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CONFIDENTIAL

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

Dear Mr. Margolis:

It is approaching six months since I first provided the Attorney General the materials concerning prosecutorial misconduct by the Office of Independent Counsel Arlin M. Adams in United States of America v. Deborah Gore Dean, No. CR 92-181-TFH (D.D.C.), and five months since you forwarded the first portion of those materials to the Office of Professional Responsibility. In light of the passage of time, and certain other factors, it is necessary that I call a number of matters to your attention.

Initially, however, I should advise you that on March 31, 1995, I retired from the United States Government. Thus, your concerns about the prohibition of a federal government attorney's representing a defendant in a federal criminal case are no longer relevant to such actions as I may now take in this matter. That said, however, let me note that I still do not represent Deborah Gore Dean in any manner. As with my earlier communications to the Department of Justice and the White House Counsel, I am at this time acting solely as a citizen.

A. Matters Relating to James G. Watt2

The first matter I need to bring to your attention involves the case brought against James G. Watt by Independent Counsel Arlin M. Adams on February 22, 1995, United States of America v. James G. Watt, No. CR 95-0040 (D.D.C.). It is my understanding that the case is scheduled for trial in September 1995. It seems to me that basic fairness requires that the defendant in that case be apprised of the information in the materials I provided the Department of Justice in order that he may anticipate any similar prosecutorial abuses in his own case and that he may make whatever other use of the information he believes beneficial to his defense.

Further, I have been led to understand that the Office of Independent Counsel has identified Deputy Independent Counsel Bruce C. Swartz as a prosecution witness in the Watt case. Mr. Swartz, who is mentioned in a number of places in my letter to you of December 25, 1994, had a substantial role in the Dean case and in many of the more serious matters addressed in the materials now being reviewed by the Office of Professional Responsibility. Those materials suggest that Mr. Swartz may have been involved in a conspiracy to obstruct justice with regard to more than one of those matters. In any event, the materials show Mr. Swartz to have been exceedingly dishonest in his representations to the district court and to the court of appeals. These are matters that bear on Mr. Swartz's credibility as a witness, providing additional reason for full disclosure of the materials to Mr. Watt and his counsel.

In my letter to you of December 25, 1995, I suggested as one of the reasons for referring the materials to the Office of Professional Responsibility without first raising the issues with Judge Adams that the disclosure of the contents of those materials to Judge Adams or members of his staff might compromise any subsequent investigation. If I provide these same materials to Mr. Watt and his attorneys, it is possible that in their use of the materials, they may disclose significant portions of the contents to members of the Office of Independent Counsel staff, possibly raising some of the same concerns that the disclosure to Judge Adams might have raised. Therefore, before I move forward on this, I request your advice on the matter, and whether, in light of the current status of the investigation by the Office of Professional Responsibility, either you or the Office of Professional Responsibility believes a disclosure concern continues to be justified.

B. Matters Relating to the Progress of the Investigation by the Office of Professional Responsibility

The second matter I wish to raise concerns the status of the investigation by the Office of Professional Responsibility. I do not know how long such investigations typically take. I would assume, however, that the issues raised in the materials I provided the Attorney General would be given a high priority, for several reasons. First, they concern the possible involvement of the Assistant Attorney General for the Criminal Division in a conspiracy to obstruct justice. Second, they involve a situation where there may occur at any time a ruling by the court of appeals that could require that a defendant commence a prison sentence after having been convicted as a result of prosecutorial misconduct involving criminal acts by agents of the federal government. Third, the Office of Independent Counsel that is the subject of the allegations has brought another indictment even as the investigations into those allegations is ongoing, and, as I noted above, intends to rely on the testimony of an individual who there is reason to believe was involved in the most serious abuses reflected in the materials. Fourth, it is my understanding that Robert E. O'Neill, the lead trial counsel in the case, continues to function as a federal prosecutor, and that Paula A. Sweeney, Mr. O'Neill's co-counsel, is employed by the Central Intelligence Agency. Yet, even taking the most benign view of the documented actions of Mr. O'Neill and Ms. Sweeney, most observers would conclude that neither of them is fit to represent the United States Government in any capacity.

Moreover, because Ms. Harris no doubt deals extensively with Office of Professional Responsibility personnel involved with the investigation, there exists the danger of unauthorized disclosure of the contents of the material to Ms. Harris, particularly if the investigation is protracted. Given Ms. Harris' apparent intention to leave the Department at the end of the summer, the Department would seem also to have a strong interest in expediting the investigation to avoid any suggestion that the investigation was conducted with other than appropriate expedition in order to allow Ms. Harris the opportunity to leave the Department before any findings were disclosed.

