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CONFIDENTIAL

HAND DELIVERED

The Honorable Abner J. Mikva
Assistant to the President and
Counsel to the President
The White House
West Wing, Second Floor
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Judge Mikva:

Thank you for your letter of March 8, 1995, advising that you had forwarded the materials I provided you on February 9, 1995, to the Department of Justice. Your letter referenced allegations of prosecutorial misconduct by the Office of Independent Counsel that I had already brought to the attention of the Department of Justice and indicated that you are relying on the Department of Justice to address those allegations in the appropriate manner. In light of that characterization of the nature of my correspondence to you, some clarification is in order.

The materials I provided you on February 9, 1995, consisted of nearly 400 single-space pages of narrative material, as well as a large volume of supporting attachments, which I had previously provided to the Attorney General on December 1, 1994, and January 17, 1995. These materials addressed issues of prosecutorial misconduct by the Office of Independent Counsel Arlin M. Adams that I suggested may involve federal crimes. It is my understanding that the materials provided to the Department of Justice on December 1, 1994, which were approximately 85 percent of the total, were forwarded by Associate Deputy Attorney General David Margolis to the Department's Office of Professional Responsibility at the beginning of the year, with the materials I provided in mid-January being forwarded to the Office of Professional Responsibility shortly after they were received in the Department. As suggested by the volume of the materials, the issues they address are of some complexity, though that volume also reflects the fact that the materials themselves contain the answers to many of the issues they raise. In any case, the Office of Professional Responsibility presumably will carefully review the issues raised in those materials and will do so in as

expeditious a manner as possible, and the Attorney General then will take such action as she deems appropriate with regard to requesting the removal of Judge Adams as Independent Counsel or recommending the disciplining or prosecution of Judge Adams or persons who served on his staff.

My purpose in bringing those materials to your attention, however, involved a subject that was both less complex and more appropriately considered by the President than the broader allegations contained in the materials. Specifically, the subject of my letter to you involved the issue of whether actions of the Honorable Jo Ann Harris in her role as an Associate Independent Counsel warrant the President's removing her from the position of Assistant Attorney General for the Criminal Division. As I show below, the actions of Ms. Harris that I maintain render her unfit to fulfill the responsibilities of her current position can be summarized relatively briefly. Moreover, the nature of Ms. Harris' conduct in these matters is something about which there is little room for disagreement. As I noted in my earlier letter, I believe that the great majority of Americans would regard those action to disqualify Ms. Harris from overseeing the actions of federal prosecutors. Indeed, most Americans, as well as most principled federal prosecutors, would likely believe that Ms. Harris should herself be prosecuted.

In any case, assuming that the description of events I set out below is an accurate one, I cannot believe that either you or the President would regard Ms. Harris as a suitable person to exercise responsibility in any matter involving the administration of justice. I therefore urge you to consider these matters carefully, verifying any matters about which you may harbor doubts, and, assuming that you do find my description of these events to be essentially accurate, to bring these matters to the attention of the President.

I set out in Section A below a description of certain matters in which Ms. Harris was directly involved while an Associate Independent Counsel. In Section B, I point out why in light of Ms. Harris' role in these matters and certain issues currently facing the Department of Justice, it is particularly inappropriate that Ms. Harris continue in her role as Assistant Attorney General.

A. <u>Prosecutorial Misconduct in Which the Honorable Jo Ann Harris was Directly Involved While Serving as an Associate Independent Counsel in the Office of Independent Counsel Arlin M. Adams</u>

The matters addressed in this section have been selected because of Ms. Harris' role while she was an Associate Independent Counsel, a position she left some time subsequent to November 1992. In some cases, however, the descriptions continue beyond the time when Ms. Harris left that position. This is, in part, to give the matter context, and, in part, because, whether or not Ms. Harris had any continuing involvement in the matter after she left the position of Associate Independent Counsel, it is reasonable to regard her as sharing responsibility for the Office of Independent Counsel's ultimate actions even when those actions occurred subsequent to Ms. Harris' departure.

