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CONFIDENTIAL

David Margolis
Associate Deputy Attorney General
United States Department of Justice
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

HAND DELIVERED

Dear Mr. Margolis:

This is the letter you requested addressing your suggestion that the materials I provided the Attorney General regarding prosecutorial misconduct by the Office of Independent Counsel Arlin M. Adams be referred to Judge Adams himself for an initial investigation.

First, however, let me clarify again that I in no manner represent Deborah Gore Dean in bringing these matters to the attention of the Department of Justice. I have taken this action entirely on my own, without consulting with Ms. Dean or with her attorney. Further, as a citizen, I would feel an obligation to bring these same matters to the attention of an appropriate authority were Ms. Dean an absolute stranger to me.

With regard to the suggestion of referring these matters to Judge Adams, I fully recognize the legitimacy of the institutional considerations you raised and recognize as well how strongly those considerations militate against the Attorney General's taking any action against an Independent Counsel in circumstances where such action is not clearly warranted. Yet, I do not think that the materials I provided you leave doubt that this is an exceptional case of governmental abuse. And I suggest that there is little reason to expect that any institutional interests will be much advanced by referring these materials to Judge Adams.

It must be recognized that many of the matters raised in the materials were the subject of extensive briefing in the district court. Documents filed in the district court in support of Ms. Dean's request for a new trial showed, for example, that the Superseding Indictment contained inferences that the Independent Counsel's immunized witness had specifically contradicted and that Independent Counsel attorneys had overwhelming reason to believe were false. Thereafter, notwithstanding Judge Gerhard A.

Gesell's order to provide exculpatory material to the defendant as soon as it was discovered, Independent Counsel attorneys would withhold for more than a year the statements specifically contradicting those inferences while representing to the court that they were aware of no exculpatory material. Aided by the belated disclosures of exculpatory material, Independent Counsel attorneys would then introduce evidence in a manner to lead the jury to believe things Independent Counsel attorneys had every reason to believe was false.

It is difficult to believe that Independent Counsel attorneys would draft that indictment for Judge Adams' signature without advising him of the contrary evidence or would defy Judge Gesell's order without consulting with Judge Adams. In any case, Ms. Dean's post-trial motion raised these and other issues of prosecutorial misconduct sufficiently substantial to cause the district court to harshly criticize Independent Counsel attorneys for a variety of abuses, including falsely representing to the court that they were unaware of exculpatory material and the use of government witnesses when the Independent Counsel possessed documentary evidence that the testimony of those witnesses was false. The court also observed that trial counsel had acted in a manner that the court had never observed from an Assistant United States Attorney and, more generally, that Independent Counsel attorneys had acted in a "manner not worthy of prosecutors in the federal government or Justice Department standards of conduct."

Putting aside that these remarks of the court would eventually further alert Judge Adams to the need for examining the conduct of his attorneys, it does not seem possible to doubt that the allegations in Ms. Dean's memoranda were immediately brought to Judge Adams attention in some detail. In particular, it seems impossible to doubt that by mid-January, 1994, Judge Adams had been made fully aware of the material submitted by Ms. Dean providing reason to believe that a government agent on whose testimony the prosecutor placed great weight in attacking Ms. Dean's credibility in closing argument had not testified truthfully. Presumably, Judge Adams was also made aware that Independent Counsel attorneys were refusing to address Ms. Dean's claim that information on the whereabouts of a check in April 1989 would corroborate her disputed testimony about a telephone call to that agent and were continuing to ignore Ms. Dean's counsel's requests for such information. Yet, on January 18, 1994, Judge Adams himself signed a letter to the probation officer arguing that Ms. Dean should have her sentence increased for obstructing justice by falsely testifying about the call to the agent.

Moreover, I think that upon inquiry you will find that Judge Adams took a very active role in this case, including personally approaching the probation officer regarding the sentencing recommendation. Whether or not that occurred, it remains noteworthy that Judge Adams would himself orally argue the final sentencing issue, urging the court to impose a sentence at the higher end of the guideline range, in order that Ms. Dean not be perceived as being treated more leniently than a member of a minority group. In these circumstances, regardless of what you may think is the likely outcome of a thorough investigation into whether the government agent testified falsely or whether Independent Counsel attorneys sought to conceal what they believed to be false testimony of the government agent, there is little reason to expect Judge Adams to undertake such an investigation.

In some of the materials I provided you, I noted the Independent Counsel's adamant refusal to acknowledge any misconduct, even as to matters where the misconduct was evident to the district court. In the court of appeals, responding to questions by Judge Laurence Silberman, Deputy Independent Counsel Bruce C. Swartz refused even to acknowledge that Independent Counsel attorneys had intentionally withheld material that they knew to be exculpatory, instead arguing that those attorneys merely made mistaken judgment calls and representing that a reexamination of evidence during the preparation for trial had led Independent Counsel attorneys ultimately to disclose certain exculpatory material several weeks before trial.

In other words, Mr. Swartz was representing to Judge Silberman that only during a pretrial reexamination of the evidence did Independent Counsel attorneys recognize that Richard Shelby's statement that he did not believe Ms. Dean knew about John Mitchell's involvement with the Park Towers project was exculpatory. Mr. Swartz was also representing to Judge Silberman that only upon the pretrial reexamination of evidence did Independent Counsel attorneys recognize that Mr. Shelby's statement that Ms. Dean was not the person referred to in a memorandum as "the contact at HUD" was exculpatory. Judge Adams sat at counsel table while Mr. Swartz made these representations.

