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Counsel
Office of Professional Responsibility
United States Department of Justice
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Request for Investigation Into the Handling by Department of Justice Officials of Allegations of Prosecutorial Misconduct by the Office of Independent Counsel Arlin M. Adams in the Prosecution of United States of America v. Deborah Gore Dean, Criminal No. 92-181-TFH (D.D.C.)

Dear Mr. Jarrett:

By letter dated August 3, 1998, I provided certain materials to Lee J. Radek, Chief of the Public Integrity Section of the Department of Justice's Criminal Division, concerning the actions of Independent Counsel attorneys in the prosecution of United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.). In the transmittal letter, I advised Ms. Radek that information in the materials suggested that Robert J. Meyer, an attorney in the Public Integrity Section, was unfit to represent the United States and that he may be party to a continuing conspiracy to obstruct justice as a result of his role in deceiving the courts concerning whether certain government witnesses had committed perjury in the case. By letter dated August 20, 1998, Ms. Radek advised me that she had referred my letter and the attached materials to the Office of Professional Responsibility.

As indicated in my letter to Ms. Radek, the matters addressed in the letter had been brought to the attention of Michael R. Bromwich, Inspector General for the Department of Justice, by letter dated December 23, 1997 (Attachment 1 to my letter to Ms. Radek). In the letter to Mr. Bromwich I requested that he investigate whether Department of Justice officials had previously failed to treat my allegations of prosecutorial misconduct in good faith out of concern that an investigation would reveal that certain Independent Counsel attorneys who went

on to hold high positions in the Department of Justice, including Assistant Attorney General for the Criminal Division, had violated federal laws through their actions in the Dean case. By letter of January 14, 1998 (Attachment 2 to the letter to Ms. Radek), I provided the Attorney General a copy of the December 23, 1997 letter to Mr. Bromwich, requesting in the letter to the Attorney General that the Department of Justice again examine the conduct of the Office of Independent Counsel in the Dean case. I requested that the Attorney General do so both because Department officials did not previously consider the matter in good faith and because developments subsequent to the Department's last communication to me on the matter provided independent justification for reconsideration of the Department's earlier determination that no action by the Department was warranted. By letter dated March 2, 1998 (Attachment 3 to the letter to Ms. Radek), I provided the Attorney General additional information concerning that request.

As also indicated in the letter to Ms. Radek, by letter dated April 8, 1998 (Attachment 4 to the letter to Ms. Radek), Inspector General Bromwich advised me that he could not address the issues raised in my December 23, 1997 letter to him because, by Attorney General order, the Office of Inspector General did not have jurisdiction to investigate matters concerning Department of Justice attorneys' exercise of their authority to investigate, litigate, or provide legal advice. Subsequently, by letter dated May 4, 1998 (Attachment 5), Mr. Bromwich advised me that my correspondence to the Attorney General had been forwarded to him for response. Referencing his letter to me dated April 8, 1998, Mr. Bromwich advised me that the Inspector General did not have jurisdiction to address the issues raised in my correspondence to the Attorney General.

By letter to the Attorney General and to Mr. Bromwich dated June 17, 1998 (Attachment 6 to the letter to Ms. Radek), I requested clarification of whether the Attorney General had in fact intended to refer the matter addressed in my earlier letters to a division of the Department of Justice that did not have jurisdiction over the matter. Pointing out that it was an unusual thing for the head of an agency having jurisdiction over a matter to refer the matter to a division within the agency that did not have jurisdiction, I suggested that if such had been the Attorney General's intention, she reconsider the appropriateness of such course and instead refer the matter to a division of the department that does have jurisdiction. I have not yet received a response to the June 17, 1998 letter to the Attorney General and Mr. Bromwich.

In light of the absence of a response from the Attorney General, I formally request that the Office of Professional Responsibility investigate whether the Department of Justice previously investigated the allegations I brought to its attention in good faith. I request that in doing so the Office of Professional Responsibility determine whether Department of Justice officials attempted to conceal what they recognized to be criminal conduct by Jo Ann Harris and other Independent Counsel attorneys in the prosecution of the Dean case.

