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[There are some irregularities in this item as a result of conversion from the WordPerfect.]

BY MESSENGER

The Honorable Joseph M. McDade
Member of Congress
2107 Rayburn House Office Building
Washington, D.C. 20515-3810

The Honorable John P. Murtha
Member of Congress
2423 Rayburn House Office Building
Washington, D.C. 20515-3817

Re: Citizens Protection Act

Dear Congressman McDade and Congressman Murtha:

Enclosed are some materials pertinent to the referenced legislation and the need for an independent body to oversee the conduct of Justice Department lawyers. I understand from the August 3, 1998 Washington Post that the legislation is being considered on the House floor next week.

The principal enclosed document is an 86-page letter I delivered to Department of Justice Inspector General Michael R. Bromwich on December 23, 1997 (Attachment 1). The letter recounts my efforts since 1994 to cause the Department of Justice to investigate the Office of Independent Counsel Arlin M. Adams in the prosecution of United States of America v. Deborah Gore Dean, Crim. No. 92-181 (TFH), and to cause the Department of Justice or the White House to remove certain former Independent Counsel attorneys from positions in the Department of Justice because their actions while serving as Independent Counsel attorneys indicated that they were unfit to represent the United States. Those former Independent Counsel attorneys included Jo Ann Harris, who resigned from the position of Assistant Attorney General for the Criminal Division three months

after I brought these matters to the attention of the White House Counsel. The letter to Mr. Bromwich requested that he investigate whether Department of Justice officials previously reviewing my allegations failed to investigate those allegations in good faith because of a concern that doing so would reveal that high-ranking Department of Justice officials, including Ms. Harris, had violated federal laws in the Dean case.

Attachments 2 through 6 are correspondence related to my bringing the matters addressed in my letter to Mr. Bromwich also to the attention of the Attorney General in early 1998. Attachment 7 is my letter of August 3, 1998, to Lee J. Radek, Chief of the Department of Justice's Public Integrity Section, seeking removal of another attorney from the Department of Justice because of his conduct in the Dean case and requesting an investigation of the Office of Independent Counsel by the Public Integrity Section.[1]

The materials and correspondence relate primarily to peculiar issues concerning Department of Justice oversight of an Independent Counsel and the conduct of Department of Justice attorneys prior to their joining the Department. Nevertheless, the matters addressed in the materials and correspondence, and the Department of Justice's

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[1] In addition to the removal of Ms. Harris, I have sought the removal of the following former Independent Counsel attorneys from positions in the Department of Justice: (1) Bruce C. Swartz from the positions of Special Assistant and Counsel to the Assistant Attorney General for the Criminal Division; (2) Robert E. O'Neill from the position of Assistant United States Attorney; (3) Claudia J. Flynn from the position of Chief of Staff to the Assistant Attorney General for the Criminal Division; and (4) Robert J. Meyer from the position of Attorney in the Public Integrity Section in the Criminal Division.

Ms. Flynn apparently left the Criminal Division some time between my informing her in June 1997 of my intention to seek her removal and my actually doing so by writing to Acting Assistant Attorney General John C. Keeney in October 1997 (though she may currently hold another position in the Department of Justice). Mr. Swartz apparently left the Criminal Division in early 1998. So far as I know, Mr. O'Neill and Mr. Meyer (who is the subject of my August 3, 1998 letter to Lee J. Radek) remain employed by the Department of Justice.

handling of those matters, are pertinent to the Department of Justice's oversight of the conduct of its own attorneys in a number of respects.

