

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

June 10, 2010

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

Re: Deputy Assistant Attorney General Bruce C. Swartz and Assistant United States Attorney Robert E. O'Neill

Dear Mr. Macklin:

Thank you for your [letter of June 8, 2010](#),¹ informing me that my [letter of November 2, 2010](#), to Attorney General Eric Holder had been forwarded to the General Counsel's Office of the Executive Office for United States Attorneys (EOUSA). Describing my letter as an inquiry concerning Bruce C. Swartz, a Deputy Assistant Attorney General for the Criminal Division, your letter advises that allegations involving professional responsibility or prosecutorial misconduct are handled by the Office of Professional Responsibility (OPR) and that your office is not involved in the investigation of such matters.

Initially, I note that when the Attorney General refers an inquiry from a member of the public to an office of the Department of Justice that does not handle matters addressed in the inquiry, it seems that the appropriate course would be to inform the Attorney General that the matter is outside the office's purview, rather than to so inform the member of the public. That way the Attorney General may advise the office as to any reason for the referral that might not have been evident in the transmittal or refer the inquiry to a more appropriate office.

In any event, the referral to your office would in fact seem to have a specific purpose unrelated to the responsibilities of OPR. That purpose, however, would not involve Bruce C. Swartz, a

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

Jay Macklin, Esq.

June 10, 2010

Page 2

person concerning whom (to my knowledge) EOUSA has no supervisory responsibility. My letter to Attorney General Holder did identify Mr. Swartz as its principal subject, and it forwarded a hard copy of a document styled “Bruce C. Swartz – Prosecutorial Misconduct in *United States of America v. Deborah Gore Dean*” (which document is also available online as [html](#) or [pdf](#)). But page 4 of the letter addressed issues involving Robert E. O’Neill, an Assistant United States Attorney in the Office of the United States Attorney for the Middle of Florida, a person concerning whom EOUSA does have supervisory responsibility. The principal pertinent language read:

There exist several related matter that may be the subject of future letters, but that I mention briefly here because I am uncertain when, or necessarily if, I shall write those letters. As indicated, Assistant United States Attorney Robert E. O’Neill was involved in the matter just discussed. Varied materials, including the [Robert E. O’Neill profile](#), document Mr. O’Neill’s role in many prosecutorial abuses in the *Dean* case. According to my last understanding of the matter, the July 2009 recommendation of the Florida Federal Judicial Nominating Commission that Mr. O’Neill be one of three candidates Florida Senators should consider recommending to the President for appointment to the position of United States Attorney for the Middle District of Florida is still under consideration. In the event Mr. O’Neill advances further toward appointment to the United States Attorney position, I may raise the matter of Mr. O’Neill’s unsuitability for such position with the Department of Justice or other persons or entities involved in the nomination and confirmation processes. But regardless of whether Mr. O’Neill continues to be a serious United States Attorney candidate, the same matters that call into question his suitability for the United States Attorney position call into question whether he should be permitted to serve in his current position or to represent the United States in any capacity.

Thus, I suggest, the referral of my letter to your office would appropriately involve Mr. O’Neill, rather than Ms. Swartz. Further, Attorney General Holder did in fact also forward my letter to OPR, which responded by [letter from Deputy Counsel Judith B. Wish dated December 28, 2010](#). As indicated in the letter from Deputy Counsel Wish, OPR takes the position that it will not investigate the allegations discussed in my November 2, 2009 letter and related materials because, in its view, the matters were or could have been raised in litigation. As discussed in Section B of my [January 15, 2010 letter](#) to Deputy Counsel Wish, whatever the merit of OPR’s putative basis for refusing to investigate the matters, the fact that the matters could have been raised in litigation in no way detracts from the relevance of the conduct at issue to the Department’s current supervision of the involved attorneys. Such matter is also addressed in Addendum 5 to the [profile on Mr. O’Neill](#) referenced in the quotation above (which item is also available as [pdf](#), with endnotes as footnotes).

Three ongoing matters in the Middle District of Florida illustrate the issues. The first involves Department of Justice actions regarding the criminal case of *United States v. Thomas Spellissy and Global Systems International, Inc.*, No. 8:05-Cr-475-T-27TGW, where Department attorneys have for some time been defending against allegations of misconduct by Mr. O’Neill in the prosecution of the matter. The second involves Department of Justice actions regarding the

Jay Macklin, Esq.