Though I submit that the matters discussed below would disqualify Ms. Harris from a position of responsibility in federal law enforcement, it should borne in mind that there is little reason to believe that the matters addressed even in the larger materials are the only, or the most serious, instances of prosecutorial abuse in which Ms. Harris was directly involved. Presumably, at least some other instances of similar conduct involving Ms. Harris will be revealed in a competent investigation by the Office of Professional Responsibility.

Each of the matters described below involves Count One of the Superseding Indictment in United States of America v. Deborah Gore Dean, No. CR 92-181-TFH (D.D.C.). Count One alleged a conspiracy to defraud the United States among Deborah Gore Dean, former Attorney General John N. Mitchell, and others, with regard to the Department of Housing and Urban Development's (HUD's) funding of three moderate rehabilitation projects. Count One alleged that Ms. Dean had caused or facilitated the funding of these projects in order to benefit Mr. Mitchell, whom Ms. Dean considered to be her stepfather.

To give the matter further context, it is necessary to note that upon assuming the position of Independent Counsel with responsibility for investigating HUD's moderate rehabilitation program, the Honorable Arlin M. Adams informed a reporter for USA Today that he might have been appointed to the Supreme Court in 1971 had he not offended then Attorney General Mitchell. 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 raising certain 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, and requesting that Judge Adams be recused from her case. The Department of Justice denied the request stating that it did not regard the

matters raised by Ms. Dean to warrant removal of Judge Adams, advising 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. Writing on Judge Adams' behalf, Associate Independent Counsel Jo Ann Harris summarily denied the request.

It should also be borne in mind that, though each of the co-conspirators involved with projects that Ms. Dean was alleged to have caused to be funded for the benefit of Mr. Mitchell testified as an immunized government witness, neither they nor any other witness testified that he or she knew, or believed, that Ms. Dean was aware that Mr. Mitchell earned any fee related to HUD's moderate rehabilitation program or any other HUD program. Richard Shelby, an unindicted co-conspirator with regard to one of the projects in Count One, testified that he had himself sought to conceal Mr. Mitchell's involvement from Ms. Dean. Colonel Jack Brennan, who was Mr. Mitchell's partner in another project involved in Count One, testified that Ms. Dean had been shocked when, subsequent to Mr. Mitchell's death and the disclosure through a HUD Inspector General's Report that Mr. Mitchell had been involved in at least one HUD project, Colonel Brennan had informed her of the scope of Mr. Mitchell's HUD consulting activities.

It must also be noted that Count One and Ms. Dean's involvement with Mr. Mitchell were the overarching issues in the government's case, as reflected in the extensive attention given to that matter in the government's closing argument. That closing argument occurred in a situation where a white defendant from a wealthy family was being tried before an entirely African-American jury, and where the court had twice accused the prosecutor of ridiculing the defendant in a manner he would not have done but for the racial make-up of the jury. The argument was exceedingly inflammatory with the prosecutor repeatedly asserting that the defendant had lied to the jury, and making those assertions with regard to matters where the prosecutor knew for a fact that the defendant had not lied. In particular, in attacking Ms. Dean's credibility, the prosecutor relied heavily on two witnesses whose testimony the prosecutor asserted showed that Ms. Dean had lied concerning her relationship to Mr. Mitchell. With regard to one of those witnesses, a HUD driver named Ronald L. Reynolds, as discussed in the Introduction and Summary and the Narrative Appendix styled "Testimony of Ronald L. Reynolds," the court found that the government had in its possession materials indicating that Mr. Reynolds' testimony could not be true. With regard to the other witness, a government agent named Alvin R. Cain, Jr., as discussed in the

Introduction and Summary and the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.," the court appeared to accept that Ms. Dean had testified truthfully about the matter on which Agent Cain had contradicted her. In any case, unless my own affidavit filed in the case was false, there seems no room for doubt that Agent Cain's testimony was false. Even without regard to my own affidavit, the evidence is compelling both that Agent Cain's testimony was false and that, whether or not Independent Counsel attorneys knew that Agent Cain's testimony was false when they elicited it, after comming to believe that the testimony was probably or certainly false, those attorneys sought to conceal that the testimony was false and to continue to rely on it.

