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TRANSCRIPT OF PROCEEDINGS

United States Court of Appeals
For the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS **FILED FEB 06 1996**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

----- X
UNITED STATES OF AMERICA,

Appellee,

v.

DEBORAH GORE DEAN,

Appellant.
----- X

No. 94-3021

Pages 1 thru 90

Washington, D.C.
November 15, 1994

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, :
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Appellee, :
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v. : No. 94-3021
 :
DEBORAH GORE DEAN, :
 :
Appellant. :
 :
-----x

Tuesday, November 15, 1994

Washington, D. C.

The above-entitled matters came on for oral
argument, pursuant to notice, at 1:00 p.m.,

BEFORE:

CIRCUIT JUDGES WALD, SILBERMAN AND RANDOLPH, U.S.
COURT OF APPEALS FOR THE D.C. CIRCUIT.

APPEARANCES:

JAMES M. SPEARS, ESQ., Nudge, Rose, Guthrie,
Alexander and Ferdon, 2121 K Street, N. W.,
Washington, D. C. 20037; for the Appellant

BRUCE C. SWARTZ, ESQ., Deputy Independent Counsel,
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Capitol Street, N. W., Washington, D. C., 20001;
for the Appellee

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C O N T E N T SORAL ARGUMENT OF:PAGE:

James M. Spears, Esq., on behalf of Appellant.....	3
Bruce C. Swartz, Esq. on behalf of Appellee.....	20
James M. Spears, Esq., on behalf of Appellant -- Rebuttal.....	67

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P R O C E E D I N G S

THE CLERK: Case No. 94-3021, United States of America v. Deborah Gore Dean, Appellant; Mr. Spears for Appellant, Mr. Swartz for Appellee.

Mr. Spears.

ORAL ARGUMENT OF JAMES M. SPEARS, ESQ.,

ON BEHALF OF APPELLANT

MR. SPEARS: Good morning.

May it please the court, in my presentation this morning, I would like to cover three points specifically; that is, the sufficiency of the evidence supporting the conspiracy charges in this case, counts 1, 2 and 3; the sufficiency of the evidence supporting the gratuity charge in this case, count 4 and then the issues regarding prosecutorial misconduct, which was raised in our briefs.

The elements of a conspiracy to defraud the United States are quite clear. There has to be an agreement. There has to be an agreement to defraud the United States and there has to be an agreement that the defendant knowingly and intentionally participates in and there must be an overt act by one of the participates.

Examining the direct evidence and there was substantial direct evidence in this case, there is absolutely no support for any of these particular elements. Perhaps, the best source of direct evidence in this case

1 were the statements by the alleged co-conspirators to each
2 of these conspiracies. Each one of the alleged co-
3 conspirators living at the time of trial was offered
4 immunity and came in and testified fully and completely.

5 None of those witnesses or none of the alleged co-
6 conspirators aver to the fact that any agreement existed
7 between them and the defendant, much less any agreement to
8 commit a fraud against the United States. None of them
9 suggested that there was any fraudulent or illegal motive on
10 their part or on the part of the defendant. None suggested
11 that there was any wrongful, improper or fraudulent act
12 committed on their behalf by the defendant.

13 Indeed, each of the co-conspirators contradicted
14 certain assertions that were central to the independent
15 counsel's case. So, this case rests then on circumstantial
16 evidence, circumstantial evidence, again, we submit, does
17 not support any of the elements established by the offense.

18 There was no circumstantial evidence of any
19 agreement between Ms. Dean and the alleged co-conspirators.
20 Now, independent counsel attempts to draw the inference of
21 guilt or the inference of agreement from acts that are
22 wholly consistent with the friendship that existed between
23 Ms. Dean and each of the co-conspirators. They tried to
24 draw inferences of illegal conduct--

25 QUESTION: What if inferences can be drawn from

1 ambiguous acts either in terms of a conspiracy or in terms
2 of non-conspiracy? Aren't we bound by the inferences that
3 the government can point to that suggest conspiracy? We
4 can't reexamine the facts.

5 MR. SPEARS: It's not a question of reexamining
6 the facts, Your Honor. What it is, is a question--

7 QUESTION: What about the inferences question? If
8 evidence is ambiguous from which you can draw one or two
9 inferences, either a conspiracy or it's a friendship, aren't
10 we bound by the jury's conclusion?

11 MR. SPEARS: No, Your Honor, I don't believe you
12 are.

13 QUESTION: Why?

14 MR. SPEARS: As a matter of fact, I think that it
15 is exactly the opposite. If you take a look at cases like
16 Recognition Equipment that were decided in the District
17 Court and in other cases, you have reason. There has to be
18 an inference. The inference has to support more likely than
19 not the inference of guilty, Your Honor, over one of
20 innocence. If it is essentially--the question is how could
21 anyone get to the point of finding proof beyond a reasonable
22 doubt, then indeed doubt was there. The element had been
23 met by a reasonable doubt.

24 Each one of the elements, Your Honor, have to be
25 met beyond a reasonable doubt by the prosecution. That is

1 their standard. On review, there is some deference that is
2 given to the evidence that is presented by the prosecutor
3 and supports the prosecutor's case.

4 When you have a situation where I do x and it is
5 equally likely that I did it totally innocently or I did it
6 totally as a part of a conspiracy, I think, Your Honor, to
7 infer and to presume guilt goes beyond the standard that is
8 established by this court. It is a reasonable inference,
9 Your Honor. If it is equally innocent or equally guilty, I
10 would submit that it is not reasonable to infer guilt from
11 that sort of conduct.

12 QUESTION: Let me take one specific instance and
13 let's do the Arama project, okay.

14 MR. SPEARS: Sure.

15 QUESTION: My understanding of the Arama project
16 is, Mitchell was a consultant and received a fee for that
17 and we do have evidence in the record of a relationship
18 between Mitchell--I mean, a friendly or a familial or
19 whatever relationship between--

20 MR. SPEARS: Yes, Your Honor.

21 QUESTION: --Mitchell and Ms. Dean. We also have
22 evidence of her writing to Governor Nunn, I think, a
23 consultant that says it will concern my recent phone
24 conversation with General Mitchell concerning Arama. The
25 key sentence is, let me assure you that all necessary

1 paperwork will be transmitted and that Arama Partnership
2 will definitely receive these units from HUD.

3 Now, not simultaneously, but also in the record is
4 a letter from her to a Sister Schulte [phonetic] of
5 Transitional Housing saying, federal regulations prohibit
6 her from making project-specific allocations. HUD has no
7 direct role in providing the moderate rehabilitation fund.
8 So, you have one letter to one person saying, we have no
9 role and the other saying, be assured that Arama is going to
10 get these particular--.

11 All I am suggesting is, isn't that enough for a
12 jury to infer that, in fact, she had--well, whatever the
13 word is--she had arranged or been implicated in the
14 arrangement of these projects getting directly, directly
15 being told that they would get it from HUD. That is the
16 sort of thing, it would seem to me, a jury could draw an
17 inference that would survive our review.

18 MR. SPEARS: Well, Your Honor, I guess if I could
19 go back and let's do Arama, because I am happy to do Arama.
20 Arama arose at a time when Ms. Dean had just become
21 executive assistant to the Secretary. The facts and the
22 testimony of Mr. Maurice Barksdale, who was Federal Housing
23 Commissioner at that time said, that he was the one who made
24 the decision to fund Arama. It was not Ms. Dean and that,
25 in fact, Ms. Dean had not even talked to him about

1 allocating those units to the--I think it was the Metro Dade
2 Housing Authority to support Arama.

3 So, we already have testimony in there that she
4 did not talk to him about it. She did not ask him to fund
5 it and that he, in fact, had funded it.

6 QUESTION: He also said that, if she had talked to
7 me about--

8 MR. SPEARS: He would have remembered it.

9 QUESTION: --it, I would have remembered.

10 MR. SPEARS: Yes, Your Honor, that's exactly
11 right.

12 So, what happens is, she goes and talks to
13 Mr. Barksdale. Mr. Barksdale says, oh, that one has been
14 approved. So, she writes or she calls Mr. Mitchell, who was
15 ostensibly calling her in Governor Nunn's behalf. He said,
16 would you please write a letter to Governor Nunn. She
17 obliges him. She doesn't understand the nature of this
18 thing at that time. She is still fresh in the process and
19 sends out a letter to Governor Nunn on her stationery.

20 I submit, Your Honor, if there was something
21 untoward going on here, there were some conspiratorial
22 activity, I doubt very seriously if she would have put it on
23 HUD's stationery.

24 QUESTION: When did the fiscal year run at HUD?

25 MR. SPEARS: I believe it is the normal federal

1 fiscal year, Your Honor. It ends at the end of September,
2 October.

3 QUESTION: October?

4 MR. SPEARS: Yes, Your Honor.

5 QUESTION: The letter that the prosecutor refers
6 to in regard to the Arama project about we approve, et
7 cetera, et cetera, which indicates joint approval between
8 Ms. Dean and whomever it was--was it Barksdale?

9 MR. SPEARS: Yes, it was Barksdale.

10 QUESTION: Only refers to Fiscal Year 1985, as I
11 recall.

12 MR. SPEARS: That's right, Your Honor.

13 QUESTION: The Arama project was during Fiscal
14 Year 1984, wasn't it?

15 MR. SPEARS: I would have to go back and take a
16 look at it, Your Honor.

17 QUESTION: It was July of 1984 that the letter
18 that Judge Wald referred to occurred.

19 MR. SPEARS: Yes, that was at the time, Your
20 Honor, when she was in the process of moving from being
21 executive in charge of the--

22 QUESTION: That was fiscal 1985?

23 MR. SPEARS: That was, that should have been
24 fiscal 1984; that's right.

25 QUESTION: Let me ask you about another incident

1 in count 1, Park Towers.

2 Your reply brief says that, there is a notation in
3 Ms. Dean's diary indicating that she had lunch with Shelby,
4 Mitchell, with Shelby and Mitchell. The prosecutor points
5 that out. You say in your reply brief that, Shelby
6 explained that, once he learned of the Mitchell-Dean
7 relationship during lunch, once he learned of the Mitchell-
8 Dean relationship, he ceased seeking material assistance
9 from Mitchell and went out of his way to avoid any
10 discussion of Park Towers in Mitchell's presence during the
11 lunch, right?

12 MR. SPEARS: Yes, Your Honor.

13 QUESTION: Well, that's truly not an answer,
14 because the lunch occurred on the 9th of September. There
15 is a letter in the record from Shelby to Dean on the 10th.
16 Now, he may have gone out of his way to deal with Mitchell,
17 but he sure didn't go out of his way to deal with Dean.

18 MR. SPEARS: No, Your Honor, I think, first of
19 all--

20 QUESTION: The very next day, he wrote her a
21 letter.

22 MR. SPEARS: That's absolutely right. I don't
23 think Shelby denied that he had--that he suggested that he
24 hadn't had some conversation with her about Park Towers.
25 The issue was, whether he had that conversation with her

1 about Park Towers in Mitchell's presence. Shelby learned of
2 the relationship between Mitchell and Dean only when he
3 joined the Keith and Company [phonetic] and his superiors in
4 that company told him about that relationship. He had
5 already agreed to have Mitchell serve as a consultant on
6 that project at that time. That was when he learned it.

7 Now, we didn't find out about any of this until we
8 saw the Jencks material on Shelby that was produced on the
9 day of trial. So, that is something that Shelby wasn't
10 tested on particularly closely in his examination or the
11 cross examination by defense counsel.

12 Shelby's testimony, after you piece together from
13 the various statements that he provided to the Independent
14 Counsel, all of which should have been produced over a year
15 before this trial, you can piece it together and see that,
16 Shelby learned of this and realized he had made a mistake.
17 He had lunch that day and made clear that he was not going
18 to talk about Park Towers with Dean in Mitchell's presence
19 and did not do so.

20 That doesn't exclude the fact that he may have
21 mentioned Park Towers to Ms. Dean. That's the whole, Your
22 Honor. It doesn't make--

23 QUESTION: I'm not sure I get it. He and Mitchell
24 are in business together. He says, I'm not going to talk to
25 you, Mr. Mitchell, anymore about Park Towers and the next

1 day, he writes a letter to Dean asking for her--that letter
2 is at what?

3 MR. SPEARS: Well, Ms. Dean, Your Honor, was at
4 the Department of Housing and Urban Development. She was a
5 person that he had every right to talk to. He was
6 representing his clients. He has a right to lobby anybody
7 he wants over there. The fact is, he and Mitchell were not
8 partners in terms of they sat in the same office. They were
9 not members of the same firm. He had asked Mitchell to come
10 into the contract to help him consult. He was with the
11 Keith and Company at the time he was doing that and Mitchell
12 was in his own firm. So, they were not business partners.

