**Bruce C. Swartz – Prosecutorial Misconduct**
**in *United States of America v. Deborah Gore Dean***
(April 20, 2009; rev. Feb. 11, 2012)

*[This is a PDF version of the Bruce C. Swartz profile page on jpscanlan.com, with endnotes converted to footnotes.]*

***Prefatory Notes:***

***1. General:*** *This and other items under the Misconduct Profiles page of jpscanlan.com are supplements to that site's main Prosecutorial Misconduct page (PMP), which addresses prosecutorial abuses in* United States of America v. Deborah Gore Dean, *Crim. No. 92-181-TFH (D.D.C.). The treatment below assumes the reader has a general familiarity with the subject of that material and frequently references parts of the material, with links provided to such parts. It is recommended that the reader review Sections B.1, B.3, B.3a, and B.4 of PMP, as well as the profile of Robert E. O'Neill, in conjunction with the review of this profile. But a detailed understanding of the material on PMP is not essential to an appraisal of the conduct described here.*

***2. Visibility:*** *Since at least February 2011, Internet searches for "Bruce C. Swartz" on the major United States and foreign search engines invariably yield this profile or one of the Truth in Justice items mentioned below as one of the first few results. When persons from the Department of Justice and other federal agencies, representatives of foreign governments before which Swartz represents the Department, or members of the press and public attempt to learn about the character or background of Swartz by means of the Internet, typically they are taken almost immediately to one of the editorials or to this profile. Others are brought to the profile as a result of reviewing materials relating to United States Attorney nominee (or United States Attorney) Robert E. O'Neill, including the Robert E. O'Neill profile and the correspondence in Addendum 7 to the O'Neill profile and Truth in Justice items. IP address-identified of viewers of the profile include persons from the Departments of Justice and State and other federal agencies and persons from European governments or the government of the European Union.*

*Swartz is featured in the following Truth in Justice items:*

*August 7, 2011 ("The Ever Rising Star of Criminal Division Deputy Assistant Attorney General Bruce C. Swartz")*

*June 29, 2011 ("Robert E. O'Neill's Tricks of the Trade – One (The False or Misleading Testimony of Supervisory Special Agent Alvin R. Cain, Jr.)");*

*June 4, 2011 ("Willful Ignorance at the Department of Justice, and its Consequences");*

*March 10, 2010 ("Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material");*

*March 2, 2011 ("The Curtailed Tenure of Criminal Division Assistant Attorney General Jo Ann Harris");*

*February 6, 2011 ("Bruce Swartz – Our Man Abroad");*

*September 4, 2010 ("Doubtful Progress on Professional Responsibility at DOJ).*

*He is also given attention in the following items:*

*March 16, 2010 ("The Arlin M. Adams Interview");*

*February 22, 2011 ("Unquestionable Integrity versus Unexamined Integrity: The Case of Judge Arlin M. Adams");*

*September 26, 2010 ("The Honorable Robert E. O'Neill Regrets That He Is Unable to Answer Questions from the Audience").*

***3. Format:*** *Originally this item was not divided into sections save by spacing. At some point bracketed numbers were added to facilitate the referencing of particular material. In the July 25, 2010 revision, formal section headings were added to make the document more readable. In order to ensure correspondence with prior references to this document in other documents, the bracketed numbers have been retained at the end of each section heading. Readers should find the bracketed numbers (which have been added to addendums) also useful for navigating within the document by means of search functions.*

*This document had not been materially revised between January 30, 2010, and July 25, 2010. The nomination of Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida on June 9, 2010, created potential for increased attention to this item because of the involvement of Swartz with most matters that are the subjects of the O'Neill profile. That potential prompted me to add several addendums with the July 25, 2010 revision of this item Addendum 6 addresses some implications of the O'Neill nomination and the obligation of Swartz to advise his superiors in the Criminal Division and elsewhere in the Department of Justice that O'Neill made a false statement on his application for the United States Attorney position (a matter also addressed in the separately accessible Addendum 7 to the O'Neill profile). After publishing the September 4, 2010 Truth in Justice editorial ("Doubtful Progress on Professional Responsibility at DOJ") suggesting that Bruce C. Swartz's conduct in defending against allegations of prosecutorial abuse in the Dean case would provide a useful case study for illustrating impermissible deceptions or evasions in prosecutor responses to misconduct allegations, a separately accessible Addendum 7 was added to this profile discussing that matter further.*

*In order to further facilitate the review of this document, an outline is set out below:*

**Introduction**

Since at least 2000, Bruce C. Swartz has been Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice in charge of international issues. A 2003 award received by Swartz indicates that his duties included interacting with foreign governments on such issues as counterterrorism and law enforcement cooperation. Swartz is certainly one of the most important career officials in the Department and he is probably more important than many presidential appointees. Internet searches for "bruce swartz deputy 2011" give some indication of the scope of Swartz's current involvement in crucial international issues, as will like searches with the

word "wikileaks" According to this mainjustice.com item, Swartz was one of just several Department attorneys accompanying Attorney General Eric H. Holder, Jr. on a June 2010 trip to Afghanistan. He is co-chair of the sub-working group on Anti-Corruption of the Civil Society Working Group of the U.S.-Russia Bilateral Presidential Commission. On September 29, 2010, Swartz testified before the Senate Foreign Relations Committee regarding Department of Justice actions pertaining to Scotland's release of Pan Am Flight 103 bomber Abdel Basset Ali Mohmed al-Megrahi. On July 27, 2011, Swartz testified before the Senate Judiciary Committee regarding the Consular Notification Compliance Act of 2011. On April 27, 2011, Swartz was one of five Department of Justice officials to receive a Presidential Rank Award, which was accompanied by a bonus of 35% of salary. See Truth in Justice items of February 6, 2011 ("Bruce Swartz – Our Man Abroad"), regarding Swartz's general importance, March 10, 2010 ("Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material"), regarding Swartz's involvement in the effort to secure the extradition of Roman Polanski, and August 7, 2011 ("The Ever Rising Star of Criminal Division Deputy Assistant Attorney General Bruce C. Swartz"), regarding, *inter alia*, the likelihood that representatives of foreign governments before whom Swartz represents the Department of Justice will know more about Swartz's character than his colleagues at the Department do.

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Swartz is a graduate of Yale College and Yale Law School. He clerked for Judge Wilfred Feinberg on the Second Circuit and for Associate Justice Harry Blackmun on the Supreme Court. He was a partner with the firm of Shea & Gardner when, sometime in 1990, he joined the Office of Independent Counsel Arlin M. Adams. At some point thereafter (and prior to the *Dean* trial) Swartz became Deputy Independent Counsel, a position in which he remained until joining the Department of Justice in June 1995.

Swartz apparently was very much personally involved in the *Dean* prosecution, as reflected, among other things, by his role in pressuring Supervisory Special Agent Alvin R. Cain, Jr. into providing misleading testimony in order to enable Robert E. O'Neill to lead the jury falsely to believe that the defendant lied about a conversation with Agent Cain, as well as by his participation in the interviews where Richard Shelby stated that Eli Feinberg was aware of John Mitchell's involvement in the Park Towers project and presumably in the decision to elicit Feinberg's testimony that he was not aware of Mitchell's involvement in the project without confronting Feinberg with Shelby's statements. *See* Park Towers Appendix and Part I of the DC Bar Counsel materials. *See* Section C of the profile of Robert E. O'Neill with regard to the provocative assertion in closing argument that the supposed concealment of Mitchell's involvement from Feinberg was "the hallmark of conspiracy."

These known involvements of Swartz with particular matters in the preparation for and the trial of the case suggest that he was likely involved in every important decision including those regarding the taking of the position whereby the Independent Counsel would make no *Brady* disclosures of exculpatory information in witness statements (which position Swartz attributed to Jo Ann Harris in the court of appeals argument, as

discussed in Jo Ann Harris profile and the March 2, 2011 Truth in Justice item styled "The Curtailed Tenure of Criminal Division Assistant Attorney General Jo Ann Harris") and the adherence to such position after Harris left; the inclusion of false statements or inferences in the Superseding Indictment; the fabrication of Government Exhibit 25 to support a false statement in the Superseding Indictment (see Section B.9a of PMP); the initial failure to produce in discovery and then the hiding of the Sankin Harvard Business School application (see Section B.7a of PMP); the failure to make a *Brady* disclosure of a single one of the many documents calling into question or specifically contradicting things the Independent Counsel intended to prove at trial; and not only the failure to make a *Brady* disclosure of the Mitchell message slips indicating that Dean was almost certainly innocent of the Arama charge but also the failure to confront Maurice Barksdale with the information on the message slips indicating that crucial testimony Robert E. O'Neill would elicit from Barksdale at trial was false (see Section B.3, Section B.3a, and Section B.3 of PMP).

