

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Patty Merkamp Stemler  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

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IN RE CONTEMPT FINDING IN  
*UNITED STATES v. STEVENS*

Case: 1:09-mc-00273  
Assigned To : Robertson, James  
Assign. Date : 6/2/2009  
Description: Miscellaneous

MOTION TO VACATE FINDING OF CONTEMPT

Patty Merkamp Stemler, by and through counsel, respectfully moves this Court under LCrR 57.6 to vacate its February 13, 2009 finding of contempt in *United States v. Stevens*, Case No. 08-cr-231 (EGS). In support of this motion, Ms. Stemler incorporates by reference the accompanying memorandum of law and declarations.

Respectfully submitted,



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Dated June 2, 2009

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Misc. No. 09-273

**MEMORANDUM IN SUPPORT OF MOTION  
TO VACATE FINDING OF CONTEMPT**

Patty Merkamp Stemler is the long-standing Chief of the Appellate Section of the United States Department of Justice's Criminal Division. As the record makes clear, she had no role whatsoever in the investigation, interviews, or grand jury proceedings that led to the indictment in *United States v. Stevens*, No. 08-231. Ms. Stemler had no role in the pretrial disclosure of documents to the defendant, in the preparation of the case for trial, and in the trial proceeding itself. In short, Ms. Stemler had no knowledge of, involvement in, or responsibility for the events that gave rise to any of the allegations of prosecutorial misconduct or those that factored into the dismissal of that case with prejudice on April 7, 2009.

As Chief of the Appellate Section, Ms. Stemler's involvement in the *Stevens* case was limited to providing legal guidance, research, and writing assistance to both the original and new prosecution teams. Her role never encompassed responsibility for the production of any documents to the defendant. Accordingly, Ms. Stemler should not have been held in contempt during a status hearing on February 13, 2009, for an alleged violation of the Court's January 21, 2009 and February 3, 2009 Orders regarding a four-day delay in disclosing certain documents to

the defendant that had previously been shared with the Court. Ms. Stemler hereby moves to vacate the Court's finding her in contempt.

### Background

#### Role of the Appellate Section

Since 1992, Ms. Stemler has been the Chief of the Appellate Section of the Department of Justice's Criminal Division ("Appellate Section"). (Stemler Decl. ¶ 1, June 1, 2009.) She has been an attorney in that Section since 1976, when she entered the Justice Department through the Honors Program. (*Id.*) Ms. Stemler has argued in twelve circuit courts of appeals and the United States Supreme Court, and she has been the recipient of numerous Department awards, including the Attorney General's Distinguished Service Award, the Criminal Division's Henry E. Peterson Award, and the Attorney General's John Marshall Award for the Handling of Appeals. (*Id.* ¶¶ 4-5.) Ms. Stemler has never previously been sanctioned or reprimanded by any of the courts in which she has appeared. Her self-reporting of the Court's contempt finding to the Justice Department's Office of Professional Responsibility ("OPR") on February 13, 2009 was Ms. Stemler's first OPR referral in her thirty-three years at the Department. (*Id.* ¶¶ 5, 38.)

Attorneys in the Appellate Section prepare briefs and argue cases in the United States courts of appeals, draft Supreme Court briefs for review and filing by the Solicitor General, and prepare recommendations to the Solicitor General in cases decided adversely to the government. *See* <http://www.usdoj.gov/criminal/links/appellate.html> (last visited June 1, 2009). From time to time, the Section's lawyers also assist prosecutors with researching, briefing, and arguing motions in significant district court cases. *See id.* The Section provides research and writing assistance; it does not participate – unless specifically requested – in other aspects of district court litigation, including document production. As Chief of the Appellate Section, Ms. Stemler

is also consulted by others within the Justice Department on questions of law. (Stemler Decl. ¶ 3.)

Involvement in *United States v. Stevens*

1. *Trial Assistance*

Until January 2009, the government's counsel of record in the prosecution of *United States v. Stevens* were Brenda Morris, Edward Sullivan, and Nicholas Marsh, attorneys in the Public Integrity Section ("Public Integrity") of the Justice Department's Criminal Division; and Joseph Bottini and James Goeke, Assistant United States Attorneys for the District of Alaska. (Att'y Update, July 29, 2008; Minute Entry for Proceedings, July 31, 2008.) The Appellate Section provided legal research and advice upon request to the trial team prior to verdict on only four discrete occasions. First, in March 2008, Ms. Stemler and another Section attorney commented on a draft indictment. In early September 2008, Ms. Stemler commented on draft jury instructions. On October 8, 2008, the trial team asked for emergency research assistance on a discovery sanction issue. And finally, during deliberations, the trial team sought research assistance on a juror misconduct allegation. (Stemler Decl. ¶ 8.) Ms. Stemler and her Section did not participate in discovery or provide legal advice on the government's discovery obligations.

2. *Assistance with Post-Trial Briefs*

Following the October 27, 2008 verdict in *United States v. Stevens*, the defendant filed a lengthy Motion for New Trial on December 5, 2008. (Mot. New Trial, Dec. 5, 2008.) Public Integrity asked the Appellate Section for assistance in researching and drafting discrete portions of the government's opposition to this motion. (Stemler Decl. ¶ 11.) Ms. Stemler assigned three Appellate Section attorneys to the matter (*id.*), and the government filed its response on January

16, 2009. (Mem. Opp'n Mot. New Trial, Jan. 16, 2009). Ms. Stemler did not draft any portion of this response, nor did she review it prior to its filing. (Stemler Decl. ¶ 18.)

3. *Consultation Concerning Agent Joy's Whistleblower Status*

On December 1, 2008, Ms. Stemler received a hard copy of FBI Special Agent Chad Joy's complaint setting forth allegations related to the *Stevens* case ("Joy Complaint"). (*Id.* ¶ 9.) Upon the request of Matthew Friedrich, the then-acting Assistant Attorney General of the Criminal Division, and William Welch, Chief of Public Integrity, Ms. Stemler consulted with the Justice Department's Civil Division to ascertain whether whistleblower statutes and regulations allowed for the disclosure of the Joy Complaint to the Court or the defendant. (*Id.* ¶ 10; Hertz Decl. ¶ 4-5, Feb. 9, 2009.) She summarized the information she gathered in an email to Mr. Welch on December 5, 2008. (Stemler Decl. ¶ 10.)

On December 15, 2008, Brenda Morris, Principal Deputy Chief of Public Integrity and the lead prosecutor in the *Stevens* trial, suggested to Ms. Stemler that an Appellate Section attorney should attend the December 19, 2008 sealed hearing. (*Id.* ¶ 12.) Ms. Morris thought the hearing, during which the Court would consider whether to make the Joy Complaint public, might give rise to additional briefing. (*Id.*) Ms. Stemler accompanied Ms. Morris to the hearing in this limited capacity; she did not speak and left midway through the proceeding due to another commitment. (*Id.* ¶ 13.) Ms. Stemler did not attend a proceeding in the *Stevens* case again until she sat in the audience for the February 13, 2009 status hearing.

At a status hearing on January 14, 2009, the prosecutors told the Court that Agent Joy "does not qualify for whistleblower status." (Hr'g Tr. 8, Jan. 14, 2009.) Because the Court had based its December 19, 2008 decision to seal portions of Agent Joy's complaint on the belief that he was entitled to whistleblower protection, the Court ordered the Attorney General of the

United States to provide by noon on January 16, 2009, a declaration regarding what and when individuals and offices at the Justice Department knew about Agent Joy's Complaint and his status as a whistleblower. (Jan. 14, 2009 Order 4-5.)

