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**To:** askdoj@usdoj.gov
**Cc:**

**Date:** Monday, July 14, 2008 03:59 pm
**Subject:** Prosecutorial misconduct web page

Please forward this e-mail to the Attorney General, the Chief of the Public Integrity Section, the Assistant Attorney General for the Criminal Division, and the Director of the Executive Office United States Attorneys as addresses.

Please copy Deputy Assistant Attorney General Bruce C. Swartz, United States Attorney Robert E. O'Neill, and Counsel for the Office of Professional Responsibility H. Marshall Jarrett

Dear officials:

This is to inform the Department of Justice of the creation of a web page on prosecutorial misconduct in *United States of America v. Deborah Gore Dean*, Criminal. No. 92-181-TFH (D.D.C.), an Independent Counsel case that was ultimately prosecuted by the Public Integrity Section of the Criminal Division. The page may be found at; http://www.jpscanlan.com/homepage/prosecutorialmisconduct.html.

In addition to providing a substantial narrative, the page makes accessible a large volume of material related to the case, including a substantial body of material provided to, and a substantial body of correspondence with, the Department of Justice between December 1994 and January 2000. Those materials and correspondence involved my effort (1) to cause an investigation of the conduct of Independent Counsel attorneys in the Dean case; (2) to cause the removal of certain of those attorneys from positions they subsequently held in the Department of Justice (including (a) Jo Ann Harris from the position of Assistant Attorney General for the Criminal Division, (b) Bruce C. Swartz from the position of Counsel to the Assistant Attorney General for the Criminal Division, (c) Robert E. O'Neill from the position of Assistant United States Attorney for the Middle District of Florida, and (d) Robert J. Meyer from the position of Trial Attorney in the Public Integrity Section of the Criminal Division) on the grounds that their conduct in the Dean case indicated they were unfit to represent the United States; and (3) to cause the successors to Independent Counsel Arlin M. Adams in the continued prosecution of the case (initially, from July 1995, Independent Counsel Larry D. Thompson and later, from approximately July 1999, the Public Integrity Section of the Criminal Division of the Department of Justice) to acknowledge to the court certain actions Independent Counsel attorneys had previously taken to deceive the jury and the courts both in the prosecution of the case itself and in subsequently responding to allegations of prosecutorial misconduct.

The narrative introduction is critical of the Department of Justice both for its handling of my initial complaints and for its involvement with the matter when it assumed the role of prosecutor in July 1999. See Section B.8. The material also calls into question past prosecutions conducted or supervised by Robert E. O'Neill in the Middle District of

Florida, in the event that such prosecutions involved conduct similar to that with which Mr. O'Neill was involved in the Dean case. For these reasons, I suggest that the Department familiarize itself with the material on this page.

Further, I have recently contacted former Supervisory Special Agent Alvin R. Cain, Jr. (the witness whose testimony is the subject of the Section B.1 of the narrative material) as well as the principal involved attorneys, requesting that they advise me as to ways in which my account, either generally or with regard to their role in any matter, is inaccurate or unfair. In the case of former Agent Cain, I also requested that he provide information on the circumstances leading to his testimony on October 18, 1993, which, in addition to being the subject of Section B.1, was the subject of many of my earlier communications with the Department. In both of these letters, I suggest to the recipients that, since the Public Integrity Section is the entity last responsible for the prosecution of the Dean case, they should contact the Public Integrity Section before contacting me. The Public Integrity Section was provided a copy of my July 9, 2008 letter to Arlin M. Adams, Jo Ann Harris, Robert J. Meyer, Robert E. O'Neill, Bruce C. Swartz, and Larry D. Thompson. So the Public Integrity Section may be called upon to address this matter it its role as the prosecutor in the case.

If the Department familiarizes itself with these materials it should recognize that there exists (among other issues) an issue as to whether the matters addressed on the page provide reason for the termination of Bruce C. Swartz and Robert E. O'Neill from the their current positions as Deputy Assistant Attorney General and interim United States Attorney for the Middle District of Florida. In addressing such issue, I suggest that the Department consider the following points.

Some might suggest that for the Department to terminate these attorneys because of conduct in the Dean case would be unfair given not only that the conduct occurred quite some time ago, but that, after purporting to consider whether the conduct called into question the fitness of Mr. Swartz and Mr. O'Neill to serve in the Department, the Department concluded that such conduct did raise such an issue and thereafter allowed both attorneys to develop careers in the Department. I suggest the following approach to consideration of the fairness issue. Assuming that Mr. Swartz and Mr. O'Neill were to now be entirely candid about the nature of their conduct in the Dean case, one would need to know how long ago each individual made his last statement designed to cover up the nature of Independent Counsel conduct in the case. In the event that the Department questioned either employee in addressing the issues I raised beginning in 1994, one would wish to know whether attorneys were completely candid in their responses. There are also, of course, question concerning whether government attorneys have an obligation to inform the current authority conducting a prosecution of the nature of their past conduct in the matter. In any event, it seems that the overriding issue is not whether either individual should in some manner be punished for conduct some years in the past, but whether, if there should be a widespread awareness of such conduct, the continued service of these attorneys in their current positions would undermine public confidence in the administration of justice.