Further, in contrast to what I assume are many of the matters brought to the attention of the Office of Professional Responsibility, there is no basis whatever for believing that the allegations either are entirely unfounded or are trivial. Here, it must be remembered, the trial court itself severely criticized the conduct of the prosecution, observing, among other things, that trial counsel had acted in a manner that the court would not

have expected from any Assistant United States Attorney who had ever appeared before it, and, more generally, that the conduct of the prosecution evidenced "a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards." Among the factors prompting those remarks was the indefensible withholding of Brady materials, a matter with which Ms. Harris was directly involved.

The court also specifically found that the prosecution possessed documentary and other evidence indicating that government witnesses Ronald L. Reynolds and Thomas T. Demery testified falsely. This is essentially the same conduct underlying the matters to which I gave the greatest emphasis in the materials I provided, namely, the Independent Counsel's actions with regard to the testimony of Supervisory Special Agent Alvin R. Cain, Jr. and the testimony of Eli Feinberg. Notwithstanding that emphasis, however, one ought not to lose sight of the court's findings with regard to the testimony of Reynolds and Demery. Thus, Cain and Feinberg aside, the Office of Professional Responsibility and the Department of Justice must decide whether the actions of Independent Counsel attorneys regarding Demery and Reynolds that were specifically noted by the court provide a basis for removing Judge Adams, as well as whether those actions constituted federal crimes or render Mr. O'Neill and Ms. Sweeney unfit to serve in the federal government.

In this regard, let me note as well the statement by the Deputy Attorney General in her op-ed piece in the May 21, 1995 Washington Post that where a federal judge makes a finding of misconduct by a government attorney, the Office of Professional Responsibility makes an expedited inquiry. While this statement apparently was directed toward Department of Justice attorneys, many of the considerations warranting expedition ought to apply as well in Independent Counsel cases, particularly where, as here, Department of Justice attorneys were directly involved in the identified misconduct while acting as Associate Independent Counsel. Indeed, assuming that the Department of Justice was objectively monitoring the conduct of the Office of Independent Counsel, the trial court's findings ought to have occasioned an inquiry by the Office of Professional Responsibility even had I not brought these matters to the attention of the Attorney General.

Finally, the materials I provided do not contain some conclusory account based on unspecified evidence. Rather, those materials set out the relevant events in meticulous detail with the evidentiary basis for each statement carefully identified. I

suspect that few final reports issued by the Office of Professional Responsibility are as comprehensive or as well documented, and that this is true regardless of whether I have here or there made any factual errors or misconstrued events or motives. Thus, while there remain several areas where the investigative resources of the Office of Professional Responsibility can invaluably augment the materials (as I discuss below), one needs do little more than verify the accuracy of the materials before concluding that action by the Attorney General is manifestly warranted.

It is true that, assuming the general validity of my characterization of the conduct of the Office of Independent Counsel regarding the issues addressed in the materials, there is reason to believe that the matters I have identified constitute only a portion, and perhaps a small portion, of the prosecutorial abuses actually occurring in the wide-ranging and protracted investigation by Judge Adams. Inquiry into the full range of such abuses might indeed require an extensive investigation by the Office of Professional Responsibility or by another Independent Counsel. That would not, however, appear to be sufficient reason to delay the Attorney General's requesting the immediate removal of Judge Adams from the position of Independent Counsel for the continuing HUD investigation.

In light of the above considerations, I set out below certain points about the progress of the investigation by the Office of Professional Responsibility, including an aspect of that investigation of which I have first-hand knowledge. These points principally concern the issues I raised regarding the testimony of Supervisory Special Agent Alvin R. Cain, Jr., the testimony of Eli Feinberg, and the testimony of Thomas T. Demery. Specifically, based on what I know about the Office of Professional Responsibility's failure to make inquiries regarding the first matter, I suggest obvious areas of inquiry with regard to all three matters that, absent compelling reason not to make them, one would expect already to have been made in the course of a competent investigation.

Before addressing each of the three matters, it is necessary to note that a significant (though not the sole) element in each of them is the evident willingness of the prosecution to put on witnesses when there was compelling reason to believe that the testimony was false and without confronting the witness with information that might cause him to tell the truth. This approach by the prosecution, which was specifically noted by the trial court, is also reflected in various ways in other matters addressed in the Introduction and Summary to the materials and

the Narrative Appendixes styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale"; "The Russell Cartwright Receipt"; "The Andrew Sankin Receipts"; and "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee." The approach was often facilitated by tactics aimed at preventing the defense from putting forward evidence that the testimony was false.

