Note

Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for *Brady* Disclosure

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Perhaps never before had a single commodity broker caused such a stir. In March of 1993, the Commodity Futures Trading Commission (CFTC) accused Lawrence J. Bilello, a registered floor broker on the Commodity Exchange, Inc., of engaging in fraudulent trading.[1] From such humble and obscure facts grew a monster of a case, spanning over four and a half years of prehearing posturing.[2] Throughout this span, according to the court, the CFTC Division of Enforcement brought three "screeching halt[s]" to the proceedings through dilatory motions or conduct,[3] including a failure to comply with a court rule to disclose exculpatory information.[4] At a conference in advance of the proceeding, counsel for the Division went so far as to tell the court that it would have to "assume" that substantial records suspected by the court as being exculpatory did not require disclosure, essentially forcing the court to trust the body prosecuting the claim to decide whether to disclose the evidence.[5]

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1. Press Release, Commodity Futures Trading Comm'n, CFTC Accepts Settlement Offer of Lawrence J. Bilello (June 30, 1998), *available at* http://www.cftc.gov/opa/enf98/opa4161-98.htm.
2. *See* Bilello, No. 93-5, 1997 WL 693557, at *2 (C.F.T.C. Oct. 1, 1997).
3. *Id.*
4. *See id.* at *3–4.
5. *See id.* at *3 n.17.

A court order eventually brought the release of the exculpatory information for Mr. Bilello,[6] but this turn of events was not a reflection of his strong case.[7] Instead, as the court order notes, the CFTC's adoption of the *Brady* rule required that the Division of Enforcement release this information.[8] This rule, derived from the landmark decision in *Brady v. Maryland*,[9] states that prosecutors who fail to disclose evidence "material to guilt or punishment" violate the due process rights of defendants.[10] By adopting the *Brady* rule, the CFTC is relatively unique among federal agencies in its liberal discovery procedure,[11] a fact that casts a glaring light upon the procedural due process protections of other federal administrative agencies. The generous discovery authority in the Federal Rules of Civil Procedure (FRCP) does not bind these agencies.[12] Federal agencies are not required to provide discovery in adjudications—whether formal or informal—unless otherwise provided in their rules of procedure.[13] Yet federal administrative agencies, whether in preparation for litigation or not, gather large amounts of information as regulators—and all of it comes from potential defendants.[14] This asymmetry of information poses a

6. *Id.* at *11–12.

7. Ironically, the information did not exonerate him. Press Release, Commodity Futures Trading Comm'n, *supra* note 1.

8. *See Bilello*, 1997 WL 693557, at *3; First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *8 (C.F.T.C. July 2, 1980).

9. *Bilello*, 1997 WL 693557, at *4.

10. Brady v. Maryland, 373 U.S. 83, 87 (1963). The Brady Court only applied the "disclosure" requirement to criminal proceedings in Article III courts. *Id.*

11. At least five administrative agencies have adopted the *Brady* rule. These include the CFTC; the Securities and Exchange Commission (SEC) (17 C.F.R. § 201.230(b)(2) (2009)); the Federal Maritime Commission (Exclusive Tug Franchises, No. 01-06, 2001 WL 1085431, at *5–6 (F.M.C. Aug. 14, 2001)); the Federal Deposit Insurance Corporation (First Guar. Bank, No. FDIC-95-65e, 1997 WL 33774615, at *2 (F.D.I.C. Apr. 7, 1997)); and, most recently, the Federal Energy Regulatory Commission (FERC) (Policy Statement on Disclosure of Exculpatory Materials, 129 FERC ¶ 61,248 (2009), *available at* http://www.ferc.gov/whats-new/comm-meet/2009/121709/m-2.pdf).

12. *See* Katzson Bros. v. EPA, 839 F.2d 1396, 1399 (10th Cir. 1988); Hess & Clark v. FDA, 495 F.2d 975, 984 (D.C. Cir. 1974) ("Of course, administrative agencies are not bound by the same details of procedure as the courts.").

13. Kenrich Petrochemicals, Inc. v. NLRB, 893 F.2d 1468, 1484 (3d Cir. 1990); MODEL ADJUDICATION RULES § 230 cmt. 1 (1994).

14. *Bilello* is an example of an agency request for documents in preparation for litigation. The Division requested information on "[t]he authenticity and meaning of thousands of business records and notations relating to the 83 pairs of trades in issue," resulting in "over 4,300 requests." *Bilello*, 1997 WL

problem of fundamental fairness for defendants. Within the thousands of pages of data reported to these administrative bodies, it becomes difficult for even the most sophisticated defendant to find the information sufficient for exoneration.[15] While defendants seek this exonerating information, the prosecutor's wealth of investigative resources, her head start in piecing together a case, and her ability to compel testimony can all place the defendant at a distinct disadvantage.[16] Finally, if history is any indication, the responsibilities of administrative agencies will continue to grow[17] and federal agencies will continue to erode formal procedural due process protections for defendants,[18] thereby exacerbating this problem.

In light of this situation, and these aggravating factors, this Note suggests that administrative agencies need to hold agency enforcement authorities to a constitutionally based[19] *Brady*-disclosure standard for their formal adjudicatory proceedings.[20] Part I examines the underlying justifications of dis-

693557, at *2 n.1 (citing Bilello, No. 93-5, 1994 WL 97075 (C.F.T.C. Mar. 25, 1994) (order granting review)).

15. Indeed, these agencies collect so much data that they may not be able to keep track of it all. *See, e.g.*, Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 ENVTL. L. 647, 677 (2009) (referencing the SEC in particular).

16. Wardius v. Oregon, 412 U.S. 470, 475–76 & n.9 (1973) (citing Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018–19 (1972)). The Court further stated that a diligent prosecutor "will have removed much of the evidence from the field" before the defendant is informed of the charges against him as a justification for implementing the *Brady* rule. *See id.* at 476 n.9.

17. *See* Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 298 (2001) ("In fact, agency creation and expansion of existing agency authority have tended to occur during periods of national crisis or favorable political conditions, when progressive presidents enjoyed majorities in both houses of Congress.").

18. Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 496–97, 500–02 (2003) (noting the evolution of administrative agencies from formal to informal adjudication, and the concomitant loss of procedural due process rights).

19. *See Bilello*, 1997 WL 693557, at *12 ("*Brady* disclosure rests on an independent basis from discovery, constitutional due process. As a result, it does not automatically follow that limits on discovery also limit *Brady* disclosure. In addition, *Brady* is a constitutional right and, as such, it cannot be limited as easily as discovery.").

20. This Note advocates specifically for applying the *Brady* rule to formal adjudications because judicial, trial-like hearings fall within their scope, while nontrial hearings, such as licensing and waiver proceedings, generally fall outside their scope and into the category of informal adjudications. *See* Levy & Shapiro, *supra* note 18, at 499.

closure in the *Brady* ruling, provides a survey of administrative bodies' dispositions towards disclosure, and describes the discovery procedures available in these bodies relative to the level of protection required in *Brady*. Part II explains why the *Brady* rule should apply to administrative agencies, and it synthesizes the rationale of agencies that have not adopted the rule and the problems that ensue from a lack of disclosure. Part III elaborates upon the need for the *Brady* rule in federal administrative proceedings, defends it from potential criticism, and suggests that the Supreme Court should require the *Brady* rule's application to all federal agency formal adjudications. This Note concludes by pointing out that while concepts of equal treatment of private defendants against government prosecution provide the impetus for agency adoption of this rule, the most compelling reason to adopt the *Brady* rule is to ensure public confidence in the instruments of government.

I. THE EVOLUTION OF THE *BRADY* RULE AND THE RESPONSE OF FEDERAL ADMINISTRATIVE AGENCIES

Over the span of three decades, from its decision in *Brady* until its holding in *Kyles v. Whitley*,[21] the U.S. Supreme Court refined the concept of prosecutorial disclosure.[22] While federal courts applied *Brady* and its successors—broadening the bounds of disclosure in the process[23]—administrative agencies conducted a concurrent debate as each agency received *Brady* challenges to its rules of discovery. This Part begins with a profile of *Brady* and subsequent decisions, followed by an analysis of selected administrative agencies, their discovery rules, and why they chose to adopt (or not to adopt) the *Brady* rule.

A. THE IMPLICATIONS OF DISCLOSURE: *BRADY* AND ITS PROGENY IN THE COURTS

Brady arose as a petition by the State from the postconviction relief granted to Mr. Brady by the Maryland Court of Appeals, which found that suppression of evidence by the prosecution was a violation of the Due Process Clause of the

21. 514 U.S. 419, 432–34 (1995).

22. *See* Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose* Brady *Evidence Favorable to Accused*, 158 A.L.R. FED. 401, 401 (1999).

23. *Kyles*, 514 U.S. at 432.

