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CONFIDENTIAL

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Office of Professional Responsibility
United States Department of Justice
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Allegations of Misconduct by the Office of Independent Counsel in the Matter of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.)

Dear Mr. Shaheen:

This is a response to your letter dated June 28, 1995, in which you informed me that a review by the Office of Professional Responsibility of materials I provided the Department of Justice concerning misconduct by attorneys of the Office of Independent Counsel Arlin M. Adams in the prosecution of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.), found insufficient evidence to warrant further action by the Department. I set out below reasons why the Office of Professional Responsibility should reconsider the decision to proceed no further on this matter.

A. Background

1. December 1, 1994 Materials

On December 1, 1994, I delivered to Attorney General Janet Reno a large volume of materials concerning prosecutorial misconduct by attorneys of the Office of Independent Counsel (OIC), advising the Attorney General that the materials suggested that certain actions of those attorneys may constitute federal crimes. In the transmittal letter (Attachment 1), I also advised the Attorney General that while serving as an Associate Independent Counsel, Assistant Attorney General Jo Ann Harris was involved in certain of the matters addressed in the materials.

The materials consisted of a 54-page document styled "Introduction and Summary," along with ten Narrative Appendixes, ranging in size from eight to 84 pages, that developed in greater detail the issues described in the Introduction and Summary.

Each Narrative Appendix was introduced by an individual summary ranging from one paragraph to six pages. The ten individual summaries, along with a summary of a subsequently provided eleventh Narrative Appendix, are provided as Attachment 2.

To take as examples things that are in no manner open to question, these materials showed that attorneys in the OIC crafted an indictment creating inferences that the OIC's immunized witness had specifically contradicted; that those attorneys wrongfully withheld statements indicating that the inferences were false while explicitly representing to the court that they were aware of no exculpatory material; that those attorneys contrived to cause the jury to believe that a conspiratorial reference in a document to "the contact at HUD" was a reference to the defendant even though an immunized witness had told them--and other evidence indicated--that the reference was not to the defendant; and that those attorneys sought to lead the jury or the courts to believe that the defendant had provided certain internal government documents to a consultant though they knew that the defendant had not provided the documents. Also not open to dispute is that OIC attorneys relied on government witnesses whose testimony those attorneys had compelling reason to believe was false, without confronting the witnesses with information that might be expected to lead them to tell the truth, and failed to correct testimony the OIC attorneys knew to be false.

Various of these matters that were called to the attention of the district court in support of a motion for a new trial led the court to make the following statement, after observing that the lead trial counsel, Associate Independent Counsel Robert E. O'Neill, had acted in a manner the court would not expect from any Assistant United States Attorney who had appeared before it:

> 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 the stand, it evidences to me by the Independent Counsel's Office at least 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.

The Introduction and Summary gave special attention to two matters concerning the use of testimony by two crucial government witnesses that OIC attorneys had strong reason to believe was false. One of these witnesses was Supervisory Special Agent Alvin R. Cain Jr., an agent of the HUD Inspector General's Office who had been assigned to the OIC since 1990. The matter of Agent Cain's testimony, which is treated at length in the Narrative Appendix styled "Testimony of Supervisory Special Agent Alvin R. Cain, Jr.," also involved an attempt by the OIC to conceal that the testimony was false after attorneys at the highest levels of the OIC (including Deputy Independent Counsel Bruce C. Swartz and Independent Counsel Arlin M. Adams) were confronted with information that would lead them to believe, if they did not already believe, that the testimony was in fact false; and the continued reliance on the testimony in arguments made to the district court, to the probation officer, and finally to the court of appeals. The other witness was Eli M. Feinberg, a Miami lawyer and consultant, whose role is discussed at length 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." In the case of Feinberg, the reasons OIC attorneys had for believing that the sworn testimony it elicited was false were the repeated statements of an immunized witness specifically contradicting the testimony of Feinberg.

The Cain matter was addressed at length in the district court. The Feinberg matter was not addressed at all in the district court. The facts most pertinent to each of these matters are summarized under the two subheadings below.

a. Testimony of Supervisory Special Agent Alvin R. Cain, Jr.

Count One of the Superseding Indictment alleged that Deborah Gore Dean had caused certain decisions to be made by the Department of Housing and Urban Development (HUD) in order to benefit former Attorney General John N. Mitchell, whom Dean regarded as a stepfather. A critical issue in the case was whether Dean was aware that 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 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 in 1984 for a Dade County, Florida project called Arama. 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. Specifically, Dean described how she had sent Mitchell's daughter, Marti Mitchell, to pick up a copy of the report from Agent Cain. She stated that she opened the report and saw the discussion of Mitchell's consulting in the report. Dean then testified as follows:

Q. Okay. After you learned -- was that the first time you knew that John Mitchell was receiving dollars based on consulting with HUD?

A. Yes.

Q. This was in May -- or, I'm sorry, April of 1989.

A. Yes, the day the report came out.

Q. Was John Mitchell alive, or had he passed away by then?

A. He had died the previous November.

> Q. Did you place any telephone calls after you heard that in the report -- after you discovered that information.
>
> A. Yes.
>
> Q. Who did you call.
>
> A. I called Al Cain.
>
> Q. What did you say to Mr. Cain?
>
> A. I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, that John would never have done that, and that he better be prepared, because I was really mad, and I wanted to see the check, and if there had been a check written to John Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in any way had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.
>
> And Al said, Al told me that he --

Tr. 2617-18.

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.

It would have been an extraordinary thing for Dean to testify about this call to Agent Cain if she had not in fact called him. That she had called Agent Cain in April 1989 hardly corroborated Dean's statement that she had been previously unaware of Mitchell's HUD consulting, particularly since she could have called Agent Cain simply to divert suspicion. Dean was aware that at the time she testified Agent Cain was assigned to the OIC and was therefore readily available to contradict her testimony if it was not true. Further, if Dean fabricated the story about calling Agent Cain, she was apparently ready also to fabricate a story of what Cain had told her notwithstanding that Cain was available to contradict her. Moreover, since Agent Cain was an African-American and Dean was being tried before an entirely African-American jury, she would have reason to expect

that for Cain to contradict her would have a devastating impact on her credibility.

Though Dean would remain on the stand for all or part of three more days, Associate Independent Counsel Robert E. O'Neill would not cross-examine her at all about the call to Agent Cain. The OIC then called Agent Cain as its second rebuttal witness. Questioned by O'Neill, Agent Cain first testified, in details essentially consistent with Dean's testimony, about providing Dean a copy of the HUD Inspector General's Report. O'Neill then elicited the following testimony from Agent Cain:

> Q. At or about that date, do you recall any conversation with the defendant Deborah Gore Dean in which she was quite upset with you about the contents of the report?
>
> A. No, I do not.
>
> Q. Do you recall her mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report?
>
> A. No, I do not.
>
> Q. Do you recall her telling you that she was going to hold a press conference to denounce what was in the report?
>
> A. Absolutely not.

Tr. 3198-99.

Though Agent Cain merely testified that he did not recall Dean's mentioning these things, that testimony, following Cain's detailed recounting of his providing a copy of the report to Dean, was delivered in a manner clearly to suggest he would have remembered these things if they had occurred.