13 Shelby had sought Mitchell's assistance as an
14 outside consultant to help him with this contract. Once he
15 realized the relationship between Mitchell and Dean, he
16 ceased to seek Mitchell's advice. He ceased to seek
17 Mitchell's involvement. He also specifically said that he
18 made sure that Ms. Dean did not learn of his relationship
19 with Mitchell, because he did not want to taint that
20 relationship and he did not want to lose that contact.

21 Now, I have to tell you, at the end of the day,
22 Your Honor, that is something that is totally inconsistent
23 with what the Independent Counsel has charged in count 1,
24 because they charge that there is this seamless web of
25 conspiracy involving Mitchell, Dean and Shelby and that was

1 the nature of the relationship and that, in fact, Ms. Dean
2 did everything including writing the letters with the
3 specific intent of helping Mr. Mitchell. It is clear from
4 Mr. Shelby's testimony that she was unaware of Mitchell's
5 involvement in Park Towers.

6 QUESTION: What you are saying is that, after the
7 lunch, Shelby severed his relationship with Mitchell?

8 MR. SPEARS: No, he did not learn of the
9 relationship of Mitchell and Dean at lunch. He learned of
10 the Mitchell-Dean relationship, as best we can determine,
11 based upon the Jencks statements. He learned that when he
12 joined the Keith and Company several weeks earlier. He
13 learned of that relationship from his superior at the Keith
14 and Company. That is when he realized that he had a
15 problem.

16 He was already committed to the lunch. They had
17 the lunch. He did not talk about Park Towers.

18 QUESTION: What do we do with the JA 888, which is
19 the developer, the Martin Fein memorandum which says, at
20 about 4:30 today, Feinberg [phonetic] called and said he had
21 a very good conversation with Rick Shelby. Rick said he had
22 lunch with his friend at HUD and she indicated to be dealt
23 with in a favorable manner. She requested certain
24 information.

25 MR. SPEARS: I guess I come back to, Your Honor,

1 that it is not illegal. I am presuming that everything--we
2 are going to give the prosecutor the benefit of his
3 presumption. Assuming that Rick Shelby talked to Deborah
4 Gore Dean about what was going on at HUD, that he basically
5 said, hey, look, I want you to see this information. We are
6 putting these projects together. We have an application
7 there.

8 QUESTION: But she was simultaneously writing
9 other people and even testifying, I think, before Congress
10 that these kinds of allocations were made at the local
11 housing level.

12 MR. SPEARS: They are made at the local level.

13 QUESTION: It didn't do anybody any good to go
14 talk to people at HUD and that the specific allocations were
15 not made by HUD people. Yet, there is a lot of evidence in
16 the record suggesting that, it isn't like one contact.
17 There is a lot of contact.

18 MR. SPEARS: But, Your Honor, there is no--

19 QUESTION: There are a lot of projects in which
20 people--there is evidence that they came away thinking they
21 had a deal.

22 MR. SPEARS: Your Honor, there is no evidence in
23 this record at all that any specific allocation went to any
24 developer from HUD. That simply is not supported in the
25 record. It goes to a PHA, a local public housing authority.

1 QUESTION: I know. If you mean it went actually
2 through the local housing, yes, of course, it did. I am
3 sure it didn't--

4 MR. SPEARS: No, it doesn't go through. They have
5 an independent decision to make, Your Honor.

6 QUESTION: I know. That is the way the system
7 should work. The whole case is about whether or not that is
8 the way the system did work.

9 MR. SPEARS: Well, Your Honor, in two instances,
10 the two instances that are alleged here, the system did work
11 that way. I've got a--you know, at the end of the--

12 QUESTION: Well, that is the question about
13 inferences.

14 MR. SPEARS: Well, Your Honor, at the end of the
15 day, I guess the question is, are we suggesting that it is
16 illegal, it is inappropriate, it is illegal for Mr. Shelby
17 to come representing his clients before HUD and to say, I
18 would like to see--my client is doing work in Jacksonville
19 or in Dade County, Florida. I would like to see those
20 allocations made to Dade County, Florida, because my client
21 has a project that he would like to go to Dade County,
22 Florida and present to them and get funded.

23 Now, I have to tell you something, Your Honor. I
24 don't see anything illegal about that there. I don't see
25 anything inappropriate about that. I don't see anything

1 that is illegal about Ms. Dean receiving information
2 pertaining to that project. I don't see anything that
3 suggests that it is inappropriate for her to do so. I don't
4 see that there is inconsistency--

5 QUESTION: Is it appropriate if the jury were to
6 infer from the evidence that, in fact, she gave assurances
7 to these people that the individual project would get it?

8 MR. SPEARS: Well, Your Honor, if they can show
9 one shred of information where she did deliver a project to
10 the client through the PHA, then I would say that is a
11 reasonable assumption. They have not done that. They
12 haven't done it one time.

13 QUESTION: What about the inference that she did
14 this as a favor to Mitchell?

15 MR. SPEARS: Well, Your Honor, I guess the thing
16 is, what did she do. Let's start with that.

17 QUESTION: Right.

18 MR. SPEARS: She nothing but write a letter to
19 Nunn. That is what we have determined. She was not the
20 principle contact on Park Towers. Silvio DeBartolomeis was,
21 according to Richard Shelby. She didn't have any decision--

22 QUESTION: Is Silvio a male or a female?

23 MR. SPEARS: A male.

24 Silvio DeBartolomeis was Rick Shelby's primary
25 contact on Park Towers. That is that Rick Shelby said.

1 While Maurice Barksdale said he was the one who made the
2 decision--excuse me, Your Honor.

3 QUESTION: The letter talks about a she. The
4 letter that Judge Wald referred to talks--

5 MR. SPEARS: That's right. Richard Shelby had
6 contacts with a number of people at HUD and presumably and
7 including Ms. Dean. If you take a look at every one of the
8 alleged co-conspirators, they had a wide variety of
9 contacts. Mr. Kitchin--

10 QUESTION: I just don't want to lose this.

11 MR. SPEARS: Right.

12 QUESTION: The letter is written in February of
13 1986. The lunch that we referred to before was in September
14 of I don't know, 1985?

15 MR. SPEARS: Something like that.

16 QUESTION: This letter is February of 1986. So,
17 maybe it is the same lunch and maybe it is not the same
18 lunch.

19 MR. SPEARS: I would think it is.

20 QUESTION: The likelihood is, it is not the same
21 lunch.

22 Rick said he had lunch with his friend at HUD and
23 that she indicated. Now, we know it is not--what is his
24 name, DeBartolomeis?

25 MR. SPEARS: DeBartolomeis.

1 QUESTION: We know it is not him, what this refers
2 to, correct?

3 MR. SPEARS: Yes, Your Honor, that's right. I
4 don't know what that letter means. I don't know what we are
5 talking about in terms of what finds relating to somebody
6 else. This is hearsay on hearsay on hearsay.

7 QUESTION: To the file?

8 MR. SPEARS: Yes, to the file. What is this all
9 about? This is the basis we're going to send a young woman
10 to prison for 21 months. I mean, this is the question we
11 have. She has a legitimate right to listen to people that
12 are coming in and lobbying her agency. It is totally
13 legitimate for somebody to come in and say, my client has a
14 project that he wants to do in Metro Dade and I think those
15 allocations should be made to Metro Dade.

16 She is supposed to serve as an interface between
17 the Secretary and these groups and the people who are
18 interested in doing business.

19 No, she doesn't have the power; nobody has the
20 power to assign those projects ultimately to the developers.
21 That is something that is decided by the public housing
22 authority. The question is, by receiving that information,
23 is she guilty of a criminal conspiracy? Does she go to jail
24 for 21 months.

25 QUESTION: Is it an element of 371 that she has to

1 have gotten something out of this?

2 MR. SPEARS: No, you have to demonstrate that she
3 willfully and intentionally helped participate in a fraud.
4 In most instances, you demonstrate that by using
5 circumstantial evidence, by demonstrating that somebody
6 received something out of the transaction. That is one of
7 the ways you can demonstrate, using circumstantial evidence,
8 the elements.

9 This is the whole point. The Independent Counsel
10 has no direct evidence on it and then they try to run away
11 from every inference of circumstantial evidence. They say,
12 we don't have to show that there is any loss to the uns.

13 QUESTION: Would it be your position that, under
14 the Independent Counsel's theory of this 371 prosecution
15 that if you had an employee in the government that just
16 didn't do his or her job, that just wanted to help or wanted
17 to be nice and help a developer who came in and said, sure,
18 let's have lunch, oh, I'll help you out and so and so forth
19 and it was not exactly the way things ought to go or so on
20 and so forth, that that would turn into a five-year felony
21 every time?

22 MR. SPEARS: Yes, sir; yes, Your Honor, I
23 certainly do. That is our position. That is exactly what
24 this case is all about. I have to tell you something, Your
25 Honor. The elements have not been met, the elements showing

1 agreement. There is no evidence of an agreement. There is
2 no evidence of any kind of inappropriate intent.

3 This goes back to Judge Silberman's question.
4 These guys are either over there trying to subvert the
5 system or they are lobbying in behalf of their clients.
6 Which way is the prosecutor and which way is the jury
7 allowed to presume? That is the issue that is in this case.

8 I have a minute left. I would like to have some
9 response time at the end of my argument, if I could.

10 QUESTION: All right.

11 MR. SPEARS: Thank you.

12 QUESTION: Mr. Swartz.

13 ORAL ARGUMENT OF BRUCE C. SWARTZ, ESQ.,

14 ON BEHALF OF THE APPELLEE

15 MR. SWARTZ: Thank you, Your Honor.

16 My name is Bruce Swartz and I represent the United
17 States in this case. We meet today as Independent Counsel,
18 Arlin Adams. The trial counsel in this case have returned
19 to the Department of Justice or other federal agencies and,
20 therefore, are not at counsel table today.

21 Your Honors, this is not a case about lunches with
22 friends. This is a case about a high-ranking government
23 official who betrayed the public trust and then committed
24 perjury in order to conceal that betrayal.

25 The jury found that Defendant Dean, while she was

1 executive assistant to the Secretary of HUD, used a program
2 designed to aid low-income families to benefit her family,
3 herself and her co-conspirators. As the District Court
4 found in sentencing Dean, her conduct was intentional and it
5 was serious.

6 QUESTION: What is the best evidence of it,
7 Mr. Swartz? That is what we are fighting about here, I
8 think, or disputing or whatever.

9 MR. SWARTZ: Well, Your Honor, with regard to the
10 sufficiency of the evidence, I think it is clear that
11 Defendant Dean does misunderstand the standard. This court
12 has made clear from the outset in its rulings on sufficiency
13 of the evidence cases that, the question is not what this
14 court would find, but rather a reasonable jury could find--

15 QUESTION: Beyond a reasonable doubt.

16 MR. SWARTZ: --beyond a reasonable doubt in each
17 regard. In fact, in Herron, this court made clear that if a
18 reasonable person might decide one way or the other, it is
19 for the jury to decide. I think the evidence here is
20 compelling. It's not simply sufficient--

21 QUESTION: Why don't you go through what you think
22 are the major points of evidence on the conspiracy. Put
23 aside the perjury question for a moment.

24 MR. SWARTZ: Sure, Your Honor.

25 QUESTION: The major point of evidence on the

1 conspiracy counts.

2 MR. SWARTZ: I think with regard to all of the
3 conspiracy counts, there are four critical points. First,
4 the Defendant Dean had power over the mod rehab system.
5 That evidence was overwhelming. It came from a variety of
6 sources.

7 QUESTION: Okay, you're going to tell us what it
8 was?

9 MR. SWARTZ: Yes, Your Honor.

10 It came from the testimony of Acting Assistant
11 Secretary Hale, from Acting Assistant Secretary
12 DeBartolomeis, Susan Sagami, another HUD employee at the
13 time--

14 QUESTION: So, would you characterize their
15 evidence, a generic characterization? Obviously, we will
16 read it for ourselves, but as far as saying Deborah Dean
17 played a key role in the specific allocation of projects or
18 what.

19 MR. SWARTZ: Absolutely, Your Honor and this
20 evidence is direct. It is not circumstantial evidence.
21 This is evidence of what these individuals saw and
22 experienced while they were at HUD.

23 Janet Hale testified flatly that it was Dean that
24 was making the decisions. DeBartolomeis testified that Dean
25 ordered him to sign the funding documents. Susan Sagami

1 testified along the same lines that DeBartolomeis did.
2 Dean's own secretary, Cherrelle Hawkins [phonetic],
3 testified that Dean said that, assistant secretaries should
4 obey her.

5 QUESTION: Is this through the whole period or
6 just part of the period?

7 MR. SWARTZ: This is through the whole period,
8 Your Honor.

9 As Your Honor knows, there were periods of time
10 when there were assistant secretaries in place and periods
11 of time in which there were simply acting assistant
12 secretaries. There is no doubt that, from the time Dean
13 came to HUD, even when she was still in the Executive
14 Secretariat and a special assistant, she involved herself in
15 HUD decisions. She would call HUD people, HUD employees to
16 her office and ask for explanation, particularly with regard
17 to matters involving John Mitchell.