First, principal attorneys involved in the prosecutorial abuses in the Dean case, including Jo Ann Harris, were former Justice Department prosecutors. There is reason to believe that the evident belief of these attorneys that federal prosecutors have no responsibility to ensure the truthfulness of the testimony of government witnesses, and that government attorneys may deceive or mislead courts or juries, stemmed in some part from the historical failure of the Justice Department to provide adequate guidance to its attorneys. Further, after directing pretrial activities in the Dean case that included a calculated flouting of the government's Brady obligations and a court order to immediately provide the defendant all exculpatory material, as well as a systematic refusal to confront government witnesses with evidence indicating that their contemplated testimony was false, Ms. Harris became the Department of Justice's principal decisionmaker with respect to imposing discipline on federal prosecutors. There is reason to believe that her own prior conduct influenced the manner in which she imposed discipline on Department attorneys engaging in similar conduct. It is possible as well that Ms. Harris's evident lack of understanding or a government lawyers's obligations regarding the truth influenced the apparent failure of the Department to implement any of the reforms that were discussed when Ms. Harris was appointed in 1994 to the Department's Advisory Board on Professional Responsibility. See my letter to White House Counsel Abner J. Mikva dated May 17, 1995, at 13-15.

Further, shortly after Ms. Harris submitted her resignation from the Justice Department (which was announced in the Washington Post on May 19, 1995), Ms. Harris hired former Deputy Independent Counsel Bruce C. Swartz as a Special Assistant. After Ms. Harris's departure from the Department, Mr. Swartz remained in the Criminal Division eventually to assume the position of Counsel to the Assistant Attorney General. In addition to being deeply involved in the prosecutorial abuses initiated when Ms. Harris was lead trial counsel in the Dean case, Mr. Swartz was the principal actor in the matter that in the letter to Mr. Bromwich I maintain constituted a conspiracy to obstruct justice by deceiving the court in resisting discovery into whether a government witness committed perjury. Some time during the ensuing years, Claudia J. Flynn joined the Criminal Division as Chief of Staff. As explained in my letter to Mr.

Bromwich, though otherwise having no known role in the Dean case, Ms. Flynn was involved with Mr. Swartz in deceiving the court concerning the government agent's testimony. During the long period following Ms. Harris's departure when there was no permanent Assistant Attorney General for the Criminal Division, Mr. Swartz and Ms. Flynn may well have exercised significant influence concerning the disciplining of Department of Justice prosecutors and the guidance to be imparted to those attorneys concerning their professional responsibilities.

Second, if the representations by former Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. to me that his office had closely reviewed the materials I provided to the Department and did not find the described conduct to constitute either exceptional prosecutorial misconduct or violations of federal law were truthful representations, then the moral and ethical sense guiding the Department of Justice's oversight of its prosecutors for the last generation has been sorely deficient. As discussed in my letter to Mr. Bromwich, there is reason to believe that the very existence of an Office of Professional Responsibility under the direction of Mr. Shaheen may have undermined a regime of responsible law enforcement by affording an avenue for otherwise conscientious officials to absolve themselves of responsibility for oversight of their subordinates by habitually deferring matters to an entity of presumed competence, integrity, and judgment that either will fail to vigorously investigate allegations of prosecutorial abuse or will fail to honestly report the results of its investigations.

A third matter, which is reflective of the first point above, requires some elaboration. The letter to Mr. Bromwich recounts a situation where the evidence supports the following version of events (though, as explained below, the facts are not as significant as Associate Deputy Attorney General David Margolis's reaction to my description of the facts). Deborah Gore Dean was accused of conspiring with former Attorney General John N. Mitchell to cause the funding of certain HUD moderate rehabilitation projects, and a crucial issue in the case was whether Dean knew Mitchell had earned HUD consulting fees while she was Executive Assistant to HUD Secretary Samuel R. Pierce, Jr. Dean denied knowing that Mitchell had earned HUD consulting fees until she read of it in a HUD Inspector General's Report when the report was released in April 1989. Dean gave emotional testimony about reading the report and then calling a HUD Inspector General Agent named Alvin R. Cain, Jr. to complain of the treatment of Mitchell in the report and to demand to know

whether there existed a check showing the payment to Mitchell. A hearsay objection prevented Dean from testifying as to what Cain had told her when she asked about the check.

