

**James P. Scanlan**  
**Attorney at Law**  
**1529 Wisconsin Avenue, NW**  
**Washington, D.C. 20007**  
**(202) 338-9224**  
**jps@jpscanlan.com**

August 18, 2010

The Honorable Eric H. Holder, Jr.  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Jay Macklin, Esq.  
General Counsel  
Executive Office for United States Attorneys  
U.S Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Re: Violation of 18 U.S.C. § 1001 by Robert E. O'Neill, Nominee for United States Attorney for the Middle District of Florida

Dear Attorney General Holder and General Counsel Macklin;

This letter is to call to your attention additional information concerning matters raised in earlier corresponding regarding the fact that Robert E. O'Neill, currently an Assistant United States Attorney in the Middle District of Florida and nominee for the position of United States Attorney for that district, made a false statement in an application he submitted for the position to the Florida Federal Judicial Nominating Commission.

In letters of [June 28, 2010](#),<sup>1</sup> and [July 9, 2010](#), to Attorney General Holder and [July 5, 2010](#), and [July 13, 2010](#), to General Counsel Macklin, I advised you that in the Nominating Commission application Mr. O'Neill stated that a District of Columbia Bar Counsel investigation of his conduct in *United States v. Deborah Gore Dean* had been initiated by a complaint filed by the defendant when in fact Bar Counsel itself initiated the investigation after reading a court of appeals opinion "deplor[ing]" the conduct of lead counsel O'Neill and his colleagues. I also pointed out that if Mr. O'Neill made the same false statement to a federal entity, as he may well

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<sup>1</sup> As with the June 28, 2010 letter, underlinings of references in this letter indicate that active links to the references are available in an electronic copy of this letter that may be found by its date on the Letters sub-page of the Prosecutorial Misconduct page of [jpscanlan.com](http://jpscanlan.com).

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have done during the United States Attorney nomination/confirmation process, he very likely violated 18 U.S.C. § 1001. I have also suggested that, whether or not Mr. O'Neill violated any federal law, the false statement should disqualify him from consideration for the United States Attorney position and cause his removal from the position of Assistant United States Attorney. With regard to the implications of the eventual widespread awareness of the fact that Mr. O'Neill made a false statement in his United States attorney application, assuming he continues to serve as a federal prosecutor at any level, I call to your attention in particular the final paragraph of the July 13, 2010 letter to General Counsel Macklin.

Further with regard to the July 13, 2010 letter, I note that I just received a [letter dated August 13, 2010](#), from General Counsel Macklin stating that it was a response to my letter of July 13, 2010. General Counsel Macklin's recent letter states that in my July 13, 2010 letter I continued to raise allegations of misconduct by Mr. O'Neill; that those allegations had been reviewed by the Department, the Office of Professional Responsibility (OPR), and the Office of Inspector General; and that I have been informed by OPR that it is that office's "policy to refrain from investigating issues or allegations that were addressed, or that could have been addressed, in the course of litigation." Whatever the wisdom of the OPR policy or its relevance to the issues that had been brought to OPR's attention at the time it expressed that policy to me (which matters of wisdom and relevance are addressed in my [January 15, 2010 letter](#) to OPR Deputy Counsel Judith B. Wish), the policy has no bearing whatever on the issue raised in July 13, 2010 letter, which involve the simple fact that in an application submitted to the Florida Federal Judicial Nominating Commission on June 5, 2009, Mr. O'Neill made a false statement and the possibility that he may have made the same false statement to a federal entity. This is a subject, I might add, that quite obviously was not and could not have been raised in the litigation to which Deputy Counsel Wish refers and that probably could not be raised in any other litigation save in a Department of Justice prosecution. Apart from the fact that the reasoning set out in General Counsel Macklin's letter has nothing to do with the subject of my July 13, 2010 letter, General Counsel Macklin's letter, particularly given that Mr. O'Neill is now the nominee for the United States Attorney position, seems to say that even heinous conduct by a federal prosecutor will not stand as an obstacle to a Presidential appointment if the matter was or could have been addressed in litigation. Most people would find that a very disturbing position, and I hope that the Department will reconsider it, if not with regard to Mr. O'Neill's appointment, at least with regard to future appointments as to which the Department is called upon to advise the President.

Turning to the additional information mentioned in the first paragraph above, in the June 28, 2010 letter to Attorney General Holder (at 2 n.2), I raised the possibility that Mr. O'Neill violated 18 U.S.C. § 1001 even by making the false statement to the Florida Federal Judicial Nominating Commission on the basis that the false statement related to Mr. O'Neill's responsibilities as an employee of the Department of Justice or the Office of Independent Counsel. In making the point, I did not consider the possibility that the Nominating Commission might be deemed a federal entity. More recently, I have come to understand that in the civil action *Jeffrey J. Del Fuoco v. Robert E. O'Neill and Eric H. Holder, Jr.*, No. 8:09-cv-1262-T-27MAP, Department of Justice attorneys representing Mr. O'Neill and the Department filed a [Motion to Dismiss](#) on April 26, 2010, in which, in arguing that allegedly defamatory statements

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Mr. O'Neill made about the plaintiff in the Florida Federal Nominating Commission application enjoyed an absolute privilege, those attorneys asserted (at 6) that the Nominating Commission is "a quasi-legislative body, established by members of the U.S. Senate." Though the motion does not make the point because it is not germane to the argument, it is clear that the motion means "a quasi-*federal* legislative body." Thus, there may exist another argument as why Mr. O'Neill violated 18 U.S.C. § 1001 by falsely describing the origin of the District of Columbia Bar Counsel investigation in his Nominating Commission application.

Further, in a May 7, 2010 Response to the above-mentioned Motion to Dismiss (at 2 n.1), the plaintiff asserts that in order for Department of Justice attorneys to represent Mr. O'Neill in his personal capacity, the Department would have to have concluded that the allegedly tortious actions of Mr. O'Neill were undertaken in the course of his employment. If the Department did make such a determination before providing Mr. O'Neill representation with regard to allegations that he made defamatory statements in the Nominating Commission application, such determination may provide further support for an argument that Mr. O'Neill violated 18 U.S.C. § 1001 by making a false statement in the Nominating Commission application on the basis that the statement involved a matter within the jurisdiction of the Department of Justice or the Office of Independent Counsel.<sup>2</sup>

I discuss implications of the Department's position on the status of the Nominating Commission in an August 17, 2010 [editorial](#) ("Additional Problems with Middle District of Florida U.S. Attorney Nomination") on [truthinjustice.org](#). In the editorial, I also address some implications of the fact that the *Del Fuoco* complaint alleges that Mr. O'Neill committed perjury in a 2005 deposition in another case and identifies three present or former Assistant United States Attorneys as persons who could corroborate the description of events that the complaint maintains Mr. O'Neill falsely denied.

I hope you will take these additional matters into account in considering my suggestions in the first paragraph.

Sincerely,

/s/ **James P. Scanlan**

James P. Scanlan

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<sup>2</sup> The material in [Addendum 7](#) to the [Robert E. O'Neill profile](#) on [jpscanlan.com](#) immediately following treatment of the August 17, 2010 [truthinjustice.org](#) editorial discussed *infra* addresses some of the problems that may arise from having Department of Justice attorneys represent Mr. O'Neill regarding statements made in the Nominating Commission application or other matters that may involve federal crimes.

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cc: Robert Bauer, Esq.  
Assistant and Counsel to the President

The Honorable Patrick J. Leahy  
Chairman, Senate Judiciary Commission

The Honorable Jeff Sessions  
Ranking Member, Senate Judiciary Committee