the Executive Branch and Congress both mounted investigations, existing practices were terminated, legislation was enacted, new Executive Orders issued, and new procedures implemented to regulate both intelligence and law enforcement activities.

14. *See* Stewart Baker, *Panel Discusses Problems of Law Enforcement and Intelligence*, 17 A.B.A. NAT'L SECURITY L. REP. 1, 1 (1995) (quoting former Director of Central Intelligence R. James Woolsey, Baker observes that "[t]he new tension in relations between law enforcement and intelligence stems in part from the fact that '[s]uch matters as terrorism, weapons proliferation, narcotics and others have both foreign and domestic tails to them, so to speak.'"); *see also* REPORT ON THE COMMISSION ON THE ROLES AND CAPABILITIES OF THE UNITED STATES INTELLIGENCE COMMUNITY, PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF UNITED STATES INTELLIGENCE, ch. 4 (Mar. 1, 1996) (referring to the new phenomenon giving rise to this emerging relationship as "global crime").

law enforcement and intelligence communities remain designed and operated in fundamentally dissimilar manners, retaining differing legal authorities, internal modes of organization, and governing paradigms. Even with increasing numbers of joint successes, for those reasons working together at times till can prove fitful.

This is because each set of organizations is created and operated with certain clear responsibilities. Law enforcement agencies, for example, must investigate crimes and collect evidence in accordance with precise constitutional and statutory requirements. They organize their information in a manner readily retrievable for purposes of litigation, master the details of courtroom procedure and the criminal law, produce documents, witnesses, and evidence for direct challenge by defense counsel, and measure their success or failure in large part by the publicized rates of conviction.

In contrast, intelligence agencies normally depend on sources that cannot be revealed in court, and draw upon legal authorities separate from those of law enforcement. Beyond its normal authorities to *collect* intelligence abroad, the CIA, with specific presidential approval, also may conduct *covert actions* abroad, such as working to prevent, deter, or disrupt terrorist activities by means different from those of law enforcement.[15] The NSA, DIA, and NRO also collect intelligence abroad, operating within U.S. legal parameters separate from those of law enforcement. The widespread use of intelligence information as evidence may therefore jeopardize the specific legal authority of those intelligence agencies to collect information abroad under standards that differ from those of law enforcement, and also could raise a question of compliance by the CIA with the law enforcement proviso of the National Security Act.[16]

Nor does the conduct of U.S. intelligence collection or covert action operations lend itself well to the records requirements that are common to law enforcement agencies. The documentary procedures of law enforcement agencies are highly specialized, directly designed to support the investigation and prosecution of offenses; their formats and modes of employment are not readily adaptable to intelligence agencies and their operations. Rather, the intelligence agencies organize and maintain their

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15. Covert action is defined as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly." Section 503(e) of the National Security Act of 1947, as amended, 50 U.S.C. § 413b(e). The statute requires explicit presidential approval in advance for the conduct of any covert action; provides that the President shall ensure timely notification of the covert action to the intelligence committees of the House and Senate; and states that no Presidential approval of covert action may authorize a violation of the Constitution or any U.S. statute. *See generally id.* §§ 413, 413b, and 414.

16. *See supra* text accompanying note 12.

records in a manner conducive to intelligence analysis and dissemination, rather than for potential use as evidence. And, unlike prosecutors and law enforcement agencies that can assess the results of their work by means of public trials, intelligence agencies must work in secret with little publicity about either their successes or their failures.

Nonetheless, both constitutional and statutory issues of discovery may arise when intelligence activities produce information that may be relevant either to the prosecution or the defense.[17] The failure to disclose intelligence information in specific cases may jeopardize the ability to prosecute those cases and endanger the discovery rights of the respective defendants. Intelligence sources or methods also may be placed at risk, should they be disclosed in the course of criminal proceedings,[18] and the very nature of intelligence work may render it difficult or impossible to produce certain witnesses, such as foreign nationals who are clandestinely assisting U.S. intelligence, for either the case-in-chief or production to the defense.

This Article addresses those discovery rights and the commensurate obligations that they place on prosecutors in cases that may involve intelligence community information. In this respect, it should be observed that the Classified Information Procedures Act (CIPA)[19] does facilitate the discovery and use of classified information during criminal proceedings, thereby protecting defendants' rights while preserving the appropriate degree of protection for classified information.[20] But neither CIPA

17. *See, e.g.,* Baker, *supra* note 14, at 4 (reporting former Deputy Attorney General Philip Heymann's observation about the "difficulties for the intelligence agencies when they try to comply with constitutional and statutory criminal discovery rules," Jim Woolsey's description intelligence agencies as "'archivally challenged,'" partly for security reasons, and former National Security Counsel Legal Advisor Paul Schott Stevens' comment that the Intelligence Community is not simply an asset of the prosecution).

18. *See* Section 103(c)(6) of the National Security Act of 1947, as amended, 50 U.S.C. §403-3(c)(6), explicitly requires the Director of Central Intelligence to "protect intelligence sources and methods from unauthorized disclosure." The statute, of course, is to be applied in a manner consistent with the Constitution and its trial guarantees, as well as with relevant statutory law such as the Classified Information Procedures Act, discussed *infra* notes 19-20 and accompanying text.

19. *See* 18 U.S.C. App. 3 (1980).

20. The CIPA was enacted in order to protect the secrecy of classified information during the course of criminal proceedings, while preserving the defendant's constitutional and statutory rights. The CIPA sets forth procedures whereby specific classified information may be reviewed by the court for possible disclosure to the defendant and use at trial. In particular:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant[,] . . . to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. *Id.* § 4. If, however, the court finds that disclosure of the classified information must be made in order to satisfy the defendant's rights, the Attorney General may determine that the information nonetheless may not be released, at which point the court may take appropriate action, up to and including dismissal of the indictment. *See id.* § 6.

nor any other statute specifically addresses the *extent* to which information in the possession of the intelligence community may be subject in the first place to the defendant's rights of discovery or the prosecution's obligation to search.

Rather, the normal federal discovery requirements delineate those boundaries.[21] Unfortunately, in some situations the mere invocation of the terms "CIA" or "intelligence" may raise unusual concerns: for example, defendants may claim they have been the victims of secret government conspiracies, prosecutors may be concerned that their cases will become complicated by the law of espionage and classified information; and judges may find themselves faced with discovery challenges that pose the prospect of lengthy digressions into the world of clandestine information. Certain defendants may seek discovery from a broad range of intelligence agencies, even in the absence of any showing that those agencies contributed to the criminal investigation; prosecutors and judges may conclude that intelligence agencies are somehow different and that the normal boundaries of discovery should be expanded.

But even where a prosecution may involve intelligence agency information, those normal boundaries can and should be respected. Part II presents a general overview of the federal discovery obligations, as developed outside the specific context of intelligence records, and Part III describes the means by which those rules are applied beyond the relevant prosecutor's office itself, including a review of one recent case in which the obligations of search and discovery were extended to a number of intelligence agencies. Drawing from those basic foundations, Part IV concludes that the search and discovery requirements applicable to intelligence agency records generally should be similar to those which apply to non-intelligence agencies, thereby reflecting both the case law and pragmatic considerations of resources and efficiency.

II. The Central Discovery Requirements in Federal Criminal Prosecutions

The federal discovery rules generally include the constitutionally compelled *Brady* obligation to produce material evidence relating to guilt or punishment, the statutory duty under the Jencks Act to produce wit-

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It must be emphasized that CIPA is only a procedural statute. As the court observed in *United States v. McVeigh*, 923 F. Supp. 1310 (D. Colo. 1996):

> CIPA does not enlarge the scope of discovery or of *Brady*. [Rather, if] in complying with the duty under Rule 16 or *Brady*, government counsel must provide copies or permit inspection of documents that are now classified, they have the choice of declassifying, redacting, or seeking protective orders restricting access and use of the sensitive information under CIPA.

Id. at 1314 (citations omitted).

21. *See infra* Part II.

ness statements, and the rights provided by Rule 16 of the Federal Rules of Criminal Procedure. A brief review of those rules is appropriate, to lay the foundation for their application to the intersection between law enforcement and intelligence.[22]

Although their specific terms vary, the overall goals of the various discovery rules are similar: to ensure a fair and balanced trial for every federal criminal defendant.[23] Although each plainly imposes a duty upon the government to produce certain information to the defendant, the extent to which the prosecution must search other governmental sources for such information has required extensive judicial clarification.

A. Brady v. Maryland

In 1963, the Supreme Court examined in *Brady v. Maryland*,[24] whether withholding from a criminal defendant the confession of an accomplice violated the Due Process Clause of the Fourteenth Amendment. The Court concluded 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."[25] Without such disclosure, the Court reasoned, defendants would be deprived of their Fourteenth Amendment rights.[26]

Accordingly, *Brady* generally requires the prosecution to provide the defendant with evidence material to the guilt or punishment of the accused. The failure to produce such evidence may constitute reversible error where the defendant is convicted. For example, such error has been found where the prosecution failed to disclose that evidence contained perjured testimony, did not abide by a pretrial request for specific evi-

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22. A detailed description of those criminal discovery rules is beyond the scope of this Article. For more comprehensive discussions, see generally, Steven Washawsky & Gregory D. Bassuk, *Discovery*, 84 GEO. L.J. 992 (1996) (providing a general discussion of *Brady*, the Jencks Act, and Rule 16); Colleen A. O'Leary et al., *Discovery: Eighth Survey of White Collar Crime Procedural Issues*, 30 AM. CRIM. L. REV. 1049 (1993) (providing insight into the scope of discovery in criminal proceedings); and Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991) (addressing discovery in criminal matters).