But Swartz's most visible role in the *Dean* case involved defending against allegations of prosecutorial abuse. In doing so, Swartz repeatedly endeavored to deceive the courts in order to cover up his own actions and action of others under his supervision. Such matter is highlighted in the September 4, 2010 Truth in Justice editorial (Doubtful Progress on Professional Responsibility at DOJ") referenced above, which suggests that Swartz's action in defending against Dean's allegations would provide a useful case study for purposes of illustrating impermissible deceptions or evasions in prosecutor responses to misconduct allegations. That point has since been further developed in the directly accessible Addendum 7 hereto. The March 10, 2010 item ("Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material") highlights Swartz's duplicity in the court of appeals, as does the directly accessible Addendum 2 hereto.

**A. Bruce C. Swartz's Role in Pressuring Supervisory Special Agent Alvin R. Cain, Jr., to Provide Testimony That Would Seem to Directly Contradict the Defendant and in Post-Trial Efforts to Cover Up His Own and Others' Actions Concerning Agent Cain's Testimony [1]**

As discussed in Section B.1 of the main Prosecutorial Misconduct page (PMP) and in the introductory material above, Swartz was directly involved in pressuring Supervisory Special Agent Alvin R. Cain, Jr. into testifying that he did not remember an April 1989 call from Deborah Gore Dean in which she complained about the treatment of former Attorney General John N. Mitchell in the HUD Inspector General's report. That testimony would then enable Robert E. O'Neill to dramatically undermine Dean's credibility by provocatively asserting that Agent Cain's testimony showed that Dean had lied on the stand.

After Dean filed her post-trial motion, in which, among other things, she provided evidence that she had made the call to Agent Cain (including information she could have only learned from the call to Cain), Swartz was the principal Independent Counsel attorney involved with opposing that motion. He was then faced with the choice of (a)

advising Judge Thomas F. Hogan that, although Dean had testified truthfully about the call to Agent Cain, Cain's apparent contradiction of Dean was also literally true because it technically applied to a different date from that given by Dean (in which case Hogan might well have dismissed the indictment and recommended that Swartz and O'Neill, possibly among others, be sanctioned or prosecuted for the suborning of perjury),[1] or (b) attempting to deceive Hogan in order to forestall inquiry in the matter. Swartz, presumably in consultation with Independent Counsel Arlin M. Adams, chose the latter course.

Useful information for the appraisal of Swartz's character may be found in statements he made in court hearings in defense of Independent Counsel conduct with regard to this and other matters – conduct, it warrants note, for which in some cases he may have been primarily responsible. His efforts to persuade Judge Hogan at the February 22, 1994 hearing that Dean had lied about the call to Agent Cain and had lied as well about Agent Cain's telling her where the check was maintained is discussed in Section M of the Cain Appendix. Based solely on what was known when that document was provided to the Department of Justice on December 1, 1994, Swartz's argument seems manifestly dishonest. Indeed, it is utterly impossible to believe Swartz could have believed the point he made about how Dean might have learned of the whereabouts of the check. But additional light is cast on the situation when one realizes that Swartz knew with absolute certainty that Dean had called Agent Cain and that Cain had told her where the check was maintained in April 1989 – and that Swartz himself had been involved in causing Cain to testify in a manner that seemed to contradict Dean. This matter is addressed more fully in the directly accessible Addendum 3 to this document.

The reader ought also to review the part of the Independent Counsel opposition (authored by Swartz and Robert J. Meyer) devoted to the Cain matter with special attention to the expressed indignation (at 73) that Dean had alleged that a "career government employee" committed perjury and did so "with complicity of this office," and to the claim (at 79) that Dean's submissions reflected "an unrepentant willingness to lie to avoid responsibility for her actions." Given that this language is part of a desperate effort to cover up actions that most persons would regard as Swartz's suborning of perjury, as well as Swartz's corrupting of a career government employee, it bespeaks a breathtaking hypocrisy. See also Section D *infra* regarding Swartz's subordinating the interests of the government to his personal interest in covering up his conduct.

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[1] As explained in Section B.1 of PMP, the idea that, even though Dean's testimony about calling Agent Cain was true, Cain's testimony might also be literally true was first suggested to me by Associate Deputy Attorney General David Margolis in a meeting during the week of December 12, 1994. I would eventually surmise that the literal truth rationale rested in the notion that prosecutor Robert E. O'Neill's question phrased "at or about that date" was intended to tie Cain's denial of recollection of the call from Dean to the date the report was published internally at HUD rather than the day it was released to the public (though the phrasing did not quite achieve that end). Thereafter, I would be informed by the former Independent Counsel document manager discussed in Section B.9 of PMP that Swartz and O'Neill had pressured Agent Cain into giving testimony he was very reluctant to give and that there was considerable elation and relief in the offices of the Independent Counsel when the manner of securing Cain's testimony was not revealed during his cross-examination.

**B. Swartz's Role in Court in Covering up Independent Counsel Actions Regarding the Park Towers Project [2]**

*[The subject of this section is touched upon in the March 10, 2010 Truth in Justice item styled "Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material"]*

Section I of the Park Towers Appendix describes Swartz's role at the February 14, 1994 hearing in defending the Independent Counsel's effort to lead the jury to believe that the conspiratorial reference to "the contact at HUD" was a reference to Dean notwithstanding that the Independent Counsel's immunized witness Richard Shelby had informed Independent Counsel attorneys that the reference in fact was to Deputy Assistant Secretary Silvio DeBartolomeis. Swartz, who was present at the interview when Shelby provided that information, acknowledged that Independent Counsel attorneys had intended to lead the jury to believe that the reference was to Dean. He defended that conduct, however, on the basis that other evidence – in particular, the supposed facts (a) that there were no documents reflecting Shelby's contacts with DeBartolomeis and (b) that Dean had been responsible for the post-allocation waiver on the Park Towers project – provided the Independent Counsel a basis to believe, and hence to lead the jury to believe, that the reference to "the contact at HUD" was in fact a reference to Dean. Tr. 9-10. When making these arguments to the court, Swartz knew with absolute certainty both that there did exist documents reflecting the contacts between Shelby and DeBartolomeis (though Independent Counsel attorneys had sought to trick the jury to believe otherwise) and that DeBartolomeis not Dean was responsible for the post-allocation waiver (though, again, Independent Counsel attorneys had sought to trick the jury to believe otherwise).

As discussed Section C of the profile of Robert E. O'Neill, which section shows how O'Neill led the jury to believe there were no documents showing Shelby's contacts with DeBartolomeis and why the word "trick" is suitable in the circumstances, the most notable of the documents reflecting Shelby's contacts with DeBartolomeis was a March 10, 1986 memorandum to file by Park Towers developer Martin Fine. The memorandum recorded the fact that Shelby had told Eli Feinberg that he had met with DeBartolomeis and that DeBartolomeis had told Shelby that he (DeBartolomeis) would grant the post-allocation waiver. Though the document directly contradicted several points Independent Counsel attorneys intended to prove at trial, the Independent Counsel never made a *Brady* disclosure of the document and the defense did not find it in time to use it at trial or in the post-trial motion. Thus, Swartz felt he could with impunity lead the court falsely to believe both (a) that no documents existed showing Shelby's contacts with DeBartolomeis and (b) that Dean had been responsible for the post-allocation waiver – as well as lead the court falsely to believe that these supposed facts were true reasons that Independent Counsel attorneys believed that it was permissible to lead the jury to believe that the reference to "the contact at HUD" was a reference to Dean.

It should be borne in mind, of course, that, as discussed in Section B.4 of PMP and Section C of the profile of Robert E. O'Neill, this particular act of deception on Swartz's

part involved a claim where Independent Counsel knew with virtual or absolute certainty that each of the nine inferences supporting the claim was false. And as discussed in Section B.3 of PMP, notwithstanding the success of Independent Counsel attorneys in creating a substantial quantum of false evidence, the court of appeals would find that there was insufficient evidence to sustain a conviction concerning the Park Towers project.

**C. Swartz's Role in Deceiving the Court Concerning the Sankin Receipts [3]**

*[The subject of this section is touched upon in the March 10, 2010 Truth in Justice item styled "Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material." The hidden Harvard Business School application discussed toward the end of that item related to Andrew Sankin, whose receipts are discussed in the section.]*

Section M of the Sankin Appendix discusses Swartz's argument at the February 14, 1994 hearing on the Sankin receipts (the subject of Section B.7 of PMP and Section A of the O'Neill profile). That section of the Sankin Appendix should be read with recognition that Swartz knew (and knew that O'Neill knew) with virtual or absolute certainty that approximately one-half the receipts O'Neill planned to introduce into evidence to lead the jury to believe applied to Dean did not apply to her. Swartz and O'Neill knew these things, among other reasons, because the receipts did not name Dean or her position but instead named other positions such as the position of a person Sankin was known to be dating at the time. *See* Section B of the Sankin Appendix and Section II.B.1 of Dean's February 1997 Memorandum.