Shortly after Dean left the stand, Agent Cain was called as a rebuttal witness and firmly denied any recollection of the call from Dean. Such testimony would be expected to be especially damaging to Dean, since Agent Cain was an African-American and Dean was being tried before an entirely African-American jury. (The court had repeatedly chastised the prosecutor for what the court perceived as an effort to play on the racial differences between the defendant and the jury.) In a closing argument where prosecutor Robert E. O'Neill provocatively asserted approximately 50 times that Deborah Gore Dean had lied on the stand (most of the time in circumstances where he had reason to know that she had not lied), he placed great weight on Cain's contradiction of Dean's testimony about the call both in the initial and rebuttal parts of his closing arguments.[2]

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[2] Three quarters of the way through the first day of the closing argument, O'Neill attacked Dean's credibility with particular acerbity, stating:

> Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees and Agent Cain's contradiction of Dean's testimony about calling him to question the treatment of Mitchell in the HUD Inspector General's Report. O'Neill stated the following:

> Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant

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and rave. That's exactly what she told you.

> So we had to call in Special Agent Alvin Cain for two minutes' of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that.

Tr. 3419-20.

During rebuttal the following day, while continuing the attack on Dean's credibility, O'Neill again turned to Cain, asserting:

> Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never ever happened.

Tr. 3506.

As discussed in the letter to Mr. Bromwich, it appears that Cain in fact remembered the call from Dean and had so informed Independent Counsel attorneys. But those attorneys persuaded or pressured Cain to give certain precise answers to questions posed to him on the stand that would cause the jury to infer that Dean had lied about calling him. Apparently, those attorneys had contrived some rationale--though it would have to have been a strained rationale--by which Cain's responses might be deemed literally true even though he remembered the call from Dean.

In support of a motion for a new trial, Dean presented evidence that she had in fact called Cain, including an affidavit by me stating that Dean had told me about the call in 1989 and had even told me what Cain had told her concerning the whereabouts of the check to Mitchell.[3] Crucially, in responding to a claim that Cain committed perjury with knowledge of Independent Counsel attorneys, Independent Counsel attorneys did not inform the court that there existed a rationale by which Cain's testimony was true even though he did remember the call. Had they done so, the court would probably have dismissed the indictment and endeavored to cause some disciplinary action to be taken against the attorneys.

Instead, Independent Counsel attorneys asserted that Cain's testimony was true and Dean's testimony and my affidavit were false. They did so in not only in attempting to uphold the verdict, but also in seeking to have Dean's sentence increased for lying about the call and in resisting discovery into whether Cain had committed perjury. Assuming this version of events is correct, it would seem that at least by deceiving the court in resisting discovery into whether Cain committed perjury Independent Counsel attorneys, including attorneys who went on to hold positions of Special Assistant and Counsel to the Assistant Attorney General for the Criminal Division (Bruce C. Swartz) and Chief of Staff for the Criminal Division (Claudia J. Flynn), as well as attorney in the Public Integrity Section (Robert J. Meyer), engaged in a conspiracy to obstruct justice that continues to this day.

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[3] Dean and I both stated that she had told me that Cain had told her there did exist a check, but that he did not have a copy of it since it was maintained in a HUD field office. Dean argued that if the check was maintained in a field office in April 1989, it would tend to corroborate her testimony about the call, since she would otherwise have no basis for knowing that fact.

The point concerning the pending legislation, however, does not turn on the accuracy of this interpretation, but rather on the reaction of Associate Deputy Attorney General David Margolis when the matter was brought to the attention of the Department of Justice in December 1994. I raised this and other matters in voluminous materials I provided to the Attorney General on December 1, 1994. In doing so, having taken for granted that Cain's testimony was false (since my own was true), I did not address the implications of the possibility that there existed a rationale by which his testimony might be literally true.

