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December 5, 1995

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CONFIDENTIAL

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

Dear Mr. Thompson:

This letter concerns three matters. First, enclosed you will find four additional addenda to various Narrative Appendixes to the materials on prosecutorial misconduct I provided you on September 18, 1995. A second Addendum to the Cain Narrative Appendix discusses additional information regarding the roles of Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce C. Swartz in the details of the case, including the initial decision to call Supervisory Special Agent Alvin R. Cain, Jr. to contradict Deborah Gore Dean's testimony about calling him in April 1989. In particular, it discusses Associate Independent Counsel Robert E. O'Neill's statement to the court that he had met with Adams and others to discuss the case on the day preceding the calling of Cain to the stand.

A second Addendum to the Park Towers Narrative Appendix discusses the fact that Swartz and O'Neill were together involved in the interviews of Richard Shelby on May 18, 1992 (where Shelby for the second time stated that Eli M. Feinberg was aware of John Mitchell's involvement with Park Towers); the telephonic interview of Feinberg on May 18, 1992 (where Feinberg stated that he was not aware of Mitchell's involvement with Park Towers); the May 19, 1992 re-interview of Shelby (where Shelby firmly stated again that Feinberg was indeed aware of Mitchell's involvement with Park Towers and provided details of Feinberg's role in setting Mitchell's fee); the May 19, 1992 re-interview of Shelby's employer, Clarence James (where, contrary to his earlier statement, James acknowledged that he did know that Mitchell was involved with Park Towers). This Addendum also discusses certain information relevant to whether O'Neill misrepresented his intentions to the court when, on the day before Shelby testified, O'Neill responded to the court's inquiry regarding the following

day's witnesses with a description of witnesses that did not encompass Shelby.

A third Addendum to the Barksdale Narrative Appendix discusses O'Neill's efforts to cause Dean to accuse Maurice C. Barksdale of lying with regard to testimony that O'Neill had reason to believe was almost certainly false. An Addendum to the Sankin Narrative Appendix discusses the fact that O'Neill failed to correct Andrew C. Sankin's statement, known by O'Neill to be false, that Dean had asked him to contribute to F.O.O.D. for Africa. It also provides a document showing that Sankin had made his contribution in response to a request from a developer named Israel Roisman.

Second, if you have read the copies I provided you of my November 30, 1994 letters to John C. Keeney, Acting Assistant Attorney General for the Criminal Division of the Department of Justice, and The Honorable Charles R. Wilson, United States Attorney for the Middle District of Florida, you know that I have now brought to the attention of the superiors of Bruce Swartz and Robert O'Neill within the Department of Justice the same matters I brought to your attention in September. I suggested to Mr. Keeney and Mr. Wilson that the actions of Bruce Swartz and Robert O'Neill while serving as Deputy Independent Counsel and Associate Independent Counsel raise issues as to their fitness to serve as attorneys representing the United States Government.

Further, as I noted in my letter to Mr. Keeney, following its coming to my attention that the District of Columbia Bar had initiated on its own an investigation into the actions of attorneys in the Office of Independent Counsel, I also provided copies of the materials I had provided you to the District of Columbia Bar. I did that on October 31, 1995. I also provided the District of Columbia Bar copies of my correspondence with the Department of Justice and the White House Counsel, as well as my September 18, 1995 letter to you. I advised Bar Counsel Leonard H. Becker that I then intended shortly to supplement the materials I had provided you and to address with you the inaction of the Office of Independent Counsel in light of the information brought to its attention in the materials I provided. I indicated that I would bring the same matters to the attention of the District of Columbia Bar when I raised them with you. Accordingly, I am providing a copy of this letter and the enclosed materials to Mr. Becker.

Third, it has now been eleven weeks since I provided you the materials on prosecutorial misconduct in the Dean case, and I have not yet heard from you regarding any matter raised in those materials. More important, I have not heard that the Office of Independent Counsel (OIC) has taken any action to bring to the attention of the courts and the defense that certain evidence presented in the case was false and that certain representations OIC attorneys impliedly or explicitly made to the courts were also false. Thus, I think it is appropriate at this time to

express certain views regarding your obligations in this matter and the implications of any failure to discharge those obligations.