Thus, one will observe that, as with the "contact at HUD" reference, Swartz attempted to deceive the court through a combination of misleading arguments and outright false statements. The latter include (1) the acquiescence in the prior false statement in the Opposition that Independent Counsel attorneys did not review the receipts with Sankin because he was hostile;[2] (2) the representation that there was only one receipt that the government knew did not apply to Dean; (3) the representation that with regard to that receipt, the government "put before the jury that the receipt did not involve Ms. Dean"; (4) the representation that it was only because of the amount of time consumed that the receipts were admitted without eliciting information on their particular notations. With regard to item 3, which involved a receipt for $158 for lunch with "HUD officials" where "Mod Rehab Units" were discussed, O'Neill merely elicited that Sankin did not know who was there. The Independent Counsel would then use the receipt in its summary charts in a manner to lead the jury to believe that the receipt in fact applied to Dean.

[2] The statement could be deemed true only in the sense that any hostility might have made it more likely that, if shown the receipts in advance of testifying, Sankin would truthfully tell Independent Counsel attorneys that certain receipts that those attorneys already knew did not apply to Dean in fact did not apply to her, or worse, reveal on the stand that the receipts did not apply to Dean

With regard to the above representations by Swartz, it should be borne in mind that these occurred in the context of an effort generally to lead the court to believe that Independent Counsel attorneys believed that all the Sankin receipts introduced into evidence as if they applied to Dean in fact applied to her – something Swartz knew manifestly to be false.

**D. Swartz's False Representation to the Court of Appeals Regarding the Mitchell Message Slips [4]**

*[The subjects of this section are discussed upon in the March 10, 2010 Truth in Justice item styled "Criminal Division Assistant Attorney General Bruce C. Swartz, Roman Polanski, and the Hiding of Exculpatory Material."]*

As discussed in Section B.8 of PMP and the profile of Jo Ann Harris, Swartz is also the Independent Counsel attorney who represented to Judge Laurence Silberman in the court of appeals that there had been no intentional violation of the Independent Counsel's *Brady* obligations, though never revealing Swartz's own involvement in the matter. At some point Swartz's argument in the court of appeals should receive separate treatment. For in the eleven pages of colloquy on prosecutorial misconduct issues Swartz says a good many misleading or false things aimed at concealing the nature of actions of Independent Counsel attorneys, including an implied representation that Independent Counsel attorneys failed to make a *Brady* disclosure of the Mitchell telephone message slips because those attorneys believed the message slips were incriminating rather than exculpatory. That in its decision, the court of appeals would "deplore" the Independent Counsel's failure to identify the message slips as exculpatory material indicates that it did not believe that representation. Sections B.3 and B.3a of PMP and the materials they reference show why no one could believe it.[3] *See also* Addendum 2 *infra* regarding Swartz's false response to an appellate judge's question about whether the Independent Counsel identified John Mitchell as a former Attorney General.

As discussed in the Harris profile, like other Independent Counsel and Department of Justice attorneys involved in the case, Swartz was never required to explain why the Independent Counsel failed to make a *Brady* disclosure of the Sankin Harvard Business School application contradicting the Independent Counsel's charge as to the Foxglenn project. *See* Section B.7a of PMP. As may not have been the case with Harris, however, Swartz was involved with the matter *both* when a decision was made (*Brady* issues aside) not even to include the application in the discovery materials initially made available on

[3] Among other things, Swartz would state (Tr. 44): "I must say that, everything in the record belies any suggestion that the government had an interest in hiding information here. The government exceeded, in almost every area, its statutory obligation in terms of turning over materials." The reference to "everything in the record" is an interesting one. For it would be things like the failure to make a *Brady* disclosure of the Fine March 10, 1986 memorandum and varied other documents, as well as the failure at first even to produce and then actually to hide the Sankin Business School application discussed in the next paragraph of text, that would enable Independent Counsel attorneys to create the record that Swartz would maintain showed that the government had no interest in hiding information. See Section B.3a of PMP regarding efforts to cause the defense not to discover the Mitchell telephone message slips.

Sankin and when a decision was made to calculatedly hide the document in a later production.[4]

## E. Swartz's Subordination of the Interests of the United States to His Interest in Covering Up His Own Conduct [5]

As Swartz would be the principal Independent Counsel attorney responding to charges of prosecutorial misconduct, the following distinction between the underlying conduct and the defense of it warrants note. Whatever might have been the motivations of Independent Counsel attorneys that led to the underlying conduct, an additional motivation for concealing the nature of that conduct following the trial presumably involved a concern that disclosure of the nature of the conduct could subject the involved attorneys to sanctions and, sanctions aside, obloquy among their peers and the public. Thus, for example, when at the February 22, 1994 hearing Swartz argued so vigorously against Dean's challenge to Agent Cain's testimony, even maintaining that Dean should have her sentence increased for statements she made in raising the issue,[5] Swartz's behavior had to have been in some part, possibly substantial part, motivated by the fact that many would regard his own conduct in securing Agent Cain's testimony to be the suborning of perjury regardless of whether Cain's testimony might have been literally true or not and that virtually everyone, certainly including every graduate of Yale Law School, would regard the conduct as heinous.[6] So in choosing what positions to take,

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[4] See Section B.9a of PMP regarding a false entry in the Superseding Indictment where, not only would there be no *Brady* disclosure of the documents contradicting the entry, but Independent Counsel attorneys would fabricate a document to support the entry. While Harris may have left the Office of Independent Counsel by the time the document was fabricated (unless the fabricated document was presented to the grand jury), Swartz was supervising the case both when Independent Counsel attorneys made the false entry in the Superseding Indictment and failed to immediately make a *Brady* disclosure of the documents contradicting it and when Independent Counsel attorneys later fabricated the document to support the entry. *See also* Section D of the O'Neill profile regarding the nature of the document.

[5] Independent Counsel attorneys, while knowing with absolute certainty that Dean had told the truth about the call to Agent Cain, had already secured a recommendation from the probation officer that Dean's sentence be increased by six months for lying about the call. The first known action taken in this regard is a January 18, 1994 letter from Independent Counsel Arlin M. Adams to the probation officer (the relevant pages of which may be found as Attachment 4 to the Cain Appendix). Notwithstanding that Independent Counsel attorneys knew that Dean had made the call to Agent Cain and that Cain had been pressured into providing an answer intended literally to mean only that Dean did not call him on a certain date, in the letter (at page 8) Adams wrote that "Agent Cain testified on rebuttal that to his recollection this conversation never occurred." This letter was written after Dean, in her motion of November 30, 1993, had provided information that she could only have learned from the call to Cain, and after Independent Counsel attorneys had decided not to advance the literal truth rationale to the court and to instead to attempt to cover up their actions regarding Cain by leading the court falsely to believe that the call never occurred. Only Swartz and his colleagues might know for sure whether (a) even had this issue never been raised, they still would have sought to have Dean's sentence increased for lying about the call to Agent Cain or (b) their seeking to have Dean's sentence increased for lying about the call was part of an aggressive strategy in covering up their conduct regarding Cain's testimony.

[6] The statement that virtually everyone would regard the underlying action of Swartz and others concerning Agent Cain to be heinous warrants the following qualification. As discussed in Section B.1 and Section B.8 of PMP, Associate Deputy Attorney General David Margolis suggested the possibility that

including whether to seek to have Dean's sentence increased for lying about the call to Cain, Swartz and other Independent Counsel attorneys, including Independent Counsel Arlin M. Adams, were almost certainly subordinating the government's interest in securing justice (or even the distorted notion of justice that may have underlain some part of the underlying conduct) to their own self-interest in covering up the nature of their conduct.

**F. Swartz's Role in Causing the Criminal Division to Interfere with the Investigation of the Document Manager's Complaint [6]**

According to complaints of the former Independent Counsel document manager discussed in Section B.9 of PMP, Swartz, along with Independent Counsel Arlin M. Adams, altered or destroyed interview reports that failed to advance the Independent Counsel's case. (*See* Section B.9a of PMP regarding the fabrication of Government Exhibit 25 and the reasons to believe that the interview report of Aristides Martinez was altered.) According to the former document manager, in April 1993, Swartz told the document manager to cease taking notes at staff meetings because the "notes were perhaps 'too good,'"[7] and not to retain notes previously taken. The former document manager also complained to Independent Counsel Adams that Swartz improperly steered contracts for legal services to Swartz's former firm. That Swartz had steered the contracts to his former firm was not in dispute. But Swartz's outrage at the document manager's raising with Adams this and other issues concerning the misuse of government funds, including Jo Ann Harris's steering a lucrative handwriting contract to a friend, likely caused the document manager to be terminated by Independent Counsel Arlin M. Adams. In any case, all valid complaints of the former document manager can be deemed to involve conduct for which Swartz was in some manner responsible, since Swartz was in charge of the day-to-day operations of the office. For example, it is inconceivable that Independent Counsel attorney Paula A. Sweeney (whom Swartz had hired from his former firm) would have been able to use Independent Counsel investigative resources to secure information concerning Dean's putative sex partners and to display a chronology of such partners in the office without approval of Swartz.

