

## PART V

### INDEPENDENT COUNSEL EFFORTS TO PREJUDICE THE JURY AGAINST DEAN

Adequately appraising Independent Counsel attorneys' conduct with regard to issues addressed in Parts I through IV requires an understanding of the efforts of those attorneys to prejudice Dean before an entirely African-American jury. The sections below describe a variety of tactics Independent Counsel attorneys employed to achieve that end, including, among other things, ridiculing Dean during her testimony and attempting to make her appear to falsely accuse others of dishonesty in circumstances where Independent Counsel attorneys had reason to know that Dean's testimony was in fact true. These sections also describe how Associate Independent Counsel O'Neill engaged in a highly inflammatory closing argument, in which he repeatedly mischaracterized the record and, through that and other means, sought to lead the jury to believe numerous things that he knew were false, and in which he more than fifty times stated that Dean had lied on the stand, often in circumstances where he had strong reasons to know that she had not lied. These sections also describe the crucial role of certain government rebuttal witnesses who Independent Counsel attorneys had compelling reason to believe had testified falsely.

#### A. Background

The jury in this case was initially composed of eleven African-Americans and one white. On the fifth day of the defense's case, the white juror would be dismissed following a heart attack and replaced by a twelfth African-American juror. Tr. 2539.

The trial occurred at a time when the nation's attention was focused upon issues of jury race/defendant race/victim race, as a result of the riots following the trial of four Los Angeles police officers for assaulting Rodney King in 1991, and the trial of the African-American defendants alleged to have criminally assaulted Reginald Denny, a white truck driver, in the course of those riots. The latter trial was occurring contemporaneously with the trial of this case, and the deliberations of the jury in that case received substantial media attention.<sup>1</sup> Dean herself would be on the stand for all or part of eight trial days between October 5, and October 18, 1993, days largely coinciding with the deliberations and rendering of the initial verdict (October 18) in the Los Angeles case. Closing argument would commence on October 20, 1993, the day the final verdicts were rendered in the Los Angeles case.

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<sup>1</sup> See, e.g., Crosby, Judge Orders Break for Tense Jurors in Denny Beating Trial, The Washington Post, Oct. 10, 1993, at A10, col. 2; El Nasser, Cooled-Off Jury Goes Back to Work, USA Today, Oct. 11, 1993, at A3, col. 6; El Nasser, Juror Furor Rattles Denny Trial, USA Today, Oct. 12, 1993, at C3, col. 2; Hamilton, Judge Dismisses Denny Case Juror, The Washington Post, Oct 12, 1993, at A3, col. 1; Hamilton, Second Denny Trial Juror is Replaced, The Washington Post, Oct. 13, 1993, at A5, col. 1; Edmonds, For Juries, High Anxiety, USA Today, Oct. 14, 1993, at A3; Hamilton, Replacement of Two Jurors Brings Out Critics in L.A., The Washington Post, Oct. 14, 1993, at A3, col. 1; El Nasser, Record Reveals Juror Disarray in Denny Trial, USA Today, Oct. 15, 1993, at A1, col. 2; Hamilton, Denny Beating Trial Judge Releases Juror Transcripts, The Washington Post, Oct. 15, 1993, at A2, col. 5; El Nasser, Key Charges Stymie Denny Jury, Oct. 18, 1993, at A3, col. 3.

Recently there had also been considerable attention to racial tensions in Miami, where a number of the projects at issue in the case were located. Those tensions involved conflict between African-Americans and Hispanics and had been heightened at the end of May 1993 when an Hispanic police Officer was acquitted of the 1989 slaying of two African-Americans that had sparked riots several years earlier.<sup>2</sup> That same month had witnessed the end of a three-year African-American economic boycott of Miami in protest to perceived limitations on black opportunities in the hotel industry.<sup>3</sup>

The case involved allegations relating to former Attorney General John N. Mitchell, a figure who frequently had been an object of notoriety during the two decades of recurring attention to events following the Watergate break-in. This created the danger that the jury might consider Dean to be guilty simply because of her association with Mitchell.

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<sup>2</sup> Booth, Police Officer's Retrial Set for Florida Capital, The Washington Post, Mar 6, 1993, at A3, col. 5; Booth, Street Deejaays Pump Positive Message to Miami on Eve of Sensitive Retrial, The Washington Post, May 15, 1993, at A3, col. 4.; Booth, Officer's Retrial Starts in Florida, The Washington Post, May 18, 1993, at A3, col.1; Booth, Jurors in Shooting Retrial Deliberate Fate of Suspended Miami Police Officer, The Washington Post, May 28, 1993, at A3, col. 1; Booth, Law Officer is Acquitted in Florida, The Washington Post, May 29, 1993, at A1, col. 1; Rohter, Tensions Surrenders to Relief as Miami Reacts to Verdict, The New York Times, May 29, 1993, at 18, col. 1;

<sup>3</sup> Booth, Miami Agreement Ends a Costly Black Boycott, The Washington Post, May 13, 1993, at A3, col. 4; Rohter, As Hispanic Presence Grows, So Does Black Anger, The New York Times, June 20, 1993, at A1, col. 2; Nicole, Empowerment Agreement Ends Miami Boycott, Black Enterprise, Aug. 1993, at 19.

Several years earlier Dean had received immense publicity in the principal local newspaper and the national popular press, frequently with suggestions that she had taken actions without the knowledge of Secretary Pierce. For example, in the December 25-January 1, 1990 issue of People Magazine, Dean had been featured as one of "The 25 Most Intriguing People of the Year." That issue contained a picture of Dean surrounded by African-American demonstrators<sup>4</sup> opposite an article describing her as someone who had filled a power vacuum created by Pierce, whom the article characterized as "a Cabinet-level hologram" who spent much of his time watching television. Dean was described as the person who "controlled the paper flow and knew how to use [Secretary Pierce's] autopen."

The article concluded with a discussion of Dean's relationship to John Mitchell and the \$75,000 payment he had received for the Arama project:

Deborah Dean's mother, Mary, lived with convicted Watergate conspirator John Mitchell after he got out of jail. Deborah came to refer to him as her stepfather, or sometimes "Dad." So here's a mystery for a rainy night: how Dean, with Mitchell's notorious example before her, fell into the same sink--and even cut Mitchell in for \$75,000 in consulting fees.

Dean Rule 33 Mem., Exh. NN.

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<sup>4</sup> The picture was taken from the front page of The Washington Post, which covered an incident where a group of protesters gathered outside Dean's home. Spolar, Face-Off on a Georgetown Doorstep, Aug. 19, 1989, at A1.

The suggestion in the People Magazine piece that Dean had used the Secretary's autopen without authority was a common theme in these accounts, as were suggestions that Dean was actually running HUD, that she had deceived Pierce about her activities, and that Pierce blamed her for improprieties in the mod rehab program as well as other problems at HUD.<sup>5</sup> The nature of that coverage, with the suggestion that

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<sup>5</sup> See, e.g., Ifil, Ex-Secretary Pierce says HUD Aides Deceived Him: Subsidy Awards 'Automatically Approved', The Washington Post, May 27, 1989, at A1. (The article reported that Secretary Pierce "said that he delegated the actual decisions to his aides, including then-executive assistant Deborah Gore Dean .... " and that he "'automatically approved' every project selection made by the panel." Pierce was also quoted as observing, "there was some lying going on, no doubt in my mind." Id. at A17);

Martz, Poking Into HUD's Swamp, Newsweek, June 26, 1989, at 19 (A picture of Dean before the Lantos subcommittee would bear the caption: "Taking the fifth: Pierce blamed his longtime aide Dean, but she wouldn't talk.");

Traver, The Housing Hustle, Time, June 26, 1989, at 18 (The article stated: "Pierce stood idly by as his executive assistant Deborah Gore Dean, 35, turned over contracts to firms that enlisted Washington insiders as consultants. They included Dean's close friend former Attorney General John Mitchell and former Interior Secretary James Watt." This caption appeared under pictures of Pierce and Dean: "But sources at HUD say it was controlled by Deborah Gore Dean, who was Pierce's Executive Assistant. When consultants, developers, or consultants wanted HUD money, they turned to Dean, who approved the funding requests without turning them over to Pierce for review." Id. at 19);

Waldman, The HUD Ripoff, Newsweek, Aug. 7, 1989, at 16, 18 (With large pictures of Pierce and Dean on facing pages, the article described Dean as the "de Facto CEO of HUD," and noted: "She operated his autopen and according to a 1985 document obtained by Newsweek explicitly instructed HUD's housing commissioner that she would have final say on all moderate rehabilitation awards.");

Traver, Sam Pierce's 'Turkey Farm', Time, Sep. 18, 1989, at 20 (Opposite a full-length picture of Pierce against the Reflecting Pool and Washington Monument was a smaller picture of Dean with the caption: "' I should have checked on her more.'" The article observed: "Although Pierce pronounces himself shocked by revelations about Dean, he gave her plenty of opportunity to do his job for him. In 1986 Pierce traveled to Des Moines and was embarrassed and angered by questions about a \$225,000 HUD

a strong white woman had manipulated a weak black man,<sup>6</sup> not only heightened the racially sensitive nature of the trial, but created an obvious danger that jurors' decisions would be based, not on the evidence presented in court, but on something read in the press.