It is against this background, where a central aspect of the government's case involved the alleged conspiracy between Ms. Dean and Mr. Mitchell, and where there existed little evidence that such a conspiracy existed, that the matters described below must be appraised. Each of these matters involves that alleged conspiracy and Ms. Harris' role in crafting an indictment containing inferences which Ms. Harris had overwhelming reason to believe were false; the flouting by Ms. Harris and other Independent Counsel attorneys of the court's disclosure order by withholding from the defense information indicating that the inferences were false, such flouting occurring in the face of Ms. Harris' assurance to the court that she would comply with its order; and the reliance by Independent Counsel attorneys on the testimony of government witnesses that prosecutors had overwhelming reason to believe was false without confronting the witness with information that there was reason to believe would lead the witness to testify truthfully.

By way of further background, it should be noted as well that in ruling on a motion for a new trial based on prosecutorial misconduct, the Honorable Thomas F. Hogan would make numerous statements in essential agreement with the above characterizations. Apart from noting, among other things, that the government had relied on two witnesses (including Ronald L. Reynolds who is discussed above) when the government had reasons, including documentary evidence, to know that their testimony was false, and that he had observed conduct by the prosecution in this case that he would never expect from any Assistant United States Attorney who had ever appeared before him, Judge Hogan made this statement regarding the prosecution's overall behavior in the case:

> It evidences to me in the Independent Counsel's Office, where there were Brady requests made a long time ago,

> statements that there were no Brady materials, which is obviously inaccurate, where these witnesses are put on that I've just reviewed, where there was substantial questions and information that they may not have been telling the truth in the prosecution's files or the prosecution didn't ask if they were telling the truth to make sure they were before they went on stand, it evidences to me a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors I'm very familiar with, and that concerns the Court and is not the first time I've seen it in Independent Counsel cases.

Transcript of Hearing 28 (Feb. 14, 1995).

Judge Hogan nevertheless would ultimately find that the misconduct of the prosecution did not deprive the defendant of a fair trial. That does not, however, resolve the issue of whether the United States Government can countenance such action by its agents or whether individuals who participated in such conduct ought to hold presidential appointments overseeing the nation's criminal justice system. Moreover, a number of the matters addressed below, including one of the most serious, was never brought to the attention of Judge Hogan.

Certain of the matters discussed below involve a project in Dade County, Florida called Park Towers. A fuller elaboration of these matters may be found among the materials I previously provided you, in the Introduction and Summary and the Narrative Appendix styled "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony." The other matters involve a project, also in Dade County, called Arama. A fuller elaboration of the matters relating to Arama may be found in the Introduction and Summary and the Narrative Appendixes styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale" and "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee." The matters relating to each project are treated under separate subheadings below.

1. Matters Related to Park Towers

The original indictment in United States of America v. Deborah Gore Dean was issued on April 28, 1992. In a hearing on May 6, 1992, Associate Independent Counsel Jo Ann Harris, appearing as the lead counsel in the case, acknowledged to the Honorable Gerhard A. Gesell the government's obligation under Brady v. Maryland, 373 U.S. 83 (1963), to provide exculpatory information to the defendant. On June 3, 1992, Ms. Harris

appeared again before Judge Gesell, who specifically instructed her to turn over exculpatory material to the defendant as soon as such material was discovered. Ms. Harris acknowledged the obligation to turn over exculpatory material as soon as it was discovered, but stated that she was then aware of no exculpatory material.

At that time, the pending Indictment did not contain allegations involving John N. Mitchell, which are the principal subjects addressed below. It is nevertheless worth noting at this point that when the government ultimately would make its first disclosure of exculpatory material to the defendant on August 20, 1993, long after Ms. Harris had left her position as an Associate Independent Counsel, the disclosure would contain statements specifically germane to the first indictment. Those statements had been taken by representatives of the Office of Independent Counsel on April 13, 1992, and May 15, 1992, and hence were in existence at the time that Ms. Harris, on June 3, 1992, advised Judge Gesell that she was aware of no exculpatory material. See the Park Towers Appendix at 11 n.1.

