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

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Larry D. Thompson, Esq.
Independent Counsel
Office of Independent Counsel
444 North Capitol Street
Suite 519
Washington, D.C. 20001

Re: United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.)

Dear Mr. Thompson:

In recent correspondence to you I have given considerable attention to actions of Independent Counsel attorneys concerning the testimony of former Assistant Secretary for Housing-Federal Housing Commissioner Thomas T. Demery. I have also addressed the matter in my June 10, 1997 letter to Claudia J. Flynn, a former Associate Independent Counsel who is now the Chief of Staff in the Office of the Assistant Attorney General for the Criminal Division of the Department of Justice (at 7), in my July 23, 1997 letter to Associate Independent Counsel Michael A. Sullivan (at 5), and in my July 29, 1997 letter to the Independent Counsel's retained outside counsel, Mark J. Hulkower of the firm of Steptoe & Johnson, L.L.P. (at 7-8).

In this correspondence I have maintained that Independent Counsel attorneys violated 18 U.S.C. § 1001 by deceiving the courts in this and another case with regard to whether Demery falsely testified in this case that he had never lied to Congress. In my letter to you dated March 26, 1997 (at 15 n. 12), with regard to the arguments Independent Counsel attorneys had previously advanced in the district court concerning why neither Demery nor trial counsel recognized that Demery's repeated and unequivocal denials that he had ever lied to Congress were false, I made the seemingly remarkable suggestion that it was unlikely that you had ever seen "a balder effort to deceive a court, not in document filed by the government, but in a document filed by any litigant, represented or unrepresented by counsel," only to observe two months later, in my letter to you dated May 26, 1997 (at 4, 10), that your own efforts to deceive

the United States Supreme Court concerning the same subject were of a comparable baldness.

I have also observed that it is difficult to believe that Demery would repeatedly deny ever having lied to Congress notwithstanding his having several months earlier admitted to Independent Counsel attorneys that he had lied to Congress at least a dozen times unless Independent Counsel attorneys told him that if he would adamantly deny ever having lied to Congress, the Independent Counsel would tell the court in Demery's own case that he had given completely truthful testimony in this case. And I have asserted that when you proceeded to advise the presiding Judge in Demery's own case, the Honorable Stanley S. Harris, that Demery had given completely truthful testimony in this case, while failing to advise Judge Harris either that a question had been raised as to whether Demery committed perjury in this case or that the court had essentially found that Demery did commit perjury in this case, you and other Independent Counsel attorneys violated 18 U.S.C. § 1001. I have also suggested that you made this false representation to Judge Harris apparently with full knowledge of high-ranking officials of the Department of Justice, who had been repeatedly warned that Independent Counsel attorneys would attempt to deceive the court in Demery's case.

I think you understand that, assuming the facts are as I have suggested they are, including even that Independent Counsel attorneys instructed Demery to lie in this case while assuring him that they would tell the court in Demery's own case that he had given completely truthful testimony, there still would be more serious prosecutorial abuses that you eventually will have to justify. Nevertheless, regardless of what Independent Counsel attorneys said to Demery before he testified, the documented actions of Independent Counsel attorneys following Demery's testimony reflect a contemptuousness of the court and the legal process generally that most people would consider extraordinary, leave aside that here such actions were taken under the direct supervision of a former court of appeals judge and a former United States Attorney.

For that reason, and simply because of the general severity of the allegations I have made and will continue to make concerning this matter, I thought it would be useful to out set the relevant facts in greater detail than I have done previously, and, in doing so, to distinguish between the various representations the Independent Counsel made before I brought this matter to the attention of the Department of Justice and to your own attention and the representations the Independent Counsel made thereafter.

In this instance let me note in advance that, as I have repeatedly observed in past correspondence, if in the discussion that follows I have misstated or misinterpreted any of the actions I describe, or if there exist facts that would cause the actions of Independent Counsel attorneys or Department of Justice officials to be perceived in a less malevolent light than I portray them, I would welcome your so advising me. Let me also make again the request in my letter of May 26, 1997 (at 11), that you state whether when you represented to Judge Harris that Demery had given completely truthful testimony, and thereby secured for Demery a downward departure from sentencing level provided by the United States Sentencing Guidelines that allowed him to avoid a prison sentence, you did so with the knowledge of officials of the Department of Justice and whether officials of the Department of Justice discussed with you the allegations in the materials I provided the Department concerning this matter prior to your making your representation to Judge Harris.[1]

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[1] Please also consider still to be outstanding the questions that I posed to you in my letter of July 3, 1997, including the following two questions:

9. Do you deny that in a motion pursuant to 18 U.S.C. § 3553(e) and § 5K1.1 of the United States Sentencing Guidelines in the case of United

A. General Background

States of America v. Thomas T. Demery, Crim. No. 92-227-SSH (D.D.C), you represented to the Honorable Stanley S. Harris that Thomas T. Demery had given completely truthful testimony in this case? Do you deny that that representation was known by you to be patently false when made? Do you maintain that if the representation was false, you did not violate 18 U.S.C. § 1001 or other federal laws by making it?.

10. Do you deny that either you have refused to attempt to learn whether Thomas T. Demery was instructed by Independent Counsel attorneys to deny that he had ever lied to Congress or you have known or assumed for some time that Thomas T. Demery was instructed by Independent Counsel attorneys to deny that he had ever lied to Congress?

A crucial issue concerning Counts Three and Four of the Superseding Indictment in this case involved whether it was Deborah Gore Dean or Assistant Secretary for Housing Thomas T. Demery who had been responsible for the decision to allocate 203 moderate rehabilitation units to Dade County, Florida in a moderate rehabilitation selection committee meeting on April 7, 1987. That allocation would go to support two projects (Springwood and Cutlerwood) supported by Louis F. Kitchin, who was alleged to be a co-conspirator with Dean in Count Three and who was alleged to have given Dean a gratuity in Counts Three and Four. Though there were three projects at issue in Counts Three and Four, the April 1987 funding decision was the most important, since it occurred very close in time to Kitchin's providing Dean a check for $4,000.

There existed considerable evidence in Independent Counsel files indicating that Demery was responsible for the allocation. It was undisputed that Demery spoke on behalf of the Dade County allocation at the selection committee meeting, as Demery would himself acknowledge. Former HUD General Counsel, J. Michael Dorsey, who sat on the selection committee with Dean and Demery, would also testify for the defense that Demery had spoken on behalf of the allocation, and that Demery defended the allocation when Dorsey questioned it. Dorsey would also testify that he did not remember Dean's saying anything about the allocation. Tr. 3176-77. Presumably, the Independent Counsel had reason to anticipate this testimony, since its attorneys had interviewed Dorsey a number of times.[2]

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[2] Testifying before Congress, Demery also had repeatedly indicated he had commonly supported moderate rehabilitation allocations for Dade County for what he maintained were legitimate reasons. Abuses, Favoritism, and Mismanagement in HUD Programs, Hearings Before the Employment and Housing Subcommittee of the Committee on Government Operations of the House of Representatives, 101st Cong.,

1st Sess. (Lantos Hearings), Pt. 1, at 58; HUD Investigation, Hearings Before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs of the House of Representatives, 101st Cong., 1st Sess. (Banking Hearings) at 82, 92.

Dade County's letter request for the 203 units, which was introduced into evidence by the Independent Counsel as Government Exhibit 198, was from Demery's files.[3] The document, a February 13, 1987 request for 203 units, bore the word "Funded," in Demery's handwriting, and also bore the words "Lou + file" near the top. Attachment 1.[4] On June 23, 1987, after an issue had arisen concerning Dade County's use of the units, Abbie Wiest, a special assistant in the Office of Multifamily Housing, had sent a memorandum to Demery concerning the matter, and in the memorandum noted that the 203 unit allocation was for Lou Kitchin. Attachment 2. On July 16, 1987, when Dade County decided to award the 203 units to Jim Mitchell, the developer represented by Kitchin, a Dade County memorandum stated that the HUD area office had indicated that the units should go to Jim Mitchell. Attachment 3.

There was also strong evidence that Kitchin had approached Demery about the request. The proposal of the developer represented by Kitchin had been submitted to the Dade County housing authority at 10:00 a.m. on January 27, 1987. Attachment

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[3] That the letter was from Demery's files is reflected by the fact that when it was produced as Government Exhibit 518 with the Independent Counsel's exhibits on the initial indictment, the document bore the microfiche prefix CA119, a prefix that appeared on documents from Demery's files.

[4] This letter, which gave the bedroom configurations for the 203-unit request, would be referenced in a handwritten list
prepared by Dean, which she said she prepared as Demery read off the list of allocations he was recommending. Tr. 2572-80. In closing argument, Associate Independent Counsel Robert E. O'Neill would discuss this list, and the reference to the letter, in pressing the theme that the local housing authorities were cut out of the process, preventing them from providing opportunities to black developers. O'Neill stated:

> In her own handwriting she had the bedroom configurations and the number of bedrooms, and then it says "letter.["] They are funding 203 units to Metro-Dade before Metro-Dade even asks for them.[ ] Is that the way the program was supposed to operate? Is that the way it's supposed to run?