18 QUESTION: Was that by itself, without the
19 conspiracy or why she did it, was that in itself a violation
20 of anything?

21 MR. SWARTZ: No, Your Honor, not--although
22 certainly it undercuts entirely her argument that she was
23 some kind of neophyte, unaware of what was happening at HUD.

24 QUESTION: No, no, no, the fact that she took a
25 very active, proactive role in these particular allocations,

1 even though she might have been telling people--

2 MR. SWARTZ: I'm sorry, Your Honor.

3 QUESTION: --or the program might have said, hey,
4 it's not determined at the HUD level. It is determined at
5 the local agency. Was that, leaving the conspiracy part
6 out, would that have been a violation of anything for her to
7 have actively, just because she liked this project or she
8 like that project said, I really want you to give favorable
9 treatment to this project?

10 MR. SWARTZ: Well, Your Honor, I think that cases
11 such as Hammerschmidt and cases in that line of cases make
12 clear that there is a problem if a government employee
13 subverts a lawful government function.

14 QUESTION: I don't want to--

15 QUESTION: Well, why would it be a subversion? Do
16 you mean the Secretary of HUD couldn't call down and say,
17 you know, I think that is a really good project, you ought
18 to take a hard look at it?

19 MR. SWARTZ: Yes, Your Honor. There is a
20 difference, I think, between saying you should take a good,
21 hard look at it and--

22 QUESTION: Well, if you are the Secretary of HUD
23 and you tell somebody to take a good, hard look at it, they
24 usually take a very good, hard look at it. So, you're not
25 suggesting that is illegal?

1 MR. SWARTZ: No, Your Honor. What I am
2 suggesting--

3 QUESTION: Well, why is that a subversion?

4 MR. SWARTZ: What I am suggesting the subversion
5 that went on here was that, there was an attempt to present
6 to the outside world--

7 QUESTION: But wait a minute. We are putting
8 aside the question of perjury. I said, you were going to
9 focus only on the conspiracy points. You said the first
10 point was that, the Defendant Dean had power--

11 MR. SWARTZ: That's correct, Your Honor.

12 QUESTION: --or influence, influence in the key
13 role of the allocations.

14 MR. SWARTZ: That's correct, Your Honor.

15 QUESTION: Judge Wald asked you if there is
16 anything separately illegal about that? The proper answer
17 to that is, no, that's not separately illegal, but it is one
18 of the elements in the conspiracy. Isn't that correct?

19 MR. SWARTZ: That is correct, Your Honor.

20 QUESTION: All right, then don't try to over-argue
21 your case.

22 MR. SWARTZ: I'm sorry, I misunderstood Judge
23 Wald's question.

24 QUESTION: Yes, I got two different answers there.
25 I mean, even if she sat up there in a program in which the

1 allocation to the outside world was supposed to be made by
2 the local agencies and for no conspiratorial reason just
3 said, I like the project in South Florida, I like this
4 project, I like that project. I want you people to fund
5 those. Is your answer still the same as to Judge Silberman,
6 nothing wrong with that?

7 MR. SWARTZ: Your Honor, I think that I need some
8 additional facts or perhaps I should explain some additional
9 facts.

10 QUESTION: All right, all right, I don't want to--

11 QUESTION: What would your motive be? If the
12 motive is benign, you wouldn't have a criminal act there,
13 right?

14 MR. SWARTZ: If her motive was not to commit a
15 crime, yes, that's correct. If she had no criminal intent--

16 QUESTION: I mean, if her motive was she was just
17 interested in the project?

18 QUESTION: Yes, her motive was power, she liked to
19 exercise power?

20 MR. SWARTZ: Yes, Your Honor, but I think it is
21 important to emphasize how this system was supposed to work.

22 QUESTION: Yes, we know. I think we all know
23 that.

24 QUESTION: That's a different question. That's a
25 different question.

1 QUESTION: I don't want to eat up all your time,
2 so move on.

3 MR. SWARTZ: Fine, yes, Your Honor, that's fine.

4 QUESTION: What is the second point?

5 MR. SWARTZ: The second point is that, she agreed
6 to exercise her power to benefit her co-conspirators.

7 QUESTION: Where is the agreement?

8 MR. SWARTZ: That agreement, Your Honor, comes
9 through evidence both in the documents, which we consider to
10 be--

11 QUESTION: Well, let me ask you a key question
12 about the record and I will yield.

13 What we have in the record is evidence of her
14 using the power to help projects and obviously the ones you
15 have introduced evidence about it, projects in which
16 somebody she had some other kind of relationship or had had
17 some prior contacts with was interested in. How do we know
18 or why should the jury have inferred that those were the
19 only types?

20 Maybe for every one of those six projects in which
21 Mitchell or the other people that she knew were involved,
22 the alleged co-conspirators, maybe she was doing the same
23 for 55 projects in which she had no interests. Is there
24 anything in the record which suggests the exercise of her
25 power was channeled towards the projects in which these

1 people were involved?

2 MR. SWARTZ: Oh, Your Honor, there is no doubt
3 that with regard to these particular projects that she paid
4 particular attention to these.

5 QUESTION: Yes, okay.

6 MR. SWARTZ: It is also the case that she did get
7 involved in other projects. That is not to suggest that
8 there may not have been other motives and other reasons why
9 she was involved in particular projects beyond these
10 projects charged.

11 QUESTION: How many projects all together was
12 there evidence about her being involved in that involved
13 some kind of alleged co-conspirators, roughly?

14 MR. SWARTZ: That involved alleged co-
15 conspirators?

16 QUESTION: Yes.

17 MR. SWARTZ: I think that roughly we are talking
18 about eight to ten projects.

19 QUESTION: Eight to ten projects over a couple
20 year period?

21 MR. SWARTZ: That's correct, Your Honor.

22 QUESTION: Okay.

23 QUESTION: Is that it? Is there any more?

24 MR. SWARTZ: Excuse me, Your Honor, more projects?

25 QUESTION: No, no, you said--

1 MR. SWARTZ: Oh, more factors? Yes and I think
2 that--

3 QUESTION: --there are letters showing she did
4 something. She received a document. She sent audios. She
5 did whatever and she had power in general and that is--

6 MR. SWARTZ: No, Your Honor, it is not that she
7 just had power in general. The second point is, she agreed
8 to use that power for her co-conspirators.

9 QUESTION: When had she agreed to use the power?
10 What is the best evidence of her agreement to use the power
11 for her co-conspirators?

12 MR. SWARTZ: Well, Your Honor, I think if we, for
13 instance, look at the second conspiracy, the Sankin
14 conspiracy--

15 QUESTION: The which one, I'm sorry?

16 MR. SWARTZ: The Sankin conspiracy.

17 There, there was testimony that Mr. Broussard and
18 Mr. Sankin received 150 units, were promised 150 mod rehab
19 units, that is, funding for 150 mod rehab apartments and
20 were allowed to peddle those units, to sell them to the
21 highest bidder. In other words, really what the defendant
22 did here was to turn over the authority to decide where
23 these very scarce federal resources would go to her co-
24 conspirators.

25 Now, Ms. Dean insists that there is no direct

1 evidence of this.

2 QUESTION: Wait a minute. Is this evidence of the
3 agreement or is this evidence that you were going to put on
4 through items 3 and 4 of your 1, 2, 3, 4 list?

5 MR. SWARTZ: No, Your Honor, we suggest that,
6 that's evidence of the agreement. There was testimony that
7 Dean agreed to give Broussard 150 mod rehab units. That
8 testimony came not simply from Mr. Wilson, a developer who
9 was approached by Mr. Broussard to buy those units and
10 refused to do so because Mr. Broussard would not tell him
11 how he got such units and Mr. Wilson considered it to be
12 improper for him to have had such a promise of units.

13 QUESTION: Your theory is that he was, in effect,
14 given authority to peddle those slots, if you will?

15 MR. SWARTZ: Absolutely, Your Honor. The jury was
16 more than justified in concluding that. In fact, Mr. Ruby,
17 the ultimate developer of the project in question, paid
18 \$100,000 each to Mr. Sankin and Mr. Shelby to get those
19 units, to get control over those units, even though Mr. Ruby
20 testified that he had support from Senator D'Amato for
21 getting mod rehab units. Now, this is a hard-headed
22 business person, Your Honors.

23 Beyond that, he testified that at the suggestion
24 of Sankin and Broussard, he drafted the papers with regard
25 to his payments to them to make it appear that he was

1 providing services to them, so that it would appear that
2 they were providing legal or other consulting services. As
3 he testified, all he was really doing was buying the units.

4 QUESTION: You mentioned a Senator and that
5 intrigues me.

6 Suppose, as apparently happened, a senator from a
7 particular state called that Ms. Dean knew. Well, maybe he
8 was friendly and he called her up and said, look, we really
9 could use this particular project in Philadelphia. Can you
10 help me out here and she went to bat for him. She had the
11 power. They reached an agreement. She did it as chron.

12 MR. SWARTZ: Your Honor, it's not clear exactly
13 what the senator would say. Certainly, a senator can call
14 and say that he would think it was appropriate that funding
15 go to this particular project.

16 QUESTION: This is a great project and if you
17 don't really help us out, you're making a big mistake. I
18 could really use it in my district or my state or whatever.
19 That's all he says. Is that a crime if she does--

20 MR. SWARTZ: Certainly not on the senator's part,
21 Your Honor.

22 QUESTION: No, no, if she does it? Well, maybe he
23 is an unindicted co-conspirator, but how about Ms. Dean?

24 MR. SWARTZ: No, Your Honor. I think that
25 certainly to have a call like that is not a crime. The

1 question is

2 QUESTION: Suppose she gave the senator the same
3 alleged power that she gave the developer or the
4 intermediaries here, Sankin and whatever the other fellow's
5 name was, the 100,000 units, she said to Senator X in
6 Pennsylvania said, look, you tell us what to do with those
7 100,000 units?

8 MR. SWARTZ: That becomes more problematic, Your
9 Honor.

10 QUESTION: What do you mean it becomes more
11 problematic? What exactly do you mean, it's a crime? Is it
12 a conspiracy?

13 MR. SWARTZ: Your Honor, the problem is that, HUD
14 had established a system here and was telling the outside
15 world--

16 QUESTION: No, whether it violated their system
17 internally, it doesn't make it a crime. The question is, is
18 that a crime then?

19 MR. SWARTZ: Your Honor, I think that one cannot
20 in the abstract--Hammerschmidt makes clear, cannot in the
21 abstract say whether or not a government program has been
22 subverted unless one knows the ground rules of the
23 government program. Now, senators--

24 QUESTION: That is true, but Hammerschmidt also
25 talks about cheating the government out of money. It also

1 frames it up in terms of using dishonest means.

2 MR. SWARTZ: That is correct, Your Honor. Here,
3 there is no question. After all, the senators were told in
4 Ms. Dean's testimony that the system was a regularized one;
5 that it didn't make any sense to come to HUD on these
6 matters.

7 QUESTION: Does it make a difference, in the
8 example of the senator, as to whether or not outside people,
9 public officials with whom she had no other kind of
10 relationship were making these kinds of requests and
11 occasionally she might go to bat for them and people that
12 she had a relationship with, if there was a kind of
13 continuing, ongoing relationship that would normally give
14 rise to some questions of, not nepotism, but favoritism,
15 where somebody who works for you, it looks like they get a
16 deal or someone who is a member of your family where there
17 is somebody with whom you have a separate relationship going
18 on the side?

19 Now, leave conspiracy. Let's say there wasn't any
20 agreement. She was sitting up there in a position of power.
21 She saw a chance to help out not just the senator, but the
22 family retainer, the cohort, the consort of her mother, that
23 sort of stuff and she just did it, without any "agreement"
24 between the parties. Would that be violative of federal--

25 MR. SWARTZ: Well, Your Honor, I think my third

1 point would be in terms--here there is evidence of criminal
2 intent. Part of that evidence arises from the very fact
3 that Dean was warned against, explicitly warned against that
4 kind of conduct by the HUD General Counsel's office; that if
5 she--

6 QUESTION: So, that would violate something?
7 Conspiracy or not, it would violate something to give
8 special favors to people you had a relationship with?

9 MR. SWARTZ: In fact, Your Honor, Dean herself
10 testified that she was aware, while she was at HUD, that it
11 would be wrong to use HUD funds to benefit family members.
12 That is really not an issue that she was--she was aware that
13 it was wrong to do that, aware and had been--

14 QUESTION: But to survive here, do you have to
15 show over and above--let's assume you could show that, that
16 she did actually go to bat for people who had these other
17 kinds of relationships with her. You still have to show
18 something over and above that, namely, that that was all in
19 pursuance of a conspiracy.