My letter to Mr. Bromwich, along with my letters to the Attorney General in January and March, summarize two areas where there is reason to believe that Independent Counsel attorneys violated federal law. The first of these involves actions of Independent Counsel attorneys with respect to the testimony of Supervisory Special Agent Alvin R. Cain, Jr. Agent Cain is the individual the Office of Independent Counsel called as a rebuttal witness to contradict Deborah Gore Dean's testimony that she had called Agent Cain in April 1989 to ask whether there existed a check showing a $75,000 payment to John N. Mitchell concerning a Dade County, Florida moderate rehabilitation project called Arama. Though Independent Counsel attorneys knew that Dean had made the call to Agent Cain, they elicited testimony from Cain designed to lead the jury to believe that the call never occurred. When information was brought to the court's attention that appeared to show that Dean had made the call, Independent Counsel attorneys decided not to advise the court of such rationale as they might have had by which Cain's testimony was literally true even though he remembered the call from Dean. Rather, in seeking to uphold the verdict, in seeking to increase Dean's sentencing level on the basis that she lied about the call to Cain, and in resisting discovery into whether Cain committed perjury with knowledge of Independent Counsel attorneys, Independent Counsel attorneys sought to lead the court falsely to believe that Cain's testimony showed that Dean had fabricated the story about the call. In the letter to Mr. Bromwich, I explained why, whether or not Independent Counsel attorneys committed any crime in the initial use of Cain's testimony, Independent Counsel attorneys involved in attempting to deceive the court concerning Cain's testimony in post-trial proceedings engaged in a conspiracy to obstruct justice at least with respect to deceiving the court in resisting discovery into whether Cain committed perjury. Among the persons involved in this conspiracy were Bruce C. Swartz (until recently Counsel to the Assistant Attorney General for the Criminal Division), Claudia J. Flynn (until recently Chief of Staff to the Assistant Attorney General for the

Criminal Division), and Robert J. Meyer (the attorney in the Public Integrity Section who is the subject of my letter to Ms. Radek).

The second principal matter summarized in my letter to Mr. Bromwich involves actions of Independent Counsel attorneys in making a false entry in the Superseding Indictment in the Dean case regarding Louie B. Nunn's annotation on the Arama consultant agreement to the effect that one-half of the $150,000 consultant fee belonged to John Mitchell. In order to support that false entry, and to lead the court and the jury falsely to believe that Arama developer Aristides Martinez was aware of Nunn's annotation and knew that Mitchell was to receive half the consultant fee, Independent Counsel attorneys introduced Government Exhibits 20 and 25 into evidence while representing them to be things they were not. By doing so, whether or not they obstructed justice, Independent Counsel attorneys violated 18 U.S.C. § 1001.[1] One of the principal actors in this matter is Jo Ann Harris, who was the lead trial counsel at the time the false entry was made in the Superseding Indictment and who was Assistant Attorney General for the Criminal Division at the time I brought these matters to the attention of the Attorney General and White House Counsel Abner J. Mikva.[2]

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[1] The false representations Independent Counsel attorneys made concerning these documents violated 18 U.S.C. § 1001 not because they were made to a court, but because they involved matters within the jurisdiction of a department or agency of the United States, namely the Office of Independent Counsel. See United States of America v, Deborah Gore Dean, 55 F.3d 640, 659 n.10 (D.C. Cir. 1995). I have yet to receive a response to the parts of my November 24, 1997 Freedom of Information Act request to the Department of Justice directed to determining whether the Department of Justice considers it a violation of 18 U.S.C. § 1001 for a federal government attorney to introduce a document into evidence, and to make false representations concerning the document, with the intent of leading the court or jury to believe the document to be something it is not.

[2] I initially brought these issues to the attention of the Attorney General on December 1, 1994, supplementing the materials on January 17, 1995. By letter dated February 9, 1995, I brought the same matters to Judge Mikva's attention in connection with a request that Judge Mikva recommend that the President remove Ms. Harris from the position of Assistant Attorney General for the Criminal Division. By letter dated March 8, 1995, Judge Mikva advised me that he was forwarding the materials I had provided him to the Deputy Attorney General.

The material provided to Ms. Radek and forwarded to you should provide adequate information for you to determine that Department of Justice officials endeavored to conceal the nature of the conduct of Ms. Harris and other Independent Counsel attorneys. The materials also should provide you sufficient information to conclude that letters Mr. Shaheen wrote to me in June 1995 and January 1996 were intended to mislead me concerning the conclusions the Department had reached regarding my allegations. Certain additional matters warrant mention, however, because they may cast additional light on the conduct of Department of Justice officials in this matter.