Tr. 3514-15. This statement was patently false, however. As indicated, Dade County had requested the units, in the exact bedroom configuration on Dean's list, almost two months before the selection committee meeting.

4 (fourth entry). On January 28, 1987, Kitchin's office called Demery asking if Kitchin could meet with Demery the following day. Attachment 5. Demery's calendar indicates that the meeting, described as a "courtesy call," did take place on January 29, 1987. Attachment 6.[5] In addition, Kitchin, who testified that he had talked to Dean about the request, testified that he would also have talked to whoever was in Demery's position about the matter. Tr. 1437-38.

It was clear that at some point during 1987, Demery was assisting Kitchin with regard to a variety of HUD matters including moderate rehabilitation allocations. Demery had matched Kitchin's name with a 52-unit Mobile, Alabama moderate rehabilitation allocation selected in November 1987 (Attachment 7), and had matched Kitchin's name with two moderate rehabilitation requests pending in November 1987. Attachment 8. Kitchin, listed as "Lou," would eventually appear as one of twenty names on Demery's wallet-sized listing of frequently called numbers, along with various other of the individuals who had benefited from Demery's decisions on moderate rehabilitation and other HUD programs. Attachment 9. Demery would testify that he had funded moderate rehabilitation requests for Kitchin whose support Demery had sought in an effort to be appointed Secretary of HUD. Tr. 1911-12.

[5] Dean's calendars indicate that Kitchin also met with her that day.

There was also considerable evidence that Demery had improperly assisted Kitchin with regard to certain Title X loans, including a loan on a project called Cumberland II.[6] In August 1988, a HUD Inspector General's Hotline complaint alleging that it was common knowledge that Demery accepted gratuities specifically mentioned Kitchin's name (though the Independent Counsel redacted Kitchin's name from the document provided in discovery summarizing the investigation of that allegations).[7]

Despite this evidence of Demery's involvement with the 203-unit allocation and his connection with Kitchin, the Independent Counsel intended to elicit testimony from Demery that, while he had formally presented the allocation at the selection committee meeting, he had not known the identity of the consultant involved with the allocation (though he added that it was possible that Dean had told him but he just did not remember). Most significantly, the Independent Counsel intended to elicit that the request was brought to Demery's attention by Dean. The Independent Counsel waited until Demery's redirect examination to elicit testimony on this matter, thus closing its case-in-chief with Demery's response that Dean had brought the Dade County request to his attention. Tr. 1939-40.

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[6] The Memorandum in Support of Dean's recent Motion for a New Trial (at 99-100) describes how the HUD audit concerning that project was not provided during discovery or as Giglio on Kitchin or Demery. The Memorandum also describes how Kitchin's name was redacted from a summary of a HUD I.G./F.B.I. investigation of Cumberland II provided during discovery and how the entire reference to that investigation was eliminated from a document provided as Giglio on Demery.

[7] See Memorandum in Support of Dean's recent Motion for a New Trial at 102-03.

Apparently, the Independent Counsel did not confront Demery with Kitchin's testimony that he (Kitchin) would have talked to Demery about the request or with the fact that Kitchin met with him the day after the developer submitted his proposal to Dade County.[8] Nor did the Independent Counsel confront Demery with the letter request from Demery's files bearing the notation "Lou and file."[9]

As you know, the Independent Counsel's failure to confront Demery with information suggesting that his contemplated testimony was false was consistent with the practice of Independent Counsel attorneys, reflected in their actions with regard to Maurice L. Barksdale and Eli M. Feinberg, to refuse to confront government witnesses with information indicating that the witnesses' expected testimony was false. I have repeatedly stated to you that the evident reason for such refusals was that Independent Counsel attorneys preferred to elicit perjured testimony that would support their case rather than confront government witnesses with information that would cause the witnesses to tell the truth. I doubt that you could persuade a living soul that such was not the reason why Independent Counsel attorneys acted in this matter with regard to Barksdale, Feinberg, or Demery.

In any event, Demery's credibility was a crucial issue with regard to who was responsible for the Dade County allocation. Demery's credibility was highly suspect, however, among other reasons, because he had lied to Congress more than thirty times

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[8] Notwithstanding the calendar entry indicating that he had met with Kitchin in January 1987, Demery would testify on cross-examination that he did not even meet Kitchin until the Spring of 1987. Tr. 1925, 1932-34.

[9] This was made clear in Demery's cross-examination. Tr. 1922-23.

when testifying before two House subcommittees on three occasions in 1989 and 1990. Appendix D contains a listing of 36 statements Demery made to Congress with an explanation of the evidence demonstrating that the testimony was false.[10]

The Independent Counsel indicted Demery on two counts of perjury for statements before the two subcommittees in which he denied that he was aware that Philip Winn and Philip Abrams, principals in the so-called "Winn Group," were involved in the moderate rehabilitation program. In interviews during the course of, and following, his reaching a plea agreement that did not include a perjury charge, Demery confessed that the statements underlying his perjury charges were false. In those interviews Demery also made statements indicating that numerous of his other statements before Congress were false. Including the statements Demery made in these interviews, the Independent Counsel had a basis for knowing that Demery committed perjury dozens of times when he testified before Congress.

Demery's plea agreement required that he testify truthfully in other proceedings, and, given the agreed-upon total offense level in the plea agreement, a failure to comply with the agreement to testify truthfully would mean that Demery would have to serve some amount of time in prison. Nevertheless, during cross-examination, while testifying as the Independent Counsel's final witness in it case-in-chief, Demery repeatedly and unequivocally denied ever having lied to Congress. It is almost impossible to believe that a rational person in Demery's position would have provided these responses if he had not been told by Independent Counsel attorneys that he should deny ever having lied to Congress and that, if he did deny having ever lied to Congress, those attorneys would not regard such denials as false. In any case, following these denials, trial counsel made no attempt to correct Demery's false denials that he had ever lied to Congress. Instead, trial counsel proceeded to elicit Demery's most important testimony on redirect.

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[10] The 36 statements in Appendix D are largely comprised of instances where the falsity of Demery's statements could probably be proven beyond a reasonable doubt, at least when considered together.

When this matter was raised in support of Dean's motion for a new trial, the Independent Counsel was obligated to investigate whether Demery had lied and whether its attorneys knew that Demery had lied and to truthfully advise the court of the results of its investigation. Rather than fulfilling that obligation, however, the Independent Counsel impliedly represented to the district court, the court of appeals, and the Supreme Court that neither Demery nor trial counsel recognized that Demery's responses that he had never lied to Congress were false. Thereafter, in seeking a downward departure from the Sentencing Guidelines range in Demery's own case, the Independent Counsel impliedly represented to the court in that case that Demery had testified truthfully in the Dean case. In doing so, the Independent Counsel did not alert the judge in that case either that a question had been raised concerning whether Demery had testified truthfully in the Dean case or that the district court in the Dean case had essentially found that Demery had testified falsely by denying he had ever lied to Congress.

B. Background to Thomas T. Demery's Denials That He Had Ever Lied to Congress

As I have noted in a number of places, the arguments the Independent Counsel advanced in the district court as to why neither Demery nor trial counsel understood that Demery's responses were false were preposterous by any standard. Demonstrating just how preposterous were these arguments--and how false were the Independent Counsel's implied representations concerning the understandings of Demery and its trial counsel--requires that the background to Demery's denials that he ever lied to Congress be presented in some detail. In particular, the pages that follow present the background for appraising the Independent Counsel's claim that, because defense counsel introduced his questioning of Demery by a reference to testimony concerning the HUD Inspector General's allegations, and that those allegations "touched on Demery's relationship regarding Winn and Abrams only peripherally," neither Demery nor trial counsel recognized that Demery's repeated denials that he had ever lied to Congress were false.

Though I will show that this statement was false, and not the only false statement that the Independent Counsel made in seeking to deceive the court on this matter, one ought not to lose sight of the fact that, even if this statement were true, the conclusion still would be inescapable that Independent

Counsel attorneys attempted to deceive the court concerning Demery's knowledge, and the knowledge of Independent Counsel attorneys, that Demery's repeated denials that he had ever lied to Congress.

