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February 26, 1997

BY FACSIMILE AND MAIL

Larry D. Thompson, Esq.
Independent Counsel
Office of Independent Counsel
444 North Capitol Street
Suite 519
Washington, D.C. 20001

Re: United States of America v. Deborah Gore Dean, Crim. No.
92-181-TFH (D.D.C.)

Dear Mr. Thompson:

In materials and correspondence I provided you between September 1995 and January 1996, I advised you that prior to your assuming the position of Independent Counsel, attorneys representing the Office of Independent Counsel had engaged in various acts of prosecutorial misconduct in the referenced case. Such misconduct included deceiving the courts and the jury regarding numerous factual issues and introducing documents into evidence representing them to be things Independent Counsel attorneys had reason to know they were not. I urged you to advise the court and the defense concerning any matter where this had occurred, and suggested that your failure to do so would implicate you in the misconduct of your predecessors including any such conduct that was of a criminal nature. This letter concerns one of the matters brought to your attention and constitutes a formal request to review certain public documents in your possession relating to that matter.

In Supplement I to the materials I provided you on September 18, 1995, which was a 44-page, single-spaced document styled "Nunn's Annotation Regarding Mitchell's Right to Half the Arama Consultant Fee" (Nunn Appendix), I brought to your attention that the Independent Counsel had introduced into evidence as Government Exhibits 20, 22, and 25, certain documents representing them to be things that they were not. The most important of these were Government Exhibits 20 and 25.

Government Exhibit 20 was a copy of the Arama consultant agreement bearing the following annotation by Louie B. Nunn: "1/25/84. In event of death or disability, 1/2 of above amount belongs to John Mitchell. Louie B. Nunn." The Independent Counsel introduced this document into evidence in a manner to

lead the court and the jury to believe that the annotation had in fact been made on January 25, 1984, and also made a number of explicit representations to that effect.

Government Exhibit 25 was an April 3, 1984 letter from Arama developer Aristides Martinez, enclosing, inter alia, a copy of the Arama consultant agreement bearing Nunn's annotation concerning Mitchell's right to have the consultant fee. The Independent Counsel introduced this document into evidence in a manner to lead the court and the jury to believe that the annotation was on the copy of the consultant agreement in Government Exhibit 25 when Martinez mailed it to Nunn. Attachment A is a copy of the agreement as it appears as Government Exhibit 20 and as part of Government Exhibit 25.

The various representations the Independent Counsel made concerning these documents, including an allegation in the Superseding Indictment suggesting that the annotation was an instruction to Martinez, all supported the inferences that Nunn had made the annotation in Martinez's presence and that Martinez knew about the annotation and in fact possessed a copy of the agreement bearing the annotation. Indeed, that Martinez at some point possessed a copy of the agreement bearing the annotation would appear to have been conclusively established by Government Exhibit 25, since Martinez could not have mailed Nunn a copy of the agreement bearing the annotation unless Martinez possessed such a copy.

The apparent purpose of creating this impression was to increase the chance that the court would allow the Independent Counsel to elicit, and to enhance the impact of, testimony from Martinez that in early 1984 he had been told that John Mitchell was related to Deborah Gore Dean and that she held an important position at HUD. This was consistent with the claim in the Superseding Indictment that the co-conspirators in Count One would tell their developer clients of their association with John Mitchell and that Deborah Gore Dean was John Mitchell's stepdaughter. Superseding Indictment, Count One, ¶ 6 at 8-9, ¶ 16 at 11.¹ In arguing to be permitted to elicit this testimony,

¹ In the Nunn Appendix, I misquoted ¶ 16, stating that it said:

It was a further part of the conspiracy that the Co-conspirators would tell developers/clients of their association with the defendant **DEBORAH GORE DEAN's** stepfather, Co-conspirator One.

Nunn Appendix at 6 (emphasis added). The underscored words actually are from ¶ 6. The quotation of ¶ 16 should have read:

It was a further part of the conspiracy that the Co-conspirators would tell developers/clients that the defendant **DEBORAH GORE DEAN's** was Co-conspirator One's stepdaughter.

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Associate Independent Counsel Robert E. O'Neill suggested to the court that such testimony might be crucial to the Independent Counsel's ability to establish a conspiracy as to Count One. Tr. 246-48.

Despite the fact that the Independent Counsel made numerous statements consistent with the version of facts whereby Nunn made the annotation on January 25, 1984, and the annotation was on the copy of the agreement Martinez mailed to Nunn on April 3, 1984, documents possessed by the Independent Counsel made it absolutely clear that Nunn did not make the annotation on a copy of the consultant agreement until after he received the copy of the agreement sent to him by Martinez on April 3, 1984, and that Nunn made the annotation only on his own copy. In the Nunn Appendix, I explained to you in great detail how the consultant agreement was modified in various respects prior to Nunn's making his annotation, including the addition of a one-page addendum in early February 1984 and the addition of a guarantee by the Arama General Partners between March 23, 1984, and April 3, 1984, when Martinez mailed Nunn a copy of the guaranteed consultant agreement by letter of that date. The copy of the consultant agreement Martinez mailed to Nunn did not then bear Nunn's annotation concerning Mitchell, nor did any copy in Martinez's files.²

There is no reason to believe that Martinez ever saw a copy of the annotation or knew that it existed. In fact, there is considerable reason to believe that Martinez explicitly informed Independent Counsel attorneys that he was unaware of the annotation. Specifically, immediately after the court refused to allow Associate Independent Counsel O'Neill to elicit the testimony concerning the conversation about Mitchell and Dean, O'Neill proceeded to elicit from Martinez that he was not aware that he was hiring anyone other than Nunn or that Nunn was hiring anyone else. Tr. 250-51. That testimony would then be relied upon by the Independent Counsel to support a theory directly contrary to the theory in the Superseding Indictment--namely, that, rather than being touted to the developers as suggested in the Superseding Indictment, Mitchell's role was concealed from the developers. That the Independent Counsel repeatedly asserted to the courts that Mitchell's involvement with Arama was

I apologize if this error in any manner complicated your effort to determine the truth concerning this matter.

² Attachment B is the copy of the Arama consultant agreement from Nunn's files that formed the basis for the guaranteed consultant agreement that would eventually be Government Exhibit 20 and part of Government Exhibit 25. This is the way the document appeared subsequent to the addition of an addendum in early February 1984 (as evidenced by the reference to the addendum above the signatures) and prior to the addition of the guarantee of the Arama General Partners between March 23, 1984, and April 3, 1984.

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concealed from Martinez, while knowing with absolute certainty that the assertion was false, is another issue addressed in the materials I provided. It is also a subject of Dean's recent motion for a new trial.³

In any event, Martinez's response that he did not know that he or Nunn was hiring anyone else was obviously anticipated by Associate Independent Counsel O'Neill. That fact presupposes that O'Neill knew that Martinez had never seen Nunn's annotation. Martinez may well have made this disclosure in the same May 1992 interview in which he told representatives of the Office of Independent Counsel about the conversation concerning Mitchell and Dean. This interview occurred one month after Nunn had told Independent Counsel attorneys that they would have to ask Martinez if he knew about the annotation. Nunn Grand Jury Testimony at 36 (Attachment 61 to Dean's recent motion).

³ The materials I provided also addressed the fact that, consistent with the revised theory, the Independent Counsel elicited the sworn testimony of Eli M. Feinberg that he was unaware of John Mitchell's involvement with Park Towers, another Count One project. The Independent Counsel elicited that testimony without confronting Feinberg with the three statements of immunized witness Richard Shelby that Feinberg was aware of Mitchell's involvement and was even involved in setting Mitchell's fee, and without making a Brady disclosure of Shelby's statements. The Independent Counsel then would place great emphasis on the supposed concealment of Mitchell's role in Park Towers and Arama as evidence of conspiracy. Most notably, at the end of the rebuttal portion of his closing argument, Associate Independent Counsel O'Neill relied on Feinberg's testimony in asserting that the secrecy reflected in the supposed concealment of Mitchell's role from Feinberg and Martin Fine was "the hallmark of conspiracy." O'Neill then repeatedly emphasized that Feinberg's and Fine's testimonies were absolutely unimpeached, stating that "[n]obody ever contended that they did know." Tr. 3519. As I brought to your attention in the materials provided on September 18, 1995, and as addressed at greater length in my letter to you of December 21, 1995, Associate Independent Counsel O'Neill made those statements even though he had himself been present on two occasions where Shelby stated that Feinberg was aware of Mitchell's involvement.

As a rule, the Independent Counsel would together cite three instances of concealment as reflecting the conspiratorial nature of various relationships concerning Count One: (1) Nunn's concealment of Mitchell's involvement with Arama; (2) Shelby's concealment of Mitchell's involvement with Park Towers; and (3) Shelby's concealment of his contacts with Dean concerning Park Towers. As shown above, Independent Counsel attorneys knew with absolute certainty that the first was false and had compelling reason to believe that the second was not only false, but based on perjured testimony. The Park Towers Appendix I provided you also shows that Independent Counsel attorneys knew with absolute certainty that the third was false.

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Yet the written report of the Martinez interview that the Independent Counsel provided to the defense (Attachment 1 to the Nunn Appendix) shows no questioning of Martinez whatever about the consultant agreement that would be Government Exhibit 20, the attorney agreements that would be Government Exhibits 21 (prior to the \$50,000 increase) and 22 (with the \$50,000 increase noted), or the copies of both agreements that would be attached to Government Exhibit 25. The interview report does show, however, that Martinez was questioned serially about the documents that would become Government Exhibits 19, 23, and 24, and the transmittal letter in Government 25. Interview Report at 4-5. This suggests that Martinez may in fact have been questioned about the agreements, including questioning as to whether he was aware of Nunn's annotation concerning Mitchell's right to half the consultant fee, but Independent Counsel attorneys excluded that questioning and Martinez's response from the report of the interview that it provided to the defense.

In addition to bringing the above matters to your attention in the Nunn Appendix provided on September 18, 1995, I separately discussed the fact that these exhibits were false at pages 21-22 of my transmittal letter. I again addressed this matter at page 7 of my letter to you of December 5, 1995, in which I stressed that you had an obligation to immediately advise the court and the defense concerning this and other matters where Independent Counsel attorneys had misled the court.

By letter of February 18, 1996, you advised me that the materials and correspondence would be reviewed. Over the next year, however, I did not hear from you concerning any of the matters raised in the materials I provided you.⁴ Nor did you advise the court or the defense that the Independent Counsel had endeavored to mislead the court in any. In particular, you did not advise the court or the defense that Government Exhibits 20 and 25 were not what the Independent Counsel had represented them to be.

⁴ Recently, by letter of February 18, 1997, you did respond to my letter of February 11, 1997, in which I asked you various questions concerning the apparent holding in United States of America v, Deborah Gore Dean, 55 F.3d 640 (D.C. Cir. 1995), that statements by officials or agents of executive branch agencies concerning matters within the jurisdiction of those agencies are covered by 18 U.S.C. § 1001, regardless of whether the statements are made to "department or agencies of the United States" within the meaning of that statute. Among my questions was whether you agreed that, according to that decision, any material false statement by an official or agent of a department or agency of the United States in the course of the prosecution of a civil or criminal matter in the federal courts--whether made to the defense or to the court--violated 18 U.S.C. § 1001. In your letter of February 18, 1997, you indicated that you could not respond to my questions at this time.

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The Independent Counsel did, however, continue over the course of that year to make a number of representations to the courts in this and at least one other case that were contrary to the facts, as described to you in the materials and correspondence I had provided. Most pertinent to the subject of this letter is the statement at page 9 of the Government's Opposition to Defendant Dean's Motion for New Trial (Jan. 15, 1997):

... The evidence showed that in January 1984 Nunn had entered into two agreements with the developers of Arama to seek mod rehab funding for the projects and signed over part of the fees called for by these agreements to Mitchell. Trial Tr. at 238-42, 1351-52, 1368-69, GX 20, 21.

It is true, of course, that the evidence did show that in January 1984 Nunn had signed over part of the fees called for by these agreement to Mitchell, or, more precisely, part of the fee called for by one of the agreements. But it was false evidence that showed this. I do not think that stating that "[t]he evidence showed" would make this less of an effort to mislead the court to believe that, consistent with prior representations of the Independent Counsel concerning Government Exhibit 20, Nunn signed over half the fees in January 1984.

In any event, if you do maintain that Nunn in fact signed over half the consultant fee to Mitchell in January 1984, I would appreciate your specifically so advising me. I would also appreciate your advising me if you maintain that Nunn's annotation concerning Mitchell was on the copy of the consultant agreement made part of Government Exhibit 25 when Martinez sent the April 3, 1984 letter to Nunn.

Further, as I understand the procedures of the district court, the government retains the originals of exhibits it introduced into evidence in a criminal case. I would assume, however, that these exhibits are nevertheless public documents that are available for review by members of the public. Therefore, as a member of the public, I am requesting the opportunity to examine the originals of Government Exhibits 20, 21, 22, 25, and 33. I would like to do so sometime this week. The review should not take more than an hour and I am very flexible with regard to timing. I can be reached during the day at (202) 887-4453.

Finally, at the hearing on February 18, 1997, at which you and the Deputy Independent Counsel also were present, Associate Independent Counsel Michael A. Sullivan argued for the Independent Counsel, and in doing so discussed a number of matters addressed in the materials I provided to you. As I indicated to you in my letter of December 5, 1995, each attorney of record on this case has the same responsibilities as you with

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regard to a number of ethical issues. Accordingly, I will henceforth copy Mr. Sullivan with my correspondence to you.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: Dianne J. Smith, Esq.
Deputy Independent Counsel

Michael A. Sullivan, Esq.
Associate Independent Counsel

Attachments