

**James P. Scanlan
Attorney at Law
1529 Wisconsin Avenue, NW
Suite 300
Washington, D.C. 20007
(202) 338-9224
jps@jpscanlan.com**

July 13, 2009

John M. Fitzgibbons, Esq., Chair
Florida Federal Judicial Nominating Commission
Law Offices of John M. Fitzgibbons
707 North Franklin Street, Suite 700
Tampa, Florida 33602

Wayne Hogan, Esq., Conference Chair
Middle District Conference
of the Florida Federal Judicial Nominating Commission
Terrell Hogan
233 East Bay Street, 8th Floor
Jacksonville, Florida 32202

Members of the Middle District Conference
of the Florida Federal Judicial Nominating Commission
(names and addresses listed in the Attachment)

Re: Candidacy of Robert E. O'Neill for Position of United States
Attorney for the Middle District of Florida

Dear Mr. Fitzgibbons, Mr. Hogan, and Members of the Middle District Conference of the
Florida Federal Judicial Nominating Commission:

I write to you with regard to a matter involving your roles as Chair of the Florida Federal
Judicial Nominating Commission and as Chair and Members of the Middle District
Conference of the Commission. My letter concerns Robert E. O'Neill, Esq., Chief of the
Criminal Division of the Office of the United States Attorney for the Middle District of
Florida. I understand that Mr. O'Neill is a candidate for the position of United States
Attorney for the Middle District of Florida and that he is scheduled to be interviewed on
July 22, 2009, at 1:00 p.m.

Based on things that are widely known about Mr. O'Neill's career as a federal prosecutor, he would appear to be an excellent candidate for the position of United States Attorney. There are, however, things about Mr. O'Neill's behavior as a prosecutor that are not yet widely known, but that are likely eventually to be widely known, indicating not merely that Mr. O'Neill is an unsuitable candidate for the position of United States Attorney, but that he ought not to be representing the United States in any capacity.

Mr. O'Neill was the lead trial counsel in the prosecution of *United States of America v. Deborah Gore Dean*, Criminal. No. 92-181-TFH (D.D.C.), an independent counsel case tried over a six-week period in September and October of 1993. The courts recognized that there occurred substantial prosecutorial abuses in the case. At a [hearing on February 14, 1994](#),¹ in addition to noting that Mr. O'Neill had acted in a manner that the court had never observed from an Assistant United States Attorney, the Honorable Thomas F. Hogan specifically criticized the prosecution for failing to make *Brady* disclosures while falsely representing that there existed no *Brady* material and for failing to confront prosecution witnesses with information in prosecution files indicating that the witnesses' expected testimony was not true. The court observed that the prosecution had shown "at least a zealotness that is not worthy of prosecutors in the federal government or Justice Department standards..." Tr. 27. While repeatedly observing that it was almost impossible to evaluate the cumulative effect of the identified abuses on the defendant's right to a fair trial, the court ultimately found that the conduct did not warrant dismissal of the indictment or a new trial. Tr. 27-30. The [court of appeals](#) left that ruling undisturbed. But the court of appeals noted that it "deplore[d]" the failure of the prosecution to make certain *Brady* disclosures, impliedly finding that statements Mr. O'Neill and his colleagues made during the course of the prosecution were false.

Whether the identified prosecutorial abuses should have resulted in an overturning of the verdicts in the *Dean* case involves different considerations from the issue of whether Mr. O'Neill's conduct in the case indicates that he is an unprincipled prosecutor. And solely those matters specifically addressed by the courts raise serious questions about Mr. O'Neill's fitness to represent the United States in criminal proceedings. Further, however, the misconduct of Mr. O'Neill in the *Dean* case went far beyond that identified by the courts. Some part of that misconduct went unaddressed in the courts precisely because deceitful actions of Mr. O'Neill and his colleagues during the trial and pre-trial proceedings prevented the defense from recognizing the scope of the abuses; and some part of the misconduct went unaddressed because Mr. O'Neill's fellow prosecutors deceived the courts in responding to the defendant's post-trial allegations of prosecutorial abuse. But while the full scope of Mr. O'Neill's abusive conduct in the *Dean* case may never be known, things that are now known would cause every reasonable observer to believe that Mr. O'Neill lacks the ethical sense that citizens have a right to expect from federal prosecutors. Reasonable observers must also suspect that, assuming the ethical

¹ The underlining of words or phrases in this letter indicates that the identified material (in this instance the hearing transcript) can be directly accessed by a link in an electronic version of this document posted on jpscanlan.com. The electronic version may be found at the end of the material under the "Robert E. O'Neill" sub-tab on the "Misconduct Profiles" tab of the referenced web site.

vision underlying Mr. O'Neill's behavior in the *Dean* case informed his conduct in prosecutions he conducted in the Middle District of Florida over the last fifteen years, an untold number of such prosecutions have been tainted and may yet be subject to challenge.