1. Thomas T. Demery's False Statements to Congress

The Inspector General's Report on HUD's moderate rehabilitation program contained the name of former Assistant Secretary for Housing-Federal Housing Commissioner Thomas T. Demery on its cover. Demery, who would testify three times concerning the Inspector General's allegations before two House subcommittees,[11] was the first HUD official involved with the moderate rehabilitation program to testify before Congress. Demery immediately complained that his name appeared on the front cover of the report and that the report barely mentioned Dean, who had been HUD Secretary Samuel R. Pierce, Jr.'s Executive Assistant for a much longer period covered in the Inspector General's Report than Demery had been the Assistant Secretary for Housing. Lantos Hearings, Pt. 1, at 52-53. Eventually, Demery would persuade the Committee on Government Operation that the Inspector General should not have singled out Demery on the cover of the report while "[k]ey players such as Secretary Pierce and Deborah Gore Dean were only briefly mentioned in the Inspector General's Report." Gov. Op. Final Report at 5.[12] In the course of making his case that he had been unfairly singled out in the report, however, Demery many numerous false statements to both of the subcommittees before which he testified under oath.

Many of the false statements Demery made to Congress involved general denials of knowledge of the identity of developers and consultants benefiting from his moderate rehabilitation funding decisions; denials of knowledge that former HUD employees, including Philip Abrams, Philip Winn, and

[11] These are the Employment and Housing Subcommittee of the Committee on Government Operations, chaired by Congressman Tom Lantos (Lantos Subcommittee), before which Demery testified on May 8, 1989, and May 23, 1990, and the Subcommittee on Housing and Community Development of the Committee on Banking and Urban Affairs, chaired by Congressman Henry B. Gonzalez (Banking Committee), before which Demery testified on May 11, 1989.

[12] Abuse and Mismanagement of at HUD, Twenty-Fourth Report by the Committee on Governmental Operations, 101st Cong., 2d Sess., House Report 101-977.

Lance Wilson (another member the Winn Group) were benefiting from his decisions or had spoken to him about moderate rehabilitation funding requests; and denials of even knowing that Philip Abrams and Philip Winn were involved in the moderate rehabilitation business. In fact, however, Demery kept lists matching moderate rehabilitation requests with consultants or developers who were supporting them, including former HUD employees Winn and Wilson. Winn and Wilson had both spoken to Demery about moderate rehabilitation funding requests, including ones for Casper, Wyoming, Richland, Washington, and Victoria, Texas, all of which were funded and two of which received considerable attention in the HUD Inspector General's Report.[13]

[13] The list concerning Casper, Richland, and Victoria, Attachment 8 hereto, is also be found in the Lantos Hearings, Pt. 5, at 339-40. Though the Final Report of the Government Operations Committee would report that Demery told Lantos Subcommittee staff that Wilson never discussed the Casper project with him (Gov. Op. Final Report at 98), under oath Demery in fact twice acknowledged to the Lantos Subcommittee itself that Wilson had spoken to him about the project. Lantos Hearings, Pt. 5, at 364, 400. Though Demery would deny to the subcommittee that Winn spoke to him personally about the projects in Richland and Victoria (id. at 400), as explained infra, Demery would later acknowledge that the statement was false.

A number of Demery's false statements also concerned his lack of knowledge of contributors to a charity he had helped to organize called F.O.O.D. for Africa. The Winn Group had been major supporters of F.O.O.D. for Africa. Wilson had been the principal organizer of a fundraiser in New York on March 12, 1987, and, along with Winn and Abrams and several other persons, had sponsored a fundraiser in Washington, D.C. on October 19, 1987. Winn Group member J. Michael Queenan organized a fundraiser in Denver on April 28, 1988. Winn Group members, along with affiliated entities solicited by the Winn Group, contributed over $100,000 to F.O.O.D.: Wilson $14,250 (including $10,000 he solicited from his employer, Paine Webber); Queenan $36,000; Winn $6500, Abrams $1500, Raymond Baker (including Gold Crown Foundation) $5,000, Robert Silvestri $2,000, Ronnie Mahon $2,000, Miede & Sons $10,000, and Benton Mortgage and its officers $24,200.[14] A front-page article in the Sunday

[14] The following are the contributions: Lance Wilson: $1250 6/6/87, $1000 10/87, $2000 4/22/88 (Banking Hearings at 1089, 1194); Paine Webber $5000 4/21/87, $5000 11/25/87 (id. 1198, 1095); Philip Winn: $5,000 3/4/87, $500 10/87, $1,000 4/4/88 (id. 1089, 1194); Philip Abrams: $500 10/87 (id.), $1000 4/5/88 (id. 1089,1198); J. Michael Queenan: $1000 10/6/87 $35,000 4/28/88 (id. 1187, 1188); Ronnie Mahon: $1000 10/6/87, $1000 4/25/88 (id. 1186, 1192, 1198); Robert Silvestri: $1000 10/2/87, $1,000 2/23/88 (id. 1187, 1198); Raymond T. Baker, including Gold Crown Foundation: $2000 11/13/87, $3000 5/11/88 (id. 1190,
1196) Benton Mortgage Co., including officers Joe Hawkins and Thomas Ford: $2500 3/31/87, $2500 4/24/87, $200 6/4/87 $1,000 10/9/87, $1000 10/23/87, $5000 3/21/88,

Washington Post concerning Demery's apparent favoring of F.O.O.D. contributors was devoted almost entirely to the discussion of the Winn Group an affiliated entity.[15]

Among Demery's denials that he was aware of the identity of F.O.O.D. contributors was the following statement made at the beginning of his first day of testimony:

> Mr. Chairman, the only statement I do want to make is I want to state without a shadow of a doubt that not only was there no quid pro quo, until the Inspector General's report came out, I did not know who contributed what to F.O.O.D. for Africa.

Lantos Hearings, Pt. 1, at 56. See also id. at 62; id., Pt.5, at 368, 375; Banking Hearings at 102.

In fact, however, Demery did know the identity of many contributors to F.O.O.D. and the amounts they contributed. Silvio DeBartolomeis told Independent Counsel attorneys that on one occasion he delivered F.O.O.D. checks from Winn and Abrams to Demery, specifically showing him the amounts. As discussed below, Demery himself would eventually acknowledge that he had been handed an envelope with the contributions from the Denver fundraiser and was shown the $35,000 check from Queenan. See Appendix D, Item A.5.

Demery also apparently accepted a Paine Webber check for $5,000 from Lance Wilson at dinner on April 21, 1988. Banking Hearings at 1186; Lantos Hearings, Pt. 4, at 257, Pt. 5, at 412-13. Two days later, Demery approved a waiver on a New York Apartment Building called the Colorado, for which Wilson would

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$5000 4/11/88, $7000 5/5/88 (id. 1077-78 1084-86, 1191-92); Miede & Sons: $10,000 4/26/88 (id. 1189).

[15] Anderson, J. W., "Developers Contributed to HUD Official's Charity," The Washington Post, July 9, 1989, p. A1.

receive $25,000. Lantos Hearings, Pt. 5, at 377-82; Gov. Op. Final Report at 105. It would be in connection with another Paine Webber $5000 contribution secured by Wilson that Demery would make one of his statements that he did not know who contributed to F.O.O.D. for Africa or how much they contributed until he read the Inspector General's Report. Lantos Hearings, Pt. 5, at 368. See Appendix D, Item C.7.

2. The Significance of the Winn Group in the HUD Inspector General's Investigation and the Hearings Before Congress

The HUD Inspector General's investigation of the moderate rehabilitation program appears to have been prompted in significant part by concerns over the Winn Group's influence at HUD. The investigation had been initiated in early 1988 by HUD Investigator Agent Alvin R. Cain, Jr. The first interview recorded in the Inspector General's Report (conducted by Agent Cain and HUD-OIG Auditor Jose Aguirre on March 9, 1988) involved the Winn Group's approaching the housing authority in Richland, Washington, indicating that the authority could secure moderate rehabilitation funding. Banking Hearings at 966-68. Two days later, Cain and Aguirre interviewed a housing official in Clark County, Nevada, concerning Winn Group projects there. Id. at 944-45. On April 4, 1988, a confidential source told a HUD IG agent that Winn Group members were "getting an unlimited number of moderate rehabilitation units for their use." Id. at 990. On April 12, 1988, an official of the Salt Lake County Housing Authority told Aguirre that on March 30, 1988, Queenan had provided him a copy of Demery's March 25, 1988 memorandum relating to the new moderate rehabilitation selection procedures and had encouraged him to submit an application. Id. at 911. Also, on April 12, a confidential source told Aguirre in a telephone interview that Queenan had similarly approached a housing official in Santa Cruz, California (id. 1039). In an interview on April 24, 1988, the same source told an IG agent that Queenan had told the Santa Cruz official that if the official dealt with Queenan's developer, the Santa Cruz housing authority could secure moderate rehabilitation units. Id. at 1040.[16]

[16] During the same period, Agent Cain was conducting interviews concerning projects in Dade County not involving the Winn Group. See Banking Hearings at 766 (Mar. 23, 1988), 768 (Apr. 13, 1988), 778 (Apr. 6, 1988), 782 (Apr. 13, 1988), 785 (Apr. 15, 1988).