a. Dean's Knowledge of Mitchell's HUD Consulting

The Superseding Indictment was issued on July 6, 1992. Count One of the Superseding Indictment alleged that Deborah Gore Dean had conspired with John N. Mitchell and others to secure funding for three projects in Dade County, Florida. One of these was Park Towers, a 143-unit moderate rehabilitation project that was funded as a result of HUD actions in 1985 and 1986. The most important of these actions were the allocation of 266 moderate rehabilitation units at the end of November 1985 and the approval of a post-allocation waiver of certain HUD regulations in May 1986. The Park Towers developer was a Miami lawyer named Martin Fine. In the spring of 1985, Martin Fine secured the services of a Miami consultant named Eli Feinberg in order to assist in securing HUD funding for Park Towers. Eli Feinberg then secured the services of Washington consultant Richard Shelby, who then retained John Mitchell. Martin Fine wrote many memoranda to his file recording Richard Shelby's progress on the Park Towers project. Usually, these memoranda would record what Eli Feinberg had told Martin Fine about that progress.

Count One of the Superseding Indictment alleged that Richard Shelby had secured funding of Park Towers through a conspiratorial relationship with Mr. Mitchell and Ms. Dean, and that Ms. Dean had facilitated the funding of Park Towers in order to benefit Mr. Mitchell, whom she considered to be her stepfather. The Superseding Indictment also alleged that Ms. Dean furnished internal HUD documents to her co-conspirators,

which they would then provide to the developers they represented. Martin Fine ultimately would pay $225,000 to Richard Shelby's employer, The Keefe Company, which paid John Mitchell $50,000 in connection with the Park Towers project.

Central to the theory of the conspiracy alleged with regard to Park Towers was the premise that Richard Shelby had retained John Mitchell because of Mr. Mitchell's relationship to Ms. Dean and Ms. Dean had sought to cause the project to be funded in order to benefit Mr. Mitchell. Yet, prior to the issuance of the Superseding Indictment, Richard Shelby, already under a grant of immunity, had informed representatives of the Office of Independent Counsel that he had retained Mr. Mitchell prior to learning of Mr. Mitchell's relationship to Ms. Dean and that, after learning of the relationship, had ceased to seek material assistance from Mr. Mitchell. Richard Shelby also stated that he believed that Ms. Dean was unaware of Mr. Mitchell's involvement with Park Towers and that he (Shelby) had gone out of his way to avoid Ms. Dean's learning of that involvement.

Notwithstanding Judge Gesell's order, and Ms. Harris' assurance to Judge Gessell that she would abide by it, none of this information would be made available to the defense before Ms. Harris left the Office of Independent Counsel months after the Superseding Indictment was issued. Such portions of this information as would be made available to the defense pursuant to a Brady disclosure would not be produced until August 20, 1993, two weeks before jury selection. Other portions of this information would only be provided as Jencks material at the beginning of trial.

b. "The Contact at HUD"

The Superseding Indictment contained an allegation that on July 31, 1985, in a memorandum to the file, Martin Fine had written that he had been informed by Eli Feinberg that Richard Shelby was scheduled to meet with "the contact at HUD" the following week. The government would acknowledge that it had intended to create the inference that the reference to "the contact at HUD" was a reference to Dean. Yet, prior to issuance of the Superseding Indictment, Shelby had informed representatives of the Office of Independent Counsel that the reference to "the contact at HUD" was not a reference to Dean, but actually was a reference to a Deputy Assistant Secretary named Silvio DeBartolomeis, and that almost all of his (Shelby's) HUD contacts on Park Towers were with Silvio DeBartolomeis.

The Office of Independent Counsel had no sound basis for disbelieving this. Various other Martin Fine memoranda discussed Richard Shelby's meetings with Silvio DeBartolomeis concerning Park Towers, particularly with regard to a post-allocation waiver, and recorded that in March 1986 Silvio DeBartolomeis had advised Richard Shelby that he (DeBartolomeis) would approve the waiver. The Office of Independent Counsel also possessed a letter from Richard Shelby to Eli Feinberg enclosing a copy of the waiver and indicating that he (Shelby) had received it from Silvio DeBartolomeis. Further, Silvio DeBartolomeis also was an immunized government witness.