23. The Fifth and Sixth Amendments grant individuals the right to due process and the right to a fair trial, respectively. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence").

24. 373 U.S. 83 (1963).

25. *Id.* at 87.

26. *See id.*

dence, or failed to respond to a generalized request for *Brady* information.[27]

Materiality will not be found for purposes of *Brady*, however, if there is only a "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial . . . ."[28] Rather, in order to constitute a *Brady* violation, the undisclosed information must create "a reasonable doubt that did not otherwise exist."[29] A "constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[30] Moreover, although the rule is constitutionally-mandated, *Brady* rights are not boundless. *Brady* did establish one additional avenue by which to ensure due process, but even so "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[31]

B. The Jencks Act

Even before its *Brady* decision, the Supreme Court had addressed the due process implications of the government's failure to disclose witness statements. In *Jencks v. United States*,[32] the Justices examined whether the prosecution should have produced copies of FBI reports made by two government witnesses, members of the Communist Party whom the Bureau had paid to report on the defendant's affiliation and participation in Party events, after those informants had testified at trial about those reports. The *Jencks* Court found that the defendant indeed had been "entitled to an order directing the Government to produce for inspection all reports of [the two witnesses] in its possession, written and, when orally made, as recorded by the FBI, touching the events and activities as to which they testified at trial."[33]

Concerned with the broad scope of the Court's decision, Justice Clark

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27. *See* United States v. Agurs, 427 U.S. 97, 103-07 (1976).

28. *Id.* at 109-10; *see also* United States v. Bagley, 473 U.S. 667, 675 (1985) (asserting that the purpose of the *Brady* rule is "not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur"); United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971) (stating that "the purpose of the duty is not simply to correct an imbalance of advantage," but also "to make of the trial a search for truth informed by all relevant material").

29. *Agurs*, 427 U.S. at 112; *see also id.* at 110 ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.").

30. *Bagley*, 473 U.S. at 678. The *Bagley* Court further stated that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682.

31. Weatherford v. Bursey 429 U.S. 545, 559 (1977).

32. 353 U.S. 657 (1957).

33. *Id.* at 668.

asserted in dissent that:

> [u]nless Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.[34]

Reflecting that concern, Congress promptly enacted a new statutory provision, commonly known as the Jencks Act, to regulate the production of witness statements at trial. In pertinent part, the Act provides that:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
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> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified....
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> (e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—
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> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
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> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
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> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.[35]

The Jencks Act sets forth three criteria: the requested material must be a "statement," as defined in subsection (e); the statement must be "in the possession of the United States"; and it must correspond with the testimony of the witness.[36] Subsection (e)'s definition of "statement" is not to be read narrowly, however,[37] and the trial court has wide discretion to

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34. *Id.* at 681-82 (Clark, J., dissenting).

35. 18 U.S.C. § 3500 (1994).

36. Interpreting the breadth of the fledgling Jencks Act for the first time, the Supreme Court observed that the Act "narrowed the scope for needful judicial interpretation to an unusual degree[, for it] clearly defines procedures and plainly indicates the circumstances for their applications." Palermo v. United States, 360 U.S. 343, 349 (1959).

37. The *Palermo* Court noted that:

> [t]he suggestion that the detailed statutory procedures restrict only the production of the type of statement described in subsection (e), leaving all other statements, *e.g.*,

interpret the Jencks Act in the specific circumstances.[38] In practice, the courts have interpreted "statement" rather generously, so that a "statement" need not be a verbatim transcription of the witness's impressions, as long as the document asserted to be a statement has been approved or adopted[39] in a recognizable manner by the witness.[40]

One court has held, for example, that the term comprehends "written statements of the witness and contemporaneous recordings or transcripts, including stenographic notes of testimony or statements."[41] Another has held that the term means "a statement of a witness whose direct testimony is presented in a criminal trial, which statement had been previously recorded and approved or adopted by the witness."[42] Accordingly, for purposes of the Jencks Act, a "statement" may be either a recording or verbatim transcript of the witness's own words, or a document that purports to comprise the witness's impressions that is actually endorsed in some manner by the witness.[43]

> non-verbatim, non-contemporaneous records of oral statements, to be produced under pre-existing rules of procedure as if the statute had not been passed at all, flouts the whole history and purpose of the enactment. It would mock Congress to attribute to it an intention to surround the production of the carefully restricted and most trustworthy class of statements with detailed procedural safeguards, while allowing more dubious and less reliable documents a more favored legal status, free from safeguards in the tournament of trials. *Id.* at 349-50.

38. *See id.* at 353 ("Final decision as to production must rest . . . within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts.") (footnotes omitted).

39. *See* United States v. Gonzales, 90 F.3d 1363, 1369 (8th Cir. 1996) (observing that "oral, untranscribed, *nonadopted* assertions are not 'statements' within the meaning of the *Jencks* Act") (emphasis added).

40. In *Goldberg v. United States*, 425 U.S. 94 (1976), the Court held that

> a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that has been 'signed or otherwise adopted or approved' by the Government witness is producible under the Jencks Act, and is not rendered unproducible because a Government lawyer interviews the witness and writes the 'statement.'

Id. at 98. The Goldberg Court rejected the argument that a statement given to the government's attorney, that was signed and adopted by the witness, is protected as work-product, and is, therefore, not producible as Jencks Act material. *Id.* at 105 (asserting that "[t]he objective of preventing 'rummaging' plainly adds no support to the argument that Congress meant that distinctions should be made based upon the occupation of the Government official to whom the witness gave the statement").

41. United States v. Moeckly, 769 F.2d 453, 463 (8th Cir. 1985).

42. United States v. Nickell, 552 F.2d 684, 687 (6th Cir. 1977).

43. In *Nickell*, an FBI agent's record of a witness statement had been produced to the defendant. On appeal, the defendant argued that because the agent himself had interviewed the witness, that agent had become a "witness" himself. Hence, the defendant argued that the Jencks Act had required the government to provide him with everything in its files written by that FBI agent.

Rejecting that argument, the court stated that the

> endorsement of this broad right would require either a wholesale turnover of FBI files to any defendant on demand or, at a minimum, that the trial judge examine for relevance and materiality all of the reports filed by any government agent who took the witness stand. The first of these alternatives would have the potentiality for placing in

Failure to comply with the Jencks Act will result in striking the testimony of the government witness.[44] At times, this may prove fatal to the prosecution. But the denial of Jencks Act material does not automatically constitute reversible error, especially where the appellate court finds it unlikely that the omission was made in bad faith or had a material effect upon the verdict.[45]

C. *Rule 16*

The Federal Rules of Criminal Procedure provide a third route of discovery, allowing defendant to obtain his own statements and other items material to the defense. Rule 16(a)(1) provides, in relevant part:

> (A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government....
>
> ...
>
> (C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places,

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> the hands of a person (or persons) charged with crime much confidential government information which had no bearing at all upon the issue of guilt or innocence at the trial involved.... In the face of clear Congressional opposition to such 'rummaging' of the FBI files as was expressed in the Jencks Act, and in the absence of any clear affirmative mandate from the Supreme Court we decline the invitation to adopt such a broad (and necessarily unilateral) discovery rule.

Id. at 689.

For an early interpretation of the Jencks Act that comports with the *Nickell* court's reasoning, see *Palermo* 360 U.S. at 350. In *Palermo*, the Court stated:

> One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the undiscriminating production of agents' summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness's own rather than the product of the investigator's selections, interpretations and interpolations.

Id. at 350.

44. The Jencks Act provides that

> [i]f the United States elects not to comply with an order of the court... to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

18 U.S.C. § 3500(d) (1994).

45. *See Moeckly*, 769 F.2d at 464 (stating that where there is "no indication of bad faith on the part of the Government, and no indication of prejudice to the defendant," admission of the testimony of a minor witness was not reversible error).

> or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.[46]

In short, Rule 16(a)(1)(A) provides that the government must honor defendants' discovery requests for their own "relevant" statements. Similarly, Rule 16(a)(1)(C) provides for discovery of those documents and other items that are "material to the preparation of the defendant's defense," as well as those that are "intended for use by the government as evidence in chief" or which "were obtained from or belong to the defendant."[47] Whether a statement or other item is "relevant" or "material" is a question for the court;[48] moreover, "statements" discoverable under Rule 16(a)(1)(A) are not limited to those made *to* the government. Rather, the term includes defendant statements given to third parties, so long as they indeed are relevant and in the government's possession.[49]

Just as the government's failure to satisfy the requirements of *Brady* and the Jencks Act may result in reversible error, so may the failure to produce Rule 16 material.[50] Even so, the Rule 16 requirements differ in several ways from those of *Brady* and the Jencks Act. *Brady*, for exam-

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46. FED. R. CRIM. P. 16(a)(1)(A), (C). In 1974, the advisory committee reported that

> the amendment making disclosure mandatory under the circumstances prescribed.... [comports with] the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

FED. R. CRIM. P. 16 advisory committee's note (1974).

47. The Supreme Court has recently clarified the scope of Rule 16(a)(1)(C). *See* United States v. Armstrong, 116 S. Ct. 1480, 1485 (1996) ("[W]e conclude that in the context of Rule 16 'the defendant's defense' means the defendant's response to the Government's case-in-chief.... We hold that Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case-in-chief, but not to the preparation of selective-prosecution claims.").

48. *See, e.g.*, United States v. Caldwell, 543 F.2d 1333, 1368 (D.C. Cir. 1974) (MacKinnon, J., dissenting) ("The word 'relevant' in the Rule is not an idle word. It means something. Relevant to what? The obvious intent is to refer to statements that were 'relevant' to the offenses charged."); *see also* United States v. Graham, 83 F.3d 1466, 1474 (D.C. Cir. 1996) ("Under Rule 16, evidence is material if there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation,... or assisting impeachment or rebuttal.") (internal quotations omitted) (citation omitted); FED. R. CRIM. P. 16 advisory committee's note (1974) ("Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects 'material to the preparation of his defense' underscores the importance of disclosure of evidence favorable to the defendant.").