That Dean's jury was entirely African-American complicated her defense in a variety of respects, particularly with regard to the Arama project, since, in addition to Secretary Pierce, Maurice Barksdale and Lance Wilson were both African-Americans. Dean's testimony on Arama would differ with Barksdale's. Dean's contentions concerning the Mitchell telephone message slips would be legitimately perceived as placing the responsibility on Wilson, as well as contradicting Barksdale. And Dean's broader claims that everything she did regarding the mod rehab program was authorized and approved by Secretary Pierce could be perceived as placing blame on Pierce.

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grant that the city was to receive--without his knowledge. Dean had used the secretary's autopen to approve the grant." Id. at 22).

<sup>6</sup> The racial implications did not go unnoticed at the time. One African-American observer noted: "Am I crazy to think that there's racism and sexism coloring the portrait of Deborah Gore Dean and Samuel Pierce, as a strong white woman controlling a weak black man." Edley, HUD Crud, Sleaze Fees, and the Law's Limits, Legal Times, Aug. 21, 1989, at 22.

At a minimum, from the outset the OIC had evidently intended to attempt to take advantage of the socioeconomic disparity between Dean and the jury.<sup>7</sup> The OIC sought to introduce into evidence a picture that had been taken in a flyover of Marwood, Dean's family's estate in Potomac (Gov. Exh. 257), which could have had no purpose than to suggest to the jury that Dean was very wealthy.<sup>8</sup>

Associate Independent Counsel O'Neill's opening argument was provocative from the outset. After initially explaining that the case was about white collar crime which could be even more serious than the street crime "we're all familiar with"--in the course of which explanation he would once say "white color crime" (Tr. 32)<sup>9</sup>--he would make repeated references to "prominent, powerful people," "powerful prominent people," and "rich, powerful consultants," who he maintained had usurped the authority of the local housing authorities, causing local priorities to be ignored.<sup>10</sup>

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<sup>7</sup> Because it was to be a lengthy trial, the jury pool was restricted to persons who would be available for extended service. That necessarily made the jury a relatively unaffluent group in comparison with all eligible jurors.

<sup>8</sup> The defense objected of the use of the exhibit. The objection was either sustained by the court or the OIC subsequently withdrew the exhibit.

<sup>9</sup> That O'Neill did not intentionally misspeak makes his remark no less significant. It is possible, of course, that there was a mistranscription, though the reporter correctly transcribed "white collar crime" two other times on the same page.

<sup>10</sup> Appendix V-A sets out some of O'Neill's more provocative remarks on that theme.

Turning to a description of the facts, he wasted little time in alerting the jury that John Mitchell was the former Attorney General and someone whom the jury had probably heard about. Tr. 43.<sup>11</sup> And in explaining that Aristides (Art) Martinez was the developer of properties in Miami that would be at issue in the case, O'Neill would immediately note that Martinez was "a Cuban individual." Tr. 51.

On the second day of testimony in the OIC's case-in-chief, the racial element underlying that theme that "these rich, powerful consultants ... took the place of the public housing authorities" (Tr. 43) manifested itself. After eliciting from Melvin J. Adams, the former director of the housing authority in Dade County, Florida, that the need to favor developers who had caused HUD to allocate the mod rehab units to the housing authority caused local priorities to be ignored, Associate Independent Counsel Sweeney conducted this questioning:

Q. Did you still have local priorities at the PHA?

A. We did not have published local priorities. We -- since the priorities would play no role, we did not have local priorities that were in effect.

Q. Did you have local needs in the community that would have been priorities?

A. Yes, we did.

Q. And could you described for us what those needs were.

A. Well, they would have been the same as before. We would have wanted to have a substantial number of properties being rehabilitated in the inner city. Areas that needed attention would have benefited from the program.

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<sup>11</sup> O'Neill stated: "Another person will be John Mitchell, and your question is, you already saw a question, he's a former attorney general of the United States."



And the county had a policy to encourage minorities in Dade County. That meant black entrepreneurship. We would have encouraged black developers to get a piece of the pie.

Tr. 411.

Later, Dean's former secretary, Sherrill Nettles-Hawkins,<sup>12</sup> would describe her understanding of the role of consultants in the following terms:

After a period of time, I learned that the role of the consultant was more or less like a negotiator for the housing authority, but then I later find that the housing authority was just a ghost entity used to, to get the funding.

Tr. 1553.

Associate Independent Counsel Sweeney shortly followed up on the reference to "ghost entity" with this questioning:

Q. A moment ago, you described the PHA as a ghost entity. Could you tell us what you mean by that?

A. That the, that the housing authority was perhaps named in a particular letter or used to, in order to get the funding. They didn't actually benefit from the funding.

Q. Who did benefit?

A. The consultant and whoever they were actually working for.

Tr. 1554.

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<sup>12</sup> Nettles-Hawkins, who was a young African-American woman, may have been the most important witnesses in the eyes of the jurors. Apart from her testimony about housing authorities as "ghost entities," she presented testimony that Louis Kitchin had called to ask something concerning when certain units would be coming and whether a letter could be project specific. Tr. 1550-51. With regard to that matter, Dean testified that Nettles-Hawking would never lie about anything but that she (Dean) could not imagine a consultant calling and saying "Where are my units." Tr. 3128-29. The single instance where the jury requested further information from the court concerned Nettles-Hawkins' testimony, with the jury requesting to know the time frame of the call where Kitchin asked "'Where are my (his) units.'" Tr. 3606. The court indicated that there was no testimony as to the time frame. Tr. 3606-9.

The above testimony of both Adams and Nettles-Hawkins would play a significant role in O'Neill's closing argument. In particular, he would recall Adams' testimony about local priorities to the jury no less than three times.<sup>13</sup>

In that argument, O'Neill would also pursue the theme developed in the OIC's case-in-chief that Dean had made the decisions without the knowledge of Pierce. From three of the four government witnesses who served as Assistant Secretary for Housing or Acting Assistant Secretary for Housing, the OIC also elicited vague or sweeping statements concerning Pierce's limited role in the decision-making process. Former Assistant Secretary for Housing Maurice Barksdale testified that Pierce's management style was "totally hands off" and that during Wilson's and Dean's tenure as Executive Assistant, "I felt Lance Wilson was running the Department"; "I felt Deborah was running the Department." Tr. 464. Former Acting Assistant Secretary for Housing Janet Hale described Pierce as "a delegator of authority, very remote, not a direct hands-on manager" (Tr. 732) and testified that Dean made all the decisions Hale signed off on. Tr. 726. Former Acting Assistant Secretary for Housing Secretary Silvio DeBartolomeis described Pierce's management style as "[v]ery hands off or laissez-faire, if you will"; when asked "who ran HUD," he stated: "The Executive Assistant to the Secretary." Tr. 814. None of these witnesses, however, testified to an instance where the witness knew, or believed, that Dean had acted without the knowledge or authority of Pierce.

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<sup>13</sup> As shown in Section F, *infra*, in pressing this theme that local authorities were cut out of the process, O'Neill would make one of numerous statements in closing argument that was patently contrary to the record.

It was not until day the white juror was replaced, at the beginning of Dean's fourth of her eight days of testimony, that the prosecution engaged in tactics that the court would perceive as playing to the racial differences between Dean and the jury. When during her direct examination Dean first started to discuss her mother's relationship with John Mitchell--an issue the court would recognize to involve a "crucial allegation in the case" (Tr. 2594)--O'Neill interrupted to make a snide comment. Tr. 2592. Though the court admonished O'Neill for the remark (Tr. 2592-95), the following day, when Dean was making a vigorous defense of her conduct, O'Neill again interrupted with a comment intended to ridicule Dean. Tr. 2671.

Following this interruption, in a bench conference, the court questioned whether racial considerations had prompted O'Neill's remarks:

THE COURT: Mr. O'Neill, let me ask you if that had been a black defendant on the stand with a white jury, would you be making the same kind of smart comments you've been making with a white defendant and a black jury?

MR. O'NEILL: Do you think I'm making those racially?

THE COURT: No, what I'm impugning is that you're making these comments with a white defendant and a black jury which you wouldn't be doing with a black defendant and a white jury, and I resent that. I think it may be a basis eventually for the bench to take a look at this case.

Tr. 2776.

The following day, when O'Neill questioned the remarks set out above, the court elaborated its concerns:

MR. O'NEILL: Judge, just briefly. Yesterday you put something on the record. I apologized for my remark before the jury and it was an unfortunate remark. However, I didn't understand what you said at the end and I just want to put that on the record. There was no intention, and I don't think the record supports anything that we ever played race here.

It's an all black jury, but we exercised no peremptory challenges on any white people.

THE COURT: I didn't say you did. I think the import of the actions -- as I said, I think if it had been a well known prominent black person as the defendant in this case, as a good prosecutor, and you are a very good one, [you'd have been<sup>14</sup>] careful not to show any disrespect --

MR. O'NEILL: I understand.

THE COURT: I was a little concerned with this jury. All right.

Tr. 2786-87.<sup>15</sup>

During the first day of Dean's cross-examination, the court again found it necessary to admonish O'Neill for making comments after Dean answered questions, noting that the only purpose of such comments was to improperly influence the jury. Tr.

