Impeachment Trial of Attorney General Jason Ravnsborg: Crafting an Opening Statement

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IMPEACHMENT TRIAL OF ATTORNEY GENERAL JASON RAVNSBORG: CRAFTING AN OPENING STATEMENT

ALEXIS A. TRACY†

In the fall of 2021, the South Dakota House of Representatives began reviewing material to consider whether or not to impeach South Dakota Attorney General Jason Ravnsborg for his conduct surrounding the death of Joseph Boever during a motor vehicle pedestrian crash that occurred in September 2020.1 The House hired its own attorney to assist them with their process.2 The Senate reached out to Mark Vargo, Pennington County State’s Attorney, to request he serve as the Senate’s attorney to prosecute the case in the Senate, if the House voted to impeach.3 Mark Vargo advised President Pro Tempore Lee Schoenbeck that trying the case would be a two-attorney job and thereafter contacted me to inquire if I would be co-counsel with him for the Senate in the proceedings.4 How could one refuse an opportunity to try a case with Mark Vargo and to potentially be a part of a historic proceeding in South Dakota? I was honored to have been asked and said yes.

One of the most time-consuming tasks, post confirmation of the South Dakota House of Representatives voting to impeach South Dakota Attorney General Jason Ravnsborg, was to begin combing through the plethora of evidence in the case. The Senate adopted a set of procedural rules to govern the trial,5 and those rules provided deadlines to submit exhibits and subpoena witnesses one month before trial6 and only gave us four hours to present evidence at the impeachment trial itself.7 Considering these limitations, it was particularly important to organize and process a high volume of information quickly. Early on, from a trial strategy standpoint, Mark Vargo requested I begin reviewing the various interviews of Attorney General Ravnsborg, making notes regarding video

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6. Id. at R. 3-3.

7. Id. at R. 4-3(4).
time stamps and categorizing statements made into generally four different categories: (1) the event (Count 1 of the articles of impeachment); (2) lies (aggravation for Count 1 and relevant to Count 2); (3) malfeasance (Count 2 of the articles of impeachment); and (4) disqualification from holding future office. It was important to categorize information to condense the voluminous amounts into “bite sized” portions, if possible, for senators to digest. It was also important for us to decide which pieces of evidence we wanted to present during the opening statement, draw attention to through witness questions during trial, and reiterate during closing argument.

In the two months of preparation, Mark and I exchanged numerous phone calls, several Zoom meetings, and a total of four in-person prep sessions (two in Vermillion, two in Rapid City), as well as a final meeting in Pierre two days in advance of the trial itself. Some of the calls were structured with specific goals in mind, put on the calendar in order to devote time to the case. Others were more spontaneous, such as: “Was just reviewing this, have you come across it yet? What did you think of it? Could we or should we use it in any fashion?” Video notes were emailed back and forth in anticipation of splicing content down to see if we could create a shortened version of the interview tapes. In the end, it was decided that reels of spliced snips based upon themes (“I am the Attorney General,” phone usage, lies, etc.) were all we would have time to present. Any other spliced portions of relevant information became too long and would have consumed too much of the precious four hours we were allotted.

The procedural rules the Senate adopted for the impeachment trial were like nothing I had experienced before. To spend more than fifteen years practicing law and honing my knowledge and execution of the rules of evidence in a courtroom (anticipating how trials unfold and working within the confines of those rules to offer pertinent evidence for the factfinder to consider) only to find myself in a position in which those rules would be abandoned for this trial was a difficult concept to wrap my mind around. Offering all the evidence to our factfinders in advance of trial was also mind boggling. The point of a trial in a lawyer’s world is to present the evidence. The factfinders (the jury) in a court of law are specifically ordered in their jury instructions to confine their decision to the evidence that is presented to them during the trial and not to consider outside sources of information. This proceeding was different, and in many respects, it needed to be, as there was no judicial body presiding over the trial; it was a legislative body that was unfamiliar with the rules to be applied. Abandoning

8. See S.D. S. Res. 702.
9. Id. at R. 4-2 (“The South Dakota Rules of Evidence do not apply to this proceeding.”).
10. Id. at R. 3-1(2) (“Each party to the trial of impeachment shall provide to the presiding officer by June 1, 2022, the documents that each party intends to submit to the Senate in advance of the trial. The Secretary of the Senate shall make those documents available on the legislative website.”).
12. See Hunter Dunteman, Timeline: How Did a Fatal Crash Evolve into South Dakota’s Historic Impeachment of Jason Ravnsborg?, MITCHELL REPUBLIC (Apr. 30, 2022, 9:00 AM),
the traditional trial rules of evidence was not only necessary given the time constraints, but also helpful in many ways. The factfinders (the senators) had a full month to pour over the evidence the attorneys gave them in advance. This gave the senators far more time to digest and contemplate the information by the time of closing arguments and decision-making.

