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July 9, 2010

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

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:

This is a follow up to my June 28, 2010 letter[1] to you concerning Robert E. O'Neill, the nominee for the position of United States Attorney for the Middle District of Florida. The letter alerted you that in an application for the United States Attorney position submitted to the Florida Federal Judicial Nominating Commission Mr. O'Neill made a false statement concerning the origin of a District of Columbia Bar Counsel investigation of his conduct in *United States v. Deborah Gore Dean* and raised the issue of whether Mr. O'Neill made that or similar false statements in circumstances whereby he violated 18 U.S.C. § 1001. It also suggested that you advise the President of the false statement and, in doing so, suggest that the President withdraw Mr. O'Neill's nomination for the United States Attorney position.

This letter serves two purposes. First, it advises you of developments subsequent to the June 28, 2010 letter. Second, it provides you documentary proof that Mr. O'Neill's statement was false, which proof also reflects reasons why Mr. O'Neill made the false statement.

A. Developments Subsequent to the June 28, 2010 Letter

Developments since my letter of June 28, 2010, which are also reflected in Addendum 7 to the Robert E. O' Neill profile on jpscanlan.com, include the following:

[1] 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. Portions the letter are redacted in the posted version.

By letter dated June 29, 2010, I brought the matter of Mr. O'Neill's misrepresentation on the Florida Nominating Commission application to the attention of staff writers of the *St. Petersburg Times* who had been involved in recent coverage of Mr. O'Neill. I urged them to address the matter with Mr. O'Neill.

By letter dated July 1, 2010, I advised Bruce C. Swartz (currently a Deputy Attorney General in the Criminal Division and a person who would know the actual circumstances of the initiation of the Bar Counsel investigation) of the statement that Mr. O'Neill made on his United States attorney application concerning the origin of the Bar Counsel investigation. I further advised Mr. Swartz that as an official of the Criminal Division, he had an obligation to bring the fact that Mr. O'Neill's statement was false to the attention of officials in the Criminal Division and elsewhere in the Department of Justice.

On July 5, 2010, drawing on the June 23, 2010 Truth in Justice editorial mentioned in my earlier letter, Paul Mirengoff posted an item on powerlineblog.com styled "A Nomination That Should Be Closely Scrutinized." In addition to discussing my account of the district court and court of appeals criticisms of Mr. O'Neill's conduct in the *Dean* case, the item discussed my allegations concerning Mr. O'Neill's misrepresentation in the Florida Federal Judicial Nominating Commission application. The item also discussed my allegation that in the *Dean* case Mr. O'Neill and a colleague (Bruce C. Swartz, who is mentioned above) pressured a government witness into providing testimony that would be interpreted as categorically contradicting the defendant in order that Mr. O'Neill could provocatively state that the defendant had lied on the stand about an interaction with the witness (when Mr. O'Neill knew that the defendant had not lied about the interaction). That matter was also the subject of an August 2008 item by Mr. Mirengoff on the same site. The matter is also the subject of the fifth summarized item in my June 16, 2010 letter to the Senate Judiciary Committee and numerous items of correspondence to the Department of Justice, including my November 2, 2009 letter to you principally concerning the fitness of Mr. Swartz to continue to serve in his current position (which letter is discussed in Addendums 5 and 6 to the O'Neill profile).

It is my understanding that powerlineblog.com is visited by over 40,000 users daily. My site traffic records indicate that the recent Mirengoff item has already brought increased attention to the prosecutorial misconduct materials on my website, including attention from persons at the Department of Justice. Thus, the Mirengoff item substantially increases the likelihood that large segments of the public will become aware of Mr. O'Neill's misrepresentation on his application and other reasons that Mr. O'Neill ought not to serve as a United States Attorney.

By letter dated July 5, 2010, I advised Robert E. O'Neill that, whatever explanation he may have for stating that the District of Columbia Bar Counsel investigation was initiated by Ms. Dean, he is obligated to bring the fact that the statement was false to the attention of the President and various other persons or entities involved in the United States Attorney nomination process.

By letter of July 5, 2010, I advised Jay Macklin, General Counsel for the Executive Office for United States Attorneys (recipient of the June 10, 2010 letter discussed in Addendum 6 of the

O'Neill profile), of Mr. O'Neill's misrepresentation concerning the origin of the Bar Counsel investigation in the application to the Florida Nominating Commission. I also advised General Counsel Macklin that, whether or not Mr. O'Neill violated any federal law, the making of the misrepresentation in the circumstances Mr. O'Neill made it calls into question the appropriateness of Mr. O'Neill's continued employment as an Assistant United States Attorney.