20 MR. SWARTZ: Well, Your Honor, yes. A conspiracy
21 was charged here, yes.

22 QUESTION: Oh, I know it was, but I said you have
23 to show that.

24 MR. SWARTZ: Yes, we certainly have to meet the
25 requirements of the conspiracy.

1 QUESTION: You are asking from the kind of
2 evidence that you've given us, that she had the power and
3 that she exercised it and that she exercised it, at least,
4 in the instances that are in the record in favor of people
5 with whom she had other kinds of ongoing relationships.
6 That is the guts of your argument that, that's enough for a
7 jury to infer a conspiracy between all of them?

8 MR. SWARTZ: Your Honor, while it may be enough to
9 do that--

10 QUESTION: Do you have more?

11 MR. SWARTZ: Of course, there's more, Your Honor.

12 QUESTION: You'd better give it to us quick.

13 MR. SWARTZ: The fourth point here is that, the
14 co-conspirators provided things of value in return to Dean.

15 QUESTION: Yes, that is the ongoing relationship.

16 MR. SWARTZ: Certainly, the questions, the outer
17 reaches of Hammerschmidt and how these matters should be
18 dealt with in terms of 371 conspiracies and subversion of
19 government programs don't have to be reached in this case,
20 because in this case, with regard to each and every one of
21 the three conspiracies, the fact was that Dean received or
22 her family received benefits from her actions.

23 QUESTION: In Mitchell's case it would be the ones
24 that he was allegedly--

25 MR. SWARTZ: That's correct, Your Honor.

1 QUESTION: It would be the kind of family and the
2 birthday parties and then one of the other ones was a check
3 for \$4,000.

4 MR. SWARTZ: Well, Your Honor, with regard--

5 QUESTION: Why don't you run through them, because
6 this is a key point.

7 MR. SWARTZ: With regard to the first conspiracy,
8 the Mitchell conspiracy, the testimony from Dean and from
9 others was that, Mr. Mitchell was in financial straits at
10 this time period. Not only was he in dire financial
11 straits, but he looked to Ms. Dean's mother for his
12 financial resources. Ms. Dean herself, according to her own
13 testimony and the testimony of others, also looked to her
14 mother. So, it is quite obvious that lessening
15 Mr. Mitchell's financial difficulties would also have a
16 direct and beneficial impact on her own family's finances,
17 quite apart from the fact--

18 QUESTION: Because her mother would give her more
19 money?

20 MR. SWARTZ: Well, there would be more money freed
21 up, Your Honor.

22 QUESTION: She wouldn't have to give him as much.

23 MR. SWARTZ: Beyond that, of course, Your Honor,
24 Mr. Mitchell was in essence Ms. Dean's stepfather. She
25 treated him as such. She treated, for all intents and

1 purposes, as if he was a member of the family. He was, at
2 the time, sharing a residence with her mother. So, there is
3 a direct family relationship there. It lessens the burden
4 on the family and, indeed, as Ms. Dean herself points out in
5 her brief, she could expect the normal kind of flow through
6 of benefits from someone in a fatherly capacity if he had
7 the kind of resources to do that.

8 There's only one reason he did have these
9 resources. It is because she made it possible for him to be
10 a HUD consultant, that is, to get mod rehab units--

11 QUESTION: Is there evidence of anything other--
12 there is one, in one of these deals--I forgot which one it
13 was. He did get a \$75,000 consultant's fee. Was there
14 evidence that he got actual cold cash in any of the others?

15 MR. SWARTZ: As to each of the projects, yes, Your
16 Honor, he received a payment. From Mr. Shelby, for
17 instance, who supposedly doesn't want any dealings with him,
18 pays him \$50,000 notwithstanding that. Similarly, with
19 regard to Mr. Brennan, his business partner.

20 QUESTION: Okay, so there were several of them
21 that were consummated that he got the money on?

22 MR. SWARTZ: Yes, Your Honor, over \$200,000 in
23 terms of fees.

24 QUESTION: Okay.

25 MR. SWARTZ: In regard to the second conspiracy--

1 QUESTION: So, what did she receive in that first
2 one then? In other words, you are deeming she receives
3 everything Mitchell receives?

4 MR. SWARTZ: I'm deeming her family certainly
5 received that, Your Honor.

6 QUESTION: No, for purposes of this case, you are
7 deeming that she receives, therefor.

8 MR. SWARTZ: Yes, Your Honor. I think that the
9 case is, in the 371 cases, make it clear, cases such as
10 Gallup, Conover and this circuit's decision in Treadwell
11 that that is more than enough that a family member receives
12 benefits.

13 QUESTION: Okay.

14 MR. SWARTZ: Quite apart from the fact that, here,
15 there was evidence of flow through.

16 QUESTION: What else?

17 MR. SWARTZ: With regard to the second conspiracy,
18 the Sankin conspiracy, here the evidence was that Sankin
19 was, as Judge Wald suggested, in essence a family retainer.
20 Part of that retainer was paid for by the United States.
21 That is, Sankin refrained from charging Ms. Dean and her
22 family for certain of the services he provided, including
23 services of significant value, such as, obtaining the rent
24 petition with regard to their low income housing at the
25 Stanley Arms project and his actions as broker, because he

1 knew that Dean was providing him with benefits.

2 In fact, even the way he compensated his manager
3 of the apartment, Mr. Sankin compensated his manager,
4 reflected his awareness that there was a relationship
5 between the services he was providing her and the benefits
6 that he was receiving from HUD. Beyond that, of course, he
7 was, as Ms. Dean herself understood, someone she thought of
8 in essence on the family payroll. So, she was free to ask
9 any number of services, which is quite apart as well from
10 the various gifts and other things that he gave her during
11 this time period.

12 Finally, with regard to the third conspiracy, the
13 evidence is uncontradicted. In fact, this is the Kitchen
14 conspiracy. It is uncontradicted that Mr. Kitchen gave
15 Ms. Dean \$4,000 in a check at a time when he was seeking mod
16 rehab units, at a time when she was under investigation in
17 connection with her Senate confirmation proceedings,
18 confirmation proceedings that Mr. Kitchen had already aided
19 her on by contacting the White House.

20 QUESTION: I think that is your strongest bit of
21 evidence of all.

22 You don't have much time left, but I would like to
23 ask you a question about the misconduct charges against the
24 Independent Counsel. I caught at the outset that your trial
25 counsel have flown the coop and returned to Justice. So,

1 they are not sitting at the counsel table to hear any
2 questions from the bench.

3 What are we to make of the misconduct charges?
4 Are you prepared to concede that there is misconduct here?

5 MR. SWARTZ: No, Your Honor, we are not prepared
6 to concede it.

7 QUESTION: None at all?

8 MR. SWARTZ: Your Honor, let me say at the outset
9 that, of course, we are very concerned about the concerns
10 expressed by Judge Hogan in this matter, as any prosecutors
11 would be. We have reviewed our procedures. Insofar--

12 QUESTION: This is the delay stuff you are talking
13 about, the delay in getting the information?

14 MR. SWARTZ: Certainly the delay, Your Honor.
15 If we take first the Brady point--

16 QUESTION: Isn't that unconscionable? Is there
17 any possible justification for that?

18 MR. SWARTZ: Well, Your Honor, let me explain.
19 From the outset--

20 QUESTION: Is this just absolute support for the
21 proposition that the notion of an independent counsel
22 divorced from the Justice Department is inherently a corrupt
23 notion?

24 MR. SWARTZ: Certainly not, Your Honor.

25 QUESTION: I think we have recently had some cases

1 which had similar Brady problems which involved the regular
2 U. S. Attorney component.

3 MR. SWARTZ: As Paxson, for instance, Your Honor,
4 probably the leading Brady case from the circuit involved
5 non-disclosure of very serious material until the trial
6 itself. In this case--and I would refer the court to the
7 record. It's in the Joint Appendix, actually.

8 From the outset, the associate independent counsel
9 who handled this case before Judge Gessell, who is now in
10 fact the Assistant Attorney General of the United States, in
11 charge of the Criminal Division, made clear she was
12 distinguishing between what she thought of as Giglio
13 material, that is, prior witness statements and Brady
14 material. That may have been an erroneous--that may have
15 been a mistaken distinction in her mind, but it is--

16 QUESTION: Counsel, the trial counsel in this
17 case, the one who is responsible for the delay in the Brady
18 material is now the Assistant Attorney General?

19 MR. SWARTZ: No, Your Honor. This case was first
20 brought by an individual who is now the Assistant Attorney
21 General. That was when it was before Judge Gessell, prior
22 to the interrogatory appeal.

23 QUESTION: Oh.

24 MR. SWARTZ: Then the new trial counsel came on.
25 The new trial counsel was also a career federal prosecutor,

1 is now a prosecutor again and has returned to the U. S.
2 Attorney's Office in the Middle District of Florida. Each
3 individual here, Your Honor, has a long record as a
4 Department of Justice attorney.

5 If I could refer the court in this regard to the
6 Brady--

7 QUESTION: His answer is the quick answer that you
8 say they were cutting, perhaps, too fine a point in deciding
9 what had to be given over versus what didn't have to be
10 given? That's not a great excuse.

11 MR. SWARTZ: Yes, Your Honor.

12 QUESTION: I'm just characterizing your reply.

13 MR. SWARTZ: Certainly, Your Honor.

14 QUESTION: Is that what you are saying?

15 MR. SWARTZ: I think if you look at Joint Appendix
16 114, for instance, Ms. Harris' statement, she makes it quite
17 clear the distinction she's drawing. As I say, yes, that
18 may have been too fine a distinction. I think that the
19 critical point here is, the evidence was turned over and it
20 was turned over in advance of trial.

21 QUESTION: How much in advance, just a week or two
22 or something?

23 MR. SWARTZ: Two weeks in advance, in this case,
24 more than a month before the witnesses testified.

25 QUESTION: Enormous preparation. This case was,

1 what, a year between indictment and trial?

2 MR. SWARTZ: That's correct, Your Honor.

3 QUESTION: The preparation is enormous and two
4 weeks beforehand is sufficient time for a defense attorney
5 to absorb all this material?

6 MR. SWARTZ: Well, Your Honor, not only was it--

7 QUESTION: Was this buried or was it segregated?

8 MR. SWARTZ: No, this was segregated, the
9 particular matters here.

10 In the Brady materials, there are four items of
11 evidence that are at issue. Out of all evidence in this
12 case, the first are the so-called notes, the John Mitchell
13 telephone notes. Those were produced more than a year prior
14 to trial. The argument there is, they should have been
15 segregated. The government's position is, that far from
16 being exculpatory, those notes showed that Barksdale was
17 being contacted by the executive assistant.

18 QUESTION: How was the production--was it done by
19 giving the defense counsel access to a big room with a
20 hundred filing cabinets or was it Xerox?

21 MR. SWARTZ: Well, Your Honor, the documents were
22 reproduced from microfilm copies and were given to the
23 defendant in--

24 QUESTION: At defense's request, they had to go
25 through microfilm; is that the way it worked?

1 MR. SWARTZ: No, no, they were microfilm copies,
2 from microfilm but not the actual documents themselves.
3 They were Xeroxed copies of documents for them to review.

4 QUESTION: How were they indexed?

5 MR. SWARTZ: They were provided in sequential
6 production, Your Honor, according to the request of the
7 defendant. The discovery here was massive. I must say
8 that, everything in the record belies any suggestion that
9 the government had an interest in hiding information here.
10 The government exceeded, in almost every area, its statutory
11 obligations in terms of turning over materials.

12 QUESTION: How was it that it was two weeks prior
13 to trial that the lightbulb suddenly went off in the
14 prosecutor's head? How did that happen?

15 MR. SWARTZ: Your Honor, in reviewing the
16 materials prior to trial, in an excess of caution,
17 notwithstanding the position they have been taking before,
18 that these were Giglio materials, this material was
19 segregated. I'd like again to emphasize--

20 QUESTION: Would you go down through them? I know
21 your time is up, but I find this to be important. You have
22 told us--and as briefly as you can--that one of the four
23 Brady, let's just stick with the Brady items--was given
24 actually a year before trial.

25 MR. SWARTZ: That's correct, Your Honor.

1 QUESTION: Tell us what the other three were and
2 when people got them.

3 MR. SWARTZ: Out of the remaining three, one is a
4 statement by Marion Pines, who was a housing official in
5 Baltimore. I think the seriousness of defendant's argument
6 that that was important can be gauged by the fact that,
7 whereas Marion Pines had been listed as a witness by
8 defendant prior to our getting that material over, she was
9 thereafter not used as a witness by defendant,
10 notwithstanding her awareness of what apparently Ms. Pines
11 would say.

12 Similarly, with regard to Mr. Shelby and
13 Mr. Kitchin's statements. Those were statements that were
14 embedded in lengthy 302s or witness reports.

