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Judith B. Wish, Esq.
Deputy Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Deputy Assistant Attorney General Bruce C. Swartz

Dear Ms. Wish:

Thank you for your letter of December 28, 2009,[1] which references my letter to Attorney General Eric Holder dated November 2, 2009, as well as my emails to the Department of Justice dated July 14, 2008, July 17, 2008, and April 9, 2009. A response is in order relating to (1) the wisdom and pertinence to the instant matter of your letter's stated position that the Office of Professional Responsibility will refrain from investigating issues or allegations that were addressed, or could have been addressed, in the course of litigation, unless a court has made a specific finding of misconduct or there are present other extraordinary circumstances; and (2) the implications of the current circumstances of Bruce C. Swartz and Robert E. O'Neill in the Department of Justice. These matters are addressed under the two headings below.

Initially, however, several points in your letter warrant correction or clarification. The corrections or clarifications are of varying importance.

First, your letter's listing of the involved attorney omits two persons who were subjects of my letter to Attorney General Holder. These include Raymond N. Hulser, currently acting chief of the Public Integrity Section of the Criminal Division, who, as lead trial counsel in the *United States v. Dean* when it was prosecuted by the Department of Justice, was involved in efforts to cause pending allegations of prosecutorial misconduct not to be addressed by the courts; and the person who is the subject of the Temp Confidential sub-page of the Password Protected page of jpscanlan.com discussed in the

[1] As with my November 2, 2009 letter to Attorney General Eric Holder, the underlinings indicate links to referenced documents in an online electronic copy of this letter that may found by its date on the Letters (Misconduct) sub-page of the Prosecutorial Misconduct page of jpscanlan.com.

second paragraph of page 5 of the letter to Attorney General Holder and who was apparently involved in efforts to cover up Independent Counsel actions concerning Supervisory Special Agent Alvin R. Cain, Jr. (a matter also addressed briefly in Section B *infra*).

Second, your letter states that Agent Cain was an agent of the Federal Bureau of Investigation. Rather, Agent Cain was an agent of the Inspector General's Office of the Department of Housing and Urban Development, who, at the time of his testimony, was detailed to the Office of Independent Counsel.

Third, your letter describes Robert E. O'Neill as currently the United States Attorney for the Middle District of Florida. Mr. O'Neill was the interim United States Attorney in that district at the time of my emails of July 2008. But as, as discussed in my November 2, 2009 letter to Attorney General Holder, as of the date of the letter Mr. O'Neill was Chief of the Criminal Division of the Office of the United States Attorney for the Middle District of Florida in which position he remains today (though, as discussed in the letter to the Attorney General and below, Mr. O'Neill is a leading candidate for the position of United States Attorney).

Fourth, in its description of my allegations concerning Supervisory Special Agent Alvin R. Cain, Jr. (a matter discussed, among other places, in Sections B.1,[2] B.1a, and B.2 of the main Prosecutorial Misconduct page (PMP) of jpscanlan.com as well as in the profile pages on Arlin M. Adams, Bruce C. Swartz, Robert E. O'Neill, and Robert J. Meyer, and an August 2008 post on powerlineblog.com), your letter states that I assert that Agent Cain's testimony was literally true. It is fairer to say that I assert that Agent Cain was pressured into giving the testimony on the basis that it was supposed to be literally true. In a number of places I note that the testimony in fact appears not to have been literally true.

Fifth, your letter describes my allegation concerning Agent Cain's testimony as being that the testimony was intended to give the court and the jury a false impression and thereby suggest that the defendant had lied. It is fairer to say that Robert E. O'Neill repeatedly and provocatively told the jury that the testimony proved that the defendant had lied and that Bruce C. Swartz explicitly told the court that the testimony proved that the defendant had lied. Arlin M. Adams also specifically told the probation officer that the testimony showed that the defendant had lied.