On April 26, 1988, Cain interviewed Demery's Executive Assistant Christine Oliver regarding the Winn Group. Id. at 1050. Demery would then be interviewed for the first time on May 2, 1988. This was the first business day after Demery had returned from the April 28, 1988 F.O.O.D. for Africa fundraiser in Denver, Colorado, organized by Queenan, and at which Winn Group members and associated entities contributed over $50,000 (Queenan $35,000, Wilson $2000, Winn $1000, Abrams $1000, Raymond Baker $3000, Ronnie Mahon $1000, Benton Mortgage $5000, Meide & Sons $10,000). In the interview, Demery was questioned intensively about his contacts with the Winn Group concerning the Richland, Washington funding and other matters. It was on this occasion that Demery first denied that he knew Winn and Abrams were in the moderate rehabilitation business and first falsely stated that he paid $500 for rental of a condominium in Vail, Colorado (id. at 1042-44), a statement that led to the creation of a false receipt that would be a subject of Demery's Superseding Indictment and plea agreement.

In the months following the May 2, 1988 interview of Demery, the investigation continued to give considerable attention to the Winn Group. Id. at 850-52, 860-68, 901, 905-07, 910-14, 937-57, 963-75, 1008, 1033, 1039-44, 1077-81, 1083-84, 1087, 1089, 1092-95, 1142-63. In the introduction to the Inspector General's Report, Winn Group members were discussed with regard to four of HUD's ten regions, and with regard to three of those regions only Winn Group projects were discussed. Banking Hearings at 570-76. In the listing of former HUD officials and employees who had benefited as moderate rehabilitation developers or consultants, Winn, Abrams, and Wilson were at the top of the list, and, in all, five of the eleven listed persons were Winn Group members. Id. at 576.

From the outset of the release of the Inspector General's Report, the press coverage gave considerable attention to the Winn Group.[17] Of the six persons on the list of former HUD

[17] See Ifil, G., Mariano, A., "HUD Program Beneficiaries Revealed," Washington Post, Apr. 28, 1989, p. A17; Ifil, G., "Insiders Were Key to Using HUD Housing Fund," Washington Post, May 8, 1989, p. A1; Ifil, G., "Lawmakers Condemn 'Influence Peddling' at HUD," Washington Post, May 9, 1989, p. A9; Ifil, G., "HUD Moved Fast on Carmen Project," Washington Post, June 22, 1989, p. A1; Ifil, G., Vobejda, B., "HUD Ex-Officials Tell of Work as Consultants," Washington Post, June 23, 1989, p. A14; Ifil, G., Spolar C., "HUD Documents Shed Light on Deal-Making in Program," Washington Post, June 28, 1989, p. A9; Anderson, J. W., "Developers Contributed to HUD Official's

officials who had become developers and consultant who would be asked to testify, four (Winn, Abrams, Wilson, and Queenan) were Winn Group members. Winn (Lantos Hearings, Pt. 2, at 308-42), Abrams (id. at 24-308), and Queenan (id., Pt. 4, at 541-606) each did testify, and Wilson appeared but refused to testify. Id., Pt. 4, at 85-139.[18] Winn Group employee Silvio DeBartolomeis also testified. Id., Pt. 1, at 411-52. The large share of available moderate rehabilitation units received by the Winn group during periods that were being investigated, including one-sixth of the units available in one year during Demery's tenure (id., Pt. 2, at 329) received considerable attention during the hearings. Lantos Hearings, Pt. 2, at 283-4, 306-08, 329, Pt. 4, at 538.[19]

Demery was questioned about his contacts with the Winn Group both before and after the disclosure, in October 1989, of his listing that matched moderate rehabilitation requests with Winn

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Charity," The Washington Post, July 9, 1989, p. A1; Waldman, S., Cohn, B, Thomas, R., "The HUD Ripoff," Newsweek, Aug. 7, 1989, p. 16; Ifil, G., "GSA Ex-Chief's Development Approved Before Submission," Washington Post, Oct. 14, 1989, p. A2.

[18] Wilson's employer, Paine-Webber, was required to give extensive testimony about Wilson's activities. Id., at 188-275.

[19] The day after Winn and Abrams testified, the Washington Post reported that the 1,347 units they received between 1984 and 1988 constituted 5 percent of all units allocated nationwide. Ifil, G., Vobejda, B., "HUD Ex-Officials Tell of Work as Consultants," Washington Post, June 23, 1989, p. A14

and Wilson, which questioning led to his denials that he was even aware that Winn and Abrams were involved in the moderate rehabilitation program. The Winn Group, as well as Demery's denial that he was aware that Winn and Abrams were involved in the moderate rehabilitation program, received special attention in the Government Operations Committee's Final Report. Gov. Op. Final Report at 88, 93-105.

3. Thomas T. Demery's Superseding Indictment

On December 4, 1992, a Superseding Indictment was issued charging Demery with 24 felony counts. Counts Fifteen through Twenty-four related to the Winn Group; moderate rehabilitation decisions Demery made for the Winn Group; the free use of a condominium provided to Demery by Philip Winn because of official acts in connection with Winn's requests for moderate rehabilitation funding; the creation of a false receipt to conceal the free use of the condominium and the providing of that false receipt to the grand jury; and false statements made to HUD Inspector General investigators, Congress, and the Independent Counsel concerning Demery's knowledge that the Winn Group was involved in moderate rehabilitation program projects.

Count Twenty-one charged Demery with violating 18 U.S.C. § 1001 by falsely stating to agents of the HUD Inspector General's Office on May 2, 1988, that he did not know that the Winn Group was involved in the moderate rehabilitation program. Counts Twenty-two and Twenty-three alleged that Demery committed perjury by falsely denying to a subcommittee of the House Banking Committee at a hearing on May 11, 1989, and to a subcommittee of the House Government Operations Committee at a hearing on May 23, 1990, that he knew that Philip Winn and Philip Abrams were involved in the moderate rehabilitation program. The latter two counts alleged that the false statements constituted perjury because "[i]t was material to the [subcommittees'] investigation to determine the extent to which the defendant THOMAS T. DEMERY, in his position as Assistant Secretary of Housing-Federal Housing Commission, was aware of the identity of the developers and consultants who were seeking Section 8 Moderate rehabilitation

funds." Superseding Indictment, Count 22, ¶ 74, at 64; Count 23, ¶ 78, at 65.[20]

On June 16, 1993, Demery reached a plea agreement by which he pled guilty to two felony counts, the second of which pertained to the Winn Group. Demery pled guilty to having obstructed justice by creating and providing the false receipt for the condominium to the grand jury, a count based on Count Eighteen of the Demery Superseding Indictment. Like Count Eighteen in the Superseding Indictment (and like Counts Twenty-two and Twenty-three), the Criminal Information on Count Two of the plea agreement alleged that "[i]t was material to this grand jury investigation to determine, among other matters, whether the defendant THOMAS T. DEMERY, in his position as HUD Assistant Secretary for Housing, was aware of the identity of developers and consultants who had sought or obtained Section 8 Moderate Rehabilitation program funding and whether the defendant THOMAS T. DEMERY had been influenced by those developers and consultants." Criminal Information, Count Two, ¶ 13.

[20] Pages 63 to 67 of the Demery Superseding Indictment may be found in Exhibit TT to the Dean Rule 33 Memorandum.

The plea agreement did not include a perjury charge. In an interview on June 11, 1993, however, Demery had made clear that he knew that Philip Winn was involved with the moderate rehabilitation program when he (Demery) made decisions concerning the allocation of moderate rehabilitation units to Richland, Washington, and Victoria, Texas, which he explained that Winn had spoken to him about at a breakfast meeting in September 1987. In the interview, Demery also stated that Philip Abrams had contacted him about a moderate rehabilitation request for the Colorado Housing Finance Agency. Demery also explained the circumstances involving the free use of Winn's condominium and the creation of the false receipt for that use. He also explained that when he testified before Congress he had falsely denied that he knew Winn and Abrams were involved in HUD-subsidized projects to deflect the questioning away from the discussion of the condominium Winn had allowed him to use without charge. Interview Report at 3-8.[21]

Demery's acknowledgments concerning his conversations with Winn also essentially established that he had made numerous false statements to Congress other than those for which he had been indicted. These included statements that none of a group of eleven former HUD employees identified in the Inspector General's Report as being involved in the moderate rehabilitation program as developers or consultants (including Winn, Abrams, Wilson, and two other Winn Group members) had talked to him about moderate rehabilitation funding (Lantos Hearings, Pt. 1, at 53; see Banking Hearings at 576); that he did not know whether former HUD employees were involved in the projects when he made funding decisions (Lantos Hearings, Pt. 1, at 55, 65); that no former HUD official ever improperly influenced his moderate rehabilitation decisions (Banking Hearings at 55, 362); that there was no way that favoritism could influence the process under the selection procedures in place in Spring of 1988 (before Demery caused

[21] Exhibit UU to Memorandum of Law in Support of Deborah Gore Dean's Motion for Judgment of Acquittal Pursuant F.R.Crim.P. 29(c) and (d) and Motion for New Trial Pursuant to F.R.Crim.P. 33 (Nov. 30, 1993) (Dean Rule 33 Mem.).