15 QUESTION: That would normally be kind of Jencks
16 material, wouldn't it?

17 MR. SWARTZ: Your Honor, they would normally be
18 part of Jencks material or Giglio material and that is--

19 QUESTION: It wouldn't be Jencks material, would
20 they?

21 MR. SWARTZ: Well, they testified, Your Honor, so
22 they were Jencks materials as well.

23 QUESTION: You don't mean to suggest that, if you
24 have material, if the prosecutor has material that looks
25 like it is exculpatory, it can justify not turning it over

1 to the defense on the grounds that it is Jencks material, so
2 it doesn't have to be turned over until the witness
3 testifies? That's ridiculous.

4 MR. SWARTZ: Your Honor--

5 QUESTION: That's not what he said.

6 MR. SWARTZ: The reason, Your Honor, that we did
7 turn it over in advance--

8 QUESTION: I'm worried about that. That would be
9 ridiculous.

10 MR. SWARTZ: Your Honor, yes. Let me say this.
11 Your Honor, the position that was taken before Judge
12 Gessell--and it is quite clear on the record--is that, there
13 would be a production of these materials, that is, the Brady
14 materials, separate Brady materials and the production of
15 Giglio materials some of the time.

16 QUESTION: But timing is very important here.

17 MR. SWARTZ: Yes, Your Honor.

18 QUESTION: If it is exculpatory, it is important
19 that it be turned over immediately. Jencks material doesn't
20 have to be turned over until after the witness testifies.

21 MR. SWARTZ: Yes, Your Honor. When the government
22 reanalyzed this material prior to trial, the decision was
23 made to make advance disclosure. Then when we realized that
24 there might be a question raised about the argument--

25 QUESTION: Are you saying that, in these

1 statements that were originally not turned over, it is your
2 excuse that the close calls that in the mass of material,
3 all of which was Jencks or Giglio or whatever kind of
4 material, you didn't do a careful enough job in scanning it
5 immediately to find those statements in there that might
6 properly be classified as Brady material, but that they were
7 close?

8 MR. SWARTZ: Yes, Your Honor, I think they were--

9 QUESTION: I'm just asking, is that your basic
10 excuse?

11 MR. SWARTZ: Yes, Your Honor, I think that is
12 certainly part of it. I think the problem arises from the
13 fact, as the Joint Appendix at 114 makes clear, that the
14 government was proceeding on the assumption that Giglio
15 material and witnesses' statements themselves would be
16 turned over at one time.

17 QUESTION: Even if a witness' statement said he
18 didn't do it?

19 MR. SWARTZ: Yes.

20 Well, Your Honor, of course, the problem is that,
21 the witnesses' statements here, as Your Honor noted, are
22 embedded in much broader statements.

23 QUESTION: It doesn't matter whether they are
24 embedded, does it?

25 MR. SWARTZ: Yes, Your Honor, that is correct.

1 That is why when the government reviewed the matter, it did
2 turn it over prior to trial.

3 QUESTION: What about prejudice then? If they had
4 been prejudiced, this excuse, I would agree with Judge
5 Silberman. It wouldn't amount to a hill of beans. Now,
6 what is your argument on the fact they weren't prejudiced?

7 MR. SWARTZ: Well, Your Honor, as Judge Hogan
8 found, they in fact were not prejudiced by this. They had,
9 under the Paxson standard, more than sufficient time to make
10 use of this material prior to trial.

11 QUESTION: Well, how much time? Two weeks except
12 for the Mitchell notes, right?

13 MR. SWARTZ: That's correct, which they had more
14 than a year before and the Pines materials which, of course,
15 they made no use of at all.

16 QUESTION: They didn't use as a witness.

17 MR. SWARTZ: In fact, both Kitchen and Shelby were
18 cross examined on these matters if they needed to be.
19 Kitchen didn't need to be, because he reiterated some of
20 this at trial himself.

21 There is no doubt, as Your Honors have pointed
22 out. We have reviewed our procedures in that regard. I do
23 think that, the record makes clear from the start, the
24 government was operating under a different approach as to
25 how the Jencks materials and the Giglio materials would be

1 turned over, which these fell into.

2 In any event, as Judge Hogan found, found prior to
3 trial, found during trial and after trial, there was no
4 prejudice here. Under the Paxson standard--

5 QUESTION: I have a couple of questions.

6 With respect to any of the mod rehab approvals
7 that are attributed either directly to Ms. Dean or
8 indirectly that she may have had some--were any of those mod
9 rehab units in violation of HUD regs? Were the units not
10 existent? Did the developers not do their job? Were they
11 not qualified? Did they in any way not comport with HUD
12 regulations?

13 MR. SWARTZ: Your Honor, there is no proof that
14 projects were not built. There was proof, however--

15 QUESTION: In fact, one of them got an award in
16 Philadelphia?

17 MR. SWARTZ: That's correct, Your Honor. There
18 was proof, however, from such individuals as the PHA
19 director from the Metro Dade area, Mel Adams and Pat Cherif
20 [phonetic], another witness from there, that the entire
21 system had been turned on its head by the actions of
22 defendant and her co-conspirators.

23 QUESTION: It was run out of HUD, not out of the
24 local--

25 MR. SWARTZ: It was not only run out of HUD, but

1 the idea that the PHA had anything to do with the decision
2 was completely abrogated.

3 QUESTION: Did you have PHA officials testify that
4 somehow HUD directed them who to give the mod rehab units
5 to?

6 MR. SWARTZ: Mel Adams testified, for instance and
7 his was the Metro Dade PHA and a very important one. In
8 essence what happened at Metro Dade was that, the developers
9 would have a particular project in mind with a particular
10 number of units. How the allocations were made when they
11 came down from HUD had nothing to do with the normal system,
12 the system that was supposed to be in place, a system of
13 competition where the PHA would rate and rank and decide on
14 the basis of local priorities where these scarce resources
15 would go.

16 Instead, what would happen is, they would give out
17 the funds according to how they matched with the particular
18 developer's projects. That was why it was so important for
19 the developers to have 219 units come down or whatever
20 number of units.

21 For instance, in the particular matter that the
22 defendant cites where she claims that 300--

23 QUESTION: Let me turn to another thing which I
24 don't understand. Do you have your brief there, page 20?

25 MR. SWARTZ: Yes, Your Honor.

1 QUESTION: The first Mitchell project you talk
2 about is Marbilt.

3 MR. SWARTZ: Yes, Your Honor.

4 QUESTION: Your brief says, Dean wrote to Mitchell
5 and advised him that she had discussed the project with
6 relevant HUD officials. The very wording of the letter
7 would suggest it is time to say adios to the developer and
8 would justify the jury concluding that Dean and Mitchell
9 were working together. That letter, at page 858 of the
10 Appendix--

11 MR. SWARTZ: Yes, Your Honor.

12 QUESTION: What the letter says is that she stands
13 behind the decision of the career people in headquarters.
14 What I don't see in this letter is, adios to the developer.
15 Where does that come from or is that just your
16 editorializing?

17 QUESTION: Well, we think, Your Honor, that it is
18 fair for the jury to conclude that that is who they were
19 talking about, saying adios to. Mr. Martinez being from
20 Florida--

21 QUESTION: Where does it say that? Does the
22 letter say that?

23 MR. SWARTZ: No, Your Honor. It says, I think it
24 is time we say adios. I think the question is, what
25 inference can be drawn from that. That seems to me

1 peculiarly a jury question, a jury inference to be drawn.

2 QUESTION: Your argument is, that is suspicious?
3 That suggests that, adios means we'd better stop dealing on
4 this anymore?

5 MR. SWARTZ: Well, Your Honor--

6 QUESTION: This information is now a matter of
7 public record and you may feel free to copy it and share it
8 if you wish, Love Deborah. That is criminal conspiracy?

9 MR. SWARTZ: Well, Your Honor, I think that the
10 point here is, this evidence was introduced to establish the
11 beginning of the Mitchell-Dean relationship while she was at
12 HUD. This, I think it should be emphasized, is at a time
13 when she supposedly is still a special assistant and when
14 she is not active in HUD matters.

15 QUESTION: Well, I asked you whether your
16 argument--your first point was, she had the power to control
17 and I asked you whether that was throughout this entire
18 period and you said, yes. Now, you're telling me no.

19 MR. SWARTZ: I'm sorry, Your Honor. Certainly
20 from the time she was executive assistant on, she had that
21 power.

22 QUESTION: Was she executive assistant when this
23 letter was written?

24 MR. SWARTZ: Well, at that time, Your Honor, in
25 terms of the Marbilts, I think she was still a special

1 assistant. That, Your Honors--

2 QUESTION: Let me ask you about John Mitchell.
3 Did you put evidence on before the jury that he was a felon,
4 a convicted felon?

5 MR. SWARTZ: No, Your Honor.

6 QUESTION: Did you identify him as a former
7 Attorney General?

8 MR. SWARTZ: Your Honor, my recollection is that
9 the court took steps to insure that did not come before the
10 jury throughout. I believe Ms. Dean testified that she saw
11 Mr. Mitchell on television during Watergate and that her
12 first reaction was that, he was guilt.

13 QUESTION: There were also some communications
14 talking about General Mitchell.

15 MR. SWARTZ: General Mitchell.

16 QUESTION: Anybody could infer.

17 MR. SWARTZ: The government certainly did not make
18 it part of its case to suggest that he was a convicted
19 felon?

20 QUESTION: How do we know that? Oh, to suggest
21 that he was a convicted felon?

22 MR. SWARTZ: Yes, Your Honor, that is correct,
23 yes.

24 QUESTION: But if the jury, if one could assume
25 the jury knew who John Mitchell was, it certainly was not of

1 any benefit to Ms. Dean that her mother was living with this
2 particular individual and Ms. Dean called him dad? That was
3 not really helpful, was it?

4 MR. SWARTZ: Your Honor, I think in that regard,
5 the most that can be said is that the government was
6 scrupulous in its attempts not to link this up in any way to
7 Watergate. Ms. Dean herself was the one who mentioned it in
8 her testimony at trial, the facts--

9 QUESTION: I think you are well over your time,
10 but we have kept you--

11 QUESTION: Well, I have one other question.

12 QUESTION: Oh, yes, sir, go ahead.

13 QUESTION: I would like you to respond to the
14 appellant's argument concerning the alleged misconduct in
15 closing argument, particularly the accusation that she is or
16 was a liar.

17 MR. SWARTZ: Your Honor, I think in that regard,
18 again, Judge Hogan's ruling is the critical factor here, a
19 ruling that I believe under this court's decisions in cases
20 such as Paxson and Harris cannot be reversed except for
21 abuse of discretion.

22 Judge Hogan concluded that the closing use of the
23 word liars did not present a basis for a new trial for two
24 reasons, first because of the nature of the case, a case and
25 nature that distinguishes it from virtually all other cases

1 that involves the question and the use of the word liar. As
2 Judge Hogan pointed out, it is a perjury case.

3 QUESTION: You mean the perjury?

4 MR. SWARTZ: It's a perjury case, Your Honor. Not
5 only is it a perjury case, but it is a perjury case in which
6 the defendant took the stand and reiterated the very
7 testimony that was charged as perjury and did so in an
8 extremely lengthy time, I understand, approximately eight
9 days on the stand. That, in and of itself, renders this
10 case different other cases since it seemed to be agreed by
11 the defense counsel as well, that it is certainly
12 permissible to say that the defendant lied in connection
13 with her perjury.

14 QUESTION: Wasn't there a specific curative
15 instruction here, unlike even North--

16 MR. SWARTZ: Right.

17 QUESTION: --where the judge actually went after
18 the specific testimony rather than the boilerplate to which
19 Judge Silberman objected?

20 MR. SWARTZ: Yes, that is correct. That is the
21 second factor on which Judge Hogan relied, that he gave a
22 curative instruction here.

23 Beyond that, of course, Your Honor, as we pointed
24 out, this case falls squarely within the invited reply rule.
25 The entire thrust of defendant's case was to put her

1 credibility at issue. In fact, when all of the evidence is
2 considered here, it is really her testimony against that of
3 virtually every other witness who testified on each of those
4 points, that is, whether or not she had any power at HUD.
5 Remember, it is her argument that she had no real power at
6 HUD. Whether she exercised that power at HUD.

7 MR. SWARTZ: I had one more question, Mr. Swartz,
8 I forgot to ask you. It is on counts 11 and 12--

9 MR. SWARTZ: Yes, Your Honor.

10 QUESTION: --the perjury counts.

11 What exactly what it was that she said--it was
12 something about no one got project--

13 MR. SWARTZ: No units went to Maryland, Your
14 Honor.

15 QUESTION: Solely because--

16 MR. SWARTZ: Because she sat on the piano, unless
17 the Secretary sent them directly.

18 QUESTION: Solely because I sat on the panel.
19 Isn't that because--

20 QUESTION: Simply, simply for that reason.

21 QUESTION: Simply?

22 MR. SWARTZ: I think, Your Honor, that no units
23 went to Maryland unless the Secretary sent them directly,
24 simply because I sat on the panel. I just got the exact
25 language.

