

**JAMES P. SCANLAN**

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**PERSONAL AND CONFIDENTIAL**

Claudia J. Flynn, Esq.  
Chief of Staff  
Office of the Assistant Attorney General  
for the Criminal Division  
United States Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

Dear Ms. Flynn:

This letter is to request you to provide a listing of positions you have held with the federal government. I am most interested in knowing when you served in the Office of Independent Counsel Arlin M. Adams or Larry D. Thompson and the positions (with dates) you have held at the Department of Justice. If there exists an official Department of Justice profile or biography on you, I would appreciate a copy. These seem to be items of information that a government official in your position would readily reveal to any member of the public regardless of the reasons such person sought the information.

I think it appropriate, however, to state that my interest in this information relates to your conduct as an Associate Independent Counsel in the Office of Independent Counsel Arlin M. Adams. All I know of that conduct is that you appeared at a hearing on February 22 and 23, 1994, to address certain sentencing issues in United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.). On the first of those days, prior to considering sentencing issues, the court heard argument on the defendant Deborah Gore Dean's motion for reconsideration of the court's earlier denial of her motion for a new trial. In the motion for reconsideration, Ms. Dean had argued, inter alia, that Supervisory Special Agent Alvin R. Cain, Jr. had committed perjury while testifying as an Independent Counsel witness and requested discovery on that issue as well as on whether Independent Counsel attorneys were implicated in that perjury.

As I trust you recall, during the trial Ms. Dean had testified about calling Agent Cain in April 1989 to question the statement in the HUD Inspector General's Report that Louie B.

Nunn had paid former Attorney General John N. Mitchell a \$75,000 consultant fee on a moderate rehabilitation project called Arama and to demand to know whether there existed a check showing that Mr. Mitchell had received that fee. Testifying as an Independent Counsel rebuttal witness, Agent Cain firmly denied any recollection of such call. In closing argument, Associate Independent Counsel Robert E. O'Neill placed great weight on Agent Cain's testimony contradicting Ms. Dean's testimony about the call in asserting that Ms. Dean lied about her knowledge that John Mitchell had earned HUD consulting fees.

In support of a request for a new trial Ms. Dean provided an affidavit stating that when she called Agent Cain, he had told her that there did exist a check showing that Mr. Mitchell had earned the consultant fee, but that the check was then maintained in the Regional Inspector General's Office. Ms. Dean also stated that after calling Agent Cain she had told me about the call, including what Agent Cain had told her about the whereabouts of the check. I submitted an affidavit stating that in April 1989 Ms. Dean had told me about the call to Agent Cain and had told me that Agent Cain had told her that the check was maintained in a HUD field office. Ms. Dean argued that if the check was in fact maintained in a field office in April 1989, it would be highly relevant to the issue of whether Agent Cain committed perjury.

In its opposition to this motion, the Independent Counsel said nothing whatever about the whereabouts of the check or about Ms. Dean's argument that the whereabouts of the check could corroborate her testimony about the call to Agent Cain. Only when forced to do so by the motion for reconsideration in which Ms. Dean pressed this issue further and requested discovery on the matter, did the Independent Counsel say anything about the check. In an effort to persuade the court not to allow discovery on these issues, Deputy Independent Counsel Bruce C. Swartz endeavored to lead the court to believe that the Independent Counsel believed that Ms. Dean had surmised that the check was maintained in HUD's Atlanta Regional Office by an entry in the HUD Inspector General's Report following the report of a December 12, 1988 interview of Louie B. Nunn. The entry stated: "All the contracts/agreements shown to NUNN were obtained from HUD-OIG audit file in Atlanta, Georgia."

Mr. Swartz also argued that Ms. Dean's sentence should be increased for fabricating the story about the check. He did not address the implications of my affidavit or indicate whether the Independent Counsel maintained that it was in April 1989 that Ms. Dean had surmised that check was maintained in the regional office and that she had falsely told me at that time that Agent Cain had told her the check was that office, or the Independent Counsel maintained that Ms. Dean had only recently fabricated the story about the call to Agent Cain and that my affidavit was therefore false. The court refused to reconsider its ruling or to allow the discovery sought by Ms. Dean stating that the evidence put forward "doesn't mean of necessity the government is putting on information they knew was false before the jury."