At the direction of Mr. Friedrich, Ms. Stemler prepared and signed on January 15, 2009, the government's motion to vacate that order on grounds that the Attorney General lacked first-hand knowledge of the facts and that there is a presumption against compelling high-level Executive Branch officials to provide information or testimony in legal proceedings. (Stemler Decl. ¶ 16; Glavin Decl. ¶ 5, June 1, 2009; Mot. Recons. & Vacate Jan. 14, 2009 Order 5-9.) In the motion, which was the first pleading prepared and signed by Ms. Stemler in the *Stevens* case, Ms. Stemler also apologized on behalf of the government for the misstatement made by prosecutors during the January 14, 2009 status hearing that Agent Joy had been denied whistleblower protection: "Government counsel was mistaken; they had misconstrued the [December 4, 2008] letter sent to Agent Joy by OPR. The Department has never determined that Agent Joy is not entitled to whistleblower protection, and has never so advised him. . . . We apologize . . . for the confusion caused by our misinterpretation of OPR's December 4 letter." (Mot. Recons. & Vacate Jan. 14, 2009 Order 1, 5.) Because Ms. Stemler was the sole signatory on this motion, she entered a formal appearance in the case on January 16, 2009. (Stemler Decl. ¶ 17; Notice Appearance Jan. 16, 2009.)

The Court granted the government's motion in part, allowing the Attorney General to designate another Department official to provide the required declaration by 5:00 p.m. on January 17, 2009. (Jan. 16, 2009 Order 11-12.) However, because the Court required the Attorney General's designee to have a scope of oversight possessed, in fact, only by the Attorney General and the Deputy Attorney General, the revised order did not moot the government's

contention that high-level officials should not be compelled to declare facts about which they have no personal knowledge. Accordingly, the Solicitor General authorized the Criminal Division to file a timely petition for writ of mandamus and request for an emergency stay with the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). See Pet. for Writ of Mandamus, *In re Michael B. Mukasey*, No. 09-3005 (D.C. Cir. Jan. 16, 2009). Ms. Stemler signed the petition as counsel for the United States. *Id.* On January 17, 2009, the D.C. Circuit granted an administrative stay. Per Curiam Order, *In re Michael B. Mukasey*, No. 09-3005 (D.C. Cir. Jan. 17, 2009).

4. *Assistance in Responding to the January 21 and February 3, 2009 Orders*

On January 21, 2009, the Court vacated its January 16, 2009 Order and issued a new order directing the government to produce to the Court and to the defendant by January 30, 2009, all communications regarding the Joy Complaint within and between Public Integrity and any other office within the Department of Justice, as well as declarations describing the substance of any oral communications regarding the same. (Jan. 21, 2009 Order 1-2, 18.) Upon issuance of the January 21, 2009 Order, the government withdrew its petition before the D.C. Circuit.<sup>1</sup> Notice of Withdrawal of Pet. for Writ of Mandamus, *In re Michael B. Mukasey*, No. 09-3005 (D.C. Cir. Jan. 22, 2009); see also Per Curiam Order, *In re Michael B. Mukasey*, No. 09-3005 (D.C. Cir. Jan. 26, 2009) (granting motion and vacating January 17, 2009 Order as moot).

Ms. Stemler prepared a responsive declaration describing her oral communications with Public Integrity attorneys regarding Agent Joy’s status. (Stemler Decl. ¶ 21.) On January 29,

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<sup>1</sup> Ms. Stemler’s only communications with counsel for the defendant occurred between January 15 and January 22, 2009, when Ms. Stemler led the Department’s efforts to excuse the Attorney General and Deputy Attorney General from filing declarations in this case. (Stemler Decl. ¶ 20.)

2009, to ensure her declaration was up-to-date and accurate, Ms. Stemler sought confirmation via email from Rita Glavin, then-acting Assistant Attorney General, that there was still no formal determination of Agent Joy's status before she hand-delivered her completed declaration to the Criminal Division's Office of the Acting Assistant Attorney General, which was compiling the ordered declarations. (*Id.*) Attorneys at the Public Integrity Section compiled the document production in response to the January 21, 2009 Order,<sup>2</sup> but Ms. Stemler also reviewed her own emails and forwarded a list of her responsive emails to Mr. Welch and Raymond Hulser, Deputy Chief of Public Integrity, on January 28, 2009, to make sure those emails had been included. (*Id.* ¶¶ 22-23; Glavin Decl. ¶ 6; Hulser Decl. ¶¶ 4-5, Jan. 29, 2009.) Ms. Stemler and others in her Section substantially assisted in drafting the government's pleading that accompanied the January 30, 2009 production of documents. (Stemler Decl. ¶ 24.)

On January 30, 2009, the government submitted to the Court *in camera* and under seal its document production, declarations, and accompanying pleading in response to the Court's January 21, 2009 Order. The pleading delineated the legal difference between "whistleblower protection" and "whistleblower status," which was the underlying cause of the prosecution's earlier confusion. (Gov't Submission Resp. Jan. 21, 2009 Order 2-4.) Moreover, although the Court's Order directed a copy of the production to be provided to the defendant, the government explained that it was producing the emails *in camera* because disclosure to the defendant of the government's internal communications "would require the production of substantial amounts of privileged and work-product protected materials." (*Id.* at 13.)

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<sup>2</sup> The document collection occurred at Public Integrity's offices, which are located in the Bond Building, approximately eight blocks from the Appellate Section's offices in the main building of the Justice Department on Pennsylvania Avenue. (Stemler Decl. ¶ 22.) No Appellate Section attorney actually saw the document production before it was submitted to the Court on January 30, 2009. (*Id.* ¶ 25.)



In light of the Appellate Section's involvement in researching and providing substantial drafting assistance for the pleading that accompanied the government's production, that pleading was signed not only by Mr. Welch and Ms. Morris, but also by Ms. Stemler. (*Id.* at 15; Stemler Decl. ¶ 25; Glavin Decl. ¶ 7.) Ms. Stemler played no part, however, in collecting and producing the emails and declarations beyond drafting her own declaration and reviewing her own emails. (Stemler Decl. ¶¶ 21-23; Glavin Decl. ¶ 6.) In fact, apart from her own emails, Ms. Stemler did not see the emails submitted to the Court until after the Court's February 13, 2009 contempt finding. (Stemler Decl. ¶¶ 25, 39.)

Ms. Stemler was out of the office on a family vacation from Sunday, February 1, 2009 to Friday, February 6, 2009. (*Id.* ¶ 26; Glavin Decl. ¶ 8.)

On February 2, 2009, the defendant moved to dismiss the indictment or for a new trial, arguing that the government had interpreted the scope of the January 21, 2009 Order too narrowly and that it had violated the order by not providing a copy of its production to the defendant. (Mot. Dismiss or for New Trial 1-2, Feb. 2, 2009.) Alternatively, the defendant asked the Court to "hold the government in contempt and require immediate compliance with the January 21 Order. To the extent the government claims that compliance with the Court's Order would require it to produce privileged documents, those documents should be ordered produced to the defense as a remedy for the government's contempt."<sup>3</sup> (*Id.* at 12.)

Following the defendant's motion, the Court on February 3, 2009, ordered the government to (1) file a response to the defendant's motion by noon on February 9, 2009; (2) provide "a detailed privilege log for each communication it [sought] to withhold," including

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<sup>3</sup> On February 16, 2009, the government did produce to the defendant all of the emails, regardless of any applicable privilege, that had initially been provided to the Court *in camera* in response to its January 21, 2009 Order. (Notice Produc. Emails, Decls., & Pleadings, Etc. 1, Feb. 16, 2009.)