The absence of formal rules of evidence also proved important for efficiency when it came time to present one’s opening statement. In a traditional trial, a lawyer must be careful what is said during an opening statement. It is a time to give a road map of what you believe the evidence will show, but you should comment only on evidence that you know will be admitted (making reference to inadmissible evidence can be grounds for a mistrial), and arguing a case during opening is grounds for objection. Both of these traditional trial rules were nonissues in the impeachment trial before the South Dakota Senate. Evidence had been presented in advance, and our factfinders were hopefully familiar with it. Furthermore, an argument was likely expected.

In discussing how we intended to present the case though, it was virtually impossible to untrain some of the traditional opening statement styles out of seasoned prosecutors. Mark and I discussed that while this was not a criminal trial where a defendant’s liberty interests were at stake, it was still a significant proceeding, and we wanted to treat it with a level of dignity and respect that would be provided to any other trial in a court of law. We agreed early on there would be some fundamental evidentiary principles that would be adhered to by us in our roles as prosecutors, even if they were not required by the impeachment rules. Yes, it was a “political” proceeding, but a serious one, with serious ramification and repercussions. Ultimately, a good impeachment proceeding should not be as much about politics as it is about fitness (regardless of political affiliation) to hold public office. As career prosecutors, this adhered well to the trial strategy we were used to: Present the truth, and the facts will speak for themselves.

Beyond that, an opening statement was the opportunity to set the tone for the case: Why are we here? Why does it matter? We needed to explain the case and outline what we believed the evidence would prove. The articles of impeachment, given by the House, was our charging document. The analogy to the House being the grand jury in a case was an easy parallel to draw. In a prosecutor’s world, however, the prosecutor generally proposes the charging language to the grand jury for their review and, therefore, has some say in the manner in which the case they must prove at trial is charged. In the impeachment, we inherited the charging document from the House with no prosecutorial input. It was our task to take the two charges put forth by the House and provide evidence to substantiate them. Count 2, malfeasance, naturally seemed the stronger of the two charges for purposes of these impeachment proceedings. But we took Count 1 seriously.

https://perma.cc/J6XR-NTHU (noting this was South Dakota’s first impeachment trial); see also S.D. S. Res. 702 (containing the rules that would apply to the first impeachment trial).
because the House believed it important to put forth, and we intended to present
evidence to support it to the Senate.

In approaching Count 1, the crimes that led to Joseph Boever’s death, we
knew one of the challenges we would face (Why are we here, and why does it
matter?) would be: Should an elected official really be impeached for Class 2
misdemeanor traffic offenses?15 These were not just any misdemeanor traffic
offenses though. Despite the Attorney General’s attempts to make the legislative
bodies and the public believe they were, they weren’t. Rather than dance around
the difficult issue of how and why these offenses were different, it was decided
early on to embrace it. In one of my many pages of meandering notes from prep
sessions, I had written in big letters and circled: “He knew what he hit. Embrace
it.” I remember Mark saying this, me jotting it down, and running with it from
there. Mark and I both have rather candid personalities: We are direct, and we
don’t mince words. Stylistically, this was advantageous for how we approached
the trial from start to finish, starting with this simple aspect of the case. The very
reason these were not ordinary misdemeanor offenses is because a man died, and
in review of the evidence, it was readily apparent to both Mark and I, as well as
the investigators on the case, that the Attorney General knew he hit a man. To
tiptoe around that issue was disingenuous to the impeachment case and the victim.
This simple fact also explained the motivation behind the Attorney General’s
inappropriate behavior thereafter.

In reflecting back, there would have been three reasons to shy away from
saying “Ravnsborg knew he hit a man” definitively. One was to attempt to spare
the Attorney General’s feelings: This was not our job and not a courtesy
Ravnsborg had ever shown the victim’s family in our review of the evidence.
Reason two was out of an inherent prosecutorial thinking surrounding ethical
guidelines of shying away from publicly saying something that could impact
potential jurors in a criminal case and consequentially impact a potential change
of venue in order for a criminal defendant to receive a fair trial. But the criminal
and civil matters were over,16 and this definitive statement would be stated during
the impeachment trial (not beforehand), which was an appropriate time to voice
the statement.