Fourteenth Amendment.[24] Affirming this finding, the Supreme Court hearkened to an inscription on the façade of the Department of Justice Building: "The United States wins its point whenever justice is done its citizens in the courts."[25] According to the Court, in the interest of justice, prosecutorial suppression of exculpatory evidence "violates due process . . . irrespective of the good faith or bad faith of the prosecution."[26] The Court, however, limited the due process violation to encompass only nondisclosure of "material" evidence.[27] Most important, the Court never explicitly stated that the *Brady* rule applies to civil claims,[28] an omission used by subsequent courts to deny *Brady*'s application to civil proceedings.[29]

In *United States v. Agurs*,[30] the first Supreme Court case to consider the details of applying the *Brady* rule, the Court addressed the relative ambiguity of the materiality standard and the types of situations in which courts could apply *Brady*.[31] According to the Court, *Brady* applies in three situations. First, prosecutors must divulge material evidence indicating that a witness perjured his or her testimony.[32] Second, prosecutors

24. Brady v. Maryland, 373 U.S. 83, 86 (1963). This protection was enshrined in the Fifth Amendment's Due Process Clause in *United States v. Agurs*, 427 U.S. 97, 107, 114 (1976).

25. *Brady*, 373 U.S. at 87.

26. *Id.*

27. *Id.* (finding a due process violation comprises only nondisclosures in which "the evidence is material either to guilt or to punishment").

28. The Supreme Court has applied the *Brady* rule only to criminal cases. *See, e.g.*, *Kyles*, 514 U.S. at 432 (first-degree murder); United States v. Bagley, 473 U.S. 667, 670 (1985) (criminal drug offense); *Agurs*, 427 U.S. at 100, 107 (second-degree murder); *Brady*, 373 U.S. at 84, 86 (first-degree murder).

29. The case most often cited for this proposition is *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993). The Supreme Court, however, left *Brady*'s application to civil cases an "open issue," thus making *Demjanjuk*'s proposition less secure. *See* United States *ex rel.* (Redacted) v. (Redacted), 209 F.R.D. 475, 482–83 (D. Utah 2001). Only two federal courts have declared that the *Brady* rule applies to a civil claim—both of which arose as civil claims brought by federal administrative agencies. *See* Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 142 (S.D.N.Y. 1966) ("Presumably, the essentials of due process at the administrative level [in civil cases] require similar disclosures by the agency where consistent with public interest . . . ."). Federal cases that treat civil and criminal cases differently cite reasons independent of any textual analysis of *Brady*. *See, e.g.*, NLRB v. Nueva Eng'g, Inc., 761 F.2d 961, 969 (4th Cir. 1985) ("An action for violations of the National Labor Relations Act is civil in nature, does not involve potential incarceration and violation of the Act does not carry with it the stigma of a criminal conviction.").

30. 427 U.S. at 97.

31. *Id.* at 106–07.

32. *Id.* at 103.

must divulge material evidence specifically requested before trial by defense counsel.[33] Finally, the prosecutor must disclose this evidence even if the defense counsel makes only a general, nonspecific request for exculpatory evidence.[34] The *Agurs* Court found that *Brady* defined "material" evidence as information that creates a reasonable doubt of the defendant's guilt.[35] In *United States v. Bagley*[36] and *Kyles*[37] the two most recent cases detailing *Brady*, the Court retained a liberal materiality standard for knowing use of perjured testimony,[38] but applied a more restrictive "reasonable probability" standard for both general and specific requests for evidence by the defense.[39]

This line of cases builds the *Brady* rule into an essential element of procedural due process whose general language seemingly applies to both criminal and civil government prosecutions. This rule calls for prosecutors to disclose all evidence—whether by specific, general, or no request from the defendant—that is material to the case at issue, including evidence that impeaches a witness for the prosecution.[40] The most recent Supreme Court precedent defines material evidence as that which, if absent, casts doubt that the defendant's trial and verdict are "worthy of confidence."[41] Most importantly, the *Brady* rule arguably sets forth a key due process standard: a legal sys-

33. *Id.* at 104.

34. *Id.* at 106–07. The Court decided to include this generous third situation, noting that "[i]n many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel." *Id.* at 106.

35. *Id.* at 112–13 ("It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed . . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.").

36. 473 U.S. 667 (1985).

37. 514 U.S. 419 (1995).

38. *Bagley*, 473 U.S. at 680. The Court took this stance because such behavior involves "a corruption of the truth-seeking function of the trial process." *Id.* (citation omitted).

39. The Court held that if there is a "reasonable probability" that, without counsel's suppression of the evidence, "the result of the proceeding would have been different," the evidence is material. *Id.* at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). The Court in *Kyles* redirected the standard toward a more liberal construction of materiality. The Court defined "reasonable probability" not as a reasonable probability "of a different result," but rather in the absence of evidence, whether the defendant received a "trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. The *Kyles* Court did not touch the standard of materiality applied by *Bagley* for perjured testimony. *Id.* at 433 n.7.

40. *Agurs*, 427 U.S at 103, 104, 106–07.

41. *Kyles*, 514 U.S. at 434.

tem violates due process if it allows the prosecution, even in good faith, to suppress any evidence material to the guilt or punishment of a defendant.[42]

Ultimately, only a couple of courts acknowledge that *Brady* may apply to purely civil proceedings.[43] In *Sperry & Hutchinson Co. v. FTC*, a trading stamp company sought broad discovery privileges in an enforcement action brought by the FTC.[44] The hearing examiner and the Commission denied this request, and the company brought its appeal to federal district court.[45] While the district court denied the extension of the *Brady* rule to Sperry in particular, citing the fact that the request was too preliminary, the court did uphold the concept of extending the *Brady* rule to civil prosecutions.[46] Although subsequent courts have not followed the Southern District Court of New York's reasoning,[47] Judge van Pelt Bryan's logic is straightforward:

> There is no question that due process requires the prosecution in a criminal case to disclose evidence in its possession which may be helpful to the accused. Presumably, the essentials of due process at the administrative level require similar disclosures by the agency where consistent with the public interest. In civil actions, also, the ultimate objective is not that Government "shall win a case, but that justice shall be done."[48]

42. Brady v. Maryland, 373 U.S. 83, 87 (1963).

43. *See* Sperry & Hutchinson Co. v. FTC, 256 F. Supp. 136, 142 (S.D.N.Y. 1966). Coincidentally, this case suggests that *Brady*-like disclosure might be required for administrative proceedings. Only one other court has declared that principles derived from the *Brady* rule may apply to wholly civil enforcement proceedings, again referencing administrative proceedings, and using the same logic as Judge van Pelt Bryan. *See* EEOC v. Los Alamos Constructors, Inc., 382 F. Supp. 1373, 1383 & n.5 (D.N.M. 1974). Surprisingly, lower federal courts have been reticent to extend the *Brady* rule to civil government prosecutions. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 353 (6th Cir. 1993); *see also supra* notes 24–25. However, those few cases upsetting this rule each share the same quality: they blend traditional elements of criminal prosecutions within a civil enforcement context. *See, e.g.*, *Demjanjuk*, 10 F.3d at 353. These cases also include civil rights claims stemming from criminal investigations brought by defendants. *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 69–75.

44. *Sperry*, 256 F. Supp. at 139.

45. *Id.*

46. *Id.* at 142 (citations omitted).

47. *See* United States *ex rel.* (Redacted) v. (Redacted), 209 F.R.D. 475, 482–83 (D. Utah 2001) (reading these arguments as dicta and not sufficiently supported).

48. *Sperry*, 256 F. Supp. at 142 (quoting Campbell v. United States, 365 U.S. 85, 96 (1961)). In essence, this Note provides the analysis that the *Redacted* court needed to affirm *Sperry*.

Judge van Pelt Bryant's reasoning forms the fundamental premise of this Note. As the next section reflects, this logic is one of the most salient arguments in favor of placing a *Brady* disclosure requirement upon federal administrative agencies.

B. THE *BRADY* RULE AND DISCOVERY: A SURVEY OF FEDERAL ADMINISTRATIVE AGENCY PROCEDURES

Over the years, numerous parties have made arguments invoking the *Brady* rule before multiple federal agencies.[49] Nonetheless, most agencies do not include the rule in their procedures for formal adjudication.[50] As this section highlights, these cases reveal the prevailing arguments for and against agency adoption of the *Brady* rule. Additionally, the methods of discovery adopted by agencies in lieu of the rule may serve as a useful basis for comparison.[51] A suitable analysis begins, however, with a look at existing norms uniting federal administrative agency procedures.

1. Rules of Discovery in Formal Federal Agency Adjudication Generally

The Administrative Procedure Act (APA) lists the statutory requirements for formal adjudicatory procedures in federal administrative agencies.[52] Agencies, however, can add further procedural rights to these provisions if they so choose.[53] This is a necessity if the agency wants to allow formal discovery, as the APA does not expressly provide for it.[54] As a result, discovery regimes tend to vary greatly across agencies, and many agencies have resisted outside pressure to create a uniform set of rules.[55] Partly in response to this diversity and the need to

49. Other cases not profiled in this Note include Tiger Shipyard, Inc., No. 96-3, 1999 WL 1631889 (E.P.A. Apr. 21, 1999), and George T. Hernreich Trading, 34 F.C.C.2d 708 (1972) (memorandum opinion and order).

