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August 28, 2010

The Honorable Russ Feingold  
United States Senator  
Washington, DC 20510

**Letter made available electronically**

Re: Nomination of Robert E. O'Neill for the Position of United States Attorney for the Middle District of Florida – False Statement on Application Submitted to Florida Federal Judicial Nominating Commission

Dear Senator Feingold:

This letter concerns Robert E. O'Neill, nominee for the position of United States Attorney for the Middle District of Florida. By letters to Senate Judiciary Committee members dated [June 16, 2010](#),<sup>1</sup> and [July 26, 2010](#), I brought to the Committee's attention certain matters concerning Mr. O'Neill's suitability for the United States Attorney position, including the fact that Mr. O'Neill made a false statement in an application for the position that he submitted to the Florida Federal Judicial Nominating Commission (FFJNC). The July 26, 2010 letter suggested that if Mr. O'Neill made the same false statement to a federal entity, he violated 18 U.S.C. § 1001. The purpose of this letter is to bring to the Committee's attention an argument recently advanced by the Department of Justice whereby the FFJNC is itself a federal entity, raising the possibility that the false statement to the FFJNC violated 18 U.S.C. § 1001, as well as two matters raised in the litigation in which the Department made that argument that also bear on Mr. O'Neill's suitability for the United States Attorney position.

As explained in the earlier letters, the false statement in Mr. O'Neill's FFJNC application involves the initiation of a District of Columbia Office of Bar Counsel investigation of Mr. O'Neill's conduct as lead trial counsel in *United States of America v. Deborah Gore Dean*, Crim. No. 92-181-TFH (D.D.C.). Mr. O'Neill stated that the investigation was initiated by a complaint filed by the defendant. In fact, as shown in the attachment to my July 26, 2010 letter, the investigation was initiated by Bar Counsel itself after reading a court of appeals decision

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<sup>1</sup> As in the earlier letter, underlinings of words or phrases reflect links to the referenced items in an electronic copy of this letter that may be located by its date on the Letters (Misconduct) sub-page of the Prosecutorial Misconduct page of jpscanlan.com. While hard copy letters are addressed to individual Senators (save those who preferred email), only the copy addressed to the Chairman is posted online.

“deplor[ing]” the conduct of Mr. O’Neill and his colleagues.<sup>2</sup> The unavoidable inference is that Mr. O’Neill falsely described the origin of the Bar Counsel investigation because he believed that an investigation initiated by a convicted defendant would raise fewer concerns with the FFJNC or other readers of his application than an investigation Bar Counsel itself initiated after reading a reported opinion criticizing prosecutor conduct.

In the earlier letters, I did not raise the possibility that the FFJNC might be considered a federal entity. Subsequently, however, I became aware of the following information. In the *Jeffrey J. Del Fuoco v. Robert E. O’Neill and Eric H. Holder, Jr.*, No. 8:09-cv-1262-T-27MAP, a civil action pending in the Middle District of Florida, plaintiff Jeffrey J. Del Fuoco has sued both Mr. O’Neill and the Attorney General Eric H. Holder, Jr. regarding a number of matters. One claim involves an allegation that in the FFJNC application, Mr. O’Neill defamed Mr. Del Fuoco. In a [Motion to Dismiss](#) filed on April 26, 2010, Department of Justice attorneys representing Mr. O’Neill and the Department have argued (at 6) that the allegedly defamatory statements Mr. O’Neill made about Mr. Del Fuoco in the FFJNC application enjoyed an absolute privilege because the FFJNC is “a quasi-legislative body, established by members of the U.S. Senate.”<sup>3</sup> Though the motion does not make the point because it is not germane to the argument, it is clear that the motion means that the FFJNC is “a quasi-*federal* legislative body.” To the extent that there is merit to that argument, it may provide a basis whereby the false statement in the FFJNC application itself violated 18 U.S.C. § 1001.