As I discuss under the headings several paragraphs below, with regard to a number of matters, the materials I provided either demonstrate beyond any doubt, or leave little room for doubt, that OIC attorneys presented evidence aimed at leading the jury and the court to believe things OIC attorneys knew or believed to be false, and that those attorneys also made implied or explicit representations to the courts that they knew to be false. With regard to some matters, at a minimum, the materials present a clear basis for believing it highly likely that OIC attorneys relied on government witnesses while believing that the witnesses' testimony was probably or certainly false. As to the matters where there are doubts as to what the full truth may be, the circumstances suggest that the OIC could readily have determined what the full truth is during the course of the last eleven weeks through interviews of individuals available to the OIC. Other matters of a similar nature can also be found within the materials.

I have suggested in various places that certain actions of OIC attorneys may constitute a conspiracy to obstruct justice, and I do not think that you will doubt that able prosecutors could find arguable crimes in the actions of OIC attorneys recorded in the materials while demonstrating much less imagination than OIC attorneys showed in pursuing the various conspiracy claims in the Dean case. In any event, however, whether the OIC attorneys previously handling the case engaged in criminal conduct, or solely in noncriminal unethical conduct, I suggest that failure of the successors to those attorneys to appropriately address that conduct implicates the successor attorneys in the conduct, and does so regardless of the motivations of the successor attorneys. With regard to documentary or testimonial evidence known or believed by OIC attorneys to be false, as well as false representations to the court, continued reliance on that evidence and those representations is effectively the re-presenting of the evidence and the restatement of the representations.

I realize that the materials I provided you are of some complexity. Apart from the time required to review the materials, some amount of time would be required for deliberation and investigation of certain matters. Nevertheless, to at all delay either in determining the truth or in bringing the truth to the attention of the court and the defense, with the intention of deriving some benefit from the delay, is not materially different from the underlying acts of misconduct that created a false record. It is understandable that, at times when the defendant is considering a petition for certiorari or the Supreme Court is considering such a petition, as well as when former OIC attorneys are responding to an ethics investigation, the OIC might prefer not having to acknowledge that, in its own view, portions of the trial record were false and actions of its attorneys in creating

that record were unethical or criminal. I trust, however, that you appreciate that such a consideration is not a legitimate basis for delay. If anything, the possibility that it might later be believed that the OIC delayed in addressing these matters in order to derive some benefit from that delay ought to provide additional incentive for addressing these matters with the utmost expedition.

Further, upon your coming to believe that a certain item of evidence presented to the court was false, it would be inappropriate to significantly delay advising the court or the defense of that fact because of a preference for addressing all matters at one time. Rather, upon your coming to believe that there exists one item of false evidence in the record, your obligation is immediately to inform the court and the defense of that fact, advising the court and the defense of your intentions regarding other matters not yet fully investigated.

You should also be mindful that it is not the role of the prosecutor to determine whether any item of false evidence may have affected the outcome and then to bring only those items to the court's attention that the prosecutor determines may have affected the outcome. It is the prosecutor's responsibility to bring to the court's attention all instances of the government's use of false evidence, and then to make to the court such arguments as the facts may warrant as to whether the evidence affected the outcome.

Under the eight headings below, I discuss certain matters as to which there is no room for doubt regarding the nature of the OIC's conduct or as to which any doubts ought to be readily resolved through interviews of individuals available to the OIC.

1. The Testimony of Supervisory Special Agent Alvin R. Cain, Jr.

The Cain Narrative Appendix should have left you with little doubt that Cain testified falsely and that OIC attorneys knew shortly after Dean filed her motion (if they did not know it earlier) that Dean had called Cain and had learned from him that the Nunn-to-Mitchell check was maintained in a HUD field office.

More likely, however, OIC attorneys knew that Cain's testimony was false at the time it was elicited in court. Further, documented actions of OIC attorneys with regard to other efforts to rely on testimony they believed was false and otherwise to lead the jury to believe things that OIC attorneys knew or believed to be false suggests that it is entirely possible that Cain testified falsely because one or more OIC attorneys either asked him to testify that he did not remember the call or otherwise approached him in a manner to cause him to indicate that he would testify that he did not remember the call, regardless of whether he did remember the call.