49. *See Caldwell*, 543 F.2d at 1352-53 (rejecting "arguments that 'statements' discoverable under Rule 16(a) are only those made to governmental agents," and noting "the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them") (footnotes omitted).

50. It should be noted, however, that "cases consistently have required a showing of prejudice to the substantial rights of the defendant before reversing because of an error in administering the discovery rules." United States v. Scruggs, 583 F.2d 238, 242 (5th Cir. 1978).

ple, requires the production of exculpatory or mitigating materials, while the Jencks Act relates solely to witness statements. In contrast, Rule 16(a)(1)(A) and (C) apply to a broader range of items.

Moreover, the Rule 16 obligations arise at the pre-trial stage, and impose a continuing responsibility upon the Government to produce responsive material. In contrast, the *Brady* rule and the Jencks Act can be satisfied at various stages in the litigation process.[51] *Brady*, for example, "is fulfilled when a disclosure of exculpatory material is made at a time such that it allows the defense to make effective use of the material at trial [although] 'disclosure to be effective must be made at a time when the disclosure would be of value to the accused.'"[52] The Jencks Act is invoked at trial, and is satisfied so long as the defendant is afforded a "reasonable opportunity to examine [the witness statement] and prepare for its use in the trial."[53]

The three discovery avenues provided by *Brady*, the Jencks Act, and Rule 16 generally complement one other. Prosecutors and defense counsel regularly invoke the rules and, in the usual course of events, the scope of their respective duties is relatively clear. Relevant police and prosecution files are searched, the responsive documents are produced, and any controversies that may arise are resolved within limited boundaries.

But where requests are made for materials in the possession of other government entities, the boundaries of discovery may not be so clear. And those boundaries may appear even less distinct where a criminal proceeding concerns international terrorism, narcotics trafficking from abroad into the United States, or the global proliferation of chemical, biological, or nuclear weapons. But even in such cases, the standard practices followed in more traditional domestic prosecutions may be applied as well.

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51. In United States v. Deerfield Specialty Papers, Inc. 501 F. Supp. 796 (E.D. Pa. 1980) (mem.), the court noted that

> the importance of making a clarification between the roles afforded by F.R.Crim.P. 16(a)(1) and the *Brady* rule.... This distinction is necessary because case law has consistently held that *Brady* did not create a discovery device as was intended with the promulgation of F.R.Crim.P. 16(a)(1). Fishing expeditions into the government's files and records are not cognizable under *Brady* and its progeny, especially at the pretrial stage.... 'Where documentary evidence is exculpatory, it may be within both *Brady* and Rule 16, but nonexculpatory records are obtainable in advance of trial only by virtue of Rule 16. It is conceivable that some documents which are not covered by Rule 16,... may be *Brady* material because of their content.'... The Court will not confuse the two (2) [sic] rules by applying the time-of-disclosure element of F.R.Crim.P. 16(a)(1) to the nature-of-information-to-be-disclosed as dictated in *Brady*.

Id. at 818-19 (quoting United States v. Kaplan, 554 F.2d 577, 579-80 (3d Cir. 1977) (citations omitted)).

52. United States v. Shifflett, 798 F. Supp. 354, 355 (W.D. Va. 1992) (quoting United States v. Elmore, 423 F.2d 775, 779 (4th Cir. 1970) (citation omitted)).

53. United States v. Holmes, 722 F.2d 37, 40 (4th Cir. 1983).

III. ALIGNMENT, OR THE PROSECUTION TEAM

In general, the courts have held that federal discovery obligations extend to those government agencies that are so closely "aligned" with the prosecution of a specific matter that justice requires their records be subject to the respective discovery obligations.[54] The issue also has been cast in terms of the "prosecution team," consisting of those agencies whose activities so closely support a specific prosecution that justice requires them to be subject to the discovery obligations.[55] Described in either manner, the inquiry is critically important both when formulating responses to discovery requests and when federal prosecutors seek to search files in advance of such requests.[56]

These issues arise because none of the discovery rules explicitly define the intra-governmental limits of their obligations. For example, it is not clear from the text of *Brady* itself exactly *whose* records the prosecution must search. Similarly, while the Jencks Act applies to items "in the possession of the United States,"[57] the statute does not confirm whether the obligation is limited to statements that are in the prosecution's actual possession, extends to documents constructively in the prosecution's possession, or, following the literal language of the statute, extends all the way to statements in the possession of *any* U.S. Government entity. Completing the trilogy, Rule 16(a)(1)(A) and (C) provide that the duty extends to statements in the "possession, custody or control" of the "government" that the prosecutor would be able to locate by the "exercise of due diligence."[58]

Drawing from the case law to provide general guidance in this area, the United States Attorneys' Manual observes that

> an investigative or prosecutive agency becomes aligned with the government prosecutor when it becomes actively involved in the investigation or the

54. For examples of cases relying on "alignment" analysis, see *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977); and *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

55. For examples of cases using the term "prosecution team," see *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996); *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); and *United States v. Mannarino*, 850 F. Supp. 57, 64-65 (D. Mass. 1994).

56. The report of the Joint Task Force on Intelligence and Law Enforcement recognized the growing problems posed by the overlapping interests of the intelligence and the law enforcement communities. *See* JOINT TASK FORCE ON INTELLIGENCE AND LAW ENFORCEMENT, REPORT TO THE ATT'Y GEN. AND DIRECTOR OF CENTRAL INTELLIGENCE, at 7-8 (May 1995). The Task Force noted "the lack of consistent policies and procedures" in this area as an obstacle that needs to be overcome by "coherently defin[ing] and regulariz[ing]" the "policies that trigger Intelligence Community participation in criminal litigation." *Id.* at 7. The Task Force concluded that "[i]n particular, the issue of what constitutes 'alignment' of an Executive Branch agency with the prosecution so as to require searches of that agency's files for purposes defined in law (for example, *Brady* and the Jencks Act) needs to be clarified." *Id.*

57. 18 U.S.C. § 3500(a) (1994).

58. FED. R. CRIM. P. 16(a)(1)(A), (C).

> prosecution of a particular case. When that occurs, the agency's files are subject to the same requirement of search and disclosure as the files of the prosecuting attorney or lead agency.[59]

The Manual cautions, however, that "the mere fact that an agency has been solicited to produce documents generated independently of the criminal case does not necessarily result in the alignment of that agency with the prosecutor."[60]

Where law enforcement and intelligence overlap, as in matters of international terrorism, transnational crime, and weapons proliferation, the alignment issues can be significant. The challenge lies in distinguishing cases in which an intelligence agency has participated actively in the investigation of a matter, notwithstanding its own lack of law enforcement authority, from those in which it simply has provided the prosecution with information it collected for other purposes, or where it has engaged in other activities separate from the criminal investigation. Even in the latter cases, however, courts at times may conclude that discovery is appropriate.

These types of issues arose, for example, during discovery proceedings in the prosecution of Timothy McVeigh for the April 19, 1995, bombing of the Murrah Federal Building in Oklahoma City. The defense made numerous requests for the production of documents and information, the fulfillment of which would necessitate comprehensive searches not only of prosecution files, but of those maintained by the CIA, NSA, and DIA as well.[61] In a domestic prosecution with no apparent relation to international terrorism, must the government satisfy such demands and, if so, how wide is its duty to search? An overly constrained response might deprive a defendant of his or her due process rights, while too broad an interpretation of the discovery obligations could encourage unfounded requests, promote inefficiency, and jeopardize intelligence sources and methods.

Clearly, the government must satisfy the requirements of *Brady*, the Jencks Act, and Rule 16. Neither the courts nor Congress, however, have yet defined the precise boundaries of those obligations insofar as they may require a prosecutor to produce information that is in the custody of federal intelligence agencies, especially absent any showing that those agencies have contributed to the specific law enforcement effort or hold materials of the nature described in those criminal discovery rules. Even so, the normal discovery procedures developed in non-intelligence con-

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59. UNITED STATES DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL, VOL.9A CRIMINAL DIV., pt.3A, ch. 90.210(D)(1) (1997).

60. *Id.* (citing United States v. Polizzi, 801 F.2d 1543, 1553 (9th Cir. 1986)).

61. For further discussion of the McVeigh prosecution, see *infra* Section III.D.

texts may be applied here as well.

A. Brady

General guidelines for *Brady* purposes may be gleaned from the reported cases, although "[a]s has proved true of the other aspects of *Brady* jurisprudence, no formula defining the scope of the duty to search can be expected to yield easily predicted results."[62] To some extent, the government's duty to search for potential *Brady* material held by a specific agency may be broader where the prosecution and the agency in question are under the same sovereign, federal or state, and certainly will exist where the law enforcement investigation has been conducted jointly with that second agency.

At the outset, it should be observed that all information within a particular prosecutor's office falls within the ambit of *Brady*. In *Giglio v. United States*[63] one prosecutor had promised a key witness that he would not be prosecuted if he cooperated with the government.[64] A subsequent prosecutor, however, was unaware of that promise and did not disclose it to the defense.[65] This omission violated *Brady*, for "[t]he prosecutor's office is an entity and as such it is the spokesman for the Government. . . . A promise made by one attorney must be attributed, for these purposes, to the Government."[66] *Giglio* adds that documentary evidence within the same prosecutor's office, even concerning an unrelated case, is subject to *Brady* obligations.[67] Intelligence information, therefore, that has been provided to a U.S. Attorney's Office for use in one case may well be subject to discovery in another criminal proceeding handled by that Office.