Thus, regardless of the extent to which Judge Adams may have been involved in the entire pattern of misconduct, it is not reasonable to expect that Judge Adams would himself undertake a good faith effort to investigate any of the issues raised in the materials I provided. There does, however, exist a danger that providing these materials to Judge Adams may compromise any subsequent investigation by the Department of Justice or other

appropriate entity. This is an especially pertinent consideration with regard to the issue of the testimony of Eli Feinberg and a number of other matters, where, as of this date, Independent Counsel attorneys have no basis for perceiving that the matters might be investigated.

A number of issues involve the thinking of Independent Counsel attorneys when they decided to take certain actions. Important evidence pertaining to such issues may be reflected simply in the manner in which documents are maintained in various files. Even without the physical destruction of documentary material, any reordering of such material may entirely undermine its probative value.

To be sure, it is difficult to believe that government attorneys would obstruct justice in such a manner. Yet, the dangers to Independent Counsel attorneys of an independent investigation are substantial, particularly if underlying the actions described in the materials I provided you there exist actions that could be construed as criminal. And it is not clear why a government attorney should regard even the physical destruction of evidence as more unethical than crafting an indictment containing false inferences. There seems no doubt, however, that Independent Counsel attorneys did that here, and that they committed as well numerous other ethical breaches of at least equal gravity. They did so, moreover, while under no great pressure to do anything other than fulfill their oaths. Thus, one cannot dismiss the concern that those attorneys will act to impede an investigation that might lead to their own prosecution or discipline.

In light of the relatively small size of the Office of Independent Counsel, these dangers exist regardless of the involvement of Judge Adams with the more serious allegations of misconduct. Given the pervasiveness of the misconduct here, if in fact Judge Adams was not directly involved in any part of it, his inability to monitor the conduct of his subordinates in such circumstances not only suggests an inability to investigate that conduct, but suggests as well an inability to investigate these matters in a manner that would not compromise subsequent investigations.

These considerations would counsel against referring the material to Judge Adams even without regard to any suggestion of bias on the part of Judge Adams. Yet, as I mentioned to you and as I noted in a number of places in the materials, in an April 11, 1990 article in USA Today, Judge Adams is quoted as observing that he might have been on the Supreme Court had he not offended John Mitchell. Many would regard that statement, and the fact

that Judge Adams would see fit to volunteer it almost twenty years after the events in question, as reasons why Judge Adams should not even have accepted an appointment to investigate matters where John Mitchell's role had already received widespread publicity, much less to investigate matters directly involving Mr. Mitchell or a person Mr. Mitchell considered to be his stepdaughter.

When it became known that the Independent Counsel intended to allege that Mr. Mitchell and Ms. Dean were together involved in a conspiracy to defraud the United States, Ms. Dean wrote to Attorney General Richard Thornburgh requesting that Judge Adams be recused from her case. Though I have not seen Ms. Dean's letter to Attorney General Thornburgh, it evidently raised issues concerning what Ms. Dean maintained were improprieties by Independent Counsel attorneys before the grand jury as well as the potential bias reflected in Judge Adams' statement to USA Today. The letter was responded to on July 10, 1992, by Assistant Attorney General Robert S. Mueller, III (signed by Deputy Assistant Attorney General John C. Keeney). Mr. Mueller's response stated that the Department of Justice did not regard either matter to warrant removal of Judge Adams, stating as well that "we have no reason to believe that Judge Adams is not fully aware of the standards for recusal."

At the same time, Ms. Dean wrote to Judge Adams requesting that he recuse himself. I have seen neither Ms. Dean's letter to Judge Adams nor the response on his behalf. I have been led to understand, however, that a letter to Ms. Dean's counsel summarily denied Ms. Dean's request, stating words to the effect that it had been Ms. Dean, not Judge Adams, who had involved John Mitchell in these matters.

Whether or not Judge Adams harbored any actual animus toward John Mitchell, it is undeniable that within days before or after the denial of Ms. Dean's request for his recusal, Judge Adams signed an indictment containing inferences intended to reflect a conspiracy between Mr. Mitchell and Ms. Dean, despite the fact that the Independent Counsel's immunized witness had stated that those inferences were false. Further, a substantial part of the misconduct reflected in the materials I provided involves the Independent Counsel's allegations concerning Mr. Mitchell and Independent Counsel attorneys' efforts to discredit Ms. Dean's testimony that she was unaware that Mr. Mitchell had earned HUD consulting fees. These circumstances further militate against referring the materials to Judge Adams for initial investigation.

I recognize that the strength of the above arguments much depends on how compelling is the case of prosecutorial abuse set out in the materials I provided. For that reason, I urge you to carefully review those materials before the Department of Justice makes a decision on this matter. Whether or not I have made a factual error or misinterpreted certain actions or events here or there, I think you still will find in those material undisputable evidence of prosecutorial abuse of remarkable proportions. Moreover, the abuses shown in the paper records underlying those materials can only intimate the scope of abuse that is likely to be revealed by an actual investigation.

In any case, if a decision is made to refer the materials to Judge Adams, please advise me of that decision.

Pursuant to your request, I have enclosed copies of the briefs in the court of appeals. Unfortunately, I was unable to finish the additional materials I mentioned before having to leave town for the holidays. Since I will not return until the first of the year, I have left this letter to be hand delivered to you at the beginning of the week.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Enclosures