Notwithstanding Judge Gesell's Order, neither Shelby's statement that the reference to "the contact at HUD" was not a reference to Dean, nor his statements that most of his contacts on Park Towers were with Silvio DeBartolomeis, would be disclosed to the defendant before Ms. Harris departed the Office of Independent Counsel. That information would not be disclosed to the defendant until August 20, 1993.

The Superseding Indictment also contained allegations implying that in November 1985, Ms. Dean had provided Richard Shelby a copy of an internal HUD document called a rapid reply. Before the Superseding Indictment was issued, however, Richard Shelby had informed representatives of the Office of Independent Counsel that he had received the document from Silvio DeBartolomeis or another HUD official named R. Hunter Cushing. These statements of Shelby would not be turned over as Brady material at any time, but would only be made available to the defendant as part of a massive Jencks production several days before Richard Shelby testified.

Though the following are matters occurring subsequent to Ms. Harris' departure, they, too, warrant brief elaboration. The government would introduce the Martin Fine memorandum referencing "the contact at HUD" into evidence through its author without eliciting from anyone the identity of the referenced "contact." The government would then include the reference in its summary charts used in closing argument in a manner that the government would acknowledge was intended to lead the jury to believe that the reference was to Dean.

Further, the night before Richard Shelby testified, the government showed him a number of documents and asked him to review them to refresh his recollection about his dealings with HUD officials on the Park Towers project. The government failed to include among the documents then shown to Shelby the various documents possessed by the Office of Independent Counsel

referencing Richard Shelby's contacts with Silvio DeBartolomeis. When Richard Shelby testified, the prosecutor asked him whether the documents he reviewed "to refresh [his] recollection as to who [sic] he dealt with at HUD" on the Park Towers project mentioned Deborah Dean, to which he responded affirmatively, and whether they mentioned Silvio DeBartolomeis, to which he responded negatively. The apparent purpose of this questioning was to lead the jury to believe that there existed no documentation of Richard Shelby's contacts with Silvio DeBartolomeis. The government would later rely on the supposed absence of documentation of Richard Shelby's contacts with Silvio DeBartolomeis to justify its efforts to lead the jury to believe that the reference to "the contact at HUD" was a reference to Deborah Dean.

In the summary charts used in closing argument, the government also would include entries that plainly were intended to lead the jury to believe that in November 1985, Deborah Dean had provided Richard Shelby a copy of the rapid reply letter, and that in May 1986, Deborah Dean had provided Richard Shelby a copy of a HUD waiver. The government did so notwithstanding statements by Richard Shelby that the rapid reply letter had been provided to him by someone other than Deborah Dean, and notwithstanding the government's possession of a document causing it to know with absolute certainty that the copy of the waiver had been provided to Richard Shelby by someone other than Deborah Dean.

c. The Eli Feinberg Testimony

The Superseding Indictment had alleged that the co-conspirators involved in Count One would tell their developer/clients that John Mitchell was Deborah Dean's stepfather. Ultimately, however, the Office of Independent Counsel would argue that Richard Shelby had concealed John Mitchell's involvement from Eli Feinberg and Martin Fine, and that argument would play a large role in the Independent Counsel's attempt to show that Richard Shelby, John Mitchell, and Deborah Dean were involved in a conspiratorial relationship.

The key testimony in this regard would be that of Eli Feinberg, who, on September 17, 1993, would testify under oath that he was unaware of John Mitchell's involvement with the Park Towers project. Yet, prior to a telephonic interview of Eli Feinberg on May 18, 1992, Richard Shelby, already under a grant of immunity, had twice told representatives of the Office of Independent Counsel that he (Shelby) had told Eli Feinberg about John Mitchell's involvement with Park Towers, and that he assumed