But beyond information already in its possession, the prosecution may need to search for material in the hands of some other agency. Independent government entities may conduct separate investigations of a matter, however, and the alignment doctrine does not make it incumbent upon the prosecution to seek out documents in every conceivable agency. Rather, the inquiry under *Brady* is whether those agencies are closely aligned on the facts[68]—whether, for example, they cooperated on an es-

62. United States v. Brooks, 966 F.2d 1500, 1504 (D.C. Cir. 1992).

63. 405 U.S. 150 (1972).

64. *See id.* at 153.

65. *See id.* at 152.

66. *Id.* at 154; *see also* Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984) (stating that "a prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or [by] compartmentalizing information about different aspects of a case").

67. *See* 405 U.S. at 154.

68. *See* United States *ex rel.* Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985). In *Fairman* the court stated,

sentially joint investigation or simply pursued separate interests in the same topic. In this respect, in considering the use of perjured testimony, the Fifth Circuit has "declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' that includes both investigative and prosecutorial personnel."[69]

In *United States v. Brooks*,[70] the D.C. Circuit found a *Brady* violation[71] where the prosecution had failed to check the personnel file of a police officer, the government's key witness in a drug case, who had been shot with her own service revolver in a colleague's apartment.[72] The court stated that "[i]n some cases, the duty to search flows straight from the nature of the files.... Where[, however,] the file's link to the case is less clear, the court must also consider whether there was enough of a prospect of exculpatory materials to warrant a search."[73] The *Brooks* court observed that "[t]he cases finding a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution,' and in each case the court has found the bureaucratic boundary too weak to limit the duty."[74] Applying these principles to the specific, the court found a duty to obtain the witness's personnel file "given the close working relationship between the ... police and the U.S. Attorney."[75]

Similarly, in *United States v. Deutsch*,[76] the Fifth Circuit addressed the implications of *Brady* where a postal employee, who allegedly had accepted payment from the defendant in exchange for credit cards stolen from the mail,[77] had become the key government witness.[78] When the defendant moved to obtain that employee's personnel file, the prosecution responded that it did not possess it.[79] Although discounting the position "that the government was obliged to obtain evidence from third parties," the *Deutsch* court held nonetheless that "there is no suggestion in *Brady*

> [t]he prosecutor's ignorance of the existence of [the police officer's] worksheet does not justify the State's failure to produce it, since *Brady* provides that the good faith or bad faith of the prosecution is irrelevant to the due process inquiry.... This may be especially true when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution, such as the police.

Id. (citations omitted).

69. United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979) (citations omitted).
70. 966 F.2d 1500 (D.C. Cir. 1992).
71. *See id.* at 1503.
72. *See id.* at 1501.
73. *Id.* at 1503.
74. *Id.* (citation omitted).
75. *Id.*
76. 475 F.2d 55 (5th Cir. 1973).
77. *See id.* at 56.
78. *See id.* at 57.
79. *See id.*

that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities."[80]

The Seventh Circuit has adopted a similar approach, observing that

> as a general rule, the government's obligation to disclose exculpatory or impeaching information under *Brady* is limited to that information which is then known to the government. Although we have not interpreted *Brady* as requiring prosecutors to affirmatively seek out information not presently in their possession, we have found it improper for a prosecutor's office to remain ignorant about certain aspects of a case or to compartmentalize information so that only investigating officers, and not the prosecutors themselves, would be aware of it.[81]

That the legal separation between federal agencies is not dispositive is reflected by those cases that have found *Brady* alignment even across federal-state jurisdictional boundaries. Applying *Giglio v. United States*,[82] the Fifth Circuit has found that where "two governments, state and federal, pooled their investigative energies to a considerable extent," and where "[t]he entire effort was marked by this spirit of cooperation and state officers were important witnesses in the federal prosecution," all of the agencies involved were part of the prosecution team for *Brady* purposes.[83] But a state prosecution that has received no assistance from federal authorities, or vice-versa, ordinarily will not be obliged to search for or produce *Brady* material in the possession of those other authorities, at least where the first set of prosecutors has no contemporaneous knowledge of the contents of the other agency's files. Indeed, this holds true even where subsequent events demonstrate that those files did in fact contain exculpatory material.[84]

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80. *Id.* The court reasoned that

> [t]he government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency.

Id.

81. United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996) (citations omitted).

82. 405 U.S. 150 (1972).

83. United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979). In *Antone*, the Fifth Circuit added that:

> federal and state sovereignty overlap in many respects. Imposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process. Rather than endorse a per se rule, we prefer a case-by-case analysis of the extent of interaction and cooperation between the two governments.

Id. at 570.

84. Even as to evidence within the same government there are limits to what a prosecutor must furnish under the Brady rules. A state prosecutor who does not have knowledge or possession of exculpatory material is not obliged by the Brady decision to find out if the F.B.I. has such material, particularly where the defendant has knowledge that the F.B.I. investigated the case. *See* United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

In *United States v. Osorio*,[85] the First Circuit concluded that "'[t]he government' is not a congery of independent hermetically sealed compartments; and the prosecutor in the courtroom, the United States Attorney's Office in which he works, and the FBI are not separate sovereignties. The prosecution of criminal activity is a joint enterprise among all these aspects of 'the government.'"[86] Moreover, *Osorio* imposed a duty of reasonable inquiry on the prosecution, stating that

> The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge. The criminal responsibility of a corporation can be founded on the collective knowledge of its individual employees and agents. There is no reason why similar principles of institutional responsibility should not be used to analyze the actions of individual government attorneys called upon to represent the government as an institution in matters of court-ordered disclosure obligations.[87]

For purposes of *Brady*, therefore, the prosecution must determine which other agencies are "in a position to have relevant knowledge." Even so, in *United States v. Morris*[88] the Seventh Circuit declined to hold that *Brady* "impos[es] a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue,"[89] and thus rejected defense arguments that the prosecutors must seek out "information in the hands of other government agencies that at various times conducted independent investigations of [defendants' corporation's] affairs."[90] The court concluded that "the prosecution team, which included investigating officers and agents, had no knowledge of the specific documents identified by defendants. The prosecutors therefore had no affirmative duty to discover those documents and to disclose them to defendants."[91]

The specificity and breadth of any defense request for another agency's files also come into play. Where the defense can produce specific reasons to believe that files may contain *Brady* material, the courts more readily may find a duty to search. In *Pennsylvania v. Ritchie*,[92] the Court considered *Brady* in the context of a child abuse case, in which the state had failed to produce records of the Commonwealth's Children and

85. 929 F.2d 753, 758 (1st Cir. 1991).

86. *Id.* at 760.

87. *Id.* at 761 (citation omitted); *see also id.* at 762 (stating that trial counsel for the government has the duty to inquire "among all those in the government in a position to know" of relevant information and to demand "compliance with disclosure responsibilities by all relevant dimensions of the government.").

88. 80 F.3d 1151 (7th Cir. 1996).

89. *Id.* at 1169.

90. *Id.* at 1169-70.

91. *Id.* at 1170.

92. 480 U.S. 39 (1987).

Youth Services. Although that agency's records generally were privileged under state law, the privilege statute authorized disclosure to the courts pursuant to court order.[93] Because the agency's records did bear a logical connection to the subject matter of the trial, the Court found it incumbent upon the state to determine whether those records in fact contained *Brady* material.[94] In remanding the case, the Court noted that "[a]lthough the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of [the defendant's] request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure."[95]

Similarly, in *United States v. Agurs*[96] the Court suggested that the more specific the request, the broader the prosecution's obligation to provide a response.[97] *Agurs* observed that "[t]he test of materiality in a case . . . in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made."[98] Whether there is only a general request for *Brady* material, the prosecutor has "no better notice than if no request is made."[99]

A framework for the application of *Brady* can thus be derived, which requires the prosecution to determine whether any other agencies may have relevant knowledge. One efficient means of making that determination would be to extend the search obligations to those agencies most likely to have information about the specific matter. The duty to search

93. *See id.* at 43-44, 51-52.

94. *See id.* at 61. The Court added, however, that the "defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files." *Id.* at 59. Accordingly, the Court stated that "[u]nless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Id.*

95. *Id.* at 58 n.15; *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) (observing that "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. [Therefore,] the defense might abandon lines of independent investigation, defenses, or trial strategies . . . .").

96. 427 U.S. 97 (1976).

97. *See id.* at 106 ("Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond . . . ."). The Court added that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id*; *see also* United States v. Brooks, 966 F.2d 1500, 1504 (D.C. Cir. 1992) (noting that where "there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information, we think the prosecution should make the inquiry").

98. *Agurs*, 427 U.S. at 106 (footnote omitted).

99. *See id.* at 106-07. "[T]here is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all." *Id.* at 107.

might encompass, for example, a particular agency in circumstances where law enforcement and that organization had conducted complementary efforts, or where the second agency had provided information directly supporting the specific investigation. Clearly, close coordination between the activities of law enforcement and intelligence agencies in a particular matter should subject the intelligence files to *Brady* search.

Accordingly, an Assistant United States Attorney prosecuting an international narcotics case under 21 U.S.C. § 952 (1994) would request a search of intelligence community files if she had reason to believe that the intelligence agencies possessed relevant knowledge about the specific matter. But, as *United States v. Morris* illustrates,[100] the case law should not require such a search otherwise, so the mere fact that an intelligence agency has collected information on international narcotics trafficking in general, without more, should not subject that agency to *Brady* strictures in that case.