Victoria, Texas to be funded for Winn) (Banking Hearings at 76); that his discussions with Winn did not include the moderate rehabilitation program (Banking Hearings at 88); that the moderate rehabilitation requests he selected for funding were always the best (Banking Hearings at 100-01); that he had not spoken with Winn personally about the Richland, Washington, and Victoria, Texas moderate rehabilitation requests. Lantos Hearings, Pt. 5, at 400.

In an interview on June 17, 1993, Demery also stated that he had been handed an envelope before the Denver fundraiser and asked to look at the checks inside, including Queenan's $35,000 check (though Demery described the amount as $30,000).[22] That statement constituted an acknowledgment of several more instances of perjury (see Appendix D), though, as noted, the Independent Counsel already possessed considerable other evidence of that perjury. In all, Demery's statements to the Independent Counsel at the time of reaching his plea agreement constituted acknowledgments of having committed perjury well more than fifteen times with regard to matters involving the Winn Group.

Demery's plea agreement entailed stipulation to a total offense level of 13 for the obstruction of justice count falling under the Sentencing Guidelines, which would require a minimum sentence of one year in prison. As part of the plea agreement, Demery agreed to cooperate with the Independent Counsel in the prosecution of other individuals, including "testifying completely and truthfully before any federal grand jury or at any trial or other proceeding." The agreement further provided that if the Office of Independent Counsel "determines, in its sole discretion, that the defendant has rendered substantial assistance in the investigation or prosecution of others involved in criminal activities, then it will file a motion pursuant to 18 U.S.C. §3553(3) and U.S.S.G. § 5K1.1, which will so advise the Court. The Defendant understands that these provisions allow the Court to impose a sentence that departs from the guideline range established by the United States Sentencing Commission." Demery Plea Agreement at 5-6.

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[22] Interview of Thomas T. Demery at 1-2 (June 17, 1993) (Attachment C to Dean Omnibus Motion (Feb. 8, 1994)).

C. Demery's Testimony at Trial

Demery was called as the last witness in the Independent Counsel's case-in-chief. After testifying about his position at HUD, Demery testified that he had pled guilty to accepting an unlawful gratuity and to obstructing justice by producing a false receipt to the grand jury concerning the use of the condominium owned by Philip Winn. Tr. 1890-91. During his direct examination, Demery was asked no questions concerning whether he had lied under oath when he testified before Congress.

Demery did, however, make at least one statement during his direct examination that Independent Counsel attorneys had reason to know was false. Demery stated the following concerning a funding in "late October/early November" of 1986 that was an issue in Counts Three and Four:

> I had a conversation with Ms. Dean, I believe it was in her office, where there were approximately nine PHAs that were to receive funding. She gave me the nine PHAs that were to receive funding, and I then initiated the funding process.

Tr. 1892.

In fact, at the end of October 1986 Dean handed Demery a list of nine allocations that included a 44-unit allocation for Texas. Gov. Exh. 180. Instead of funding that list, however, Demery created another list, replacing the Texas allocation with one for Lansing, Michigan. Dean Rule 33 Mem., Exh. XX. Demery then funded the latter list. Gov. Exhs. 181-83. The assignment of 44 units of moderate rehabilitation to the Lansing Housing Authority and the subsequent manipulations for the benefit of a group that had bought Demery's business were a subject of a conspiracy charge in Demery's Superseding Indictment (though, as with the perjury charges, this matter was not part of Demery's guilty plea). Demery Superseding Indictment at 36-39 (Dean Rule 33 Mem., Exh. TT).

During Demery's cross-examination, defense counsel questioned him concerning whether in January 1987 he had lied to Secretary Pierce regarding Joseph Strauss' having spoken to him about certain funding requests; Demery maintained that he had merely given Secretary Pierce an incomplete answer. Tr. 1912-1914. Set out below is the questioning that then followed

concerning whether Demery had lied to Congress when testifying during the Congressional HUD investigation. It is this questioning that would form the basis for the Independent Counsel's statement to the Supreme Court that it was "apparent from the record" that "the question as to which petitioner now claims that Demery perjured himself was ambiguous."

Q. Okay. Now you have testified -- you testified publicly on television, as a matter of fact, regarding certain of the inspector general's allegations at HUD; isn't that right?

A. Yes.

Q. And those were on C-Span, were they not?

A. Yes, they were.

Q. And you were put under oath --

A. Yes, I was.

Q. -- during those hearings?

A. Yes, I was.

Q. And did you swear to tell the truth?

A. Yes, I did.

Q. And did you tell the truth?

A. Yes, I did.

Q. You told the utter and complete truth in front of those -- on those hearings?

A. Yes, I did.

Q. Okay. You haven't been -- you didn't plead guilty to perjury, did you?

A. No, I did not.

Q. Okay. Is that because you've never committed perjury?

A. Of course.

Q. Okay. And you told the truth in front of the Lantos committee in the same fashion as you're telling the truth today, correct?

A. Correct.

Q. I mean, you've been put under oath today, correct?

A. Yes.
Q. And you had the same obligation you have today as when you were in front of the Lantos committee? You recognize that?

A. Yes, I do. I know a lot more than I did before the Lantos committee. I've had an opportunity to look at documents and spend a lot more time on issues than I did when I testified in front of chairman Lantos.

Q. Okay. So you may have made some mistakes in front of the Lantos committee, but they certainly wouldn't have been intentional; is that what you're saying?

A. Yes.

Tr. 1915-17.

Thereafter, defense counsel requested the court's permission to use a videotape of certain portions of Demery's testimony before Congress to further impeach Demery. During the discussion, counsel pointed out how the testimony concerning Strauss already established the falseness of the statement that Demery never talked to former HUD officials about moderate rehabilitation. The court decided to permit the questioning on a limited basis. Tr. 1917-19.

After some questioning on other matters, defense counsel, with the use of the videotape, further questioned Demery as to whether he had lied when he testified before Congress concerning meetings with former HUD employees, meetings with consultants and developers, and whether the best projects were always selected. Demery insisted that all of his answers before Congress were true. Tr. 1920-35. For reasons shown earlier and discussed fully in Appendix D, however, Demery's responses to Congress concerning each of these matters had in fact been false.

It is not possible for a person at all familiar with the facts concerning Demery's testimony and the facts concerning the perjury charges in his indictment to believe that Demery did not testify falsely when he repeatedly denied having lied to Congress. Even the follow-up questions were closely connected to the perjury issues on which Demery had been charged, among other reasons, because Winn and Abrams were among the former HUD employees that Demery falsely denied ever discussing moderate rehabilitation with. Regardless of the relationship of any of the questioning to issues involving the Winn Group, however, the unambiguous and unequivocal denials of having at all lied to Congress in the material quoted above were manifestly false. For Demery had lied to Congress about the matters on which he was charged with perjury and about dozens of other matters as well. Nevertheless, the prosecutor did nothing to correct Demery's testimony that he had never lied to Congress or to bring to the attention of the court or the defense that the testimony was false.

Instead, on redirect, the prosecutor closed the Independent Counsel's case-in-chief by eliciting Demery's most crucial testimony: that Deborah Gore Dean had brought the Dade County request to his attention. Tr. 1936-40.

The following was the questioning that would conclude the Independent Counsel's case-in-chief:

> Q. Did you have anything to do with the funding of [the Dade County] project?
>
> A. In an official capacity, yes.
>
> Q. How about an unofficial capacity?
>
> A. Well, I presented it to the committee, but I was not the initial contact on behalf of the PHA.
>
> Q. Who was, if you know?
>
> A. It was brought to my attention by Miss Dean.

Tr. 1939.

The testimony would prove directly contradictory to the testimony of Dean, who later testified that Demery had

recommended funding the request, indicating that it was for Kitchin. Dean stated that she brought the matter to the attention of Secretary Pierce, advising him of her business relationship with Kitchin, and that Pierce had advised her simply not to participate in the decision on the allocation. She stated that she did not speak when Demery recommended the funding at the selection committee meeting. Tr. 2572-78.

Demery's testimony, if true, would not only establish that Dean was responsible for the Dade funding, but would show that Dean had lied on the stand. And in closing argument, in the litany by which the prosecutor sought to convey to the jury that Dean had falsely accused numerous persons of lying, he included Demery, observing, ".... Thomas Demery, lied...." Immediately afterwards, the prosecutor would assert to the jury: "But she's the only one we know who definitively did lie." Tr. 3431.