The third reason to shy away from boldly embracing the truth that Ravnsborg
knew he hit and killed a man was the fear of political backlash by individuals who
may refuse to believe the facts and evidence supporting the same; because that
truth in many respects, was a horrifying thought. Ravnsborg knew many of the
legislators personally and professionally, and he knew other prosecutors across

15. Judgment of Conviction and Sentence, South Dakota v. Ravnsborg, No. MAG21-1 (S.D. 6th
Cir. Sept. 2, 2021). Strategically, we decided early on we were not going to argue a manslaughter case.
If that is what the senators wanted to consider, then it was well within their purview to do so, and the
burden of proof is far different in an impeachment proceeding than a criminal trial. However, we would
confine our presentation in the impeachment trial to the crimes Ravnsborg was charged with and
particularly the ones he was convicted of. See Complaint, Ravnsborg, 2021 WL 651372 (Feb. 17, 2021);
see also Judgment of Conviction and Sentence, Ravnsborg, No. MAG21-1 (Sept. 2, 2021) (containing the
charges Ravnsborg was convicted of).
the state (colleagues of ours) personally and professionally; he could come across as a nice guy. But as career prosecutors, this concept was also not foreign to us. Prosecutors generally see people in our cases on their worst days, not their best. It is common in emotionally charged criminal actions for a defendant’s family members and friends to refuse to acknowledge their loved one could be capable of doing something horrific and tragic and to be angry with “the State” for holding their loved one accountable. In most cases, a prosecutor works through those occasions and moves on: It is part of doing our job, and if friends or family members see us as the bad guys, so be it. In this case, however, the fallout of bitter supporters had the potential to be more personal. Ravnsborg’s supporters were not only his friends and colleagues but Mark’s and mine as well. In some respects, it wasn’t just work: This had the potential to be personal for all of us. Ultimately, however, embracing the truth of the events surrounding Joseph Boever’s death certainly explained why we were there, why it all mattered, and why these weren’t just ordinary criminal offenses: Ravnsborg knew he hit a man. We needed to embrace it and say it. It was the truth.

This approach dovetailed into how we approached a crucial part of any good opening statement and trial preparation: a theme. In any trial, a good attorney understands the importance of a theme woven into the presentation of one’s case—facts and all. A trial theme grounds oneself as a person works through presentation of what one is trying to prove (Why are we here?) and how you go about it (Why does it matter?). A trial attorney will weave his or her theme into jury selection (a process we did not have for the impeachment trial), into one’s opening statement, into questions for witnesses, and into one’s closing argument. Mark and I went back and forth on what the impeachment trial theme would be and considered a number of different possibilities. Ultimately, the one we kept coming back to was arguably the simplest: Do the right thing.

In discussion, Mark would often offer far more elegant and intellectual ways of saying do the right thing, but they were all versions of the same thing. And it was natural: The phrase summed up every issue presented in the case and the reason there was an impeachment in the first place. Do the right thing: Pay attention while driving so as to not hit and kill a person. Do the right thing: If a mistake is made and tragedy strikes, respond appropriately.17 Do the right thing: Don’t cover up one’s actions; own your mistakes. Do the right thing: Don’t lie to investigators and others; better to say nothing at all. Do the right thing: Show respect to the Office of the Attorney General by respecting the work others do when on the other side.18 Do the right thing: Don’t drag employees into one’s own mess by asking them to assist in attempts to mislead investigators. Do the

17. A more appropriate response would have curbed the horror of the truth that Ravnsborg knew what he hit and perhaps would have impacted the outcome at many different stages of the aftermath, arguably, never resulting in his impeachment and removal from office.
18. The Attorney General employs agents who are tasked every day with seeking out the truth in investigations. By steering investigators wrong in a criminal investigation of himself, Ravnsborg showed a disrespect to the work done, and the office itself, and conveyed a message of a double standard for everyone else and the Attorney General himself.
right thing: Offer genuine condolences to the family of one victimized by poor actions or say nothing at all. 19  Do the right thing: Don’t make oneself out to be a victim of circumstances you caused.  Do the right thing: Take responsibility for one’s actions. Do the right thing: Resign from office when one’s personal life has become a distraction from the work to be done by the office he or she holds.