In reviewing defense requests to extend discovery to intelligence agencies, the courts must determine whether a valid basis exists, or whether the inquiry is merely a stab in the dark. In the former situation, courts will be more likely to conclude that the prosecution team encompasses the other named government elements. An individual affiliated with an international terrorist organization, for example, may be under indictment for acts of *domestic* terrorism. If he submits a specific request for *Brady* material potentially contained in CIA files, and articulates particular reasons to believe that the CIA has information about him or others who may have committed the crime, or has worked jointly with law enforcement on the matter, a court likely would find that the *Brady* obligations in that instance extend to the CIA. Even before the court's decision, the prosecution may decide to conduct a file search of CIA records in anticipation of that result.

But if the defendant were to submit a more general request, such as a request simply for *any Brady* materials possessed by *any* U.S. Government entity, the courts might well find no obligation to require such a broad set of searches, even from the CIA. In the absence of any connection between a domestic defendant and a foreign terrorist group, and without any indication that law enforcement and intelligence had cooperated on the investigation, it is unlikely such an obligation would be found.

B. The Jencks Act

Although the Jencks Act applies to a more limited set of items than

100. *See supra* text accompanying note 81.

does *Brady*, the analysis for alignment purposes is largely similar. The Act addresses statements "in the possession of the United States," but does not define the scope of that clause. Concurrently, however, the Act "protects Government files from unnecessary and vexatious 'fishing expeditions' by defendants."[101] The Ninth Circuit attempted to simplify interpretation of this issue in *United States v. Durham*,[102] concluding that "for Jencks Act purposes, a statement is in the possession of the United States when it is in the possession of the prosecutor."[103] Nonetheless, this approach still leaves open the question of just when a witness statement will be deemed to be in the prosecutor's possession.

The Ninth Circuit has set forth its rationale in terms of the joint investigation inquiry. In *Durham*, the defendant had challenged the federal prosecutor's failure to produce a state police official's notes from an interview with a key prosecution witness. The federal agent in charge of the investigation had prepared a report indicating that he believed a particular state officer had taken the witness's statement, and the defendant claimed that the Jencks Act had required the federal prosecutors to produce the results of that state officer's witness interview.[104]

Rejecting the defendant's argument, the court found that the state investigator's notes had not been "in the possession of the United States" for Jencks Act purposes. The court accepted the argument that "[a]lthough the agencies were exchanging information," the Jencks Act discovery obligations did not extend to the state government's files because "the two agencies were not undertaking a joint investigation."[105] Rather, although the federal agent's report had mentioned the *existence* of a statement by the witness, that report itself did not constitute interview notes taken by the federal agent. Consequently, the prosecution had been under no duty to "preserve and produce the interview notes taken by [the] state investigator."[106]

Clearly, had the federal agent conducted the witness interview, the government would have had a Jencks Act responsibility to produce the notes. The Ninth Circuit reserved the question whether the Jencks Act obligation would have extended to those state files if the federal and state

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101. United States v. Carter, 613 F.2d 256, 261 (10th Cir. 1979) (citations omitted); *see also* Palermo v. United States, 360 U.S. 343, 354 (1959) (stating that the "Act's major concern is with limiting and regulating defense access to government papers"); United States v. Nickell, 552 F.2d 684, 688 (6th Cir. 1977) (noting that "[t]he purpose of the Jencks Act itself was to restrict a defendant's right to any general exploration of the government's files").

102. 941 F.2d 858 (9th Cir. 1991).

103. *Id.* at 861 (citing United States v. Polizzi, 801 F.2d 1543, 1552 (9th Cir. 1986)).

104. *See id.* at 859.

105. *Id.* at 860.

106. *Id.* at 861.

governments had engaged in a joint investigation.[107] The court did not directly address whether the prosecution team might be more broadly defined for Jencks Act purposes where two agencies are components of the same sovereign, state or federal.

As with *Brady* analysis, the central element of the joint investigation inquiry under the Jencks Act is whether the various agencies—here state and Federal—were involved in a cooperative effort. In *United States v. Moeckly*,[108] the Eighth Circuit concluded that "[t]he Jencks Act does not apply to statements made to state officials when there is no joint investigation or cooperation with federal authorities."[109] Likewise, the Second Circuit has found that even where federal and state agencies are conducting simultaneous investigations into related issues, the absence of a cooperative effort removes any duty to produce Jencks Act materials.[110]

Nonetheless, the Fifth Circuit has observed that for Jencks Act purposes,

> [i]mposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process. Rather than endorse a *per se* rule, we prefer a case-by-base analysis of the extent of interaction and cooperation between the two governments.[111]

In one such case, the court relied upon agency law to provide a functional definition of the prosecution team for Jencks Act purposes. In

107. *See id.* at 861 n.3. The court observed that "the two agencies were not undertaking a joint investigation. Although the agencies were exchanging information, [it was] explained that [the state investigator] was working on a separate investigation to bring charges ... under a ... state statute." *Id.* at 860.

108. 769 F.2d 453 (8th Cir. 1985).

109. United States v. Moeckly, 769 F.2d 453, 463 (8th Cir. 1985).

110. *See* United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975). In *Bermudez*, the court observed:

> At the post-trial hearing on the motion for a new trial the Government produced both its own agent and the New York police detective who had participated in the State's investigation. They both testified that there was no joint federal-state investigation ... although there were partly simultaneous separate investigations going on .... These witnesses and the Assistant United States Attorney also stated that this local police file was never in the possession of the prosecution or the federal investigators in this case. This uncontradicted evidence makes clear that there was no violation of the Jencks Act ....

Id. at 100 n.9.

Another court has asserted that "the Jencks Act does not apply to documents which are not generated in a joint federal-state investigation." United States v. Myerson, 684 F. Supp. 41, 44 (S.D.N.Y. 1988). Thus, where New York City's mayor had appointed a special counsel to investigate allegations of criminal activity by a State Supreme Court Justice, the Jencks Act did not require that the results of that investigation be produced to the defendant, since the special counsel "was conducting a different investigation for a different purpose." *Id.* "Although the Special Counsel choose to cooperate with the prosecutor and decided to give the prosecution access to his files, this does not turn the Special Counsel into a part of the prosecution effort." *Id.*

111. United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979).

United States v. Mannarino,[112] a state officer, who was helping federal officials supervise and interview a paid government informant and witness, had obtained a detailed written narrative of the witness's criminal history. The state officer had destroyed that narrative sometime after the issuance of a court order requiring compliance with the Jencks Act.

Notwithstanding the formal separation between the federal and state sovereignties, the court found that the failure to produce that witness statement violated the Jencks Act because the state officer had been "functionally part of the United States Attorney's prosecutorial team, and . . . his possession of [the] narrative history must be imputed to the government."[113] The state officer had had extensive involvement with the investigation, including the acceptance of tasking from the federal officials conducting the inquiry. Drawing from agency law, the court found the state officer's actions to be "those of the government, for, by imputation, they are the actions of an agent of the prosecution team."[114]

Clearly, the existence of a joint investigation will support application of the Jencks Act to all the agencies involved, and conversely, the absence of a joint effort ordinarily should restrict the Act's application as well. Thus, where a state drug enforcement agency has investigated a particular narcotics dealer while the Drug Enforcement Administration (DEA) separately collected information about the same trafficker, absent a coordinated effort between the DEA and the state agency, or dissemination of that information from the state to the prosecution, federal prosecutors should be under no Jencks Act obligation to produce witness statements in the state's possession. Similarly, had the CIA or the NSA also collected information that incidentally involved that trafficker, absent a showing of dissemination to the DEA or a joint effort between the federal law enforcement and intelligence organizations, the Jencks Act obligations should not extend to those intelligence files.

C. Rule 16

Rule 16 applies to statements, documents, and tangible objects

112. 850 F. Supp. 57 (D. Mass. 1994).

113. *Id.* at 64 (footnote omitted); *see also id.* at 65 (concluding that the state officer's "federally-assigned duties made him part of the prosecution team").

114. *Id.* at 66 (observing that "'[t]he liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal'" (quoting RESTATEMENT (SECOND) OF AGENCY § 272 (1958))); *see also id.* at 72 (concluding that the prosecutor must demand compliance with the discovery obligations from all relevant agencies, and stating that "'[u]ltimately, regardless of whether the prosecutor is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office'" (quoting United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1990)).

"within the possession, custody or control of the government." The pertinent inquiry is thus similar to those under *Brady* and the Jencks Act—in this case, the meaning of the term "government." Rule 16, of course, does not provide an unlimited opportunity for the defendant to obtain documents from any government agency, and where defendants may easily obtain evidence through some other means, Rule 16 does "not entitle the movants to a carte blanche perusal of the content of the Government's documentary file."[115]

Additionally, a Rule 16 motion normally will be denied where a defendant "is not seeking information to which he is entitled under the discovery rules to enable him to defend against the current charge, [but rather] is engaged upon a fishing expedition which, if permitted, would in effect require the government to disgorge material contained in its internal investigatory files."[116] In this context, the question is whether a request for a specific agency's files constitutes such a "fishing expedition."[117]

In *United States v. Trevino*,[118] the defendant, convicted of conspiracy to possess and possession of marijuana, had sought at trial the probation officer's presentence report about another party to the possession charge.[119] Alluding to the importance of the particular relationship between the prosecution and the other government entity at hand, the *Trevino* Court found that Rule 16(a)(1)(C) did not apply to the presentence report, for "neither the prosecutor nor any governmental unit aligned with him in the prosecution can have possession of or access to a presentence report except in limited circumstances."[120]

In *United States v. Gatto*,[121] the Ninth Circuit observed that *Trevino* had "concluded the 'government' meant the prosecution, which is 'in the business of introducing evidence in chief at trial.' In dictum, the [*Trevino*] court included in that term the prosecutor and closely connected investigative agencies."[122] *Gatto* involved a local FBI office that had investigated

115. United States v. Zirpolo, 288 F. Supp. 993, 1020 (D.N.J. 1968), *rev'd on other grounds*, 450 F.2d 424 (1971).

116. United States v. Wilson, 571 F. Supp. 1422, 1424 (S.D.N.Y. 1983).

117. *Id.*

118. 556 F.2d 1265 (5th Cir. 1977).