It is my understanding that the Department of Justice does not provide written guidance for attorneys representing the United States Government with regard to determining the credibility of government witnesses or relying on the testimony of government witnesses when there exists doubt about the truthfulness of that testimony. I base that understanding on my interpretation of the September 15, 1994 response by Bonnie L. Gay to my Freedom of Information Act request dated January 24, 1994.

Whether or not the Department of Justice provides guidance in this area, however, this seems clear. For government attorneys to put a witness on the stand and elicit testimony that those attorneys believe is more likely than not perjured amounts to intentionally putting on perjured testimony (assuming that the testimony is in fact false), just as taking property that one believes more likely than not belongs to someone else is theft. To make the analogy closer to the situation here, it would be necessary to posit that one waits for the probable owner to leave the room (or tricks the probable owner into leaving the room), before taking the property. In most of the situations involved here, however, the government did not rely on witnesses who its attorneys merely believed more likely than not would commit (or had committed) perjury; rather, the government relied on witnesses who its attorneys believed certainly or almost certainly would commit (or had committed) perjury.

The single justification for the Department of Justice to fail to provide guidance in this area would seem to be that Department of Justice prosecutors would instinctively understand the government's obligations in such matters. Yet, the conduct of the several Independent Counsel attorneys who had previously served as federal prosecutors, including both Ms. Harris and Mr. O'Neill, suggests that the Department's faith in the ethical instincts of its attorneys may not be well founded. It is worthy of note that in defending the actions of its attorney before the court of appeals, the Office of Independent Counsel would point to the fact that they were experienced federal prosecutors, as if to maintain that their actions were consistent with Department of Justice standards. Whatever the validity of that argument, it

does seem that the lax guidance by the Department of Justice had some role in the abuses in this case. Apart from suggesting that the Department reevaluate the content and effectiveness of its ethical guidance, these facts provide further reason for the Department to address the ethical issues raised in this case with vigor and expedition.

1. Testimony of Alvin R. Cain, Jr.

The testimony of Alvin R. Cain, Jr. is treated at length in the Introduction and Summary to the materials and the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.", as well as in my letter to you of December 25, 1994. It was also a subject of conversation at the meeting in your office in early December 1994. The facts pertinent to the points to be made here are the following.

A critical issue in the Independent Counsel's case against Deborah Gore Dean concerned whether Dean was aware that former Attorney General John N. Mitchell earned HUD consulting fees. One immunized witness who retained Mitchell on a HUD matter testified that he deliberately concealed Mitchell's role from Dean. Mitchell's partner, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he or she knew or thought that Dean was aware of Mitchell's HUD consulting.

Dean denied knowing that John Mitchell earned HUD consulting fees before she read the HUD Inspector General's Report when it was issued in April 1989. The report had stated that Louie B. Nunn paid Mitchell $75,000 for assistance in securing funding for a project in 1984. Dean gave emotional testimony about calling HUD investigator Alvin R. Cain, Jr., who had prepared the report, to express her anger about statements in the report that Mitchell earned the $75,000 consulting fee and to demand to know if there was a check proving that Mitchell earned that fee.

Dean started to testify as to what Cain had told her when she called him. A prosecution objection to that testimony would be sustained, however, so Dean would not be allowed to testify as to what Cain had told her. Though Associate Independent Counsel Robert E. O'Neill would not cross-examine Dean about the call to Cain, the prosecution called Cain as its second rebuttal witness. Cain, who had been detailed to the Office of Independent Counsel for the preceding three years, firmly stated that he had no recollection of any such call. In closing argument, O'Neill relied heavily on Cain's testimony in asserting that Dean lied

when she testified that she did not know that John Mitchell had earned HUD consulting fees.

In support of a motion for a new trial, Dean argued that Cain was one of at least three government witnesses who had lied and who the Independent Counsel attorneys knew or should have known had lied. (The others are Thomas T. Demery and Ronald L. Reynolds, who is the other witness on whose testimony O'Neill placed great weight in closing argument in asserting that Dean had lied about her knowledge of Mitchell's consulting.) Dean provided an affidavit stating that when she asked Cain about the check from Nunn to Mitchell, Cain said it was maintained in the HUD regional office. In her affidavit Dean also stated that, after talking to Cain, she told me what Cain had told her. I provided an affidavit stating that in April 1989, Dean had told me about the call to Cain and had said that Cain had told her the check was in a field office. I also provided reasons why I remembered the matter very well. In her memorandum, Dean pointed out that if the check was in fact maintained in a HUD field office in April 1989, that fact would tend to corroborate her account of the call to Cain. Dean requested a hearing on the matter.

