

STATEMENT OF

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BEFORE THE

**SUBCOMMITTEE ON CRIME, TERRORISM
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

CONCERNING

**THE PROSECUTION OF
FORMER SENATOR TED STEVENS**

PRESENTED ON

APRIL 19, 2012

Chairman Sensenbrenner, Ranking Member Scott and Members of the Subcommittee, thank you for the invitation to appear before you today. My name is Ken Wainstein. I'm a partner at the law firm of Cadwalader, Wickersham & Taft LLP, and I'm proud to represent Assistant United States Attorney Joe Bottini in this matter. I'm here with two of my colleagues, Jeffrey Nestler and Sara Zdeb, who have worked closely with Joe and me on this case.

I. Introduction

We are here today for one reason — to demonstrate to you and the American people that the Special Prosecutor's conclusion that Joe Bottini intentionally violated the law is simply wrong.

Before starting into the facts, it's important that you understand who Joe Bottini is. Joe is a 27-year veteran of the Alaska U.S. Attorney's Office; he has tried over 50 cases and prosecuted hundreds of crimes ranging from bombings to complex white-collar schemes without so much as an allegation of misconduct; and he is widely respected by the Alaska bench and bar, and particularly by the criminal defense bar. Joe has spent his entire career doing the hard work of criminal prosecution, and does so without fanfare or glory. He is the ultimate team player, always the first to volunteer for the tough job and the last to ask for credit.

Throughout his career, Joe has shunned the spotlight and declined numerous offers to assume more glamorous leadership positions. He wants nothing more than to serve as a line federal prosecutor, and the only recognition he seeks is to be counted among those who proudly go to work each day seeking justice on behalf of the people of the United States. As one Alaska defense attorney explained, Joe is "a modest man, without ego, and incapable of saying or doing something that is self-aggrandizing." In short, Joe is a model public servant.

Joe is also something else: he is human. He makes mistakes. Like every prosecutor — myself included — he has made his share of mistakes, especially in the hectic and unpredictable environment of criminal trials. He acknowledges that he made mistakes — serious mistakes — in the Senator Stevens case, and he will always regret the effect they had on the integrity of that prosecution and on the public perception of the Justice Department.

But Joe will never acknowledge, I will not acknowledge, and — most importantly — the facts do not acknowledge that he purposely committed those errors with the intention of violating Senator Stevens' rights.

The Special Prosecutor's report nonetheless concluded that he did — that Joe intentionally suppressed exculpatory information that he knew he was obligated to disclose to defense counsel.

II. General Concerns about the Special Prosecutor's Report

Considering the length of the report — all 500-plus pages of it — one would assume that that conclusion must be well-founded. That assumption would be wrong. This is a case that proves up the old adage that quantity does not lead to quality. If you actually read all those pages, you find that they distill down to two findings about Joe: (1) a finding that he committed the errors that he acknowledges; and (2) a finding that those errors were intentional. Completely missing, however, is any connective tissue between those two findings; any support for the inference that

Joe's errors were intentional and not inadvertent; or any genuine effort at all to apply and satisfy the specific intent elements of the crime of contempt.

In fact, there is really no analysis of Joe's intent in this report at all. We have carefully gone through it page-by-page, and among its 514 pages we have found a grand total of one paragraph (page 505, paragraph 3) that purports to actually analyze the intent behind Joe's conduct — one single paragraph for the most critical question in the whole investigation.

Reading this report is actually a little disconcerting. It's like reading a novel that goes straight from the introduction to the happy ending or a judicial opinion that states the issue and the court's ruling but omits the analysis that leads to the ruling. It's as though someone forgot to include the most important part of the report.

Professional prosecutors understand that it is their job to analyze intent when deciding how and whether to assign blame. They recognize that every error is not a punishable crime, and that it is the prosecutor's duty to examine all the relevant circumstances and carefully distinguish between mistake and misconduct before concluding that someone is guilty of a crime. The Special Prosecutor's report failed to uphold that duty. It branded AUSA Bottini a criminal and found his errors intentional without so much as considering the circumstances that demonstrated their inadvertence.

We have the greatest respect for the attorneys who generated the Special Prosecutor's report and for their diligence in pursuing and bringing to conclusion what was a tremendously complicated investigation. It is clear, however, that their investigation fell victim to the loss of perspective and target-fixation that can affect high-profile prosecutions.

Prosecutors have to constantly guard against the human temptation to see the target of an investigation as their quarry and to conduct the investigation as an effort to "build a case" against that target rather than as an effort to reveal the facts, no matter whether those facts incriminate or exculpate the target. That temptation is a constant struggle for professional prosecutors, and many features of federal prosecution practice — including charging guidelines and supervisory review of proposed indictments — are in place largely to protect the criminal process from its effects. Special prosecutions can be even more vulnerable to this temptation, given that they are solely focused on one case and are not governed and checked by the regularized procedures of a prosecutor's office. The telltale symptoms of that target-fixation are a result-oriented approach to the investigation, a conclusory assessment of the target's motive and intent, and ultimately a flawed determination of criminality. Each of those symptoms is present here.

III. Specific Failings of the Special Prosecutor's Report

Let's now look at the specific failings in the report — the particular reasons why its conclusions are unreliable and wrong. These failings are fully addressed in my March 15, 2012 letter to the Attorney General — which is attached to my testimony — and I will only summarize them here today.