“whether, even if a portion of a communication is privileged or protected, the communication can nevertheless be produced in redacted form”; (3) file a redacted version of its January 30, 2009 submission on the public docket; and (4) file “a supplemental submission with a declaration from an official with oversight responsibility for the Civil Division at the Department of Justice and any and all relevant communications between attorneys in the Civil Division and attorneys within the Public Integrity Section or the Appellate Section of the Criminal Division.” (Feb. 3, 2009 Order 3-5.)

During Ms. Stemler’s absence, attorneys from Public Integrity and the Appellate Section prepared a draft consolidated response to the defendant’s February 2, 2009 motion and the Court’s February 3, 2009 Order. On Saturday, February 7, 2009, upon her return from vacation, Ms. Stemler reviewed and provided comments on that draft. (Stemler Decl. ¶ 27; Glavin ¶ 9.) On February 8, 2009, Ms. Stemler also looked over a draft of the privilege log prepared by Public Integrity. Concerned that some of her emails with attorneys in the Civil Division might be missing, she forwarded her responsive emails that day to the Public Integrity attorneys who were compiling the log and supplemental production; they confirmed that the emails were included. (Stemler Decl. ¶ 28.)

On the morning of February 9, 2009, Ms. Stemler, to the best of her recollection, asked Mr. Hulser about the blank spaces next to approximately thirty or so entries on the privilege log. (*Id.* ¶ 29.) She recalls she was told that the government was withdrawing its claim of privilege as

to those emails because they were largely non-substantive.<sup>4</sup> (*Id.*) Kevin Driscoll, a Public Integrity attorney, provided the Appellate Section with draft language explaining the withdrawal of privilege for insertion into the government's pleading.<sup>5</sup> (*Id.*) Based upon this information, Ms. Stemler understood that Public Integrity would produce those thirty or so documents to the defendant. (*Id.* ¶ 30.)

Public Integrity filed on February 9, 2009, the government's consolidated response, privilege log, supplemental production, and the declaration of the Civil Division's acting Assistant Attorney General. The declaration and supplemental production were produced to the Court *in camera*. (Gov't's Consolidated Resp. 16, Feb. 9, 2009.) The government in its consolidated response set forth the legal basis for its assertion of work product protection (*id.* at 2-8); explained why it believed it was in compliance with the January 21, 2009 Order (*id.* at 8-11); and argued that the defendant's request for civil contempt was both unnecessary and not appropriate (*id.* at 14-16). Because of its direct relation to the January 30, 2009 submission that had been signed by Mr. Welch, Ms. Morris and Ms. Stemler, the government's February 9, 2009 consolidated response included the same signatories. (*Id.* at 18; Stemler Decl. ¶ 31; Glavin ¶ 10.)

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<sup>4</sup> Ms. Stemler did not possess copies of these emails, except of course for the few that she had sent or received. (*See* Stemler Decl. ¶ 26.) All but a few of these emails pertained merely to the scheduling of meetings or requests for phone calls. The only emails without log entries that contained any relevant substance discussed Agent Joy's wish for confidentiality, which had already been disclosed to the defendant by Joy's counsel at the December 19, 2009 sealed hearing. (*See* Hr'g Tr. 37-40, Dec. 19, 2009.)

<sup>5</sup> The suggested language was edited by the Appellate Section and added to footnote 1 of the Government's Consolidated Response: "In accordance with the Court's admonition that 'generalized assertions of privilege or protection are not warranted,' February 3, 2009 Order at 3, the Government hereby waives any assertion of work-product protection that might otherwise apply to those documents in the privilege log for which no specific basis for protection is provided." (Gov't's Consolidated Resp. 3 n.1, Feb. 9, 2009.)

February 13 Status Hearing

Ms. Stemler attended the February 13, 2009 status hearing upon the request of Ms. Glavin. (Stemler Decl. ¶ 32; Glavin ¶ 11.) Ms. Stemler, however, did not sit at counsel table and merely observed the proceedings from the audience. (Stemler Decl. ¶ 33.)

During the hearing, Mr. Driscoll engaged in a colloquy with the Court regarding the government's assertion of work product protection over the emails produced *in camera* on January 30, 2009 in response to the Court's January 21, 2009 Order. The Court confirmed that the government had properly interpreted the scope of its production obligations pursuant to the order, but urged the government to reconsider its decision to assert work product protection and not produce to the defendant. (Hr'g Tr. 5-8, Feb. 13, 2009.) Turning to the thirty-two emails over which the government was no longer asserting privilege—as disclosed in the government's February 9, 2009 pleading and privilege log—the Court asked Mr. Driscoll whether those emails at least had been produced to the defendant. (*Id.* at 10.) Mr. Driscoll responded, "I don't believe they have, your Honor. I think we did relinquish the assertion of the privilege with respect to them, and since we have done so, we will provide them to the defendant." (*Id.*) Until Mr. Driscoll's answer, Ms. Stemler was unaware that the documents had not yet been produced. (Stemler Decl. ¶ 34.)

The Court then asked Mr. Driscoll whether there was a reason for the delay, and Mr. Driscoll explained that "we were waiting for the Court to determine whether our interpretation and construction of the Court's January 21st order was correct." (Hr'g Tr. 10-11, Feb. 13, 2009.) The Court then stated:

THE COURT: I understand all that. I'm just saying, is there some reason why to date those documents have not been produced? That's what a Court order –

MR. DRISCOLL: There is not, and they will be produced forthwith.

THE COURT: There is no reason?

MR. DRISCOLL: There is no reason.

THE COURT: Then I'm holding the attorneys in contempt of court. Ms. Morris, Mr. Welch; you just joined the team, you. Who else signed those pleadings? That was a Court order. That wasn't a request. I didn't say out of the goodness of your heart do this. I said turn them over or invoke the privilege, and you're telling me there was no reason why they weren't turned over, so I'm holding the team of attorneys responsible for that with contempt of court and I'll deal with whatever sanctions are appropriate at the conclusion of this case. I want those documents turned over today before the close of business, and my interpretation of close of business is five o'clock.

MR. DRISCOLL: Yes, your Honor.

THE COURT: Who else is on the team that I need to include in an order holding in contempt?

(*Id.* at 11-12.) Ms. Stemler, who was sitting in the back of the courtroom, then stood and identified herself as having signed the February 9, 2009 submission:

MS. STEMLER: Your Honor, I signed the pleading.

THE COURT: I'm sorry?

MS. STEMLER: I signed the pleading, your Honor.

THE COURT: And your name?

MS. STEMLER: Patty Stemler.

THE COURT: Ms. Stemler.

It's a Court order. Isn't the Department of Justice taking Court orders seriously these days?

(*Id.* at 12; Stemler Decl. ¶ 35.) Mr. Driscoll answered, "We are, your Honor. . . . The reason [the emails have not been produced] was just to be sure we were making our work product protection clear, and we will provide them as soon as possible." (Hr'g Tr. 12, Feb. 13, 2009.)

The Court then reiterated:

Those lawyers are held in contempt. And there will be further proceedings at the appropriate time, and I don't plan to get side tracked on any sanctions right now. I'm going to preside over all these remaining matters and resolve the defendant's requests and motions before the Court in as timely a manner as I can. That's paramount to this Court, and I'll deal with the sanctions associated with the content [sic] at a later date, but that's outrageous for the Department of Justice, the largest law firm on this planet, to come before a federal judge and say, yeah, Judge, you know, we recognized your order, we realized it and we haven't gotten around to complying with it, and we really don't have a good faith reason or any reason for not having complied with it. That is not acceptable in this court and that's the reason why I'm adjudicating those attorneys in contempt.