In its opposition to Dean's motion, the Office of Independent Counsel said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. In a reply, Dean noted that the Office of Independent Counsel's failure to discuss the check suggested that the check was in fact maintained in a field office in April 1989 and that the Office of Independent Counsel did not have a plausible theory as to how she could have learned of that matter other than through her call to Cain.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the U.S. Probation Officer, Independent Counsel Arlin M. Adams relied on Cain's testimony in arguing that Dean committed perjury during her trial and should therefore have her sentence increased for obstruction of justice. In a February 7, 1994 Revised Presentence Investigation Report, the Probation Officer agreed, recommending a two-level upward adjustment that would increase Dean's minimum sentence by six months.

On February 14, 1994, the court denied Dean's motion for a new trial. The court essentially agreed with Dean's claims that Reynolds and Demery lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Cain and the Office of Independent Counsel's heavy reliance on

Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the Office of Independent Counsel's failure to respond regarding the whereabouts of the check in April 1989 is probative that the Office of Independent Counsel knew that Cain lied. Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the Independent Counsel's argument that Cain's testimony contradicting Dean about the call showed that she lied during the trial. Dean also argued that, whatever may have been the Office of Independent Counsel's knowledge regarding the truth of Cain's testimony at the time of trial, the Office of Independent Counsel had continued to rely on Cain's testimony having the additional information provided in the Dean and Scanlan affidavits as well as the opportunity to investigate such matters as the whereabouts of the check.

Dean requested the court to defer final ruling on her motion for a new trial and on the sentencing until the matter of the whereabouts of the check was resolved. Dean argued that, if the check was maintained in a field office in April 1989, there should be discovery as to whether the Office of Independent Counsel knew or should have known that Cain committed perjury and whether such perjury should be imputed to the Office of Independent Counsel.

At a February 22, 1994 hearing, the Office of Independent Counsel discussed the issue of the whereabouts of the check for the first time. Arguing for the Office of Independent Counsel, Deputy Independent Counsel Bruce C. Swartz still refused to state what the Office of Independent Counsel knew about the whereabouts of the check in 1989, but argued that Dean could have surmised that the check was maintained in a field office through a statement in an interview report in the HUD Inspector General's Report. That statement, however, could not reasonably have provided a basis for Dean's knowledge. Indeed, the context of the interview report suggested that it was unlikely that the regional office would have gone to the trouble to secure a copy of the check by April 1989. The court denied Dean's motion without indicating what it believed about who was telling the truth about the call.

Later in the hearing, the court refused to accept the Probation Officer's recommendation to increase Dean's sentencing level on the basis of Cain's contradiction of Dean's statement about her call to him. The court stated that it believed that Dean may have in fact called Cain. The court, however, accepted the Probation Officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement

Dean had made that she did not know John Mitchell that well until after she left HUD. In so ruling, the court relied on Dean's testimony about her call to Cain as evidence of the closeness of her relationship to Mitchell. That reliance would only have made sense if the court accepted that Dean in fact had told the truth about the call to Cain.

I suggest that, even apart from the court's apparent acceptance that Dean had told the truth about the call to Cain, a reasonable person would interpret these events as I set out in next paragraph. In attempting an objective appraisal of how a reasonable person would interpret these events, I acknowledge that the effort is complicated by the fact that I know my affidavit to be true, and, if my affidavit is true, it is virtually impossible that Cain's testimony was also true. The reasonable observer, on the other hand, must merely consider the probability that my affidavit is true in attempting to appraise this matter.

With that caveat noted, I suggest that without regard to the truth of my affidavit, based on a number of factors including the implausibility of Dean's making up the story about the call and also being ready to make up a story about what Cain said to her (while knowing that Cain was available in the Office of Independent Counsel to contradict her), the implausibility of Dean's filing an affidavit in which she made up the story about Cain's telling her the check was in a field office, and the Independent Counsel's evasiveness and dishonesty in responding to Dean's motion, the reasonable observer would conclude the following. Cain was certainly testifying falsely when he denied any recollection of the call from Dean. Whether or not Independent Counsel attorneys at that time knew that Cain was testifying falsely, upon coming to believe that Cain's testimony was probably or certainly false, the Independent Counsel attorneys handling the post-trial matters sought to conceal that the testimony was false and to continue to rely upon it.

There would exist additional reason for that conclusion based simply on the probability that my affidavit is true. Notwithstanding my acknowledged close relationship to Dean, that probability ought to appear high based on the unlikelihood that a career government attorney almost eligible to retire would provide a false affidavit, particularly one that included the statement that Dean had told him the check was maintained in the HUD field office, a fact that presumably could be readily checked.