In closing argument, after asserting that Dean's defense rested entirely on her credibility, O'Neill repeatedly asserted that she had lied to the jury. The pervasiveness of O'Neill's assertions that Dean had lied is not paralleled in reported federal cases. A fairly comprehensive summary of the remarks is set out in Attachment 1a to the Cain Narrative Appendix. A sampling of the statements follows: Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her..she lies about that.. if she's

going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("I told you during closing argument that Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it.").

In attacking Dean's credibility, O'Neill relied heavily on two witnesses. One of these was HUD driver Ronald L. Reynolds. The court would later find that the OIC had information indicating that Reynolds' testimony was not true. The other witness on whose testimony the OIC relied heavily in attacking Dean's credibility was Agent Cain.

Three quarters of the way through the first day of the OIC's closing, O'Neill pressed the attack on Dean's credibility with particular acerbity, stating:

> Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees and Agent Cain's contradiction of Dean's testimony about calling him to question the treatment of Mitchell in the HUD Inspector General's Report. O'Neill stated the following:

> Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave. That's exactly what she told you.
>
> So we had to call in Special Agent Alvin Cain for two minutes' of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that.

Tr. 3419-20.

During rebuttal the following day, while continuing the attack on Dean's credibility, O'Neill again turned to Cain, asserting:

> Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never ever happened.

Tr. 3506.

In support of a motion for a new trial, Dean argued that Agent 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, as noted, is another witness on whose testimony O'Neill placed great weight in closing argument in asserting that Dean had lied about her knowledge of Mitchell's HUD consulting.) Dean provided an affidavit stating that when she asked Agent 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 Agent Cain, she told me, whom she had been dating at the time, about her call to Cain, including what Cain had told her. At the time of Dean's motion, I was an Assistant General Counsel with

the Equal Employment Opportunity Commission, then with more than twenty years of service as an attorney for the federal government. I provided an affidavit describing my background and stating that in April 1989 Dean had told me about the call to Agent Cain and had said that Cain had told her the check was in a field office. I also stated that Dean had also told me about her call to Mitchell's partner, who had informed her that Mitchell's HUD consulting was more extensive than that reflected in the report. I provided reasons why I remembered these matters 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.

When Dean's motion was filed, the principal trial counsel in the case, Robert E. O'Neill and Paula A. Sweeney, were no longer with the OIC. Deputy Independent Counsel Bruce C. Swartz assumed the role of lead counsel in the case. Associate Independent Counsel Robert J. Meyer signed the OIC's opposition to Dean's motion.

In its opposition to Dean's motion, the OIC said nothing whatever about the check or whether it was maintained in a HUD field office in April 1989. The OIC dismissed my affidavit in a footnote, observing:

> The affidavit of James Scanlan adds nothing in this regard, for Mr. Scanlan -- aside from his obvious bias -- has no firsthand knowledge of defendant's purported conversation with Agent Cain. Rather, he relies solely on what defendant told him.

During the three weeks period between the filing of the Dean's motion on November 30, 1993, and the filing of its opposition on December 21, 1993, the OIC did not interview me to attempt to determine whether I was telling the truth about my conversation with Dean in 1989, nor would the OIC seek to interview me during the ensuing period when the OIC continued to rely on Cain's testimony.

In a reply, Dean noted that the OIC's failure to discuss the check suggested that the check was in fact maintained in a field office in April 1989 and that the OIC did not have a plausible theory as to how she could have learned that other than through her call to Agent Cain. With regard to my affidavit, Dean noted that my relationship to Dean was a legitimate issue to be explored in a hearing, but was not a basis for ignoring the affidavit entirely. With regard to the fact that I had only

recounted what Dean had told me, Dean argued that, given the circumstances in which she told me of the conversation with Cain in 1989, it was virtually inconceivable that Cain and I were both telling the truth.

Subsequent to briefing on Dean's motion for a new trial, in a January 18, 1994 letter to the 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 Ronald Reynolds and Thomas Demery lied and that the government knew that they had lied, but did not discuss Dean's arguments about her call to Agent Cain and the OIC's heavy reliance on Cain's testimony in closing argument. Dean filed a motion for reconsideration arguing again that the OIC's failure to respond regarding the whereabouts of the check in April 1989 is probative that OIC attorneys knew that Cain lied. Dean noted the additional importance of the matter in light of the Probation Officer's acceptance of the OIC'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 OIC's knowledge regarding the truth of Cain's testimony at the time of trial, the OIC had continued to rely on the 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 in April 1989.

Dean requested the court to defer final ruling on her motion for a new trial and on 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 OIC knew or should have known that Cain committed perjury and whether such perjury should be imputed to the OIC.

At a February 22, 1994 hearing, the OIC discussed the issue of the whereabouts of the check for the first time. Arguing for the OIC, Deputy Independent Counsel Bruce C. Swartz still refused to state what the OIC 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. The statement to

which Swartz referred, however, could not reasonably have provided a basis for Dean's knowledge. Nor does it seem remotely possible that the OIC could in fact have believed that the statement formed the basis for Dean's statements regarding the whereabouts of the check. Indeed, the context of the interview report suggested that it was very unlikely that the regional office would have gone to the trouble even to secure a copy of the check by April 1989, much less that it would have secured a check and then failed to forward it to Washington along with the interview report. Swartz did not state whether the OIC maintained that Dean had surmised that the check was maintained in a field office from the interview report when in April 1989 she informed me that Cain had said the check was maintained in the field, or that the surmise was recent and that I had falsely stated in my affidavit that in April 1989 Dean had told me that Cain had told her the check was maintained in the field.

The court denied Dean's motion without indicating what it believed regarding how Dean came to claim that Agent Cain told her that the check was maintained in a field office and without specifically indicating whether it believed Cain or Dean was telling the truth about the call. The court merely stated that the evidence put forward "doesn't mean of necessity that the government is putting on information they knew was false."

Later in the hearing, however, without taking argument on the issue, the court refused to accept the probation officer's recommendation to increase Dean's sentencing level on the basis of Agent 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. But the court did initially accept the probation officer's recommendation to increase Dean's sentencing level for obstruction of justice based on a statement Dean had made that she was not very close to John Mitchell until after she left HUD. The court would later reverse that ruling after concluding that the statement on which the OIC had relied to persuade the probation officer to recommend the upward adjustment had been taken out of context. In its initial ruling, however, the court relied on Dean's testimony about her call to Agent 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.

Dean did not press this issue further on appeal. In its appellate brief, however, the OIC continued to rely on Cain's testimony about the call to contradict Dean.

The treatment of the Cain matter in the district court was complicated by the fact that Dean had raised other issues regarding Agent Cain's credibility based on his responses to certain questions on cross-examination. In support of a claim that certain responses were evasive or false, Dean described in her affidavit a party attended by Cain that she had paid for and her efforts to cause Cain and other to investigate a particular project. The OIC produced material showing, apparently conclusively, that Cain was not at the party described by Dean and raising an issue regarding Dean's account of initiating an investigation of the project. That Cain was not at the party described by Dean may have influenced the district court in its treatment of the matter. Yet, the totality of materials does not support a contention that Dean intentionally misstated any facts in her affidavit. Moreover, the OIC's efforts to focus attention on that matter, and away from the issue of the whereabouts of the check, further reflect the OIC's dishonesty in addressing the Cain matter. For example, in an effort to cast doubt on Dean's credibility, the OIC raised an issue about the legitimacy of a receipt that bore an erroneous date and Dean's mother's name rather than Dean's own name, though no reasonable person could possibly believe the receipt was other than what it was represented to be. In any case, however, the facts presented in the Cain Appendix would lead most observers to believe that Cain had in fact lied and that, at least at some point in time, OIC attorneys came to believe that he had lied, or that, at a minimum, whether Cain had lied and whether OIC attorneys knew he had lied is a matter the government could readily determine.