The above discussion assumes absolute candor in the attorneys' now addressing the matters with the Department. Such candor would include disclosure of whether they have ever made any statements concerning this matter, including statements in any bar proceedings, and whether they ever advanced any arguments either in a bar proceeding or in a court proceeding, that were intended to mislead with regard to the true nature of the attorneys' actions and motivations for such action. I suggest that both attorneys should also be questioned as to whether any of the allegations in the referenced are essentially correct as to Mr. Swartz's and Mr. O'Neill's efforts to lead the jury and the courts to believe things they (Mr. Swartz and Mr. O'Neill) knew or believed to be false. The Department can proceed from there to determining how many of the allegations are true and whether there also occurred any similar conduct that is not addressed in the materials made accessible on the web page. A useful focus of the initial examination would involve the circumstances surrounding the initial use of Agent Cain's testimony as discussed in Section B.1 (a matter involving both attorneys) and in the response following the defendant's challenging the testimony (a matter involving Mr. Swartz but, so far as I know, not Mr. O'Neill). Very simply, did Mr. Swartz and O'Neill pressure or persuade the agent to provide testimony that, even if literally true, was intended to lead the jury to believe things those attorneys knew to be false? Did Mr. Swartz attempt to lead the court to believe the defendant lied about the call when Mr. Swartz knew that she did not? Other obvious initial areas of inquiry include the motivations of both attorneys with regard to the matters addressed in Section B.3 (including the failure to confront Barksdale with the information on the Mitchell message slips) and B.4 (including, but by no means limited to, the failure to confront Eli Feinberg with information suggesting that his testimony on which Mr. O'Neill would so provocatively rely in closing argument was false).

In order to be plausible, the responses can be nothing like the statements made in the Independent Counsel's opposition to Dean November 30, 1993 Rule 33 Motion. It is one thing, though by no means an appropriate one, for attorneys to respond on such matters (as was done, for example, with regard to the failure to confront government witness Maurice C. Barksdale with information on certain message slips) by offering such diversions as that the government does not have an obligation "to seek out all potentially material evidence conceivably related to the defense" or by suggesting that Barksdale reaction to the message slips on the stand is somehow relevant to the nature of Independent Counsel conduct. It is another thing to provide the true reason the attorneys did not confront a witness with information that strongly suggested that the witness's expected testimony was going to be false. I doubt that any reasonable observer would conclude other than that in the case of Barksdale (and Feinberg) the true reason for the failures to confront the witnesses was that the attorneys believed or feared that confronting the witnesses with such information would cause the witness to tell the truth, hence denying the attorneys the use of the false testimony.

At any rate, once the Department poses these questions, the plausibility of the responses of Mr. Swartz and O'Neill can then be evaluated. If such responses are implausible, the attorneys should be terminated for currently making false statements and prosecuted for violating 18 U.S.C. §1000. If the attorneys provide accounts that are perceived to be

truthful in light of all the evidence – which I assume would involve the acknowledgment of the accuracy of most or all of the allegations in the materials I have provided – the reasonableness of the continued employment of the attorneys can be evaluated in light of the considerations set out in the prior paragraph.

In the case of Mr. O'Neill, assuming that he acknowledges any effort to deceive the jury or the court in the Dean case – or that, regardless of what Mr. O'Neill acknowledges, one concludes, as I think one must, that he endeavored to deceive the jury and the court in numerous instances in the Dean case – he should certainly be questioned as to whether he has been involved, directly or as supervisor, in similar actions in federal prosecutions in the Middle District of Florida or elsewhere. If denials of any such actions are not deemed plausible, such responses would provide current reason for termination. If Mr. O'Neill acknowledges similar actions, such acknowledgments can provide a basis for the Department to evaluate the suitability of Mr. O'Neill to remain in his current position based on his more recent actions, and also provide the Department information to assist it in fulfilling its obligations to advise the courts and defense counsel in the subject cases of any efforts to deceive the courts or juries in such cases (as discussed in Section A.).

As I noted in recent letters to the involved attorneys, to Agent Cain, and to the Honorable Thomas F. Hogan, as with my prior correspondence on this matter, it is like that I will make current correspondence available on the web page. That would also apply to this communication.

Sincerely,
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