In any case, however, given the virtual impossibility that both my affidavit is true and Cain also told the truth, one cannot conclude that Cain was telling the truth without concluding that my affidavit is false. In the materials I provided to the Attorney General, the point is made that Independent Counsel attorneys never contacted me during the course of their responding to Dean's entirely plausible arguments as to why Cain was not telling the truth. That the Independent Counsel adopted a position before the court that was defensible only if my affidavit was false without ever interviewing me is itself indicative of the Independent Counsel's systematic refusal to undertake actions that might lead to the revelation of facts contradicting its desired version of events.

In the same vein, while I think the Office of Professional Responsibility could readily conclude that Cain testified falsely without regard to my affidavit and without ever talking to me, the Office of Professional Responsibility cannot conclude that Cain told the truth without concluding that my affidavit is false. Yet, to this day, no representative of Office of Professional Responsibility has contacted me to ask any of the varied questions an attorney would wish to ask of an affiant whose affidavit the attorney did not believe.

I must therefore conclude either that the Office of Professional Responsibility believes that my affidavit is true --and hence believes that Cain testified falsely--or that it has been extremely slow in getting around to a crucial interview. I might add here as well that the Office of Professional Responsibility has so far failed to contact me for clarification as to any matter in the voluminous materials I provided the Attorney General. At a minimum, one would expect that in materials of that magnitude there will be some incorrect citations, for which I might be able to provide a correction in an instant, though it might require a reviewer hours or days to find the intended reference. Similarly, as in the case of your expressed concern at the December 1994 meeting as to whether there existed the possibility that Cain was telling the truth notwithstanding that Dean had in fact called him, there are issues of interpretation as to which, whether or not my interpretation would be correct, fully understanding my interpretation would facilitate the reviewer's effort to form his or her own view. Thus, while I think that the materials are quite comprehensive, and to my knowledge accurate in every important respect, the absence of any communication about them raises further issues about the expedition with which the Office of Professional Responsibility is carrying out this investigation.

A further question arises as to whether the Office of Professional Responsibility has yet secured a copy of the trial transcript or copies of the numerous other documents that I referenced in the materials. Though I have no doubt that reviewers of referenced transcript and documents will find my descriptions of their contents to be accurate, I would expect attorneys for the Office of Professional Responsibility to insist on verifying my descriptions and determining whether there are any material omissions. In any case, whether the Office of Professional Responsibility has secured the relevant transcripts and other documents ought to provide some indication of whether it is pursuing its investigation with the seriousness and expedition warranted in a matter of this gravity.

While on the subject of the testimony of Agent Cain, it would be useful to digress slightly to consider again your point about the possibility that Cain was telling the truth even though Dean had in fact called him. As you may recall, I pointed out that it seemed to me that, whatever may be said of the specific terms of the other denials by Cain, his denial of a recollection that Dean had called him "mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report" would appear inconsistent with any plausible interpretation of the specifics of Dean's call to Cain. It nevertheless is worth appraising the Independent Counsel's conduct based on the assumption, albeit quite improbable, that each of Cain's three denials of recollection was literally correct.

Suppose then that Dean did call Cain and did learn from him that the check was maintained in a HUD field office, but that it is also true that Cain's recollection of what Dean specifically said to him in the call was consistent with his responses to the three questions put to him by Robert O'Neill in court. Presumably, if the Independent Counsel fulfilled its obligation to investigate the issues raised in Dean's motion, Independent Counsel attorneys did know shortly after Dean filed her motion (if they did not know it earlier) that Dean had called Cain and had learned from him that the check was maintained in a HUD field office. Thus, one is still left with the situation that, on January 18, 1994, though knowing that Dean had made the call to Cain, Independent Counsel Arlin M. Adams wrote the U.S. Probation Officer arguing to have Dean's sentence increased because she had lied in testifying that she made the call. One is also left with the situation that, at the hearing on February 22, 1994, though knowing that Dean had learned that the check was maintained in a HUD field office from her call to Cain, Deputy Independent

Counsel Bruce C. Swartz argued to the court that Dean in fact had surmised that the check was maintained in a field office from an entry in the HUD IG report and therefore should have her sentence increased for falsely stating that she learned this from a call to Cain.