50. The only other agencies adopting the *Brady* rule not profiled here are the Federal Maritime Commission, the Federal Deposit Insurance Corporation, and the Federal Energy Regulatory Commission. *See supra* note 11.

51. For example, the two agencies profiled in this Note as rejecting the *Brady* rule have discovery procedures that are otherwise more restrictive than those of agencies that have adopted the rule. *Compare infra* notes 69–74, 80–82, and accompanying text, *with infra* notes 88, 101–02 and accompanying text.

52. *See* 5 U.S.C. §§ 554(b)–(d), 556(b)–(e) (2006).

53. United States v. Fla. E. Coast Ry., 410 U.S. 224, 236 n.6 (1973).

54. McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

55. *Cf.* Michael P. Cox, *The Model Adjudication Rules (MARs)*, 11 T.M. COOLEY L. REV. 75, 75–76 (1994) ("In general, the responses from the agencies did not support the development of uniform rules . . . .").

amend agency rules, the Administrative Conference of the United States adopted the Model Adjudication Rules (MARs) with agency input.[56] The discovery provisions in the MARs borrow substantially from the FRCP.[57] Although the MARs are intended to provide greater due process protections and uniformity, their explicit impact has been marginal.[58]

Absent the APA and MARs, the only other major legal instrument uniting agency procedures is the Freedom of Information Act (FOIA), which helps to define the available scope of discovery.[59] In particular, FOIA provides uniform statutory privileges for government attorneys to withhold interagency memoranda or letters.[60] Courts interpret this privilege as conveying the same privileges afforded evidence and documents protected from discovery in civil procedures.[61] Even so, FOIA informs little else regarding agency adjudicatory procedure.[62]

Because of the limited practical impact of these uniform elements upon federal administrative procedure, a description of individual agencies' discovery procedures is more useful. The following section compares the discovery procedures of agencies that have adopted the *Brady* rule and those that have not, and their respective justifications.

56. *Id.* at 75–77.

57. MODEL ADJUDICATION RULES, *supra* note 13, § 230 cmts. 1, 3; Cox, *supra* note 55, at 103 ("Rule 26(a) [Discovery Methods], FRCP and Rule 26(d) [Sequence and Timing], FRCP provide the basic pattern for agency rules dealing with the subject."); *id.* ("Rule 26(b) [Scope of Discovery], FRCP, provides the basic pattern for agency rules on this subject.").

58. Only one administrative agency rulemaking docket has referenced the MARs. *See* Rules of Practice, Exchange Act Release No. 35,833, 59 SEC Docket 1170, 1189–90, 1203 (June 9, 1995).

59. FOIA both defines, 5 U.S.C. § 552(a), (d) (2006), and limits, *id.* § 552(b)–(c), the scope of discoverable information for defendants. *See generally* Freedom of Information Act, *id.* § 552. For examples of how FOIA impacts agency procedure, see 18 C.F.R. § 385.410 (2009) (FERC); 40 C.F.R. § 22.19(e)(5) (2009) (EPA); 49 C.F.R. § 511.45(a) (2009) (Nat'l Highway Traffic Safety Admin.); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1074 (2007) (detailing how FOIA influences what government lawyers can disclose or withhold in a proceeding); Morell E. Mullins, *Manual for Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 43 n.125 (2003) (discussing how FOIA applies to private litigation involving the federal government).

60. 5 U.S.C. § 552(b)(5).

61. *See, e.g.*, Dow Jones & Co. v. U.S. Dep't of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990). These protections include the civil work product doctrine and the attorney-client privilege. *Id.* (citation omitted).

62. *See generally* 5 U.S.C. § 552.

2. Administrative Agencies That Deny the Application of the *Brady* Rule

A number of agencies have refused to adopt the *Brady* rule,[63] and this section provides an overview of the reasons for that refusal by highlighting two individual agencies' justifications. The diversity of the alternative discovery regimes provides further insight as to why these agencies have rejected *Brady*.

The U.S. Department of Agriculture (USDA) refuses to adopt the *Brady* rule for its administrative proceedings.[64] The formative case on the USDA's refusal to apply the *Brady* rule involved a Packers and Stockyards Act (PSA) administrative proceeding.[65] To justify the decision, the judge cited the fundamental differences between *Brady* and claims brought under the PSA, noting that *Brady* involved *malum in se*, or actions that are inherently wrong, and the PSA case involved *malum prohibitum*, or acts unlawful only by virtue of statute.[66] The court also noted that, in criminal cases, witnesses can be "unsavory" or lie, while in PSA cases, "witnesses are generally reputable citizens."[67] Finally, the court held that there was no *Brady* evidence (i.e., exculpatory evidence) gathered in PSA investigations.[68]

63. Tiger Shipyard, Inc., CERCLA 106(B) Petition No. 96-3, 1999 WL 1631889, at *2 (EAB 1999) (EPA); George T. Hernreich Trading, 34 F.C.C.2d 708 (1972); Allied Chem. Corp., 75 F.T.C. 1055, 1056 (1969); Local 259, United Auto., 276 N.L.R.B. 276, 296 (1985); Miguel A. Machado, 42 Agric. Dec. 820, 857 (U.S.D.A. 1983).

64. *Machado*, 42 Agric. Dec. at 821 ("The *Brady* doctrine . . . does not apply to administrative disciplinary proceedings.").

65. *Id.* at 857 ("[T]he *Brady* doctrine should not be applied in administrative proceedings under the Packers and Stockyards Act.").

66. By definition, administrative regulatory authority constitutes malum prohibitum. *See* United States v. Balint, 258 U.S. 250, 252 (1922) ("[R]egulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."). Thus, the distinction made in *Machado* essentially applies to all federal administrative agencies. *Machado*, 42 Agric. Dec. at 860–61. The judge eventually also made the argument that civil claims and criminal charges are fundamentally different. *See id.* at 862.

67. *See id.* at 861. One presumes that the court believes that a penchant for witness mendacity must increase the need for exculpatory information.

68. *Id.* at 862. Today, this logic may not apply, as the PSA currently has a broad information collection regime within which exculpatory evidence may be gathered. *See* 9 C.F.R. § 201.94 (2009) (obligating a business to provide "any information concerning the business of the packer . . . which may be required

According to 9 C.F.R. § 202.200, the USDA Uniform Rules of Practice (USDA Rules) apply to PSA adjudications.[69] In its handling of evidence, the USDA Rules provide only a general requirement for the government to divulge official records or documents "if admissible for any purpose."[70] The only formal right of discovery of nontestimony data and records is the right to receive "[c]opies of or a list of documents which the party anticipates introducing at the hearing" during a prehearing conference,[71] and to request a subpoena for the production of documents.[72] Unlike the FRCP,[73] however, the disclosure requirements in the USDA Rules are not automatic, and instead require a judge's order.[74] Moreover, the USDA Rules fail the *Brady* due process standard—ensuring that prosecuting attorneys cannot, even in good faith, withhold exculpatory information[75]—since they dictate no affirmative duty to disclose.

Another federal agency that rejects the *Brady* rule is the National Labor Relations Board (NLRB). Government attorneys in formal adjudications before the NLRB are not required to disclose exculpatory information to the defense.[76] The Administrative Law Judge (ALJ) in *Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America* reasoned that disclosure is not necessary because of the fundamental difference between civil and criminal cases, the fact that the general counsel is already duty bound to not knowingly suppress evidence, and the fact that NLRB files must be guarded as confidential.[77] In *North American Rockwell Corp. v. NLRB*, the court found that applying *Brady* would be akin to demanding that a prosecutor must "comb his file for bits and pieces of evidence which conceivably could be favorable to the defense" and was thus improper.[78] Reinforcing this point

in order to carry out the provisions of the Act . . . ."); *id.* § 201.100 (detailing various records that must be furnished to growers and sellers under the Act).

69. 7 C.F.R. §§ 1.130–.151 (2009).

70. *Id.* § 1.141(h)(5).

71. *Id.* § 1.140(a)(1)(iii).

72. *See id.* § 1.149(a). The subpoena request must indicate the "necessity[,] . . . competency, relevancy, and materiality" of the request. *Id.*

73. FED. R. CIV. P. 26(a)(1)(A) (providing for initial disclosure as a default rule).

74. 7 C.F.R. § 1.140(a)(1).

