From: Scanlan, James <jps@jpscanlan.com>

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To: askdoj@usdoj.gov
Cc:

Date: Thursday, July 17, 2008 05:25 pm
Subject: Prosecutorial misconduct web page

This follows on an e-mail dated July 14, 2008, which I requested to be forwarded 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 for United States Attorneys as addresses, with copies to 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.

Please forward this e-mail to the same addresses, with the same persons copied as before.

Dear officials:

This follows on my e-mail dated July 14, 2008, regarding a web page on prosecutorial misconduct in *United States of America v. Deborah Gore Dean*, Criminal. No. 92-181-TFH (D.D.C.) (now accessible by means of this link:
Prosecutorial Misconduct in US v Dean
.
Further consideration of this matter and review of certain materials prompt me to add several points. These include a clarification of a statement, as well a comment on, or qualification of, aspects of the July 14 e-mail's reasoning and tone.

First, in the seventh paragraph of the e-mail, I stated that to my knowledge, Robert E. O'Neill was not involved in responding to Deborah Gore Dean's motion regarding the Agent Cain matter. But I trust that Mr. O'Neill will acknowledge that at a time when they were both employed by the Department of Justice, he and Mr. Swartz took affirmative steps to make it appear to observers that Ms. Dean had not called Agent Cain as she said. Such steps constituted a further effort to conceal that Agent Cain had been pressured to give answers that would lead observers falsely to conclude that Ms. Dean had lied about the call to Agent Cain. Thus, if acts taken to conceal those circumstances involved obstruction of justice or other federal crimes, Mr. O'Neill would seem also to have been party to such crimes, and to have been so at a time when he was employed by the Department of Justice.

Second, in sixth paragraph of the July 14 e-mail, I suggested that for purposes of appraising how long in the past the misconduct occurred one should determine the date of the last statement made to conceal the nature of the attorneys' actions, merely noting that there exist "question[s] 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." The point about the date of the last act of concealment was unduly influenced by legalistic concepts regarding limitations periods. If prosecutors

deceived juries or courts in order to secure a conviction, say, ten or twenty years in the past, so long as the conviction stands, it makes no sense to regard the prosecutors' conduct as somehow occurring long ago. For the defendant and the public continue to suffer from that deceit on the part of the prosecutors. It is far more reasonable to regard the prosecutors' failure to make public their conduct to be itself a perpetuation of the conduct. Thus, regardless of legal rules relating to the commencement of limitations periods for conspiracies to obstruct justice or other crimes, from a moral and ethical perspective one must regard the conduct as continuing until, at a minimum, the prosecutors inform the court and all affected parties of the actions those prosecutors took to deceive the court and the jury in securing the conviction in the case.

In addition, I note again that it is reasonable to assume that when prosecutors undertake to deceive the jury or the courts, those prosecutors do so because they believe doing so will affect the outcome of the case. The manner in which Mr. Swartz and Mr. O'Neill secured and used Agent Cain's testimony was something that one must assume was fairly remarkable. It was, moreover, something involving considerable risk – as reflected by the relief within the Office of Independent Counsel when the circumstances of securing Agent Cain's testimony were not revealed in cross-examination (as discussed in Section B.1 of the introductory material on the web page), as well as by the unwillingness of Independent Counsel attorneys to explain those circumstances in responding to Dean's motion. See also the March 31, 2008 document styled "The Independent Counsel's Use of Dean's Off-the-Stand Remark about David Barrett and the Judge" (Barrett). Thus, there is strong reason to believe that Independent Counsel attorneys decided to use Agent Cain as a rebuttal witness in the manner they did because those attorneys were very worried that they would lose the case. In any event, any claim the attorneys were now to make that the testimony was not a matter of great consequence should only further undermine their credibility.

Third, in the ninth paragraph of the earlier e-mail I stated that, assuming Mr. Swartz and Mr. O'Neill were now to be completely candid about their conduct, the Department of Justice should evaluate the reasonable of their continued employed "in light of the considerations set out in the prior paragraph." Possibly, I meant to type "paragraphs." But, in any case, it is the sixth paragraph, not the eighth, that sets out the considerations I suggested were relevant.

Further with regard to the relevant considerations, and also with regard to the tone of the earlier e-mail, it is possible that some could read the July 14 e-mail to suggest that if Mr. Swartz and Mr. O'Neill were now to be fully candid about their earlier actions, the Department might reasonably conclude that they may continue to serve as Department of Justice attorneys. But, even if the only things at issue were the use of Agent Cain's testimony and the efforts to cover it up, I believe that, regardless of the candor Mr. Swartz or Mr. O'Neill might now show, it would be inappropriate for the Department to allow either attorney to remain in the Department. That holds especially if the public were to become fully aware of the nature of the actions of Mr. Swartz and Mr. O'Neill in the Dean case. But it holds as well regardless of what knowledge the public may have of the matter.

Finally, I note that the problems the Department now faces with regard to Mr. Swartz and Mr. O'Neill (including, in the case of Mr. O'Neill, potential problems with regard to prosecutions in the Middle District of Florida) is entirely a result of the Department's deficient handling of the matter commencing in 1995. Thus, I suggest that the Department should thoughtfully address these issues now lest if face even larger problems in the years ahead.

Sincerely,
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