(*Id.* at 12-13.)

Immediately after the February 13, 2009 hearing, Ms. Stemler worked with the Public Integrity attorneys who had possession of the documents to ensure that the thirty-two emails over which the government no longer asserted privilege were delivered that afternoon to the defendant, with an additional eight redacted emails delivered later that day. (Stemler Decl. ¶¶ 36-37.) She also reported the Court's contempt finding to OPR that evening. (*Id.* ¶ 38.)

#### Subsequent Developments

On Saturday, February 14, 2009, the Court issued a minute order explaining that, "[u]pon reflection," it would not hold Mr. Driscoll in contempt because he "appears to have been brought in by his supervisors only recently for the limited purpose of addressing a discrete issue," while

“the three senior DOJ attorneys present at the hearing did sign the relevant pleadings and have been working on the specific issues related to the Court’s January 21, 2009 and February 3, 2009 Orders for months. Therefore, under the circumstances, it was those attorneys’, and not Mr. Driscoll’s, responsibility to ensure that the government complied with the Court’s Orders.” (Minute Order, Feb. 14, 2009.) This minute order is the only entry in the *Stevens* docket memorializing the Court’s February 13, 2009 contempt finding.

On Monday, February 16, 2009, the government reconsidered its position and produced to the defendant all of the emails that had been produced *in camera* to the Court on January 30 and February 9, 2009. (Stemler Decl. ¶ 41.) The government also filed an accompanying pleading explaining that the disclosure was to “resolv[e] the pending post-trial motions as expeditiously as possible” and avoid any further litigation or delay related to Agent Joy’s whistleblower status. (Notice Produc. Emails, Decls., & Pleadings, Etc. 1-2, Feb. 16, 2009.) The government further stated that a new prosecution team would take over and would work with defense counsel “to resolve as many discovery issues as possible” prior to the scheduled discovery hearing related to the defendant’s post-trial motions. (*Id.* at 2-3.) Despite the change in the prosecution’s composition, the filing disclosed that the new team intended for the Appellate Section’s role to remain the same: to “continue to provide legal support on these matters as needed.” (*Id.*)

On April 1, 2009, the government filed a motion to set aside the verdict in *United States v. Stevens* and dismiss the indictment with prejudice. As disclosed in the filing, when the new prosecution team began collecting and reviewing documents and interviewing potential witnesses in preparation for a possible evidentiary hearing, it discovered a witness interview that had occurred in April 2008. (Mot. Set Aside Verdict 1-2.) The substance of that interview

should have been disclosed to the defendant, but was not. (*Id.* at 2.) Upon the government's motion, the Court set aside the verdict and dismissed the case on April 7, 2009. (Apr. 7, 2009 Order.) In addition, the Court "commence[d] criminal contempt proceedings against the original prosecution team, [naming six individuals], pursuant to the Court's authority under Federal Rule of Criminal Procedure 42, based on failures of those prosecutors to comply with the Court's numerous orders and potential obstruction of justice." (Hr'g Tr. 46, Apr. 7, 2009.) Ms. Stemler was not a member of the original prosecution team, had no involvement whatsoever in the alleged misconduct, and was not named in the Court's referral.

Although the case is now dismissed and a criminal inquiry is underway with respect to the various allegations of prosecutorial misconduct that have nothing to do with Ms. Stemler, the Court's February 13, 2009 contempt citation as to Ms. Stemler remains undisturbed.

#### Argument

##### I. Ms. Stemler Did Not Participate in Any Contumacious Conduct

On February 13, 2009, the Court found contumacious the government's failure to turn over thirty-two emails to the defendant immediately upon the government's February 9, 2009 withdrawal of privilege. Because the Court ordered the government to "turn [the documents] over or invoke the privilege," and the government had done neither as to these thirty-two emails, the Court held "the team of attorneys responsible for" this failure in "contempt of court." (Hr'g Tr. 11, Feb. 13, 2009.)

Ms. Stemler is not aware of any contumacious conduct with regard to these documents. In any event, she was not part of "the team of attorneys responsible for" the underlying collection, logging, and production of documents in this case. Following the verdict, Ms. Stemler and her Section stepped into a particular role uniquely and historically filled by the



Appellate Section: first, to help research and brief specific legal issues related to post-trial motions practice and to prepare the case for its likely appeal; and second, to consult on difficult questions of law, such as whether regulatory whistleblower protections restricted when and to whom the Department could disclose the Joy Complaint. As the government explained in its February 16, 2009 filing, the Appellate Section “provide[s] legal support.” (Notice Produc. Emails, Decls., & Pleadings, Etc. 2, Feb. 16, 2009.) That is the role Ms. Stemler and her Section played with respect to the original prosecution team, and it is the role the Appellate Section continued to play in support of the new prosecution team.

Ms. Stemler had no responsibility for the management of documents in the *Stevens* case and had no reason to inquire into the production of documents beyond the inclusion of her own responsive emails. Had Ms. Stemler stood before the Court on February 13, 2009, she would not have been able to answer the Court’s questions about the production status of any of the underlying documents. Prior to Mr. Driscoll’s statement, Ms. Stemler was wholly unaware that the emails for which there was no longer an assertion of privilege had not been produced. On that date, Ms. Stemler had not even seen the documents that comprised the production at issue. In short, Ms. Stemler was in no way a participant in, nor was she responsible for the conduct that the Court held contemptuous.

Ms. Stemler stood and identified herself at the February 13, 2009 hearing solely in answer to the Court’s initial question, “Who else signed those pleadings?” (Hr’g Tr. 11, Feb. 13, 2009.) By standing up and stating “Your Honor, I signed the pleading” (*id.* at 12), Ms. Stemler did not intend to identify herself—incorrectly—as a member of “the team of attorneys responsible for” turning over the documents the government was no longer seeking to protect (*id.* at 11). In other words, her self-identification was not in response to the Court’s second question,

“Who else is on the team ...?” (*Id.* at 12.) Ms. Stemler signed the pleadings in her role as Chief of the Appellate Section to reflect her Section’s work on the pleadings’ legal arguments and its drafting assistance, not as a member of the team of attorneys handling the document production. Ms. Stemler’s absence from the counsel table at the February 13, 2009 status hearing reflected the supporting role she played as a legal advisor for the prosecution. Because Ms. Stemler had no involvement in the conduct at issue, the finding of contempt against her should be vacated.