75. Brady v. Maryland, 373 U.S. 83, 87 (1963).

76. Local 259, United Auto., 276 N.L.R.B. 276, 296 (1985).

77. *Id.* at 296 & n.91. Note, however, that this "duty" referenced by the ALJ is not supported by any authority. *See id.*

78. N. Am. Rockwell Corp. v. NLRB, 389 F.2d 866, 873 (10th Cir. 1968).

beyond any practical or ideological concern, the *Local 259* court noted that "[t]raditionally, demands for exculpatory information from the General Counsel have not been granted" by the NLRB.[79]

NLRB procedural rules allow for "[t]he Board, or any Member thereof" to subpoena "any evidence" under the control of either party as requested by any party.[80] Access to records, however, is particularly narrow in proceedings before the NLRB, as one must obtain the General Counsel's written consent for any documents or witnesses from the regional offices of the NLRB, even with a subpoena.[81] Conversely, accused parties must fully divulge similar information.[82] This creates a sizeable discrepancy in discovery rights between plaintiff and defendant, in contrast to the norms of equal discovery rights found in the FRCP.[83] Ultimately, the NLRB provides fewer procedural due process protections to defendants in its formal adjudications than their civil counterparts receive before Article III courts. Moreover, its procedural rules clearly do not meet the *Brady* due process standard,[84] as all defense evidence requests go through the General Counsel, who traditionally does not grant requests for exculpatory information, whether in good or bad faith.[85]

What unites agencies that reject the *Brady* rule is that they afford defendants less procedural due process than what is required by the FRCP. This results in two separate standards for civil defendants—greater protections in Article III courts and lesser protections in the Article I courts hitherto profiled—

79. *Local 259*, 276 N.L.R.B. at 296.

80. 29 C.F.R. § 102.31 (2009). Although this provision applies only to unfair labor practices cases, similar provisions apply for all other formal adjudications governed by the NLRB. *E.g.*, *id.* § 102.66(c) (outlining the same subpoena power for proceedings regarding employee representation).

81. *See id.* § 102.118(a)(1). This curious provision is akin to a district attorney having free reign to withhold evidence at will from an order of the court (in this case, the Board). For evidence of the broad scope of the General Counsel's authority, see *N. Am. Rockwell Corp.*, 389 F.2d at 872–73.

82. *See N. Am. Rockwell Corp.*, 389 F.2d at 872.

83. *See generally* FED. R. CIV. P. 26 (providing equal disclosure obligations and rights to both parties).

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

85. Local 259, United Auto., 276 N.L.R.B. 276, 296 (1985) ("Traditionally, demands for exculpatory information from the General Counsel have not been granted.").

in addition to the substantial differences in due process protections between *Brady* criminal defendants and civil enforcement defendants. From a fairness perspective, applying the *Brady* rule is a first step toward balancing these discovery standards that currently treat classes of civil defendants very differently. Moreover, adopting the *Brady* rule finally gives defendants in federal administrative proceedings the breadth of due process protection envisioned by the Court in *Brady*.[86] The next section profiles two examples of agencies that have adopted the *Brady* rule, each testifying to *Brady*'s applicability to formal agency adjudications.

3. Administrative Agencies That Accept the *Brady* Rule

Five federal agencies embrace the *Brady* rule,[87] but these agencies apply it in differing fashions. They also invoke different bases of authority to support their applications of the *Brady* rule in formal adjudications. This Note profiles both facets as developed by the Securities and Exchange Commission (SEC) and the CFTC.

The SEC adopted the *Brady* rule in a peculiar and limited way. First, the SEC uniquely incorporated the rule as an actual rule in its rules of procedure.[88] In one of the most recent cases defining the application of *Brady* to SEC proceedings,[89] the Commission found that the evidence must be material to guilt or punishment,[90] but that *Brady* does not "authorize a wholesale 'fishing expedition' into investigative material,"[91] and is only designed to "insure that exculpatory material known to the [Enforcement] Division is not kept from the respondent."[92] Second, discovery procedures of formal SEC adjudications mirror many of those agencies previously profiled.[93] Although the

86. *Brady*, 373 U.S. at 86.

87. See *supra* note 11.

88. 17 C.F.R. § 201.230(b)(2) (2009).

89. Warren Lammert, Release Nos. 33-8833 & 34-56233, 91 SEC Docket 756 (Aug. 9, 2007).

90. *Id.* at 761 (quoting Elizabeth Bamberg, Release No. 34-27673, 50 SEC Docket 201, 205 (1990) (citation omitted)).

91. *Id.* (citing Orlando Joseph Jett, Release No. 34-36696, 52 SEC Docket 830, 830 (1996)).

92. *Id.* (quoting David M. Haber, Exchange Act Release No. APR-418, 55 SEC Docket 3333, 3334 (Feb. 2, 1994)).

93. *See* 17 C.F.R. § 201.230. Like those other agencies—USDA, NLRB, FTC—the SEC provides a list of documents that are and are not available for inspection by defendants. *Id.*

SEC adopted the *Brady* rule, it also curtails the application of the rule by only forbidding the Division of Enforcement from withholding "documents that contain material exculpatory evidence," but not imposing an affirmative duty to divulge and mark such evidence as exculpatory.[94]

The CFTC also employs the *Brady* rule.[95] The CFTC adopted *Brady* through adjudicative precedent.[96] In its formative case on the *Brady* rule, the CFTC found that the rule "is not a discovery rule," but "rather it is a rule of fairness and minimum prosecutorial obligation," and cited its premise as rooted in due process grounds.[97] The court declared that prosecutors should default to disclosure if there is any doubt of materiality.[98] In laying out a rough procedure, the court required that any such exculpatory information must either be given to the defendant directly, "or provided to the Administrative Law Judge, for his determination as to whether it is producible or not."[99] Subsequent CFTC proceedings have further defined exculpatory material as "any information that is either favorable to the respondent's theory of the case or would tend to undermine the Division's case."[100]

Discovery procedures for the CFTC are more generous to defendants than the agencies profiled in Part I.C.2.[101] Though the CFTC includes provisions for disclosable and nondisclosable material, it substantially limits nondisclosable evidence by narrowing the class of evidence permissibly withheld to information from transactions not related to the proceeding, and requiring the listing of all withheld documents.[102]

In summary, this Part explored the evolution of the *Brady* rule's meaning within the Article III courts, and how this doctrine affected procedures adopted by noncriminal, non-Article

94. *See id.* § 201.230(b)(2). Some commentators view this version of *Brady* as deficient. *See* Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 411–12 (2008) (advocating for a "written and uniform 'full-disclosure' policy for [SEC] enforcement matters").

95. First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980).

96. *Id.*

97. *Id.*

98. *Id.* (citing United States v. Agurs, 427 U.S. 97, 108 (1976)).

99. *Id.*

100. *See, e.g.*, Bilello, No. 93-5, 1997 WL 693557, at *5 (C.F.T.C. Oct. 1, 1997) (citing United States v. Bagley, 473 U.S. 667, 676 (1985)).

101. *See* 17 C.F.R. § 10.42 (2009).

102. *See id.* § 10.42(b)(3)–(4).

III courts. A sampling of administrative agencies rejecting the *Brady* rule revealed agencies whose discovery privileges for defendants do not even meet FRCP standards. This relative dearth of procedural due process protection likely influences the fortunes of defendants. On the other hand, agencies adopting the *Brady* rule provide more robust discovery privileges to defendants, hewing to the Supreme Court's admonition that the government succeeds in court when its foremost concern is in achieving a just outcome.[103] With the preceding summary implying an inherent inequity in the widely divergent discovery regimes of federal agencies, this Note now considers whether agencies who fail to adopt the *Brady* rule sufficiently protect the due process rights of defendants.

II. IN THE ABSTRACT—WHY FEDERAL AGENCIES SHOULD ADOPT THE *BRADY* DISCLOSURE STANDARD

Arguments levied by administrative agencies against the application of the *Brady* rule fall into two categories—arguments premised upon abstract theories of justice and fairness, and arguments that question the practicality of the *Brady* rule as applied.[104] While this Note later addresses practical concerns, this Part focuses upon the former criticisms. Rebutting these criticisms in turn establishes a theoretical framework in support of the *Brady* rule's adoption by federal administrative agencies.

A. THE DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES IS ARBITRARY IN PURSUING A JUST OUTCOME

Many of the cases that have denied the civil application of the *Brady* rule justified their decisions by highlighting the fundamental difference between criminal and civil claims.[105] In particular, these cases cited both the nature of the claims brought in *Brady* and its progeny, and the severity of punishment awaiting the defendants in these cases as being "inappo-

103. *See supra* note 24 and accompanying text.

104. For examples of the former, see Tiger Shipyard, Inc., CERCLA 106(B) Petition No. 96-3, 1999 WL 1631889, pt. II.A (EAB 1999) (EPA). For the latter, see Miguel A. Machado, 42 Agric. Dec. 820, 861–62 (U.S.D.A. 1983).

105. *See* George T. Hernreich Trading, 34 F.C.C.2d 708, 711 (1972); *Machado*, 42 Agric. Dec. at 860–62; *cf.* Allied Chem. Corp., 75 F.T.C. 1055, 1056–57 (1969) (noting the irrelevance of criminal discovery cases to Commission proceedings).

site" to the administrative proceeding.[106] On the matter of punishment, this critique flows from the idea that with the risk of more severe punishment, a court must grant the defendant greater procedural protections.[107] These courts also draw contrasts between the underlying criminal claims in *Brady* and its progeny, and the comparatively mild civil claims at bar in administrative proceedings as a way to justify applying *Brady* to the former and not the latter.[108]

On punishment, however, Article III courts do not solely limit the *Brady* rule's application to those instances cited by the agency courts rejecting *Brady*—to capital offenses.[109] Instead, the *Brady* rule protects all criminal defendants facing federal charges, no matter how mild.[110] Not surprisingly, at least one Article III court[111] and Article I court[112] have noted that civil punishments can exact harm similar to criminal punishments. Thus, as a categorical distinction based on punishment, the criminal-civil dichotomy alone fails to justify divergent application of the *Brady* rule.