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Agent Cain's testimony might be literally true apparently as a basis for believing that Independent Counsel conduct might not be as egregious as I maintained. This suggests not only that Margolis regarded the underlying conduct not to be heinous, but that he regarded that conduct, combined with Swartz's defending it in the deceitful manner he did, not to be heinous as well. Further, it would apparently be with a recognition of both the probable nature of the underlying conduct and the probable nature of Independent Counsel attorneys' actions in defending the conduct that Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. would conclude in his letter to me of June 28, 1995, that "no outrageous government misconduct appears to have occurred." Thus, it might be fairer to say that virtually everyone outside of the United States Department of Justice would regard the conduct as heinous – even though, to be sure, thousands of Department of Justice attorneys would regard the conduct to be heinous and be deeply disturbed that any high-level officials in the Department did not.

[7] While I believe the manner in which the quotation marks are used is technically correct, I note for clarity that the entire quote is of the former document manager's words. The document manager, in his May 12, 1997 filing with the Merit Systems Protection Board (at 11), had put the words "too good" in quotes.

In any case, Swartz presumably had a role in causing the Criminal Division of the Justice Department (then headed by Assistant Attorney General Jo Ann Harris) to investigate the former document manager for allegedly disclosing grand jury testimony in connection with his complaints of improper conduct within the Office of Independent Counsel. And, as discussed in Section B.9 of PMP and the profile of Jo Ann Harris, the Criminal Division also sought to cause the Office of Special Counsel to delay its investigation of the document manager's Office of Special Counsel complaint, which included allegations of fiscal abuses by Swartz and Harris.

**G. Swartz's Joining the Department of Justice in 1995 [7]**

[7] By letter of June 23, 1995, Swartz resigned from his position as Deputy Independent Counsel, effective June 25, 1995, thanking Arlin M. Adams for all he had done "for me, for the Office, and for our country," and noting: "There has never been a finer Independent Counsel." As discussed in the profile page on Jo Ann Harris, after resigning from the position of Assistant Attorney General for the Criminal Division but before actually leaving the Department of Justice, Harris hired Swartz as a special assistant, effective June 26, 1995. In an undated memorandum presumably drafted shortly before she left the Department of Justice, Harris recommended Swartz for a $3,500 monetary award for "exceptional performance while serving as my Acting Special Assistant since May [*sic*] of this year." Swartz received such award on September 17, 1995. Swartz then remained in the Justice Department after Harris's departure.

It was shortly after Swartz had joined the Department of Justice that I filed the complaint with the District of Columbia Office of Bar Counsel discussed in Section B.11a of PMP.[8] Among other things that section raises the issue of whether, in responding to allegations in the Bar Counsel complaint concerning Agent Cain's testimony, Independent Counsel Robert E. O'Neill and Paula A. Sweeney would either (a) offer the literal truth rationale that apparently caused Agent Cain to provide the testimony he did, or (b) attempt to deceive Bar Counsel on the matter in the same way that Swartz, Arlin M. Adams and Robert J. Meyer had attempted to deceive Judge Hogan. Swartz himself was in a somewhat different position from that of O'Neill and Sweeney. For offering the literal truth rationale would necessarily indict him for his manner of defending against Dean's motion before Judge Hogan. As discussed in that section, DC Bar rules prevent me from disclosing the nature of those responses at this time, but I will seek to secure Bar Counsel's permission eventually to make such information public. (*See* discussion of one implausible representation made on Swartz's behalf in the Bar Counsel proceeding in Addendum 7 hereto.)

[8] As discussed in Addendum 7 to the O'Neill profile, prior to O'Neill's falsely stating in his application for the United States Attorney position that the Bar Counsel investigation was initiated by Dean, I solely referred to me own Bar Counsel complaint. But thereafter I revealed that the Bar Counsel investigation was initiated by Bar Counsel itself. I filed my complaint after learning that the Bar Counsel investigation was in progress.

Shortly after filing the DC Bar Counsel complaint, by letter of November 30, 1995 to Acting Assistant Attorney General John C. Keeney, I sought Swartz's removal from the Justice Department, By letter from Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr., dated January 30, 1996, the Department declined to investigate Swartz's conduct as Deputy Independent Counsel. By letter of January 5, 1998, Swartz resigned from the Department of Justice, effective the same date.[9]

But sometime thereafter, even though career Department of Justice officials such as Associate Deputy Attorney General David Margolis and Counsel for the Office of Professional Responsibility H. Marshall Jarrett were fully aware of Swartz's conduct in the *Dean* case, the Department of Justice would again hire Swartz. He is currently a Deputy Assistant Attorney General in the Criminal Division in charge of international issues. In early versions of this item, I noted that he occasionally testifies before Congress and has some role in the approval or wiretaps. His 2008 testimony before the Senate Foreign Relations Committee may be found here. As of the October 2009 updating of this page, Swartz had been most recently in the news for holding a meeting with lawyers for Roman Polansky where those lawyers argued that, because of prosecutorial and judicial misconduct in handling of the Polansky case, the United States should not seek Polansky's extradition.

More recently, I learned of the 2003 award received by Swartz (discussed in the introduction of this item) that indicates that Swartz's duties included interacting with foreign governments on such issues as counterterrorism and law enforcement cooperation. The scope of Swartz's current responsibilities is discussed in the Introduction.

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**H. The 2008 and Early 2009 Efforts to Cause Swartz's Removal from the Department of Justice [8]**

By letter of July 9, 2008, I informed Swartz and other involved Independent Counsel attorneys of the creation of the main Prosecutorial Misconduct page, requesting that they alert me as to any matter as to which my treatment was inaccurate or unfair. By letter of September 8, 2008, I requested from Swartz and other respondents in the DC Bar

[9] Swartz's resignation occurred less than two weeks days after I sent my December 23, 1997 letter to Department of Justice Inspector General Michael R Bromwich in which I maintained that the Department's handling of my requests for an investigation of the Office of Independent Counsel and for the removal of Swartz and others from positions in the Department was influenced by concern that a good faith investigation would have found that Swartz and others in the Department had violated federal laws in their prosecution of the *Dean* case. Section III.F of the letter discusses my December 3, 1997 conversation with the former Independent Counsel document manager discussed in Section F of this profile and Section B.9 of PMP in which the former document manager told me that Agent Cain had been pressured to give certain answers and that there was elation and relief in the office of the Independent Counsel when the manner of securing Cain's testimony was revealed on cross-examination. Testimony of the document manager would substantially increase the prospect that a court would find Swartz's actions concerning Agent Cain to have violated federal law. Thus, there exists some possibility that the Bromwich letter led to Swartz's 1998 resignation. But my experience with the Department of Justice as reflected in the various pages on this site and the Truth in Justice editorials does not lead me to think that the possibility is a strong one.

proceeding permission to make the DC Bar materials public. In the letter, I noted the attention that had been given to the Agent Cain matter in an August 2008 post on powerlineblog.com, and I again requested to be informed as to any way in which my interpretation regarding the Agent Cain matter or any other matter might be mistaken. Swartz did not respond to either letter. I again wrote Swartz by letter of August 14, 2009, among other things, advising him of modifications to this page and seeking from him whether he believed any aspect of it was inaccurate or unfair and, in light of Robert E. O'Neill's being a leading candidate for the position of United States Attorney for the Middle District of Florida, advising Swartz of his obligation to inform his superiors at the Department of Justice of the facts concerning O'Neill's conduct regarding Agent Cain. Swartz has not responded to this letter. *See* Addendum 6 *infra* regarding Swartz's obligation to bring to the attention of his superiors the fact that O'Neill made a false statement in the application he submitted to the Florida Federal Judicial Nominating Commission.

See also (1) my emails to the Department of Justice of July 14, 2008 and July 17, 2008 regarding whether Swartz (and (then) interim United States Attorney Robert E. O'Neill) should be permitted to remain with the Department of Justice should they now (a) acknowledge their conduct in the *Dean* case or (b) continue to deny it; (2) my email to the Department of Justice of April 8, 2009 regarding whether Attorney General Eric Holder's asserted commitment to correcting prosecutorial abuses can be taken seriously if Swartz and O'Neill are permitted to continue serving in their current positions; and (3) my July 13, 2009 letter to Chair of the Florida Federal Judicial Nominating Commission and the Chair and Member of the Middle District Conference of that Commission regarding the candidacy of Assistant United States Attorney Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida.