An obvious avenue for further investigation of the matter would be an interview of Cain, questioning him about his communications with Independent Counsel attorneys both before and after he testified. The Independent Counsel's other actions with respect to the verifying of testimony that was likely to be false suggests that, if in fact the Independent Counsel attorneys handling post-trial matters were not aware that Cain had testified falsely prior to receiving Dean's motion for a new trial, upon reviewing that motion and the information provided with it, those attorneys did not confront Cain with such information. The presumptive reason for the failure to confront Cain would be the fact that those attorneys already knew Cain's testimony was probably or certainly false or that, in any case, they did not wish to chance eliciting from Cain information supporting a belief that the testimony was false. Thus, apart from what an interview of Cain might elicit about the truthfulness of his testimony, it could yield highly significant information about the Independent Counsel's actions and motives. Thus, a question arises as to whether Cain has so far been interviewed and, if not, why he has not been interviewed.

2. Testimony of Eli Feinberg

The matter of the testimony of Eli Feinberg is treated in the Introduction and Summary and in 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 facts pertinent to the points to be made here are the following.

One of the projects that the Superseding Indictment alleged that Deborah Gore Dean caused to be funded for the benefit of John N. Mitchell was Park Towers, a 143-unit moderate rehabilitation project in Dade County, Florida, which was funded as a result of HUD actions in 1985 and 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. Feinberg then secured the services of Washington consultant Richard Shelby, who then retained John Mitchell. Though Shelby at times communicated directly with Fine, for the most part it was Feinberg who kept Fine apprised of Shelby's

progress in securing funding for the project as well as in securing a later waiver of certain HUD regulations. Fine ultimately would pay $225,000 to Shelby's employer, The Keefe Company, which paid John Mitchell a total $50,000 in connection with the Park Towers project.

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 instead 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 Feinberg on May 18, 1992, Shelby, already under a grant of immunity, had twice told representatives of the Office of Independent Counsel that he had told Feinberg about Mitchell's involvement with Park Towers, and that he (Shelby) assumed that Feinberg had told Martin Fine. In the telephonic interview of May 18, 1992, Feinberg then stated that he was not aware of Mitchell's involvement in Park Towers. 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, Shelby was apparently advised by Independent Counsel attorneys that Feinberg had stated that he was unaware of Mitchell's involvement with Park Towers. Shelby nevertheless firmly stated that Feinberg was aware of Mitchell's involvement and even provided details of Feinberg's role in determining Mitchell's fee. Even though there were obvious reasons why Feinberg might wish to falsely deny knowledge of Mitchell's involvement with the Park Towers project, so far as Feinberg's Jencks materials reveal, between the time of Feinberg's May 18, 1992 telephonic interview and his being called to testify under oath, on September 17, 1993, that he was unaware of Mitchell's involvement, Independent Counsel attorneys never confronted Feinberg with Shelby's statements.

At trial, without advance notice, the Independent Counsel would put Shelby on the stand out of order and ahead of Feinberg. This would occur just three days after the Independent Counsel

turned over to the defense Shelby's Jencks materials that contained the three statements by Shelby that Feinberg was aware of Mitchell' involvement with Park Towers. Those statements appeared at various places among ten items of Shelby materials then being provided, including interview reports running as long as 27 single-spaced pages. The Shelby materials were provided along with Jencks material for 35 other witnesses.

Then, though knowing beyond any doubt that the government's immunized witness Shelby would have denied that he had concealed Mitchell's involvement from Feinberg, Associate Independent Counsel Robert E. O'Neill would avoid any questions that might elicit a statement on the matter. When Shelby started to describe his discussions with Feinberg about setting Mitchell's fee, O'Neill changed the subject. Shortly after Shelby finished his second day of testimony, the Independent Counsel then called Feinberg, and, despite having compelling reason to believe that such testimony would be false, Associate Independent Counsel Paula A. Sweeney directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with Park Towers. The Independent Counsel subsequently 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 and otherwise seeking to lead the jury to believe things that Independent Counsel attorneys believed to be false (as documented throughout the materials), Associate Independent Counsel O'Neill 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 secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Richard Shelby would have contradicted Feinberg's testimony, O'Neill would make a special point of the fact that the testimony was unimpeached. The supposed concealment by Shelby of Mitchell's involvement with Park Towers also would be an important feature of the Independent Counsel's brief in the court of appeals.

I suggest that the information in the materials I provided in and of itself makes a compelling case that the Independent Counsel elicited Feinberg's testimony believing that it was certainly or almost certainly false. There are a few things that one still would wish to know. First, one would wish to ask Feinberg whether in fact, as the Jencks documents seem to indicate, he was never confronted with any of Shelby's statements or other information indicating that he (Feinberg) did know of Mitchell's involvement. One also would wish to probe Feinberg

about whether he in fact knew about Mitchell's involvement with Park Towers. The evaluation of Feinberg's response on the latter issue would, of course, take into account that he had already once told federal investigators that he was unaware of Mitchell's involvement and that he also testified under oath to the same effect. Possibly an offer of immunity would be useful for ensuring the truthfulness of Feinberg's ultimate response.