In the event that that Mr. O’Neill did violate 18 U.S.C. § 1001 by falsely stating that the District of Columbia Bar Counsel investigation of his conduct in the *Dean* case was initiated by the defendant, either in the FFJNC application or at some other point in the process of seeking the United States Attorney position, the limitations period for prosecution of Mr. O’Neill under that statute would not expire until 2014 or 2015. Should Mr. O’Neill be confirmed as United States Attorney he would be the highest law enforcement officer in the Middle District of Florida making decisions about the scope of 18 U.S.C. § 1001, including decisions about whether the statute should be interpreted to cover false statements to the FFJNC. Mr. O’Neill would also be

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<sup>2</sup> Describing the origin of the investigation, Mr. O’Neill stated ([application](#) at 43): “After her conviction on all counts, Ms. Dean filed a bar complaint alleging a number of instances of prosecutorial misconduct during the trial.” The June 27, 1996 Bar Counsel letter that Mr. O’Neill cites in the same entry in fact stated (Attachment to my July 26, 2010 letter to the Committee):

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.2d 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.

<sup>3</sup> My letter to Committee members of July 26, 2010 (at 1 n.2) discussed what was then my uncertainty as to the precise nature of the FFJNC. Rules 10-12 of the [Florida Federal Judicial Nominating Commission Rules of Procedure](#) (Rev. Apr. 2009), signed by Florida United States Senators Bill Nelson and Mel Martinez, indicate that Florida’s United States Senators appoint all members of the FFJNC. The FFJNC, however, also appear as a committee of the Florida Bar on the Florida Bar [website](#).

the highest authority in the Office of the United States Attorney with regard to whether individuals who make false statements on applications for positions within the office should be automatically disqualified or prosecuted. But these anomalies simply underscore the fundamental incongruity of a person's serving in a high law enforcement position after making a false statement on an application for the position, particularly an application submitted to a body specifically charged by United States Senators with assessing the candidate's character and integrity. *See* Rule 3 of the [Florida Federal Nominating Commission Rules of Procedure](#).<sup>4</sup>

The Del Fuoco case also highlights or raises other issues that bear on Mr. O'Neill's suitability for the United States Attorney position. First, Mr. Del Fuoco's defamation allegations concern statements Mr. O'Neill made at pages 38-40 of the FFJNC [application](#). In responding to a request for information on "Legal Activities," which made no reference to management experience,<sup>5</sup> Mr. O'Neill included as item (h) (which item he denominated "Management Experience") eleven paragraphs comprising slightly more than two pages of text. In the fourth to the tenth paragraphs, Mr. O'Neill discussed issues involving Mr. Del Fuoco, whom Mr. O'Neill identified by name. Mr. Del Fuoco maintains that the statements, which clearly were quite derogatory, were defamatory. Whatever the merit of Mr. Del Fuoco's claim, the mention of a former subordinate in a document of this nature – which, in addition to being available to the public, was sent directly to 56 members of the FFJNC (generally, prominent Florida attorneys) – reflects an unprofessionalism indicative of unsuitability to hold a supervisory position in the federal government leave aside the presidentially-appointed position of United States Attorney.

Such would be the case even if the FFJNC form had requested an example of how Mr. O'Neill dealt with a problem employee, in which case no responsible manager or supervisor, in or out of government, would include the employee's name in the response. But, apart from the fact that the Legal Activities item did not seek information on management experience at all, the information provided by Mr. O'Neill appears much more directed at airing his side of his disagreements with Mr. Del Fuoco than genuinely providing information about Mr. O'Neill's management experience. According to the Del Fuoco [complaint](#) (at 8), in a 2005 deposition Mr. O'Neill acknowledged that a complaint filed by Mr. Del Fuoco caused Mr. O'Neill "tremendous

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<sup>4</sup> The appointment of a United States Attorney who made a false statement on his application for the position would be incongruous in any event. But the incongruity would be heightened in Mr. O'Neill's case, given his penchant for provocatively calling people liars. See especially the discussion of Mr. O'Neill's "a liar is a liar" remarks from *United States v. Spellissy* in my July 11, 2010 Truth in Justice [editorial](#). In the event Mr. O'Neill is confirmed, those remarks may be quoted often during his tenure as United States Attorney. See also the fifth summarized item of my [letter](#) to Committee members of June 26, 2010, which involves Mr. O'Neill's pressuring a government agent to give misleading testimony in order to enable Mr. O'Neill to falsely lead the jury to believe that the defendant had lied about a conversation with the agent.

<sup>5</sup> The FFJNC Legal Activities information request stated:

Describe as many as ten of the most significant legal activities you have pursued, including a significant litigation that did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the action, omitting any information protected by the attorney-client privilege, unless the privilege has been waived.

animosity.” Regardless of whether Mr. O’Neill believed his animosity was justified, it was inappropriate for him to air that animosity by identifying its subject by name in a publically available job application, the more so if Mr. O’Neill took advantage of a privileged forum to do so (as he and the Department of Justice now maintain is the case).

Second, in the context of a claim that Mr. O’Neill defamed Mr. Del Fuoco in a 2005 deposition, Mr. Del Fuoco alleges in his [complaint](#) (at 6-9) that Mr. O’Neill made statements in the federal workplace to certain identified Assistant United States Attorneys (AUSAs) that Mr. Del Fuoco alleges constituted threats of bodily injury to Mr. Del Fuoco. According to the complaint, in the deposition Mr. O’Neill acknowledged the substance of the statements, but explicitly denied that they took place in the federal workplace. The complaint alleges that Mr. O’Neill’s denial that the statements were made in the federal workplace constituted perjury. If the suit goes forward, the AUSAs identified in the complaint or other persons in the United States Attorney’s Office may be deposed. If such persons support the allegation that Mr. O’Neill made the subject statements in the federal workplace, Mr. O’Neill will be shown to have committed perjury.<sup>6</sup> This, too, would cause a diminishing of respect for Mr. O’Neill in the eyes of the public and within the Office of the United States Attorney and contribute to a lack of respect for law enforcement generally. But, irrespective of what may occur in the lawsuit, I suggest that the Committee ought not to advance Mr. O’Neill’s nomination without determining whether the AUSAs the complaint identifies by name, or others in the United States Attorney’s Office, would corroborate the version of the underlying facts set out in the Del Fuoco complaint.

Finally, in at least two of the cases listed among his most important on the FFJNC application, Mr. O’Neill’s has broadly observed that a person who fails to tell the truth about one matter cannot be trusted to tell the truth about any matter. Whether or not one agrees with him on that score, I note that there is no reason to believe that the statement regarding the initiation of the District of Columbia Bar Counsel investigation is the only false statement in Mr. O’Neill’s FFJNC application. As discussed in my [July 20, 2009 letter](#) to the Middle District Conference of the FFJNC (at 2-6), Mr. O’Neill’s description of his successful prosecution of the *Dean* case is not a model of candor. And, while falsely attributing the initiation of the District of Columbia Bar Counsel investigation to the convicted defendant, Mr. O’Neill fails to note that after Bar Counsel initiated its investigation of issues raised by the court of appeals decision, I, a member of the District of Columbia Bar, filed a Bar Counsel complaint raising issues far beyond those already being considered by Bar Counsel. That failure, while arguably itself a false statement, is at least an important omission in Mr. O’Neill’s response to a request for information regarding disciplinary matters. See [Section B.11a](#) of the main [Prosecutorial Misconduct](#) page on [jpscanlan.com](#). Thus, solely with regard to issues arising from the *Dean* case, Mr. O’Neill’s FFJNC application raises issues about his credibility going beyond the false statement

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<sup>6</sup> The alleged perjury occurred on July 12, 2005. Hence, in contrast to violations of 18 U.S.C. § 1001 occurring during the course of Mr. O’Neill’s recent efforts to secure the United States Attorney position, a prosecution for the alleged 2005 perjury would be time barred. But if Mr. O’Neill made any false statements about the matter to federal entities, including statements to the Department of Justice in the course of securing Department of Justice representation in the Del Fuoco suit, such statements would seem to violate 18 U.S.C. § 1001 if not other statutes..

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concerning the District of Columbia Bar Counsel investigation. And, if the level of candor Mr. O'Neill exhibited with regard to those matters also underlies his descriptions of other matters in the FFJNC application, the application may raise a number of issues that the Committee should carefully examine before Mr. O'Neill's nomination is allowed to go forward.

Sincerely,

**/s/ James P. Scanlan**

James P. Scanlan