119. *Id.* at 1269-70.

120. *Id.* at 1272.

121. 763 F.2d 1040 (9th Cir. 1985).

122. *Gatto*, 763 F.2d at 1047 (citations omitted). The *Trevino* court distinguished between the facts before it, in which the evidence in question (a presentence report) was traditionally access-restricted, and a situation in which it was faced with "considering some type of report held by an arm of the government other than the probation officer, an investigative agency, for example . . . ." 556 F.2d at 1272. The court asserted that in the latter situation:

> different questions would be presented, those concerning the prosecutor's duty to disclose material not technically within his possession but to which he has ready ac-

a company for various mail and securities fraud violations. A state agency similarly had investigated the company, and possessed certain relevant documents which it had located during a search of the company's trash. The FBI did not learn of the existence of these documents until shortly before the trial, well after the defendant had made the Rule 16 discovery requests.[123]

The issue before the *Gatto* court was "whether rule 16(a)(1)(C) ever requires the federal government to disclose and produce documents that are in the actual possession, custody or control of state officials, the relevance of which the federal government negligently or recklessly fails to appreciate."[124] Distinguishing between Rule 16(a)(1)(A) and Rule 16(a)(1)(C), the court considered whether the prosecution had had actual or constructive possession of the documents. The court found that the due diligence standard meant that constructive possession would suffice for purposes of Rule 16(a)(1)(A),[125] but that actual possession by the federal government would be required to satisfy Rule 16(a)(1)(C).[126]

The *Gatto* court found that the issue of constructive possession for purposes of Rule 16(a)(1)(A) turned on whether the prosecutor, with the exercise of due diligence, *should* have been aware of the existence of documents held by another federal agency.[127] Although this does not im-

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> cess.... Certainly the prosecutor would not be allowed to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial; such evidence is plainly within his Rule 16 "control."

Id. (citations omitted).

123. *See Gatto*, 763 F.2d at 1042-43.

124. *Id.* at 1047.

125. *See id.* at 1047-48. The court further stated:

> Under rule 16(a)(1)(A)... we have recognized that the prosecutor's actual possession is not necessary in all cases. For example... we [have] held that the rule imposed a duty on the prosecutor to produce copies of a defendant's statements that he did not actually possess if the FBI possessed them and the prosecutor could have learned about them by exercising due diligence.

Id. at 1047 (citation omitted).

126. The court observed that

> a literal reading of the entire rule requires us to conclude that Congress intended no such constructive possession extension. Moreover, even if such language were found in rule 16(a)(1)(C), it would only create a due diligence requirement over documents in the possession, custody, or control of some federal agency. We would still be required to find some special reason to justify extending the requirement to documents in the possession, custody, or control of state authorities.
>
> Because we find no due diligence language in rule 16(a)(1)(C) at all, nor any special reason to deviate from its plain language, we conclude that it triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control.

Id. at 1048.

127. "[T]he due diligence requirement establishing constructive possession relates solely to the prosecutor and whether he should have been aware of a statement in the possession of another *federal* agency." *Id.*

ply an affirmative duty on the part of the prosecutor to seek out documents that may or may not exist in *any* other agency, it does suggest that where a prosecutor has an objective reason to believe that another federal agency may possess materials that would be within the scope of Rule 16(a)(1)(A), a search should be undertaken.

Even under Rule 16(a)(1)(C), however, courts may apply a broader standard than simply actual possession by the prosecutor. In *United States v. Bryan*,[128] the Ninth Circuit stated:

> the government's obligation under Rule 16(a)(1)(C) should turn on the extent to which the prosecutor has knowledge of and access to the documents sought by the defendant in each case. The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant.[129]

Noting the unrealistic burden that would be placed upon the government if it were required to search every U.S. government file potentially containing Rule 16(a)(1)(C) material, the *Bryan* court confirmed the importance of the existence of a joint effort.[130] The court also conditioned the scope of the government's duty on the prosecution's access to, and knowledge of, the relevant documents.

The Tenth Circuit also has accorded the Rule 16 requirement a fairly broad interpretation. In *United States v. Jensen*,[131] the court wrote:

> [I]t is argued that the government attorney had met his obligation by producing everything he intended to use at trial and everything within his possession. But the government's duty to produce is broader than this. Rule 16 requires the prosecution to produce all of defendant's written or recorded statements that are relevant and all other documents that are material.... There is some duty of inter-agency discovery, which normally can be discharged "by searching, or requesting that search be made, of the files of administrative or police investigations of the defendant, in addition to his own files."[132]

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128. 868 F.2d 1032 (9th Cir. 1989).

129. *Bryan*, 868 F.2d at 1036 (citation omitted); United States v. Robertson, 634 F. Supp. 1020, 1025 (E.D. Cal. 1986) ("[T]he scope of the term 'government' for purposes of rule 16(a)(1)(C) turns on considerations of the prosecution's access to the relevant evidence."); *see also* United States v. James, 495 F.2d 434, 436 (5th Cir. 1974) (discovery cannot be avoided "by pleading ignorance of discoverable material which is in the possession of another governmental agency; especially ... when both are supposedly working together to apprehend and convict those engaged in the distribution of illegal drugs").

130. *See Bryan*, 868 F.2d at 1036 (Rule 16(a)(1)(C) does not require a federal prosecutor to "comb the files of every federal agency which might have documents regarding the defendant.... However, we do not believe that adopting a mechanical definition of 'government' that would deny to the defendant documents accessible to the prosecution would reflect a fair balance of the competing concerns....").

131. 608 F.2d 1349, 1357 (10th Cir. 19709).

132. *Id.* at 1357 (quoting 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶16.05 (2d ed. 1979)). The court did not directly decide, however, "the extent of the government's duty to provide information held by its various agencies." *Id.*

Nonetheless, on the specific facts the court declined to decide the scope of the government's duty to provide documents possessed by the Department of Justice, the Securities Exchange Commission, and the FBI, for the failure to do so had constituted harmless error.[133]

Accordingly, the question whether a joint investigation has occurred remains relevant for Rule 16 analysis. Other courts have echoed the *Jensen* rationale to find that the "duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies.'"[134] Considering whether documents from the local District Attorney's office could be considered in the "possession, custody or control" of the United States Attorney, the court in *United States v. Guerrerio*[135] found it necessary to review the relationship between the two offices,[136] and that "[t]he existence of a close relationship between two prosecutor's offices is relevant to considerations of discovery responsibilities."[137] The *Guerrerio* court concluded that, in the absence of a joint investigation, federal prosecutors had not had "possession, custody or control" of the District Attorney's files.[138]

In contrast, where the United States closely cooperated with Canadian officials in an investigation, "even absent actual possession of the material sought, the close relationship between the two prosecutors' offices did place an added discovery obligation on the U.S. government."[139] As another court put it, the question is "not whether the United States Attorney's Office physically possesses the discovery material," but rather "the extent to which there was a 'joint investigation' with another agency."[140]

The analysis for purposes of Rules 16(a)(1)(A) and (C), therefore, appears similar to that under *Brady* and the Jencks Act, again turning primarily on whether a joint investigation was undertaken, whether information produced by another agency was provided to the prosecution, or whether the prosecutor has objective reason to believe that another

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133. *Id.*

134. United States v. Caldwell, 543 F.2d 1333, 1352 n.91 (D.C. Cir. 1974) (quoting United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1941)).

135. 670 F. Supp. 1215 (S.D.N.Y. 1987).

136. *See id.* at 1218.

137. *Id.* at 1219; *see also* United States v. Upton, 856 F. Supp. 727, 749 (E.D.N.Y. 1994) ("The question . . . whether agencies other than the United States Attorney's Office should be considered part of the 'government' for Rule 16 purposes [depends on] the level of involvement between the United States Attorney's Office and the other agencies.").

138. *Guerrerio*, 670 F. Supp. at 1219. The court found that the offices had conducted "separate and independent investigations," and that the federal inquiry had continued after the District Attorney's investigation had stopped. *Id.* at 1218.

139. *Id.* at 1219 n.3 (citing United States v. Paternina-Vergara, 749 F.2d 993 (2d Cir. 1984)).

140. *Upton*, 856 F. Supp. at 750.

agency may possess responsive material.[141] And, as with discovery pursuant to *Brady* and the Jencks Act, the more direct the participation of an intelligence agency in investigating a particular defendant or related matters, the greater the likelihood that Rule 16 will be found to apply.