It is possible that this matter could be wholly resolved simply through your calling Cain into your office and, among other things, asking him to detail his discussions with OIC attorneys concerning the call both before and after the filing of Dean's motion for a new trial. The fact that Cain was not pressed about the information provided with Dean's motion--if in fact he was not pressed--would be compelling evidence that OIC attorneys believed that an interview of Cain would lead to the discovery that Cain had testified falsely and would be only slightly less compelling evidence that OIC attorneys knew that Cain's testimony was false when Associate Independent Counsel Robert E. O'Neill elicited that testimony in court. You now have had eleven weeks to conduct such an interview of Cain.

2. The Testimony of Eli M. Feinberg

The Park Towers Narrative Appendix should have left you with little doubt that when Associate Independent Counsel Paula A. Sweeney elicited Eli M. Feinberg's sworn testimony that he was not aware of John Mitchell's involvement with Park Towers, and when Associate Independent Counsel Robert E. O'Neill emphasized that testimony in closing argument and repeatedly stressed that it was not contradicted, Sweeney and O'Neill, not only believed with absolute certainty that its immunized witness Richard Shelby would have contradicted that testimony, but believed with close to absolute certainty that Feinberg's testimony was in fact false. It seems also not open to dispute that, assuming that OIC attorneys never confronted Feinberg with Shelby's statements that Feinberg was aware of Mitchell's involvement, the failure to confront Feinberg was motivated by a concern that confronting Feinberg would cause him to testify truthfully in a manner that would be less supportive of the OIC's case than the false testimony OIC attorneys believed Feinberg would give.

Any possibility that prior to his testimony Feinberg was confronted with Shelby's statements and gave OIC attorneys a reasonable basis for believing that, notwithstanding Shelby's statements, he (Feinberg) had not been told of Mitchell's involvement with Park Towers could be readily resolved through a call to Feinberg. You now have had eleven weeks to make such an inquiry.

I have already noted more generally that the government's obligation to advise the court of situations where its attorneys presented evidence they believed to be false does not turn on whether the government believes that the testimony might have affected the outcome. With regard to matters related to Park Towers, in particular, the fact that the court of appeals found insufficient evidence to sustain a conviction as to that project would not in any event relieve the OIC of its obligation to reveal false evidence regarding that project. Further, some of Robert O'Neill's most inflammatory rhetoric in both his opening and closing arguments was directed to the Park Towers project.

Thus, the impact of the false evidence related to that project goes far beyond the specific charge concerning the project.

3. The Testimony of Maurice C. Barksdale

The Arama Narrative Appendix should have left you without any doubt whatever that OIC counsel believed that Maurice C. Barksdale's testimony that he did not remember Lance H. Wilson's contacting him about Arama was false. You should also have no doubt whatever that the sole reason OIC attorneys failed to confront Barksdale with the information on the Mitchell telephone messages was the concern that it would cause Barksdale to acknowledge that Wilson had spoken to him on the matter and possibly that he (Barksdale) had caused the funding at Wilson's behest without involvement of Dean. In any case, you can readily determine the truth of whether Wilson contacted Barksdale through an interview of Wilson, who is now a cooperating witness. You can probably also find the truth from Barksdale. As with other matters noted above, you now have had eleven weeks to make such inquiries.

4. The Park Towers Post-Allocation Waiver

The Park Towers Narrative Appendix should have left you with no doubt whatever that, contrary to the implication in the OIC's chart used in closing argument, Dean did not provide Shelby a copy of the post-allocation waiver at the end of April 1986. In this regard, I should note that the OIC represented to the district court that it had not been the OIC's intention to lead the jury to believe that a Rapid Reply Letter had been provided to Shelby by Dean in November 1985. I suggest that it would be clear to any reasonable observer that this representation to the court was false. It would also be clear to any reasonable observer that a representation that the OIC had not sought to cause the jury to infer that Dean had provided Shelby a copy of the post-allocation waiver would be a false representation as well. Thus, I suggest that you have an obligation, not only to advise the court that the OIC sought to lead the jury to believe that Dean had provided Shelby the copy of the waiver while knowing with absolute certainty that Dean had not provided Shelby a copy of the waiver, but also to advise the court that the OIC's earlier representation regarding the Rapid Reply Letter was false.