Assuming my interpretation of events surrounding the Agent Cain testimony is correct (or even that something close to it is correct), there is a good chance that Swartz and others committed obstruction of justice or other federal crimes when they endeavored to deceive the court and the probations officer in forestalling inquiry into the matter. But such crimes would very likely be time-barred even if a conspiracy to commit such crimes continued for some years.[10] On the other hand, if Swartz were to be other than candid in any inquiry by the Department of Justice – such as the Department's posing the simple question of whether my allegations concerning Agent Cain are essentially correct – he might now be committing obstruction of justice. In any event, any false denial as to the accuracy of my account of Swartz's conduct concerning Agent Cain would seem an attempt to conceal or cover up a material fact concerning a matter within the jurisdiction of a department or agency of the United States and hence to violate 18 U.S.C. § 1001.

[10] Time bar is not a certainty, however. Assuming Swartz and others engaged in a conspiracy to obstruct justice, any overt act in furtherance of the conspiracy, including, for example, an effort to cover it up by stating that my allegations were false, would restart the limitations period (which I expect would be five years). So if such statements were made in, say, 1996, 2000, and 2005, the limitations period might not yet have expired.

**Addendum 1 – Visibility of this Profile (June 27, 2009, rev. July 20, 2009) [a1]**

*Note of August 24, 2010: This addendum has been largely superseded by the note on visibility preceding the Introduction.*

July 25, 2010 searches for "'Bruce C. Swartz'" yields this profile as the first result on Google and Bing and the second result on Yahoo. Thus, anyone seeking to learn about Swartz is brought immediately to my site. Some reviewers of the Swartz profile have been from the Department of Justice or the Department of State. The nomination of Robert E. O'Neill for the position of the United States Attorney for the Middle District of Florida has substantially increased the traffic to the Robert E. O' Neill profile page and main Prosecutorial Misconduct page, which in turn will bring viewers to this page. I mention these facts as indications of the likelihood that my interpretation of Swartz's conduct will eventually be widely known among the public, among Swartz's colleagues at the Department of Justice, and among those persons and entities before whom Swartz appears as a representative of the Department of Justice.

**Addendum 2 – Deceiving the Court of Appeals Regarding the Discussion of John Mitchell (July 15, 2009; rev. Mar. 6, 2011) [a2]**

I am not sure when I shall address what, in Section D of this document, I describe as a good many misleading or false things Swartz said in the court of appeals in the eleven pages of colloquy on misconduct issues. But a few words are in order on a statement Swartz made elsewhere during the argument. At page 53 of the court of appeals transcript, one finds this colloquy with an unidentified member of the appeals court panel:

> QUESTION: Let me ask you about John Mitchell. Did you put evidence before the jury that he was a convicted felon?
> MR. SWARTZ: No, Your Honor.
> QUESTION: Did you identify him as a former attorney general.
> MR. SWARTZ: Your Honor, my recollection is that the court took steps to insure that did not come before the jury throughout. I believe Ms. Dean testified that she saw Mr. Mitchell on television during Watergate and that he first reaction was that, he was guilt [sic].

It is true that there had been a court order or instruction regarding mention of who John Mitchell was. I believe that, as suggested by Swartz, the order or instruction included that Independent Counsel attorneys should not describe Mitchell as a former Attorney General. My recollection, though an uncertain one (and one I do not have the transcripts to verify), is that it was a ruling of Judge Gerhard A. Gesell, issued sometime between the July 7, 1992 issuance of the Superseding Indictment adding the John Mitchell count and the February 11, 1993 transfer of the case to Judge Thomas F. Hogan.

In any case, assuming my recollection is generally correct, as with Judge Gesell's order on the production of exculpatory materials, Independent Counsel attorneys freely flouted it, and did so within the first half hour of the trial.

Fifteen pages into his opening argument, Robert E. O'Neill stated (Tr. 43):

> Another person will be John Mitchell, and your question is, you saw already a question, he's a former attorney general of the United States.

Thus, contrary to Swartz's representation to the court of appeals, minutes into the trial O'Neill had told the jury that Mitchell was a former Attorney General. Further, in doing so, O'Neill implied that the jury had likely heard of John Mitchell, thereby at least intimating the connection to Watergate.

Ten pages later O'Neill repeated the point, stating (Tr. 53):

> The evidence will show that Louie Nunn at this time went to an individual by the name of John Mitchell. Again, we've spoken about John Mitchell, an ex-attorney general of the United States, a person who the defendant considers to be her father.[11]

A moment later, at page 54, O'Neill made the point a third time:

> Again, you'll hear the terms "General Mitchell," "Colonel Brennan." "General Mitchell" refers to him having been an ex-attorney general in the United States.

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[11] For purposes of accuracy, I note that this quote is based on previously copied material from page 53 (which page I misplaced at some point between 1993 and 2005). Thus I have to consider whether O'Neill might have said "stepfather" rather than "father." On all other occasions where O'Neill made the point in the opening argument (at 49 and 57) he used the word "father." So I assume that "father" is correct.

While not germane to the instant point, I add here that material immediately following the quotation above reads:

> Nunn asks Mitchell to help him out to try to get the units, and what does Mitchell do? Mitchell goes to the defendant. Now John Mitchell died in 1988, so you might say, "Well, how are you going to prove that he went to the defendant?" We're going to prove it through documents, the documents in black and white are going to show that Mr. Mitchell spoke with the defendant about Arama and that she agreed to send 300 units to units to Arama.

When O'Neill made this statement, precisely because he had it in black and white, O'Neill knew with 100% certainty that what Mitchell did was not go to the defendant, but go to Executive Assistant Lance Wilson. O'Neill also knew with close to 100% certainty that when Mitchell did this, Wilson agreed to cause Maurice Barksdale to send 300 units to Dade County for the Arama project and that at no timewas Dean involved in causing Barksdale to send those units. Section B.3 of PMP.

Then, during the Independent Counsel's case-in-chief, O'Neill would three times introduce the discussion of Mitchell with reference to Mitchell's having been the attorney general.

At page 657, O'Neill asked government witness Martin Fine: "During his lifetime, Mr. Fine, did you know John Mitchell, the ex-Attorney General of the United States?"

At page 1347, O'Neill asked government witness Louie B. Nunn: "Mr. Nunn, at that time, were you familiar with an individual by the name of John Mitchell, the ex-attorney general of the United States?"

At page 1704, O'Neill asked government witness Philip Winn: "Now, Mr. Winn, during his lifetime, were you familiar with John Mitchell, the ex-Attorney General to the United States?

Further, at page 817, O'Neill conducted this questioning of immunized witness Silvio DeBartolomeis, who may well have been coached as to his response:

> Q Now, you mentioned the name John Mitchell on two occasions. Who was John Mitchell?
> A John Mitchell was the former U.S. Attorney General under President Nixon.[12]

In closing argument, in discussing Arama developer Aristides Martinez's retaining of Nunn and Mitchell to secure funding for the Arama project, O'Neill would remind the jury once more that Mitchell was a former attorney general (Tr. 3384):

> Obviously, he's paid $425,000 to hire somebody with influence, somebody with connections in Washington, somebody who knows the right people, an ex-governor and an ex-attorney general of the United States, and they know the defendant, Deborah Gore Dean.[13]

One must consider the possibility that Swartz, though almost certainly in court during the opening and closing arguments, and frequently in court during the trial, simply was unaware that O'Neill had mentioned, or made a special point of the fact, that Mitchell was a former Attorney General. Regardless of whether it is impossible that Swartz was unaware of what O'Neill had done, it is substantially more likely that Swartz (and Independent Counsel Arlin M. Adams, who sat with him at counsel table for the court of appeals argument and whose presence there Swartz mentioned (Tr. 20) to enhance his

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[12] The statement of Dean to which Swartz alluded occurred (Tr. 2591) after there had already been numerous references to the fact that Mitchell had been an Attorney General making at least some if not all jurors aware of the John Mitchell being discussed was the person involved in the Watergate scandal.

[13] Again, while it is not precisely germane to the instant point, it nevertheless warrants note that when making this argument, O'Neill knew with absolute certainty that it was not because Nunn and Mitchell knew Dean that Martinez sought their assistance, but because Nunn and Mitchell knew Lance Wilson. *See* Section B.3 of PMP.

credibility with the appeals court[14]) were involved, along with O'Neill, in a deliberate decision to emphasize, notwithstanding any court instruction to the contrary, the fact that Mitchell was a former attorney general with the expectation that doing so would remind the jury of Mitchell's involvement in the Watergate scandal.