Sixth, your letter's description of the allegation regarding Agent Cain overlooks the attention given to the post-trial actions of Independent Counsel attorneys including Arlin M. Adams, Bruce C. Swartz, and Robert J. Meyer, where, rather than acknowledging that

[2] This letter provides several links to sections of the main Prosecutorial Misconduct page on jpscanlan.com. Since those sections are periodically revised, links to those sections herein are to separately maintained copies of those sections as they existed at the time this letter was mailed and posted on jpscanlan.com.

the rationale underlying Agent Cain's testimony was that it was supposed to be literally true even though the defendant's testimony was also true, those attorneys sought to deceive the court and probation officer in order to cover up Independent Counsel actions in the eliciting and use of Agent Cain's testimony. This aspect of the matter is of some importance given that, as I have argued in several places, the efforts to deceive the court and the probation officer in the course of an inquiry into whether Agent Cain committed perjury are among the actions of Mr. Swartz and other Independent Counsel attorneys that are most likely to have constituted obstruction of justice or other federal crimes. Further, that in order to cover up conduct that many would regard as the suborning of perjury Mr. Swartz and others sought to have the defendant's sentence increased for giving false testimony when they knew for a fact that her testimony was true is also something that many would consider to be particularly heinous regardless of whether it involved any criminality. And, since the Department of Justice seems to be of the view that even assuming the complete accuracy of my interpretation of the conduct of Mr. Swartz and Mr. O'Neill regarding Agent Cain's testimony, such conduct would not call into question their fitness to serve in their current positions, the essential aspects of the matter should be clearly stated.

Finally, I note that two aspects of your letter are somewhat cryptic. The letter states that it is your understanding that "the defendant could have raised some or all of these issues during trial" and that your office "concluded that Ms. Dean has raised (or could have raised) the issues of alleged prosecutorial misconduct with the court." These statements leave it unclear whether the Office of Professional Responsibility concluded that all issues could have been raised with the court, including such things as the fabrication of Government Exhibit 25 (the subject of Section B.9a of PMP and a matter of considerable complexity), or, for that matter, the actions of Mr. Swartz and others in covering up the manner in which Agent Cain's testimony was secured. As noted, your letter in fact ignores entirely the allegations concerning the efforts to deceive the court in responding to those allegations or the implications of such efforts (a matter addressed further in Section A below).

In any case, I doubt that the Office of Professional Responsibility can conscientiously state that it reviewed my allegations with sufficient thoroughness to conclude that all of them could reasonably have been raised with the court. And, as in a situation where a defendant in a case brought by the Government has a defense to some or even most of the Government's allegations, a response that does not cover all allegations is a deficient one.

The letter is similarly somewhat cryptic as to when the Office of Professional Responsibility determined that various matters were or could have been raised with the courts. I am inclined to regard the varying tenses employed at the close of the third paragraph as indicating that any review of the allegations that underlies your conclusion on this matter is such review as was undertaken by the Office of Responsibility in 1995

and that there has been no more current appraisal of those allegations and whether they were or could have been raised at trial. Please correct me if I am mistaken in that regard.[3]

A. The Office of Professional Responsibility's Position of Refraining from Investigating Matters that Were or Could Have Been Raised in Litigation.

Your letter describes an investigative policy of the Office of Professional Responsibility as follow:

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[3] Though in the scheme of things the timing of the determination is not of great importance, I note the following as a matter as to which the timing may have some pertinence. Section [3] of the profile of Bruce C. Swartz discusses, *inter alia*, Mr. Swartz's action at a February 1994 hearing where he defended the effort of Independent Counsel attorneys to lead the jury to believe that a seemingly conspiratorial reference to "the contact at HUD" on the Park Towers project was a reference to the defendant, even though an immunized witness had told Independent Counsel attorneys that the reference was to a Deputy Assistant Secretary named Silvio DeBartolomeis. In the hearing, Mr. Swartz told the court that it was permissible to attempt to lead the jury to believe that the reference was to the defendant because (a) there were no documents showing the witness's contacts with DeBartolomeis and (b) the defendant was responsible for the post-allocation waiver on the project. In making these points, Mr. Swartz was attempting to lead the court to believe both that (a) and (b) were true and that (a) and (b) were the actual reasons Independent Counsel attorneys deemed it permissible to lead the jury to believe that the "contact at HUD" reference pertained to the defendant. Mr. Swartz, however, knew that both (a) and (b) were untrue. There were documents reflecting the witness's contacts with DeBartolomeis and one such document showed as well that DeBartolomeis had been responsible for the post-allocation waiver. But as a result of various deceitful tactics by Independent Counsel attorneys (*see* section [3] of the profile of Robert E. O'Neill), including the failure to make a *Brady* disclosure of the documents refuting (a) and (b), those attorneys were able to create a record that would allow Mr. Swartz to deceive the court. The defense did not initially raise this matter with the court (which, it warrants note, may have been influenced by Mr. Swartz's statements in deciding not to overturn the verdict). The matter was raised, however, in materials I provided to the Department of Justice in December 1994 and was presumably considered by the Office of Professional Responsibility in 1995. Any conclusion the Office of Professional Responsibility reached at that time that the matter could have been raised with the courts would seem to involve a rather liberal interpretation of "could have been raised," as would any such conclusion in circumstances where it is the federal prosecutors' successful deceiving of the defense that causes a matter not to be raised with the courts.

The instant point, however, involves the fact that the matter was raised in the defendant's motion of February 1997, where it was cited as an instance of additional prosecutorial abuses not previously addressed and as an instance of Independent Counsel efforts to deceive the court in responding to the defendant's earlier motion. The matter was never actually addressed by the court because the Department of Justice – after initially adopting the Independent Counsel position that it was too late to raise such matters and that there had been no efforts to deceive the court in responding to the defendant's earlier motion – reached an agreement whereby the matters would never be addressed by the court. Similar issues exist as to such things as the failure to disclose, and concealment of, the Sankin Harvard Business School application discussed in Section B.7a of PMP, which was not raised in the defendant's 1993 motion or in the materials I provided to the Department in December 1994, but which was raised in the defendant's February 1997 motion, as well as the matters discussed in Sections B.6 and B.7, which involve efforts to deceive the courts that had not yet taken place when the Office of Professional Responsibility addressed the matter in 1995.

Thus, as to these and varied other matters, the reasonableness and meaning of any conclusion of the Office of Professional Responsibility that many or all matters could have been raised with the courts may be somewhat affected by when the Office of Professional Responsibility reached such conclusion.

> It is the position of this Office to refrain from investigating issues or allegations that were addressed, or that could have been addressed, in the course of litigation, unless a court has made a specific finding of misconduct by a Department attorney or there are present other extraordinary circumstances.

I show below why this position would be disturbing to most thoughtful observers. One preliminary matter warrants mention.

Even assuming that the Office of Responsibility reasonably concluded that all my allegations were or could have been raised with the courts, your letter seems to have overlooked that there did occur specific findings of misconduct by courts in this case. The district court specifically found that in failing to disclose a witness's off-the-stand statement Mr. O'Neill had engaged in conduct that the court would not have expected from any Assistant United States Attorney who had ever appeared before it.[4] The court also found that the Independent Counsel attorneys had put on witnesses without determining whether they were telling the truth, including witnesses who in the court's view did not tell the truth. The court's observations regarding the testimony of Thomas T. Demery reflect a view, not only that Independent Counsel attorneys wrongfully failed to correct testimony that they knew to be false, but that their efforts to lead the court to believe that they did not recognize that the testimony was false were intended to deceive the court. The court's findings that Independent Counsel attorneys wrongfully failed to disclose exculpatory information while representing that no such material existed similarly reflected an implicit finding that actions of Independent Counsel attorneys in defending their conduct involved an effort to deceive the court. More generally, in addition to lamenting the near impossibility of evaluating the cumulative effect of identified abuses (hence, indicating that in the court's view the abuses were widespread), the district court found that the case was prosecuted in a manner that was inconsistent with what the court regarded as Department of Justice standards of conduct. The court of appeals, by "deplor[ing]" certain failures to bring exculpatory information to the attention of the defense effectively found that the prosecution directed by Mr. Swartz and Mr. O'Neill violated obligations imposed both by *Brady v. Maryland* and by specific orders of the Honorable Gerhard A. Gesell, implicitly finding as well that Mr. Swartz's implied or explicit representations that that there had been no intentional *Brady* violations were false.