D. The Independent Counsel's Efforts to Deceive the Courts Concerning Whether Demery Testified Falsely in Court and Whether Trial Counsel Knew That He Had, Prior to My Raising This Matter With the Department of Justice and Independent Counsel Larry D. Thompson

1. The Independent Counsel's Efforts to Deceive the District Court

a. Representations in the Independent Counsel's Opposition to Dean's Motion for New Trial

Dean raised the issue of the prosecutor's failure to correct Demery's testimony in support of her Rule 33 Motion, arguing that Demery's denials of having lied to Congress were false because Demery had "lied under oath to Congress on a minimum of two occasions by denying that he knew that members of the so-called Winn Group were involved in the moderate rehabilitation program." Dean Rule 33 Mem. at 135. She explained that even if the trial counsel did not know that Demery's responses to the follow-up questions concerning his contacts with former HUD employees and other matters were false, trial counsel had to know that Demery had lied to Congress on the matters as to which he had been indicted and as to which he had subsequently confessed to Independent Counsel attorneys. Id. at 135-40.

Dean also raised the issue of the Independent Counsel's eliciting Demery's testimony during direct examination that at

the end of October 1986 he had funded the list given to him by Dean, without mention of his alteration of that list. Id. at 141-43.

Dean's motion contrasted the false statement during Demery's direct testimony with those during his cross-examination, noting that Demery presumably had been prepared by trial counsel for the former statement but that he might not have been prepared to respond to questions posed during cross-examination. Dean Rule 33 Mem. at 143 n.105. Presumably, Demery had indeed discussed with trial counsel the question concerning the implementation of the October 1986 funding list. In reality, however, it defies reason to think that in preparing a crucial witness who had committed perjury dozens of times, who had been indicted for perjury, and who had confessed to numerous instances of perjury, trial counsel would not also discuss with the witness how he would respond to questions about perjury during his cross-examination.

In any event, after these matters were brought to the attention of the highest levels of the Office of Independent Counsel by Dean's Motion, the Independent Counsel had an immediate obligation to determine, and to reveal to the court, whether Demery had lied in his court testimony; whether trial counsel knew that Demery had lied; and whether discussions with Independent Counsel attorneys concerning how Demery should respond to questions about prior perjury had caused Demery to deny ever having lied to Congress. The last point is an important one. For it is hard to understand how a person in Demery's position could feel that he could with impunity deny having lied to Congress, notwithstanding having recently confessed to doing so to Independent Counsel attorneys. Yet none of the Independent Counsel's subsequent actions suggest that Independent Counsel attorneys handling the response to Dean's motion ever questioned Demery or trial counsel concerning what they had said to Demery to cause him to believe (apparently correctly, as shown below) that he could with impunity deny under oath that he had ever lied to Congress.

In its Opposition to Dean's Rule 33 motion, the Independent Counsel did not contest that Demery had lied when he testified before Congress that he did not know that Winn and Abrams were involved in the moderate rehabilitation program. However, in addition to arguing that, for strategic reasons, the defense did not question Demery about the subject of his perjury charges, the Independent Counsel argued that the questioning by defense

counsel was "not designed to alert either Demery or the government that defendant was seeking to elicit Demery's testimony concerning Winn and Abrams." Gov. Rule 33 Opp. at 64-66.[23] Pointing to the fact that defense counsel had introduced his questioning of Demery as to whether he had lied to Congress by referencing the Inspector General's allegations, the Independent Counsel also made the following statement:

> At best, the focus of defense counsel's inquiry here was ambiguous. The "Inspector General's allegations" vis a vis Demery touched on Demery's relationship regarding Winn and Abrams only peripherally; rather, they focused on Demery's relationship with and knowledge regarding contributions to the charity Food [sic] for Africa and Demery's relationship with defendant and Secretary Pierce in the Moderate Rehabilitation funding process.

Gov. Rule 33 Opp. 64-65.

[23] The relevant pages of the Independent Counsel's Opposition are set out in Attachment 10.

For reasons set out earlier, this statement was far from the truth. Indeed, it was not even true that the Inspector General's Report focused on Demery's relationship with Dean and Pierce in the moderate rehabilitation funding process. In fact, the Inspector General was sharply criticized for failing to give attention to the roles of Pierce and Dean.[24] In any event, the Independent Counsel's claim was a transparent effort to confuse the issue by suggesting that the defense counsel had an interest in eliciting some testimony about Winn and Abrams, rather than simply eliciting the testimony that Independent Counsel attorneys knew beyond any doubt to be true--that Demery had repeatedly lied to Congress after taking the same oath he had taken in court.

More important, given the government's obligation to investigate the matter and alert the court as to the facts, the argument constituted an implied representation that neither Demery nor trial counsel knew that Demery's statements that he had never lied to Congress were false. In light of that fact, as well as the fact that for Independent Counsel attorneys to lead the court to believe that Demery had not committed perjury while knowing that Demery had committed perjury would constitute a willful effort to conceal a felony, some belaboring of the obvious may be warranted here.

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[24] Ifil, G., "Pierce Blamed for HUD Fund Abuses," Washington Post, May 12, 1989, p. A8 ("Gonzalez suggested that [Inspector General Paul A.] Adams kept Pierce out of most of the
report for political reasons."); Maitland, L., "H.U.D. Inspector Also on the Firing Line," The New York Times, June 16, 1989, p. A15; Gov. Op. Final Report at 5 ("Key players such as Secretary Pierce and Deborah Dean were only briefly mentioned in the Inspector General's Report.")

In particular, though there are comparable examples, the eighth and ninth sets of questions and answers in the quoted colloquy during Demery's cross-examination provide a pointed illustration of the preposterousness of the Independent Counsel's claim that Demery did not commit perjury in court by repeatedly denying he had ever lied to Congress. Responding to those questions, Demery claimed that he had never pled guilty to perjury because he had never committed perjury.[25] Thus, leave aside that Demery had confessed to numerous instances of lying to Congress and leave aside as well that the two perjury charges on which Demery had been indicted in fact pertained to focal points in the Inspector General's investigation and involved restatements of the same false statement that Demery had made to the HUD Inspector General. The Independent Counsel was still claiming that when Demery firmly denied ever having committed perjury, because of defense counsel's earlier reference to the Inspector General's allegations, Demery failed to recollect the two instances of perjury for which he had been indicted and as to which he had confessed less then four months earlier.

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[25] The following was the questioning:

Q. Okay. You haven't been -- you didn't plead guilty to perjury, did you?

A. No, I did not.

Q. Okay. Is that because you've never committed perjury?

A. Of course.

Tr. 1916.

In its Opposition to Dean's motion, the Independent Counsel responded only in a footnote to Dean's contention that Demery had testified falsely concerning his implementation of the funding list in October 1986. It described Dean's claim as one that the "testimony was ambiguous" and argued that defense counsel had chosen not to challenge that testimony during cross-examination as a matter of trial strategy. Gov. Rule 33 Opp. at 29 n.29. The Independent Counsel did not challenge Dean's claim that Demery had altered the list. It said nothing whatever in response to Dean's contention concerning the probable discussion between Demery and trial counsel regarding the contemplated testimony regarding that list.

b. Representations Following Dean's Reply on the Motion for New Trial

In her Reply,[26] Dean pointed out that Demery's statements concerning Winn and Abrams were merely examples of situations where Independent Counsel attorneys had to know that Demery had lied before Congress. She noted that there existed many other such instances, including instances concerning Demery's denials of knowledge of F.O.O.D. for Africa contributors. Dean Rule 33 Reply at 20-23. She submitted additional information showing that Demery had lied to Congress concerning his knowledge of F.O.O.D. contributors. These included a statement by Demery that he had been shown a $30,000 check that J. Michael Queenan was contributing at a Denver fundraiser; a statement by Silvio DeBartolomeis that he had delivered checks from Winn and Abrams to Demery; and a statement by Ed Siegel that he had seen Howard Cohen hand Demery a check at a fundraiser conducted on a boat trip on the Chesapeake Bay.[27]

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[26] Deborah Gore Dean's Reply to Government's Opposition to her Motion for Judgment of Acquittal, or in the Alternative, a New Trial (Jan. 7, 1994) (Dean Rule 33 Reply).

[27] Interview of Thomas T. Demery at 1-2 (June 17, 1993); Interview of Silvio DeBartolomeis at fourth page (unnumbered); and Interview of Ed Siegel at 1 (May 22, 1993). These interviews are parts of Exhibit C to the Dean Omnibus Motion (Feb. 9, 1994).

It could hardly be more clear that at the time of the filing of the Independent Counsel's Opposition, its attorneys recognized that Demery's statements that he had not lied to Congress were false, just as they had to have recognized at the time that Demery made those statements. It also could hardly be more clear that in its Opposition, the Independent Counsel had sought to facilitate it deceiving of the court by obfuscating the issue raised in Dean's motion. Nevertheless it is worthwhile considering the implications of Dean's Reply, which made clear to Independent Counsel attorneys, if they did not already know, that Demery had lied to Congress about many matters other than his knowledge that Winn and Abrams were in the moderate rehabilitation business.