In any case, in light of Swartz's conduct throughout the case, including the remainder of the court of appeals argument, such reason as exists to believe that Swartz was not being deliberately deceptive in the above-quoted response lies not in any unlikelihood that Swartz would deliberately misrepresent the facts to the court of appeals if he thought it useful to do so. Rather, it would lie in a concern by Swartz that a deception so manifestly contrary to the record would be discovered. But in the many efforts of Swartz and other Independent Counsel attorneys to lead the jury and the courts to believe things those attorneys knew to be false, they were nothing if not bold.

**Addendum 3 – Deceiving the Court Regarding Dean's Learning of the Whereabouts of the Arama Consultant Fee Check (Aug. 9, 2009) [a3]**

In her Rule 33 Motion, Dean maintained that when she called Agent Cain in April 1989 to demand to see a check showing that John Mitchell received a consultant fee on the Arama project, Cain had told her there did exist a check showing the payment to Mitchell, but that he could not show it to her because it was not at HUD Headquarters but maintained in the field, specifically in HUD's Regional Inspector General's Office. Dean argued that she could only have learned such fact from the call to Cain, and therefore, if the check was maintained in the field office in April 1989, such fact would corroborate her testimony about calling Cain. After the Independent Counsel failed even to mention the check in its response, Dean moved for discovery as to the whereabouts of the check in April 1989.

Swartz had to know with absolute certainty that in April 1989 Dean had called Cain, just as she said in court, and that Cain had told her the check was maintained in the field office, just as she said in support of her Rule 33 Motion. Among other reasons, Swartz would presumably know these things because Cain had told him so during the course of the meetings when Swartz and Robert E. O'Neill pressured Cain into giving testimony that would seem to contradict Dean – if, indeed, Cain had not told Swartz about the call even prior to the bringing of the Superseding Indictment. It is with recognition of this knowledge on the part of Swartz, as well as the fact that in the hearing before Judge Hogan Swartz was endeavoring to conceal conduct by himself and Robert E. O'Neill that Judge Hogan would certainly regard as outrageous and probably regard as the suborning of perjury, that the reader must appraise the following statements Swartz made in seeking

[14] See the February 22, 2011Truth in Justice item styled Unquestionable Integrity versus Unexamined Integrity: The Case of Judge Arlin M. Adams" regarding the way Adams' prestige may have influenced key decisions on misconduct issues by District Judge Thomas F. Hogan. Though not discussed there, I note that an ironic aspect of the matter is that the more heinous the conduct in which a person of Adams' prestige is involved, the less inclined a deferential court will be to cause the matter to come fully to light.

to forestall discovery into where the check was maintained in April 1989 (Feb. 22, 1994 Transcript 7-8):

> That brings us, Your Honor, to the third suggestion, that Agent Cain perjured himself, and that is the supposed conversation with regard to John Mitchell. Defendant's argument both in her original motion and in her motion for reconsideration is that she was told by Agent Cain that the check from Louie Nunn to John Mitchell in connection with the Arama project was being kept in the field, being maintained by the HUD regional inspector general's office. She says if true, that's a fact that she could have only learned from Agent Cain, and therefore she is entitled to discovery on the issue of where the check was. But, Your Honor, it's false.
>
> [While Swartz's phrasing is inexact, his subsequent statements make clear that he means that it is false that Dean could have only learned that the check was in the regional inspector general's office from the call to Cain, not that it is false that the check was maintained in the regional inspector general's office. Swartz never addresses where the check was in fact maintained in April 1989.]
>
> I'd like to provide to the Court, if I may, an excerpt from -- if I can find it -- the inspector general's report. If the Court will indulge me for a second?
>
> THE COURT: All right.
>
> MR. SWARTZ: Your Honor, this is a copy, an excerpt from the HUD Inspector General's Office report on the Mod Rehab program of April 1989, the report that defendant says was the predicate for her phone call to Agent Cain after she received it. The first page is a cover page of that report. The second and third pages are excerpts from the report, the interview of Louie Nunn.
>
> If Your Honor will turn to the third page of this interview report, which again was in defendant's possession by her own testimony, you'll note that the final statement in the report is, "Agent's note: All the contracts agreements shown Nunn were obtained from HUD OIG audit file in Atlanta, Georgia."
>
> So, Your Honor, the report itself suggests that the materials shown to Nunn that involved General -- excuse me, former Attorney General Mitchell were maintained in the field. There's simply no basis for her suggestion that she could have only learned such a fact from Agent Cain. Even if it were true, the report itself on its face would have provided her with the information that suggested to her that materials were being maintained in the field.[15]

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15 Since the point of the instant treatment involves Swartz's effort to deceive the court in circumstances where Swartz knew for a fact that Dean learned the whereabouts of the check from the call to Cain, I do not want to distract the reader with unnecessary attention to an extraneous issue. Nevertheless a couple of the things about the details of Swartz's argument may warrant mention. First, the statement "which again was in defendant's possession by her own testimony" is a common trick whereby a lawyer seeks to give the

> We submit that on all three of these points then, Your Honor, defendant has attempted to pit her credibility against Agent Cain and has made attacks on Agent Cain's integrity that are completely unfounded.

See also the profile of Robert J. Meyer regarding the feigned outrage in the Independent Counsel's Opposition, authored by Meyer and Swartz, at unjustified attacks on the integrity of a "career government employee."

It is common usage (and therefore perhaps arguably correct usage) to describe as an attack on a person's integrity what, strictly speaking, is an attack on the person's reputation for integrity. Such attacks, whether well- or ill-founded and whether successful or not, leave the person's integrity unaffected. I mention this semantic point only because in this case there did in fact occur an attack on Agent's Cain's integrity in the strict sense of the phrase. That occurred when Swartz and O'Neill pressured a career government employee (and one who, in the eyes of the former document manager discussed on Sections B.1 and B.9 of PMP, considered himself to be highly principled) to provide testimony intended to lead the jury to believe something that Swartz, O'Neill, and Cain knew to be false. Subsequent attacks on Cain's reputation for integrity – whether cast as allegations that he committed perjury or allegations that he testified in a manner to lead the jury to believe something he knew to be false – were all direct results of the collective effort to make Cain appear to say something that was known to false and the later actions of Swartz and others to cover up that conduct.

**Addendum 4 – The Beverly Wilshire Diversion (October 28, 2009) [a4]**

On August 15, 2009, Section B.1a was added the main Prosecutorial Misconduct page. That section shows how an error by Dean on a peripheral matter facilitated Swartz's efforts to deceive Judge Hogan regarding Cain's testimony about Dean's calling him in April 1989. As with the main treatment of the Cain testimony, the recognition that

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impression of significance to an utterly commonplace fact. It has no more actual bearing on the issue than would a statement that "defendant has admitted that she knows how to read."

Second, Swartz apparently showed Judge Hogan the second and third pages of the Nunn interview, excluding the first page that indicated that the interview took place in Nunn's office in Kentucky on December 12, 1988. The interview report, which states that Nunn was shown agreements with Martinez from a HUD Atlanta Audit file, makes clear that the interviewers did not then possess the Mitchell check. And it says nothing whatever even to suggest that a copy of the check was then secured from Nunn, much less that it was secured from Nunn, taken to Atlanta, and was still there in April 1989. Rather than arguing that Dean would nevertheless surmise such facts and be confident enough about them to falsely maintain that Cain told her the check was maintained in the Atlanta office and seek discovery on the matter, Swartz conflates the issues in a manner that would allow Hogan to infer that the check was among the items shown to Nunn from that Atlanta file. In this instance Swartz faced a somewhat different situation from that involving the "contact at HUD" matter discussed in Section B of the body of the Swartz profile. There Swartz could base his argument on premises that, though false, were not known by the court to be false. In the case of the check, Swartz is forced into an approach with greater danger of being perceived as an insult to the court's intelligence. But, given the commitment to deceiving Judge Hogan about Cain's testimony, Swartz had few alternatives.

Swartz knew all along that Dean had called Agent Cain just as she said casts additional light on the manner in which Swartz used that error in order to lead the court to believe things that Swartz knew to be false.

**Addendum 5 – November 2009 Effort to Cause the Removal of Swartz (January 31, 2010; rev. Feb. 12, 2011) [a5]**

*Note added January 25, 2010 (and modified February 7, 2010): The text below in this addendum has not been modified since January 31, 2010, and the discussion of the matters related to the candidacy of Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida is thus out of date. As discussed elsewhere, O'Neill would be nominated in June 2010 and confirmed in September 2010. The material below should be considered in light of the Truth in Justice editorials dated September 4, 2010* ("Doubtful Progress on Professional Responsibility at DOJ"), September 26, 2010 ("The Honorable Robert E. O'Neill Regrets That He Is Unable to Answer Questions from the Audience"), October 3, 2010 ("Whom Can We Trust?"), and February 6, 2011 ("Bruce Swartz – Our Man Abroad").