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<sup>14</sup> The transcript actual reads "and you've been," which the context suggests is a mistranscription.

<sup>15</sup> There was an additional basis for the court's concern about the jury as a result of events occurring during and after the defendant had called two African-American witnesses. Because of the jury's inappropriate behavior during that testimony, the court chastised the jury just before Dean took the stand. Responding to defense counsel's expressions of concerns about the behavior of Juror Number 7, the court noted that her behavior had been a principal reason for chastising the jury, and that she had not taken the reprimand well. Tr. 2269. The following day Juror Number 7 was late, and arrived with excuses for Juror Number 5, who did not appear at all. Tr. 2277-79. Juror Number 7 also explained that Juror Number 5 had borrowed money from her. Tr. 2293. When the decision was made to strike Juror Number 5, defense counsel requested that Juror Number 7 also be stricken both because of her behavior and because of her involvement with Juror Number 5. Tr. 2295-96.[redacted] O'Neill opposed striking Juror Number 7, noting that the only time that she was laughing was during the testimony of a defense character witness, adding that he (O'Neill) had been laughing during part of that testimony as well. Tr. 2296. Though the Court acknowledged the inappropriate behavior of Juror Number 7, including that fact that the day before she had refused to look at anyone, it declined to strike her at that time. Tr. 2296-98. The following day, defense counsel again moved to strike Juror Number 7, noting that she had been asleep and was seen passing a pill. O'Neill stated that he did not notice the pill or anything else unusual about Juror Number 7. While observing that it did have some concerns about Juror Number 7's behavior, the court indicated that it did not find her behavior sufficiently unusual to warrant striking her. Tr. 2411-12.

2899-90. At this time, the court restated its concerns about O'Neill's ridiculing of Dean while she was testifying. The court stated:

I just wanted to make it clear yesterday and I don't want to rehash this again because it's over, it's water over the dam, but I'm not sure the record reflected what my concern was adequately and I don't want to leave an unfair impression to Independent Counsel. Miss Dean had been answering a question, had raised her voice and spoken very loudly and repeated a couple times she never meant to do something. That's the general context, that's not totally accurate, but said never, never it [sic] very loud several times. The remark of counsel for the prosecution was I'm sorry, I didn't hear you, and holding your hand to your ear which caused the jury to laugh and snicker. I'm not sure that would appear in the record.

The prosecutor did not use all its strikes in choosing jury and I have no question that that's a problem with choosing jury at all. My concern was that there was an insensitivity at least and maybe something much more.

These remarks are to influence the jury. We're here to give the defendant a fair trial and that's what we're all here to do.

Tr. 2900-01.

B. Dean's Direct Examination

It was made clear during the cross-examinations of Maurice Barksdale, Silvio DeBartolomeis,<sup>16</sup> and Louie Nunn that, relying on the Mitchell telephone message slips, the defense would claim that Wilson was responsible for the Arama funding. Tr. 510-11, 866-70, 1395-96.

During her direct testimony, Dean explained that Lance Wilson had been responsible for hiring her at HUD. Tr. 2169-71. The prospect that the jury would perceive Dean as improperly laying blame on an African-American who had helped her was somewhat diminished by Wilson's occasional appearance in court in apparent

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<sup>16</sup> DeBartolomeis had been on Barksdale's mod rehab selection committee at the time of the Arama funding.

support of Dean. Near the end of her direct examination, Dean was asked whether Wilson was present in the court room. She pointed him out and he raised his hand to identify himself to the jury. Tr. 2670-71.

With regard to the Arama funding, Dean testified that Mitchell had called her shortly after she had become Executive Assistant and told her that Nunn had a project that had been funded and that there was a problem with an option and the developer had to know when the funds were being assigned. Mitchell asked if she would check on the matter. Dean stated that she contacted Barksdale who appeared to know all about the matter and told her that the funding documents would be issued in a few days, which she then wrote to Nunn. This occurred about ten days after Dean was officially in the position of Executive Assistant. Dean also stated that Barksdale later brought her a copy of the rapid reply, which she then sent to Nunn. Tr. 2621-22. Dean stated that she did not know that Mitchell was receiving any money relating to the matter. Tr. 2622.

Though Barksdale had said nothing to tie Dean to the Arama funding, her testimony was nevertheless inconsistent with his, since he testified that he did not remember her talking to him about the matter at all. He had also stated that he did not know that the particular Dade County funding was for the Arama project. Tr. 457. Barksdale's testimony that he had no recollection of Wilson's talking to him about the matter (and that he would have remembered it if it had occurred), of course, was also inconsistent with Wilson's having been responsible for the Arama funding.

Dean also gave emotional testimony that she did not know that Mitchell earned HUD consulting fees until she read in the HUD Inspector General's Report on the

moderate rehabilitation program, issued at the end of April 1989, that he had received \$75,000 from Nunn on the Arama project. She first testified in detail about sending Mitchell's daughter, Marti Mitchell, to secure a copy of the Inspector General's Report from Alvin Cain, the agent in the HUD Inspector General's Office who had prepared the report. Tr. 2614-16. She then testified that after reading in the report that Mitchell had earned a HUD consulting fee, she called Cain, expressing her disbelief that Mitchell had received the fee and demanding to know if there was a check proving that Mitchell had received the fee. Tr. 2617-18. Specifically, she stated:

I told him that I considered him to be a friend and I couldn't believe that he wouldn't have told me about this before now and that I knew it wasn't true, that John would never have done that, and that he better be prepared, because I was really mad, and I wanted to see the check, and if there had been a check written to John Mitchell, Al better have a copy of it, and I was coming down there, and if I found out that he was, in any way had misinterpreted or had misrepresented John's actions, I was going to have a press conference and I was going to scream and yell and carry on.

And Al said, Al told me that he --

Tr. 2617-18.

Dean's attempt to state what Cain had told her when she asked him about the check was interrupted by an objection from O'Neill, which was sustained. Tr. 2618.

Dean then went on to testify about calling Mitchell's partner, Colonel Jack Brennan, who told her that Mitchell's HUD consulting was more extensive than was reflected in the Inspector General's Report and that Richard Shelby might be involved. Tr. 2618-19. Brennan had testified earlier that Dean was shocked when he told her about Mitchell's HUD consulting. Tr. 369.

It should be noted at this point that it would have been an extraordinary thing for Dean to testify about the call to Cain if she had not in fact called him. That she had called Cain in April 1989 hardly corroborated her statement that she had been previously unaware of Mitchell's HUD consulting, particularly since she could have called Cain simply to divert suspicion. And whatever the probative value of her statements about calling either Cain or Brennan, the testimony about calling Cain added little to the testimony about calling Brennan, which was entirely consistent with Brennan's own testimony. More significant, Dean was aware that at the time she testified Cain was assigned to the Office of Independent Counsel and was therefore readily available to contradict her testimony if it were not true.<sup>17</sup> Further, if Dean fabricated the story about calling Cain, she was apparently ready also to fabricate a story of what Cain had told her notwithstanding that Cain was available to contradict her. And, since Cain was an African-American and Dean was being tried before an entirely African-American jury, she would have reason to expect that for Cain to contradict her would have a devastating impact on her credibility.

C. Dean's Cross-Examination

During Dean's cross-examination, O'Neill would repeatedly attempt to cause Dean to accuse others, including Lance Wilson, of dishonesty. The questioning concerning these matters would later underlie O'Neill's assertions in closing argument that Dean had falsely accused others of dishonesty.

The first questioning in this regard commenced on the first day of Dean's cross-examination with a discussion of whether Dean had accepted meals from persons

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<sup>17</sup> Cain had originally been on the OIC's witness list as well as Dean's own witness list.



doing business with HUD. This questioning would form the basis for O'Neill to make the following statement in closing argument.

Mr. Sankin takes her out to lunch, out to dinner. You heard a lot of testimony that his receipts were fabricated, that they're all lies. Well as you go through them you'll see one receipt goes right on point.

And isn't it coincidental that all of his receipts are lies, all the Lance Wilson receipts are lies? Lance Wilson is actually a very good friend. All of Linda Murphy's receipts are lies? Remember Linda Murphy, one of her closest friends. I showed you that on [sic] an affidavit. And she said one of her closest friends. All of Russell Cartwright's receipts are lies. All of these people.

Look through her calendars. She's meeting with them for lunch all the time, but yet they're all lies, all attempts to deduct business expenses and commit crimes.

Tr. 3408.

By these remarks, O'Neill intended to convey that Dean had lied when she supposedly made these statements. Accordingly, it is worthwhile to set out the questioning and the facts underlying it in some detail.

When questioned by Associate Independent Counsel O'Neill concerning Sankin's buying her meals, Dean noted that Sankin probably did buy her lunch and she certainly bought him lunch or dinner on occasion but stated: "... none of your credit cards receipts that you put through, I think, are accurate." Tr. 2845. With regard to receipts not introduced into evidence that showed Sankin to have bought flowers for Dean, she stated that she did not recall that Sankin had bought her flowers but that if he remembered that he did specifically she would not argue with it. Concerning one of three receipts for flowers, which had a date corresponding with Dean's Senate

testimony, she stated that it did refresh her recollection concerning flowers from Sankin. Tr. 2845-46.<sup>18</sup>

Shortly thereafter, Associate Independent Counsel O'Neill turned to the discussion of Lance Wilson. Associate Independent Counsel O'Neill first made a point of the facts that Dean and Wilson were friends; that she had pointed him out in the courtroom; and that he had been present in the courtroom on numerous occasions. Tr. 2848. Associate Independent Counsel O'Neill then questioned Dean about certain expense records of Wilson's, who had become a consultant. At one point during this questioning, when Dean stated that she had seen Wilson's receipts before and they were very inaccurate, Associate Independent Counsel O'Neill stated: "Are you saying he, too, is lying on his taxes?" Tr. 2850.<sup>19</sup>

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<sup>18</sup> As discussed in Part III.F., the only Sankin meal receipt introduced into evidence that O'Neill questioned Dean about was Government Exhibit 11k, the July 23, 1986 receipt for the 219 Restaurant in Alexandria, which is the only receipt naming Dean or her position that in any way matches an entry on Dean's calendars. Dean stated that, although Sankin's name was penned in on one of the calendars, she believed that the entry reflecting that she had dinner with another person was correct. Tr. 3092-93.

<sup>19</sup> This was the questioning where Dean stated Wilson's receipts were inaccurate:

Q. Let me ask you then if you had lunch with Mr. Wilson on May 15, 1986.

A. I will tell you his were very inaccurate. I've seen them before, and they --

Q. Are you saying he, too, is lying on his taxes?

A. He, too? Did we mention someone else was earlier?

Q. Mr. Sankin.

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A. I think that Mr. Wilson has admitted that his expense accounts were not accurate. I know that when the Lantos hearings were going on, he did contact the committee and tell them that a lot of the things that were written off to Deborah Dean were not Deborah Dean expenses.

Q. Well, how about that date in front of you?

A. Okay. May 15? Yes, I had lunch with Lance. It's written in my calendar.

Q. Do you recall whether you spoke about co-insurance [the subject matter of Wilson's expense record] at that time.

A. Lance and I wouldn't have spoken about -- Lance knew more about HUD programs than I did, and I can't imagine why Lance and I would talk about coinsurance, but I can understand why Lance might write it off to that.

Q. Well, Lance wasn't at HUD anymore; isn't that correct?

A. No, he was not at HUD anymore.

Tr. 2850.

During that questioning, which would form the basis for Associate Independent Counsel O'Neill to later assert in his closing argument that Dean had falsely testified that "all the Lance Wilson receipts are lies" (Tr. 3408), and, later in that argument, that if Dean was telling the truth, then Lance Wilson must have lied (Tr. 3431), Dean acknowledged having lunch or dinner with Wilson on the four occasions reflected in the receipts that matched entries in her calendars (July 24, 1985, March 6, 1986, May 15, 1986, and March 15, 1987). Tr. 2850-51. Of a fifth receipt (December 3, 1986), Dean stated: "It's not on my calendar, so I can't say whether I did or not, but normally it would be on my calendar if I did." Tr. 2851.

Relying on her calendars, Dean denied being present at an event that Associate Independent Counsel O'Neill twice described as occurring on June 11, 1986; she stated that she was in California on that date. Tr. 2851. The event that Associate Independent Counsel O'Neill described as occurring on June 11, 1986, however, actually occurred on June 11, 1987. See Exhibits V-A, V-B.<sup>20</sup> And, relying on her calendar, Dean stated that she had not had lunch with Wilson on April 22, 1986 (Tr. 2849); her calendar, however, did indicate dinner with Wilson on that date.

Questioned regarding a July 17, 1986 dinner party that Wilson's expenses records indicated he had given for Dean and a number of other persons at Mr. K's, Dean testified that the event was a birthday party for Lynda Murphy thrown by Murphy's husband, and that Wilson, who attended, had apparently picked up the check and

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<sup>20</sup> Dean's calendars placed her at a luncheon meeting honoring Secretary Pierce, on June 11, 1987, at the L'Enfant Plaza Hotel, while Wilson's receipt of that date is for the Monocle Restaurant. On the other hand, one might expect that if Wilson was in Washington, he would attend an event honoring Pierce. In any case, had O'Neill given Dean the correct date, she might have been able to clarify the matter based on her calendars.

written it off as if it were something for Dean. She stated that Wilson had acknowledged that the party was not for her. Tr. 2850-51. Associate Independent Counsel O'Neill had no reason to doubt this testimony. Dean's calendar indicated that she was attending a birthday party for Murphy on the date in question. Very likely, the calendar of Richard Giegengack, a close friend of Murphy's husband, said the same thing. Murphy and Murphy's husband were both cooperating with the OIC and were also available to confirm Dean's testimony.

Further, apart from the suggestion in Dean's calendar that the December 3, 1986 receipt also did not apply to her, Associate Independent Counsel O'Neill knew for a fact that Wilson sometimes made false statements on his receipts. The OIC possessed an expense record where Wilson claimed an expense for Dean as Executive Assistant at HUD in March 1988, almost eight months after Dean had left that position. Exhibits V-C, V-D. The OIC also had prosecuted Wilson for making false statements purportedly on behalf of his employer in connection with a conspiracy to defraud the United States. See Second Superseding Indictment, United States v. Lance Henry Wilson, Crim. No. 91-0399 (D.D.C.).

After the initial discussion of Wilson's receipts, Associate Independent Counsel O'Neill questioned Dean about Lynda Murphy, a lawyer whose HUD work included some mod rehab consulting. Murphy was a friend of Dean's, and her husband, Jon Boisclair, was a very close friend of Richard Giegengack. Tr. 2853-54. Dean stated with regard to the two couples' buying meals for one another, "it was absolutely equal." Tr. 2854. O'Neill questioned Dean about three of Murphy's expense records purporting to relate to Dean that Murphy had apparently claimed to be business related.

One expense record concerned drinks when the two couples were in Vail, Colorado in February 1986, at a place called "The Saloon Across the Street." Responding to Associate Independent Counsel O'Neill's question whether Murphy had purchased drinks for Dean at the place, Dean said that it was impossible because Murphy had broken her leg and was in the hospital. Tr. 2855. When O'Neill asked whether Boisclair paid for the drinks, Dean said she did not remember a place called The Saloon and did not think that she could have been in more than one restaurant while she was there and that she (Dean) had paid on that occasion. When Associate Independent Counsel O'Neill asked whether Dean knew if Murphy deducted the expense, Dean indicated that she did not know. Tr. 2855-56.

When asking these questions, Associate Independent Counsel O'Neill presumably knew from Murphy's interview that she (Murphy) in fact had been in the hospital the entire time Dean was in Vale and that Murphy believed that she had deducted the entire trip because the trip was in connection with a business conference, not because Dean was present on any occasion. Dean Rule 33 Mem., Exh. PP at 7-8. Presumably, Associate Independent Counsel O'Neill also knew that if Murphy had deducted any drinks that were in fact bought for Dean at The Saloon Across the Street on the basis that they involved the discussion of business, while Murphy herself was in the hospital, the deduction would have been improper.

Associate Independent Counsel O'Neill then questioned Dean about going to dinner on July 28, 1986, with Murphy and a number of other people where HUD business was discussed. Dean stated that she recalled the event very well, stating that it was a birthday party for Murphy's husband held at the 1789 and that no HUD

business was discussed. Tr. 2856-57. Whether or not any HUD business was discussed in or out of Dean's presence, however, Associate Independent Counsel O'Neill knew that in fact the event was a birthday party for Murphy's husband, Jon Boisclair, because that is what Dean's calendars had indicated.

Associate Independent Counsel O'Neill also showed Dean a Murphy expense record for the Somerset account, which contained the entry "Dinner Debbie Dean, Drinks, \$278.63," and asked if Murphy had sought Dean's assistance on the Somerset matter. Dean stated that Murphy had sought Dean's assistance and that she (Dean) had met with the owner, but that she and Murphy had not had drinks regarding it. The backup documentation for the expense record indicated that it was based on two separate receipts for the Ritz Carlton Hotel (\$230.75 and \$21.75), each with posting dates of April 22, 1987, and a receipt for The Guards (\$26.60) with a posting date of April 29, 1987. Exhibits V-E, V-F.<sup>21</sup> On the latter date, Dean's calendars show her at the President's Dinner. There is nothing in her calendars suggesting that the former events involved her.<sup>22</sup>

Associate Independent Counsel O'Neill then questioned Dean about certain receipts for Loury Gay and Richard Davis, of the firm of Black, Manafort, Stone & Kelly. Dean stated that she was at each of the events in question. Tr. 2863-64.

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<sup>21</sup> The three transactions apparently comprised all transactions on a MBNA account for April 1987.

<sup>22</sup> Based on a transmittal memo in Dean's files, O'Neill also questioned her about whether Murphy had sent her tickets to a National Housing Conference dinner. Dean indicated that she had no recollection of attending the dinner or of getting the letter from Murphy, but stated that "I know that did come from my files, so I'm not going to say that never happened." Tr. 2858.

Associate Independent Counsel O'Neill then asked Dean if she ever had meals with a member of that firm named Russell Cartwright and she said she had never eaten with Russell Cartwright. Associate Independent Counsel O'Neill then asked her about whether she had dined with Cartwright and Abbie Weist on October 22, 1987, and Dean repeated that she had never eaten with Cartwright. Tr. 2865.

The receipt that formed the basis for that questioning was actually for October 27, 1987, and was not consistent with an entry on Dean's calendars. The receipt had previously formed the basis for questioning Abbie Weist before the grand jury about whether Dean was present at the dinner with Cartwright. Weist, testifying with immunity, had forcefully, and with clear recollection of the event, denied the possibility that Dean could have been involved in such a dinner. See Dean Rule 33 Mem., Exh. OO.<sup>23</sup>

Nevertheless, Associate Independent Counsel O'Neill would again rely on the receipt when, after a short break, he commenced to badger Dean to testify that Murphy, Wilson, and members of the Black, Manafort, Stone and Kelly firm had committed crimes by creating false receipts. The following was the questioning:

Q. Miss Dean, when we left off we had been speaking about certain expense accounts for certain people. Isn't it your testimony that Miss Murphy falsified certain expense accounts?

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<sup>23</sup> Confronted with the representation that the questioner (which it is believed was Associate Independent Counsel Sweeney) had information that Cartwright, Weist, and Dean had dined at the Mayflower Hotel on October 27, 1987, Weist first specifically denied that Dean was there. She further observed:

October 28th is my birthday, and Russell and I were out having drinks. It was just me and Russell. I remember specifically that night.



A. Well, I know that I did not -- it doesn't truly reflect what had to do with me.

Q. Then she falsified them.

A. Well, I don't -- I don't know. I -- it does not accurately reflect an expense that should have been to me or having to do with me.

Q. So they're false.

A. It's an assumption, but my assumption would be that, yes, people falsify their records.

Q. Well, I showed you the records and you stated that you were not present at certain of those meals, is that correct?

A. Yes, that is correct.

Q. So then they're false.

A. All right.

Q. How about Lance Wilson, the same thing?

A. Yes.

Q. How about Black, Manafort & Stone, the same thing?

A. I didn't look at any [receipts] from Black, Manafort & Stone. I don't remember looking at any.

Q. The Russell Cartwright entry?

A. I didn't see it. I didn't allow you to show it to me, I'm sorry.

Q. Let me show you --

A. Wedgewood, Wadsworth, Wiest [sic]. I don't have any recollection of being with Miss Wiest [sic] and Mr. Cartwright.

Q. So this would be false as well, correct?

A. He may have been with Ms. Wiest [sic].

Q. I believe you just testified that he was not with you?

A. He was not with me.

Q. So this is false?

A. All right.

Q. Now you understand that to file false statements like that would be illegal, correct, ma'am.?

A. Yes, I believe it is. Yes.

Q. So each of these individuals has committed a crime?

Tr. 2870-71.

At this point, the court sustained a defense objection. Tr. 2871-72.

The facts described above indicate that with regard to most, if not all, of the receipts with which Dean disagreed, Associate Independent Counsel O'Neill had fairly strong reason to believe that the receipts were false or improper. Further, with regard to none of them did Associate Independent Counsel O'Neill have a basis for believing that Dean was not telling the truth when she disagreed with the notation on the receipt.<sup>24</sup>

Shortly after concluding the questioning concerning the expense records, Associate Independent Counsel O'Neill also questioned Dean about whether Wilson had been responsible for sending 600 mod rehab units to Puerto Rico to benefit a former Pierce special assistant named Joseph Strauss. Dean stated that she did not know and was not a party to the funding. Tr. 2884. Asked whether she had made

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<sup>24</sup> As discussed in the Sections G-H of the Cartwright Appendix, when the OIC finally responded to demands to reveal what Russell Cartwright had stated about the receipt for October 27, 1987, Swartz's description of Cartwright's grand jury testimony (which was never shown to the defense) is difficult to interpret. The most revealing statement concerning the receipt that Weist had testified about, however, was the Cartwright testimony that it was common practice at his firm to fabricate receipts.

statements to an F.B.I. agent in a 1987 interview indicating that she believed that Wilson was responsible for the funding, Dean stated that she assumed that the agent's notes of the interview to that effect were correct and that she probably told the agent that it was not Secretary Pierce who caused the funding that therefore it must have been Wilson or Barksdale. Tr. 2882-87. Since this questioning, and the supposed contradiction of it by an OIC rebuttal witness, would form the basis for Associate Independent Counsel O'Neill to assert in closing argument that Dean "fingered Lance Wilson, her friend," the entire colloquy is set out below.

After discussion of Dean's earlier testimony concerning her calling to Secretary Pierce's attention that 10 percent of available mod rehab units were being sent to Puerto Rico (Tr. 2881-84), this questioning occurred:

Q. And is it correct that you testified that Secretary Pierce had no idea that 600 units were going to Puerto Rico because Joe Strauss was involved.

A. What he said to me was that he had been misled as to how many units there were in the country. He did not know that. He agreed it looked very bad and he felt we should bring them back. I don't recall him saying to me whether he knew that Joe Strauss was involved or not.

Q. Isn't it a fact that Lance Wilson is the one who gave those units to Joe Strauss for Puerto Rico?

A. I don't know.

Q. You don't recall that.

A. I wasn't there to recall it, I was not a party to that funding at all.

Q. Do you recall telling a special agent of the Federal Bureau of Investigation back in 1987 that "shortly before the departure of Lance Wilson from HUD he gave 600 units to Joe Strauss for projects in Puerto Rico?"

A. No, I mean -- I certainly can assume that, that I said that to the agent, yes.

Q. I'll show you a document and see if that refreshes your recollection as to what you told the agent. It's near the back, if that will help.

A. It says here "Dean" -- would you like to show me where it is because I don't -- oh, I was on the wrong page. Well, I mean this is in the FBI agents notes of what was said?

Q. The question is do you recall saying that?

A. I'm looking through a lot of this and I think it pretty much encapsulates what I said to the agent and I probably told the agent that it was my understanding that it wasn't Secretary Pierce who had done it and that left Mr. Barksdale and Mr. Wilson.

Q. I'll ask again, Miss Dean. Does this refresh your recollection as to whether you told the FBI agent that "shortly before the departure of Lance Wilson from HUD he gave 600 units to Joe Strauss for projects in Puerto Rico?"

A. No, it doesn't refresh my recollection, but I don't think that's inconsistent. I think that --

Q. I don't remember asking you that, Miss Dean?

A. I'm sorry.

Q. Is there any mention of Maurice Barksdale?

A. I don't know.

Q. Now, is it fair to say that Lance Wilson sent these units to Puerto Rico without the knowledge of Secretary Pierce?

A. I have absolutely no idea.

Q. Even though you had a conversation with Secretary Pierce where he didn't know they were going there?

A. And I just told you that Secretary Pierce did not tell me one way or the other whether he knew that Mr. Strauss was involved. He said that he had been misled. I know I thought it was wrong and he did the right thing. He brought them back.

Q. Now, this is the same Lance Wilson we're talking about who previously bought you meals, is that correct?

A. Yes, Lance Wilson is my friend and was my predecessor and advisor.

Q. And he is the one you told the FBI that sent the 600 units to Puerto Rico.

A. Well, what happens when I give you one answer and you repeat it back to me a different way. I didn't say that. I said that those are the notes of an FBI agent and I probably said it to him, if that is his shorthand version of it, that I didn't believe it was Secretary Pierce. That didn't leave too many other people for it to have been. And I believe also in that interview that I said that Mr. Strauss and Mr. Wilson were close, and they were. I also don't believe I said I approved of that.

Q. You didn't approve of what, that they were close?

A. That -- I don't approve of Special Assistants of the Secretary of HUD leaving HUD and cashing in on their former positions, no.

Tr. 2884-87.

Immediately thereafter, after bringing out the fact that Dean had worked with Wilson after she left HUD, Associate Independent Counsel O'Neill conducted this questioning of Dean:

Q. Miss Dean, Lance Wilson, that is also the same person you claim was helping John Mitchell on these matters that we talked about previously, correct, the Arama project?

A. I know that subsequent to this indictment I have had a conversation with Mr. Wilson and Mr. Wilson told me that he had been the person working with John.

Tr. 2887. The response was stricken as hearsay. Tr. 2887-88.

With regard to Barksdale, on Dean's second day of cross-examination, Associate Independent Counsel O'Neill questioned her as follows:

Q. You heard Mr. Barksdale deny any involvement in the Arama project other than signing it?

A. I heard him say he didn't remember --

Q. Was he lying?

A. That he didn't remember? How --

Q. Yes, was he lying?

A. That he doesn't remember? I don't know -- how could I say such a thing?

Tr. 2986-87.

In considering this testimony and the way Associate Independent Counsel O'Neill would later use it, it must be kept in mind that the OIC had compelling reason to believe that Barksdale had not testified truthfully at least when he denied that Lance Wilson had contacted him about Arama. It must also be kept in mind that the OIC's theory was that, contrary to Barksdale's testimony, he and Dean had talked about the funding, and that such conversation is what caused Barksdale to authorize the funding.

Associate Independent Counsel O'Neill also pressed Dean to accuse various other persons of lying with regard to certain matters. One example, which would form the basis for one of Associate Independent Counsel O'Neill's accusations in closing argument, involved Colonel Jack Brennan, regarding whom the following colloquy took place:

Q. Did he tell you that he was being paid as a consultant on South Florida I.

A. No. And when I confronted him later about John's being paid, he didn't tell me either.

Q. So he lied to you, ma'am?

A. He did not tell me.

Q. So he deliberately withheld that information from you, ma'am?

A. He did not tell me.

Tr. 3003.

There was no testimony in the case, including Brennan's immunized testimony, suggesting that Brennan told Dean he had been paid for South Florida I at any time. In light of Brennan's description of Dean's reaction to his informing her of Mitchell's role,<sup>25</sup> it is unlikely that he would have then volunteered the information to Dean that he too was being paid for HUD business. In short, Associate Independent Counsel O'Neill had no basis for questioning Dean's account of what Brennan had told her, and pressed her on whether "he lied" solely in order to later assert that if Dean was telling the truth, then "Jack Brennan lied to her." Tr. 3431. See Section E, infra.

While stating that Secretary Pierce approved all mod rehab decisions with which she was involved, Dean spoke highly of Pierce throughout her testimony. On the final day of her cross-examination, Associate Independent Counsel O'Neill confronted Dean with a letter she had written in September 1983 to the mother of Silvio DeBartolomeis (Dean had been dating DeBartolomeis at the time), in which Dean apparently had criticized Pierce for failing to promote DeBartolomeis despite the fact that Pierce himself had wanted DeBartolomeis for the position in question. Tr. 3076-77. When Dean

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<sup>25</sup> Brennan stated that when he informed Dean of Mitchell's HUD consulting, "Her reaction was shock and aghast." Tr. 369

stated that she hardly knew Pierce at the time, O'Neill asked: "Now, Miss Dean, when you say you didn't know Secretary Pierce very well at the time, is that why you wrote at the time that he lacks a backbone?" Tr. 3077.

Later, after Dean testified that Pierce had approved a certain funding and that he was "the highest authority in the Department and the most ethical person I know," O'Neill asked: "No longer spineless by that time, is that correct, ma'am?" Tr. 3105.

D. The OIC's Rebuttal Witnesses

Dean's last day of testimony was Monday, October 18, 1993. The day before, Associate Independent Counsels had met with Independent Counsel Arlin M. Adams to talk about the case, presumably discussing the final cross-examination of Dean and the OIC's rebuttal witnesses that would follow. Tr. 3050-51. Associate Independent Counsel O'Neill concluded his last day of Dean's cross-examination, having failed to question her at all about the call to Agent Cain.

Shortly after Dean left the stand, the OIC called F.B.I. Supervisory Special Agent David Bowie as its first rebuttal witness. Questioned by Associate Independent Counsel O'Neill, Bowie, an African-American, first described his background, which, in addition to 21 years with the F.B.I., included 30 years in the army, with service in Vietnam, and six years teaching public school. Tr. 3192. Bowie then testified that in a 1987 interview Dean told him that in 1984 Wilson had caused 600 moderate rehabilitation units to be sent to Puerto Rico and that Bowie believed the units went to Joseph Strauss. Tr. 3193-95.

There is no reason to believe that this testimony was not Bowie's best recollection of the interview, as refreshed by his notes. It does not appear, however,



that it materially differed from Dean's testimony. In any event, as shown below, in closing argument, Associate Independent Counsel O'Neill would rely on it both as contradicting Dean and as proving that "she fingered Lance Wilson, her friend."

The OIC's second rebuttal witness was an African-American Supervisory Special Agent from the HUD's Inspector General's Office named Alvin R. Cain, Jr., the person Dean testified she called to demand to know if there was a check proving that Mitchell had earned a HUD consulting fee.

Cain first described his prior experience as including 21 years of service in the Air Force, 20 of them with the Air Force Office of Special Investigations, before joining HUD. He stated that he had been assigned to the Office of Independent Counsel since 1990. Tr. 3195-96.

Cain then testified, in details essentially identical to those provided by Dean, concerning Dean's calling him in April 1989 to secure a copy of the HUD Inspector General's Report, including that Dean said she would send Marti Mitchell to pick up a copy of the report, and that he had made a copy of the report available which Marti Mitchell picked up that day. Tr. 3197-98.

This questioning then concluded Associate Independent Counsel O'Neill's direct examination of Cain.

Q. At or about that date, do you recall any conversation with the defendant Deborah Gore Dean in which she was quite upset with you about the contents of the report?

A. No, I do not.

Q. Do you recall her mentioning John Mitchell to you and the fact that he made money as a consultant being information within the report?

A. No, I do not.

Q. Do you recall her telling you that she was going to hold a press conference to denounce what was in the report?

A. Absolutely not.

Tr. 3198-99.

Though Cain had merely stated that he did not remember Dean's call, given the detail with which he recalled to the jury the events related to Dean's securing from him a copy of the Inspector General's report, the impression conveyed by Cain's testimony that he did not recall the telephone call was that, if Cain was telling the truth, the call did not happen. That, in any event, is how Associate Independent Counsel O'Neill would characterize the testimony in closing argument when he would place great weight on Cain's testimony in arguing that Dean lied about her knowledge of Mitchell's HUD consulting.

It may or may not be significant that, notwithstanding that Dean had made three references to a check when describing her call to Cain, Associate Independent Counsel O'Neill said nothing about a check when attempting to recall the conversation to Cain. However, as discussed in the Cain Appendix, in support of her Rule 33 Motion, Dean would provide an affidavit stating that when she asked Cain about the check, he stated that a check existed but he could not show it to her because it was maintained in the HUD Regional Office. She also stated that after talking to Cain, she told James Scanlan, whom she was dating at the time, about the call to Cain and what Cain had told her about the whereabouts of the check. Scanlan, a career government attorney, provided an affidavit stating that in April 1989 Dean told him about the call to Cain and

told him that Cain said the check was maintained in a field office. Dean argued that if the check was in fact in a field office in April 1989, it would corroborate her testimony about calling Cain.

In responding to Dean's Rule 33 Motion, and claiming that it was simply Cain's word against Dean's, the OIC said nothing whatever about the whereabouts of the check. At the same time, the OIC persuaded the probation officer to recommend an increase in Dean's sentencing level for testifying falsely about the call to Cain. The OIC was forced by a motion to reconsider the denial of Dean's Rule 33 Motion finally to address the issue of the check at a hearing on February 22, 1994. Associate Independent Counsel Swartz still refused to state what the OIC knew about the whereabouts of the check. Associate Independent Counsel Swartz did, however, produce a copy of the report of Louie Nunn's interview from the HUD Inspector General's Report, and argued that a sentence appended to the interview report had provided a basis for Dean to surmise that the check was maintained in the field.<sup>26</sup> He further argued that Dean should have her sentence increased for making false statements about the check in her affidavit. Transcript of Hearing 8-9 (Feb. 22, 1994).

As discussed in the Cain Appendix, however, any careful reading of the sentence appended to the Nunn interview makes it clear that the sentence could not

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<sup>26</sup> The sentence in the interview report, which was dated December 12, 1988, read: "Agent's note: All the contract agreements shown to Nunn were obtained from HUD-OIG audit file in Atlanta, Georgia." The interview report said nothing about any check Nunn had written to Mitchell, though it did discuss showing Nunn two checks that Martinez had written to Nunn. The report also said that Nunn had stated he did not know where any of the contracts and agreement between him and Martinez were. Cain Appendix, Att. 7.

possibly have provided Dean a basis for surmising that the check was maintained in a field office. It also is not remotely possible that Associate Independent Counsel Swartz could have believed that the sentence in fact had been the basis for the statements concerning the check in Dean's affidavit, when he relied on the sentence both to defend against Dean's claim that the OIC had relied on perjured testimony of a government witness and to seek to have Dean's sentence increased because of the testimony in her affidavit.

The court refused to accept the probation officer's recommendation to increase Dean's sentencing level on the basis of Cain's contradiction of Dean's statement about her call to him, stating that it believed that Dean may have in fact called Cain. In the course of other rulings, however, while finding that the evidence put forward "doesn't mean of necessity the government is putting on information they knew was false before the jury," the court would indicate the view that Dean in fact had made the call she described to Cain. See Cain Appendix at 24-29.

The OIC's third rebuttal witness was a HUD driver named Ronald L. Reynolds. Questioned by Associate Independent Counsel O'Neill, Reynolds testified about, among other things, his driving Dean when she told him that she was having lunch with John Mitchell or with John Mitchell and her mother. Tr. 3237-45. As in the case of Cain, Associate Independent Counsel O'Neill would place great weight on Reynolds' testimony in asserting to the jury that Dean had lied about her knowledge of Mitchell's HUD consulting.

As discussed in the Reynolds Appendix, the OIC had compelling reason, including documentary evidence, to believe most of Reynolds' testimony was false,

including the statements that Associate Independent Counsel O'Neill specifically elicited on redirect in an effort to rehabilitate Reynolds and the statements that Associate Independent Counsel O'Neill specifically cited in his closing argument. The court would find that the OIC had strong reason to believe Reynolds' testimony was false.<sup>27</sup>

In the face of Associate Independent Counsel Sweeney's "strenuously object[ing]" to Dean's request to present surrebuttal as to both Cain and Reynolds, the court denied the request. Tr. 3269-71.

E. Associate Independent Counsel O'Neill's Closing Argument

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<sup>27</sup> As discussed in the Reynolds Appendix, even before Reynolds testified it was recognized by both sides that he was an extremely unreliable witness, because of statements in his interview that were patently false and appeared to be based on things Reynolds read in the newspaper. For example, he had stated that he drove Dean to meet Mitchell for lunch about once a month and that he drove Dean to lunch at the Hay Adams or Ritz Carlton when she would say she was meeting with Mitchell, and that sometimes Dean's mother would meet them. It appears that Dean met Mitchell for lunch two or three times while she was at HUD, with none of those lunches at places mentioned by Reynolds, and that Dean never met her mother for lunch at all while she was at HUD. That Reynolds drove Dean to the Fairfax Hotel (Ritz Carlton) when she said was meeting Mitchell and her mother is one of the statements that O'Neill elicited to attempt to rehabilitate Reynolds on redirect.

As previously discussed, in closing argument, in addition to repeatedly mischaracterizing the evidence and attempting to lead the jury to believe things that he believed or knew to be false, Associate Independent Counsel O'Neill carried out a sustained diatribe against Dean's character in which he more than fifty times asserted that she had lied, often in circumstances where he believed, or knew for a fact, that she had not lied.<sup>28</sup> The OIC's rebuttal witnesses Cain and Reynolds would play a large role in the attack on Dean's credibility.

Shortly after summarizing the issues, Associate Independent Counsel O'Neill began the attack on Dean's credibility, stating:

The defendant's story just doesn't make sense. It is not credible. It is not believable. It is what you often see about admitting what you can't deny, denying what you can't admit.

Tr. 3375.

He then described the July 5, 1984 letter Dean wrote to Nunn concerning the Arama funding, and stated:

She has to admit that. It's in black-and-white, as I said during opening. But how does she deny it? Because that document in and of itself shows she's dealing with John Mitchell on Arama. She's assuring a set number of units. So how do you deny that?

You say, "Well, I got this information from someone else." So you go outside the document. You say, "Maurice Barksdale told me that."

Now Maurice Barksdale didn't testify here that he told her that, but that's what you say. You go around it, because you cannot deny what's in black-and-white, what's on these documents, written before this trial ever started. And in fact, it's written in 1984.

Tr. 3376.

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<sup>28</sup> The pervasiveness and virulence of O'Neill's attack on Dean's credibility is unparalleled in reported federal cases. Appendix V-B sets out the instances where [redacted] O'Neill stated that Dean had lied.

Associate Independent Counsel O'Neill did not at this time, or at any other time during the first day of his closing argument, discuss the telephone messages slips that Associate Independent Counsels contend are inculpatory, but that would have led any other reasonable person to believe with a moral certainty that Wilson had talked to Barksdale about the Arama funding and that Barksdale had not testified truthfully about the matter. As previously discussed those messages would also have led any responsible prosecutor, or, for that matter, any individual recognizing that the government has an obligation to seek the truth, to confront Barksdale with the information contained on those messages slips.

After then stating that the "government's case was built brick by brick... like a house," O'Neill heightened the attack on Dean's credibility, stating:

The defendant's case is not built the same way. It rests on a very shaky foundation. That foundation is her credibility, what she's told you. Everything she's told you rests on her word, on what she says.

The problem with that is her story is like a house of cards with a very rotten foundation, because as we will show, she lied to you, and if she lied to you, how can you believe the rest of what she says? That is the problem, Ladies and Gentlemen.

Tr. 3377.

Associate Independent Counsel O'Neill then turned to a discussion of the difference between white collar crime and the street crime that "we all know about," stating that this was a "classic case of the government not working for all of us," but for "prominent, powerful people." Tr. 3378-79.

Referring to "the problem with white collar crime" and a public officials' "not helping all of us," Associate Independent Counsel O'Neill discussed Melvin Adams' testimony:

[A]s you heard from Melvin Adams, the ex-director of the Dade County Housing Authority, what happens is the local priorities get pushed under, because you do whatever you can to get those units, and in this case, the units would only go to people who knew the defendant.

Tr. 3379.

It will be recalled that the only local priorities that Adams had mentioned were inner-city housing and the use of black developers.

Associate Independent Counsel O'Neill then commenced to display the OIC's charts, stating he would "utilize those charts to show you exactly what the government has proved." Tr. 3380. These are the same charts that, as discussed in Part I and in the Park Towers Appendix, Associate Independent Counsel O'Neill would use to lead the jury to believe a variety of things concerning the Park Towers project that he had reason to know were certainly or almost certainly false. They are also the charts, as discussed in Part III, supra, that would include references to Andrew Sankin's receipts intended to lead the jury to believe that certain receipts applied to Dean that Associate Independent Counsel O'Neill knew did not apply to Dean.

Commencing the discussion of Arama, Associate Independent Counsel O'Neill cited Nettles-Hawkins' testimony that "the PHAs became a ghost entity," and argued that local priorities like closing a crack street or rehabilitating a troublesome apartment building could no longer receive attention because of the hiring of "prominent, powerful people," who displaced local housing authorities. Noting that Martinez had paid



\$425,000 to hire "these powerful people," he asked: "How could a small developer do that?" Tr. 3380-81.

Associate Independent Counsel O'Neill then again cited Melvin Adams' testimony, this time noting that Adams had said local priorities like "encouraging minority developers to associate with them" could no longer be followed "if these monies have to be paid and you have to know certain people." Tr. 3381. Though Associate Independent Counsel O'Neill said "minority developers," he presumably expected the jury to recall that Adams had in fact said "black developers." Martinez was himself a member of a minority group, Cubans, whose success relative to African-Americans in Miami was one source of the much-publicized racial tensions in that city.

After stating that Mitchell got \$75,000 for talking to Dean, Associate Independent Counsel O'Neill turned to the initial entries on the Arama chart, emphasizing that it was at Mitchell's address that Martinez had written Nunn and that a consulting contract was then reached. Tr. 3383.<sup>29</sup> As with the reference to "the contact at HUD" in the Park Towers chart, Associate Independent Counsel O'Neill left it to the chart to lead the jury to believe that Nunn wrote the annotation regarding Mitchell on January 25, 1984,

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<sup>29</sup> The following were the entries:

Jan. 5, 1984: Martinez contacts **NUNN** at **MITCHELL**'s business address (Government Exhibit 19)

Jan. 25, 1984: Consultant contract betw. Martinez and **NUNN**. **NUNN** adds note about paying half to **MITCHELL**. (Government Exhibit 20)  
Second contract betw. Martinez and **NUNN**. (Government Exhibit 21)

possibly out of a wish to avoid to the extent possible saying things that documents in the OIC's files specifically contradicted.<sup>30</sup>

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<sup>30</sup> As explained in the Nunn Appendix, Nunn did not make his annotation on Government Exhibit 20 until after April 3, 1984. The Nunn Appendix also shows that, though the OIC would change its theory and argue to the courts that Mitchell's role was concealed from Martinez, it would never make that argument to the jury, possibly fearing that some jurors would recall Nunn's testimony that Martinez did know about Mitchell's involvement. See Nunn Appendix.

After several more minutes discussing Arama and the other Martinez projects, with repeated references to influence peddling and knowing the right people and the amounts of money being earned,<sup>31</sup> O'Neill turned to the discussion of the Park Towers project. As shown in Part I, in discussing that project, while employing similarly inflammatory rhetoric, Associate Independent Counsel O'Neill would repeatedly seek to lead the jury to believe things that he had reason to know were false. Tr. 3390-96.

Associate Independent Counsel O'Neill then turned to the discussion of Count 2, in which the principal co-conspirator was Andrew Sankin, whom Associate Independent Counsel O'Neill in opening argument had described as someone who was "wining and dining" Dean, and "buying her gifts." Tr. 3396-408.

Introducing the theme that Dean had falsely accused other of dishonesty, Associate Independent Counsel O'Neill would conclude the discussion of Count 2 as follows:

Mr. Sankin takes her out to lunch, out to dinner. You heard a lot of testimony that his receipts were fabricated, that they're all

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<sup>31</sup> Among other things, O'Neill stated:

Obviously, [Martinez has] paid \$425,000 to hire somebody with influence, somebody with connections in Washington, somebody who knows the right people, an ex-governor and an ex-attorney general of the United States, and they know the defendant, Deborah Gore Dean.

Tr. 3384

Louie Nunn, John Mitchell, influence peddlers, people who make their living selling influence to buyers, but they can't sell that influence unless they have somebody on the inside, because they don't have a product unless there is someone abusing their position of trust within the United States Government, doing what these people are requesting, and that's the defendant.

Tr. 3386.

lies. Well as you go through them you'll see one receipt goes right on point.

And isn't it coincidental that all of his receipts are lies, all the Lance Wilson receipts are lies? Lance Wilson is actually a very good friend. All of Linda Murphy's receipts are lies? Remember Linda Murphy, one of her closest friends. I showed you that on [sic] an affidavit. And she said one of her closest friends. All of Russell Cartwright's receipts are lies. All of these people.