1 QUESTION: No units went to Maryland simply
2 because--well, isn't that, under Bronson literally true?
3 The units would have to--it can't be simply because she sat
4 on the panel. The project would have to meet certain
5 minimum requirements in order to get approved, wouldn't it?

6 MR. SWARTZ: Your Honor, let me read the language
7 exactly, because I think the simply--

8 QUESTION: Where is it? What page are you reading
9 from? Is that in the brief?

10 MR. SWARTZ: Yes, Your Honor.

11 It is page 39. The simply modifies a different
12 point. It says no mod rehab units, quote, unless they were
13 sent directly by the Secretary have ever gone to my home
14 state of Maryland, simply for that reason that I sat on the
15 panel.

16 QUESTION: Page 39 of your brief?

17 MR. SWARTZ: Yes, Your Honor.

18 In other words, Dean's testimony was--

19 QUESTION: Are you sure?

20 MR. SWARTZ: Yes, Your Honor, in counts 11 and 12,
21 the first paragraph there.

22 QUESTION: Where is the false statement? Do we
23 have that?

24 MR. SWARTZ: That would be in the Joint Appendix,
25 Your Honor, at 629.

1 [Pause]

2 QUESTION: 629?

3 MR. SWARTZ: Perhaps, I quoted that wrong. I'm
4 sorry, Your Honor, I gave you the wrong cite on that. Let
5 me find it here.

6 [Pause]

7 MR. SWARTZ: 953, counsel tells me.

8 [Pause]

9 QUESTION: She did not state in that testimony
10 that she had never participated in a decision to award rehab
11 units in Maryland. Yet, that is basically what you are
12 charging her with perjury for.

13 MR. SWARTZ: Your Honor, her statement was that,
14 unless the units were sent directly by the Secretary--

15 QUESTION: No, she did not state--isn't it correct
16 that she did not state that she had never participated in
17 any decision to award mod rehab units in Maryland?

18 MR. SWARTZ: Well, Your Honor, I believe that it
19 certainly can be interpreted that way. That is that, the
20 Secretary sent these units directly.

21 QUESTION: No, she never said that. Yet, that's
22 basically what you're charging her with having said. She
23 said, as Judge Randolph points out, that they were not sent
24 to my home State of Maryland simply because I sat on the
25 panel.

1 MR. SWARTZ: No, Your Honor, I believe she said
2 simply for that reason that I sat on the piano. She is
3 suggesting that the reason that she had to somehow not be
4 involved is because it was her home State of Maryland. Your
5 Honor, I think in that regard, her testimony at trial
6 reiterates that point. The transcript at page 2811, Dean's
7 trial testimony, she reiterates the idea--

8 QUESTION: Well, you subsequently say in your
9 brief, the next page, not that she did not participate in
10 relating to Maryland-based applications. You are taking
11 that statement on her part to mean, I did not participate in
12 any decisions to send rehab or to award mod rehab unit money
13 to Maryland.

14 MR. SWARTZ: Yes, Your Honor and that is, in fact,
15 her trial testimony as well, at 28--

16 QUESTION: Oh, you say her trial testimony--

17 MR. SWARTZ: At transcript 2811, for instance, I
18 believe.

19 QUESTION: She said, in her trial testimony she
20 testified that she never participated in any--

21 MR. SWARTZ: Basically what her testimony--I'm
22 sorry.

23 QUESTION: Please, Counsel, let me finish my
24 question.

25 MR. SWARTZ: Sure.

1 QUESTION: In her trial testimony, she testified
2 that she had never participated in any decision on the part
3 of HUD to award mod rehab units to Maryland?

4 MR. SWARTZ: Her testimony is, as I recall, Your
5 Honor, is that she felt uncomfortable even recommending to
6 Secretary Pierce that he fund units in Maryland.

7 QUESTION: Counsel, can you answer my question?
8 Did she testify on the stand that she had never
9 participated--

10 MR. SWARTZ: I would have to go back, Your Honor,
11 and check the record in that regard to see what--

12 QUESTION: Well, isn't that what, in effect, you
13 charged her with, with having made that statement and that
14 is the perjurious statement? Yet, the statement, as Judge
15 Randolph pointed out, doesn't say that. The statement which
16 you have mentioned in your brief doesn't say that. I hadn't
17 focused on that before until Judge Randolph asked the
18 question.

19 MR. SWARTZ: Well, Your Honor, I believe that the
20 statement says that, the funds had to be sent directly by
21 the Secretary because she sat on the panel. In other words,
22 that no funds--

23 QUESTION: No mod rehab units were sent to
24 Maryland unless they were sent directly by the Secretary,
25 have ever gone to my home State of Maryland simply for that

1 reason, that I sat on the panel. It is a confusing
2 sentence, but the best I can determine is that, they didn't
3 go to Maryland simply because I sat on the panel.

4 MR. SWARTZ: Your Honor, I believe that if she had
5 said simply because I sat on the panel. She says, simply
6 for that reason. She is explaining, Your Honor, that
7 because she believes she has a conflict of interest, she
8 cannot be involved in the Maryland allocations.

9 QUESTION: Well, that is not at all clear. The
10 allegation that she is responding to is an abuse of some \$17
11 million in funds that went to Baltimore, correct? Now,
12 there are two ways to--is that right?

13 MR. SWARTZ: Yes, Your Honor, in this particular
14 matter.

15 QUESTION: Well, there are two ways to respond to
16 that. First of all, I never heard of it, what she said.
17 Second of all, if a project got funded, it wasn't simply
18 because I was on the panel. In other words, don't charge me
19 with the \$17 million abuse. I mean, I didn't approve
20 anything simply because I was there. Things got approved
21 for other reasons.

22 MR. SWARTZ: Your Honor, I think that the simply,
23 the placement of the simply in her statement differs
24 significantly from the use of the simply as you used it.
25 She did not say that no units went to Maryland simply

1 because--

2 QUESTION: Isn't there a whole body of law on
3 perjury though, that if you have a statement that can be
4 interpreted in one of two ways, one of the innocent and one
5 of them not true that, you can't make out the charge?

6 MR. SWARTZ: No. Your Honor, I believe that this
7 statement, written as it was, stated as it was at the time--

8 QUESTION: May be interpreted your way.

9 MR. SWARTZ: Your Honor, I believe that that is
10 correct. That is what Judge Hogan concluded as well, I
11 think, in reading this.

12 QUESTION: Mr. Swartz, this is going on your
13 territory, but I would like a direct colloquy or direct
14 answer from you on the same topic as opposed to a dialogue.
15 What do the government or the Independent Counsel say that
16 that statement which we have quoted 15 times in the last ten
17 minutes, what does Independent Counsel maintain that that
18 statement of hers was saying?

19 MR. SWARTZ: The government contends that the
20 statement says that Dean did not have anything to do with
21 mod rehab programs, that the funds were sent--excuse me--to
22 mod rehab allocations to Maryland; that the funds were sent
23 directly to Maryland by the Secretary if funds were sent,
24 simply for that reason, that is, because she sat on the
25 panel. Your Honor, I believe that her trial testimony in

1 that regard also elucidates what she was trying to say. It
2 is the same theme that she picked up at trial.

3 Again, the government's evidence was--

4 QUESTION: From what you're saying, I'm getting
5 the impression that you're also saying that, she was saying
6 just because I sat on that panel, no funds ever went
7 directly to my home state. You're reading, you're saying
8 that statement carries more weight. It means, just because
9 I sat on that panel or did anything else or involved myself
10 in any other way, no funds ever went to Maryland; is that
11 right?

12 MR. SWARTZ: That's right. Her statement was,
13 because she sat on the panel, no funds went to Maryland
14 unless they were sent directly by the Secretary.

15 QUESTION: Well, never mind the unless sent
16 directly. What I am trying to do is understand it myself.
17 I was confused and I needed to go over it again myself.

18 MR. SWARTZ: Perhaps, Your Honor--and I have not
19 clarified it. What Defendant Dean stated there, as again
20 she stated it at trial was, on particular matters, that is,
21 matters involving Maryland--and she expanded it with regard
22 to the other states, with the other members of the panel at
23 the time--that she did not make those allocations. If
24 allocations were made to Maryland, they were made directly
25 by the Secretary because she sat on the panel and she

1 considered it improper to award funds to the State of
2 Maryland.

3 Of course, the government's testimony was at trial
4 that, she was directly involved in allocations to Maryland,
5 including in 1987, including to Mr. Shelby, an individual,
6 by the way that she--

7 QUESTION: You mean that you are claiming--wait a
8 minute. There are three possible meanings. Now, I have a
9 different meaning. No mod rehab units were sent to Maryland
10 at all because she sat on the panel; that Maryland was
11 barred from any mod rehab units because she sat on the
12 panel?

13 MR. SWARTZ: No, she saying, she is speaking
14 historically. No units were sent at all unless they were
15 sent directly by the Secretary.

16 QUESTION: She had a conflict.

17 MR. SWARTZ: She had a conflict. So, she is
18 saying that the panel is not deciding on the Maryland units.

19 MR. SWARTZ: What is the conflict, because she is
20 from Maryland? Where is Secretary Pierce from? Where is he
21 from?

22 MR. SWARTZ: Well, I think he is from New York.

23 QUESTION: He is from New York. Is he, therefore,
24 barred from dealing with any rehab units in New York?

25 MR. SWARTZ: Your Honor, it was her testimony,

1 Your Honor.

2 QUESTION: If it is so improper, if your
3 interpretation is it is so improper--did Secretary Pierce
4 recuse himself from anything that HUD does in New York?

5 MR. SWARTZ: Your Honor, that is not in the record
6 that he did do that.

7 QUESTION: Is that inconceivable?

8 QUESTION: Is there a grounds for recusal? Now,
9 I'm beginning to understand this. This is the first time.

10 You are claiming that, her statement meant that
11 that committee could not award any mod rehab units or
12 influence anything that they would normally or legitimately
13 be able to influence in Maryland simply because she was a
14 Maryland resident?

15 MR. SWARTZ: Your Honor, not only--

16 QUESTION: What about the other members of the
17 committee? Were they from other states, too?

18 MR. SWARTZ: Yes, Your Honor. Indeed, Ms. Dean
19 testified at trial that she did not think it was proper for
20 them to award units to their states.

21 QUESTION: They have met the recusal. It didn't
22 mean that the whole panel couldn't do it. It meant that she
23 would recuse herself in those cases.

24 MR. SWARTZ: Your Honor, Ms. Dean, at trial, as
25 she was trying to do before the Senate--and this brings us

1 back to the point of reiterating her Senate testimony.
2 Ms. Dean, at trial, tried to create the impression of a
3 regularized process in which she did nothing other than to
4 follow the recommendations, in this time period, of the
5 Assistant Secretary of Housing.

6 She also testified that, when she found out about
7 Mr. Shelby's involvement in mod rehab units, she recused
8 herself. When she found out about Mr. Kitchin's
9 involvement, she recused herself. When she had anything to
10 do with Maryland, she recused herself.

11 As I said, Your Honor, at transcrip 2811 and that
12 general area of her testimony, Ms. Dean makes clear that she
13 had such a high ethical standard, she was telling the jury,
14 that she felt uncomfortable even talking about Maryland to
15 Mr. Pierce at the time.

16 QUESTION: She was living in Georgetown at the
17 time?

18 MR. SWARTZ: She was living in Georgetown.

19 Your Honor, I am not suggesting--I want to be
20 clear on this--that HUD itself had a policy in this regard.
21 I'm suggesting only that it was Defendant Dean's position
22 that--

23 QUESTION: If you interpret it your way, then you
24 are right. There was nothing in the ethical code that
25 governed HUD employees that required them recuse if--. By

1 her home state, Maryland, what does she mean by that? When
2 was the last time she lived in Maryland?

3 MR. SWARTZ: I'm not sure, Your Honor. The record
4 showed that the Dean family had a large property in
5 Maryland, property that in fact, as the evidence showed at
6 trial, were trying to sell to some of the very same
7 consultants and developers who were cheating--

8 QUESTION: There was nothing unethical about a HUD
9 employee passing on matters that involved the HUD employee's
10 home state, was there?

11 MR. SWARTZ: There is nothing in the record, Your
12 Honor. I'm unaware of anything.

13 QUESTION: Certainly, a senator from the state
14 could urge HUD to approve a project in his or her state?

15 MR. SWARTZ: Certainly, Your Honor.

16 I think the point here is that, Dean's testimony,
17 again, at the Senate and at trial was designed to suggest
18 that she had nothing to do with these kinds of allegations
19 and certainly nothing to do with anything that touched on
20 her personal integrity.