Since May of 2008, I have maintained extensive materials on jpscanlan.com documenting the abuses of Mr. O'Neill and his fellow prosecutors in the *Dean* case. The main [Prosecutorial Misconduct](#) page (PMP) outlines the issues and guides the reader to the underlying documentation, which generally is also posted on the web site. Recently, I added to the site a [page profiling Mr. O'Neill](#) and his conduct in the case. I suggest that it would be a grave error for the Commission to recommend Mr. O'Neill for the position of United States Attorney without carefully reviewing these materials. And I suggest that such review will leave no doubt as to the validity of my claim that Mr. O'Neill ought not to be representing the United States in any capacity.

One matter warrants brief summarization here. [Section B.1](#) of PMP describes a situation involving Mr. O'Neill's securing the testimony of a government agent in order to enable him (Mr. O'Neill) to provocatively assert that the defendant had lied in circumstances where Mr. O'Neill knew with absolute certainty that the defendant had not lied. That provocative assertion played an important role in Mr. O'Neill's undermining the defendant's credibility in a closing argument where almost fifty times he stated that the defendant had lied on the stand, usually, perhaps invariably, in circumstances where Mr. O'Neill believed or knew for certain that the defendant had not lied.

As discussed in that section, the defendant emotionally testified that, on the day a Department of Housing and Urban Development (HUD) Inspector General's Report was released to the public, she called the agent who authored the report to challenge a statement in the report. While knowing that this testimony was true, Mr. O'Neill and Deputy Independent Counsel Bruce C. Swartz² pressured the agent into providing carefully scripted testimony that would be interpreted by the jury to mean that the agent was specifically contradicting the defendant. Mr. O'Neill and Mr. Swartz had apparently persuaded the agent that his testimony would literally mean only that the defendant did not call him on the date the report was issued internally at HUD, which was about ten days earlier than the day the report was released to the public and the defendant secured a copy of it.

A careful reading of the agent's testimony (made available in Section B.1) reveals that the testimony is not even literally true, at least according to the way most English speakers interpret the language. But whether the testimony was literally true or not, readers of Section B.1 will regard Mr. O'Neill's manner of using the testimony to be an unconscionable act of a prosecutor with no sense of what it means to represent the United States.

² Bruce C. Swartz is now a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice. A [profile on Mr. Swartz](#) and his conduct in the *Dean* case similar to that on Mr. O'Neill is also available on jpscanlan.com.

In support of a motion for a new trial, the defendant offered evidence indicating that she had telephoned the agent just as she said, including information that she could have learned only from the call to the agent, and maintained that the agent's testimony must have been perjured. In responding to that motion, Independent Counsel attorneys did not have the temerity to advise the court that, although the defendant had testified truthfully, the agent's testimony that seemed to contradict her was nevertheless literally true because the agent's denial of recollection of the call applied only to a particular date. Had they done so, the court, which almost ordered a new trial solely on the basis of other identified abuses, might well have dismissed the indictment. The court might well also have recommended the sanctioning or prosecution of Mr. O'Neill and other involved Independent Counsel attorneys for the suborning of perjury whether the court regarded the agent's testimony to be literally true or not. So, instead, Independent Counsel attorneys endeavored to cover up their conduct by leading the court to believe that the testimonies of the agent and the defendant were irreconcilable and that the agent had told the truth and the defendant had lied. They even sought to have the defendant's sentence increased for lying about the call. The effort to deceive the court and the probation officer in the matter, undertaken in order to forestall inquiry into whether the agent committed perjury and government attorneys suborned that perjury, may have constituted obstruction of justice or other federal crimes.

Having left the Office of Independent Counsel immediately following the trial to assume the position of Assistant United States Attorney in the Middle District of Florida, Mr. O'Neill was not ostensibly involved in responding to the defendant's motion for a new trial on grounds of prosecutorial abuse. Hence, he was not necessarily involved in the efforts to deceive the court with regard to the manner of securing the agent's testimony. But, as discussed in [Section B.11a](#) of PMP, when the matter was raised in a complaint before the District of Columbia Office of Bar Counsel, Mr. O'Neill was put in the position of either explaining the literal truth rationale underlying the securing of the agent's testimony or attempting to deceive Bar Counsel in the same manner that Independent Counsel attorneys responding to the defendant's post-trial motion had attempted to deceive the court.

As also discussed in Section B.11a, unfortunately at this time DC Bar rules preclude me from making public the nature of Mr. O'Neill's response. But the panel interviewing Mr. O'Neill is entitled to, and certainly should, inquire of Mr. O'Neill just how he responded to this and other allegations of misconduct raised with DC Bar Counsel and whether by means of those responses he sought to deceive DC Bar Counsel in any manner.

More generally, I urge the interviewing panel to address with Mr. O'Neill whether he agrees with the soundness of the courts' criticism of his conduct in the *Dean* case and with the essential accuracy of the more damning account of his behavior in materials posted in the referenced places on my web site – as well as, with respect to any matter that Mr. O'Neill does not dispute, whether he engaged in similar conduct while prosecuting cases in the Middle District of Florida. Further, as Commission members are

undoubtedly aware, it is far easier for a dishonest individual to broadly maintain that certain charges are unfounded or inaccurate and to refuse to respond to particulars because of an asserted unfamiliarity with the particulars than it is for the individual to credibly respond specifically to well-founded charges when he has been forced to acknowledge familiarity with the details of the charges. Thus, I encourage the Commission to request that Mr. O'Neill, in advance of the interview, familiarize himself with the varied charges set out in his profile page and other parts of the prosecutorial misconduct materials made available on my web site.