that Eli Feinberg had told Martin Fine. In the telephonic interview of May 18, 1992, Eli Feinberg then stated that he was not aware of John Mitchell's involvement. Eli Feinberg's interview report indicates that he was not at that time advised by the Office of Independent Counsel that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, Richard Shelby was apparently advised by Independent Counsel attorneys that Eli Feinberg had stated that he was unaware of John Mitchell's involvement with Park Towers. Richard Shelby nevertheless firmly stated that Eli Feinberg was aware of John Mitchell's involvement and even provided details of Eli Feinberg's role in determining John Mitchell's fee. Even though there were obvious reasons why Eli Feinberg might wish to falsely deny knowledge of John Mitchell's involvement with the Park Towers project, apparently between the time of Eli Feinberg's May 18, 1992 telephonic and his being called to testify under oath, on September 17, 1993, that he was unaware of John Mitchell's involvement, Independent Counsel attorneys never confronted Eli Feinberg with Richard Shelby's statements.

The following matters occurred after Ms. Harris left the Office of Independent Counsel, but nevertheless appear to reflect a continuation of the decision made when Ms. Harris was handling the case not to confront Eli Feinberg with Richard Shelby's statements. At trial, without advance notice, the Independent Counsel would put Richard Shelby on the stand out of order and ahead of Eli Feinberg. Then, though knowing beyond any doubt that its immunized witness Richard Shelby would deny that he had concealed John Mitchell's involvement from Eli Feinberg, the prosecutor would avoid any questions that might elicit a statement on the matter. When Richard Shelby started to describe his discussions with Eli Feinberg about setting John Mitchell's fee, the prosecutor changed the subject. After Richard Shelby testified, the government then called Eli Feinberg, and, despite the evidence that such testimony would be false, the government directly elicited Eli Feinberg's sworn testimony that he was unaware of John Mitchell's involvement with Park Towers. The government then elicited sworn testimony to the same effect from Martin Fine.

In closing argument, in addition to seeking to cause the jury to draw various false inferences already discussed and otherwise seeking to lead the jury to believe things the government knew to be false, the prosecutor would give special attention to the testimony that Eli Feinberg and Martin Fine were not aware of John Mitchell's involvement in Park Towers,

asserting that such secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Richard Shelby would have contradicted Eli Feinberg's testimony, and having strong reason to believe that Eli Feinberg's testimony was in fact false, the prosecutor would make a special point of the fact that the testimony was unimpeached. The supposed concealment by Richard Shelby of John Mitchell's involvement with Park Towers also would be an important feature of the government's brief in the court of appeals.

2. Matters Related to Arama

Count One of the Superseding Indictment also alleged that Deborah Gore Dean had caused 293 units of moderate rehabilitation subsidy to be allocated to Dade County, Florida in order to benefit John Mitchell. The units would go to a project called Arama of developer Art Martinez, who had retained former Kentucky Governor Louie B. Nunn to assist in securing moderate rehabilitation funding. Louie Nunn, who received $425,000 from Art Martinez, paid John Mitchell $75,000 for his assistance on the matter. The funding occurred as a result of documents signed by Assistant Secretary for Housing Maurice C. Barksdale in mid-July 1984, several weeks after Deborah Dean assumed the position of Executive Assistant to HUD Secretary Samuel R. Pierce, Jr.

a. The Mitchell Messages and Maurice Barksdale

John Mitchell had died in November 1988. John Mitchell's files secured by the Office of Independent Counsel in May of 1992 contained telephone messages indicating that in January 1984, at the same time that Louie Nunn was negotiating an agreement to secure 300 moderate rehabilitation units for Art Martinez, John Mitchell was talking to Deborah Dean's predecessor as Executive Assistant, Lance H. Wilson, about securing 300 moderate rehabilitation units, and that Lance Wilson had told John Mitchell that he (Wilson) was talking to Maurice Barksdale about the units. John Mitchell knew Lance Wilson and had worked for the same law firm. Though the Superseding Indictment alleged that Deborah Dean had caused the Arama funding to benefit John Mitchell, during the time when Ms. Harris was in charge of the case, the decision was made not to turn these materials over under Brady. Rather, they would only be made available for the defendant's review as part of several hundred thousand pages of general discovery material.