The Independent Counsel had also persuaded the probation officer to recommend an increase in Ms. Dean's sentence on the basis of Agent's Cain's contradiction of Ms. Dean's testimony about the call. Presumably, you were then prepared to make the same arguments that Mr. Swartz had made about the call in order to persuade the court to adopt the probation officer's recommendation. As it happened, you were not called upon to do so, because the court, without hearing argument on the issue, refused to accept the recommendation, indicating that it believed that Ms. Dean may have made the call. In a related ruling shortly afterwards, the court appeared to indicate that in fact it believed that Ms. Dean had made the call.

Unless Mr. Swartz actually believed that Ms. Dean had surmised that the check was maintained in the HUD regional office from the cited entry in the HUD Inspector General's Report--and believed, moreover, that Ms. Dean had fabricated the story about the call to Agent Cain--the conclusion would seem inescapable that Mr. Swartz attempted to obstruct justice in arguing to persuade the court not to allow discovery on this issue. Further, unless you believed these same things, it would seem that you conspired with Mr. Swartz, and presumably with other Independent Counsel attorneys, to obstruct justice concerning this matter.

Civility inclines me to observe that you might in fact have believed that Ms. Dean had not called Agent Cain and had fabricated the story about the check. But I am afraid that I find it impossible to believe that such in fact was your belief and suspect that most persons familiar with the facts would share my view. And if you were willing to lead the court to believe that Ms. Dean had not called Agent Cain while believing that she in fact had called him, you should not serve in your current

position or in any other position representing the United States Government.

Let me note at this point that while there is little room for concluding that my affidavit is true without concluding that Agent Cain's testimony was false, the truth of my affidavit is actually not very important with regard to establishing that the Independent Counsel obstructed justice in this matter. The Independent Counsel's own actions in responding to the issue of the whereabouts of the check, including the eventual effort to rely on the entry in the Inspector General's Report, is the compelling evidence that Independent Counsel attorneys attempted to deceive the court in order to prevent an inquiry into whether Agent Cain had lied and whether Independent Counsel attorneys knew about it. There could hardly be more compelling evidence that Independent Counsel attorneys undertook to conceal what they believed to be the false testimony of a government witness than the failure of Independent Counsel attorneys handling the post-trial matters to seriously question Agent Cain and trial counsel once the issue of the check was raised. The manner in which those attorneys responded to other claims of prosecutorial abuse suggest that there is negligible chance that Independent Counsel attorneys made a good faith effort to learn whether Agent Cain had lied and whether trial counsel knew about it.

But I do not need to persuade you about this. For presumably you know precisely what actions Independent Counsel took to learn the truth when the issue of Agent Cain's possible perjury was raised in Ms. Dean post-trial motion. And you know precisely what your own beliefs and motivations were when you decided to participate in the Independent Counsel's efforts to persuade the court that Ms. Dean had fabricated the story about the call.

Be mindful, moreover, that the conclusion that Independent Counsel attorneys conspired to obstruct justice would hold even if there existed some rationale by which Agent Cain's testimony was literally true. In that regard, I note that in a meeting on December 12, 1994, Associate Deputy Attorney General David Margolis raised the question of whether it was possible that, though Ms. Dean had called Agent Cain, Agent Cain's testimony was nevertheless literally true. But even if it there existed some rationale by which Agent Cain's testimony could be literally true--for example, because he did not remember Ms. Dean's calling him on or about a certain date,<sup>1</sup> or because he simply could not

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<sup>1</sup> The crucial questioning of Agent Cain concerning his recollection of the call from Ms. Dean began with the words "At or about that date..." Tr. 3198. The only

remember a call that did occur--the Independent Counsel did not advance such rationale in seeking to uphold the verdict against Ms. Dean's charges of prosecutorial misconduct, in seeking to have Ms. Dean's sentence increased because of her testimony about the call, or in opposing discovery on the whether Agent Cain committed perjury with the knowledge or complicity of Independent Counsel attorneys. Rather, the Independent Counsel attempted to persuade the court that Ms. Dean never made the call and that she had fabricated that story about the whereabouts of the check, just as Associate Independent Counsel Robert E. O'Neill had asserted to the jury, in reliance on Agent's Cain's testimony, that "that conversation never ever happened." Tr. 3506. Thus, if Independent Counsel attorneys believed that at some time near the end of April 1989 Ms. Dean called Agent Cain and asked whether there existed a check showing the payment to Mr. Mitchell, there can be little doubt that those attorneys engaged in a conspiracy to obstruct justice that continues to this day.