First, one possible interpretation of the Department of Justice's actions is that a cursory review of the materials I provided the Attorney General led Department officials to conclude that there was a substantial likelihood that Ms. Harris had engaged in serious prosecutorial abuses that may have involved violation of federal law. Department officials therefore decided that, rather than thoroughly investigate the allegations or take such actions as the Department would take on such a matter were a high-ranking Department of Justice official not involved, the Department would allow Ms. Harris to quietly resign. At the time of writing my letter to Mr. Bromwich, I knew only that Ms. Harris's resignation was announced in the press on May 19, 1995, which was two days after I delivered a letter to White House Counsel Abner J. Mikva inquiring why Ms. Harris continued to serve as Assistant Attorney General more than six months after I had brought the misconduct allegations to the attention of the Attorney General and more than three months after I had specifically sought the removal of Ms. Harris in a letter to Judge Mikva. I also knew that the press account of the announcement of Ms. Harris's resignation indicated that on assuming the position of Assistant Attorney General, Ms. Harris had advised the Attorney General that she (Ms. Harris) would serve only two years. If it was true that Ms. Harris had advised the Attorney General that she would serve only two years when she accepted the position of Assistant Attorney General, that would tend to suggest that Ms. Harris's seemingly abrupt resignation in May 1995 was not a occasioned by my bringing to the attention of the Department of Justice and the White House information suggesting that Ms. Harris had violated federal laws through her actions in the prosecution of the <u>Dean</u> case.

Accordingly, in addition to seeking all Department of Justice communications to the press concerning Ms. Harris, my Freedom of Information Act request of November 24, 1997, sought a copy of Ms. Harris's resignation letter and all records

reflecting or relating to Ms. Harris's advising the Attorney General near the commencement of Ms. Harris's assuming the position of Assistant Attorney General that she intended to serve only two years. To aid the Department in its search, I cited, and attached, the May 19, 1995 Washington Post article reporting the announcement of Ms. Harris's resignation.

As of July 7, 1998, I had received no responsive documents to such requests from any of the several divisions of the Department of Justice to which the requests had been referred. By letter of that date, Margaret Ann Irving, Deputy Director of the Office of Information and Privacy, advised me that the Office of Public Affairs had represented that it could locate no records of communications to the press concerning Ms. Harris.

Shortly thereafter, however, I found on the part of the Department of Justice's web site maintained by the Office of Public Affairs a copy of the press release forming the basis for the May 19, 1995 Washington Post article that reported Ms. Harris's resignation. The press release on the web site referenced Ms. Harris's resignation letter, which had been attached to the release when issued and which presumably remained attached to it in Office of Public Affairs files as well as in other files in the Department of Justice. The press release also suggested that the resignation letter was the source of the claim that Ms. Harris had advised the Attorney General at the commencement of her (Ms. Harris's) tenure that she would serve only two years. And the press release indicated that the resignation letter had referenced the fact that Ms. Harris had informed the Attorney General in March 1995 of her intention to resign. Thus, on the basis of document that the Department of Justice did have but that it represented to me it did not have, I now know that Ms. Harris's decision to resign came one month after I sought her removal by letter to White House Counsel Abner J. Mikva and in the same month that Judge Mikva advised me that he was referring the matter to the Department of Justice.

By letter to Ms. Irving dated August 17, 1998 (Attachment 1), I requested that she determine how the Office of Public Affairs could fail to locate the press release concerning Ms. Harris's resignation, when the document was maintained on the part of the Department's web site maintained by that office. I also requested that Ms. Irving determine whether Ms. Harris's resignation letter in fact exists within the Office of Public Affairs and, if so, that Ms. Irving provide me a copy as soon as possible. I have yet to receive a response concerning this matter, and, though it is now two weeks short of a year since I

requested a copy of Ms. Harris's resignation letter, the Department has yet to provide it.[3]

[3] Among the other documents requested in my Freedom of Information Act request of November 24, 1997, that it would seem the Department of Justice could readily locate is an August 24, 1994 memorandum from Attorney General Janet Reno that was distributed to assistant attorneys general and United States Attorneys. The memorandum had been referenced in Klaidman, "Prosecutorial Abuse Target of Reno Plan," Legal Times, Sept. 12, 1994, and I had enclosed a copy of that article to assist the Department in locating the memorandum. In mid-December 1997, I was advised by Stuart Frisch, General Counsel of the Justice Management Division, that, while the Justice Management Division might have a copy of the memorandum (which had been widely distributed), the document could be more easily located in other offices within the Department. Accordingly, I advised Mr. Frisch that his office did not have to attempt to locate the document. As of this date, however, I have not been provided a copy of the document by any other office. For its part, the Criminal Division leads me to understand that it does not have a copy of this document.