By letter of November 2, 2009, I wrote Attorney General Eric Holder principally concerning whether Deputy Assistant Attorney General Bruce C. Swartz ought to be permitted to serve in his current position in light of conduct with which he, Robert E. O'Neill, and other Independent Counsel attorneys were involved in the *Dean* case.

By letter dated December 28, 2009, Judith B. Wish, Deputy Counsel for the Office of Professional Responsibility, referencing my November 2, 2009 letter to the Attorney General as well as my emails to the Department of Justice dated July 14, 2008, July 17, 2008, and April 9, 2009, advised that it was the Office of Professional Responsibility's policy to 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.

By letter dated January 15, 2010, I responded to Deputy Counsel Wish questioning the wisdom of the stated policy and its pertinence to the matters I had brought to the Department's attention concerning the conduct of Bruce C. Swartz, Robert E. O'Neill, and others in the *Dean* case. I also raised (at 7-9) issues as to the relevance of the possibility that a matter could have been raised in litigation to the Department's actions in responding to inquiries concerning Swartz's actions in his current position or O'Neill's suitability for the position of United States Attorney for the Middle District of Florida.

Meanwhile, there seems to have been a growing controversy over whom the President should nominate to fill of the United States Attorney position, as reflected in the January 25, 2010 *St. Petersburg Times* article "U.S. Attorney candidates face attacks from old adversaries," by Lucy Morgan. After that article prompted a substantial volume of traffic to my web pages addressing conduct of O'Neill, Swartz, and others in the *Dean* case, I added an addendum to the O'Neill profile emphasizing the Department's responsibility to be wholly forthcoming in advising the President as to O'Neill's suitability for the United

States Attorney position, notwithstanding that doing so would necessarily raise issues concerning the Department's allowing O'Neill to prosecute scores or hundreds of federal cases in light of what was known to the Office of Professional Responsibility as early as 1995, and known, in substance, to Associate Deputy Attorney General David Margolis in early December 1994.

As I noted there, for the Department to acknowledge the nature of O'Neill's conduct regarding Agent Cain's testimony will also raise issues about the Department's allowing Bruce C. Swartz to hold the positions he has held in the Department at various times since 1995. Swartz's conduct in the Agent Cain matter, it should be borne in mind, would seem considerably more serious than O'Neill's. For Swartz was supervising O'Neill at the time the two of them pressured Agent Cain into providing testimony intended to lead the jury and the court to believe something Swartz and O'Neill knew to be false. And it was Swartz, not O'Neill, who during the post-trial proceedings conspired with others to deceive the court and probation officer in covering up the actions taken during the trial.

But however disturbing might be the things the Department would reveal about itself in forthrightly advising the President regarding the suitability Robert E. O'Neill for the United States Attorney position, the Department will be better off if such things come to light in 2010 than 2012 or 2016, especially if the things that would later come to light should involve the concealing of things from the President during his consideration of whom to nominate for the Middle District of Florida United States Attorney position. Of course, inasmuch as the Florida Federal Judicial Nominating Commission's recommendation has been pending for over six months, the Department may already have provided the President some advice on the matter. Such advice would have to be deemed incomplete if it failed to apprise the President of either Judge Thomas F. Hogan's severe criticism of O'Neill's conduct in the *Dean* case (as discussed in the first paragraph of the Introduction to the main Prosecutorial Misconduct page and Section A of the January 15, 2010 letter to Deputy Counsel Wish) or my allegations of more serious ethical breaches or failed to provide the President a candid assessment of the extent to which Judge Hogan's criticisms and my allegations are well-founded.

**Addendum 6 – Swartz's Obligations Arising From the Nomination of Robert E. O'Neill for the Position of United States Attorney for the Middle District of Florida (July 25, 2010; rev. February 6, 2011) [a6]**

*Note added January 25, 2010 (and last revised February 7, 2011: As with Addendum 5, the text below in this addendum has not been greatly modified since it was originally posted and the discussion of the nomination of Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida is thus out of date. As discussed elsewhere, O'Neill would be confirmed in September 2010. The discussion of Swartz's obligations to bring to the attention of his superiors allegations being made about him that may cause embarrassment to the Department of Justice should be read in light of the Truth in Justice editorials dated September 4, 2010* ("Doubtful Progress on Professional Responsibility at DOJ") and February 6, 2011 ("Bruce Swartz – Our Man Abroad").

Section E *supra* addresses the way that, immediately following the *Dean* trial, Swartz subordinated the interest of the United States to his personal interest in covering up his own conduct and the conduct of his subordinates during the trial. But so long as a person who engaged in the conduct in which Swartz engaged in during the *Dean* trial holds a law enforcement positions, situations abound where the person's duty to his employer conflict with his own self-interest in concealing the nature of his conduct.

Because of the potential for his conduct in the *Dean* case to cause embarrassment to the Department of Justice, Swartz has an obligation to advise each new Assistant Attorney General of such matter and always to do so with absolute candor. Regardless of the obligation concerning the conduct itself, Swartz would also have an obligation to advise his superiors of the existence of my allegations and the likelihood that such allegations may receive substantial attention – again, always being absolutely candid as to the merit of those allegations and as to whether there exist similar issues that I have overlooked. Addendum 1 *supra* (superseded by the introductory note) discusses the visibility of my allegations regarding Swartz in particular and the that fact that anytime anyone wants to learn about Bruce C. Swartz – whether it be a member of the public, an official of the Justice Department or Department of State, or a foreign official with whom Swartz may have some dealing – the person's first source will almost always be this profile or one of the Truth in Justice editorials. Thus, even if my descriptions of Swartz's conduct were entirely groundless, a responsible official in Swartz's position would alert his superiors to the possibility that my allegations might cause embarrassment to the Department. But, assuming that my descriptions are essentially correct as to most matters, or as to any matter, Swartz has a strong disincentive to fulfill his obligation because in doing so he must reveal his past involvement in heinous conduct and raise serious issues as to his trustworthiness.

The July 9, 2010 nomination of Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida places additional burdens on Swartz and enhances existing ones. In the Florida Federal Judicial Nominating Commission application for the US Attorney position, and possibly in materials provided the Senate Judiciary Committee, O'Neill (properly) listed Swartz as a supervisor when O'Neill was an Associate Independent Counsel. Possibly a background check on O'Neill included an interview of Swartz. In such circumstances, Swartz would be obligated to be absolutely candid or violate 18 U.S.C. § 1001. Thus, while the matter could depend somewhat on the questions posed to him, Swartz would seem obligated to disclose the nature of O'Neill's conduct n the *Dean* case, the courts' criticisms of O'Neill's conduct, the existence of my materials on O'Neill's conduct (including a candid assessment of the validity of my allegations), and, in the event he was aware of the statement in O'Neill's application (or in other materials submitted by O'Neill) that the District of Columbia Bar Counsel investigation of O'Neill's conduct in the *Dean* case was initiated by the defendant, that such statement was false (the subject of Addendum 7 to the O'Neill profile).

Whether or not Swartz was previously aware that in O'Neill's Florida Federal Nominating Commission application (or in other documents submitted in connection with his nomination) O'Neill stated that the Bar Counsel investigation was initiated by the defendant, he became aware of such fact when I so advised him by letter dated July 1, 2010. In the letter I noted that because Swartz had also been a subject of the same investigation, Swartz would know that O'Neill's representation as to the origin of the investigation is false. Pointing out that O'Neill might also have made the same misrepresentation to federal entities in violation of 18 U.S.C. § 1001, I advised Swartz of his responsibility as an official in the Criminal Division to bring the fact of O'Neill's misrepresentation to the attention of officials in the Criminal Division and elsewhere in the Department of Justice. Irrespective of the false statement, however, Swartz has an obligation to his employer to bring things he knows about O'Neill's conduct in the case (or published allegations concerning such conduct) to the attention of officials in the Department. A reason Swartz would not wish to do so is that any lack of candor in discussion the subject would violate 18 U.S.C. § 1001.