5. "The Contact at HUD"

As noted in the Park Towers Narrative Appendix, the OIC acknowledged that it intended to lead the jury to believe that the conspiratorial reference to "the contact at HUD" in Martin Fine's July 31, 1985 memorandum was a reference to Dean, notwithstanding that its immunized witness Richard Shelby had told OIC attorneys that the reference was to Silvio

DeBartolomeis. In the OIC's opposition to Dean's motion for a new trial, and in Deputy Independent Counsel Bruce C. Swartz's oral argument on that motion at the hearing of February 14, 1994, the OIC defended the effort to lead the jury to believe that the reference to "the contact at HUD" was a reference to Dean on the basis that there were no documents showing Shelby's contacts with DeBartolomeis. The Narrative Appendix should have left you with no doubt that at the time the OIC defended its action on that basis, Swartz and other OIC attorneys knew that in fact there were documents showing Shelby's contacts with DeBartolomeis.

6. Nunn's Annotation Regarding Mitchell

The Supplement I materials, a Narrative Appendix styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee," should have left you without any doubt whatever that, contrary to the Superseding Indictment, Louie B. Nunn did not annotate the consultant agreement regarding John Mitchell's right to one-half the consultant fee on January 25, 1984. You should also have no doubt that the annotation on the copy of the consultant agreement attached to the April 3, 1984 letter from Aristides Martinez to Louie B. Nunn (admitted into evidence as Government Exhibit 25 through the testimony of Martinez) was not made until after the letter was received by Nunn. The OIC's obligation to correct this matter is not diminished by the fact that the OIC decided not to argue that Mitchell's role and his connection with Dean were stressed with Martinez and instead to argue that Mitchell's role was concealed from Martinez.

Further, that Narrative Appendix also makes clear that, when the OIC argued that Mitchell's role in Arama was concealed from Martinez, OIC attorneys knew with absolute certainty that Mitchell's role had not been concealed from Martinez. The OIC therefore now has the obligation to reveal that its attorneys intentionally sought to mislead the court.

7. The Testimony of Thomas T. Demery

The materials in the Demery Narrative Appendix should have left you without any doubt whatever that Robert O'Neill knew with absolute certainty that Thomas T. Demery lied when Demery testified under oath that he had not previously lied under oath when testifying before Congress. You also should have no doubt that the OIC's implied representations in the district court and the court of appeals that trial counsel was not aware that Demery's statement was false were false representations. The fact that the district court did not believe such representation does not relieve the OIC of the obligation to acknowledge that it was false.

Further, while testifying as the government's cooperating witness, Demery apparently felt that he could with impunity falsely deny having lied to Congress, notwithstanding his having

four months earlier confessed to OIC attorneys that he had lied to Congress. It thus seems likely that Demery testified as he did because he had been led by OIC attorneys to believe that he could, or should, testify falsely if asked on cross-examination whether he had previously lied to Congress. This is a matter that you have had ample time to resolve through an interview of Demery, who remains subject to his agreement to cooperate with the government.

8. Sankin's Contribution to F.O.O.D. for Africa

The Sankin Narrative Appendix should have left you without any doubt that, contrary to the testimony of Andrew C. Sankin, Dean did not request that Sankin contribute to the charity called F.O.O.D. for Africa, and that O'Neill knew that Dean had not solicited the contribution when he allowed Sankin's testimony to go uncorrected.

I brought these materials initially to your attention because of your role as Independent Counsel and supervising official on the case. Each attorney of record on the case, however, has the same obligations as you with respect to investigating allegations that their predecessors presented false evidence or made false representation to the court, and with respect to revealing to the court and the defense all instances where such allegations are substantiated. Accordingly, in light of your apparent inaction to date and the absence of an assurance from you that the matters raised in the materials are being conscientiously investigated, I am providing a copy of this letter, along with a copy of my earlier letter to you, to Deputy Independent Counsel Dianne J. Smith, whom I understand now to be lead counsel in the case. I realize Ms. Smith may already be fully informed concerning these matters. It is nevertheless desirable that pertinent information be brought directly to the attention of each person having an obligation concerning a matter of this nature.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Enclosures

cc: Dianne J. Smith
Deputy Independent Counsel