D. *United States v. McVeigh*

When a defendant asserts that intelligence agencies may possess discoverable material, all of these discovery issues may arise. In the prosecution of Timothy McVeigh for the Oklahoma City bombing, for example, the defense made broad discovery requests in an attempt to establish that foreign terrorists rather than their client had committed the crime.[142]

Defense counsel argued that the Department of Justice, CIA, NSA, and DIA had mounted an international search for the bombers, but had terminated those efforts prematurely following McVeigh's arrest. The defense added that the intelligence agencies possessed information about international terrorist groups that could indicate someone other than McVeigh had carried out the Oklahoma City attack, and that accordingly, the government must search the files of the CIA, NSA, and DIA for information producible under *Brady*, Jencks, or Rule 16.[143]

Had the CIA, DIA, NSA, or other federal intelligence agencies participated in the search for McVeigh, provided information about his activities to the prosecution, or jointly investigated the tragedy with U.S. law enforcement, the defense clearly would have had grounds to seek discovery from those entities. In contrast, the defendant's request sought material peripheral to the investigation of his own activities—rather he was searching for information to suggest that some other person had committed the crime, absent any specific reason to believe that such material would be found.[144]

At the pre-trial hearing, the government reported "that the intelligence agencies were not 'aligned' with the criminal investigation,"[145] reflecting the normal rule that general requests for material do not require the prosecution to search the files of unrelated agencies. But even so, on

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141. Indeed, in comparing Rule 16(a)(1)(C) with *Brady*, the *Bryan* court observed that

> [a]s with Rule 16(a)(1)(C)'s definition of government, we see no reason why the prosecutor's obligation under *Brady* should stop at the border of the district. If a federal prosecutor has knowledge of and access to exculpatory information as defined in *Brady* and its progeny that is outside the district, then the prosecutor must disclose it to the defense.

United States v. Bryan, 868 F.2d 1032, 1037 (9th Cir. 1989).

142. *See* United States v. McVeigh, 923 F. Supp. 1310, 1312 (D. Colo. 1996).

143. *See id.*

144. *See, e.g., McVeigh Attorney Accuses Government of Stalling On Information*, DALLAS MORNING NEWS, Aug. 29, 1996, at 17A.

145. *McVeigh*, 923 F. Supp. at 1315.

the specific facts of that case, the government added, and the court concluded, that the lack of alignment nonetheless did "not limit the duty to inquire of such agencies for information which may be exculpatory or impeaching to the preparation of the defense."[146] The court directed "the prosecutors [to] respond to the defendants' requests for information from a broad perspective of the government *as a whole*."[147]

During questioning by the court, the prosecution reported that it had asked the intelligence agencies to conduct "a very broad search.... [T]hey have produced more documents than would really qualify... being careful because of the nature of this case and our request to err on the side of caution producing more documents than we think would be necessary to turn over."[148] The court observed that

> recognizing the duty to disclose exculpatory and impeaching information established in *Brady v. Maryland*... as well as the discovery rights of the defendants, the prosecutors... have requested from the CIA, the DIA, and the NSA 'all material they had under *Brady*, Rule 16, and [the] Jencks Act and any information they had which would tend to show that these defendants did not participate in the crime or that others carried out the crime.'[149]

In *McVeigh*, the government did not argue that the lack of alignment should be dispositive. Normally, of course, it should not be incumbent upon the prosecution to search the records of unrelated entities where there has been no showing that they participated in a joint endeavor with law enforcement, provided information of value to the prosecution, or for some other reason may be expected to hold responsive material in their files. But in *McVeigh*, with high public interest in the proceedings and the need to ensure both the substance and perception of a fair trial under extraordinary circumstances, both the government and the judge interpreted the discovery obligations in the widest possible fashion. Rather than establishing a new rule for intelligence information, therefore, the case may be read more narrowly, as presenting a unique set of circumstances in which the court and the government afforded the defendant expanded rights by conducting extensive searches of non-aligned federal agencies.

IV. Defining the Team: Alignment and the Discovery of Intelligence Agency Information

How, therefore, to resolve the issues of search and discovery of intelligence agency information?

146. *Id.*
147. *Id.* (emphasis added).
148. *Id.* at 1313.
149. *Id.* (citation omitted).

At the outset, it should be observed that section 814 of the Intelligence Authorization Act for Fiscal Year 1997[150] enacted new section 105A of the National Security Act, which provides in relevant part:

> elements of the intelligence community may, upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the information collected for purposes of a law enforcement investigation or counterintelligence investigation.[151]

Accordingly, and despite the National Security Act's law enforcement proviso applicable to the CIA,[152] section 105A confers upon members of the intelligence community a limited investigative authority to support law enforcement even where there may be no independent intelligence interest.

No court has yet considered section 105A in the context of discovery, and neither the Senate nor the Conference Report addresses that issue.[153] But where an intelligence agency has accepted tasking from law enforcement pursuant to section 105A, a court may well conclude that discovery in a prosecution directly involving the subject of that tasking should extend to that agency. And even where a subsequent prosecution involves a separate party, alignment may be found if the subject matter of the prosecution bears a close relationship, or is identical, to the information collected by the intelligence agency in response to the law enforcement request.

But what about discovery where there has been no section 105A tasking, nor any dissemination of intelligence of general interest that subsequently becomes relevant to a prosecution? When, and to what extent, absent some specific indication that CIA or NSA records may be discoverable, must a prosecutor request a search of those agencies' records? Current procedures under a separate provision of Title 18 suggest an answer.

A. *Section 3504*

Section 3504 of Title 18 provides that in a criminal prosecution, the

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150. 50 U.S.C.A. § 403-5a (West Supp. 1997).

151. *Id.* § 403-5a(a). With respect to components of the Department of Defense, section 105A(b)(1) provides that the authority extends only to the NSA, DIA, NRO, and the National Imagery and Mapping Agency. *See id.* § 403-5a(b)(1).
The term "United States person" includes U.S. citizens, permanent resident aliens, unincorporated associations substantially composed of U.S. citizens or permanent resident aliens, and U.S. corporations that are not directed and controlled by a foreign government or governments. *See id.* § 403-3(c).

152. *See supra* text accompanying note 12.

153. The provision originated in S. 1718, the Senate version of the legislation.

government must "affirm or deny" whether it has conducted unlawful electronic surveillance "upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act."[154] As with other avenues of discovery, a request under section 3504 may require a search of intelligence community files for responsive material.

As with discovery requests under *Brady*, the more specific the section 3504 request, the greater the government's obligation to respond. In *United States v. Moeller*,[155] the district court stated that "there is considerable merit in the view . . . that 'a general claim [of wire-tapping] requires only a response appropriate to such a claim.'"[156] By this, the court wrote, it meant that:

> [a]n adequately supported claim of this sort, at least raising a suspicion that the evidence came from wiretapping, may well require the government to "affirm or deny" on the basis of a comprehensive inquiry of agencies with surveillance capability. An adequate claim that an individual has been the subject of governmental curiosity may suffice to require an inquiry of agencies with intelligence gathering responsibilities. However, a naked allegation that wiretapping has occurred may be sufficient to trigger §3504's obligation to make some response, but not necessarily an obligation to check the files of government agencies having no apparent connection with a case. To such a claim, the sworn denial by the prosecutor and the investigating agencies should suffice.[157]

Thus, the *Moeller* court was satisfied with the government's submission of affidavits from various federal and state entities, including local FBI agents in numerous cities, as well as the police charged with investigating the arson in question, stating that no wiretapping had occurred, and similarly that all of the government's "evidence had been obtained from 'direct' sources."[158] The court denied the defendant's assertion that other government agencies, such as the CIA, should have been searched.[159]

The cases construing section 3504 also conform to those analyzing the government's obligations under both the Jencks Act and Rule 16, whereby neither provision permits the unfettered search of government files. In this respect, the Second Circuit has observed that the ability to discover evidence of electronic surveillance under section 3504 does not constitute an invitation to conduct an indiscriminate search:

> Once a substantial claim is made under the statute, those government agen-

154. 18 U.S.C. § 3504 (1994).
155. 402 F. Supp. 49 (D. Conn. 1975).
156. *Id.* at 52 (quoting United States v. See, 505 F.2d 845, 856 (9th Cir. 1974)).
157. *Id.*
158. *Id.* at 51.
159. *See id.* at 51-53.

> cies closest to the investigation must scrupulously search their files and submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked. The statute was not intended, however, to transform an investigation by the government into an investigation of the government where claims of illegality lack substantial support.... Unsupported suspicion and patently frivolous assertions of government misconduct do not constitute a 'claim' under §3504 sufficient to trigger the government's obligation to disrupt grand jury proceedings and check thoroughly the applicable agency records.[160]

A defendant cannot obligate the prosecution to search every agency that conceivably may have been involved, simply by making a general inquiry. Rather, the defendant must submit a request that is neither overbroad nor simply a "fishing expedition." To satisfy the threshold, the request must be carefully crafted, articulating plausible reasons to believe that the specific agency may have mounted such surveillance.

B. *Brady, Jencks, and Rule 16*

The approach under section 3504 comports well with search and discovery under *Brady*, Jencks, and Rule 16. In each instance, the prosecution team may consist solely of the U.S. Attorney and the law enforcement agency that investigated the matter, or also may comprise a number of additional agencies. And, as with the approach under section 3504, elements such as knowledge, access, and relationship will determine the scope of discovery obligations under *Brady*, the Jencks Act, and Rule 16. The duty to search under each of those authorities will not be limited to the prosecutor's office; rather, the prosecution must seek and produce responsive material from any other agency with whom there has been a joint investigation or other close contact on the particular matter, or which the prosecution has objective reason to believe may possess such material.

But without a strong showing by a defendant that discovery truly is warranted, prosecution searches and defendants' discovery should not normally be required of other entities, whether or not they are intelligence agencies, that neither were involved in the specific case nor provided information directly supporting the investigation.[161] In this regard,

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160. *In re* Millow, 529 F.2d 770, 774-75 (2d Cir. 1976) (internal citations omitted).