I also note that many of the things that most observers would regard as indicating that Mr. O'Neill is unfit to represent the United States are not in the least in dispute. For example, as discussed on Mr. O'Neill's profile page and in [Section B.3](#) of PMP, the Independent Counsel had discovered certain documents indicating that crucial testimony Mr. O'Neill intended to elicit from a government witness was almost certainly false. The failure to make a *Brady* disclosure of those documents is one of the things the court of appeals sharply criticized. More important, however, it is undisputed that Mr. O'Neill elicited that testimony from the witness without ever confronting the witness with the documents indicating that the witness's expected testimony was false. The only reason Independent Counsel attorneys offered for such failure was that they were not obligated to confront the witness with the information. Those attorneys never addressed the critical question of *why* they did not confront the witness with the information even if they were not obligated to do so. And I submit that virtually every reader of the referenced materials would conclude that the reason for the failure to confront the witness with the information was that Mr. O'Neill and his colleagues expected that so confronting the witness would cause him to (truthfully) provide information that was exculpatory of the defendant, and that they preferred to go forward eliciting false testimony that was probative of the Independent Counsel's charge.³ The interviewing panel, however, is urged to determine whether Mr. O'Neill has a different explanation.

One will find in the [O'Neill profile](#) and materials it references other situations where the facts are not in dispute and where the presumptive answer as to why Mr. O'Neill behaved as he did is that he has no regard for truth or at least that he believes that truth is irrelevant to a federal prosecution. But, again, the panel is in a position to determine whether Mr. O'Neill has different explanations for his behavior.

The nature of the conduct at issue is such that I doubt that the Commission would consider for a moment that the fact that it occurred almost sixteen years ago undermines its relevance to the suitability of Mr. O'Neill for the position of United States Attorney. This is particularly so if Mr. O'Neil at any time engaged in similar conduct as an Assistant United States Attorney – which is something the reasonable observer has to

³ Section B.3 of PMP also shows that the defendant was in fact innocent of this charge. Most readers of that section would also conclude (a) that at the time Independent Counsel attorneys brought the charge they were almost certain the defendant was innocent, (b) that they deliberately forewent the inquiries that were likely to establish such innocence with absolute certainty, and (c) that, in all probability, they withheld from the grand jury information that might have led the grand jury to refuse to bring an indictment.

John M. Fitzgibbons, Esq. *et al.*
July 13, 2009
Page 6

take for granted. But any lack of candor on the part of Mr. O'Neill in now addressing his earlier conduct with the Commission would necessarily disqualify him for the position of United States Attorney.

Finally, I note that, while so far I have given only occasional attention to the publicizing of materials on my web site concerning the conduct of Mr. O'Neill and his colleagues, it is likely that eventually my interpretation of that conduct will be widely known. Thus, while the malfeasance of those who purport to represent the government often fails to receive public scrutiny as quickly as honest citizens might like, the Internet substantially increases the likelihood that such matters will ultimately be brought to light. If Mr. O'Neill were to be appointed United States Attorney, the eventual widespread knowledge of the interpretation of his conduct in the *Dean* case set in the prosecutorial misconduct materials on my web site, assuming the interpretation is deemed credible, could bring considerable embarrassment to the Department of Justice and generally diminish the faith of the public in the integrity of the criminal justice system.

At the same time, if the referenced materials are not credible, it would be manifestly unfair for the Commission to fail to recommend Mr. O'Neill for the position of United States Attorney simply because the materials exist and may eventually become widely read. Such action also would deny the United States what might be a capable or exceptional candidate for an important position. Thus, I suggest, it is incumbent upon the Commission both to carefully review the referenced materials and to provide Mr. O'Neill an opportunity to respond to them.

Apart from materials previously referenced, I suggest that it would be useful for the Commission to review my [email to Mr. O'Neill of June 15, 2009](#), among other things, advising Mr. O'Neill of his responsibility to bring the existence of the referenced materials to the attention of his superiors and to the attention of those persons from whom he seeks support in securing the position of United States Attorney.

In the event that there exist materials that the Commission believes it would be useful to review concerning this matter that are not found on my web site, please let me know. If I have them – and unless there exists some obstacle to disclosure (which probably applies only to materials related to the DC Bar Counsel proceeding) – I will post them on the web site or otherwise make them available to the Commission.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

John M. Fitzgibbons, Esq. *et al.*
July 13, 2009
Page 7

Attachment: Addressees, Middle District Conference of the Florida Federal Judicial
Nominating Commission

cc:

The Honorable Eric Holder
Attorney General of the United States

The Honorable A Brian Albritton
United States Attorney
Middle District of Florida

A. Lee Bentley, III, Esq.
First Assistant United States Attorney
Office of the United States Attorney
Middle District of Florida

Robert E. O'Neill, Esq.
Chief, Criminal Division
Office of the United States Attorney
Middle District of Florida