Second, it is my recollection that either in my meeting with Associate Deputy Attorney General David Margolis during the week of December 12, 1994, or in subsequent telephone conversations, Mr. Margolis stated that the materials I provided to the Attorney General would eventually be forwarded to the Office of Independent Counsel. I am in the process of confirming that recollection with Mr. Margolis. In any case, one would expect the Department of Justice, upon concluding that my allegations did not justify Department of Justice action, would refer the materials to the Office of Independent Counsel for the Independent Counsel to determine whether any convictions were tainted by misconduct and whether the conduct of any Independent Counsel attorneys warranted the disciplining or prosecution of the attorneys.[4]

One would expect the Department to do this even if the Department had concluded that the allegations were insubstantial. Here, however, the court itself had recognized that serious prosecutorial abuses had been committed. And, at a minimum, I had alerted the Department of Justice to additional matters not addressed in the district court or court of appeals, including the use of false evidence (among other things, in the case of the Arama consultant agreement in Government Exhibit 25). It should also be noted that in his letter to me of June 28, 1995, Mr Shaheen justified the Department's failure to take action in part on the basis that the offending Independent Counsel attorneys had left the Office of Independent Counsel.

In these circumstances, the question arises as to how the Department of Justice could fail to refer my allegations to the Office of Independent Counsel for the Independent Counsel to take such actions as he deemed warranted. The failure of the Department to refer the allegations to the Independent Counsel was irresponsible in any event. But it should also be borne in mind that by the time the Department of Justice reached its decision to take no action, Arlin M. Adams had resigned as

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[4] This in fact is what the Office of Professional Responsibility eventually did with allegations made by a former employee of the Office of Independent Counsel in November 1996. See my letter to Mr. Bromwich at 62-67.

Independent Counsel, and was shortly to be replaced by Larry D. Thompson. Mr. Thompson was a person who there was no reason to believe was involved with any of the matters addressed in the materials I provided the Department. Thus, there was additional reason to believe that the Office of Independent Counsel might itself address any issues of serious prosecutorial misconduct by its attorneys. There was also reason to believe that Mr. Thompson himself did not even know that the Office of Independent Counsel was continuing to rely on exhibits that were not what Independent Counsel attorneys had represented them to be.

One possible reason that the Department of Justice did not refer the materials to Mr. Thompson may well relate to the fact that there was no reason to believe Mr. Thompson was involved in the misconduct of his predecessors. Competent Department of Justice officials could not have failed to conclude that Ms. Harris was involved in a scheme to use false documents to support a false entry in the Superceding Indictment. Department officials also had to conclude that Ms. Harris was directly involved in a variety of other abuses, including the calculated failure to make timely Brady disclosures and the systematic failure to confront government witnesses with information that might cause them to disclose that their contemplated testimony was false. And whether or not Ms. Harris could be deemed by any theory to be involved in obstruction of justice or suborning of perjury through the use Agent Cain's testimony and the subsequent deceiving of the court in resisting discovery, other Department of Justice attorneys were involved in those actions. Thus, a reason that the Department of Justice did not refer these allegations to Mr. Thompson may well have involved the fact that Mr. Thompson might himself have taken actions that would reveal the nature of the conduct of Department of Justice officials while serving as Independent Counsel attorneys.

In any event, I suggest that you consider the two matters addressed above as you evaluate the allegations in the materials I provided Ms. Radek. Be mindful, however, that even if the above suggestions concerning motivations of Department of Justice officials are unfounded, you must still confront the fact that Jo Ann Harris conspired with other persons, including Bruce C. Swartz, to make a false entry in an indictment and to falsely use certain documents (and make false representations concerning those documents) to support the false entry in the indictment. That conspiracy continued, and Ms. Harris remained part of it, while she served as Assistant Attorney General for the Criminal Division. You must also confront the fact that Bruce C. Swartz, Claudia J. Flynn, Robert J. Meyer, and other persons conspired to

deceive a court in resisting discovery into whether a government agent had committed perjury.[5]

You must also confront the fact that, assuming minimal competence on the part of Department of Justice officials reviewing the materials I brought to the Attorney General's attention almost four years ago, these facts were known to

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[5] Department of Justice officials had also to recognize that Thomas T. Demery had committed perjury in the Dean case and that Robert J. Meyer and Bruce C. Swartz had attempted to deceive the court in the Dean case concerning both whether Demery had testified falsely and whether Independent Counsel attorneys knew that he had. In light of the effort by Mr. Swartz and Mr. Meyer to deceive the court in the Dean case, Department officials had strong reason to believe that, particularly if the Department of Justice took no action, Independent Counsel attorneys would eventually falsely represent to the court in Demery's own case that Demery had given completely truthful testimony in the Dean case. As discussed in my letter to Mr. Bromwich, subsequent to the Department of Justice's refusal to take action, in February 1996, Independent Counsel attorneys in fact would make such false representations to the court in Demery's case. By making those false representations, Independent Counsel attorneys violated 18 U.S.C. § 1001. Assuming that he in fact carefully reviewed my allegations concerning Mr. Demery, Mr. Shaheen cannot plausibly deny either that he expected that Independent Counsel attorneys would eventually deceive the court in Demery's own case or that he (Mr. Shaheen) attempted to mislead me with regard to the Department's conclusions concerning Independent Counsel conduct related to Demery.