161. The cases requiring that prosecutors turn over exculpatory evidence can be read as applying broadly or narrowly. Read narrowly, the obligation applies to information in the hands of the prosecutors themselves and to the investigators who developed the case. Read broadly, the obligation covers any information in any file. In my view, the better reading of the cases is that the government ordinarily must search only those records available to the prosecutor and those aligned with the prosecutor. On that reading, intelligence records would be subject to discovery whenever the two communities engaged in a coordinated investigation—although probably only the information gathered in that coordinated effort should be open to discovery. Stewart A. Baker, *Should Spies be Cops?*, 97 FOREIGN POL'Y 49-50 (Winter 1994-1995). Baker

the United States Attorneys' Manual recognizes that the intelligence and law enforcement communities may and should cooperate in appropriate instances, while still preserving the distinction between their two roles. The Manual's approach is consistent with that of section 3504, as well as judicial interpretations of the alignment rules of *Brady*, Jencks, and Rule 16.

The Manual describes the method by which the Department of Justice reviews a prosecutor's request for the search of intelligence agency records, and notes that such searches may be requested for various reasons. First are searches that are not necessarily required by law, but conducted either to assist in deciding whether and how to prosecute, or to provide the prosecution with foreknowledge of intelligence-related issues that may arise following an indictment. And, of course, there are searches undertaken pursuant to the requirements of *Brady*, the Jencks Act, and Rule 16. Discussing these various avenues, the Manual provides that a request will be granted:

> *only* when there exist objective articulable facts justifying the conclusion that
>
> (1) within specific files, or category of files, there will likely be information of which the prudent prosecutor should be aware in deciding whether, or against whom, or for what offenses to seek an indictment from the grand jury;
>
> (2) there are intelligence-related issues likely to arise post-indictment that the prosecutor should address preemptively, and that searching [intelligence community] files is likely to produce information helpful to resolving those issues; or
>
> (3) there are documents or information within the intelligence community that fall reasonably within the scope of the prosecutor's affirmative discovery obligations to the defendant, as that scope has been defined by the federal courts.[162]

Reviewing the third category, that of searches required by *Brady*, the Jencks Act, or Rule 16, the Manual states that an intelligence agency will have actively participated in a criminal investigation or prosecution, so that it has become aligned with the prosecution team and subject to discovery, when it "has served in a capacity that exceeds the role of providing mere tips or leads based on information generated independently of the criminal case."[163] As an example, the Manual notes that "alignment

adds that "[i]f there is no coordinated investigation but the defendant believes that his other activities are likely to have been of interest to intelligence agencies, no searches should be ordered—at least in the absence of strong indications that particular intelligence records will produce exculpatory evidence." *Id.* at 50.

162. UNITED STATES DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL, Vol. 9A Criminal Division, pt. 3A tit. 9, ch. 90.210(B) (1997).

163. *Id.* ch. 90.210(D)(1).

likely exists where an intelligence agency has provided information to a law enforcement agency or to the prosecution, which information serves independently as a factual element in support of a search warrant, arrest warrant, indictment, etc."[164] Citing *United States v. Trevino*,[165] however, the Manual cautions that "a government agency does not necessarily fall into alignment with the prosecutor's office, thus requiring a search of its files, simply because it is an agency of the same government and arguably could have exculpatory evidence regarding the defendant."[166]

But even without any active participation in the investigation by the intelligence community, and even absent any specific request by the defendant, the prosecution still may be required to search intelligence files. Discussing *Brady*, for example, the Manual requires a search of intelligence records when the prosecutor has "direct knowledge of potential Brady and/or other discovery material in the possession of the intelligence community" or, even without any such knowledge, there "exists any objective indication suggesting that the intelligence community possesses evidence that meets the Brady case law standard of materiality."[167] Thus, and again following the case law, the prosecutor may not turn a blind eye to his or her actual knowledge even if it is gleaned from collateral sources, such as previous work on a separate investigation. Accordingly, certain intelligence records may be subject to search even where the agency concerned technically may not have constituted part of the prosecution team.

The Manual also addresses production under the Jencks Act or Rule 16, again founding the inquiry largely on the level of knowledge attributed to the prosecution. With respect to those provisions, the Manual observes that "[i]n the absence of actual or implied foreknowledge . . . the prosecutor would have no obligation to search for such materials in I[ntelligence] C[ommunity] files over that which would exist in other criminal cases not involving IC agencies and/or classified information."[168]

As a matter of prudence, however, the Manual states that the prosecutor still must initiate contact with the intelligence community if he or she "whether pre- or post-indictment, acquires information that suggests the defendant may have had, or as part of his defense at trial will assert that he has had, contacts with the intelligence community or with an in-

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164. *Id.*

165. 556 F.2d 1265 (5th Cir. 1977). For a discussion of *Trevino*, see *supra* text accompanying notes 118-120.

166. UNITED STATES DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL, Vol. 9A Criminal Division, pt. 3A tit. 9, ch. 90.210(D)(1) (1997).

167. *Id.* ch. 90.210(D)(2)(a).

168. *Id.* ch. 90.210(D)(2)(b).

telligence component of the law enforcement community."[169] This requirement recognizes that even where discovery may not appear mandated by the law, intelligence-related issues still may arise and the wise prosecutor must anticipate them if possible.[170]

V. CONCLUSION

How, then, to minimize the burdens upon prosecutors and intelligence agencies, while preserving the discovery rights of defendants? Careful planning in specific situations may permit steps to avoid casting an intelligence agency as part of the prosecution team, while maintaining both the ability of the government to move forward and the discovery equities of potential defendants.

For example, the CIA may work abroad with a narcotics informant; should that informant have knowledge of a narcotics trafficking violation, the Agency may arrange a meeting between the individual and a representative of the Drug Enforcement Administration. As a law enforcement officer, the DEA agent then may interview the informant, prepare the necessary report, and obtain admissible evidence, and at trial, the agent will be available to establish the chain of custody. Accordingly, in such an situation no discovery may be required of CIA records, for all items relevant to the prosecution will be possessed by the DEA.

Similarly, an intelligence agency may provide basic lead information to law enforcement. In such instances, the law enforcement agency may analyze that information, decide whether an investigation is warranted, and independently develop thé necessary evidence to support a prosecution. Here as well, no obligation to search normally should extend to the intelligence agency, where it neither participated in a joint investigation nor provided information for use in the prosecution, and absent any objective indication that it may possess some other form of responsive material.

At one end of the spectrum will be cases in which domestic defendants, with no known connection to overseas activities or intelligence operations, are indicted on domestic charges and seek wide-ranging discovery from U.S. intelligence agencies. In such situations, prosecutors

169. *Id.* ch. 90.210(D)(3).

170. Moreover, even where there is no "known duty to the defendant [nor]... a known nexus to national security matters," a prosecutor may wish to request a search of intelligence community records where a pending prosecution may concern foreign officials, violations of U.S. export controls or trade sanctions, international terrorism or narcotics trafficking, or persons presently or formerly associated with an intelligence agency. *Id.* ch. 90.210(D)(4). Described by the Manual as "prudential," when used properly this type of search can assist the prosecutor in anticipating related issues that may arise, and in some cases lead to the acquisition of evidence from another source.

normally should find no requirement to search intelligence agency files, and should oppose defense requests to extend discovery to those agencies.

At the other end will be the relatively few instances in which the CIA, NSA, or DIA provides a law enforcement agency with specific information about criminal defendants, their organizations, or the underlying offenses, with that information employed directly in a prosecution. In such cases, discovery normally would extend to the intelligence agency, so that the appropriate records searches should be conducted. Additionally, in some instances a defendant may claim that his or her actions had been authorized as part of a secret intelligence operation.[171] Although such claims rarely are upheld, in such circumstances a search request normally would be appropriate in order to marshal the facts.

But beyond those extremes, there may be instances in which the boundaries are less clearly delineated, such as where an intelligence agency provides law enforcement with information that relates to a prosecution only generally, if at all. For example, the intelligence community routinely collects information about the proliferation of weapons of mass destruction, and disseminates that information as appropriate to federal law enforcement agencies and other recipients.

As a result, discovery in the course of certain U.S. prosecutions of defendants who have been charged with proliferation offenses may extend to intelligence agency records as well. In contrast, however, where there is no reason to believe that a particular intelligence agency has any information relating to a specific defendant or the subject matter of a particular prosecution, then the discovery process normally should not extend to its records. And prosecutions of wholly domestic crimes ordinarily should not engender searches, even where intelligence agencies may collect information abroad about topics that are generally comparable in nature, but still unrelated to the prosecution at hand.

Of course, where a prosecutor has objective reason to believe that an intelligence agency may possess responsive material, discovery would be appropriate. And in cases of exceptional national importance such as *United States v. McVeigh*,[172] attorneys and judges still may decide to search beyond the parameters that may be strictly required.[173] But in the regular course of events, the normal search and discovery procedures should be applied to intelligence records as well. The significant resource

171. Such assertions normally involve attempts to invoke the public authority defense. *See* FED. R. CRIM. P. 12.3.

172. 923 F. Supp. 1310 (D. Colo. 1996).

173. Prosecutors also may request prudential searches where cases collaterally may involve issues of classified information or the national security. *See supra* note 170.

demands that otherwise would be placed upon prosecutors and intelligence agencies, as well as the need to avoid unnecessary risks to intelligence sources and methods, together counsel such a course.

Where law enforcement and an intelligence agency have become aligned in a specific prosecution, or where the prosecutor has reason to believe that an intelligence agency possesses responsive material, then the constitutional and statutory obligations reach those agencies as well. In such cases, any associated resource burdens or litigation risks must yield to the preservation and defense of the Bill of Rights.

But both U.S. Attorneys and trial judges should ensure that the discovery of intelligence information is neither unduly circumscribed nor overly extended. The assertion, or even the existence, of some remote connection between the intelligence records and a pending prosecution should not stretch normal discovery procedures beyond their customary bounds. Rather, applied with deliberation, the standard scope of discovery should continue to protect defendants' rights even where intelligence agency information may be involved.