It is true, to be sure, that both courts failed to find that the abuses were sufficient to deny the defendant a fair trial. But that determination involves a quite different matter from

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[4] That matter involved the failure of Mr. O'Neill to disclose an off-the-stand statement indicating that receipts Mr. O'Neill intended to lead the jury to believe reflected meals or gifts purchased for the defendant did not apply to her. As discussed in Section B.7 of PMP and section [1] of the Robert E. O'Neill profile, even before the witness made the statement, Mr. O'Neill knew that certain of the receipts did not apply to the defendant. Had the court appreciated such fact, its criticism of Mr. O'Neill would presumably have been more severe.

whether issues have been raised that are of sufficient gravity to call into question the integrity of the prosecutors or provide reason for further inquiry.

Putting the courts' findings aside, however, let us consider the position as stated and in the context of a situation where, as here, the allegations include that government attorneys endeavored to deceive the courts in responding to allegations of misconduct. Consider a situation where government attorneys cause a witness to give false testimony and when the matter is raised in court by the defense the prosecutors provide false or misleading information in order to refute the allegation. The court, influenced in substantial part by reluctance to believe that federal prosecutors would either cause a witness to give false testimony or attempt to deceive the court in defending against the allegations, rejects the defendant's contentions on the basis that the evidence is inconclusive. According to the position advanced in your letter, in these circumstances, which do not materially differ from the circumstances involving actions of Independent Counsel attorneys in securing and using Agent Cain's testimony and in subsequently covering up their conduct, the Office of Professional Responsibility would not investigate the matter because it had been raised in the court, even if there exists strong reason to believe that the defendant's claims are valid. Many similar points could be made regarding aspects of the conduct of Independent Counsel attorneys in the trial itself and in efforts in post-trial proceedings to deceive the court in concealing the nature of the conduct during the trial.[5] Such position hardly encourages federal prosecutors to be completely forthcoming as to the nature of their actions and the motivations behind them when in court proceedings such actions are alleged to involved ethical breaches. Rather, it suggests to those prosecutors that if they are successful in concealing the nature of their actions from the courts, they will not have to answer to the Office of Professional Responsibility as to such concealment or the manner in which they achieved it. In any event, few citizens would regard the Office of Professional Responsibility's position in the described circumstances to reflect a sound understanding of the role of an entity charged with ensuring the integrity of federal prosecutions.

Further, the position advanced in your letter seems to suggest that the Office of Professional Responsibility regards the integrity of federal prosecutions merely to involve an individual right of a defendant that can be lost if the defendant fails to assert it effectively. But the public also has an interest in the integrity of federal prosecutions, as, it would seem, does the Department of Justice itself, and the stated position ignores those interests. The position ignores as well the interests of the public and the Department in ensuring that individuals who have shown themselves to lack the fundamentals of prosecutorial ethics not prosecute future cases on behalf of the United States.

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[5] Indeed, almost every matter raised with the Department of Justice concerning an issue in some manner raised with the court in 1993 involved an effort by Independent Counsel attorneys to deceive the court in responding to the defendant's allegations. See note 3 *supra*, the profile of Bruce C. Swartz, and Sections B.1, B.1a, B.3, B.3a, B.6, and B.7 of PMP.