II. The Court’s Finding Was Punitive and Wrongly Held Ms. Stemler in Criminal Contempt

As reflected in the transcript of the February 13, 2009 hearing, the import of the Court’s contempt finding was to punish the “team of attorneys responsible” for what it believed to be acknowledged noncompliance with the Court’s orders without any explanation: “you’re telling me there was no reason why they weren’t turned over, so I’m holding the team of attorneys responsible for that with contempt of court[.]” (Hr’g Tr. 11, Feb. 13, 2009.) Although the Court made it clear that it “want[ed] those documents turned over today before the close of business, and my interpretation of close of business is five o’clock,” it also made clear that “whatever sanctions are appropriate” would be imposed “at the conclusion of this case” irrespective of whether the government met that deadline. (*Id.* at 11-12.) The Court held the lawyers in contempt, with “further proceedings at the appropriate time,” because it was “outrageous for the Department of Justice . . . to come before a federal judge and say, yeah, Judge, you know, we recognized your order, we realized it and we haven’t gotten around to complying with it, and we really don’t have a good faith reason or any reason for not having complied with it.” (*Id.* at 12-

13.) The Court's contempt finding as to Ms. Stemler was punitive and unwarranted in light of her role in this matter.<sup>6</sup>

Whether a court's contempt finding is civil or criminal is determined by the contempt proceeding's "character and purpose," *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 827 (1994), and not by the intent of the court imposing the contempt. A contempt finding that is punitive in nature is thus a criminal conviction, regardless of whether the court intended so. *See, e.g., Cobell v. Norton*, 334 F.3d 1128, 1146-47 (D.C. Cir. 2003) (contempt finding was criminal in effect even though district court had thought it civil); *Evans v. Williams*, 206 F.3d 1292, 1293-94 (D.C. Cir. 2000) (same); *cf. Shillitani v. United States*, 384 U.S. 364, 368-69 (1966) (contempt finding was civil in effect even though both district court and court of appeals had treated it as criminal). Here, the Court's contempt finding was punitive because it admonished and reprimanded the offenders for their perceived disregard of the Court's authority. The design of the Court's contempt was not to coerce the government to produce the emails at issue. Indeed, although the Court directed the production of the relevant emails by the close of business that day, it went on to discuss the need for "further proceedings" and the later imposition of sanctions regardless. The Court's contempt thus did not turn on whether the government produced the thirty-two emails by the imposed cutoff and fell into compliance. *See Cobell*, 334 F.3d at 1145 ("[C]riminal contempt is used to punish, that is, to 'vindicate the authority of the court' following a transgression rather than to compel future compliance or to aid the plaintiff." (quoting *Bagwell*, 512 U.S. at 828)).

Any doubt about the nature of the Court's contempt was dispelled on February 14, 2009 with the issuance of the minute order. By the close of business on February 13, 2009, the

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<sup>6</sup> Ms. Stemler does not mean to imply that she believes the other attorneys should have been held in contempt.

government had, in fact, produced the thirty-two emails at issue and thus had rendered unnecessary any coercive component of the Court's contempt finding. Despite the government's compliance, however, the February 14, 2009 minute order reiterated that Mr. Welch, Ms. Morris and Ms. Stemler were still in contempt. Compliance did nothing to absolve them. *See Bagwell*, 512 U.S. at 828-29 (contempt "is punitive and criminal if it is imposed retrospectively for a 'completed act of disobedience,' ... such that the contemnor cannot avoid or abbreviate the [sanction] through later compliance" (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443 (1911))); *cf. Cobell*, 334 F.3d at 1147 (contempt finding was punitive because the "opinion lacks any suggestion that the defendants could yet comply and thereby purge themselves of the contempt"); *Evans*, 206 F.3d at 1295 (contempt sanctions were punitive because "there was no opportunity to escape their consequences by altering behavior"). Accordingly, to the extent the purpose of the Court's initial contempt finding was unclear, the February 14, 2009 minute order rendered it definitively punitive. But, as the facts make clear, there was no basis to hold Ms. Stemler in criminal contempt.

A criminal contempt conviction requires proof beyond a reasonable doubt that the contemnor *intended* to act wrongfully. *See In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993); *In re Brown*, 454 F.2d 999, 1007 (D.C. Cir. 1971) ("Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt."). Because Ms. Stemler did not participate in the conduct deemed contumacious,<sup>7</sup> there is no way in which she could have had the requisite intent. Ms. Stemler was not even aware of the conduct the Court found contumacious until it was disclosed by Mr. Driscoll at the February 13, 2009 status hearing. Indeed, Ms. Stemler only came to the attention of this Court because of her respect for

<sup>7</sup> Ms. Stemler also cannot be held criminally to account for the conduct of another or for conduct that occurred prior to her involvement with the case. *See Cobell*, 334 F.3d at 1147-48.

its authority. Despite the fact that she had no role in or responsibility for causing the delay in production that led to the contempt finding and was not appearing on behalf of the government on February 13, 2009, she stood up in the back of the courtroom and identified herself as a signatory in response to the Court's question as to who else signed the pleadings.

As this Court is well aware, a criminal contempt conviction further requires proper notice, an appointment of a prosecutor and a trial. *See* Fed. R. Crim. P. 42(a).<sup>8</sup> The February 13, 2009 hearing met none of these requirements. Although a court is empowered to “summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contumacious conduct and so certifies,” Fed. R. Crim. P. 42(b), discovery violations—such as the government's failure in the *Stevens* case to produce the thirty-two emails to the defendant—are not committed in the presence of the court and therefore cannot be the basis for summary criminal contempt. *See Bagwell*, 512 U.S. at 833 (an alleged “failure to comply with document discovery” is an offense that “occur[s] outside the court's presence”); *cf. Cooke v. United States*, 267 U.S. 517, 537-38 (1925) (authoring contemptuous letter sent to court not a direct offense); *United States v. Lee*, 720 F.2d 1049, 1053 (9th Cir. 1983) (submitting contemptuous motion not

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<sup>8</sup> Federal Rule of Criminal Procedure 42 provides:

(a) **Disposition After Notice.** Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) **Notice.** The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

- (A) state the time and place of the trial;
- (B) allow the defendant a reasonable time to prepare a defense; and
- (C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) **Appointing a Prosecutor.** The court must request that the contempt be prosecuted by an attorney for the government . . . .

(3) **Trial and Disposition.** A person being prosecuted for criminal contempt is entitled to a jury trial . . . .

a direct offense); *Wong Gim Ying v. United States*, 231 F.2d 776, 779-80 (D.C. Cir. 1956) (in-court refusal to testify before grand jury not a direct offense).

Furthermore, even if the circumstances here were an occasion for summary contempt, Ms. Stemler was still entitled to due process. *See, e.g., Taylor v. Hayes*, 418 U.S. 488, 498 (1974); *Doral Produce Corp. v. Paul Steinberg Assoc.*, 347 F.3d 36, 44 (2d Cir. 2003); *United States v. Browne*, 318 F.3d 261, 267 (1st Cir. 2003). As soon as Ms. Stemler stood and volunteered that she had also signed the February 9, 2009 pleading, the Court held her in contempt without further discussion and without an opportunity for Ms. Stemler to clarify that she was not a member of the team responsible for the lack of production or that she was not even aware of the government's default. As the Court's reconsideration of Mr. Driscoll's role demonstrates, the brief colloquy the Court had with Mr. Driscoll at the February 13, 2009 hearing was insufficient to provide the Court with all of the information needed to adjudicate a finding of contempt. Had the Court heard from Ms. Stemler, it would have learned that she had not participated in and was not responsible for the conduct that the Court found contumacious.

Criminal contempt is a severe finding, and as acknowledged by this Court, not to be taken "lightly." (Hr'g Tr. 47, April 7, 2009). It is "a crime in the ordinary sense . . . for [its] impact on the individual defendant is the same" as that of any other crime. *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). In line with the long-standing rule that courts should apply "the least possible [contempt] power adequate to the end proposed," *Shillitani*, 384 U.S. at 371 (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)), criminal contempt "is sparingly to be used," *Gompers*, 221 U.S. at 450, and should be "reserve[d] [for] conduct acutely demanding it," *In re Brown*, 454 F.2d at 1006. Ms. Stemler, a thirty-year veteran of the Department of Justice, has a heretofore unblemished record. The Court's contempt finding has already had ramifications for

Ms. Stemler's professional reputation, which is particularly troubling because it is entirely unsupported by the facts of this case.