Thus, assume, against all reason, that at the time of the filing the Independent Counsel's Opposition to Dean's Rule 33 Motion, the following was the thinking of Independent Counsel attorneys who crafted that Opposition. Consistent with the arguments made in the Opposition, those attorneys believed both (1) that Demery's only false statements before Congress had been his statements about Winn and Abrams and (2) that because of defense counsel's reference to the Inspector General's allegations and the fact that those allegations "touched on Demery's relationship with or knowledge regarding Winn and Abrams only peripherally" and were instead "focused on Demery's relationship with and knowledge regarding contributions to the charity Food [sic] for Africa and Demery's relationship with Defendant and Secretary Pierce," defense counsel's questioning alerted neither Demery nor Independent Counsel trial counsel that Demery's denials that had ever lied to Congress were false. Assume even that, consistent with the obligation to determine whether Demery had committed perjury in this case and whether trial counsel knew about it, the Independent Counsel had in fact questioned both Demery and trial counsel, and both Demery and trial counsel credibly advised the Independent Counsel that they had not appreciated that Demery's denials of ever having lied to Congress were false.

Even accepting this profoundly improbable interpretation of the Independent Counsel's actions as of the time of the filing or Dean's Reply, that Reply now provided information to the Independent Counsel indicating beyond any doubt that Demery had also lied to Congress about his "relationship with and knowledge regarding contributions to the Food [sic] for Africa," which the Independent Counsel had just maintained was the principal focus of the Inspector General's allegations. Thus, even assuming the Independent Counsel's good faith up to that point, the

Independent Counsel now had to recognize that the reasoning proffered in its Opposition did not in fact explain how Demery or trial counsel could have failed to understand that Demery's denials of ever lying to Congress were false. The Independent Counsel was therefore obligated again to determine the truth about Demery's and trial counsel's thinking when Demery denied ever having lied to Congress and trial counsel failed to correct that testimony.

Obviously, however, either failing to recognize the obligation of the government to determine whether a government witness had committed perjury with the collusion or encouragement of government attorneys or willfully refusing to fulfill that obligation, Independent Counsel attorneys responding to Dean's motion did no such thing. Their failure to do so only further confirms that from the outset of the Independent Counsel's receipt of Dean's Rule 33 Motion, the Independent Counsel had no intention of fulfilling its obligations to learn the truth about the allegations in Dean's Rule 33 motion and to advise the court what it found that truth to be.[28]

At the hearing on February 14, 1994, Deputy Independent Counsel Bruce C. Swartz, appearing for the Independent Counsel,

[28] Here and in some prior discussions of this and similar issues where Dean's motion put the highest levels of the Office of Independent Counsel on notice of the possibility or likelihood that trial counsel had acted improperly, I have discussed the matter as if Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce S. Swartz were not necessarily previously aware of these matters. While such an approach is useful for focusing the issue on the obligations arising upon the Independent Counsel's being confronted with the matters raised in Dean's motion, the record suggests that very likely the Independent Counsel and Deputy Independent Counsel were themselves deeply implicated in the underlying actions of trial counsel.

purported to respond to the issue raised in Dean's motion. In doing so, he made statements similar to those made in the Independent Counsel's Opposition. Tr. 12-14. Swartz again suggested that the defense's failure to "link up [Demery's] testimony, that is, his particular testimony in the Senate [sic] that she now claims is perjurious, with the questioning of Demery" had caused Demery to fail to recollect that he had testified falsely concerning Winn and Abrams. Tr. 12. Swartz said nothing about the numerous other false statements Demery made to Congress of which Swartz and other Independent Counsel attorneys were undoubtedly aware at the time Demery testified in court. Swartz also said nothing of the false statements Demery made to Congress that had just been brought to his attention in Dean's Reply.

Swartz also claimed that Demery's testimony "was largely corroborated by other testimony as well, including testimony by defendant's own witness, Mr. Dorsy [sic]." Tr. 14. Yet, with regard to the crucial piece of testimony with which the Independent Counsel chose to close its case-in-chief during Demery's redirect after failing to reveal that Demery had committed perjury numerous times on cross-examination--that Dean had called the Dade County funding request to Demery's attention--Swartz's claim was manifestly false. No witness corroborated that testimony. Indeed, government witness Louis F. Kitchin's testimony, supported by documentary material, directly contradicted Demery's testimony that it was Dean who had brought the Dade County request to his attention--though Independent Counsel attorneys plainly had failed to confront Demery either with Kitchin's testimony or the documents showing that Kitchin met with Demery two days after the Springwood and Cutlerwood proposals were submitted to Dade County housing authority. And former HUD General Counsel J. Michael Dorsey in fact testified that Demery had argued on behalf of the Dade County request and that he (Dorsey) did not remember Dean's saying anything about it. Tr. 3176-77.

The district court refused to accept the Independent Counsel's claim that its trial counsel did not recognize that Demery's denials that he had lied to Congress were false. The court faulted the Independent Counsel for not having brought to the attention of the court and defense counsel the information indicating the Demery had lied.[29] Tr. 12, 14, 26.

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[29] The court first stated:

> All right. Finally, let me ask you, the other concern I had was Mr. Demery and whether or not there were really concerns as to Mr. Demery's testimony, when the government had the evidence they indicted him for perjury and had believed he had obviously committed perjury, like it believed Ms. Dean had, and then through a plea bargain, that wasn't pled to, but then he was allowed to testify and testified that he had never committed perjury, and there was apparently no bringing to the Court's attention that that was the situation, that he had this perjury indictment and had apparently discussed that with the prosecution.

Transcript of Hearing 11-12 (Feb. 14, 1994). Later is observed:

> I was concerned about Mr. Demery in that I think his credibility was an issue in the case and concerned about documents which were available in the government's possession and knowledge they had that they as prosecutors didn't bring at least to the Court's attention. I'll find out from defendant what he knew about it.

Id. 14. The court returned to the matter near the end of the hearing:

> Mr. Demery obviously had substantial issues as to his credibility and his perjury and what that government knew about that and believed they knew about it, and again, I did not think that that was timely at least brought out for the defendant's benefit. What, there's hundreds of thousands of documents, and to say that that's sufficient I do not think answers the requirements upon the independent prosecutor.

Id. 26.

One can debate whether the court actually stated that Demery's denials that he had ever committed perjury were false and recognized by the Independent Counsel to be false. But I do not think that it can be debated that the court recognized that Demery's repeated and unequivocal denials that he had ever committed perjury were false any more than it can be debated that it was obvious that Demery's repeated and unequivocal denials that he had ever committed perjury were false .

2. The Independent Counsel's Efforts to Deceive the Court of Appeals

When this matter was raised in the court of appeals, the Independent Counsel stated that the charge that "that the government had reason to believe that Thomas Demery ... had testified falsely" "is not true, as the government demonstrated at length below." Gov. App. Br. 51 n. 23. The Independent Counsel went on to argue that the government had not sought to conceal that Demery had been charged with perjury. Whatever the merit of that argument, however, the representation that it was not true that the Independent Counsel had reason to believe that Thomas Demery had testified falsely was patently false.

E. The Independent Counsel's Efforts to Deceive the Courts Concerning Whether Demery Testified Falsely in Court and Whether Trial Counsel Knew That He Had, Following My Raising This Matter With the Department of Justice and Independent Counsel Larry D. Thompson

On December 1, 1994, I provided a large volume of materials to the Department of Justice suggesting that it investigate the Office of Independent Counsel for prosecutorial abuses that could involve federal crimes. I gave considerable attention to the Independent Counsel's action concerning the testimony of Thomas T. Demery both in the Introduction and Summary, and in the Narrative Appendix styled "Testimony of Thomas T. Demery." Attached hereto as Attachment 11 is a copy of the Demery Appendix, including an Addendum, added in January 1995, pointing out that when Demery acknowledged that, contrary to his testimony before Congress, he did know that Winn was in the moderate rehabilitation business, Demery also stated why he had lied to Congress.

In the Demery Appendix, in addition to setting out the underlying facts in a somewhat less elaborate fashion than I have done here, I pointed out that it was difficult to understand how Mr. Demery, who several months earlier had informed Independent Counsel attorneys that he had repeatedly lied to Congress, could testify under oath that he had never lied to Congress without having been led to believe he should do so by Independent Counsel attorneys. I raised the issue of what the Independent Counsel had or would advise the court in Mr. Demery's own case, noting that very likely the Independent Counsel would make no mention of Mr. Demery's perjury in this case. And I pointed out that an obvious avenue for fulfilling the government's obligations to determine

the truth was to interview trial counsel and Mr. Demery concerning their conversations before he testified. Demery Appendix at 18.

I again raised this issue in a May 25, 1995 letter to Associate Deputy Attorney General David Margolis. Believing at that time that Mr. Demery had probably already been sentenced, I stated (at 15-16):

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

I added, however, that Demery must cooperate with any governmental investigation into these matters and thus was available to be required to disclose the nature of his pre-testimonial discussions with Independent Counsel attorneys. I inquired whether the Department of Justice had yet contacted Mr. Demery and, if it had not, why it had not.