21 QUESTION: Do we have further questions?

22 Okay, thanks a lot, Mr. Swartz.

23 All right, Mr. Spears had how much time left?

24 You can have three minutes, Mr. Spears.

25 REBUTTAL ARGUMENT OF JAMES M. SPEARS, ESQ.,

1 ON BEHALF OF APPELLANT

2 MR. SPEARS: Thank you, Your Honor. You are very
3 generous.

4 I would want to just make a couple of points here.
5 Number one, there is absolutely no precedent supporting the
6 notion that this closing argument was appropriate, could be
7 excused in any shape, way, form or fashion, would suggest
8 that--

9 QUESTION: Well, wait a minute. I'm not so sure
10 about that. I can't even understand the logic that why, in
11 a perjury case, could you not as the prosecutor tell the
12 jury that the evidence suggests that the defendant was
13 lying.

14 MR. SPEARS: You probably could, if you were
15 referring to the perjury count, Your Honor. You are not
16 referring to the perjury count. If you just tell them about
17 the witness' general demeanor on the stand, that's out of
18 bounds. It doesn't make any difference.

19 QUESTION: Once you get into a perjury case, it
20 seems to me you have changed the dynamic on that.

21 MR. SPEARS: Well, Your Honor, I'm afraid that
22 I've looked at the cases, too. I don't see a perjury case,
23 ever because there is a perjury charge in the case--

24 QUESTION: Do you have an authority to the
25 contrary in a perjury case?

1 MR. SPEARS: I'll go back and take a look at them,
2 Your Honor. I'm sitting here taking a look at them and I
3 don't think there anything under invited response. I have
4 read Young v. the United States a couple of times, too.
5 There is nothing in there that suggests an invited
6 response--how do you invite a response when this statement
7 was made in their opening summation?

8 QUESTION: Can a prosecutor say in a closing
9 argument a defendant has told two different versions of this
10 story and for that reason, you should not believe either
11 one?

12 MR. SPEARS: Your Honor, the standard is whether
13 they have--

14 QUESTION: Answer that.

15 MR. SPEARS: Yes, you probably could do that.

16 QUESTION: You could do that. Could you say that,
17 ladies and gentlemen of the jury, the defendant has not be
18 truthful on the stand?

19 MR. SPEARS: I think they should be careful about
20 that and if it is tied to the testimony, that is correct.

21 QUESTION: Can you say, ladies and gentlemen, the
22 defendant lied on the stand?

23 MR. SPEARS: If it's tied, that is getting to be
24 more of a problem, because there is an inflammatory element
25 of that, Judge Randolph. As you go through the cases, when

1 you get down to statements where you can take her testimony
2 and toss it out in the garbage because it is all filtered
3 with lies; she has lied. She lied to you. She has lied to
4 us. She has continued to lie. Those are the kinds of
5 statements this man made in his summation.

6 QUESTION: No, what I am trying to get at is, is
7 it the word lie that you are objecting to?

8 MR. SPEARS: It is inflammatory, Your Honor.

9 QUESTION: If they said, look, she didn't tell the
10 truth. Then she didn't tell the truth, the second time, the
11 third time. It's all untrue. Ladies and gentlemen of the
12 jury, don't consider it as a matter of fact. Take it and
13 put it in the trash can.

14 MR. SPEARS: Your Honor, I submit that once you
15 get to the point of inflammatory conduct--and that is what
16 this was all about--I think that they are out of line. I
17 don't think that there is any case that stands for the
18 proposition that this sort of argument and summation is
19 appropriate under any standard.

20 If I could, Your Honor--I have 48 seconds and I am
21 responding to 45 minutes worth of argument.

22 The other thing that I don't understand is, there
23 is no way, at the end of the day when you sit there and take
24 a look at--and I think we have it in the Joint Appendix
25 here, on pages 160, et seq. It is essentially the list of

1 statements that were provided to defense counsel between
2 December 9th and December 13th, the day of the trial.

3 These statements--and some of them were Richard
4 Shelby's and other statements--contained exculpatory
5 information. This was buried in the midst of Jencks
6 material. These statements were there. The Independent
7 Counsel was around when these people made these statements.
8 They were clearly exculpatory and yet the--

9 QUESTION: What page is that?

10 MR. SPEARS: I believe the excerpt is 160, Your
11 Honor, which is a list of statements. Each one of these,
12 these are the statements that the Independent Counsel
13 provided--

14 QUESTION: 160 in the Joint Appendix?

15 MR. SPEARS: Yes, sir--provided to the defense
16 counsel the week of trial. If you go through all of those,
17 those contain exculpatory information. Shelby's is
18 particularly critical because Shelby's, for the first time
19 on the stand--it was produced on the day that the trial
20 opened. It identified the fact that there were witnesses
21 who told him of Dean and Mitchell's relationship.

22 QUESTION: How many pages does this comprise?

23 MR. SPEARS: I think this goes on for about ten
24 pages. We cannot--I think there are 330 interviews, Your
25 Honor. I believe that at least based on the size of

1 Shelby's statements that we have reproduced here, that would
2 be several thousands of pages of material that the defense
3 counsel, a sole practitioner, would be required to go
4 through the day before trial.

5 MR. SPEARS: I asked the prosecutor whether this
6 was Jencks material, the Shelby statement.

7 MR. SPEARS: Yes, it was Jencks material.

8 QUESTION: He adopted it?

9 MR. SPEARS: Excuse me, Your Honor?

10 QUESTION: He adopted it or is this an FBI report
11 of an interview?

12 MR. SPEARS: That is the report of an interview
13 that was produced as Jencks material.

14 QUESTION: I know, but unless it has been adopted
15 by the witness, it's not Jencks, is it? So, I mean, they
16 are giving it to you but it is not even Jencks. They may
17 have produced it as Jencks, but I don't see why it's even
18 Jencks material.

19 MR. SPEARS: Well, Your Honor, quite frankly, I
20 think it is Brady material because it has exculpatory
21 statements throughout it.

22 QUESTION: How much of it was Brady material? You
23 said that these were thousands of pages in the case of
24 Shelby. Roughly, how much of that was Brady material?

25 MR. SPEARS: Well, Your Honor, they have to go

1 through--

2 QUESTION: I'm just asking a question, Mr. Spears.

3 MR. SPEARS: All I can do is sit back and take a
4 look at--

5 QUESTION: Was it 10, 20, 30, 40?

6 QUESTION: Mr. Spears, just answer the question.
7 How much is it?

8 MR. SPEARS: Well, I'd like to go back and take a
9 look at the deal, because on page 1, I would have to go back
10 and take a look at it. On page--

11 QUESTION: Well, I don't want to use up your time.
12 I'm going to let you have as much time as the questioners
13 want to answer the questions.

14 MR. SPEARS: Well, then we have ten statements,
15 Your Honor. I think that the ten statements that are there,
16 based upon the statements we have looked at, about ten pages
17 per. So, that's about 100 pages on Shelby alone.

18 QUESTION: All right, that's an answer.

19 MR. SPEARS: That's Shelby alone, Your Honor.

20 QUESTION: I know; I know.

21 MR. SPEARS: There are 330 statements that were
22 produced pertaining to over 50 witnesses within the three or
23 four days before trial.

24 QUESTION: But they weren't all Brady.

25 MR. SPEARS: They weren't all Brady, but somewhere

1 along the line, defense counsel has got to be expected to go
2 through that to glean out the Brady material that was
3 wrongfully withheld from them for a year.

4 I'm sorry, Your Honor, that is something that is
5 prejudicial. You are a sole practitioner trying to get
6 prepared for trial and, as Judge Randolph noted, using
7 almost a year of preparation to get prepared for trial.
8 Then all of a sudden, within the weeks and days before
9 trial, the exculpatory information comes out.

10 The defense counsel has a right to sit back and
11 say, well, I guess if this is what their indictment says and
12 they haven't produced any Brady material and they
13 specifically denied having any Brady statements and they are
14 essentially not producing anything, I have a right to
15 presume that none exists.

16 QUESTION: I think most of us are in sympathy with
17 the fact that they should have produced this material much
18 earlier. Maybe you could elaborate a little bit on the
19 specific prejudice that you--I know you feel that you were
20 generally prejudiced because something was thrown at you at
21 the last minute, but the specific prejudice.

22 Mr. Swartz suggested that, in fact, one witness
23 wasn't used and a cross examination was made--a use of
24 material as to other witnesses. Aside from the terrible
25 burden that it put on the defense counsel, can you point to

1 other prejudice that came from getting it so late?

2 MR. SPEARS: Okay.

3 Your Honor, I think the thing is, wouldn't it have
4 been nice to call Mr. Shelby's superior at Keith and
5 Company, the person who basically explained to him,
6 according to Mr. Shelby for the first time, that there was a
7 relationship between Ms. Dean and Mr. Mitchell?
8 Unfortunately, that person wasn't called. Why wasn't that
9 person called? Because nobody even knew that that person
10 existed until the defense counsel had an opportunity--and
11 this was after trial, quite frankly--to go through all of
12 these statements and see what was in there. This person
13 wasn't on the witness list.

14 Let's talk about the woman in Baltimore's Uplift,
15 Mrs. Pines.

16 QUESTION: Yes.

17 MR. SPEARS: Marion Pines was the one whose
18 statement says, I ran Baltimore Uplift I. Ms. Dean had
19 nothing to do with Baltimore Uplift I.

20 Now, I have to tell you, Your Honor, given the
21 perjury charge in this case, I would say that is probably
22 exculpatory information. That comes in two weeks before
23 trial. Do we know where Ms. Pines was? Ms. Pines wasn't
24 available. I talked to trial counsel in preparing for this
25 argument. Ms. Pines wasn't available. They couldn't find

1 her. This is probably what this is all about.

2 Let's talk about Mr. Shelby. Mr. Shelby talks
3 about the fact that he didn't realize Mitchell and Dean's
4 involvement, that they had the relationship. Then he
5 severed the relationship with Mitchell from the Park Towers
6 project once he understood that.

7 If you go back and take a look at their first
8 count in this case, the conspiracy count, it is all about
9 this conspiracy was a seamless web involving Dean and
10 Mitchell and Shelby. Shelby belies that in basic assertion.
11 This is information that they had--

12 QUESTION: Where exactly in the--I'm looking at
13 the interview notes of Shelby. Can you point to me exactly
14 where the Brady material is?

15 MR. SPEARS: I think I have it referred in our
16 brief, if I could just a second, Your Honor. Let me take a
17 look at it. I think I have it.

18 QUESTION: It is 170 to--

19 MR. SPEARS: No, I see that. I need to look at
20 the brief because I have referred to it there.

21 QUESTION: There are two. I think there are two
22 interviews.

23 MR. SPEARS: Yes, Your Honor. I have to get to
24 the brief here.

25 I would make the point as I'm looking for that,

1 that there is no suggestion here--Paxson turns on the
2 ability of the defense counsel to use the information
3 effectively. That's what Paxson was all about and I have no
4 quarrel with that, if we could demonstrate that this
5 material was used effectively. If Marion Pines had come up
6 and testified and not been an effective witness, that's one
7 thing. If we couldn't have--

8 QUESTION: Did you at any point ask the trial--

9 MR. SPEARS: I wasn't the trial counsel.

10 QUESTION: Oh, I'm sorry. Then do you know
11 whether the trial counsel at any time asked for a
12 continuance, asked for extra time, asked for time to locate
13 a witness or--

14 MR. SPEARS: Your Honor, I'm not aware of the fact
15 that any requests like that were made. I would also submit
16 that, when a person is paying a sole practitioner out of
17 their pocket for a year, with after tax dollars, at some
18 point in time, you start running out of money.

19 QUESTION: I understand all that. I'm only asking
20 you for factual statements.

21 MR. SPEARS: I don't know, Your Honor. I don't
22 think that there was any request for an extension.

23 I'm still looking Judge Randolph. I think I can
24 find your--it is referred to in one of our footnotes
25 pertaining to exculpatory material. I think that is JA 171-

1 173.

2 QUESTION: All of it?

3 MR. SPEARS: No, I think that I can go back there
4 and take a look and--there it is. I think it is on page 172
5 of the Joint Appendix. When Shelby joined TKC, he
6 immediately left. TKC's president, Bob Keith, from Japan
7 got back. At some point a week or less than a month, he sat
8 down with TKC's principles to discuss various clients. They
9 discussed Park Towers, at which time Shelby learned of the
10 relationship between Mitchell and Deborah Dean. Mitchell
11 was involved with Dean's mother, okay.

12 Shelby believed that James told him about this
13 when Shelby advised him that he had contacted Mitchell about
14 Fein and Park Towers. So, that is one of the pieces of
15 information that would--

16 QUESTION: Why is that Brady?

17 MR. SPEARS: Why is that Brady?

18 QUESTION: Yes.

19 MR. SPEARS: Well, because, Your Honor, the whole
20 notion of the count 1 conspiracy is that, Mitchell, Shelby
21 and Dean were engaged in the conspiracy. I think that kind
22 of belies the assertions very central to that count. We can
23 kind of go through there. You find other--

24 QUESTION: Would you say, though, that somebody
25 reading thousands and thousands and thousands of pages would

1 immediately know that was Brady material?