III. In the Alternative, If the Court's Contempt Finding Was Intended To Be Coercive, Ms. Stemler Should Not Have Been Held in Civil Contempt

A civil contempt finding should serve a "coercive" and "remedial" purpose, with sanctions "designed to compel future compliance with a court order." *Bagwell*, 512 U.S. at 827. As explained above, however, Ms. Stemler did not violate any court order and, accordingly, there was no need to compel her compliance. To the extent the Court's finding was informed by previous allegations of prosecutorial misrepresentation, failures to produce documents to the defendant, and other claimed misconduct, the record is clear that Ms. Stemler had no involvement in those events.

Had Ms. Stemler been afforded an opportunity to speak on her own behalf, she would have been able to explain her role in this case and how she was not responsible for the production of documents underlying the Court's contempt finding. A putative civil contemnor should, at the very least, receive notice and an opportunity to be heard. *See Bagwell*, 512 U.S. at 827, 831; *Washington Metro. Area Transit Auth. v. Amalgamated Transit Union*, 531 F.2d 617, 620 (D.C. Cir. 1976); *see also, e.g., United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999); *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1127 (3d Cir. 1990); *Brown v. Braddick*, 595 F.2d 961, 966 n.7 (5th Cir. 1979) (collecting cases). Not only did Ms. Stemler have no notice that the Court was disposed toward holding her in contempt if the government did not produce those thirty-two emails prior to the hearing, but she also had no notice of the conduct itself—that the government had in fact not produced those emails. If Ms. Stemler had been provided the requisite notice through, for example, a show cause order, she would have intervened to ensure

that the government addressed the alleged violation, just as she did on the afternoon of February 13, 2009.

When Ms. Stemler did learn of the default, there was immediate corrective action, thereby mooting the need for any coercion. The defendant received the thirty-two emails that same day. Because civil contempt “is remedial, and is intended to coerce the [contemnor] to do the thing required by the order,” the contumacious party can “end the [punishment] and discharge himself at any moment by doing what he had previously refused to do.” *Gompers*, 221 U.S. at 442. Before the Court issued its minute order on February 14, 2009, the government had already remedied the alleged contempt through production of the thirty-two emails and the additional redacted emails on February 13, 2009. Further, the government produced to the defendant on February 16, 2009 all of the documents from its January 30 and February 9, 2009 *in camera* submissions in the interest of “avoid[ing] distractions and remain[ing] focused on the post-trial motions” so that those motions could be “resolv[ed] . . . as expeditiously as possible.” (Notice Produc. Emails, Decls., & Pleadings, Etc. 1-2, Feb. 16, 2009.) The government’s full production mooted any need for coercion to enforce the Court’s orders, and, thus, even if the Court had a basis for holding Ms. Stemler in civil contempt, that contempt would have been purged by the disclosure of the relevant documents.

#### Conclusion

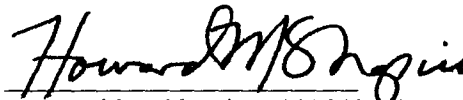
The Court held Ms. Stemler in contempt because of the delayed production of thirty-two emails, but she had no role in causing or contributing to that delay. Ms. Stemler only became involved in *United States v. Stevens* to provide “legal support . . . as needed” to the prosecution in the form of legal research, advice, and drafting of portions of the post-trial pleadings. Ms. Stemler was not involved in the underlying prosecution of the defendant and never had



responsibility for the management and production of documents to the defendant in this case. To the extent that the Court's finding on February 13, 2009, was the Court's response to a series of events, Ms. Stemler was equally uninvolved in those prior acts. At the status hearing, Ms. Stemler identified herself to the Court as having signed the government's pleadings (which she had done to acknowledge the legal assistance provided by herself and her Section), and not as a member of "the team of attorneys responsible for" the production of documents to the defendant. Indeed, Ms. Stemler was not even aware prior to that hearing that the emails at issue had not been produced.

In short, Ms. Stemler did not participate in the conduct that this Court found contumacious and she thus should not have been held in contempt. Accordingly, she respectfully asks that this Court vacate its finding.

Respectfully submitted,



Howard M. Shapiro (#454274)

Mary K. Gardner (#987638)

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*Attorneys for Patty Merkamp Stemler*

Dated June 2, 2009

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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)  
)  
UNITED STATES OF AMERICA )  
)

vs. )  
)

THEODORE F. STEVENS, )  
)

Defendant. )  
)  
\_\_\_\_\_)

09-213  
Case No. ~~08-231~~ (EGS)

**DECLARATION OF PATTY MERKAMP STEMLER  
IN SUPPORT OF MOTION  
TO VACATE FINDING OF CONTEMPT**

I, PATTY MERKAMP STEMLER, hereby declare as follows:

1. I am the Chief of the Appellate Section of the United States Department of Justice's Criminal Division. I have been an attorney in the Appellate Section since 1976, when I entered the Department of Justice through the Honors Program, and I have been Chief of the Appellate Section since 1992.

2. As an appellate attorney, I had no involvement in the investigation, interviews, or grand jury proceedings that led to the indictment in this matter. Other than a few occasions when the trial team asked for emergency assistance with legal research, I also had no involvement in the trial that took place in the fall of 2008. Accordingly, I had no knowledge of, involvement in, or responsibility for the events that gave rise to the allegations of prosecutorial misconduct made during trial and in post-trial motions, and that most recently resulted in dismissal of this case with prejudice.

3. The Appellate Section performs three principal functions: we prepare draft Supreme Court briefs for review and filing by the Solicitor General, we brief and argue cases in the federal courts of appeals, and we draft recommendations to the Solicitor General in cases decided adversely to the government. In these three categories alone, we work on more than 1,000 cases a year. The Section also provides legal advice to federal prosecutors throughout the country and to the Office of the Assistant Attorney General. Occasionally, the Section provides research assistance, drafts pleadings, and presents oral arguments in significant district court litigation.

4. At the Department of Justice, I have received the following awards, among others: the Attorney General's Distinguished Service Award, the Criminal Division's Henry E. Peterson Award, and the Attorney General's John Marshall Award for the Handling of Appeals.

5. I have argued in twelve circuit courts of appeals, as well as before the United States Supreme Court. I have never previously been sanctioned or reprimanded by any court in which I have appeared. My self-reporting to the Office of Professional Responsibility ("OPR") on February 13, 2009, was my first referral to OPR in my thirty-three years at the Department of Justice.

6. In addition to generating my first OPR referral, the February 13, 2009 finding of contempt has led me not to participate directly in ongoing appeals until this matter is resolved.

7. I incorporate by reference my January 29, 2009 declaration in this matter.

8. Prior to the verdict in *United States v. Stevens*, the Appellate Section had no involvement in the matter except on four discrete occasions. In March 2008, I and another Appellate Section attorney commented on a draft indictment. In early September 2008, I commented on draft jury instructions. On October 8-9, 2008, I and others in the Appellate Section researched a discovery

sanction issue. On October 23, 2008, I researched a juror misconduct allegation. To the best of my recollection, this was the extent of my involvement in the case before December 2008.

9. On December 1, 2008, I received a hard copy of Special Agent Chad Joy's complaint ("Joy Complaint") at a meeting with then-acting Assistant Attorney General Matthew Friedrich, then-acting Principal Deputy Assistant Attorney General Rita Glavin, and William M. Welch, Chief of the Public Integrity Section.

10. Upon the request of Mr. Friedrich and Mr. Welch, I contacted an attorney in the Civil Division on December 5, 2008, to ascertain whether there were any whistleblower limits on disclosing the Joy Complaint or any information it contained either to the Court or to the defendant. I summarized the information I gathered in an email to Mr. Welch on December 5, 2008. Also, over the next few months, I from time to time participated in discussions with and advised Mr. Friedrich, Ms. Glavin, and others about various issues relating to the Joy Complaint, and I provided comments on several complaint-related pleadings prepared by Public Integrity.

11. On December 5, 2008, Brenda Morris, Principal Deputy Chief of Public Integrity, requested the Appellate Section's assistance with the government's responses to the defendant's post-trial motions filed that day. On December 9, 2008, I attended a meeting at the Public Integrity Section's offices in the Bond Building, which is located eight blocks away from the Appellate Section's offices in the Main Building of the Justice Department. During that meeting, we discussed the division of labor and assignment of issues raised by the defendant's motions. I agreed that three appellate attorneys would help research and draft discrete portions of the government's response to the defendant's Motion for New Trial.

12. On December 15, 2008, Ms. Morris informed me of the Court's sealed hearing scheduled for December 19, 2008, and suggested that an appellate attorney should attend the hearing because it would likely give rise to additional briefing.

13. On December 19, 2008, I attended the sealed hearing with Ms. Morris but did not confer with her about the arguments she intended to make; nor did she ask me to participate directly in the hearing. Because there was no audience in the courtroom for the hearing, however, Ms. Morris suggested I sit at the counsel table, which I did. I did not speak at the hearing and left before it concluded due to another previously scheduled obligation.

14. I did not attend the January 14, 2009 status hearing.

15. After the status hearing on January 14, 2009, I was called to a meeting with Mr. Welch, Ms. Morris, Mr. Friedrich, Ms. Glavin, and possibly others.

16. At that meeting, Mr. Friedrich asked me to write the government's Motion to Reconsider and Vacate the January 14, 2009 Order. I was the only signatory on the motion, which was filed on January 15, 2009.

17. Because I was the only signatory on the government's January 15, 2009 motion, I filed a formal appearance in the case on January 16, 2009, and obtained an ECF account.

18. On January 16, 2009, Public Integrity filed the government's oppositions to the defendant's December 5, 2008 motions. I did not draft any portion of those pleadings or review them before they were filed, and I did not sign them. Attorneys whom I supervise in the Appellate Section, however, played a substantial role in drafting and reviewing the government's opposition to the defendant's new trial motion.

19. On January 16, 2009, the Solicitor General authorized the Criminal Division to file a petition for writ of mandamus of this Court's January 14, 2009 and January 16, 2009 orders and

request for an emergency stay with the United States Court of Appeals for the D.C. Circuit. I signed and filed that petition on January 16, 2009. On January 22, 2009, I filed a notice withdrawing the government's petition and stay motion as moot.

20. My only communications with counsel for the defendant occurred between January 15 and January 22, 2009, in relation to these filings.

21. In response to the Court's January 21, 2009 Order, I prepared a declaration of my oral communications with Public Integrity attorneys regarding Agent Joy's whistleblower status. On January 29, 2009, I confirmed once again via email with Ms. Glavin, then the acting Assistant Attorney General, that no formal determination had been made as to Agent Joy's status. I sought this confirmation to ensure the accuracy of my declaration. Because the declarations prepared pursuant to the January 21, 2009 Order were being collected and compiled by the Criminal Division's Office of the Acting Assistant Attorney General, I hand-delivered my declaration to the office later that day.

22. My understanding, confirmed by the January 30, 2009 declaration of Raymond Hulser, Deputy Chief of Public Integrity, was that Mr. Welch and Mr. Hulser were responsible for assembling the emails responsive to the Court's January 21, 2009 Order. The physical compilation of emails occurred at the Public Integrity Section's offices in the Bond Building. I had no role in their compilation or production other than to review my own emails with Public Integrity attorneys regarding Agent Joy's status.

23. On January 28, 2009, I received an email from Mr. Welch reporting that the production was ready to go. Although Mr. Welch and Mr. Hulser had worked with the Information Technology Office to compile the email production, I personally reviewed my emails and sent a list of what I believed to be my responsive emails to Mr. Welch and Mr. Hulser to ensure that all

of them had been included. Both Mr. Welch and Mr. Hulser confirmed that the emails had already been identified and were included in the government's production.

24. The Appellate Section helped research, write, and edit the government's written submission that accompanied the document production. I drafted the whistleblower status section of the pleading and helped edit the pleading in its entirety.

25. Because my Section and I had contributed to the legal research and writing that went into the pleading, I signed the government's written submission before sending the final version to the offices of Public Integrity, where Ms. Morris signed for herself and Mr. Welch. Public Integrity then filed the pleading and accompanying declarations and email production on January 30, 2009. Neither I nor, to the best of my knowledge, anyone else in my Section saw or reviewed the email production prior to its filing.

26. From February 1, 2009 to February 6, 2009, I was in Colorado on vacation with my family. I learned about the defendant's February 2, 2009 motion via email, but I did not review the defendant's filing or work on the government's consolidated response until I returned to Washington, D.C.

27. On February 7, 2009, I reviewed and provided comments on a draft of the government's consolidated response to the defendant's motion and the Court's February 3, 2009 Order. I was aware that Appellate Section attorneys as well as Public Integrity attorneys had worked on the draft response.

28. On February 8, 2009, I reviewed a draft of the government's privilege log prepared by Public Integrity. I noticed that some of my emails with Civil Division attorneys regarding whistleblower regulations appeared to be missing. I emailed my responsive emails that day to

the Public Integrity attorneys working on the log to ensure those emails were included. They confirmed that my responsive emails were included in the production.

29. During my review of the privilege log on February 8, 2009, I noticed that the entries for about thirty documents were blank. My recollection is that on the morning of February 9, 2009, I asked Mr. Hulser about the blank spaces on the privilege log. I was told that most of those emails had no substantive content and that the government was no longer asserting privilege as to those emails. My understanding is that on the morning of February 9, 2009, Kevin Driscoll, a Public Integrity attorney working on the work product issues, drafted language to explain the withdrawal of any previous assertion of privilege with respect to those thirty or so emails, and that an attorney in my Section revised this language and inserted it into footnote one of the government's consolidated response.

30. Based on the information I had received the morning of February 9, 2009, I understood that Public Integrity would be producing to the defendant those emails for which there were no entries in the privilege log.

31. On February 9, 2009, because I had signed the closely related January 30, 2009 submission, I signed the government's consolidated response before sending the signed original to Public Integrity, where Mr. Welch and Ms. Morris added their signatures. Public Integrity then filed the government's consolidated response, privilege log, supplemental production, and the declaration of Michael F. Hertz, acting Assistant Attorney General for the Civil Division, as required by the February 3, 2009 Order.

32. Around 1:30 p.m. on February 13, 2009, I received a phone call from Ms. Glavin, asking me to attend the status hearing that afternoon but noting that I did not need to sit at the counsel table.



33. I attended the February 13, 2009 status hearing and sat in the audience of the courtroom.

34. I first learned during that hearing, based on Mr. Driscoll's answers to the Court, that the emails without log entries had not been produced to the defendant.

35. At that hearing, the Court asked who else had signed the government's February 9, 2009 pleading. I stood up and identified myself to the Court as one of the signatories.

36. After the hearing, in the afternoon of February 13, 2009, I told Mr. Driscoll via email that I did not have a copy of the January 30, 2009 email production. Referring to the February 9, 2009 privilege log, I then compiled a list of the Bates numbers for both the emails without log entries and the emails identified on the log as being capable of redaction. I forwarded that list to Mr. Driscoll, Mr. Welch, and Ms. Glavin, among others, asking that Public Integrity produce the emails as soon as possible and that I be copied on any production.

37. I received confirmation later that day that Public Integrity (specifically, Nicholas Marsh and Marc Levin) had produced to the defendant the emails without log entries, as well as the additional redacted emails, and that Mr. Levin had notified the Court of that production.

38. In the early evening of February 13, 2009, although I was not aware of any contumacious conduct with regard to these documents by any of the government attorneys, I emailed Marshall Jarrett at OPR to inform him that Mr. Welch, Ms. Morris, Mr. Driscoll and I had been held in contempt.

39. On the evening of February 13, 2009, I received an electronic version of the government's full email production to the Court on January 30, 2009. I read those emails for the first time the following morning.

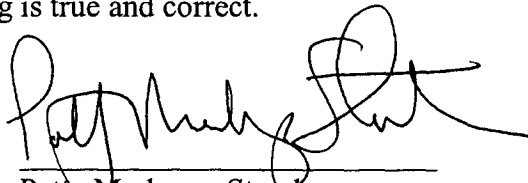
40. From February 14 to 16, 2009, I participated in the drafting and editing of the government's Notice of Production of Emails, Declarations, and Pleadings that accompanied the

production to the defendant of all the emails disclosed to the Court on January 30, 2009 and February 9, 2009.

41. On February 16, 2009, I was present with Ms. Morris when she emailed the entirety of the government's January 30, 2009 and February 9, 2009 productions to the defendant.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 1, 2009

By:   
Patty Merkamp Stemler

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_)  
 )  
 UNITED STATES OF AMERICA )  
 )  
 vs. )  
 )  
 THEODORE F. STEVENS, )  
 )  
 Defendant. )  
 \_\_\_\_\_)

09-273  
Case No. ~~08-231~~ (EGS)

**DECLARATION OF RITA M. GLAVIN  
IN SUPPORT OF MOTION  
TO VACATE FINDING OF CONTEMPT**

I, RITA M. GLAVIN, hereby declare as follows:

1. I am the Acting Principal Deputy Assistant Attorney General for the Justice Department's Criminal Division. Between January 20, 2009 and April 21, 2009, I was the Acting Assistant Attorney General for the Criminal Division. Between June 2008 and January 20, 2009, I was the Acting Principal Deputy Assistant Attorney General. In these positions, I have had supervisory authority over all of the sections of the Criminal Division, including the Appellate Section. Patty Merkamp Stemler has been the chief of the Appellate Section since approximately 1992.
2. I have prepared this declaration in connection with Patty Merkamp Stemler's Motion to Vacate Finding of Contempt.
3. This declaration addresses only Ms. Stemler in connection with this motion filed on her behalf. It is not intended to be, and should not be interpreted as, a statement of my belief that William Welch or Brenda Morris of the Public Integrity Section should have been found in contempt by this Court on February 13, 2009.

4. The Appellate Section, which consists of approximately 25 attorneys, performs five primary functions: (1) drafting Supreme Court briefs in criminal cases for review and filing by the Office of the Solicitor General; (2) briefing and arguing criminal cases in the courts of appeals; (3) preparing district court pleadings and arguing district court motions in significant cases; (4) preparing appeal recommendations to the Solicitor General on behalf of the Assistant Attorney General for the Criminal Division in all criminal cases decided adversely to the Government; and (5) providing legal advice on criminal issues to the Assistant Attorney General and others within the Department. Lawyers in the Appellate Section are not assigned to try cases or handle the day-to-day responsibility of investigating and prosecuting cases. As this Court is aware, prosecutors from the Public Integrity Section and the U.S. Attorney's Office in Alaska handled the investigation and prosecution of this matter.

5. During January and February of 2009 Ms. Stemler and her Appellate Section were heavily involved in researching, crafting legal arguments, drafting, and reviewing legal pleadings in response to (a) this Court's orders of January 14, January 16, January 21, and February 3, 2009, and (b) the defense motions relating to those orders, including a motion to hold the Government in contempt for violating the Court's January 21, 2009 Order. Matthew Friedrich, the Acting Assistant Attorney General until January 20, 2009, and I assigned the Appellate Section to assist the Public Integrity Section with these pleadings because they are superb legal researchers and writers with excellent legal judgment.

6. At no time did I understand or expect that Ms. Stemler and her Appellate Section would have any responsibility for (a) collecting all of the documents called for in the Court's January 21, 2009 Order, or (b) producing such documents to the Court and/or the defense. Instead, I understood that Ms. Stemler and the Appellate Section would be working on the Government

pleading, that Ms. Stemler would be drafting a declaration in connection with the January 21 order, and that Ms. Stemler would be reviewing her emails and providing emails called for by the January 21<sup>st</sup> Order to an attorney(s) in the Public Integrity Section.

7. Given the significant amount of work that Ms. Stemler and her Section put into drafting the Government's January 30, 2009 pleading, in a January 29, 2009 email Ms. Stemler indicated to me that she was willing to sign that pleading, which she did. On January 30, 2009, an attorney for the Public Integrity Section caused the filing of the Government's response, production, and declarations *in camera* and under seal.

8. Based on conversations with Ms. Stemler, and an email exchange I had with her, I was aware that she was on vacation from approximately February 1, 2009 to February 6, 2009.

9. On or about February 2, 2009, the defendant filed a Motion to Dismiss or for a New Trial, and on February 3 this Court issued another order in this matter calling for a response by the Government. While Ms. Stemler was away, another attorney from the Appellate Section worked with the Public Integrity Section and put a significant amount of work into the pleading that the Government filed on February 9, 2009 in response to that motion. When Ms. Stemler returned from vacation she reviewed that pleading and suggested some edits. To my knowledge, Ms. Stemler had no role in reviewing all of the documents for privilege or creating a privilege log. Moreover, given the role the Appellate Section had taken in this matter during January and February of 2009, I had no understanding or expectation that Ms. Stemler or the Appellate Section would have responsibility for producing documents to the defense for which the Government was withdrawing any claim of privilege.

10. An attorney for Public Integrity caused the filing of the Government's submission on February 9, 2009 in response to the defendant's February 2, 2009 Motion to Dismiss or for a

New Trial and the Court's February 3, 2009 Order. Although she had been absent the prior week, I asked Ms. Stemler if she was willing to sign this pleading because she had signed the prior, closely related pleading, the Appellate Section had been significantly involved with writing the Government's pleading, and I knew that Ms. Stemler reviewed this pleading prior to its February 9, 2009 filing. Ms. Stemler indicated she was willing to sign the pleading and did so.

11. On February 13, 2009, at approximately 1:30 p.m., I asked Ms. Stemler to attend the *Stevens* status hearing, but suggested that she not sit at the counsel table. I wanted Ms. Stemler to be present during the hearing because of her knowledge of the legal issues involved, as well as her and the Appellate Section's involvement in working on the various pleadings.

12. Having been a federal prosecutor since 1998, I say without hesitation that Ms. Stemler is one of the most talented, ethical and professional attorneys with whom I have ever worked.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: June 2, 2009

By:  \_\_\_\_\_

Rita M. Glavin

## CERTIFICATE OF SERVICE

I, Mary K. Gardner, hereby certify that true and correct copies of Patty Merkamp Stemler's Motion to Vacate Finding of Contempt; Memorandum in Support of Motion to Vacate Finding of Contempt; Declaration of Patty Merkamp Stemler; and Declaration of Rita M. Glavin were served this 2nd day of June, 2009, by U.S. mail upon the following counsel:


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