June 10, 2010

Page 3

civil case of *Thomas F. Spellissy v. Robert E. O'Neill et al.*, No. 8:10-cv-01070-JSM-AEP, where Department attorneys may represent Mr. O'Neill in defending against tort allegations arising from Mr. O'Neill's conduct relating to the Spellissy criminal case. The third involves Department actions concerning the civil case of *Jeffrey J. Del Fuoco v. Robert E. O'Neill*, No. 8:09-cv-1262-T-27MAP, where Department attorneys are apparently representing Mr. O'Neill in responding to allegations involving a range of tort issues.

The issues raised in my letter to Attorney General Holder and other materials concerning the conduct of Mr. O'Neill in *United States v. Deborah Gore Dean* seem most pertinent to the first two matters. For, as to both of them, the Department must make a judgment about the merits of the allegations concerning Mr. O'Neill's conduct. And Mr. O'Neill's documented conduct in the *Dean* case is something that the Department must reasonably take into account in appraising the merits of the allegations in the Spellissy cases regardless of whether the conduct in the *Dean* case was or could have been raised in the courts. That some of the issues addressed in my letter to Attorney General Holder and related materials were raised in the courts is principally relevant in that the courts found many or most of the allegations to be both meritorious and serious, even if insufficient to overturn the verdict. Thus, there exist court opinions specifically questioning Mr. O'Neill's behavior in the *Dean* case, including a statement that, with regard to a matter where most observers would consider Mr. O'Neill to have attempted to lead the jury to believe things he knew to be false, Mr. O'Neill had acted in a manner that the court would not have expected from any Assistant United States Attorney who had ever appeared before it.

To my knowledge the *Del Fuoco* case does not involve allegations of prosecutorial misconduct. Nevertheless, in appraising the merits of the plaintiff's allegations, the light Mr. O'Neill's conduct in the *Dean* case sheds on his general trustworthiness is something the Department must necessarily consider in deciding what, if any, Department of Justice resources ought to be expended in defending Mr. O'Neill against the allegations.

Thus, the refusal of OPR to investigate the matters I raised merely heightens the responsibility of EOUSA to itself determine the merits of the allegations against Mr. O'Neill and their pertinence to EOUSA's oversight of Mr. O'Neill's conduct as an Assistant United States Attorney. The situation is akin to one where allegations are brought to the attention of EOUSA suggesting that an Assistant United States Attorney had committed crimes of a nature that would call into question the Assistant United States Attorney's integrity. That the relevant law enforcement authority refused to investigate the crimes because any prosecution would be time barred would not vitiate the relevance of the allegations to the Department's appraisals of the fitness of the Assistant United States Attorney to represent the United States or to the appraisals the Department may periodically be required to make concerning the merit of misconduct allegations against the attorney.

As I trust you know, on June 9, 2010, the President announced the nomination of Mr. O'Neill for the position of United States Attorney for the Middle District of Florida. I do not know what role the EOUSA may have had in providing advice to any part of the government with regard to Mr. O'Neill's suitability for that position or whether in the normal course such role would continue throughout the confirmation process. It would seem, however, that any responsibilities

Jay Macklin, Esq.

June 10, 2010

Page 4

the EOUSA may have in the matter could not be effectively discharged without careful review of the issues raised in my letter of November 2, 2009 and the materials it references. It would also seem that, whether or not in the normal course of a confirmation process the formal role of EOUSA in such matter would be a continuing one, its responsibility to bring to the attention of the President any knowledge it has that calls into question the suitability of a nominee to hold a United States Attorney position is indeed continuing.

As the confirmation process moves forward, I will be encouraging members of the Judiciary Committee and other entities to review the conduct of Mr. O'Neill in the *Dean* case – including with regard to the matter addressed in [Section B.1](#) of the main [Prosecutorial Misconduct](#) page, which was also addressed at length in the November 2, 2009 letter to Attorney General Holder and a lengthy [August 2008 post](#) on powerlineblog.com, as well as with regard to varied other matters addressed in the profile on Mr. O'Neill – encouraging those entities as well to seek the Department of Justice's appraisal of such matters. In the event inquiries are made of the Department concerning the merits of such allegations, the Department ought to be in the position to say whether the allegations have merit and, if they do have merit, whether they bear on the suitability of Mr. O'Neill to serve as a United States Attorney. A response that the Department does not have an opinion because it has declined to investigate the allegations – whether because they could have been raised in litigation or for any other reason – would not seem a satisfactory one.

In any case, while the discussion above ought to provide reason enough for your office to attempt to determine the merits of my allegations concerning Mr. O'Neill's conduct in the *Dean* case, it may be sensible to elicit from Attorney General Holder his reasons for referring my letter to your office.

Sincerely,

/s/ **James P. Scanlan**

James P. Scanlan

cc: The Honorable Eric Holder
Attorney General