Any effort to interpret the OIC's actions with regard to Agent Cain's testimony must take into account the OIC's demonstrated misconduct elsewhere, particularly its actions with regard to the use of witnesses where the OIC had strong reason to believe the testimony was false, as in the cases of Thomas T. Demery and Ronald L. Reynolds mentioned above, as well as the cases of Eli M. Feinberg and Maurice C. Barksdale discussed below. It must also take into account the importance of the testimony of an African-American government agent in directly contradicting the testimony of a white defendant before an entirely African-American jury, in a context where the court several times chastised the prosecutor for treating the defendant in a manner he would not have done but for the racial difference between the jury and the defendant.

b. Testimony of Eli M. Feinberg

One of the projects that the Superseding Indictment alleged that Dean caused to be funded for the benefit of 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 M. 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 Mitchell a total of $50,000 in connection with the Park Towers project.

There were many undeniable instances of prosecutorial misconduct with regard to Park Towers. The central premise underlying the claim concerning that project was that Shelby secured Mitchell's services because of Mitchell's relationship to Dean. Yet prior to issuance of the Superseding Indictment, Shelby, already under a grant of immunity, had told OIC investigators that he did not know of Mitchell's relationship to Dean until after he had secured Mithcell's services, and, after learning of the relationship, ceased to seek material assistance from Mitchell. Shelby also had told OIC investigators that he did not believe Dean was aware of Mitchell's involvement in the project and that he (Shelby) had sought to conceal Mitchell's involvement from Dean. Shelby also had told OIC attorneys that a conspiratorial reference to "the contact at HUD" in a Martin Fine memorandum was not a reference to Dean. Yet, these and other statements of Shelby specifically contradicting inferences in the Superseding Indictment would be withheld from the defense for more than a year while the OIC explicitly represented to the court that it was aware of no exculpatory material. During trial, the OIC would attempt to cause the jury to believe, among other things OIC attorneys knew or believed to be false, that the reference to "the contact at HUD" was in fact a reference to Dean and that Dean had provided Shelby with copies of two internal HUD documents.

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

The key testimony in this regard would be that of 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 OIC 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 OIC that Shelby had explicitly stated the opposite.

In an interview on May 19, 1992, the day following the OIC's telephonic interview of Feinberg, Shelby was apparently advised by OIC 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, OIC attorneys never confronted Feinberg with Shelby's statements.

At trial, without advance notice, the OIC would put Shelby on the stand out of order and ahead of Feinberg. This would occur just three days after the OIC turned over to the defense Shelby's Jencks materials that contained the three statements by Shelby that Feinberg was aware of Mitchell's 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 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 OIC 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 OIC 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 OIC 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 with Park Towers, asserting that secrecy was "the hallmark of conspiracy." And despite knowing with complete certainty that the government's immunized witness Shelby would have contradicted Feinberg's testimony, O'Neill would make a special point of the fact that the testimony was unimpeached.

Specifically, O'Neill stated:

> [Dean's counsel] mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?
>
> Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved. And both of those testimonies were unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid $225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

The supposed concealment by Shelby of Mitchell's involvement with Park Towers also would be an important feature of the OIC's brief in the court of appeals.

As with the testimony of Agent Cain, the OIC's actions with regard to the testimony of Eli Feinberg must be appraised in the context of demonstrated OIC actions with regard to other witnesses whom OIC attorneys had strong reason to believe were

testifying falsely. Of particular relevance are the OIC's actions with regard to government witness Maurice C. Barksdale, a matter which is treated more fully in the Narrative Appendix styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale." Barksdale played a role in the 1984 funding of the Dade County project called Arama, another project that Count One alleged Dean had caused to be funded for the benefit of Mitchell. It is the single project in Count One as to which the court of appeals would ultimately find sufficient evidence to support a conviction. As shown in the Supplement I materials, it also is a project as to which the OIC would assert that Mitchell's role had been concealed from the developer notwithstanding that the OIC knew with absolute certainty that Mitchell's role had not been concealed from the developer.

Count One of the Superseding Indictment alleged that Dean had caused 293 units of moderate rehabilitation subsidy to be allocated to Dade County, Florida in order to benefit Mitchell. The units would go to the Arama project of developer Aristides of Martinez, who had retained former Kentucky governor Louie B. Nunn to assist in securing moderate rehabilitation funding. Nunn paid Mitchell $75,000 for his assistance on the matter. The funding occurred as a result of documents signed in mid-July 1984 by Barksdale who was then Assistant Secretary for Housing. This occurred several weeks after Dean assumed the position of Executive Assistant.

Mitchell had died in November 1988. Mitchell's files, which were secured by the OIC in May of 1992, contained telephone message forms indicating that in January 1984, at the same time Nunn was working out a consultant agreement to secure 300 moderate rehabilitation units for Martinez, Mitchell was talking to Dean's predecessor, Lance H. Wilson, about securing 300 units, and that Wilson had told Mitchell he was talking to Barksdale (then Acting Assistant Secretary for Housing) about the units. Though the Superseding Indictment alleged that Dean had caused the Arama funding to benefit Mitchell, the OIC would not turn the Mitchell messages over under Brady, a failure the court of appeals later would find to be deplorable.

More to the point here, as the OIC would eventually acknowledge, it brought Barksdale before the grand jury and called him to testify in court for the purpose of tying Dean to the Arama funding without ever confronting Barksdale with the information contained in the Mitchell message indicating that Wilson had been talking to him (Barksdale) about the matter. It did so notwithstanding the existence of a number of factors that would give Barksdale reason not to admit that he had made funding

decisions at the behest of Wilson. In eliciting Barksdale's testimony in court, O'Neill focused the inquiry solely on the period after Wilson had left HUD, and asked no questions about the messages or about Wilson. And, though knowing with virtual certainty that Wilson had talked with Barksdale about the matter, the OIC allowed Barksdale's testimony on cross-examination that Wilson had not talked to him about the matter to go uncorrected.

2. December 1994 Meeting with Associate Deputy Attorney General David Margolis

The week following the delivery of these materials to the Attorney General, I received a call from Associate Deputy Attorney General David Margolis, who requested that I meet with him the next week, after he had reviewed the materials. During the week of December 12, 1994, I met with Mr. Margolis and an assistant in Mr. Margolis' office. There were two principal topics of conversation. One involved the Cain testimony. Mr. Margolis raised the issue of whether, assuming that Dean had in fact called Agent Cain, it necessarily followed that Cain was testifying falsely. I understood Mr. Margolis' question to go to whether it was possible that Dean did not accurately recount the specifics of her call to Cain or that, though Cain did remember that Dean called him, his responses to O'Neill's questions did reflect his best recollection of the specifics of the call. In response to Mr. Margolis' question, I pointed out that it seemed that, assuming Dean had called Cain, it did not seem possible that Cain responded truthfully to O'Neill's question of whether Dean had mentioned that the report indicated Mitchell earned money as a consultant.

