The Honorable Thomas F. Hogan's Criticism of the Conduct of Robert E. O'Neill in the Prosecution of *United States of America v. Deborah Gore Dean*, Criminal No. 92-181-TFH (D.D.C.) (June 15-16, 2010 draft)

The Honorable Thomas F. Hogan's criticism of the conduct of Independent Counsel Attorneys in the Prosecution of *United States of America v. Deborah Gore Dean*, Criminal No. 92-181-TFH (D.D.C.) at a hearing on February 14, 1994, is discussed in many places found generally under the main Prosecutorial Misconduct (PMP) and Misconduct Profiles pages of jpscanlan.com. Many places on PMP and the profiles, especially that of Bruce C. Swartz, provide reasons why it should recognized that Independent Counsel attorneys, especially Swartz, deceived Hogan in a number of respects in responding to Dean's abuses claims. But for that deception, Hogan's criticisms would have been much harsher and presumably would have been especially harsh as to the efforts to deceive (including, among other matters, the efforts to deceive Hogan regarding Supervisory Special Agent Cain Alvin R. Cain, Jr., as discussed in the Swartz profile and Section B.1 and Section B.1a of PMP. Nevertheless, it would be useful in appraising this matter to keep in mind that the Hogan's criticisms at the February 14, 1993 were quite severe. While my descriptions of the matter usually refer to criticisms of Independent Counsel Attorneys, as lead trial counsel, Robert E. O'Neill – currently the nominee to the position of United States Attorney for the Middle District of Florida – was substantially responsible for and party to all of the conduct.[1]

Hogan specifically agreed with much of what Dean asserted concerning prosecutorial abuses, including that Independent Counsel attorneys failed to disclose exculpatory material while representing that no such material existed; that those attorneys put on witnesses without attempting to determine whether their testimony was true; and that those attorneys had reason to know that the testimony of two its witnesses was false. The court noted with regard to a particular matter that O'Neill had acted in a manner the court would not have expected from any Assistant United States Attorney who had ever appeared before it. More generally, the court found that Independent Counsel attorneys had acted in a manner reflecting "at least a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards …." The court repeatedly noted its concerns about the "cumulative effect" of the prosecutorial abuses it identified, observing that it was "almost impossible to quantify the total impact" of such abuses on the defendant's ability to defend herself.

The entire transcript is available by means of this link. But in order to facilitate the reader's review of the criticism, the critical remarks are themselves set out below. The

[1] As I note in the letter to Judiciary Committee members it should be kept in mind that, though working on the case at the time, O'Neill was not lead counsel when the Superseding Indictment was issue containing many inferences or statements known or believed to be false. Jo Ann Harris was lead counsel at that time. And Swartz would attribute to Harris the decision to take the position – termed "ridiculous" by Judge Silberman not to turn over exculpatory materials until the Jencks production. See Jo Ann Harris Profile. But O'Neill undertook to prove lead the court and the jury to believe many things he knew or believed to be false, and his implementation of the scheme devised by Harris was crucial to his being able to do that.

remarks of course are somewhat cryptic without their contexts. So in due course, I shall try an annotate the remarks. In the meantime, apart from the references noted above, the Robert E. O'Neill profile should provide a context for many of Hogan's statement. At some point I may also set out Hogan's several bench conference statements to O'Neill where Hogan accused O'Neill of attempting to play to racial difference between the all African American jury and the white defendant (a matter of which O'Neill's use of Agent Cain's testimony, see Section B of the O'Neill profile, must be deemed a part. Until then, I refer the reader to Part V of the DC Bar materials.

Transcript excerpts follow:

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THE COURT: It shouldn't be for the Court, and that's one of the problems I have in this new trial motion going through it, it constantly goes back to the fact, well, the Court corrected the error. I think there's numerous occasions where that had to be done, and I wonder about the cumulative effect of saying, "Well, the Judge took care of it, he told the jury to disregard it, or he told the defendant he had his option to do this or that to try to cure this problem that arose because we put on a witness whom we hadn't talked to and didn't know if these receipts really tied into the defendant or not but still put them all in as if they did, and then later when he said he wasn't sure what they meant, we told the Court, 'Well, you can do something to cure that.'" That's concerning to me, particularly the cumulative effect of it all.

Let me move to the next issue then, the issue as to Mr. Shelby's testimony [i] and whether because he was a government witness, that it was then fair to say he shouldn't be believed as to her statements that he made when you had called him. This concerns Mitchell's involvements or not and the contact that HUD referred to in a memorandum and whether it was the defendant who fax'd him the rapid reply letter or whether it was DeBartolomeis or Hunter Cushing and that there was in the government's files evidence of what was said or that was at least elicited by the government that was not accurate and that was then left up to defendant to try to straighten that out.

pp. 24 ff.
THE COURT: The Court is going to do as follows in this matter: The Court does have its concerns, as it's voiced them previously, over some of the conduct of the Independent Counsel in the case and continually made rulings during the trial, recognizing it was a long, multiple-week trial, so there's obviously many witnesses that testified, but did have to make rulings during the trial at times concerning the failure of the Independent Counsel to be forthcoming as to its evidence in its files either that would fall under Brady or would be Giglio material, and being produced shortly before a witness testified, after having asked for it two years or so earlier, is really not a complete answer. As everyone recognizes, the defendant is entitled to due process in the trial.