The argument on the differing nature of criminal and civil law also rests on a highly abstract premise rooted in substantive law and legal history.[113] Practically applied, however, this

106. *Allied Chem.*, 75 F.T.C. at 1056–57; *see also* MSC.Software Corp., 134 F.T.C. 580 (2002); *Machado*, 42 Agric. Dec. at 859.

107. *Cf. Machado*, 42 Agric. Dec. at 862 ("[A] criminal conviction can result in loss of life, liberty, or citizenship rights, while an administrative order, even though severe, cannot result in such losses.").

108. *See MSC.Software*, 134 F.T.C., pt. V; *Allied Chem.*, 75 F.T.C. at 1056–57; *Machado*, 42 Agric. Dec. at 859. These courts' arguments on the differing natures of criminal and civil law are likely based on the diverging historical development of criminal and civil law. *Cf.* Gilbert v. Johnson, 419 F. Supp. 859, 877 (N.D. Ga. 1976) (highlighting differences between civil and criminal law's constitutional requirements).

109. *MSC.Software*, 134 F.T.C., pt. V; *see also Allied Chem.*, 75 F.T.C. at 1056–57.

110. *See* United States v. Pelullo, 105 F.3d 117, 122 (3d Cir. 1997) (wire fraud); United States v. Lloyd, 71 F.3d 408, 413 (D.C. Cir. 1995) (aiding and abetting preparation of false federal income tax return); United States v. McKellar, 798 F.2d 151, 153 (5th Cir. 1986) (false statements to lenders).

111. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir. 1993).

112. First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980) ("Since [*Brady*] is premised upon due process grounds[,] we hold that its principles are applicable to administrative enforcement actions such as this which, *while strongly remedial in nature, may yield substantial sanctions*." (emphasis added)).

113. *See Gilbert*, 419 F. Supp. at 877. The court dismissed as "axiomatic," without any further explanation, the idea that due process prerequisites for criminal trials are not fully applicable to administrative hearings. *Id.*; *see also*

distinction is inapplicable to the government attorney. For instance, modern commentators justify not extending the *Brady* rule to civil claims by viewing such contests as adversarial between two private attorneys whose duties are to their clients.[114] These duties drive private attorneys to potentially derail truth or take actions that may make the outcome unjust, with the idea that by their private adversary doing likewise, just outcomes may result.[115] Government attorneys, in contrast, have a responsibility derived from *Brady* "to seek justice and to develop a full and fair record," and they should not use the power of the government to bring about "unjust settlements or results."[116] Indeed, federal courts have repeatedly held government attorneys to a higher standard in civil litigation than their private counterparts.[117] These courts base this disparate treatment on the premise that government attorneys represent the public, and not a private client.[118] Logically, then, in terms of their duties, agency attorneys or any federal attorney trying civil cases is akin to only one other type of attorney—the government attorney trying criminal matters. Both, again, are at least bound in theory by the Court's admonition in *Brady* that the state—the client of the government lawyer[119]—succeeds

Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 211 (2004). Nevertheless, in applying *Brady* to select civil claims, at least one Article III court impliedly rejected this justification. *Cf. Demjanjuk*, 10 F.3d at 354 (citing the criminal prosecution methodology employed by the prosecution in this civil proceeding as partial justification for applying *Brady*).

114. *See* Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 54 (1982).

115. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 796 (2000); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 235 (2000).

116. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980).

117. *See* Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Regulatory Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992); Douglas v. Donovan, 704 F.2d 1276, 1277–80 (D.C. Cir. 1983); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1366–70 (9th Cir. 1980).

118. *See* Gray Panthers v. Schweiker, 716 F.2d 23, 33 (D.C. Cir. 1983); THOMAS D. MORGAN, LAWYER LAW 674 (2005). *But see* Joshua Panas, Note, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 562 (2004) (contending that the government attorney owes his or her ultimate duty to the agency and not the public).

119. The State—whether embodied in an office, division, or agency—is the client of the government attorney. *See* D.C. RULES OF PROF'L CONDUCT R. 1.6 cmt. 38 (2007), *available at* http://www.dcbar.org/new_rules/rules.cfm; REGULATIONS OF LAWYERS: STATUTES AND STANDARDS 165–66 (Stephen Gillers & Roy D. Simon eds., 2003).

when just outcomes are afforded its citizens.[120] This rationale creates a simple syllogism: if the same duty binds the two, so too should the law similarly bind these attorneys to the same duty.[121]

Other authorities outside *Brady* and similar case precedent also stand for the similar treatment of civil and criminal government attorneys. For example, the D.C. Rules of Professional Conduct treat civil and criminal government attorneys the same for purposes of client confidentiality, yet different from private attorneys. Government attorneys may divulge information their agency clients deem confidential when permitted or authorized by law, or when permitted by rules or compelled by law or court order.[122] Private attorneys, in contrast, can only divulge client confidences if permitted by the rules or compelled by law or court order.[123] The government attorney has greater authority to disclose than her private counterpart, and has equal discretion regardless of her civil or criminal distinction. A plausible justification for this greater ability to disclose confidences is recognition of the *Brady* concept of the government's success hinging on just outcomes for its citizens. More importantly, this distinction provides some support for the idea that government attorneys should be more prone to disclosure, an idea at the heart of *Brady* as applied in criminal,[124] or civil,[125] contexts.

In summary, the distinctions between civil and criminal law asserted to justify rejection of *Brady* collapse under scrutiny. More fundamental distinctions, however, such as those provided by codes of conduct, cleanly separate government attorneys from their private counterparts while uniting civil and criminal government attorneys under the same impetus particular to discovery. Thus, it seems incongruous for agencies to not hold government civil attorneys to the same high disclosure requirements as their criminal government counterparts, and

120. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

121. *See* Berenson, *supra* note 115, at 789–90; Temkin, *supra* note 113, at 211 ("[D]ecisions concerning the duties of prosecutors are based upon the same definition of misrepresentation in the *Model Code* and *Model Rules* with, to be sure, an overlay of criminal law concepts.").

122. D.C. RULES OF PROF'L CONDUCT R. 1.6(e)(2)(B) cmt. 37.

123. D.C. RULES OF PROF'L CONDUCT R. 1.6(e)(2)(A).

124. United States v. Agurs, 427 U.S. 97, 110–11 (1976).

125. Exclusive Tug Franchises, No. 01-06, 2001 WL 1085431, at *4 (F.M.C. Aug. 14, 2001) (citing *Brady*, 373 U.S. at 87–88).

instead place them in the category of the private attorney.[126] Additionally, it seems contradictory for agencies to deny the application of the rule to certain federal government attorneys, and certain federal legal proceedings, when the maxim that underwrites the rule—that the government's role is "not merely to win cases, but to achieve just outcomes"—logically applies to all of them.[127] This last point is the core of *Brady*, and forms the philosophical basis for a duty to disclose.[128]

Federal agencies also justify not adopting the *Brady* rule by citing as sufficient their agency's existing procedural protections for defendants. This Note next profiles these protections, highlighting their inability to meet the *Brady* due process standard.[129]

B. FEDERAL RULES OF CIVIL PROCEDURE AND THEIR DERIVATIVES ARE INSUFFICIENT FOR SATISFYING A *BRADY* DISCLOSURE STANDARD, AND ARE THUS INSUFFICIENT FOR PROCEDURAL DUE PROCESS

Administrative agencies are not obligated to provide procedures for discovery in judicial or quasi-judicial proceedings.[130] Agencies must grant discovery only if "a refusal to do so would so prejudice a party as to deny him due process."[131] However, one argument made by agencies rejecting *Brady* is that the discovery provisions available to defendants are sufficient to ensure due process for civil defendants.[132] These agencies may adopt their discovery rules in full or in part from the FRCP.[133] This section broadly analyzes whether FRCP discovery and

126. At least one commentator, however, believes that the *Brady* rule should also apply to private attorneys. *See* Frankel, *supra* note 114, at 54–55.

127. *See* Bilello, No. 93-5, 1997 WL 693557, at *7 (C.F.T.C. Oct. 1, 1997) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). As Justice Douglas noted, a basic principle behind the *Brady* rule is "'that the Government wins its point when justice is done in its courts.'" *Brady*, 373 U.S. at 87 n.2 (quoting Judge Simon E. Sobeloff, Solicitor General, Address at the Judicial Conference of the Fourth Federal Circuit (June 29, 1954)).

128. *Brady*, 373 U.S. at 87–88.

129. *See id.* at 87.

130. *See* Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977).

131. McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

132. *E.g.,* Miguel A. Machado, 42 Agric. Dec. 820, 832–33 (U.S.D.A. 1983).