B. Documentation That the Statement Robert E. O'Neill's Made in His Florida Federal Judicial Nominating Commission Application Concerning the Origin of the District Columbia Bar Counsel Investigation Was False

As discussed in my earlier letter, on June 5, 2009, Mr. O'Neill submitted to the Florida Federal Judicial Nominating Commission an application for the United States Attorney position. In the application, in response to a request for information concerning disciplinary matters, Mr. O'Neill provided the following entry (at 43):

> (b) Deborah Gore Dean, Office of Bar Counsel, The Board on Professional Responsibility, District of Columbia Court of Appeals (1995):
>
> I prosecuted Deborah Gore Dean on behalf of the Office of Independent Counsel. The trial occurred in Washington, D.C. After her conviction on all counts, Ms. Dean filed a bar complaint alleging a number of instances of prosecutorial misconduct during the trial. On June 27, 1996, Bar Counsel sent a letter stating that there was "insufficient evidence of professional misconduct" and Bar Counsel terminated the investigation.

The Bar Counsel investigation was not initiated by Deborah Gore Dean or anyone associated with her. As reflected in the attached first page of the June 27, 1996 letter from Bar Counsel that Mr. O'Neill references, the investigation was initiated by Bar Counsel itself based on its "review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in United States v. Deborah Gore Dean, 55 F.3d 640 (1995), which raised questions concerning the prosecutors' compliance with their obligations under Brady v. Maryland, 373 U.S. 83 (1963), and certain of the prosecutors' trial tactics."

The inference is inescapable that Mr. O'Neill attributed the initiation of the Bar Counsel investigation to Ms. Dean because he believed an investigation initiated by a complaint filed by a convicted defendant would raise fewer concerns with the Florida Nominating Commission or other readers of his application than an investigation initiated by Bar Counsel itself, especially given that the fact of the self-initiated Bar Counsel investigation would raise issues as to why Bar Counsel initiated the investigation.

As noted in my earlier letter, the failure to state that I filed a complaint with the District of Columbia Bar (which complaint was addressed at length in the June 27, 1996 letter referenced by Mr. O'Neill) would seem also to make Mr. O'Neill's statement, if not false, at least seriously misleading by omission, especially since mention that I had filed a complaint could alert readers of the application to the existence of the extensive materials I maintain on the Internet regarding

Mr. O'Neill's conduct in the *Dean* case. But whatever the implications of Mr. O'Neill's failure to mention my complaint, the implications of the attribution of the initiation of the investigation to a convicted defendant rather than to the actual initiator are obvious and substantial. And, I suggest, the great majority of Americans would regard the misrepresentation as disqualifying Mr. O'Neill for the position of United States Attorney. Therefore, I again urge you to advise the President to withdraw Mr. O'Neill's nomination.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: Robert Bauer, Esq. (redacted copy, without attachment)
Assistant and Counsel to the President

The Honorable Patrick J. Leahy (redacted copy, without attachment)
Chairman, Senate Judiciary Commission

The Honorable Jeff Sessions (redacted copy, without attachment)
Ranking Member, Senate Judiciary Committee

Attachment

OFFICE OF BAR COUNSEL

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June 27, 1996

CONFIDENTIAL

[redacted]

Re: [redacted]
Bar Docket No. [redacted]

O'Neill/Bar Counsel
Bar Docket No. 397-95

Dear Mr. Jeffress:

This office has completed its investigation of the ethical issues concerning [redacted] Esquire and Robert O'Neill, Esquire. We have evaluated this matter in light of an attorney's obligations as set forth in the District of Columbia Rules of Professional Conduct (the "Rules"). It is the burden of this office to have clear and convincing evidence of a violation of the Rules to institute disciplinary proceedings against an attorney. "Clear and convincing" evidence is more than a mere preponderance of the evidence, which would be sufficient in a civil proceeding. We do not find clear and convincing evidence in our investigation and therefore, we must dismiss the matter.

History of Disciplinary Investigation

We commenced an investigation upon review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in United States v. Deborah Gore Dean, 55 F.3d 640 (1995), which raised questions concerning the prosecutors' compliance with their obligations under Brady v. Maryland, 373 U.S. 83 (1963), and certain of the prosecutors' trial tactics.

On July 18, 1995, we wrote the Independent Counsel in our Undocketed No. U-410-95 to advise that we had commenced a preliminary inquiry based upon the Court of Appeals' opinion and