In my letter to Michael E. Shaheen, Jr., Counsel for the Office of Professional Responsibility, dated August 14, 1995, I raised the same matter once again in requesting the Department of Justice to reconsider its decision not to investigate the Office of Independent Counsel. I noted (at 25) that I assumed that the Department of Justice had failed to contact Demery and specifically requested (at 32) a letter from Mr. Shaheen indicating whether the Office of Professional Responsibility had interviewed Demery.

I next raised the matter of Mr. Demery's false testimony in my letter to you dated September 18, 1995, by which I provided you the materials previously provided to the Department of Justice, as well as my correspondence with the Department of Justice. In my letter (at 19-20), I pointed out to you, as I had to the Department of Justice, that Demery must cooperate in an investigation concerning the pretestimonial discussions with Independent Counsel attorneys that led him to deny ever having lied to Congress.

I brought the matter to the attention of the Department of Justice once more in a letter dated November 30, 1995, to John C.

Keeney, Acting Assistant Attorney General for the Criminal Division (of which you were provided a copy), in which I suggested to Mr. Keeney that the conduct of Bruce C. Swartz and Robert E. O'Neill as Deputy Independent Counsel and Associate Independent Counsel in this case indicated that they were unfit to continue to serve in the positions they then held with the Department of Justice. Though I gave only limited attention to Mr. Demery in the letter to Mr. Keeney (at 10-13), I attached the correspondence previously provided. The materials I provided Mr. Keeney apparently were then referred again to Mr. Shaheen of the Office of Professional Responsibility, who had not yet responded to my specific question of whether the Department of Justice had interviewed Demery.

I raised the matter once more in my letter to you dated December 5, 1995 (at 8), noting that you had had ample time to contact Demery in fulfilling your obligation to learn whether he had committed perjury at the instigation of Independent Counsel attorneys.

By letter dated January 30, 1996, Mr. Shaheen responded to my November 30, 1995, letter to Mr. Keeney, stating that he viewed my correspondence to Mr. Keeney to be an effort to cause the Department of Justice to reconsider its decision not to investigate the Office of Independent Counsel, and indicating that the Department of Justice declined to reconsider that decision. Mr. Shaheen, who had not responded to the request in my letter of August 14, 1995, that he specifically state whether the Department of Justice had interviewed Thomas T. Demery, also stated that he was refusing to respond to that and other questions posed to him in my letter of August 14, 1995.

Over the next month, you would be responsible for two efforts to deceive the courts concerning the testimony of Thomas T. Demery, once in the Supreme Court and once in Demery's own case.

1. The Independent Counsel's Efforts to Deceive the Supreme Court

In the Supreme Court the Independent Counsel maintained that it was "apparent from the record" that "the question as to which petitioner now claims that Demery perjured himself was ambiguous." Opp. Cert. 13. In this instance, in addition to misleading the Court to believe that there was only one question that Dean claimed Demery answered falsely,[30] the Independent Counsel again claimed that the questioning quoted above was ambiguous, an argument that could hardly have been more false. Once again, given that the government has an obligation to investigate whether its witness committed perjury and whether trial counsel knew it, this argument constitutes a further implied representation that such investigation resulted in a determination that, in the view of the Independent Counsel, Demery did not lie and trial counsel did not know that Demery lied.

2. The Independent Counsel's Efforts to Deceive the Honorable Stanley S. Harris in Demery's Case

Demery's plea agreement provided for a sentencing level of 13 under the Sentencing Guidelines, which ordinarily would entail a minimum sentence of 12 months, unless the Independent Counsel sought a downward departure for rendering substantial assistance in the prosecution of others involved in criminal activity. On February 27, 1996, the Independent Counsel filed a motion pursuant to 18 U.S.C. § 3553(e) and § 5K1.1 of the United States Sentencing Guidelines seeking such a downward departure.

The motion noted that pursuant to plea agreement filed with the court Demery had "agreed to cooperate completely, candidly, and truthfully ..... by truthfully providing all information in

[30] In the questioning quoted above, Demery made at least four false statements. Because of the use of the videotape in the later questioning, it is difficult to count precisely how many times Demery falsely denied having lied to congress. Probably, however, the total is between seven and ten.

his possession relating directly or indirectly to all criminal activity and related matters of which he had knowledge," and that said cooperation included "testifying completely and truthfully before any federal grand jury, or in any trial proceeding." Though not explicitly stating that Demery had testified truthfully, the Independent Counsel stated that it believed Demery had "provided substantial assistance in its investigation and prosecution of persons who were involved in criminal activity," pointing out that he had consulted in several investigations and "testified before the grand jury and for the government in its successful prosecution of Deborah Gore Dean." The Independent Counsel then requested that the court, in this instance the Honorable Stanley S. Harris, consider a downward departure. The statements to Judge Harris constituted at least an implied representation that, in accordance with his plea agreement, Demery had given completely truthful testimony in this case.

The seven-paragraph motion did not inform Judge Harris that any question had been raised as to whether Demery had testified truthfully in court or that the judge in this case had essentially found that Demery had not testified truthfully and that Independent Counsel attorneys had to have been aware of that fact. At a hearing on March 4, 1996, appearing on behalf of the Independent Counsel, Deputy Independent Counsel Diane J. Smith advised Judge Harris that the Independent Counsel had nothing to add to its motion, stating that she would answer any questions the court might have.

Judge Harris, relying on the representations in the Independent Counsel's motion, granted a downward departure and sentenced Demery to two years on probation.

With regard to the representation to Judge Harris that Demery had fulfilled his plea agreement, one must bear in mind a distinction between the issue of whether trial counsel knew that Demery lied while he was on the stand and the issue of whether the Independent Counsel subsequently came to know that Demery had lied. For even if it were possible that during the trial, trial counsel did not realize that Demery was committing perjury, in light of the information subsequently made available to the Independent Counsel, it would not be possible for the Independent Counsel to continue to believe that Demery's testimony in the Dean case was not perjurious.

Thus, after Demery committed perjury in this case in circumstances where it almost impossible to believe that he would have done so unless advised by Independent Counsel attorneys that they would not treat any denials that he had previously lied to Congress as false statements, the Independent Counsel proceeded to treat those denials as if they were true.

This was not the last instance in which the Independent Counsel would attempt to deceive a court on this matter, however.[31] On March 3, 1997, in seeking to strike Dean's recent Motion for a New Trial, in which Dean had argued that the Independent Counsel had misled the court in responding to various issues in her earlier motion including the issue of Demery's denials that he had ever lied to Congress, the Independent Counsel's memorandum stated that the Independent Counsel made no misleading arguments in responding to the earlier motion.[32] As I have previously pointed out to you, that statement constitutes your word of honor that, with regard to the Independent Counsel's efforts to lead the courts to believe that neither Demery nor trial counsel recognized that Demery's repeated denials that he had ever lied to Congress were false and a variety of other matters, you have investigated the matter and have concluded that Independent Counsel attorneys did not attempt to mislead the courts. As I have also pointed out to you, that statement in manifestly false.

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[31] By letter dated February 11, 1997, I pointed out to you that I agreed with certain arguments the Independent Counsel advanced in the court of appeals concerning the view that the court of appeals had held that 18 U.S.C. § 1001 makes it crime for a government official to make a false statement or conceal or cover up a material fact concerning a matter within the jurisdiction of the official's agency. I then posed the question of whether you agreed that under the holding of the Court of Appeals in this case, any material false statement by an official or agent of a department or agency of the United States in the course of the prosecution of a civil or criminal matter in the federal courts--whether made to the defense or to the court--would violate 18 U.S.C. § 1001. You declined to answer that question by letter dated February 18, 1997. I trust, however, that you have long recognized that a government prosecutor violates the law when he attempts to deceive a court.

[32] Government's Reply to Defendant Dean's Opposition to Government's Motion to Strike Defendant Dean's Motion for Dismissal of the Superseding Indictment or for a New Trial, and to Strike the Memorandum in Support 9 (Mar. 4, 1997).

Finally, I will remind you once again that your obligation to disclose to the court all instances where Independent Counsel attorneys deceived it is a continuing one. And, as I pointed out to you in my letter dated May 26, 1997 (at 11), I will eventually be bringing this matter to the attention of Judge Harris, and you may wish to do so first. Be mindful, however, that this is not merely a matter of your possibly preferring to alert Judge Harris that the Independent Counsel had previously deceived him before I alert him of that fact. Upon coming to understand that Independent Counsel attorneys deceived Judge Harris in any manner in the § 5K1.1 motion, you have an immediate obligation to so inform Judge Harris. Of course, as with other obligations that I have brought to your attention since September 18, 1995, I recognize that I am not advising you of anything that an attorney in your position would not already know.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: Mark J. Hulkower, Esq.
Steptoe & Johnson, L.L.P.

Attachments
Enclosures