Further, as the Office of Independent Counsel would eventually acknowledge, in May of 1992, it had brought Maurice

Barksdale before the grand jury, and had later called him to testify in court, for the purpose of tying Deborah Dean to the Arama funding without ever confronting him with the information contained in the Mitchell telephone message indicating that Lance Wilson had been talking to him (Barksdale) about the matter. In eliciting Maurice Barksdale's testimony in court, the prosecutor focused the inquiry solely on the period after Lance Wilson had left HUD, and asked no questions about the messages or about Lance Wilson.

b. Art Martinez' Knowledge of John Mitchell's Involvement With Arama

As noted earlier, the Superseding Indictment alleged that the co-conspirators involved in Count One would tell their developer/clients of their association with John Mitchell, who was Deborah Gore Dean's stepfather. Consistent with that theme, the Office of Independent Counsel included allegations in the Superseding Indictment indicating that on January 25, 1984, the day that Louie Nunn entered into a consultant agreement with developer Art Martinez to secure moderate rehabilitation funding for the Arama project, Louie Nunn wrote on the bottom of the agreement that John Mitchell was to be paid half of the consultant fee. All actions the government took with regard to this matter -- including the words chosen in the Superseding Indictment and the presentation in the government's summary charts, as well as the actions the government took in selecting, introducing, and calling attention to the various copies of agreements between Louie Nunn and Art Martinez introduced into evidence -- were calculated to support the interpretation that Louie Nunn had annotated the consultant agreement on January 25, 1984, and that, consistent with Louie Nunn's annotating the agreement at the time it was originally executed, Art Martinez possessed a copy of the agreement bearing Nunn's notation.

Yet, the Office of Independent Counsel possessed documents making it abundantly clear that Louie Nunn did not make that annotation on January 25, 1984, and that he could not have made the annotation until subsequent to April 3, 1984, after the agreement had been modified in several respects. There is no reason to think that Art Martinez ever saw a copy of the annotated agreement or that the Office of Independent Counsel ever had reason to believe that such was the case.

Ultimately, the court would deny the Independent Counsel the opportunity to elicit testimony that would further support the theme that John Mitchell or Louie Nunn had told Art Martinez that John Mitchell was Deborah Dean's stepfather and that this was

further evidence of Deborah Dean's involvement in a conspiracy. In light of the court's ruling, the Independent Counsel altered its approach, and instead argued that John Mitchell's role in Arama had been concealed from Art Martinez, and that this concealment, like the supposed concealment of John Mitchell's role in Park Towers from Martin Fine and Eli Feinberg, was evidence of conspiracy. The Independent Counsel made the argument that John Mitchell's role in Arama had been concealed from Art Martinez, despite evidence indicating beyond any doubt that, even though Art Martinez did not possess a copy of the agreement containing Louie Nunn's notation regarding John Mitchell, Art Martinez was well aware that John Mitchell was involved in Arama.

B. Additional Considerations Supporting the Removal of the Honorable Jo Ann Harris From the Position of Assistant Attorney General

As you are no doubt aware, in recent years increasing attention has been given to ethical abuses on the part of federal prosecutors and to the perceived failure of the Department of Justice to discipline those abuses. A recent example of such attention is the commentary styled "Government Lawyers: Above the Law," by Gerald Goldstein, appearing on the op-ed page of The Washington Post on May 2, 1995. A more substantial example is the six-part series by Jim McGee appearing in The Washington Post in January 1993.

Of particular note is an article by Mr. McGee styled "Justice Dept. Releases Internal Review," appearing in The Washington Post on May 6, 1994, which reported that Assistant Attorney General Jo Ann Harris chose to impose very modest discipline upon a prosecutor who had withheld important evidence from the defense. A stated basis for the modest discipline was that the prosecutor had failed to recognize the significance of the material withheld. Six months later, in oral argument before the Court of Appeals for the District of Columbia Circuit, Deputy Independent Counsel Bruce C. Swartz would attempt to excuse Ms. Harris' own failure to turn over exculpatory material in a timely manner because of her supposed failure to appreciate the significance of the withheld material. Whether or not there is reason to believe that Ms. Harris was influenced in her treatment of the prosecutor discussed in the cited article because of Ms. Harris' own conduct in United States of America v. Deborah Gore Dean, her conduct with regard to a wide range of matters in that case would cause most observers to believe that Ms. Harris is an entirely unsuitable person to judge the ethics of federal prosecutors.