With the brutal truth to be embraced and the theme outlined, the drafting of the opening statement drew back to traditional trial strategies. For Count 1, state the facts; paint the pictures of the events that led to Joseph Boever’s death. If one laid out the facts in a direct fashion, they were not pleasant. The facts told the story of why this incident drastically differed from an elected official driving down the road and obtaining a routine traffic citation. Some offenses are worse than others. Some circumstances are more egregious. The Attorney General’s response to those events and circumstances were what directly affected his fitness to hold public office. Impeachment was not to be used as a political tool to try to remove an official when he had committed a routine traffic offense. Nothing about these events was “routine.” We intended to paint that picture clearly from the evidence. Everything down to calling out the shoddy investigation by the sheriff who responded. 20  The sheriff made mistakes; those are the facts: Embrace it. But we embraced it in a way that didn’t shift the ultimate blame for Boever’s death to the sheriff. It was the Attorney General’s actions that cost Mr. Boever his life. That was Count 1. 21  It mattered because a man lost his life through Ravnsborg’s careless conduct, and rather than respond to that tragic reality with compassion, the Attorney General panicked, thought of himself, and began his attempts to cover his own actions.

The facts from Count 1 merged quickly into Count 2: the response in the aftermath and malfeasance in office. 22  This part of the opening statement is where we stylistically shifted away from “traditional” trial tenets in some respects. Yes, the egregiousness of the facts was still important, but it would fuse into nontraditional opening “argument.” Malfeasance involved identifying standards of conduct in order to point out how and why these standards were violated by the Attorney General and why he was not fit to hold public office as a result. Lies were an obvious sign of malfeasance. But it is generally known that many politicians lie; why do these particular lies matter to a degree to remove one from office? The prevalence of the lies was one reason: These weren’t off-handed, oversimplifications of circumstances; the lies in this case demonstrated constant and repeated choices over and over again. Further, it came full circle to the justice system itself: It mattered that this elected official did not exercise his right to remain silent; instead, he chose to cover up and mislead about his actions. The

19. The outright lies about apologizing to the victim’s family, as denoted in video clip review, was labeled by us as a “disqualifier” from holding future public office in preparation. The only reason to lie to the public about something of that nature was for Ravnsborg to paint himself as the victim, rather than Joseph Boever and his family.


22. Id.
standards that the Office of the Attorney General represents made those actions all the more important. In an ideal world, the traditional opening would have laid out testimony that the factfinder would hear from an expert witness who would lay out that conduct for them. We had been unable to secure participation from anyone willing and able to put that standard out there publicly.\textsuperscript{23} So, we were left to incorporate the standards into the opening statement. In a traditional judicial trial proceeding, one waits for the court to outline the standards (the law) for the factfinder at the end of the trial, right before closing arguments and deliberation: to provide jury instructions.\textsuperscript{24} In the impeachment trial, we chose to incorporate the standards for malfeasance into the opening statement, rather than waiting until the end.\textsuperscript{25} This served three functions: (1) providing standards for the senators to contemplate as they heard the evidence; (2) providing a chance to underscore evidence that had been provided to the senators in advance of trial but that we might not have time to present again during the four hour time limit; and (3) providing an opportunity to lay out argument that would not normally be admissible in a judicial trial but that we embraced in the trial to the legislative body so that we could open with these principals and close with the same.

After combing through the evidence, structuring the presentation of evidence, discussing strategy, jotting down notes, and brainstorming, I didn’t actually begin to put thoughts to paper until a week out from trial. The Senate Rules gave me one hour for the opening statement.\textsuperscript{26} While I never intended to use the full hour, I did intend for this opening to be longer than a typical opening statement. Generally, I think the shorter the better in an opening, as one can only hold a jury’s attention for so long. However, given our evidentiary time constraints and the other goals we needed to accomplish with the opening in this trial as outlined above, this one would be longer than usual.

I intended to provide a draft earlier to Mark for his review, but he did not receive the first draft for suggestions or changes until the Friday before the Tuesday trial. We met Sunday evening in Pierre to begin final trial prep, and Mark’s preliminary feedback at supper Sunday night was affirming. It was different than the way he would have approached it, but he assured me that was a good thing: The fact that he liked it, and it was different than something he would have done, meant that it was good.