2 MR. SPEARS: Your Honor, when you have charged the
3 defendant with a criminal conspiracy like they did in count
4 1 of this indictment, yes, Your Honor, I do think they
5 understood it.

6 QUESTION: All right, I asked you for your
7 opinion, Mr. Spears. I wish you wouldn't be quite so
8 belligerent.

9 MR. SPEARS: I'm sorry, I'm not trying to be.

10 QUESTION: Yes, I agree with Judge Wald.

11 Let me ask one more question, Mr. Spears and I
12 would ask you, too, not to be belligerent.

13 Forget the oral argument today. What do you think
14 is the strongest argument you present or the weakest part of
15 the Independent Counsel's case on this? There has been a
16 long argument, but I ask you to focus on what you think is
17 your strongest position.

18 MR. SPEARS: Your Honor, I think the problem with
19 this case is that it proceeds without any discernible
20 standard of criminal conduct. What we have here is that,
21 Ms. Dean was employed as an executive assistant to the
22 Secretary of HUD. There were people who contacted her.
23 Some people she knew; some people she didn't. Some people
24 she had independent relationships with, others she did not.

25 She sought to discharge those responsibilities.

1 She worked for the Secretary. He was the person
2 responsibility for making these decisions. At the end of
3 the day, Your Honor, if there are no discernible standards
4 between right and wrong.

5 QUESTION: Let me test the point there.

6 Let's suppose that instead of the \$4,000 check,
7 she had received a \$100,000 check.

8 MR. SPEARS: An absolutely different deal.

9 QUESTION: Wait, wait, please counsel, let me
10 finish my question.

11 Let's suppose Mitchell had given her directly
12 \$50,000. The third conspiracy, she had gotten \$50,000, too.
13 Is it then clearly a criminal case?

14 MR. SPEARS: I think you have a criminal case.

15 QUESTION: So then, if we focus on the
16 consideration and we conclude that she did get consideration
17 in each one of these three transactions, then there is
18 enough evidence to establish a conspiracy?

19 MR. SPEARS: No, Your Honor, that's not correct.
20 If I may, I'd like to explain the difference.

21 That is, in normal relationships, there is an
22 exchange of whatever. There is a certain commerce in a
23 relationship. The question is, whether the consideration
24 that was given, Your Honor, consistent with that
25 relationship or inconsistent with that relationship. If it

1 is consistent with that relationship and it is an innocent
2 relationship then, therefore, Your Honor, I don't believe
3 that you can infer criminal conspiracy or criminal activity
4 from that consideration.

5 QUESTION: Isn't that the very reason why we have
6 these widespread bars against doing business with your
7 friends and family members? There is there is that
8 relationship, the nepotism in the--

9 MR. SPEARS: Your Honor, that is why we have
10 ethics regulations, as I demonstrated in our opening brief.

11 QUESTION: And even some criminal statutes on
12 that.

13 MR. SPEARS: Yes, Your Honor.

14 The point is, when you have actions which are not
15 objectionable under ethics standards, how can you turn--an
16 Independent Counsel wants to criminalize activity which is
17 not objectionable under the ethics standards.

18 Judge Silberman, to answer your question, Deborah
19 Dean gets a \$500 check from John Mitchell at Christmas
20 time--or excuse me--as the Independent Counsel alleged of
21 December 25, 1984. That is something that is consistent
22 with that relationship. She gets a \$100,000 check from
23 Mr. Mitchell on October 13th. That is something that is
24 inconsistent with that relationship. You can then
25 reasonably infer that something else is going on.

1 When she has lunch with Richard Shelby, that is
2 something that is consistent with their relationship. When
3 he flies her to Bermuda, that is something totally
4 different, okay.

5 The one thing that I would find--

6 QUESTION: What was her social relationship with
7 Shelby?

8 MR. SPEARS: They were friends. They had lunch
9 together. They would--

10 QUESTION: When did she get to know him?

11 MR. SPEARS: She got to know him during the
12 administration. He was a high-ranking--he was a political
13 type, affiliated with the Reagan campaign and she got to
14 know him as she was working at HUD. I believe that she--

15 QUESTION: Not prior to HUD?

16 MR. SPEARS: No, sir, I don't believe so.

17 QUESTION: Her business relationship turned into a
18 social relationship?

19 MR. SPEARS: I believe it was just they met each
20 other and then it was kind of a--they had a business
21 relationship and an independent social relationship.

22 The one final thing before I get out of here is,
23 the point was Mr. Swartz listening through, well, what is my
24 evidence. My evidence, he says, is that Ms. Dean had the
25 power to make these decisions. She did not have the power

1 to make those decisions. The Secretary had the power to
2 make those decisions.

3 QUESTION: No, but she had the power to influence
4 them.

5 QUESTION: Influence is enough.

6 MR. SPEARS: The second thing that I would like to
7 point out is, in terms of the decisions that she ostensibly
8 influenced, the one that Mr. Swartz decides to talk about is
9 the Alameda Towers. That was the one that was in Puerto
10 Rico, where Broussard, the lobbyist, was out arguing or
11 telling people that she had pre-assigned units to him.

12 There is no evidence or facts, of course, that she
13 had pre-assigned those units, apart from the fact that--this
14 is what Ruby said--that Broussard had told him. There is no
15 evidence that she was aware of the fact that Broussard was
16 making these statements. In fact, if you take a look at the
17 transaction, the decision to re-assign those units wasn't
18 made by HUD headquarters. It wasn't made by HUD regional
19 administrators. It was made by local officials in Puerto
20 Rico.

21 So, the question you have to ask is--and this goes
22 back to Judge Randolph's question. What did she do? What
23 was her participation? If Broussard says she can turn over
24 a million dollars to me tomorrow and there is no way she can
25 turn over a million dollars, then what evidence is that of

1 anything?

2 The fact is, this is Washington, D. C. Lobbyists
3 call people. Lobbyists exaggerate the role they have in the
4 process. They exaggerate their influence. They call
5 everybody they can find they can find that can possibly
6 affect a decision that affects their client and they try to
7 make it done.

8 QUESTION: All right, I think we know that kind of
9 background.

10 QUESTION: The prosecution says, with respect to
11 count 3, Dean's explanation for the \$4,000 payment was
12 contradicted by the testimony of Kitchen and others. In
13 addition, undisputed evidence introduced in rebuttal shows
14 that Dean's story could not be true, since her brother's
15 apartment had in fact been sold to someone else several
16 months before the date of Dean's alleged June, 1987 attempt
17 to repay the \$4,000. That is a very strong charge by the
18 prosecution. I notice your reply brief doesn't respond to
19 that.

20 MR. SPEARS: If I may, I will be happy to do that
21 real quick now, Your Honor.

22 The point is, there are three points to a
23 gratuity. There has to be a benefit conferred upon a
24 federal employee. There was disagreement as to whether this
25 was a benefit between Kitchen and Dean. We will just go

1 with Kitchin's evidence, because it is more favorable to the
2 prosecution, which is knowingly and willingly received by
3 the employee for or because of an official act, three
4 elements.

5 So, at best, we have one element demonstrated
6 there, that she received money. We don't know why she
7 received money or what she thought when she was receiving
8 money. The question is, did she receive that money because
9 of an official act. Let's talk about the direct evidence.

10 Kitchin agreed with Dean that, the \$4,000 loan, as
11 Kitchin described it, had nothing to do with her official
12 acts. He specifically rejected any attempts to characterize
13 it as a bribe or as a payoff. So, that was Kitchin's
14 testimony.

15 QUESTION: Maybe that is his testimony. Is it a
16 thing of value?

17 MR. SPEARS: Your Honor, he basically said it was
18 a loan and it was based upon their personal relationship.
19 They had a substantial personal relationship that had
20 nothing to do with business. She helped him try to find an
21 apartment. They had dinner and drinks together on a regular
22 basis.

23 QUESTION: A loan is a thing of value. Prior to
24 the making of the \$4,000 check until whenever this was, June
25 of 1987, did Ms. Dean engage in any actions with respect to

1 any projects in which Mr. Kitchen had an interest?

2 MR. SPEARS: According to Mr. Kitchen's testimony,
3 no.

4 QUESTION: Was there any other testimony?

5 MR. SPEARS: I think Jennings was very sort of
6 soupy on that particular question. I don't think there was
7 any testimony that I can recall that she was specifically
8 involved in any of Kitchen's projects. The testimony we
9 have from Kitchen is that, he went to Ms. Dean and said, by
10 the way, Atlanta is interested in getting some mod rehab
11 funds. Do you think that Atlanta has a chance? She said,
12 yes. Kitchen said later in another conversation, what about
13 Metro Dade. Well, Metro Dade has been given a lot but, yes,
14 that is not an unreasonable application to make.

15 QUESTION: The prosecution says, Kitchen asked
16 Dean for blocks of mod rehab funding units not tied to
17 particular projects. She assured him the requests were
18 reasonable. Then Kitchen then found developers who were
19 willing to pay him to receive the mod rehab units he had
20 received from Dean. That is not true?

21 MR. SPEARS: Well, I don't think so. I think if
22 you look at that statement, you're not going to find any
23 record or excerpts supporting it. No, it's not.

24 QUESTION: No, there are record excerpts there. I
25 haven't checked them though.

1 MR. SPEARS: Yes.

2 The point is, he basically came in and said, do
3 you think it would be reasonable for the City of Atlanta to
4 apply for 200 units. She said, I don't think so. Now, if
5 that is pre-assignment of units, Your Honor, I guess we are
6 still back in the same soup.

7 QUESTION: Let me do two things. Let me find out
8 if we have any further questions.

9 Judge Randolph?

10 All right, I realize you feel that you've been
11 wronged by the amount of time. Take two minutes to say
12 anything you feel hasn't been adequately covered in your
13 prior--or you don't have to take them, but if you want to.
14 Then I think we will conclude the argument.

15 MR. SPEARS: You are very generous, Judge Wald and
16 I do appreciate the opportunity to go on.

17 It is a difficult case. It is a case where, quite
18 frankly, I still think you have to come back down to what is
19 Ms. Dean's right. Where did she go wrong? What is her
20 responsibility, vis-a-vis, to people who come to her agency
21 and how does she discharge those responsibilities. We could
22 sit down and take a look at the ethics guidelines and go
23 through and parse out what an agency might do, could do,
24 might not do.

25 You don't criminalize that entire transaction.

1 You don't presume that people are operating with
2 conspiratorial motives. You don't presume an attempt to
3 harm the United States or to defraud the United States by
4 the normal sorts of transactions that these types of
5 employees have.

6 There is no one suggesting--at least, I can't
7 figure beyond the Independent Counsel--that it is
8 inappropriate for someone to approach an agency like HUD and
9 say, my client has a project in Miami. We have to get mod
10 rehab allocations to Miami. We would like for you to do it.
11 Nothing is wrong with that. There is no discernible
12 standard here that has been broken.

13 Mr. Swartz wants to talk about how the HUD ought
14 to operate. Let's talk about how HUD was operating. It was
15 a discretionary program. It was discretion in the hands of
16 the Secretary. We talk about Ms. Dean's influence with the
17 Secretary. She was there to serve the Secretary.

18 To what extent is there any credible evidence that
19 separates Ms. Dean's decision about what she was doing and
20 the Secretary's?

21 I think it is like Mr. Barksdale said.
22 Mr. Barksdale said, when he was a federal housing
23 commissioner, that when he heard from Deborah Dean, he
24 presumed that he was hearing from Sam Pierce. That's the
25 way it ought to be. You just don't presume that a special

1 assistant or an executive assistant working for secretary is
2 off on a lark and a frolic of their own, even and especially
3 when an acting assistant secretary might have a disagreement
4 with that person.

5 We are criminalizing policy differences. We are
6 criminalizing disputes that arise in every bureaucracy in
7 this town. I have to tell you, Your Honor, if you go back
8 to the baseline elements of agreement to defraud and
9 conspiratorial conduct on the part of the defendant, those
10 elements have not been met.

11 Thank you very much.

12 QUESTION: Thank you, Mr. Spears.

13 What is it?

14 MR. SWARTZ: Your Honor, just two record
15 citations, if I may, to answer questions that were opposed.

16 QUESTION: These are in answer to prior questions?

17 MR. SWARTZ: Questions that were opposed.

18 QUESTION: All right, very briefly.

19 MR. SWARTZ: Joint Appendix 151 is a reference to
20 trial counsel for Ms. Dean's decision not to seek a
21 continuance with regard to the Brady material.

22 QUESTION: Okay.

23 MR. SWARTZ: Joint Appendix 569 through 70 is
24 testimony of Mr. Jennings, Mr. Kitchin's business employee,
25 about Mr. Kitchin getting units from Deborah Gore Dean.

1 QUESTION: Okay, thank you.

2 I think we will take a short two-minute recess now
3 before the next case.

4 [Whereupon, the proceedings in the aforementioned
5 matter were submitted.]