I recognize that fiscal constraints may cause the Office of Professional Responsibility to require that certain criteria be met before it commits resources to investigating allegations that might already have been adequately addressed. But here the materials I have made available render an extensive investigation unnecessary. And, in any case, I am asking no more than that the Department conscientiously determine whether the behavior of Mr. Swartz and Mr. O'Neill ought to disqualify them from representing the United States, either at all or in their current positions. Potentially, all the Department need do is advise Mr. Swartz and Mr. O'Neill of their obligations to tell the truth (or assert their Fifth Amendment privileges against self-incrimination) and ask them whether the descriptions I have provided concerning their conduct regarding Agent Cain and other matters are essentially correct. I gather, however, that while believing either that the allegations are certainly correct in most or all essential respects, or at least that there is a high probability that they are, the Department of Justice is unwilling even to pose such questions. As suggested earlier, that would seem to indicate that the Department would wish Mr. Swartz and Mr. O'Neill to continue to serve in their current positions even if every allegation could be proven beyond a reasonable doubt.

B. Implications of the Current Circumstances of Bruce C. Swartz and Robert E. O'Neill with the Department of Justice

The great majority of readers of significant parts of the main Prosecutorial Misconduct page of jpscanlan.com and the profiles on Bruce C. Swartz and Robert E. O'Neill would likely conclude that, unless those materials materially misstate the facts, both Mr. Swartz and Mr. O'Neill are untrustworthy attorneys; that they engaged in repeated efforts to deceive the jury and the courts in the prosecution of Deborah Gore Dean; and that they did so, in at least some instances, in order to prove the defendant guilty of crimes of which Mr. Swartz and Mr. O'Neill believed the defendant to be innocent.[6] Those readers are likely also to conclude that principal motivations of Mr. Swartz and Mr. O'Neill were the advancement of their careers and, in the case of Mr. Swartz's post-trial efforts to deceive the court, the desire to cover up his own actions and actions of others that could include federal crimes. Some may also conclude that the 1995 hiring of Mr. Swartz by Assistant Attorney General Jo Ann Harris as her Senior Special Assistant was in some respects a reward for Mr. Swartz's efforts in proving certain allegations and inferences that Ms. Harris knew or believed to be false when she included them in the Superseding Indictment. It would in fact be hard not to conclude that Mr. Swartz's hire by Ms. Harris at a minimum grew out of involvements of Ms. Harris and Mr. Swartz in a prosecution that involved efforts to prove many things that Ms. Harris and Mr. Swartz knew or believed to be false.

[6] The Agent Cain matter, while having substantial implications with respect to the entire trial, was most closely related to a matter as to which Mr. Swartz and Mr. O'Neill knew with virtual certainty that the defendant was innocent, but as to which they were willing to use a substantial volume of false evidence in order to prove the defendant guilty (as discussed in Section B.3 of PMP and the materials it references) and, in the case of Mr. Swartz, also to attempt to deceive the courts in defending Independent Counsel actions. See also Section B.3a of PMP.

As a result of the Department of Justice's earlier failure to consider whether their conduct in the *Dean* case rendered Mr. Swartz or Mr. O'Neill unfit to hold positions in the Department, both now hold positions of great importance. It is my understanding that, among other duties of comparable importance, Mr. Swartz testifies before Congress and represents the Department in dealing with representatives of foreign nations on matters that include actions to thwart terrorism. It is also my understanding that Mr. O'Neill, in addition to being a leading candidate for the position of United States Attorney in the Middle District of Florida, supervises criminal prosecutions in the district and, while essentially unsupervised by anyone else, conducts criminal prosecutions himself.

The Department of Justice's allowing these individual to serve in these roles while believing, either with certainty or in all probability, that my allegations are essentially correct raises serious issues about the Department's concern for its own integrity. Apart from that, however, there exists the possibility that issues will arise as to the trustworthiness of Mr. Swartz and Mr. O'Neill where the fact that my allegations were or could have been raised in litigation could hardly provide a basis for ignoring such allegations in addressing those issues.

Suppose that a member of Congress or a representative of a foreign government questions the integrity of Mr. Swartz either on the basis of perceptions of Mr. Swartz's actions in his current position or on the basis of familiarity with the matters addressed on my website. In the former circumstance, would the Department represent that it has no reason to doubt Mr. Swartz's integrity (failing even to disclose my allegations) simply because those allegations were or could have been raised in litigation? In the latter circumstance, would the Department offer no opinion on the validity of the allegations because they could have been raised in litigation?