I suggest that if you were in some manner involved in such a conspiracy, you take immediate affirmative steps to withdraw from it. I also suggest that if you were not party to such a conspiracy, but have knowledge of actions of Independent Counsel attorneys that may have violated federal laws, you bring the matters to the attention of a proper authority.

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specific date Agent Cain had mentioned was April 17, 1989, which he gave as the date of publication of the HUD Inspector General's Report. Tr. 3197. Though dated April 17, 1989, however, the report was not actually released to the public until April 26, 1989, when it was issued in conjunction with an audit report of the latter date. Ms. Dean's written request to Agent Cain for a copy of the report was also dated April 26, 1989. Thus, Ms. Dean did not call Cain to ask about the check until at least April 26, 1989. Some might consider April 26, 1989, not to be "at or about" April 17, 1989, and it is perhaps noteworthy that in the initial part of Associate Independent Counsel O'Neill's closing argument he described Ms. Dean's testimony thusly: "And the day the I.G. Report came out, she called Special Agent Cain..." Tr. 3419.

However, after giving April 17, 1989, as the date of publication of the report, Agent Cain testified that he provided Ms. Dean a copy of the report "at or about the time that it was published." Tr. 3197. Thus, the logical antecedent of "that date" in the questioning of Agent Cain concerning Ms. Dean's call about John Mitchell was the day that Agent Cain provided a copy of the report to her. This does not, however, rule out the possibility that Agent Cain gave the responses he did because Independent Counsel attorneys persuaded him that "that date" could be reasonably interpreted as April 17, 1989.

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As you consider an appropriate course of action, it would perhaps be useful for you to know the following things that you in fact may or may not know. In December 1994 and January 1995, I brought this and other matters to the attention of Attorney General Janet Reno, requesting an investigation of Office of Independent Counsel Arlin M. Adams. In February 1995, I brought the same matters to the attention of White House Counsel Abner J. Mikva, suggesting that he recommend that the President remove the Honorable Jo Ann Harris from the position of Assistant Attorney General for the Criminal Division because her actions as an Associate Independent Counsel in the Dean case indicated that she was unfit to serve in a position overseeing the ethics of federal prosecutors. These allegations were referred to the Office of Professional Responsibility.

In June 1995, subsequent to the resignations of both Judge Adams and Ms. Harris, Michael E. Shaheen, Jr., Counsel for the Office of Professional Responsibility, informed me that the Department of Justice had declined to investigate the Office of Independent Counsel. Despite Judge Mikva's having explicitly assured me that the Department of Justice would carefully consider my allegations concerning Ms. Harris, the Department of Justice has yet to acknowledge to me that such allegations were ever made.

In November 1995, I brought these same issues to the attention of Acting Assistant Attorney General John C. Keeney and United States Attorney Charles R. Wilson, suggesting that actions of Deputy Independent Counsel Bruce C. Swartz and Associate Independent Counsel Robert E. O'Neill in the Dean case indicated that they were unfit to serve in their current positions as attorneys for the federal government. This matter was also referred to Mr. Shaheen, who informed me by letter of January 30, 1996, that he viewed my correspondence to Messrs. Keeney and Wilson to be an effort to cause the Department of Justice to reconsider its decision not to investigate the Office of Independent Counsel, and that the Department of Justice declined to reconsider that decision.

Though disagreeing with my view that there existed facts suggesting the federal prosecutors knowingly presented false evidence or that the prosecutorial abuses I had identified were exceptional, Mr. Shaheen did indicate that he believed that I personally strongly believed that several government witnesses had committed perjury. This would seem to indicate at least that Mr. Shaheen accepted the truthfulness of my affidavit. It is hard to understand how exactly Mr. Shaheen could accept my affidavit as true without believing that Agent Cain had committed

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perjury and that Independent Counsel attorneys attempted to obstruct justice in resisting discovery on that issue. Mr. Shaheen may one day be called upon to explain his reasoning on this point, and even at this time he may be willing to do so to you.

In any event, in the meantime, commencing in September 1995, I raised these same issues with Independent Counsel Larry D. Thompson, suggesting to him that his failure to inform the court of all instances of Independent Counsel misconduct would implicate him in that misconduct, including any aspect of such misconduct that violated federal law. Recently, I have resumed my correspondence with Mr. Thompson concerning certain documents the Independent Counsel introduced into evidence and certain false representations the Independent Counsel made to the court subsequent to my initially bringing these matters to his attention.