**Addendum 7 – Swartz's Conduct in Responding to Allegations of Prosecutorial Misconduct as a Case Study for Developing Procedures to Require That Prosecutors Respond Honestly to Such Allegations (Sept. 6, 2010; rev. Feb. 12, 2011) [a7]**

*Note added February 7, 2011: My September 4, 2010 Truth in Justice editorial ("Doubtful Progress on Professional Responsibility at DOJ") highlighted Bruce C. Swartz's conduct in defending against allegations of prosecutorial abuse in the Dean case and suggested that such conduct would provide a useful case study for illustrating the impermissible deceptions or evasions in prosecutor responses to misconduct allegations. The items also suggested that the Department of Justice require that in responding to allegations of prosecutorial abuse prosecutors shall provide the unalloyed truth about what they did and why they did it, and that they must do so in affidavits. This addendum was created as a further development of those points and was then referenced as such in Truth in Justice editorials of September 26, 2010 ("The Honorable Robert E. O'Neill Regrets That He Is Unable to Answer Questions from the Audience") and February 6, 2011("Bruce Swartz – Our Man Abroad"). But a reader directly accessing this item should not lose sight of the fact that the Bruce C. Swartz profile and much of Section B of the Prosecutorial Misconduct page are substantially comprised of accounts of Swartz's deceiving the courts in defending against allegations of prosecutorial abuse, especially Sections A through D and Addendums 2, 3, and 4 of the profile (some of which are separately accessible by the indicated links). Those parts mainly address Swartz's actions in orally deceiving the courts. The material below is limited to discussing how, with regard to a few particular matters, the requirement of affidavits might have prevented, or at least made more difficult, the deceiving of the courts. Some of the same things could be said about deceptions described in the parts just referenced. But, in any case, a reader of the limited treatment below should not regard it as reflective of the scope of Swartz's actions in endeavoring to deceive the courts concerning the nature of the conduct of Independent Counsel attorneys under Swartz's supervision including that in which he was personally involved. Even the entire profile and PMP merely provide*

*abbreviated treatments of parts of matters addressed in the December 1, 1994 materials and Dean February 1997 motion.*

There are numerous examples in the Independent Counsel Opposition authored by Swartz and Robert J. Meyer illustrating the need for affidavits and several of these may eventually be addressed further. Some of these are discussed in the Introduction and Summary to the materials provided the Department of Justice on December 1, 1994, and its narrative appendixes, as well as in Dean's February 1997 motion, which addresses some matters that had not been discovered as of December 1994. And Swartz's efforts to deceive the courts in responding to Dean's allegations of misconduct are the principal subjects of several parts of the main body and certain addendums to this profile, as well as parts of Section B of the main Prosecutorial Misconduct page.

A serious problem with a failure to require affidavits is that otherwise, as in the referenced Independent Counsel Opposition, prosecutors responding to misconduct allegations may merely make arguments about how the facts might provide an innocent basis for the challenged conduct, while never explicitly stating their true reasons for acting as they did. In many places I have maintained that in context these arguments are at least implied representations. But the process of revealing the truth would be much more effective if the prosecutors were required to make explicit representations and to do so under oath.

A useful example is found in the Section B.3 of PMP (also discussed in Section D *infra*), both with regard to the failure to make a *Brady* disclosure of the Mitchell telephone messages slips (which indicated that in January 1984 John Mitchell had been talking to Lance Wilson about the Arama funding and that Wilson had told Mitchell he was talking to Barksdale about the matter) and the failure to bring the information on the message slips to the attention of Maurice Barksdale before having him testify in a manner inconsistent with the information on the message slips.

As to the former issue, the Opposition (at 11) asserted there was no obligation to identify the message slips as *Brady* material because they "were as consistent with guilt as with innocence," further suggesting, with cryptic references to the fact that the award took place after Wilson left HUD and a post-award call to Mitchell, that the message slips were incriminating by "reinforc[ing] the defendant's role." The Independent Counsel court of appeals brief (47), also authored by Swartz and Meyer, asserted that the message slips "were not exculpatory," again going on to suggest that they were incriminating for cryptic reasons akin to those mentioned in the district court. As discussed in Section D, in oral argument Swartz stated that the message slips were "far from being exculpatory" (while obliquely phrasing the response in terms of "the government's position is"). But there he advanced a new a new theory as to why the slips were incriminating.[16] Evolving reasons as to the basis for attorneys' thinking at the time they made certain decisions

[16] Swartz stated (Tr. 43): "The government's position is, far from being exculpatory, these notes showed that Barksdale was being contacted by the executive assistant." The new theory apparently meant that the notes, by showing that Executive Assistant Wilson would contact Barksdale on mod rehab matters, provided evidence that Executive Assistant Dean would also do so.

highlights the avoidance of the responsibility to explain the reasons underlying the decisions at the time they were made and even suggests a scenario whereby very intelligent or creative people would be called in after the fact to develop theories supposedly underlying actions previously taken by other people. In any case, it would be a much harder thing for an attorney to say in an affidavit that he believed that the message slips were as consistent with guilt as with innocence (or were deemed incriminating) and that such was the true reason for failing to identify them as *Brady* material.[17]

As to the failure to confront Barksdale with the information on the message slips, no person of modest intelligence could believe other than that the failure was motivated by a concern that doing so would cause Barksdale to state (truthfully) that Wilson had caused the funding and Dean was not involved, and that Independent Counsel attorneys instead went forward with the hope and expectation of eliciting false testimony that would support of their claim. Here Independent Counsel attorneys never even impliedly advanced a reason for failing to confront Barksdale with the information. Rather, they merely asserted that the government does not have "an affirmative duty to question any potential witness before trial in order to seek out all *potentially* material evidence conceivably related to the defense." Opposition at 16-17 (original emphasis).

Requiring affidavits would not alone solve all problems. Attorneys still might respond evasively, including by stating what their responsibilities were rather than what their reasons were, and in many other ways. And, particularly with regard to matters as serious as the pressuring of Supervisory Special Agent Alvin R. Cain, Jr. to provide testimony intended to lead the jury to believe things prosecutors and Cain knew to be false (as discussed in the September 4, 2010, and February 6, 2011 Truth in Justice editorial and Section A *supra*), attorneys may choose to commit perjury rather than reveal their actual conduct. It discloses nothing confidential about the District of Columbia Bar Counsel investigation to note that in responding to the investigation at the time that it was limited to the issues discussed by the court of appeals, an attorney representing Swartz and O'Neill (among others) stated on behalf of the respondents (Oct. 20, 1995 Response at 11):

> [Respondents] wish to advise Bar Counsel that if they had noticed truly exculpatory documents within the production made in discovery, they would have specifically called the attention of defense counsel to those documents, rather than leaving the defense to discover then on its own.

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[17] Of course, it should be borne in mind that it is nonsensical even to speak as if there existed some unified view that the message slips were not exculpatory. In reality, even in the unlikely event that some Independent Counsel attorneys thought that the message slips were more incriminating than exculpatory, so long as any Independent Counsel attorneys had a reasonable basis for thinking they were exculpatory, they should have been turned over. But this point is more germane to underlying conduct, which involved a decision to make a *Brady* disclosure of no documents whatever, than to Swartz's deceptiveness in covering that decision up.

Given what is known not only about the message slips but the many other documents specifically contradicting things Independent Counsel attorneys attempted to prove at trial (including, just as one example, the items discussed in Section B, *supra*),[18] no intelligent person could regard this representation that Swartz and his co-respondents allowed to be made of their behalf as other than false. When making this representation (before Dean's counsel or I knew of the Bar Counsel investigation) respondents believed that all they had to contend with were the Mitchell slips discussed by the court of appeals. The respondents (who, it also warrants note, never brought a single document to the attention of the defense) might have been more cautious, if not more truthful, in their representation had they been confronted with the varied other exculpatory documents that they chose not to bring to the attention of counsel. But the representation does reveal that government attorneys will make specific statements that they know to be false in order to defend themselves. And persons who are willing to make false statements, as a group, to Bar Counsel through their counsel might also make false statements under oath. Nevertheless, requiring affidavits still would be likely to promote the disclosure of the truth in inquiries into prosecutorial abuse, especially if courts are willing to ensure that the affidavits are responsive to the issues and to scrutinize the plausibility of the prosecutors' sworn statements.

See Appendix A to my February 1996 District of Columbia Bar Counsel submission, which sets out questions for Bar Counsel to require respondents to answer by affidavit. Bar Counsel's decision gives no indication that its attorneys ever read this item. But had Bar Counsel required affidavits along the suggested lines, the outcome of that proceeding might have been quite different.

At the time of submitting Appendix A to Bar Counsel, I apparently had not discovered the Sankin Harvard Business School application that was exculpatory as to two project in Count Two of the Superseding Indictment (the item discussed in Section B.7a of PMP, as well as the Introduction and Section D of this profile, that was actually for a time withheld and then actually hidden). But consider the following question to which it would be reasonable to require the respondent Independent Counsel attorneys to provide answers:

a. When did Independent Counsel attorneys become aware of the document?
b. Why was the document not produced as *Brady* material?
c. Why was the document not provided at all in the Sankin production during discovery?
e. Why was the document inserted in the massive collection of Stanley Arms materials when it was finally provided as part of a preliminary exhibit production?
f. Was the item inserted in the Stanley Arms materials in order to diminish the chance that the defendant would discover it?

[18] Dean's February 1997 Motion probably provides the most comprehensive discussion of documents that existed specifically contradicting things Independent Counsel attorneys intended to prove at trial. At some point I may add a more comprehensive list as a supplement to this addendum.

And so on. But as illustrated in the referenced Appendix A, there exist numerous comparable examples where true answers would repeatedly reflect what most people would regard as outrageous government misconduct.

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