Martin Fine's testimony that he was unaware of Mitchell's involvement was less significant than Feinberg's, since Fine learned most of what he knew from Feinberg. Nevertheless, one would wish to undertake the same line of inquiry with Fine, not only for the same reasons one would wish to undertake it with Feinberg, but also for such light as it might shed on any continued denial by Feinberg that he knew about Mitchell's involvement.

The main question here, however, is whether the Office of Professional Responsibility has yet contacted Feinberg to pursue these lines of questioning, and if the Office of Professional Responsibility has not yet done so, why it has not done so.

3. Testimony of Thomas T. Demery

The matter of the testimony of Thomas T. Demery is treated in the Introduction and Summary and the Narrative Appendix styled "Testimony of Thomas T. Demery." The facts pertinent to the point to be made here are the following.

There is no doubt whatever that government witness Thomas T. Demery repeatedly lied under oath when he testified before congressional subcommittees investigating HUD's moderate rehabilitation program. The Office of Independent Counsel had charged Demery with two counts of perjury with regard to one of the matters about which he had lied to Congress. In the course of negotiating a plea agreement that did not include a perjury charge, Demery admitted to facts demonstrating that he had in fact committed perjury on the matter with which he had been charged. Thus, the Office of Independent Counsel knew beyond any doubt that Demery had perjured himself when testifying before Congress.

When Demery was called as a government witness, during direct examination, prosecutor Robert O'Neill did not elicit Demery's most crucial testimony--this being that Deborah Dean had called a particular funding request to his attention in the Spring of 1987--evidently intending to enhance the effect of that testimony by eliciting it on redirect. On cross-examination,

however, Demery repeatedly denied ever having lied when he previously testified under oath before Congress. Though knowing with absolute certainty that Demery had lied when denying that he had previously lied to Congress, O'Neill did not reveal this fact. Instead, O'Neill simply proceeded to elicit Demery's most crucial testimony.

When this matter was raised in post-trial proceedings and on appeal, the Office of Independent Counsel refused to admit any knowledge that Demery had lied or that Demery had in fact lied in denying he had previously lied to Congress. The Office of Independent Counsel did not, however, make any claim that Demery had not in fact previously lied to Congress. The trial court judge, though citing only that fact that the government had indicted Demery for perjury and must therefore have believed that he committed perjury (and not the fact that Demery also had confessed), found that the government had to know that Demery lied when he denied having previously lied to congress.

Presumably Demery has been sentenced by now. Almost certainly any inquiry into what the Office of Independent Counsel communicated to the U. S. Probation Officer and the sentencing court about Demery's fulfilling his agreement to testify truthfully will reveal that the Office of Independent Counsel failed to indicate that Demery had committed perjury when testifying in court.

In appraising the gravity of the Office of Independent Counsel's conduct, it is necessary to keep in mind that in deciding to reserve his most important questioning of Demery for redirect, Associate Independent Counsel O'Neill must have recognized that during cross-examination Demery would be vigorously questioned about having previously lied to Congress. Thus, one would expect that in advance of putting Demery on the stand, O'Neill discussed with him the fact that there would be such questioning. This raises the possibility that Demery falsely denied having previously lied to Congress as a result of his prior discussions with O'Neill or other members of the Office of Independent Counsel staff.

Demery remains in a position where he must cooperate with any governmental investigation into these matters. He thus is available to be required to disclose the nature of his pre-testimonial discussions with the Office of Independent Counsel. Such disclosures would be highly relevant to determining the full gravity of the Office of Independent Counsel's misconduct in this matter. The question here, then, is whether Demery has yet been contacted, and if not, why he has not been contacted.

Similar questions arise concerning whether representatives of the Office of Professional Responsibility have contacted Ronald L. Reynolds concerning his conversations with Independent Counsel attorneys about his contemplated testimony and Russell Cartwright concerning his conversations with Independent Counsel attorneys regarding the October 22, 1987 receipt. See Narrative Appendixes styled "Testimony of Ronald L. Reynolds" and "The Russell Cartwright Receipt."

C. Additional Considerations Related to Timing

The close to 400 single-spaced pages of narrative materials that I provided in December and January are indeed dense and require careful reading. Yet, even on first reading, an intelligent attorney must conclude that, unless the materials seriously mischaracterize or misinterpret a host of actions, there occurred in this case prosecutorial misconduct of exceptional dimensions. That conclusion would no doubt hold regardless of the specific results of exploring the various avenues of further inquiry I have outlined above.

It seems necessarily to follow that the Attorney General has a duty to seek the removal or Arlin M. Adams as Independent Counsel and to secure his replacement by a principled attorney who will conscientiously review the earlier actions of Judge Adams. I fear that there may be a reluctance now to address these matters with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit because a panel of the court is now considering some of these issues. Yet, I do not think this consideration can justify the failure to move as expeditiously as possible, particularly in circumstances where the Office of Independent Counsel Arlin M. Adams continues in his prosecution of cases against both Deborah Gore Dean and James G. Watt. As you should know from the briefs I provided you, only a portion of the matters treated in my materials are addressed in Dean's appellate brief, and some of them, including some important ones, were not even addressed in the district court. The oral argument on the appeal suggests that, whatever the outcome of the appeal, one or more members of the court will harshly criticize the Independent Counsel's conduct. But the court's opinion will reveal far less about the Independent Counsel's misconduct than what had been made abundantly clear to the Department of Justice many months before the court's ruling.

In our telephone discussion in mid-December, I suggested to you what I believed to be the government's duty regarding the

case in question in circumstances where it receives credible allegations that its agents acted improperly in securing a conviction. Let me restate here more clearly that the government's duty is to investigate the allegations of misconduct by its agents; to disclose any evidence of such misconduct both to the defendant and to the court; to make a good faith determination of whether the conduct was likely to have affected the outcome of the proceeding; and then to make such representations or arguments to the court as are consistent with that good faith determination. I do not think there is a defensible contrary position.

I also do not think that there is a defensible position for delaying any of these undertakings, since delay tends invariably to make it more difficult for the defendant ultimately to secure redress. Thus, the possible imminence of a decision by the court of appeals militates further towards prompt action. This is particularly so given that the Department of Justice has been possessed of the bulk of the materials for more than 90 percent of the elapsed time since the case was submitted.

D. Matters Related to Assistant Attorney General Jo Ann Harris

As you know, in February I wrote to White House Counsel Abner J. Mikva, enclosing copies of the same materials I provided to the Department of Justice, and suggesting that Assistant Attorney General Jo Ann Harris' role in various matters described in the materials warranted the President's removing her from the position of Assistant Attorney General. In early March, Judge Mikva advised me that he had confidence that the Department of Justice would carefully consider the matters raised in the materials, and that he had therefore forwarded my correspondence to the Deputy Attorney General.

On May 17, 1995, I delivered to Judge Mikva a long letter in which I impressed upon him the importance of the President's considering evidence of misconduct by Ms. Harris independently from the more involved investigation by the Office of Professional Responsibility. I also set out a substantial summary of some of the matters in which Ms. Harris was known to be involved. And I suggested to Judge Mikva that, in the event that the White House left the matter of the appropriateness of Ms. Harris' continuing to serve in her position to the Department of Justice, he request the Attorney General to examine that matter separately from the investigation by the Office of Professional Responsibility and to provide him a prompt response.

I also advised Judge Mikva that, though I continued 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 that the White House would investigate these matters directly, I would regard it as appropriate to make the same or other arguments directly to the Attorney General. In the event that I do proceed to make arguments to the Attorney General as to why she should recommend Ms. Harris' removal or seek the appointment of an Independent Counsel to investigate whether Ms. Harris committed crimes falling within the purview of the Independent Counsel statute, the same protocol considerations that caused me to believe that the issue of Ms. Harris' removal should be addressed directly with the President lead me to believe that my communications should be addressed directly to the Attorney General. Because of the sensitivity of the material, and the difficulty I have experienced delivering confidential documents directly to the Attorney General, I will deliver any such communication directly to you, trusting that you will ensure that it is handled in the appropriate manner.

Finally, in the event I have seriously misunderstood the difficulties faced by the Office of Professional Responsibility in addressing these matters or have unfairly interpreted actions of that office or of the Department of Justice, I beg your indulgence. Please appreciate, however, that I do no see this as any sort of close case, nor can I understand how principled government attorneys can view it as a close case, once they have overcome the natural reluctance to believe that other government lawyers could have behaved in the manner documented in the materials I provided. In any event, I provided these materials first to the Department of Justice, because that would seem the appropriate place initially to have the matters addressed. The Department has had the opportunity to review the materials for what seems a substantial period of time, without action. Thus, I hope you will understand why I may now feel it necessary to seek to have these issues addressed in other forums.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: The Honorable Abner J. Mikva
Counsel to the President