Shortly after I submitted the material to the Department, I was asked to meet with Mr. Margolis, who is someone I have since come to understand has had a substantial role in the oversight of the conduct of Department of Justice prosecutors for a considerable period to time. When I met with Mr. Margolis, he appeared to be quite familiar with the materials on the Cain matter. In discussing that matter, Mr. Margolis posed to me the question of whether, assuming that Dean had called Cain as she said, it was possible that Cain's testimony was nevertheless literally true. Unprepared for that question, I merely noted one of the reasons why I did not think that was possible. Thereafter, however, I would repeatedly point out to the Department the reasons why the literal truthfulness of Cain's testimony would not diminish the heinousness of the conduct of Independent Counsel attorneys; indeed, the existence of a rationale by which Cain's testimony was literally true even though he remembered the call would be compelling evidence that Independent Counsel attorneys had calculatedly elicited Cain's testimony to deceive the jury and had deceived the court in post-trial proceedings. Mr. Shaheen eventually would refuse to respond to my requests that he reveal whether the existence of a rationale by which Cain's testimony was literally true underlay the Department of Justice's handling of the matter.

Whether such rationale in fact underlay the Department's handling of the matter is not a crucial issue here, however. The telling fact here is that Mr. Margolis posed the question. By posing that question, Mr. Margolis implied both that it would be permissible for the government to elicit testimony from a government witness in order to deceive a jury so long as the witness's testimony was literally true and that it would be permissible for government attorneys to deceive a court in resisting discovery into whether the witness committed perjury. Though Mr. Margolis may not have considered the implications of his question at the time he posed it,

he had been involved with similar matters long enough that the very posing of the question suggests a seriously flawed understanding of the obligations of a government lawyer with regard to the truth. I suspect that a similarly flawed understanding of a government lawyer's obligations regarding the truth may be widespread among federal prosecutors, if for no other reason than that, so far as I can tell, the Department of Justice has done little to instruct those attorneys otherwise.

Enclosed as Attachment 8 is a copy of my correspondence with the Department of Justice between December 1, 1994, and April 20, 1998 (on diskette, in WordPerfect 6.0).[4] The letters to me exclusive of FOIA responses, including letters from Michael E. Shaheen, dated June 28, 1995, and January 30, 1996, are provided in hard copy. I suggest that a careful review of Mr. Shaheen's letters to me, along with my responses of August 14, 1995, and March 11, 1996, will cause the reviewer to find justified my claims to Mr. Bromwich that Mr. Shaheen's letters to me are not merely unsatisfactory, but are dishonest, and that they may well involve an affirmative effort to deceive me concerning the Department's view about Agent Cain's testimony.

Attachment 9 contains (on diskette, in WordPerfect 6.0) a complete set of the materials I provided the Department between December 1994 and January 1995. These materials are quite voluminous--approximately 400 single-space pages of narrative material--and rather complex. But I submit that they firmly support my claims that none of the individuals identified above who joined the Department of Justice after serving as an Independent Counsel attorney in the Dean case is fit to represent the United States. And, while I give considerable attention to the matter of Agent Cain here as well as in my letter to Mr. Bromwich and other correspondence to

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[4] The bulk of this correspondence occurred over the period between December 1, 1994, and March 11, 1996. The more recent items are related to a Freedom of Information Act request I submitted on November 24, 1998, including my April 20, 1998 appeal of a denial of a fee waiver I had requested based on my assertion that disclosure of the requested materials "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

the Department of Justice, that conclusion would hold even if Agent Cain had never testified. Yet, the Department of Justice is on record that the conduct described in these materials does not constitute what the Department regards as exceptional prosecutorial misconduct or violations of federal law.

For your information, I am myself a former government lawyer, having retired from the Equal Employment Opportunity Commission in March 1995. Currently, I am counsel to the firm of Akin, Gump, Strauss, Hauer & Feld, L.L.P.

If you have any questions concerning these materials, I can be reached during the day at (202) 887-4453.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Attachments