Mr. Margolis also expressed an institutional concern about the Department of Justice's interference with the Independent Counsel without good reason, and raised the issue of whether Arlin M. Adams was necessarily involved in such misconduct as might be reflected in the materials. Mr. Margolis suggested the possibility that the materials should first be referred to Judge Adams for investigation of the allegations therein, with a request that Judge Adams provide the Department of Justice with a response to those allegations. I expressed the view that Judge Adams seemed to be very implicated in the misconduct and that I did not think that first submitting the materials to Judge Adams would be an appropriate course of action.

Mr. Margolis suggested that I give that matter further thought and provide him with any additional argument on the issue. In telephone discussions later in the month, after

initially suggesting that I defer writing a letter on the matter until he had considered the appropriateness of receiving such a letter from an attorney employed by the federal government, Mr. Margolis requested that I write him a letter stating such arguments as I might have regarding whether the materials should first be sent to Judge Adams. Mr. Margolis also requested that I state that I did not represent the defendant in the case.

3. December 25, 1994 Letter to Associate Deputy Attorney General David Margolis

By letter dated December 25, 1994 (Attachment 3), I presented to Mr. Margolis arguments as to why the materials I had provided the Attorney General should not first be submitted to Judge Adams. Among other things, I noted that by mid-January 1994, Judge Adams had to have been made aware of the issues raised in Dean's motion for a new trial, including the issues raised about the whereabouts of a check in April 1989, as well as the failure of OIC attorneys' to respond on that matter; nevertheless, Judge Adams had still authored a letter to the probation officer requesting that Dean's sentencing level be increased because of Agent Cain's contradiction of her testimony about the call. I also pointed out that the OIC had adamantly refused to acknowledge any wrongdoing on the part of its attorneys, noting that Judge Adams sat at counsel table as Deputy Independent Counsel Bruce C. Swartz made the patently implausible representations to Judge Laurence Silberman that there had been no intentional violation of the government's Brady obligation by trial counsel. Noting the suggestion of bias on the part of Judge Adams in his comments to USA Today that he might have been on the Supreme Court had he not offended John Mitchell, I pointed out that within days of denying Dean's request for his recusal Judge Adams had signed an indictment containing inferences intended to reflect a conspiracy between Mitchell and Dean, despite the fact that the OIC's immunized witness had stated that those inferences were false. With regard to Judge Adams' possible bias, I also pointed out that a substantial part of the misconduct reflected in the materials I provided involved the OIC's allegations concerning Mitchell and OIC attorneys' efforts to discredit Dean's testimony that she was unaware that Mitchell had earned HUD consulting fees.

In a somewhat different vein, I also called to Mr. Margolis' attention the danger that providing these materials to Judge Adams may compromise any subsequent investigation by the Department of Justice or other appropriate entity. I noted that this was an especially pertinent consideration with regard to the issue of the testimony of Eli Feinberg and a number of other

matters, where as yet OIC attorneys had no basis for perceiving that the matters might be investigated.

4. January 17, 1995 Transmission of Supplement I Materials

On January 17, 1995, I delivered to Mr. Margolis additional materials comprised of a 44-page Narrative Appendix with voluminous exhibits. The Narrative Appendix, referred to as "Supplement I" in various places, bore the title "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee," and showed that the OIC engaged in the following actions with regard to the proof of Count One of the Superseding Indictment.

Though as discussed with regard to the testimony of Eli Feinberg the OIC would ultimately seek to prove that Mitchell's involvement was concealed from the developers involved in Count One, that count had alleged that the alleged co-conspirators had told their developer/clients of Mitchell's relationship with Dean. Consistent with that theme, the OIC included allegations in the Superseding Indictment indicating that on January 25, 1984, the day Louie B. Nunn entered into a consultant agreement with developer Aristides Martinez to secure moderate rehabilitation funding for the Arama project, Nunn wrote on the agreement that Mitchell was to be paid half of the consultant fee. All actions the OIC took with regard to this matter--including the words chosen in the Superseding Indictment and in the OIC's summary charts, as well as the actions the OIC took in selecting, introducing, and calling attention to the various copies of agreements between Nunn and Martinez introduced into evidence--were calculated to support the interpretation that Nunn had annotated the consultant agreement on January 25, 1984, and that, consistent with Nunn's annotating the agreement at the time it was originally executed, Martinez possessed a copy of the agreement bearing Nunn's annotation. The OIC in fact introduced a document into evidence that, assuming the document was what the OIC represented it to be, seemed to conclusively establish that Martinez possessed a copy of the agreement bearing the annotation regarding Mitchell.

Yet, the OIC possessed documents showing that Nunn did not make the annotation regarding Mitchell until the original agreement had been modified in several respects, including the addition of a guarantee by the three general partners of Arama Limited, and Nunn would not have a copy of the agreement bearing that guarantee until subsequent to April 3, 1984. There is no reason to think that Martinez ever saw a copy of the agreement

bearing Nunn's annotation regarding Mitchell. The document introduced into evidence that demonstrated that Martinez possessed a copy of the agreement bearing Nunn's annotation was not what the OIC represented the document to be.

The materials indicated that this matter had not been addressed at all in the district court. In my transmittal to Mr. Margolis (Attachment 4), I also made a point of that fact, citing it as additional reason for not first referring the materials to Judge Adams.

5. February 9, 1995 Transmission of Materials to The Honorable Abner J. Mikva, Counsel to the President

By letter of February 9, 1995 (Attachment 5), I provided to The Honorable Abner J. Mikva, Counsel to the President, copies of all the materials previously provided to the Department of Justice. I advised Judge Mikva that the materials had been provided to the Department of Justice for investigation of prosecutorial misconduct and possible criminal violations by OIC attorneys, and suggested that Judge Mikva address with the President the issue of whether, in light of the involvement of Assistant Attorney General Jo Ann Harris in certain of the matters addressed in the materials, it was inappropriate that she continue to serve in a position overseeing the conduct of federal prosecutors. I noted in particular Ms. Harris' involvement in matters addressed in the Introduction and Summary; the Narrative Appendixes styled "Arama: The John Mitchell Telephone Messages and Maurice Barksdale" and "Park Towers: 'The Contact at HUD'; Dean's Knowledge of Mitchell's Involvement; the Post-Allocation Waiver; and the Eli Feinberg Testimony"; and Supplement I, which bears the title "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee."

When advising Mr. Margolis that I had provided these materials to Judge Adams, I inquired as to the status of the Department of Justice's review of the materials. Mr. Margolis advised me that the initial group of materials had been submitted to the Office of Professional Responsibility at the beginning of the year and that the Supplement I materials had been provide to the Office of Professional Responsibility shortly after receipt in his office. Mr. Margolis also advised me that he would abide by the decision of the Office of Professional Responsibility as to whether to submit the materials to Judge Adams.

By letter of March 8, 1995 (Attachment 6), Judge Mikva advised me that he had forwarded the materials I provided him to the Department of Justice and was relying on the Department of

Justice to address the allegations of prosecutorial misconduct by OIC attorneys in an appropriate manner.

6. May 17, 1995 Letter to The Honorable Abner J. Mikva, Counsel to the President

By letter of May 17, 1995 (Attachment 7), I again contacted Judge Mikva regarding Ms. Harris. In this letter I sought to emphasize the importance of timely consideration of the allegations of abuse regarding Ms. Harris independently from the Office of Professional Responsibility's consideration of the broader issues addressed in the materials I had provided to the Attorney General. I summarized various of the matters with which Ms. Harris was directly involved, including the matter of the testimony of Eli Feinberg and the matters addressed in Supplement I. As noted above, these matters had not been addressed in the courts.

I also pointed out additional considerations supporting the removal of Ms. Harris. Among these considerations was the harm to public confidence in the Department of Justice from public awareness that Ms. Harris was allowed to continue to monitor the ethics of federal prosecutors and to serve on an Advisory Board on Professional Responsibility notwithstanding the Administration's knowledge of her conduct in the Dean case, conduct that there was reason to believe involved a continuing conspiracy to obstruct justice. I noted the press coverage of Ms. Harris' decision to impose only modest discipline for a prosecutor's wrongful withholding of exculpatory evidence, the same misconduct of which Ms. Harris was indisputably guilty in the Dean case. I also suggested that in the event Judge Mikva decided to leave the matter to the Department of Justice, he 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 raised in my materials.

By letter of May 24, 1995 (Attachment 8), Judge Mikva advised me that he continued to believe the issues I raised were most appropriately handled by the Department of Justice and that he had forwarded my letter to the Office of Professional Responsibility. Judge Mikva assured me that the concerns I raised would receive careful attention.

7. May 25, 1995 Letter to Associate Deputy Attorney General David Margolis

By letter of May 25, 1995 (Attachment 9), I called a number of matters to the attention of Mr. Margolis. First, I suggested that it seemed appropriate to bring to the attention of counsel for James G. Watt, defendant in the Independent Counsel case of United States of America v. James G. Watt, Criminal No. 95-0040 (D.D.C.), the information in the materials I provided the Department of Justice in order that they may anticipate any similar prosecutorial abuses in Mr. Watt's case and make whatever other use of the information they believed beneficial to Mr. Watt's defense. I also noted that Deputy Independent Counsel Bruce C. Swartz, who was involved in many of the matters addressed in the materials and whom those materials showed to have been exceedingly dishonest in his representations to the district court and to the court of appeals, was apparently to be a prosecution witness. I requested Mr. Margolis' advice as to whether providing these materials to Mr. Watt's attorneys, who might then disclose their contents to OIC attorneys, might compromise the investigation by the Office of Professional Responsibility.

Second, I raised with Mr. Margolis a number of matters regarding the progress of the investigation by the Office of Professional Responsibility. I noted that the investigation into the issues raised in the materials I provided was a matter that one would expect to be given a high priority for a number reasons. These included the fact that the materials suggested the possible involvement of the Assistant Attorney General for the Criminal Division in a conspiracy to obstruct justice, the fact that the OIC had recently brought another indictment and intended to rely on the testimony of a person involved in the most serious abuses reflected in the materials, and that Robert E. O'Neill and Paula A. Sweeney were continuing to act as attorneys for the federal government though their documented conduct would cause most observers to believe that they are not fit to represent the government in any capacity. I also pointed out that in light of the roles played in certain of the abuses by Ms. Harris and Mr. O'Neill, both of whom had been Department of Justice prosecutors before serving as Associate Independent Counsel, there was reason to believe that lax guidance by the Department of Justice with regard to the use of witnesses where there exists reason to believe that the witnesses' testimony is false had contributed to much of the abuse in the Dean case. I suggested that this factor would seem to provide additional reason for the Department of Justice to address the allegations raised in the materials I provided with vigor and expedition.

I raised particular questions about the progress of the Office of Professional Responsibility's investigation regarding

the testimony of Supervisory Special Agent Alvin R. Cain, Jr., the testimony of Eli M. Feinberg, and the testimony of Thomas T. Demery. With regard to Agent Cain, I noted that, other issues aside, it seemed impossible to believe that Agent Cain told the truth without concluding that I had not told the truth in my affidavit, and pointed out that the fact that the OIC had adopted a position before the court that was defensible only if my affidavit was false without ever interviewing me is itself indicative of the OIC's systematic refusal to undertake actions that might lead to the revelation of facts contradicting its desired version of events. I pointed out that, in the same vein, while the Office of Professional Responsibility could readily conclude that Agent Cain testified falsely without regard to my affidavit, the Office of Professional Responsibility could not conclude that Agent Cain told the truth without concluding that my affidavit is false; yet no representative of the Office of Professional Responsibility had 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.

Further with regard to Agent Cain, I addressed again the possibility, raised by Mr. Margolis at the December 1994 meeting, that though Dean had called Cain, Cain's responses still reflected his best recollection of the specifics of the call from Dean. I noted that if such had been the case, one would still be left with the fact that, though knowing that Dean had called Cain, the OIC nevertheless undertook to lead the jury, the probation officer, and the courts to believe that Dean had not called Cain and that she had surmised that the check was maintained in a HUD field office from reading the IG Report rather from a conversation with Cain. I noted that the obvious avenue for further investigation was an interview of Cain, questioning him as to his communications with OIC attorneys both before and after he testified, and raised the issue of whether the Office of Professional Responsibility had yet contacted Cain.

With regard to Eli Feinberg's testimony, I explained the importance of an interview of Feinberg, and, as with Cain, raised the issue of whether the Office of Professional Responsibility had yet interviewed Feinberg.

With regard to Thomas Demery, I pointed out that there was no doubt whatever that Demery had lied when testifying that he had not previously lied under oath when testifying before Congress and that there was no doubt that OIC attorneys knew he had lied. I also pointed out that in appraising the gravity of the OIC'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 OIC staff.

I noted that Demery remained in a position where he must cooperate with any governmental investigation into these matters and thus could to be required to disclose the nature of his pre-testimonial discussions with the OIC. Thus, I raised the issue of whether the Office of Professional Responsibility had yet contacted Demery.

I noted that similar issues obtained with respect to whether the Office of Professional Responsibility had contacted either Ronald L. Reynolds or Russell Cartwright to determine how the communications of each individual with OIC attorneys bore on the issues raised in the relevant Narrative Appendixes.

I also called to Mr. Margolis' attention the fact that the Office of Professional Responsibility had not contacted me to seek any clarification of any matter in the voluminous materials I provided the Attorney General. I raised an issue as to whether the Office of Professional Responsibility had yet secured a copy of the trial transcript or copies of the numerous other documents that I referenced in the materials, suggesting that whether the Office of Professional Responsibility had done so ought to provide some indication of whether it is pursuing its investigation with the seriousness and expedition warranted in a matter of this gravity.

Third, I brought to Mr. Margolis' attention certain additional considerations regarding timing, noting that the imminence of a court of appeals ruling could not justify the failure to move as expeditiously as possible, particularly in circumstances where the OIC continues in its prosecution of cases against both Dean and Watt. I pointed out that, as was evident from the appellate briefs I had provided Mr. Margolis, only a portion of the matters treated in the materials were addressed in Dean's appellate brief, and some of them, including some important ones, were not even addressed in the district court.

8. <u>May 25, 1995 Letter to The Honorable Abner J. Mikva, Counsel to the President</u>

By letter of May 25, 1995 (Attachment 10), I delivered to Judge Mikva a copy of the May 25, 1995 letter to Mr. Margolis. I called to Judge Mikva's attention the fact that The Washington Post had reported that Jo Ann Harris intended to leave the Department of Justice at the end of the summer. I suggested that Ms. Harris' planned departure provided additional reason for prompt attention to the matters addressed in my letter of May 15, 1995, and the materials provided Judge Mikva on February 9, 1995, lest there be a suggestion that inquiry was delayed in order to allow Ms. Harris to leave the Department of Justice before any findings were disclosed.

9. July 14, 1995 Letter to The Honorable Abner J. Mikva, Counsel to the President

Following receipt of your letter of June 28, 1995, by letter of July 14, 1995, I informed Judge Mikva of my receipt of your letter advising me of the Office of Professional Responsibility's decision to investigate no further the matters raised in the materials I provided the Attorney General. I also addressed the seeming failure of the Office of Professional Responsibility to address at all the concerns I had raised with Judge Mikva regarding the fitness of Ms. Harris to continue to serve as Assistant Attorney General for the Criminal Division. Among other things, I pointed out that the claim in your letter that "virtually all the misconduct issues [I raised] were the subject of extensive motions filed in the district court" was simply not true. I noted that the claim was particularly not true with regard to the issue of the OIC's use of the testimony of Eli Feinberg, which is the issue as to which there may be the greatest reason to believe that Ms. Harris is involved in an ongoing conspiracy to obstruct justice.

While the July 14, 1995 letter to Judge Mikva is not relevant to the bases for the determination reached by the Office of Professional Responsibility on or before June 28, 1995, for purposes of making this package as complete as possible, I have included it as Attachment 12. For the same reason, I have also included your June 28, 1995 letter as Attachment 11.

B. Responses to Asserted Bases for the Decision Not to Investigate the Office of Independent Counsel

In light of the background set out above, I address below the bases advanced in your letter for the conclusion of the Office of Professional Responsibility that the materials I provided the Department of Justice revealed insufficient evidence of misconduct by OIC attorneys to justify further action by the Department. In particular, I address your conclusion that no outrageous government misconduct occurred. I also address your statements that "virtually all the misconduct issues you raise were the subject of extensive motions filed with the District Court and the misconduct issues that were addressed by the District Court and the Court of Appeals were of a type suitable for judicial resolution" and that "the fact that both the District Court and the Court of Appeals declined to find any due process violation supports our independent assessment that no outrageous government misconduct appears to have occurred"; that the Office of Professional Responsibility found an "absence of evidence of systemic prosecutorial abuses in the Office of Independent Counsel generally"; and that given the absence of such systemic abuse and the fact that "the principal Associate Independent Counsel about whom you complained are no longer employed by the Office of Independent Counsel," the Office of Professional Responsibility believes that "further investigation by the Department of Justice into the investigative and prosecutorial activities of the HUD Independent Counsel is not likely to deter any improper or unlawful conduct."

Initially, however, let me note certain assumptions I have regarding your review of the materials I provided. I believe they are accurate assumptions, though I request that you correct me on any point about which I may be mistaken lest I include some erroneous information in any subsequent descriptions of these events.

First, as I suggested in my May 25, 1995 letter to Mr. Margolis, I assume from the fact that the Office of Professional Responsibility failed to interview me with regard to the statements in my affidavit that the Office of Professional Responsibility does not seriously doubt the truthfulness of the statements made therein, in particular, the statement that in April 1989 Ms. Dean told me that she had called Agent Cain and that Agent Cain had told her that a check showing a payment of $75,000 by Louie B. Nunn to John N. Mitchell was maintained in a HUD field office. If my statement was true, it seems necessarily to follow that Agent Cain's testimony was false. I believe, however, that most observers in and out of the Office of Professional Responsibility would conclude, based simply on the implausibility of Dean's making up the story about the call and the OIC's evasiveness in responding concerning the whereabouts of

the check, that, regardless of my affidavit, Agent Cain testified falsely and OIC attorneys came to believe that Cain testified falsely after Dean's post-trial motion was filed, if they did not believe it earlier.

In any case, I assume also that the Office of Professional Responsibility did not interview Agent Cain to attempt to determine whether his testimony was false or to determine what questions OIC attorneys asked Agent Cain to determine whether his testimony was true, either before or after the filing of Dean's motion. I also assume that you did not question any present or former OIC attorneys regarding the inquiries they made of Agent Cain before or after the receipt of Dean's motion.

Second, I assume that the Office of Professional Responsibility did not interview Eli M. Feinberg to attempt to determine either whether his testimony that he was unaware of John Mitchell's involvement with Park Towers was false or whether OIC attorneys ever confronted Feinberg with the statements of the OIC's immunized witness Richard Shelby indicating that Feinberg's testimony was false before those attorneys intentionally elicited that testimony under oath in court.

Third, I assume that the Office of Professional Responsibility did not interview Maurice C. Barksdale to attempt to determine whether, as documents indicate, Lance H. Wilson contacted him about securing 300 moderate rehabilitation units for Dade County in 1984 or whether OIC attorneys in any manner coerced Barksdale into recalling events in the manner most favorable to the government's case.

Fourth, I assume that the Office of Professional Responsibility did not interview Thomas T. Demery to determine whether prior to falsely testifying that he had never lied to Congress, Demery had discussed with OIC attorneys how he should respond to questions on that issue.

Fifth, I assume that the Office of Professional Responsibility did not interview Ronald L. Reynolds to determine the nature of his conversations with OIC attorneys prior to the OIC's eliciting from him sworn testimony that was facially implausible and contradicted by documents in the OIC's possession.

Sixth, I assume that the Office of Professional Responsibility did not interview Russell Cartwright to determine the nature of his statements to OIC attorneys regarding a receipt

for entertaining Dean at a dinner at which the government's immunized witness had testified Dean was not present.

Seventh, I assume that in the course of the Office of Professional Responsibility's review of the allegations in the materials I provided, the Office of Professional Responsibility did not secure copies of transcripts or court documents underlying the materials.

Finally, I assume that at least until your receipt of a copy of my July 14, 1995 letter to the Honorable Abner J. Mikva, Counsel to the President, at no time did you contact Independent Counsel Arlin M. Adams or his successor, Larry D. Thompson, to advise him that the Office of Professional Responsibility possessed information indicating that certain evidence that the OIC had presented in court might be false.

1. Absence of Outrageous Government Misconduct

With regard to your statement that the Office of Professional Responsibility found no "outrageous government misconduct," let me first comment on matters as to which there is no room for doubt concerning the actions taken by OIC attorneys.

Consider the inclusion of inferences and in some cases explicit statements in the Superseding Indictment that were specifically contradicted by statements of an immunized witness or documentary evidence. Consider also the obviously intentional failures to comply with Brady, including with regard to information directly contradicting crucial inferences in the Superseding Indictment. Consider the efforts to cause the jury to believe things that the OIC knew to be false, for example, that the reference to the "contact at HUD" was a reference to Dean or that Dean had provided Shelby a copy of the post-allocation waiver.

I think that one can count among the matters not open to dispute the eliciting of Feinberg's testimony with OIC counsel knowing with that it was almost certainly false. That characterization would hold even if, which is probably not the case, the OIC did at some point confront Feinberg with Shelby's statements unless further discussions with Shelby revealed indications that Shelby was not telling the truth on that point. In any event, I do not think that Office of Professional Responsibility doubts that OIC attorneys elicited Feinberg's testimony while believing that more likely than not the testimony was false.

It also is not open to question that there are other instances where the OIC consciously chose not to confront witnesses with information that might cause them to testify in a manner less supportive of the OIC's case. An example warranting special attention is the OIC's actions with regard to the Mitchell telephone messages indicating that, with regard to the Arama project, Mitchell had been talking to Lance Wilson about securing 300 units and that Wilson had been talking to Maurice Barksdale about the matter. No observer would believe, as I am confident no one in the Office of Professional Responsibility believes, that the OIC failed to confront Barksdale with the messages for any reason other than the concern that it would lead Barksdale to recall or admit to matters that would be exculpatory of Dean. Thus, OIC attorneys preferred to rely to testimony useful to its case that was probably false rather than confront the witness with information that was likely to cause the witness to provide truthful testimony not supportive of the OIC's case. This is a matter of particular importance since, with regard to Count One, the court of appeals would find that Arama was the only project as to which there was sufficient evidence to support a conviction. Had Barksdale testified that Wilson had requested that he approve the funding (which in all probability was the truth) rather than that Wilson had not talked to him about the matter (which was almost certainly false), it is very unlikely that the court of appeals would have found sufficient evidence to support a verdict as to Arama.

In any case, with regard to each of these and a variety of the other documented matters, I think that few Americans outside the Department of Justice would not find the OIC's conduct to be outrageous. Most Americans, indeed, would be deeply disturbed that the Department of Justice does not find such conduct to be outrageous.

With regard to the OIC's use of the testimony of Agent Cain, as well as the OIC's actions subsequent to the filing of Dean's motion, whether you have any doubts that Agent Cain lied and that, at least at some point, OIC attorneys came to believe that he had lied, it is a matter as to which the Department of Justice could readily determine the truth. And assuming that the facts are as I suggest they are, even without regard to the racial considerations almost certainly underlying the OIC's use of Cain, every American would find the OIC's actions to be conscience-shocking. Many Americans would likely also find the Department of Justice's refusal to determine the truth about the actions of its agents in the matter to be malfeasance if not complicity in those actions.

As suggested in the Comments section to the Cain Appendix, I suspect, based on O'Neill's failure to mention a check either in questioning Agent Cain in court or in recalling Dean's testimony to the jury in closing argument as well as Cain's limited interest in testifying falsely other than to accommodate OIC attorneys, that O'Neill and others knew that Dean had called Agent Cain asking about a check at the time that O'Neill questioned Cain in court. It is possible that O'Neill or other OIC attorneys contrived a rationale by which, even though Dean had called Cain to ask about a check, Cain's answers to O'Neill's specific questions were not perjurious, just as OIC attorneys somehow contrived a rationale for claiming that Demery had not testified falsely when he denied having previously lied to Congress. But, as I indicated in my May 25, 1995 letter to David Margolis, if the OIC did know that Dean had called Cain to ask about a check, the actions the OIC took regarding Cain's testimony both during and after trial are heinous regardless of any rationale for claiming that Cain did not lie. Moreover, if that is what occurred, finding out the truth is a very easy matter, since, to begin with, Agent Cain has no interest other than in explaining the circumstances under which he was persuaded to give the responses he did.

In your letter, you indicated that the Office of Professional Responsibility had examined the materials to determine whether there occurred "outrageous governmental conduct indicating that Ms. Dean stands unjustly or unfairly convicted." Given the undisputed facts detailed in the materials, I think that most observers would conclude that Dean did not receive anything approaching a fair trial. That conclusion could derive substantial additional support depending on the outcome of further investigation. That is, if Agent Cain was in fact testifying falsely, given the large role of his testimony in undermining Dean's credibility, one can only conclude that outrageous governmental conduct very likely affected the entire outcome. As I have already suggested, if in fact Wilson caused Barksdale to fund Arama and Barksdale in fact lied in court, certainly Dean was unjustly convicted at least on Count One. In any case, however, whether the misconduct of the government's agents affected the outcome of a trial has little bearing on the government's obligation to investigate the conduct of its agents and to determine whether the conduct warrants discipline or prosecution of those agents.

2. Relevance of the Rulings by the Courts

With regard to your reliance on the treatment of these issues by the courts, let me first note that the government is hardly relieved of its obligation to determine the nature of the actions of its agents simply because the courts are not persuaded that the conduct was egregious. In the case of Agent Cain, for example, even had the district court indicated that it believed Agent Cain--which the court certainly did not do--that would not relieve the government of its obligation to determine whether Agent Cain in fact lied and whether OIC attorneys knew that he lied.

Further, what ought to concern you more than it seems to is the fact that the district court harshly criticized the conduct of OIC attorneys and specifically found those attorneys were willing to rely on testimony that they had reason to believe was false. The district court's remarks alone raise serious questions as to whether the involved attorneys ought to be disqualified from representing the federal government. In any event, the court's findings are highly relevant to determining the likelihood that conduct that the court did not address is as serious as the materials I provided suggest it is.

Moreover, as I pointed out in my July 14, 1995 letter to Judge Mikva, your statement that "virtually all the misconduct issues [I raised] were the subject of extensive motions filed in the district court" simply is not true. As shown above, not only were important issues, such as the matter of the Eli Feinberg testimony, not raised with the district court, but I repeatedly advised the Department of Justice that that and other issues were not raised in the district court. And, as I trust you know, the great majority of the matters raised in the materials, including those as to which there is the greatest likelihood of criminal conduct, were not addressed at all in the court of appeals. Thus, the court of appeals' actions regarding the misconduct issues--apart from its deploring of OIC conduct in certain matters that were raised--are hardly relevant to Office of Professional Responsibility's obligation to investigate credible allegations of misconduct by government agents. What is relevant in the court of appeals decision, however, is that with regard to Count One, the court of appeals found the evidence insufficient to sustain a verdict as to three of the four projects involved in that count, and with regard to Count Two, the court of appeals found the evidence insufficient to support a verdict as to three of the five projects involved in that count. Those findings of the court of appeals are further indications that the case was a weak one in many respects, thereby increasing the likelihood that

governmental misconduct of which the Department of Justice is aware, though the court of appeals is not, affected the outcome of the case.