Failure to consider explanatory circumstances: First, the report fails to take into account the chaotic conditions under which the prosecutors were working — conditions that made it likely that balls would be dropped and that the prosecutors would make mistakes. These include:

- The failure of the Public Integrity Section management to do its job of supporting the line prosecutors and ensuring coordination across the trial team;
- The extraordinarily compressed time period between indictment and trial for preparing the case; and
- The combative defense tactics that kept the prosecutors off-balance once they got into trial.

All of these circumstances created the situation where mistakes were likely — if not inevitable — yet the Special Prosecutor’s report failed to consider them in determining that Joe’s errors were intentional.

Failure to consider mitigating circumstances: Second, the report fails to consider critically important mitigating circumstances, including:

- The abundant evidence of Joe’s exemplary character and record of absolute integrity, including letters from defense counsel in Alaska who praise him as “a man of high moral character,” as “the kind of person for whom the expression “straight arrow” was invented,” and as someone who “plays by the rules, . . . does not cut corners [and] is as thoughtful, professional, and fair-minded as any prosecutor I have encountered.”
- The fact that Joe had no motive to deny Senator Stevens a fair trial. Interestingly, when pressed by Members of the Senate Judiciary Committee, the Special Prosecutor speculated that Joe was motivated by ambition — by a win-at-all-costs gladiator mentality that he called “contest living.” While it might apply to some lawyers, that pseudo-diagnosis is completely at odds with the qualities of modesty, fairness, and gentlemanliness that Joe’s colleagues and adversaries universally attribute to him or to the selflessness that has been the hallmark of his career. It should also be noted that this “contest living” theory — and for that matter, any discussion of motive at all — was absent from the report.
- And importantly, the fact that Joe took numerous good-faith efforts to comply with all discovery requirements, including pushing his Public Integrity supervisors **on seven separate occasions** to permit him to disclose the very information that the Special Prosecutor accuses him of unlawfully suppressing — requests that were met by denials from the management of the Public Integrity Section (known as “PIN”) each time, including one in an email from PIN Chief Bill Welch instructing Joe to stand down and sharply reminding him that “you work for PIN, and so these are your marching orders.”

Failure to accurately characterize salient facts:

The report fails to accurately recite certain facts, and even mischaracterizes several uncontroverted facts in a way that puts a nefarious slant on Joe's conduct that is completely unsupported by the established record. For instance, the report accuses Joe of making a prejudicial argument in his closing jury address — an argument that the transcript shows he never made. It also asserts that Joe had a hand in drafting the critical passage in a defective discovery letter — a passage that was completely composed by *other* members of the prosecution team. In both cases the assertion was cited as a basis for the report's findings, and in both cases the assertion simply had no basis in fact.

Failure to cite facts that directly exculpate Joe of the Special Prosecutor's accusations:

Besides mischaracterizing certain facts, the report altogether ignores other facts that clearly show that Joe did not intentionally violate his discovery obligations — ironically, the exact sort of exculpatory evidence that professional prosecutors are obligated to disclose and that Joe is accused of suppressing in the Stevens trial. For instance, the report finds Joe guilty of suppressing construction worker Rocky Williams' assumption that Senator Stevens was paying for the construction work on his house. Yet, the report never addresses the fact that Joe's outline for his direct examination of Mr. Williams had an entry showing that Joe intended to elicit **that very fact** on the record in open court — a circumstance that completely undermines a finding that Joe intended to suppress that information and a circumstance which certainly should have been front and center in any credible consideration of that issue.

Failure to cite legal authority adverse to the Special Prosecutor's positions:

Not only does the report fail to advise the Court of facts that are adverse to its position, it also ignores case law that is adverse to its position — case law that a lawyer is ethically obligated to disclose to a judge, especially in an ex parte situation like this where the Court did not have the benefit of hearing opposing views from the subjects' attorneys before it adopted and announced the Special Prosecutor's findings. In April 2010, we provided the Special Prosecutor with a memo detailing significant case law that undercut any finding of intentional misconduct against our client. The Special Prosecutor's report never addresses these cases.

Failure to conduct a fair process:

It is particularly ironic that the Special Prosecutor tasked with investigating whether federal attorneys subjected Senator Stevens to an unfair process has done exactly that with the subjects of this investigation. From limiting our access to critical information (i.e., discovery) to denying us the opportunity to review and provide input about the report's findings before they were finalized and publicly announced, this investigation has been conducted with little regard for fairness and due process.

IV. Conclusion

Most troubling has been the manner in which this investigation concluded — with no criminal charge or prosecution but with a public branding of our client as a proven criminal. It is a rule in our criminal justice system that professional prosecutors are allowed to accuse a person of

criminal conduct in one way and one way only — and that's with the filing of formal charges that the person can then contest in open court to defend his liberty and his reputation. That rule is based on the rationale that a prosecutor should level accusations against a citizen only if and when he has the evidence and the confidence to back them up in a public court of law.

That rule was not followed in this case. The Special Prosecutor decided not to file charges against Joe, but then turned around and publicly declared to the world that he was guilty of the worst thing one can say about a federal prosecutor — that he is dishonest and a cheater. This has left Joe with the shame of a criminal accusation, but without the opportunity to show the American people that that accusation is wrong.

Today we finally have that opportunity, and we are very grateful to the Committee for giving it to us. I look forward to this hearing and to answering your questions.