On Monday, we began trial preparations by reviewing our courtroom (the Senate floor that had been modified by the Legislative Research Council to

\textsuperscript{23} Multiple wise individuals in the legal world had been consulted and others had been excluded for conflict reasons. The ones contacted resoundingly told us they were appreciative of our efforts, wished us the best of luck, agreed that Ravnsborg had violated ethical standards, but none wanted to publicly put their name behind that message and be the face for the cause.

\textsuperscript{24} \textit{How Courts Work: Steps in a Trial: Instructions to the Jury}, supra note 11.

\textsuperscript{25} Transcript of Proceedings, \textit{supra} note 20, at 27-30.

\textsuperscript{26} \textit{See} S.D. S. Res. 702, at R. 4-3(2) (“The prosecuting attorneys shall have one hour for an opening statement presenting the case for impeachment.”).
accommodate the trial\(^{27}\) and met with witnesses to go through questions and final modifications before the trial on Tuesday. Late Monday morning we set up our preparation area through the generous loan of workspace by a local colleague and prosecutor, Tom Maher, and our witnesses began to arrive. Mark suggested that before we went through our questions with witnesses, we would collectively go through my opening statement, making changes; tweaks; and modifications. In his experience, this honed the opening statement and utilized our witnesses to agree that the opening outline was factually accurate and we had not misunderstood any of the evidence. It was a painstaking process that we spent nearly three hours completing. Each person provided suggestions, comments, and word modifications. Stylistically, I view an opening statement as an opportunity to take a jury with us back in time to relive events, and I phrase the story in present tense. As a part of the modifications, Mark and seasoned North Dakota Bureau of Criminal Investigation Supervisory Special Agent Arnie Rummel believed that past tense was more fitting for this opening statement. I took notes as we went, and later that night (into the wee morning hours of Tuesday) I went back through the entire opening, changing all present tense to past. I also needed to strengthen the ending, reiterating our main points. After hours upon hours of pouring over the statement, reading and re-reading to the group, it was time to call it quits and move on to witness prep. I had my notes about other areas to “fix” and would tend to later in the night.

We spent the rest of our Monday afternoon into the evening working through our questions for witnesses and finalizing exhibits. We finalized our trial prep together at the hotel restaurant where we shared a meal and general conversation before parting ways. Caffeine and sugar powered me from late evening into early morning hours back through modifications to the opening statement and witness question tweaks before using the hotel printer to memorialize the final version.

Tuesday, June 21, 2022, the Senate proceedings began promptly at 8:00 a.m.\(^{28}\) By 8:15 a.m. I was called to the podium to deliver the message we had worked diligently to craft.\(^{29}\) “Setting the tone” was conceptually something Mark and I had visited about when discussing the pros and cons of openings and closings (setting the tone in the opening versus being the final word and bringing it all together in the closing). Yet, when it was time for delivery, I entered the room believing that most of the audience had their minds made up before coming there that day: a circumstance that was beyond our control. The goal was to remind them of the evidence that I had hoped they already reviewed, draw attention to key parts, and drill down on specifics that if they were to vote “no,” each would do so only after publicly acknowledging the facts as we knew them to be and the standards that were so important to one who holds the Office of the Attorney

\(^{27}\) See S. Res. 701, 96th Legis., 2d Spec. Sess. (S.D. 2022), https://perma.cc/F7PF-SANP (directing the Director of the Legislative Research Council to provide the Senate the resources needed to facilitate the impeachment trial).

\(^{28}\) S.D. S. Res. 7001, at R. 4-3(1); see also Transcript of Proceedings, supra note 20, at 1 (noting the trial occurred on June 21, 2022).

\(^{29}\) Transcript of Proceedings, supra note 20, at 12.
General. As it turned out, the senators had, in fact, poured over the evidence in the month leading up to trial. They sat alert and attentive to every portion of the impeachment trial: from opening statement, through witnesses, through their own questions, to closing arguments, and to their own final shared thoughts. They took their roles seriously, as we had taken ours. The senators took it all in, and they voted their conscious.

There is always something to be risked for doing the right thing. There was irony to that opening theme “do the right thing” woven through the rest of the trial right into the closing. Had Ravnsborg done the right thing at various points in time, then the impeachment proceeding would have been unnecessary. Instead, the senators were tasked with doing the right thing when he would not. They stood up in the face of adversity and made the difficult, but correct, decision.30 The rest, as they say, is history.

30. See Transcript of Proceedings, supra note 20, at 266-88 (reflecting the Senate’s vote to impeach Attorney General Ravnsborg on articles I and II and prohibiting him from holding a future office of public trust in South Dakota).