133. *Compare, e.g.,* 16 C.F.R. § 3.31(b) (2009) (listing the FTC procedural rules on mandatory initial disclosures), *with* FED. R. CIV. P. 26(a)(1)(A) (providing the rule on mandatory initial disclosures).

other procedural safeguards are adequate alternatives to the *Brady* disclosure for administrative agencies.

Although the FRCP was amended in 1993 to require greater cooperation between opposing counsel,[134] adversarial elements remain, including discovery exemptions for privileged information and work product.[135] Agencies rejecting *Brady* cite these exemptions as justifying their decision and as being an important buttress of agency enforcement.[136] For courts, however, the reasons behind protecting the attorney-client privilege—ensuring "full and frank communication between attorneys and their clients"[137]—or work product must be weighed against the interests of society "in accurate judicial fact finding," among other factors.[138] The Federal Maritime Commission, in weighing these factors, adopted the *Brady* rule by finding that an agency holding even privileged information confidential can subvert the purpose of discovery, which is to "avoid surprise and the need for continuances."[139] Although agencies may experience some problems in handing over work product wholesale,[140] because the commission ultimately determines what constitutes exculpatory information, such problems should be slight.[141]

Similarly, federal agencies invoke the Jencks Act,[142] a federal statute requiring agencies to divulge any statements associated with the matter on which the witness testified, as a suitable alternative to applying *Brady*.[143] The Act, however, only applies to one aspect of discovery—requiring the government to

134. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1463 (2000).

135. *Id.* at 1464; *see also* Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 19 (2003).

136. *See* George T. Hernreich Trading, 34 F.C.C.2d 708, 709–11 (1972); Allied Chem. Corp., 75 F.T.C. 1055, 1056–57 (1969); Local 259, United Auto., 276 N.L.R.B. 276, 296 (1985).

137. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

138. N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003).

139. Exclusive Tug Franchises, No. 01-06, 2001 WL 1085431, at *3 (F.M.C. Aug. 14, 2001).

140. *See* Miguel A. Machado, 42 Agric. Dec. 820, 833–34 (U.S.D.A. 1983).

141. For an example of a commission playing this role effectively, see *Bilello*, No. 93-5, 1997 WL 693557, at *11–13 (C.F.T.C. Oct. 1, 1997).

142. Jencks Act, 18 U.S.C. § 3500 (2006).

143. *See, e.g.*, Allied Chem. Corp., 75 F.T.C. 1055, 1057–58 (1969).

disclose any statements made by witnesses.[144] In addition to these limitations in scope, the Jencks Act has substantial practical limitations. The Act only gives the judge the authority to direct the government attorney to deliver the "Jencks material," while providing little recourse if she does not comply.[145] Moreover, the Act does not deem attorney work product to be a disclosable "statement," no matter how exculpatory the evidence may be.[146] Further, courts can only direct government counsel to divulge Jencks information after the witness testifies on direct examination.[147] Commentators note that, as a result, "frequent delays and adjournments" in the proceeding are likely to ensue, and a comprehensive investigation of the information may be impossible with the brief time usually given by courts.[148] By requiring pretrial disclosure of all exculpatory evidence, including witness testimony, agencies could avoid these delays and an otherwise short time frame for analyzing the exculpatory information would not burden the defense counsel.

Finally, critics of a civil *Brady* rule may contend that agencies' adoption of FRCP discovery rules is sufficient to allow access to all nonwitness exculpatory information, particularly if the agency adopts the mandatory initial disclosure requirement.[149] The language most pertinent to this argument is in FRCP Rule 26(a)(1)(A)(ii), requiring both parties to divulge all materials supporting their claims.[150] This disclosure requirement suffers from three flaws. First, the defendant only gets to see the portion of the material the agency will use in its case—that which incriminates her—instead of the larger body of in-

144. *See* 18 U.S.C. § 3500.

145. *See Machado*, 42 Agric. Dec. at 820.

146. *See id.*

147. 18 U.S.C. § 3500(b); United States v. Avellino, 129 F. Supp. 2d 214, 218 (E.D.N.Y. 2001).

148. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1090 (1991).

149. For an example of an agency with this provision and lacking *Brady*, see 16 C.F.R. § 3.31(b) (2009) (FTC).

150. FED. R. CIV. P. 26(a)(1)(A)(ii) ("[A] party must, without awaiting a discovery request, provide to the other parties: . . . a copy—or a description . . . of all . . . information, and tangible things that the disclosing party has in its possession, . . . *and may use to support its claims or defenses*, unless the use would be solely for impeachment . . . ." (emphasis added)).

formation that may exonerate her.[151] Second, agency employees can be aware of information that may be exculpatory, yet they may not feel compelled by initial disclosure to comply because they subjectively determine the evidence does not materially affect the case.[152] Third, it is the defense counsel, and not the government attorney, who has the most knowledge as to what evidence is exculpatory to their client's case; thus the attorney who decides to disclose is not the attorney who is most qualified to make that decision.[153] Notice that each of these shortcomings arises from FRCP disclosure resting upon the discretion of the adverse party. Each also strains the credibility of the argument that the FRCP would provide civil defendants due process protection that meets the *Brady* standard.

In summary, critical analysis of the abstract arguments against agency adoption of *Brady* reveals their flaws. The fundamental distinctions between criminal and civil government attorney duties are indeed fewer than those between government and private attorneys, spurning the convention that civil government and private attorneys must have more similar discovery duties between them than between criminal and civil government attorneys. Alternative discovery regimes to *Brady* currently used by agencies also suffer from deficiencies.

In totality, these last two Parts paint a clear picture. Part I noted that numerous federal agencies do not meet the FRCP standard for discovery, demonstrating that civil defendants' due process rights depend entirely upon whether litigants pursue their claims in Article III or Article I courts. Part II makes this basic inequality even starker by concluding that a higher standard of justice guides the government attorney in prosecuting any claim for the government regardless of the claim. Coincidentally, this same standard informed the Supreme Court's creation of the *Brady* rule. Building on this foundation, the next section details what basic *Brady* regime characteristics all federal administrative agencies should adopt.

151. *See* Exclusive Tug Franchises, No. 01-06, 2001 WL 1085431, at *4 (F.M.C. Aug. 14, 2001) (applying *Brady* specifically on this issue).

152. *See* First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *5–6 (C.F.T.C. July 2, 1980) (applying *Brady* specifically on this issue).

153. *Exclusive Tug*, 2001 WL 1085431, at *5 (quoting Dennis v. United States, 384 U.S. 855, 875 (1966)).

III. PRACTICAL APPLICATION—A *BRADY* DISCLOSURE RULE THAT BALANCES DUE PROCESS AND EFFICIENT ENFORCEMENT

In order to construct a proper *Brady* standard for federal agencies, this Part summarizes the most effective characteristics of the *Brady* rule as developed by Article III courts and federal agencies.

A. CONSTRUCTING A *BRADY* RULE FOR ADMINISTRATIVE AGENCIES

To restate, a *Brady* disclosure standard requires government attorneys prosecuting a case to divulge "material" exculpatory information.[154] The U.S. Supreme Court defined "materiality" as based upon the "reasonable probability" that in its absence, the resulting verdict would not be "worthy of confidence."[155] Government attorneys must divulge this exculpatory information in essentially all instances.[156]

This Note argues in favor of applying the *Brady* rule to formal agency adjudications. This choice is deliberate, rooted in the fact that formal adjudications involve the same controversies, trial-type procedures, and entail punishments of similar intensity as those provided in Article III criminal courts.[157] In spite of these similarities, Article III criminal courts generally require disclosure of material, exculpatory evidence,[158] while Article I courts do not.[159] This discrepancy in treatment creates a fundamental unfairness affecting discovery, which is itself essential to procedural due process,[160] and to exposing or deter-

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

155. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

156. United States v. Agurs, 427 U.S. 97, 106–07 (1976) (noting that the prosecution must disclose *Brady* evidence even when the defendant makes no request for the information).

157. *See* William S. Jordan, III, Chevron *and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 269–70 (2009); *see also supra* notes 110–12 and accompanying text; *cf.* Levy & Shapiro, *supra* note 18, at 496 (noting that "formal adjudication typically applies to . . . enforcement actions").

158. *Kyles*, 514 U.S. at 433–34.

159. *See* McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979).

160. "[D]iscovery is critical to the outcome of litigation because it helps frame the issues . . . and expedites the litigation by disclosing disputed and undisputed facts, insuring that all relevant facts will be available to the jury while guarding against concealed or surprise evidence." William J. Smith & Shelley G. Bryant, *A Plaintiff's View: Motions for Summary Judgment Are Paper Tigers*, 2 Ann. 2007 AAJ-CLE 1613 (2007).

ring government misconduct.[161] Often, these defendants are due such procedural due process protections because a property interest is at stake in the administrative proceeding,[162] thus implicating some of the same interests at stake in criminal cases. For these reasons, the need for the *Brady* rule is particularly evident and suited for agency formal adjudications.

The Fifth Amendment to the U.S. Constitution compels *Brady* disclosure in a criminal proceeding.[163] This Note argues that agencies should apply the *Brady* rule as a constitutionally derived provision within their discovery procedures. Without this designation, the *Brady* right could be more easily limited, similar to other aspects of discovery, by government attorneys invoking common-law or statutory exceptions, thus undermining the benefits of the rule.[164] The SEC, for example, adopted the *Brady* rule without asserting it as a constitutionally based standard,[165] and the negative result of this choice is a rule that forbids the government attorney from withholding exculpatory evidence without imposing an affirmative duty to divulge and mark such evidence as exculpatory.[166] Again, by not placing an affirmative duty on the government attorney to disclose the information, the government attorney can use his discretion to determine what is exculpatory, while the defense attorney, who has the duty and is most able to discern exculpatory evidence by her more comprehensive view of her client's case, has no

161. *See* Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 172 (2010) (describing how court-supervised discovery plays a significant role in minimizing official misconduct).

162. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–77 (1972) (noting, for example, that "a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process").

163. *See* United States v. Agurs, 427 U.S. 97, 107, 114 (1976); *cf.* Brady v. Maryland, 373 U.S. 83, 86 (1963) (agreeing that the State's withholding of exculpatory evidence violated the Due Process Clause of the Fourteenth Amendment).

164. *See* Bilello, No. 93-5, 1997 WL 693557, at *10 (C.F.T.C. Oct. 1, 1997). These include exemptions from deliberative privilege, *id.* at *11 n.81, attorney work product, *id.* at *11 n.79, and where production of evidence is otherwise a prosecutorial decision, *id.* at *4 n.25; *see also* 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 254, at 81 & n.60 (2d ed. 1982) ("Because [*Brady*] is based on the Constitution, it overrides court-made rules of procedure.").

165. *See* 17 C.F.R. § 201.230(b)(2) (2009).

166. *Cf. supra* note 94 and accompanying text.

role.[167] This dynamic could make a similarly constructed *Brady* rule a "rule of disclosure" in name alone, and it clearly goes against the *Brady* due process standard holding that prosecuting attorneys should not be able to withhold, even in good faith, exculpatory evidence.[168]

The CFTC provides a better model. This agency, like any other federal agency, is able to interpret the Constitution within the purview of authority granted by Congress.[169] The CFTC, in *First Guaranty Metals*, relied on the logic of the *Brady* Court—that the *Brady* rule "is premised upon due process grounds."[170] By extension, the CFTC reasoned that such principles apply to CFTC enforcement actions in a manner akin to *Brady*—not merely as a "discovery rule" but as a "rule of fairness and minimum prosecutorial obligation," intimating its deeper roots.[171] Subsequent CFTC courts cited this precedent as grounds for requiring that Enforcement Division attorneys divulge material, exculpatory evidence, even though agency attorneys argued that work-product privilege required them to withhold the information.[172] In practice, a judge in an in camera inspection is the ultimate authority in deciding whether evidence embedded within otherwise privileged documents is exculpatory.[173] Nothing bars other federal agencies from employing a similar, constitutionally based system.

In order to meet the *Brady* due process standard, then, a *Brady* rule applicable to agency formal adjudications must be rooted in the U.S. Constitution, as evidenced by the SEC's shortcomings. Agencies must not allow their enforcement division prosecutors to assert common-law privileges or their own discretion in subverting disclosure of exculpatory evidence. To allay the fears of prosecutors divulging sensitive records of

167. *See* Dennis v. United States, 384 U.S. 855, 875 (1966) ("The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

168. *Brady*, 373 U.S. at 87.

169. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (citing United States v. Nixon, 418 U.S. 683, 703 (1974)).

170. First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980).

171. *Id.* (citing United States v. Beasley, 576 F.2d 626 (5th Cir. 1978)).

172. *See, e.g.*, Bilello, No. 93-5, 1997 WL 693557, at *11–12 (C.F.T.C. Oct. 1, 1997).

173. For instance, this is the same system recently adopted by the FERC. *See* Policy Statement on Disclosure of Exculpatory Materials, 129 FERC 61,248 (Dec. 17, 2009), *available at* http://www.ferc.gov/whats-new/comm-meet/2009/121709/m-2.pdf.

marginal exculpatory value, the judge can determine whether the sensitivity of the records outweighs the constitutional obligation to divulge exculpatory evidence. Most of all, agencies must adopt a *Brady* rule that creates the affirmative duty for prosecutors to divulge material, exculpatory evidence. In so doing, agencies can balance countervailing concerns of enforcement integrity and defendants' needs for exculpatory information, all while adhering to *Brady*.

B. THE SUPREME COURT SHOULD REQUIRE THAT FEDERAL AGENCIES ADOPT THE *BRADY* RULE

After determining the most effective standard, the question then becomes how to achieve this standard through the most effective means. Three constitutional avenues are available for enacting the *Brady* rule in each federal agency.

First, Congress could pass a law amending the APA to require the *Brady* rule's application in all formal adjudications.[174] As the product of a political process, however, congressional legislation often creates imperfections on technical matters of administrative due process.[175] Indeed, Congress created the APA only after years of political battles spanning the FDR and Truman presidencies.[176] The APA's continued survival without major change,[177] as well as its very creation by Congress, are the result of its ambiguous construction.[178] The *Brady* rule, by contrast, is a specific, technical, and "controversial"[179] judicial construction. These qualities make it less likely that Congress

174. *See* Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 95 (1996) ("When Congress amends the APA, it adopts procedures that apply across the board.").

175. *See* Craig N. Oren, *Be Careful What You Wish for: Amending the Administrative Procedure Act*, 56 ADMIN. L. REV. 1141, 1146 (2004) (noting that special interests and political posturing could hijack a congressional amendment to the APA).

176. *See id.* at 1143–45. Oren crystallizes this fact by highlighting Justice Jackson's writing that the APA's adoption constituted the end of "'a long period of study and strife.'" *Id.* (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40–41 (1950)).

177. *See* William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance*, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 999 (2004) ("The key provisions of the APA have survived several significant changes in regulatory philosophy and the role of judicial review . . . .").

178. *See* Oren, *supra* note 175, at 1143–45 (noting that the APA is an "intentionally ambiguous text").

179. 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 557.2 (3d ed. 2004).

will promulgate a *Brady* rule amendment within a reasonable period of time, if at all. Thus, a combination of legislative friction and lack of expertise on procedural due process relative to the judiciary makes an amendment to the APA a less likely and a less effective option.

A second option involves each federal agency adopting the *Brady* rule individually. This provides the potential for both a constitutionally based right and a right tailored to the exigencies of the particular agency, while still ensuring some uniformity between agencies.[180] However, the weakness of this approach is that it relies on the action of each federal agency, a number of which have precedents clearly rejecting the application of the *Brady* rule.[181] Agency adoption of the rule in the face of years of contrary precedent also requires a substantial amount of momentum to succeed.[182] Additionally, by allowing "tailoring" of the rule by various agencies, one also runs the risk of creating different due process rights to disclosure across agencies, instead of one uniform right.[183] Indeed, agencies could follow the SEC model and adopt the *Brady* rule in word, but water it down to the point that it violates its spirit.[184] Because individual agency adoption of the *Brady* rule suffers from undue friction and increases the risk of certain agencies adopting nonuniform, weakened *Brady* disclosure standards, it is not a preferred option.

This Note instead advocates for a third option: the U.S. Supreme Court should require federal agencies to adopt the *Brady* rule for formal adjudications. The Supreme Court is the superior body for promulgating this regulation, both because of its experience in determining what constitutes procedural due process,[185] and because of its history in defining and applying

180. *See* Shapiro, *supra* note 174, at 95 (noting that when institutions other than Congress can craft procedures derived from the APA, "[s]uch adjustments can fine-tune the administrative process").

181. *See supra* note 64–66 and accompanying text.

182. In order for such agency changes to survive constitutional scrutiny, the agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed." Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

183. *Cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3046, 3048 (2010) (holding that substantive differences in the treatment of fundamental rights between states and the federal government must be limited).

184. *Cf. supra* notes 89–94 and accompanying text.

185. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Fusari v. Steinberg, 419 U.S. 379 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970).

the *Brady* rule.[186] Considering the dynamism of administrative law, the courts are generally superior for deciding due process issues because parties can repeatedly test and refine court standards to the facts of a given case.[187] Additionally, a Supreme Court mandate would speed the adoption of the *Brady* rule relative to the previous options and ensure a uniform, robust disclosure requirement.

The Supreme Court has the constitutional authority to impose a uniform *Brady* rule upon federal agency formal adjudications. Administrative agencies may interpret the Constitution in lieu of contrary court precedent.[188] Nevertheless, the Court is the ultimate authority on constitutional matters, including whether federal agencies must adopt the *Brady* rule.[189] While the Supreme Court and other Article III courts are limited in the procedural requirements they can impose upon federal agencies,[190] these courts have a substantially broader ability to impose procedural requirements on "quasi-judicial" proceedings[191]—such as formal adjudications[192]—when a court finds that the due process protections are insufficient.[193] Because the *Brady* rule derives from the Fifth Amendment,[194] it is a constitutional constraint, thus making it an exception to the *Vermont Yankee* prohibition on courts imposing additional procedural requirements on administrative agencies.[195]

186. *See* Kyles v. Whitley, 514 U.S. 419 (1995); United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

187. *See* Araiza, *supra* note 177, at 998 ("The advantage of judicially crafted tests is that they are constantly tested in litigation, leading to their refinement and alteration as agency action evolves.").

188. *See* United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (citing United States v. Nixon, 418 U.S. 683, 703 (1974)).

189. *See id.* (noting that ever since *Marbury*, the Supreme Court "has remained the ultimate expositor of the constitutional text").

190. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 541 (1978) ("[A]bsent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow . . . .").

191. *Id.* at 542.

192. *See* 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8299(b) (1st ed. 2006) (noting that "quasi-judicial action" is a term inclusive of "formal adjudication").

193. *See Vt. Yankee*, 435 U.S. at 542 ("[I]n some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.").

194. *See* United States v. Agurs, 427 U.S. 97, 107, 114 (1976).

195. *See Vt. Yankee*, 435 U.S. at 543 (noting that, "[a]bsent constitutional constraints," administrative agencies should be free to fashion their own pro-

Ultimately, the Supreme Court must adopt a *Brady* rule that comports with the due process requirement that prosecutors cannot withhold material, exculpatory information, in good faith or otherwise. The Supreme Court is the most effective body for ensuring a uniform, authoritative standard. The Court has the authority to assert the *Brady* rule over federal agencies. Some federal agencies have years of experience employing the rule,[196] and they can provide the Court with models of a rule that effectively ensures its procedural protections while guaranteeing that defendants do not subvert the legitimate enforcement of regulations. By looking to these agencies for guidance, as well as hearkening to its own precedent, the Supreme Court can craft an effective *Brady* rule.

C. RESPONDING TO THE POTENTIAL CRITICISMS OF THE *BRADY* RULE AS EMPLOYED

The agencies and courts rejecting the *Brady* rule's application to civil matters have already made many of the points that critics may potentially level against this Note's proposal. However, two critiques in particular deserve a direct response, as these criticisms question both the practicality and the utility of the *Brady* rule in civil proceedings. By addressing both criticisms, this Note constructs a process for employing the rule in formal agency adjudications.

The *Brady* rule holds that a failure of government attorneys to disclose material information is a due process violation "irrespective of the good faith or bad faith of the prosecution."[197] Thus, unlike the FRCP disclosure requirements,[198] if the evidence is arguably material, the government attorney must err on the side of disclosure.[199] Such a seemingly broad requirement to disclose lends at least facial credence to the critique that a *Brady* requirement would require agencies to dig for exculpatory evidence *ad absurdum*.[200] However, *Brady* is

cedural rules).

196. The SEC has had a disclosure rule akin to *Brady* for a decade and a half. *See* SEC Rules of Practice, 60 Fed. Reg. 32,738, 32,741 (June 23, 1995). The CFTC has enforced the *Brady* rule for three decades. *See* First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *8 (C.F.T.C. July 2, 1980).

197. Brady v. Maryland, 373 U.S. 83, 87 (1963).

198. FED. R. CIV. P. 26(a)(1)(A)(ii).

199. *See* Bilello, No. 93-5, 1997 WL 693557, at *4 (C.F.T.C. Oct. 1, 1997) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

200. *See* N. Am. Rockwell Corp. v. NLRB, 389 F.2d 866, 873 (10th Cir.

limited in scope as applied both in criminal[201] and in administrative contexts.[202] An effective standard may be the one adopted by the CFTC—limiting disclosure to that information which is within the "possession, custody or control of the Commission, the existence of which is known, or by the exercise of due diligence may become known" to the agency attorney.[203] This standard limits agency enforcement from having to seek out information from far-flung sources, and imputes a reasonability factor to the agency's search for evidence. Moreover, the fact that five federal agencies continue to enforce some version of the *Brady* rule[204] suggests that, at the very least, the costs of the rule do not outweigh the benefits.

Another criticism of *Brady* is that prosecutors will withhold a large amount of evidence favorable to the defendant in the belief that an appellate court will view the evidence as having no "reasonable probability" of affecting the original verdict.[205] This critique ignores *Kyles*[206] and overlooks the fact that the criminal *Brady* requirements, though self-enforced, work remarkably well.[207] Many government attorneys even go substantially beyond these constitutional obligations to provide defendants with additional information.[208] This success level can be explained in a number of ways—government attorneys will

1968) (acknowledging that some prosecutors view *Brady* as requiring them to comb their files for any bits of information that might conceivably be favorable to the defense).

201. *See* United States v. Agurs, 427 U.S. 97, 109 (1976) ("'[T]hey are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses.'" (quoting *In re* Imbler, 387 P.2d 6, 14 (1963))).

202. *See Bilello*, 1997 WL 693557, at *5–6; *see also* First Guar. Metals, Co., Nos. 79-55 to -57, 1980 WL 15696, at *7 (C.F.T.C. July 2, 1980).

203. *First Guar. Metals, Co.*, 1980 WL 15696, at *8. The CFTC likely borrowed this standard, in part, from the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 16(a)(1)(B)(i), 16(a)(1)(F)(i)–(ii).

204. *See supra* note 11.

205. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 715–16 (2006) (citing United States v. Bagley, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting)).

206. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995) (stating that "materiality" does not rest upon whether the evidence, if admitted, would have changed the outcome, but rather whether in the absence of the evidence, the trial resulted in "a verdict worthy of confidence").

207. *See* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 715 (2006).

208. *Id.* ("[M]any prosecutors—probably most—regularly go well beyond their constitutional and statutory obligations of discovery, providing defendants with virtually all information uncovered by law enforcement.").

divulge all exculpatory information in order to avoid errors of omission that can overturn verdicts;[209] government attorneys will divulge information because it is either exculpatory and material, thereby warranting disclosure; or the information is immaterial and thus no harm results from over-disclosing.[210] These are just a few possible explanations. Ultimately, considering these results and the level of government attorney follow through, federal agencies should encourage enforcement attorneys to adopt disclosure as a default disposition in bringing a formal proceeding as a companion policy to adopting the *Brady* rule. As noted previously, any potential negative consequences of this system, such as guilty defendants taking advantage of overly generous prosecutorial disclosure, should be addressed by a neutral arbiter that would ultimately decide what is exculpatory, admissible evidence.[211]

In the end, it is not coincidence that the two arenas of federal law without a constitutional due process right to discovery—administrative[212] and criminal law[213]—should share, in practice, the same constitutional, *Brady* rule protection against the harshness of this lack of right. This commonality intimates the importance of the *Brady* rule in government prosecution of criminal claims and, in the few agencies who have adopted it, civil claims. An effective *Brady* rule would ensure that agency attorneys cannot dismiss *Brady* through common-law or statutory means. Moreover, the *Brady* rule as applied creates a policy of default disclosure in agencies, arguably increasing the amount of exculpatory evidence provided to defendants, and

209. *Cf.* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1014 (2009) (indicating how government prosecutors are "highly motivated to avoid errors of omission," one of which may include not providing material, exculpatory evidence to the defendant).

210. *Cf.* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 513 (2009) ("If the evidence is immaterial, then by definition it will not create a reasonable doubt, and therefore its disclosure will not thwart the government's case against the defendant.").

211. *See supra* note 137–41 and accompanying text.

212. *See* NLRB. v. Interboro Contractors, Inc., 432 F.2d 854, 857 (2d Cir. 1970) ("It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right." (citations omitted)).

213. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (holding that case law does not support a "constitutionally compelled rule of pretrial discovery"); Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which [criminal] parties must be afforded . . . .").

thereby potentially increasing the chance of a fair trial. This increased disclosure would also not unduly frustrate agency enforcement, because *Brady* is limited by sound restrictions on its application.

CONCLUSION

The quilt work of discovery rights across federal administrative agencies reflects both a great amount of freedom and a substantial divergence in due process protections. Understandably, agencies adopt various procedural rules to deal with the varying gravity of proceedings before them. However, the great degree of variation between agencies on discovery rights—rights fundamental to the accused—creates its own inherent inequity. As federal agencies take on more responsibilities, expanding their enforcement potential, a strong argument arises for a concomitant increase in procedural protections. Federal government civil and criminal attorneys operate using different procedural rules. Yet, no matter how benign the penalty, or how inconsequential the offense, the civil government attorney serves the same cause of justice and the same public interest as his criminal analogue. Thus, the same procedural rules should bind both.

For these reasons, administrative agencies should adopt a constitutionally derived *Brady* disclosure standard. Grounding this standard in the U.S. Constitution's Fifth Amendment protections of due process ensures that no agency can dismiss *Brady* disclosure from their formal judicial proceedings outright. The *Brady* rule has the potential to be both a procedural device and a general guidepost for agency enforcement attorneys' discretion. By creating a robust, default standard of disclosure, the government lawyer moves toward the standard of justice seeker, and away from that of the partisan adversary—a move demanded of her by professional code and public interest. By doing so, the regulatory system increases the confidence of citizen-defendant and citizen alike so that, regardless of outcome, justice is the ultimate victor.