Further, according to a September 12, 1994 Legal Times article, Ms. Harris apparently will have a significant role on the Department of Justice's newly-formed Advisory Board on Professional Responsibility. In addition to overseeing conduct of federal prosecutors, that Board will be charged with developing a new ethics curriculum for Department of Justice Attorneys. Ms. Harris' continued participation on such a Board in light of her conduct in the Dean case heightens the anomaly of her direct supervision of federal prosecutors and validates claims that the creation of that Board does not reflect a sincere intention to vigorously address the ethical transgressions of Department of Justice attorneys.

Media coverage following the tragedy at Oklahoma City has revealed that some elements in the nation harbor serious doubts about the integrity of federal law enforcement officials. I think, however, that the great majority of Americans continue to have faith in both the integrity and basic decency of federal prosecutors. For example, most Americans believe that, as a rule, federal prosecutors would not include inferences in an indictment when immunized witnesses or other evidence indicates that the inferences are false; federal prosecutors would not violate a court's instruction to turn over to the defendant all exculpatory evidence, particularly evidence directly contradicting inferences in the indictment, while at the same time assuring the court that its disclosure orders will be complied with; and federal prosecutors would not rely on the testimony of witnesses that those prosecutors have strong reason to believe is false without taking reasonable measures to determine whether the testimony is in fact false. Most Americans also believe that on those occasions where individual prosecutors engage in such conduct, those prosecutors will be severely disciplined by higher officials.

Yet, there is no question that Ms. Harris was heavily implicated in each of these types of conduct in the Dean case. In fact, there is much reason to believe that Ms. Harris was involved in a conspiracy to obstruct justice that continues to this day, and that, whether or not she has continued to directly participate in that conspiracy, she has done nothing to withdraw from it. Nevertheless, she has been allowed to remain as one of the Department of Justice's principal officials monitoring the conduct of federal prosecutors. When Ms. Harris' actions in the Dean case are eventually made a subject of widespread public awareness, that she had been allowed to continue to serve as Assistant Attorney General after the Administration was made aware of her conduct cannot but undermine the confidence of the

citizenry in the basic decency of its government. That Ms. Harris should be allowed to remain in her position will also serve as an affront to the countless principled government attorneys whose reputations are unfairly tarnished by the behavior of individuals like Ms. Harris.

Finally, I am aware of your own expressed concerns about potential abuses by independent counsels and members of their staffs. I do not think that there is great reason to fear that in the ongoing investigations by Independent Counsel Kenneth W. Starr or others, any overreaching, however reprehensible that may be, will rise to the level of wholesale corruption of prosecutorial ethics that is well-documented in the materials I provided you. I realize, of course, that the current Administration is not responsible for these abuses. But one member of the Administration had a very large role in them. Ignoring those abuses and the role played by Ms. Harris not only tends to condone her conduct, but suggests to other members of independent counsel staffs that there is little reason to fear that they ultimately will be called to account for their actions.

Already Ms. Harris has continued to serve in her position almost six months after these matters were brought to the attention of the Attorney General and more than three months after I brought these matters to your attention. Awaiting the results of the Office of Professional Responsibility's investigation into the broader allegations against the Office of Independent Counsel Arlin M. Adams could leave Ms. Harris in her post through the next presidential election. I therefore urge you to verify the accuracy of my characterization of Ms. Harris' conduct, an undertaking that ought to require minimal resources, and then to address this matter with the President. In the event that you continue to regard this to be a matter appropriately to be handled by the Department of Justice, I suggest that you specifically request the Attorney General to investigate Ms. Harris' suitability for serving as an Assistant Attorney General in light of her actions in the Dean case, and to do so independently from the Office of Professional Responsibility's investigation into the broader issues in my materials. I also suggest that you require a prompt report on the former matter.

Though I continue to consider the removal of a presidential appointee to be a matter properly to be addressed with the President rather than the head of the appointee's agency, absent advice from you that the White House will investigate these matters directly, I will regard it as appropriate to make these or other arguments directly to the Attorney General.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan