JAMES P. SCANLAN
2638 39th Street, N.W.
Washington, D.C. 20007
(202) 337-3927

March 11, 1996

CONFIDENTIAL

Michael E. Shaheen, Jr., Esq.
Counsel
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 responds to your letter dated January 30, 1996, in which you indicated that my November 30, 1995 letters to Acting Assistant Attorney General John C. Keeney and United States Attorney Charles Wilson had been forwarded to the Office of Professional Responsibility for review and response. Your letter indicates that you have interpreted my letters to Messrs. Keeney and Wilson as further efforts to cause the Department of Justice to reconsider its decision not to investigate the Office of Independent Counsel (OIC) Arlin M. Adams, as I had directly requested in my letter to you dated August 18, 1995. Your letter also indicates that the Department of Justice declines to reopen that matter for a number of reason, including that the Department of Justice does not believe there exists "evidence of unaddressed criminal conduct or outrageous government misconduct" and does not consider any prosecutorial misconduct occurring in the Dean case to be of exceptional dimensions.

Your letter reached me as I was preparing a second letter to Mr. Keeney, providing him copies of additional material that I had recently submitted to Independent Counsel Larry D. Thompson and setting out a summary of matters relating to the roles of Bruce C. Swartz and Robert E. O'Neill in eliciting and relying upon the testimony of government witness Eli M. Feinberg. A copy of the letter to Mr. Keeney is enclosed. In it I explain to Mr. Keeney that a government attorney is not relieved of his individual responsibilities in overseeing his subordinate attorneys simply because the Office of Professional Responsibility has made a determination that no further action is

warranted. I also suggest to Mr. Keeney that the usual deference to the Department of Justice's principal authority on prosecutorial ethics issues is not warranted in this case because your letter reflects such limited understanding of the issues I had raised.

Most pertinent in the latter regard is the discussion at the beginning of the second page of your letter. In particular, after noting that my submissions to the Department "make clear that [I] believe strongly that not one, but several important government witnesses committed perjury at trial," and that the Office of Professional Responsibility does not share my "assessment that the record demonstrates that the government's witnesses were patently untrustworthy or that the Independent Counsel knowingly procured false testimony," your letter states:

> Significantly, we note as well that the credibility of these witnesses appears to have been put directly at issue during the trial of Ms. Dean and most of the arguments you have made are based on facts known to the parties and developed (and argued) during trial. Each of the witnesses you suspect of lying were [sic] cross-examined under oath by able counsel, and the jury was specifically instructed on how to assess the credibility of the witnesses who appeared at trial. The fact remains that the jury apparently chose to believe these government witnesses and to disbelieve as not credible the testimony of Ms. Dean.

In addition to appearing to condone the notion of prosecutorial ethics underlying so much of the misconduct in this case--that the government may attempt to lead the jury to believe any version of events that supports the government's case, notwithstanding substantial evidence contradicting that version, and without confronting government witnesses with information indicating that their contemplated testimony is almost certainly false; it is the defense's burden to show that the government's evidence is false--this paragraph reflects remarkably little understanding of the facts underlying the perjury issues I raised in the materials and correspondence.

There were five witnesses whose testimony I have argued OIC attorneys had compelling reason to believe was false--Eli M. Feinberg, Alvin R. Cain, Jr., Maurice C. Barksdale, Ronald L.

Reynolds, and Thomas T. Demery. The most significant facts concerning each of these witnesses are summarized below.[1]

Eli M. Feinberg. Eli M. Feinberg, whose testimony is the principal subject of my enclosed letter to Mr. Keeney, is the government witness the OIC called to testify that he was unaware of John Mitchell's involvement with a project in Count 1 called Park Towers. The OIC then placed great weight on that testimony and the fact that it was absolutely unimpeached in arguing that there existed evidence of conspiracy in Richard Shelby's supposed concealment of Mitchell's involvement from Feinberg and the developer Feinberg represented.

Yet, in April and May 1992, Shelby, already under a grant of immunity, had three times told OIC attorneys that Feinberg was aware of Mitchell's involvement with the Park Towers project. The third instance occurred on May 19, 1992. This was the day after Feinberg in a telephonic interview told Bruce Swartz and Robert O'Neill that he was unaware of Mitchell's involvement. Confronted with Feinberg's statement, Shelby reaffirmed that Feinberg was aware of Mitchell's involvement with the project. Earlier in the interview Shelby also had given details of Feinberg's role in setting Mitchell's fee and had noted a remark

[1] Since the first four of these witnesses all involve the OIC's efforts to show a conspiracy involving Deborah Gore Dean and former Attorney General John N. Mitchell, the facts pertaining to those witnesses must be appraised with an understanding that one of the first things Arlin M. Adams saw fit to tell the press on assuming the position of Independent Counsel was that he believed he might have been appointed to the Supreme Court in 1971 had he not offended then Attorney General Mitchell. As you are aware, long before most of the abuses in the Dean case occurred, the Department of Justice refused to question the propriety of Judge Adams' supervision of the prosecution of a case involving an individual who Judge Adams believed had deprived him of a coveted appointment.

Feinberg had made about that fee. Despite the fact that Shelby's statements strongly suggested that Feinberg's denial of knowledge of Mitchell's involvement was false, OIC attorneys apparently never confronted Feinberg with Shelby's statements. Instead, on September 17, 1993, the OIC directly elicited Feinberg's sworn testimony that he was unaware of Mitchell's involvement with the project. The OIC then relied on that testimony in three briefs and two oral arguments in the district court. Most notably, the testimony and the fact that it was unimpeached were given great weight at the end of the rebuttal portion of the OIC's closing argument, where Robert O'Neill would assert to the jury that the secrecy reflected in the concealment of Mitchell's role from Feinberg and the developer he represented was "the hallmark of conspiracy."

Notwithstanding the OIC's intention of eliciting Feinberg's testimony that he was unaware of Mitchell involvement with Park Towers and maintaining that Shelby's supposed concealment of Mitchell's role from Feinberg was evidence of conspiracy, the OIC never made a Brady disclosure of Shelby's three statements directly and unequivocally contradicting Feinberg's contemplated testimony. Instead, Shelby's statements were turned over with several thousand other pages of Jencks material on September 13, 1993, a week before the time the OIC had led the defense to believe that Shelby would testify, though in fact just three days before Shelby actually would testify.

At the close of trial on September 15, 1993, Robert O'Neill would make statements to the court intended to lead the court and the defense to believe that Shelby would not be among the witnesses called on the following day. Shelby nevertheless was called to testify on September 16, 1993, out of order and ahead of Feinberg. Examining Shelby, Robert O'Neill would ask him no questions that might elicit testimony concerning whether he (Shelby) had informed Feinberg of Mitchell's involvement with Park Towers. On an occasion where Shelby commenced to described Feinberg's role in setting Mitchell's fee, O'Neill changed the subject. After Shelby left the stand without addressing the issue of Feinberg's knowledge of Mitchell's role, Feinberg would be called to the stand to testify that he was unaware of Mitchell's role.

As has been repeatedly made clear to you in the materials and correspondence, the matter of the truthfulness of Feinberg's testimony was never raised in the district court. Contrary to your statement in the quoted paragraph, Feinberg was never cross-examined on this matter, among other reasons, because the

indictment had not even hinted that the OIC would claim that Mitchell's role had been concealed from the persons dealing with the alleged co-conspirators. In fact, the indictment had suggested that Mitchell's relationship with Dean would be touted to the alleged co-conspirators' clients. Contrary to your suggestion that the jury believed Feinberg over Dean, Dean's testimony had nothing whatever to do with this matter. Further, the reason that this matter was in no manner raised in the district court in post-trial proceedings was undoubtedly that the same tactics that allowed Feinberg's testimony to go unimpeached caused Dean's counsel to fail to understand that Shelby had repeatedly contradicted Feinberg's testimony in statements to OIC attorneys.

It is with regard to Feinberg that your statement that "most of the arguments you have made are based on facts known to the parties and developed (and argued) during trial" warrants special scrutiny. The statement at least is more accurate than your earlier claim that "virtually all the misconduct issues you raise were the subject of extensive motions filed with the District Court." It nevertheless reflects the same tactic of diverting attention from difficult areas that the OIC repeatedly employed in defending its conduct in this case before the courts. For example, defending against the claim that the OIC sought to lead the jury to believe certain receipts of Andrew Sankin reflected meals Sankin purchased for Deborah Dean, even though the receipts did not identify Dean by name or position and even though the OIC also possessed other documentary evidence indicating that the receipts involved meals bought for persons other than Dean, Bruce Swartz would argue that "certainly a majority of the receipts were tied to the defendant by their ... description." That fact had bearing on the propriety of using receipts that did identify Dean or her position, but it was a calculated diversion from the issue of the justification for use of receipts that did not identify Dean or her position. Similarly, your repeated mention of the fact that issues were addressed in the courts has no bearing whatever on the issues that were not addressed in the courts.

The Department of Justice continues to refuse to address the issue of the OIC's use of the Feinberg testimony. Most reasonable observers would conclude that the OIC had compelling reason to believe that Feinberg's testimony that he was unaware of Mitchell's involvement with Park Towers was false; that, regardless of how compelling was the OIC's reason to believe that the testimony was false, the OIC refused to confront Feinberg with Shelby's contrary statements out of concern that Feinberg

would (truthfully) acknowledge that he in fact knew of Mitchell's involvement, thereby depriving the OIC of a point its attorneys wished to give considerable weight; and that the OIC deliberately failed to make a Brady disclosure of Shelby's statements because doing so would enable the defense certainly to thwart the OIC's intended plan to elicit Feinberg's testimony concerning his unawareness of Mitchell's involvement with Park Towers without contradiction from Shelby and possibly to thwart entirely the eliciting of that testimony. Your failure to in any manner address this matter leaves open whether the Department of Justice disputes any of these propositions, or accepts them, but nevertheless considers this to be permissible conduct for federal prosecutors. Though you will not address these issues with me, I suggest you ought at least to enlighten Mr. Keeney and Mr. Wilson as to your views on these matters in order to assist them in exercising their independent responsibilities.

Alvin R. Cain, Jr. Alvin R. Cain, Jr. is an African-American Supervisory Special Agent from the HUD Inspector General's Office who prepared the HUD Inspector Generals' Report on the moderate rehabilitation program that first disclosed that John Mitchell had earned a $75,000 consulting fee on the Arama project. The OIC offered no evidence that Dean was aware that Mitchell earned any HUD consulting fee, and two immunized government witnesses gave testimony suggesting that Dean was unaware that Mitchell earned any such fee. During Dean's direct testimony she denied knowing that Mitchell earned a HUD consulting fee until reading about the $75,000 Arama payment in the HUD Inspector General's Report when it was released in April 1989.

Dean also testified that after reading that Mitchell had earned the Arama fee in the report, she had called Agent Cain to question the treatment of Mitchell in that report and to demand to know whether a check existed proving that Mitchell had earned a fee on the Arama project. She was prevented from stating what Cain had then told her by a hearsay objection.

During the OIC's rebuttal case, Agent Cain testified that he had no recollection of such call and did so in a manner to indicate that he certainly would have remembered the call if it occurred. In closing argument, before an entirely African-American jury, Robert O'Neill placed great weight on Cain's testimony both in asserting that Dean had lied in her testimony that she did not know Mitchell earned HUD consulting fees and in

generally undermining Dean's credibility in the eyes of the jury.

The OIC's use of the Cain testimony must be considered in light of evidence that Robert O'Neill was seeking to incite racial hostility toward Deborah Dean. The court several times chastised O'Neill for ridiculing Dean while she was on the stand in a manner the court believed to be motivated by the fact that a white defendant was being tried before an entirely African-American jury. Tr. 2776, 2786-87, 2900-01. In O'Neill's highly inflammatory closing argument he three times alluded to the testimony of a government witness that the favoring of developers who were supposed to have access to Dean had interfered with local housing authority efforts to "encourage black developers to get a piece of the pie." Tr. 411 3379, 3381, 3522-23. Further, in the face of evidence discussed below that Lance Wilson, an African-American, had in fact caused the Arama funding, O'Neill also cited evidence concerning an entirely extraneous manner solely in order that he could then state to the jury that Dean had "fingered Lance Wilson, her friend." Tr. 3420.

You are certainly correct that there is reason to believe that the jury believed Cain rather than Dean, a matter which suggests as well that Cain's testimony had a substantial impact on the outcome of the case. Your statements, however, greatly distort the issues raised regarding Cain's testimony, including the crucial issue of whether, subsequent to receiving the additional information submitted with Dean's motion for a new trial, Bruce Swartz and other OIC attorneys came to believe that Cain testified falsely and then conspired to conceal that fact.

Specifically, subsequent to the verdict Dean submitted an affidavit stating that when she talked to Cain he told her that the check showing the payment to Mitchell was maintained in a HUD field office. I also filed an affidavit stating that in April 1989 Dean told me about her call to Cain and told me that Cain had told her the check was maintained in a HUD field office. In support of her motion, Dean argued that if the check was maintained in a HUD field office in April 1989, that fact would support her testimony about the call to Cain.

Probably the most compelling evidence that, at least subsequent to the filing of Dean's motion for a new trial, Bruce Swartz and other OIC attorneys came to believe that Cain had probably lied is the failure of the OIC to mention anything concerning the whereabouts of the check when initially responding to Dean's motion and Bruce Swartz's subsequent effort to claim that Dean had surmised that the check was maintained in a HUD field office from a sentence at the end of an interview in the HUD Inspector General's Report. No person of modest intelligence could possibly believe that Dean had surmised that the check was maintained in a field office from the statement cited by Swartz. Nor could any person of modest intelligence believe that Swartz believed that Dean based the statement in her affidavit on such surmise when he so argued to the court in defending the OIC's use of Cain and in requesting the court to increase Dean's sentence for having falsely stated in her affidavit that she learned of the whereabouts of the check from a call to Cain. The court's actions with respect to the sentencing issues give every reason to believe that the court believed that Dean had told the truth, even though it concluded that the evidence put forward "doesn't mean of necessity the government is putting on information they knew was false before the jury." That a court's failure to find that the government's lawyers necessarily presented false evidence does not relieve the government of determining whether those lawyers in fact did so is one of the reasons there exist such entities as the Office of Professional Responsibility.

In my earlier letter to you, I noted that I assumed both that you did not doubt the truthfulness of my affidavit and that the Office of Professional Responsibility had made no effort to investigate this matter. With regard to the statement in your recent letter declining to indicate whether the assumptions in my letter were correct, several matters concerning the Cain testimony warrant attention. In your letter you state that it is clear to you that I "believe strongly that not one, but several important government witnesses committed perjury at trial." While that statement was advanced in support of the claim that the Department must base its decision on what the facts suggest rather than what I personally believe, it nevertheless suggests that you do not doubt the veracity of the statement in my affidavit that in April 1989, Deborah Gore Dean told me about her call to Agent Cain and told me that Agent Cain had told her that a check showing a payment to John Mitchell was maintained in a HUD field office. Yet, if I did tell the truth in my affidavit, the question arises as to how the Office of Professional Responsibility could fail to conclude that Cain testified falsely in court, or, at a minimum, that some investigation into that

matter is warranted. Further, as I have noted, regardless of my affidavit, the simple facts of the absurdity of Dean's making up a story about the call to Cain, not to mention being ready to make up a story of what Cain had told her, if the call did not occur, and the OIC's evasiveness in responding concerning the check suggest a substantial probability that the OIC sought to conceal what it believed to be the perjury of a government agent.

In the face of such evidence, I must accept a possibility that the Office of Professional Responsibility did engage in some investigation into this matter. As I have previously discussed in number of places, at a meeting during the week of December 12, 1994, Associate Deputy Attorney General David Margolis raised the question of whether, assuming that Dean had in fact called Cain, it necessarily followed that Cain's responses to the questions put to him by O'Neill did not reflect Cain's best recollection of the specifics of the call from Dean. Thus, partly because of the suggestion in your letter that the Office of Professional Responsibility may have made some inquiries in this matter, I think it useful to consider the possibility that such inquiries led the Office of Professional Responsibility to conclude that, though Dean had called Cain in April 1989 to ask about the check showing a payment to Mitchell, Cain's testimony was literally correct, and therefore Cain had not committed perjury in court.

If that reasoning does underlie the Department of Justice's conclusions in this matter, and that matter is ever publicly revealed, I suggest that the Office of Professional Responsibility will lose any credibility it may have as an objective reviewer of prosecutorial conduct. Apart from the difficulty of any interpretation that would allow Cain's testimony to be true even though Dean had called him to ask about a check,[2] there remain the facts that the OIC sought to lead the

[2] I have previously noted that Cain's denial of any recollection of a call from Dean where she "mention[ed] John Mitchell to you and the fact that he made money as a consultant being information within the report" (Tr. 3199) would seem inconsistent with any plausible interpretation of Dean's call to Cain. Robert O'Neill does begin his questioning with the words "[a]t or about that date," suggesting the possibility that the date may be relevant to any interpretation whereby Cain's testimony could be true notwithstanding that Dean had called him to ask about a check. In his testimony, Cain initially gave April 17, 1989, as the date of publication of the report. Tr. 3197. The report was not actually released, and Dean did not secure a copy, for about another ten days. Yet, the antecedent of "that date" would seem to be the day that Cain provided Dean a copy of the report rather than the day it was published. So even if Dean did not call Cain until the day after she received a copy of the report (hence, ten or more days

jury, the probation officer, and the court to believe that Dean never made any call to Cain, and to lead the probation officer and the court to believe as well that Dean had lied in her affidavit by stating that Cain had told her that the check was maintained in a field office. Thus, with regard to the Cain testimony, the only defensible justification for your conclusion that there exists no "evidence of unaddressed criminal conduct or outrageous government misconduct" is that it is improbable that Dean in fact called Cain, which I think you clearly do not believe.

I suggest, however, that if the Office of Professional Responsibility is of the view that while Dean did call Cain to ask about a check, Cain's testimony was literally true, that is something the Office of Professional Responsibility does have an obligation to tell to me, for two reasons. First, such an interpretation of events merely confirms my own good faith in bringing this matter to the attention of the Department of Justice. In such circumstances, both basic decency and the government's legitimate interest in preventing my further dissemination of allegations that the government believes to be based on a good faith misunderstanding of the facts would seem to require that the government inform me of its basis for concluding that I have misunderstood this matter. Second, since it ought to be evident to you that I will be disseminating these allegations on an increasingly wider basis, the government would seem also to have an obligation to its employee Agent Cain to correct the understanding that has led me to allege repeatedly that he committed perjury. If Cain was persuaded by OIC attorneys that he could truthfully testify that he had no recollection of the events described in the questions put to him by O'Neill, the government already has grossly ill-used an African-American employee in order to mislead an African-American jury in its judgment of a white defendant. If your investigation into this matter would cause Agent Cain's conduct to be seen in a better light than I have been portraying it, you ought to bring that to my attention.

---

after April 17), it is difficult to see how timing could reconcile the two testimonies. In any event, Robert O'Neill would tell the jury: "That conversation never ever happened." Tr. 3506.

In any case, contrary to the suggestion in your letter, the issues raised regarding the testimony of Agent Cain are by no means merely a matter of the jury's having accepted Cain's testimony over Dean's.

Maurice C. Barksdale. A Dade County moderate rehabilitation called Arama is the single project as to which the court of appeals would find sufficient evidence to sustain a jury verdict that there existed a conspiracy involving Dean and Mitchell. The testimony of Maurice C. Barksdale was crucial to that determination. Barksdale is the HUD official who authorized the allocation to support the Arama project in July 1984, shortly after Dean's predecessor, Lance H. Wilson, had resigned his position and been replaced by Dean. Telephone message slips found in John Mitchell's files indicated that in January 1984 Wilson had told Mitchell that he (Wilson) was talking to Barksdale about securing 300 units. This occurred essentially contemporaneously with Louie Nunn's initial contacts with the developer of the Arama project to secure 300 moderate rehabilitation units for that project. Documents indicated that Mitchell had previously intervened with Wilson to secure moderate rehabilitation funding for Louie Nunn.

At a minimum, the messages slips left little room for doubt that Wilson had contacted Barksdale about the funding. They also suggested that Wilson's contacts with Barksdale had caused the funding without any involvement of Dean, who had yet to assume a significant role in the moderate rehabilitation process. The OIC never provided the message slips to the defense as Brady material, with the OIC's later taking the position that OIC attorneys did not regard the message slips as exculpatory (a claim the court of appeals did not find to be credible). More important, the OIC called Barksdale to testify before the grand jury and in court for the purpose of tying Dean to the funding without ever confronting him with the information on the message slips. OIC attorneys then watched Barksdale testify that he had no recollection of Wilson's contacting him concerning the Arama funding, without making any effort to correct that testimony.

You may well be correct that the jury believed Barksdale's testimony concerning the contact by Wilson. Your treatment of this issue, however, suggests that, in view of the Office of Professional Responsibility, neither the law nor fundamental fairness imposes upon prosecutors an obligation to confront witnesses with information that is likely to cause those witnesses to testify truthfully when there is reason to expect

that the truthful testimony will be less supportive of the government's case than false testimony will be. I have several times noted that reasonable observers could only conclude that OIC attorneys failed to confront Barksdale with the information on the message slips precisely because they feared that it would cause Barksdale to truthfully testify in a manner that was exculpatory of Dean. Your response provides no basis for determining whether the Office of Professional Responsibility disagrees with that interpretation of the OIC's actions or whether the Office of Professional Responsibility finds nothing objectionable in federal prosecutors' acting in such a manner.

Ronald L. Reynolds. Ronald L. Reynolds is the HUD driver whom the court first described as the witness "[e]verybody believed no one would believe" and concerning whom the court would later state "I think the government as well as the defendant agree that they all felt Mr. Reynolds was not a believable witness," noting that "calendars and other evidence in the government's possession would suggest that his recollection was not correct." Among the reasons for the court's observations was the fact that in an interview Reynolds had stated that he drove Dean to lunch where she said she was having lunch with Mitchell or Mitchell and her mother about once a month while she was at HUD. Dean's calendars and other information indicated that Dean had lunch with Mitchell no more than three times while she was at HUD, with none of those lunches' occurring at places where Reynolds said he drove Dean to meet Mitchell for lunch, and that while working at HUD Dean had never had lunch with her mother.

Nevertheless, the OIC called Reynolds to testify about driving Dean to lunch where she said she was having lunch with Mitchell. Though a document indicated that Dean rode in HUD cars about fifteen times a month, with Reynolds' driving her on one of those occasions, Robert O'Neill elicited testimony from Reynolds that he drove Dean two out every five of her trips, "about ten times a week," and to luncheon meetings "two, three times a week." Further, in order to rehabilitate Reynolds following a damaging cross-examination, on redirect O'Neill elicited testimony that Reynolds clearly recalled driving Dean to lunch on at least two occasions when she said she was having lunch with Mitchell including one where she said she was having lunch with Mitchell and her mother. Robert O'Neill then placed great weight on Reynolds' testimony in arguing to the jury that Dean had lied on the stand.

In this instance you are again correct that Reynolds' testimony differed from Dean's and that the jury may have believed Reynolds. The Office of Professional Responsibility's view that the record does not show that Reynolds was a patently untrustworthy witness, however, is a view that would unlikely be shared by any intelligent observer, just as it was not shared by the court.

Thomas T. Demery. Thomas T. Demery is the witness who during his cross-examination repeatedly denied ever having lied to Congress. Robert O'Neill, who was examining Demery for the OIC, had to know Demery's denials were false. The OIC had indicted Demery for perjury as a result of statements he made before Congress, and during the course of reaching a plea agreement that did not include a perjury charge, Demery had confessed to having lied to Congress. Nevertheless, O'Neill allowed Demery's statements to go uncorrected and proceeded to elicit Demery's most important testimony on redirect.

Dean's testimony did not have anything to do with whether Demery lied when he testified that he had never lied to Congress. The jury, however, may well have believed Demery's testimony that Robert O'Neill elicited on redirect, which was directly contrary to Dean's testimony on a crucial issue. There is reason to believe that the jury would have been less likely to believe Demery if O'Neill had revealed that Demery had committed perjury immediately prior to giving the crucial testimony.

When this matter was raised in a post-trial motion, the OIC impliedly represented to the court that Robert O'Neill had not realized the Demery had lied when he denied having lied to Congress. The court specifically rejected that claim, finding that OIC attorneys must have believed that Demery had previously lied to Congress. The court also rejected the claim that the matter was known to the defense, noting that the fact that such information is contained in hundreds of thousands of pages of material made available to the defense is not sufficient. The court never addressed the issue of how Demery, who testified as a cooperating witness while awaiting his own sentencing, believed he could testify that he had never lied to Congress, notwithstanding his having confessed to OIC attorneys, unless OIC attorneys had led him to believe that he could or should testify that he had never lied to Congress if questioned on the matter during cross-examination.

Your letters to me give no indication of whether the Office of Professional Responsibility disputes that Demery lied when he denied having lied to Congress, that Robert O'Neill understood that Demery had just committed perjury when he proceeded to elicit Demery's most important testimony on redirect, or that the OIC falsely represented to the court that O'Neill had not understood that Demery committed perjury--or whether the Office of Professional Responsibility believes that, while these are accurate descriptions of what occurred, OIC attorneys did nothing inappropriate. Your responses also give no indication of whether the Office of Professional Responsibility believes that OIC attorneys may have told Demery that he could or should testify that he had never lied to congress and whether there was anything improper in their doing so.

The foregoing discussion concerns solely the witnesses whose testimony the OIC had compelling reason to believe was false. There are, of course, a host of other matters raised in the materials I provided the Attorney General. These include, for example, the OIC's crafting of an indictment containing inferences or explicit statements that an immunized witness had specifically contradicted or that OIC attorneys had other reasons to know were false; the OIC's withholding of evidence indicating that those inferences or statements were false while OIC attorneys explicitly represented to the court that they were aware of no exculpatory information; the OIC's efforts to lead the courts to believe that Richard Shelby concealed his contacts with Dean from Feinberg, though OIC attorneys knew with absolute certainty that such was not the case; the OIC's efforts to lead the jury to believe that Dean had provided a copy of a post-allocation waiver to Shelby, though OIC attorneys knew with absolute certainty that someone else had provided the copy to Shelby; the OIC's efforts to lead the court to believe that there existed no documents showing Shelby's contacts with Silvio DeBartolomeis, though OIC attorneys knew with absolute certainty that such documents did exist; the OIC's efforts to lead the jury to believe certain receipts such as Government Exhibit 11o reflected meals purchased for Dean, though OIC attorneys had overwhelming reason to believe that the receipts did not apply to Dean; and the OIC's introducing into evidence Government Exhibits 20 and 43 while representing them to be things that OIC attorneys knew they were not.

Your decision to respond to my submissions in broad, and to a considerable degree inaccurate, generalities leaves open the question whether you believe that these things did not occur or

that they did occur but that they nevertheless do not constitute exceptional prosecutorial misconduct. Again, however, assuming Mr. Keeney and Mr. Wilson recognize their individual responsibilities to consider allegations concerning the fitness of their subordinates to continue to serve as attorneys for the United States Government, it would be very useful if you could be more forthcoming to Mr. Keeney and Mr. Wilson as to the rationales underlying your conclusions than you have been in your correspondence to me.

Though I have deemed it appropriate to respond in some detail to your letter, you are mistaken in interpreting my letters to Messrs. Keeney and Wilson to be a further effort to cause the Office of Professional Responsibility to reconsider its earlier decision concerning an investigation of the Office of Independent Counsel. I may nevertheless at some future date bring additional matters to your attention, in fact seeking your reconsideration of the decision not to investigate the Office of Independent Counsel as well as the recent determination of the Office of Professional Responsibility that nothing in the conduct of Bruce Swartz and Robert O'Neill while in the service of the Office of Independent Counsel suggests that they ought not hold a high position with the Department of Justice or serve as an Assistant United States Attorney. In such case, I hope you will review the additional materials carefully, in light of the information previously brought to your attention, and determine whether reconsideration of the earlier decisions is warranted.

For purposes of facilitating any further review of these issues, I think that it would be useful to describe here the additional information that has been made available to the Department subsequent to the initial submissions in December 1994 and January 1995, as well as subsequent to the Office of Professional Responsibility's reaching its initial determination on this matter on June 28, 1995. This information bears principally on the conclusion in your June 28, 1995 letter (at 2) that there was no "evidence of systemic prosecutorial abuses by the Office of Independent Counsel generally," though the final point concerns the OIC's efforts to incite racial prejudice in the trial of white defendant from a wealthy family before an entirely African-American jury.

First, as initially indicated in my November 30, 1995 letter to Mr. Keeney, and as also addressed in the second Park Towers Addendum,[3] it appear that Bruce Swartz was involved in the

[3] Enclosed are my recent letters to Independent Counsel Larry D. Thompson,

interviews in which Eli M. Feinberg stated that he was unaware of John Mitchell's involvement with the Park Towers project and the interview the following day where Richard Shelby reaffirmed that Feinberg was in fact aware of Mitchell's involvement. Thus, Bruce Swartz was undoubtedly implicated in the actions of his subordinates involving the eliciting and use of Feinberg's testimony regarding Mitchell.

Second, as discussed in the Second Cain Addendum, it appears that Independent Counsel Arlin M. Adams, and presumably Deputy Independent Counsel Bruce C. Swartz, were both involved in the decision to call Special Agent Alvin R. Cain, Jr. to contradict Dean's testimony about her call to him. Thus, if the decision to elicit from Agent Cain testimony intended to lead the jury to believe that Dean had never called him to discuss Mitchell was

---

including letters of December 5, 1995, December 21, 1995, and January 3, 1996. Attached to the December 5, 1995 letter are a Second Addendum to the Cain Appendix, a Second Addendum to the Park Towers Appendix, a Third Addendum to the Arama/Barksdale Appendix, and an Addendum to the Sankin Appendix. A Revised Second Park Towers Appendix is attached to the December 21, 1995 letter. These items have not been previously provided to the Department of Justice. Also enclosed are an Addendum to the Cain Appendix and a Second Addendum to the Barksdale Appendix. These items, which were created in September 1995 to be then provided to Mr. Thompson, are contained on the electronic versions of the Cain and Arama/Barksdale Appendixes on the diskettes provided to Mr. Keeney and Mr. Wilson on November 30, 1995, but have not been previously provided to the Department on paper. Please incorporate these materials into your file copies of the materials I originally provided the Department.

made with knowledge that Dean in fact had called Cain to ask about a check, such decision was likely made with the knowledge and approval of Arlin Adams and Bruce Swartz.

Third, as indicated in the Second Addendum to the Barksdale Appendix, at some point in time Lance H. Wilson decided to cooperate with the OIC. I believe that occurred at a time when both Arlin Adams and Bruce Swartz were still with the Office of Independent Counsel. If at that time the OIC failed to inquire of Wilson whether he had in fact contacted Barksdale about the Arama funding, that failure was presumably motivated by the OIC's fear that truthful testimony by Wilson would show that the OIC had secured a conviction on the Count involving John Mitchell based on the false testimony of Maurice Barksdale.

Fourth, as the correspondence to Independent Counsel Larry D. Thompson indicates, the matters originally raised in the materials I provided the Department of Justice have also been brought to Mr. Thompson's attention. Thus, whatever may be said concerning the Office of Independent Counsel's knowledge of the actions of its agents at earlier points in time, that Office as an institution is now fully informed concerning those actions, and is in the position now either to address those actions or to ratify them. Mr. Thompson advises that the allegations in the materials are under review and I await the outcome of that process.

Finally, at places in the material and correspondence I have discussed certain racial issues. These issues also were treated at some length in Dean's motion for a new trial. Neither pleadings filed in the Dean case nor materials previously provided by me to the Department of Justice, however, raised an issue concerning the OIC's emphasis on a claim that Dean's actions interfered with public housing authorities' efforts to engage in race-conscious affirmative action. That nevertheless is an important additional part of the picture.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: The Honorable Janet Reno
Attorney General

David Margolis, Esq.

Associate Deputy Attorney General

Enclosures

cc: The Honorable Charles R. Wilson
United States Attorney
Middle District of Florida