There was a witness we haven't discussed except by reference at one point, I think, by defense counsel, Mr. Reynolds testified,[ii] who originally was not going to testify and then

was called eventually concerning the limousine trafficking, and again perhaps it's for the jury, but I think the government as well as the defendant would agree that they all felt Mr. Reynolds was not a believable witness, and that was my impression why he originally was not going to be called as to his claims of transportation of Ms. Dean aroundi and I think the calendars and other evidence in the government's possession would suggest that his recollection was not correct, but he was put forward as having a recollection that was argued as to his testimony on limousine use by the defendant.

Mr. Sankin was put on the stand by the government,[iii] who has admitted that they did not interview him as to the accuracies of the receipts and his knowledge about them and his memory of them at the time he testified. That was not brought out during the testimony but only volunteered by Mr. Sankin later the next day, or when he finished his direct and was on cross, and he indicated at that time he had already told the government the night before that he couldn't recall anything about those documents, and that was not brought to the Court's attention as it should have by the independent prosecutor.

Mr. Demery obviously had substantial issues as to his credibility and his perjury and what the government knew about that and believed they knew about it, and again, I do 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.[iv] Mr. Shelby, I think, is somewhat of a collateral matter as to that one document we're discussing, but again standing alone is a concern that that was not further reviewed with the Court at least as well as the counsel for the defendant as to his deliverance or acceptance of the receipt of this document and who his contact was at HUD.

And the receipt by Mr. Cartwright,[v] again, concerns the Court, because what we're talking about, I think, is this overall impression one gets of Ms. Dean that the prosecutor sought to convey as a person of untruthfulness and of doubtful character, who would engage in these kind of activities which may not have been directly related to the charges against her in some instances or that the government had information or could have had the information had they asked the questions of the witnesses beforehand that the documents, whatever they were using, were actually not accurate that they wished to use against her and did at times, and I don't understand that approach.

I think if it had been an assistant United States attorney who had done that before the Court in an everyday case, had put a witness on the stand and asked him to identify this group of documents, they all related to meetings with the defendant, and then had been told later by the witness that that was not accurate, I would expect every assistant I've ever had here would have brought that immediately to my attention and the defense's attention, and that was not done, and again, I don't understand that.

It evidences to me in the Independent Counsel's Office, where there were Brady requests made a long time ago, statements there were no Brady materials, which is obviously inaccurate, where these witnesses are put on that I've just reviewed, where there was substantial questions and information that they may not have been telling the truth in the

prosecution's files or the prosecution didn't ask if they were telling the truth to make sure they were before they went on the stand, it evidences to me by the Independent Counsel's Office at least a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards of prosecutors I'm very familiar with, and that concerns the Court and is not the first time I've seen it in Independent Counsel cases.

There is a report recently of an Independent Counsel before Judge Gesell in the North case, where he had to hold a hearing and put the counsel on the stand because of certain matters that had been represented that were not accurate, and after a hearing, he did not take any further steps except to criticize the Independent Counsel for their actions. The real issue for the Court is whether or not the cumulative effect of multiple concerns and multiple corrections the Court gave the jury leads to an unfair trial for the defendant. It was a multiple-week trial. There were many, many witnesses and immense documentary evidence.

I think parsing it out one witness at a time makes it very difficult for the defendant to meet her burden, as this would not have affected the jury overly and this would not cause the jury to find the defendant not guilty, etc. What is amorphous and hard to quantify is the cumulative effect of these matters and what can be said how it could have overall affected the jury's perception of the case.

The jury was selected, the Court's recollection is, with very few strikes exercised by the Independent Counsel. The panel was called they were satisfied with. The defendant had a jury selection expert consulting as well as herself and her counsel, obviously, and exercised all their strikes. So the jury was one that there had been a fairly close review of by defense counsel. I believe the government only exercised a couple of strikes, as I recall, in the selection of the jury. But the concern for the Court is after that, as to the cumulative effect of these activities that I have reviewed on all these pleadings, and again, I'm concerned about how that impacted upon the jury. As I said, it's almost impossible to quantify the total impact of various areas the Court has identified as it believes that the Independent Counsel should have been much more forthcoming and candid on its use of these witnesses and the production of these documents in a more timely fashion to the defendant to be able to meet the challenges.

On the other hand, there were multiple other witnesses that testified as to defendant's involvement, and the defendant herself testified at length as to her noninvolvement in these matters in a criminal sense, and the jury concluded against her.

[iii] See section [3] of the O'Neill profile.

[ii] See Section [5b] of the O'Neill profile and the narrative appendix styled "Testimony of Ronald L. Reynolds.

[iii] See section [1] of the O'Neill profile and Section B.7 of PMP.

[iv] See Section [5c] of the O'Neill profile and Section B.6 of PMP.

[v] See Section 5b of the O'Neill profile and as well as the narrative appendix styled "The Russell Cartwright Receipt." This matter involved O'Neill's confronting the defendant with a receipt indicating a meal purchased for her, when O'Neill had reason to know with near certainty that the receipt was false. O'Neill did not do to into probe whether the receipt might in fact be true. Rather, he did so because he knew she wold deny it and he could then later say that the denial was lie.