According to my last understanding of the matter, there has yet been no action on the July 2009 recommendation of the Florida Federal Judicial Nominating Commission that Mr. O'Neill be one of three candidates whom the Florida Senators should consider recommending to the President for appointment to the position of United States Attorney for the Middle District of Florida. In the event that one of those Senators or the President seeks the Department's views as to the suitability of Mr. O'Neill for the United States Attorney position, would the Department fail to disclose my allegations on the basis that they were or could have been raised in litigation? If the allegations are specifically brought to the attention of the Department in the context of consideration of Mr. O'Neill's suitability for the United States Attorney position, would the Department refuse to offer an opinion on their validity on the basis that they could have been raised in litigation or would it assert, perhaps more in keeping with the Department's stated position discussed in Section A, that, whatever their validity, such allegations should be ignored in determining Mr. O'Neill's suitability for the position of United States Attorney?

Further, as discussed in my letter to Attorney General Holder, any matters raising issues about Mr. O'Neill's suitability for the United States Attorney position raise similar issues

about his suitability to serve in his current position. In the event allegations are raised concerning the integrity of a prosecution conducted by Mr. O'Neill – perhaps even involving allegations similar to those of which he was accused in the *Dean* case (including those as to which the court found him culpable) – would the Department ignore the bearing of the certain or probable validity of the allegations in the *Dean* case in considering the validity of the allegations raised in the other case simply because the allegations concerning the *Dean* case were or could have been raised in litigation?

In sum, whatever might be the reasonableness of the Department of Justice's position in circumstances where Mr. Swartz and Mr. O'Neill are no longer employed by the Department, that position seems not to be reasonable in light of the current circumstances of Mr. Swartz and Mr. O'Neill. Thus, I suggest that the Department reconsider its position on this matter, at least to the point of asking Mr. Swartz and Mr. O'Neill whether my allegations regarding Agent Cain and other matters are essentially correct.

Similar issues exist with regard to the subject of the referenced password protected page. That is, it would seem difficult to justify the contemplated Department of Justice actions discussed on that page while the Department refuses to consider the allegations regarding the testimony of Agent Cain. As with any current inquiries concerning the integrity of Mr. Swartz and Mr. O'Neill, any possibility that the misconduct issues could have been addressed in litigation seems hardly of moment.

Finally, I note that in Sections B.1 and B.8 of the of the main Prosecutorial Misconduct page, I point out that it was Associate Deputy Attorney General David Margolis who first suggested to me the possibility that Agent Cain was persuaded to give the testimony that he did on the basis that, even though Deborah Gore Dean did call Agent Cain just as she said, Agent Cain's testimony was also literally true. I also point out that Mr. Margolis raised the matter apparently as a basis for believing that the conduct of Independent Counsel attorneys was not as egregious I was maintaining. Thus, as discussed to some extent in prior correspondence with the Office of Professional Responsibility, there exists the possibility that the Department of Justice accepts my interpretation of the matters involving Agent Cain to be essentially correct but regards the actions of Mr. O'Neill and Mr. Swartz both in the use of the testimony and in concealing the circumstances surrounding such use to be, if not entirely appropriate prosecutorial tactics, at least not of sufficient gravity to indicate that those who engaged in it are unfit to represent the United States (or to call into question the Department of Justice actions discussed on the password protected page). If the Department is of such view, it would seem reasonable to so advise me. Doing so would obviate any further addressing of whether the allegations concerning Agent Cain's testimony are true and thus allow further attention given to the Agent Cain matter by me or anyone else to be instead devoted solely to addressing the wisdom of the Department of Justice's view and the implications of its holding such view. I have long assumed that, even if it might have some questions as to the validity of any of my other allegations, the Department has no doubt whatever as to the essential accuracy of my allegations concerning the Agent Cain matter. Here too,

however, if I am mistaken in that regard, it would be useful if the Department would so advise me.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: The Honorable Eric Holder
Attorney General