In my earlier correspondence with Mr. Keeney, I suggested that I would be raising the same issues I had raised with him concerning Mr. Swartz and Mr. O'Neill with the next Assistant Attorney General for the Criminal Division upon confirmation of a presidential appointee in that position. When I do so, absent reason to reconsider the understanding described above concerning your involvement with one of the more serious issues of prosecutorial abuse in this case, I shall at the same time raise with such appointee the appropriateness of your continued employment with the Department of Justice.

I will also shortly be raising certain issues again with the Department of Justice on the basis of a number of developments subsequent to the Department's June 1995 and January 1996 decisions not to investigate the Office of Independent Counsel. These include the apparent disappearance from Independent Counsel files of a document that was highly relevant to one of my allegations that Independent Counsel attorneys used false evidence in the case.<sup>2</sup> They also include the Independent Counsel's proceeding, on February 27, 1996, apparently with full knowledge of Department of Justice officials, to falsely represent to the Honorable Stanley S. Harris in the case of United States of America v. Thomas T. Demery, Crim. No. 92-227-SSH (D.D.C.), that Thomas T. Demery had given completely truthful testimony in this case. See Letter from James P. Scanlan to Larry D. Thompson 4-11 (May 26, 1997).

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<sup>2</sup> See my letters to Larry D. Thompson dated February 26, 1997, March 26, 1997, March 31, 1997, May 14, 1997, and June 9, 1997, and Mr. Thompson's letters to me dated March 25, 1997, and April 3, 1997.

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Another development is my own coming to understand that the court of appeals in this case held that an official or agent of an executive branch agency who makes a false statement or conceals or covers up a material fact concerning a matter within the agency's jurisdiction violates 18 U.S.C. § 1001. It seems necessarily to follow from that holding that any effort by a government lawyer to deceive a court in the prosecution of a civil or criminal case violates 18 U.S.C. § 1001. See Letter from James P. Scanlan to Larry D. Thompson (Feb. 11, 1997).

In addition, I will from time to time be raising these issues in other forums. Whether I give attention to your actions as an Associate Independent Counsel at such times will depend on the significance of those actions, and of your current position with the Department of Justice, to the particular issues I raise and the particular forum in which I raise them.

In any event, to facilitate your consideration of these matters, I am enclosing a diskette containing all my correspondence with the Department of Justice, the White House, and Independent Counsel Larry D. Thompson, as well as hard copies of the correspondence back to me. Upon making some corrections to the rather voluminous underlying materials I had provided the entities or individual listed above, I may provide copies of those materials to you as well. The matter of the Independent Counsel's actions concerning Agent Cain are discussed at various places throughout the correspondence, probably most fully in my May 25, 1995 letter to Mr. Margolis (at 6-12), my August 15, 1995 letter to Mr. Shaheen (at 3-11), my September 18, 1995 letter to Mr. Thompson (at 5-14), my November 30, 1995 letter to Mr. Keeney (at 5-14), and my March 11, 1996 letter to Mr. Shaheen (at 5-9).<sup>3</sup>

I am providing this material to you in your private capacity in order that, should you wish to do so, you may share the material with your own counsel without wrongfully appropriating the property of the Department of Justice or the Office of Independent Counsel. If you have some need for the more voluminous materials, please contact me at the address or telephone number on the letterhead or reach me by phone during

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<sup>3</sup> The correspondence is on separate directories for material provided to the Department of Justice and White House (directory DOJ) and Independent Counsel Larry D. Thompson (directory OIC). The material is formatted in WordPerfect 5.1. The enclosed index identifies each item. Some confidential material is excised from item 15 of the first group of materials and item 2 of the second group.



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the day at (202) 887-4453. I assume, however, that you know more about the Agent Cain matter than I do.

As I have stated to Mr. Thompson on a number of occasions, if in this letter or any other of the enclosed materials I have misstated or misinterpreted any of the actions I have described, or if there exist facts that would cause your actions or those of other Independent Counsel attorneys to be perceived in a less harsh light than I have portrayed them, I would welcome your so advising me. I have no desire to mischaracterize any event or to state anything about you or other current or former agents of the Office of Independent Counsel that is not true. I recognize, however, that it would be improper for you to communicate anything to me about your actions as an Associate Independent Counsel without the permission of the Independent Counsel.

I would appreciate your providing me the material I requested in the opening paragraph at your earliest convenience.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Enclosures

cc: Larry D. Thompson, Esq.  
Independent Counsel