Department officials at the time that Mr. Shaheen wrote me on June 28, 1995, advising that the Department had decided to take no action. And, I suggest, you must conclude that in so advising me, Mr. Shaheen made dishonest and misleading statements concerning the Department's conclusions. Whether or not the sole purpose of responding to me in the manner Mr. Shaheen did was to justify to the best extent possible the Department's decision to take no action, the expected effect of his statements, if anyone believed them, was to facilitate the concealment of conduct by Department of Justice that Mr. Shaheen had to have concluded was at least arguably criminal.

Thus, even if the Department was not motivated by a desire to conceal the fact that Jo Ann Harris and other Department of Justice officials had violated federal laws while serving as Independent Counsel attorneys, the actions of Mr. Shaheen and other Department officials may have violated federal laws. If those actions were in fact motivated by a desire to conceal the conduct of Ms. Harris and others, the actions almost certainly violated federal laws.

As you review these materials and consider an appropriate course of action, I suggest that you consider the following. It is now almost four years since I brought these matters to the attention of the Attorney General. There is now new leadership in the Office of Professional Responsibility. That fact is one of the reasons why the Department of Justice may resist the effort to remove from the Department the function of overseeing the conduct of its own prosecutors.[6]

[6] I have previously suggested to the principal proponents of such legislation that the Department's handling of the allegations against Ms. Harris and others involved in the prosecution of the Dean case provides reason to question whether institutionally the Department has a sufficiently refined understanding of a government lawyer's obligations regarding the truth to provide the necessary oversight of federal prosecutors. That suggestion holds, moreover, regardless of whether my interpretation of the facts or the motivations of Department officials proves to be accurate. In that regard, consider the fact of Associate Deputy Attorney General David Margolis's posing to me in December 1994 the question of whether I had considered the possibility that Agent Cain's testimony might be literally true even though Dean had in fact called Agent Cain to ask about a check showing the payment to Mitchell. As discussed in my August 5, 1998 letter to Congressmen Joseph M. McDade and John P. Murtha (Attachment 2), the very posing of that question implies a condoning of the efforts of Bruce C. Swartz and Robert J. Meyer to deceive the court in resisting discovery into whether Agent Cain committed perjury.

But unless you responsibly address these issues, you can expect that four or eight years from now, as the Department of Justice attempts to maintain, or regain, its prerogatives concerning the oversight of federal prosecutors, it will have to defend the manner in which it addressed allegations that the Assistant Attorney General for the Criminal Division, and other high-ranking Department officials, had violated federal laws while acting as federal prosecutors.

Your immediate tasks, however, are relatively simple. You must determine whether, as I have maintained, the consultant agreement in Government Exhibit 25 is not what the Independent Counsel represented it to be.[7] You must determine whether, in resisting discovery into whether Supervisory Special Agent Alvin R. Cain, Jr. committed perjury in the Dean case, Bruce C. Swartz, Robert E. O'Neill, and Claudia J. Flynn attempted to deceive the court. And you must determine whether Bruce C. Swartz and Robert J. Meyer attempted to deceive the court with regard to whether Thomas T. Demery gave false testimony in the Dean case. I suggest that none of these issues is one about which reasonable people might differ.

After you have made those determinations, you must attempt to sort out how the Department came to previously handle my allegations in the manner it did and to determine whether there was any effort on the part of Department officials to deceive me when the Department responded to me on the matter, and, if so, whether by doing so those officials violated federal laws. Unless you are willing to pursue each of these inquiries vigorously and without regard for who might be shown to be at fault, I suggest that your continued service as Counsel for the Office of Professional Responsibility ultimately will be neither to your own benefit nor to that of the Department of Justice.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

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[7] You might also attempt to find out why the original of the document seems now to be missing from Independent Counsel files. See my letter to Mr. Bromwich at 74-75. Whether it is missing or not, however, you will have to conclude that it is not what Independent Counsel attorneys represented it to be.

Attachments