3. Absence of Systemic Abuses in the OIC and the Departure of Certain Associate Independent Counsel

Given the evident involvement of Deputy Independent Counsel Bruce C. Swartz in so many of the matters addressed in the materials, the Office of Professional Responsibility's conclusion that there was no evidence of systemic prosecutorial abuses by the Office of Independent Counsel is difficult to fathom. I assume that you mean that the Office of Professional Responsibility did not find that Independent Counsel Arlin M. Adams was himself involved in prosecutorial abuses. In light of the fact that the issues raised in Dean's motion for a new trial were presumably brought to Judge Adams' attention--and the OIC adamantly refused ever to acknowledge any misconduct by trial counsel--the conclusion that Judge Adams was not involved in the documented misconduct is also hard to understand. And, if in fact there was a concerted effort within the OIC following the filing of Dean's motion to conceal that Agent Cain's testimony was false--or to refuse to take obvious steps to determine whether it was false--it is difficult to understand how you could conclude that Judge Adams was not directly involved in that conduct unless Mr. Swartz specifically stated that Judge Adams was kept misinformed about the actions of Mr. Swartz and other OIC attorneys.

With regard to the departure of "the principle Associate Independent Counsel about whom [I complained]," it should be clear that there are at least four OIC attorneys whose misconduct was documented in the materials. These include the Associate Independent Counsel who conducted the trial, Robert E. O'Neill and Paula A. Sweeney. They also include Associate Independent Counsel Jo Ann Harris, who was lead counsel at the time of the drafting of the Superseding Indictment, and Deputy Independent Counsel Bruce C. Swartz, who was involved from the time of the drafting of the Superseding Indictment through the appeal. Even without regard to the issues as to which there may be criminal liability, the undisputed conduct described in the materials I provided would lead most Americans to believe that each of these individuals is not fit to serve as an attorney representing the federal government.

Yet, Robert E. O'Neill is an Assistant United States Attorney in the Middle District of Florida, presumably conducting his prosecutions in accordance with the sense of prosecutorial

ethics reflected in his actions in the Dean case. Apparently, Paula A. Sweeney is now the Deputy General Counsel for the Central Intelligence Agency, no doubt dealing with matters of a highly sensitive nature. Jo Ann Harris is the Assistant Attorney General for the Criminal Division overseeing the conduct of federal prosecutors throughout the country and participating with you and others on an Advisory Board on Professional Responsibility. I understand that Bruce C. Swartz recently joined Ms. Harris' staff as a Special Assistant. Whatever merit there might otherwise be to your point regarding the departure of "principal Associate Independent Counsel," the present employment circumstances of the four attorneys just identified seems an inadequate basis for the Department of Justice to fail to determine whether those attorneys were involved in unlawful or unethical conduct while acting as federal prosecutors.

Further, to my understanding, Agent Cain remains on the staff of the OIC. If in fact, Agent Cain did testify falsely in the Dean case, he ought not to remain on that staff or remain employed by the federal government. I can see no reason why he ought not to be prosecuted unless his cooperation is necessary to securing the truth regarding the actions of OIC attorneys.

Finally, I noted in my letter to Judge Mikva that it would seem to follow that, upon coming to believe that Judge Adams was not knowingly involved in the matters where the materials I provided indicated that the OIC was continuing to rely on false evidence in the courts, the Office of Professional Responsibility at least would inform Judge Adams of these matters to allow him to fulfill his responsibility to the courts. As I indicated earlier, I assume that as of the time of your receipt of a copy of my letter to Judge Mikva, you had not brought these matters to the attention of Judge Adams or his successor. Let me point out here that the obligation of the Department of Justice in that regard is a continuing one.

In early July, Dean filed a petition for rehearing, raising various issues including whether the evidence was sufficient to sustain certain conspiracy charges. In reviewing such issues, the court of appeals continues to consider a record that the Department of Justice has reason to believe includes false evidence. Further, the petition for rehearing also raised an issue of whether all three conspiracy counts must be overturned because one object of these multiple-object conspiracies was found to be legally inadequate. On July 18, 1995, the court of appeals ordered the Independent Counsel to provide a response on that issue. In light of Yates v. United States, 354 U.S. 298

(1957), there exists a prospect that all three conspiracy counts will be overturned.

Assuming that the OIC seeks again to try those claims, there is reason to expect that the OIC will again rely on testimonial and other evidence that the materials I provided to you showed to be probably or certainly false. I do not think the Department of Justice can stand idly by as that occurs.

4. Institutional Concerns

With regard to your statement that "institutional concerns suggest that the Department of Justice not lightly initiate an investigation into the conduct of the activities of an Independent Counsel," I suggest that your actions here will do little to advance any legitimate institutional concerns regarding the interaction between the Department of Justice and Independent Counsels and could do much to undermine the larger institutional concern in the integrity of the Department of Justice. As reflected in the discussion above, while there may be areas where the entire truth is not yet known, few intelligent readers of the material I provide would fail to conclude that there occurred repeated instances of "outrageous government misconduct," under any reasonable interpretation of that phrase, and that the prosecutorial abuses that occurred in the Dean case were "systemic," under any reasonable interpretation of that term. And few intelligent observers would believe that an objective review by the Department of Justice could conclude otherwise.

Recent decisions regarding prosecutorial abuses by federal prosecutors in such cases as United States v. Wallach, United States v. Kojayan, Demjanjuk v. Petrovsky, United States v. Tarricone, United States v. Isgro, and United States v. Bravo, as well as commentary on those decisions, suggest that for some time the Department of Justice has failed to adequately train federal prosecutors with regard to their ethical obligations, has failed to acknowledge the wrongdoing of those prosecutors when it has occurred, and has failed to appropriately discipline offending prosecutors. In this case, experienced Department of Justice prosecutors such as Ms. Harris and Ms. O'Neill engaged in conduct that the district court itself found to violate Department of Justice standards and that a more careful examination would show to be both more serious and more pervasive than the misconduct that appears to have occurred in the case I just noted. Yet, the Office of Professional Responsibility concludes that because Ms. Harris and Mr. O'Neill are no longer on the OIC staff, but instead are once more with the Department of Justice, further investigation of their actions is not warranted. In the long

run, that decision is not likely to increase the faith of the public in the commitment of the Department of Justice to ensuring the integrity of federal prosecutions.

Finally, with regard to Ms. Harris in particular, I note that notwithstanding Judge Mikva's assurances to me that the Office of Professional Responsibility would carefully review the concerns I raised about Ms. Harris' suitability to continue to serve as the Assistant Attorney General for the Criminal Division, your letter to me reflects no consideration whatever of that matter. I allow the possibility that you have nevertheless reported your conclusions on the matter to the Attorney General and to Judge Mikva. But if that matter has not been addressed, it is a matter that continues to warrant attention. So, too, is the matter of the role of Mr. Swartz on Ms. Harris' staff and whether Mr. Swartz should be allowed to remain with the Department of Justice subsequent to Ms. Harris' departure.

If the Office of Professional Responsibility adheres to its decision to investigate this matter no further, I would appreciate a letter indicating whether the Office of Professional Responsibility interviewed Supervisory Special Agent Alvin R. Cain, Jr., Eli M. Feinberg, Thomas T. Demery, Ronald L. Reynolds, Russell Cartwright, Maurice C. Barksdale, or any of the OIC attorneys named above. If the Office of Professional Responsibility found any factual misstatement in the materials I provided or uncovered information demonstrating that any allegation was unfounded, I would appreciate your advising me of that as well. In my further efforts concerning this matter, I have no interest in pressing any issue not fully supported by the facts.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

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

David Margolis
Associate Deputy Attorney General

Attachments