Look through her calendars. She's meeting with them for lunch all the time, but yet they're all lies, all attempts to deduct business expenses and commit crimes.

Tr. 3408.

As discussed earlier, in the above-quoted paragraphs, Associate Independent Counsel O'Neill was asserting to the jury that Dean's calendars show that she has falsely accused four persons, including Lance Wilson ("actually a very good friend"), of fabricating all their receipts that named her. Yet, with regard to Sankin, as shown in Part III, much of Dean's reasons for contesting the Sankin receipts that the OIC sought to lead the jury to believe applied to her was that the OIC used receipts that it knew did not apply to her. In any case, rather than showing that Sankin and Dean were meeting for lunch all the time, her calendars showed only a single instance of lunch with Sankin,<sup>32</sup> and actually contradicted a substantial majority of the receipts that the OIC sought to show applied to Dean. In fact, of the two receipts that the OIC would rely on to show that Sankin took Dean to lunch, the OIC would acknowledge that one (Gov. Exh. 11c) clearly did not apply to Dean, and the OIC had good reason to believe that the other (Gov. Exh. 11l) also did not apply to Dean.

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<sup>32</sup> That lunch occurred on January 29, 1985, more than fifteen months prior to the date of any Sankin receipt that named Dean.

With regard to Wilson, the questioning that would form the basis for Associate Independent Counsel O'Neill's statement has already been discussed. By definition, Dean's calendars could not refute her several disagreements with Wilson's expense records, since she based her testimony on those calendars, which also strongly supported her claim regarding the receipt for the party on July 17, 1986. With regard to any disagreement between Dean's testimony and Wilson's records, a reasonable person had to believe that Dean's testimony was very likely more accurate. In contrast to the situation with Sankin, however, Dean's calendars did show that she had a couple of lunches a year with Wilson.<sup>33</sup>

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<sup>33</sup> Dean's Rule 33 Memorandum (at 194 n.131) lists October 31, 1985, March 6, 1986, and May 15, 1986, as dates when Dean and Wilson had lunch. It appears that the two also had lunch on July 24, 1985 and March 15, 1987.

In the case of Lynda Murphy, as shown above, Dean's calendars actually confirmed Dean's account of the July 28, 1986 dinner and tended to refute the validity of Murphy's expense record for the Somerset project. Those calendars also show Dean having lunch with Murphy on one occasion during the three years Dean was Executive Assistant.<sup>34</sup>

As also explained, Associate Independent Counsel O'Neill had strong reason to believe that the single receipt that would form the basis for him to assert that Dean had falsely stated "[a]ll of Russell Cartwright's receipts are lies" was in fact a false receipt. Further, Dean's calendars, far from showing that Dean and Cartwright were meeting all the time for lunch, do not contain a single reference to Cartwright, for lunch or for anything else.

Following Associate Independent Counsel O'Neill's mention of the receipts, he turned to the discussion of Counts 3 and 4 (Tr. 3409-18). During that discussion, Associate Independent Counsel O'Neill would recall to the jury provocative testimony of government witnesses concerning their securing a letter request from the Atlanta public housing authority at the end of October 1986, which Louis Kitchin was supposed to have indicated he needed in order to deliver it to Dean in Washington during a short period at the end of that month. The OIC, however, had not alleged in the indictment that Kitchin had brought the letter to Dean; and during Kitchin's direct testimony, Associate Independent Counsel O'Neill failed to question him about it. On cross-examination Kitchin testified that he probably was in Atlanta during the period in

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<sup>34</sup> Dean's Rule 33 Memorandum (At 194 n.131) gives a date of October 15, 1985, for that lunch. Actually the date was November 15, 1985.

question. Documentary evidence suggested that the OIC knew for a fact that Kitchin had not delivered the letter.

Nevertheless, after describing the testimony concerning Kitchin's statements about needing a letter to deliver to Dean, Associate Independent Counsel O'Neill stated:

Kitchin brings it up with him. He asks for 200 units for Atlanta. A couple of days later, just a couple of days later, as that will show, the units come down.

Tr. 3410.

As discussed in the Kitchin Appendix, when this issue was raised in Dean's Rule 33 Motion, consistent with the OIC's refusal to acknowledge a single act of impropriety, the OIC maintained that Associate Independent Counsel O'Neill was making a reasonable argument as to what the evidence showed. The OIC's Opposition would say nothing whatever about the evidence that OIC attorneys knew for a fact that Kitchin had not delivered the letter.

After concluding the discussion of Counts 3 and 4, Associate Independent Counsel O'Neill increased the virulence of the attacks on Dean's credibility, stating, inter alia:

Based on her lies, you should throw out her entire testimony. Her six days' worth of testimony is worth nothing. You can throw it out the window into a garbage pail for what it's worth, for having lied to you.

Tr. 3418.

Moments later, Associate Independent Counsel O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees, asserting that she had lied about the call to Agent Cain:

Shocked that John Mitchell made any money. Remember she went into great length about that. That she was absolutely shocked. And the day the I.G. Report came out she called Special Agent Alvin Cain, who was at HUD at the time, and said I'm shocked. I can't believe it. I thought you were my friend. You should have told me John Mitchell was making money. You'd better be able to defend what you said and if you can't I'm going to hold a press conference and I'm going to do something, I'm going to rant and rave. That's exactly what she told you.

So we had to call in Special Agent Alvin Cain for two minutes' of testimony. And you heard Mr. Cain. It didn't happen. It didn't happen like that. And he remembered Marty Mitchell picking up the report, bringing the money, but it didn't happen. They asked him a bunch of questions about the Wilshire Hotel, and you could see Mr. Cain had no idea what they were talking about. We had to bring him in just to show that she lied about that.

Tr. 3419-20.

Immediately after this devastating attack on Dean's credibility, while relying on the testimony of an African-American government agent who there is every reason to believe Associate Independent Counsel O'Neill knew had lied, Associate Independent Counsel O'Neill turned to the discussion of Wilson and the testimony of another African-American rebuttal witness, F.B.I. agent David Bowie. He stated:

Lance Wilson. She said Lance Wilson gave 600 units to Joe Strauss for Puerto Rico. That's her friend. I asked her questions about that. She denied it. Then she said, well, I'm saying Lance Wilson gave 600 units. I don't know who Lance Wilson is, but it doesn't matter if I do or not. That is not the testimony. It must come from her.

So we had to call in Special Agent David Bowie, and remember special agent Bowie? He's been 22 years with the FBI, before that six years as a schoolteacher, before that with the United States Military in Vietnam. Mr. Bowie says that's what she told me. She fingered Lance Wilson, her friend, who was giving the 600 units to Joe Strauss.

Tr. 3420.



The first paragraph of the above quotation may be mistranscribed in some respect. It nevertheless is clear that O'Neill was making the point that Wilson was a friend of Dean's and was suggesting to the jury that whether or not Dean said Wilson had been responsible for the 600 units for Strauss is of some significance to the case.<sup>35</sup>

In the second paragraph, the elaboration of Bowie's background could have been for no other purposes than to suggest that there was a material difference between Bowie's testimony and Dean's and to refresh the jury's recollection of Bowie and the fact that he was an African-American. Most significant, however, is the statement that Dean "fingered Lance Wilson, her friend." It is difficult to understand what could possess a federal prosecutor to so describe a situation where a government official had given a statement to an F.B.I. agent that, whatever the precise terms of the statement, the prosecutor knows to have been a truthful statement. Here, however, the purpose was clearly enough to incite the racial prejudices of the jury by telling it that the white defendant had "fingered" her African-American friend.

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<sup>35</sup> O'Neill's statement that he does not know who Wilson is, made for whatever purpose, was certainly false. O'Neill had to know at least since he joined the OIC who Wilson was and had to know at least since May 1992 that Wilson is the person who in all probability caused the Arama funding, whether or not with the concurrence of Pierce.

Associate Independent Counsel O'Neill then again turned to Dean's testimony about her relationship with Mitchell, discussing at length the testimony of the OIC's rebuttal witness Ronald L. Reynolds and maintaining that it showed that Dean had lied. Tr. 3421-24.<sup>36</sup> These remarks, in which Associate Independent Counsel O'Neill uses the words "lie" or "lied" six times, and in which he asserts that Dean had lied "because she was in a trick bag," should be read with an understanding that the court would conclude that the OIC possessed documentary evidence indicating that Reynolds was not telling the truth and that, in any case, it was not possible for a reasonable person in Associate Independent Counsel O'Neill's position to believe even Reynolds' testimony that he remembered driving Dean on two specific occasions where she indicated she was having lunch with John Mitchell.

The remarks regarding Reynolds were additionally protracted by O'Neill's pausing to place an exhibit on the visual presenter, which he then discussed in a manner to suggest that Reynolds drove Dean frequently and that this showed that Dean had lied in her testimony about Reynolds. The document, however, would show that in the month of October 1986, Dean had taken 15 trips by HUD drivers and Reynolds had driven her once.<sup>37</sup>

Continuing the attack on Dean's credibility, Associate Independent Counsel O'Neill listed a number of statements that he maintained were lies, stating, inter alia:

Denied knowing that Andrew Sankin was a consultant. Well, we saw those letters. To believe that you'd have to disbelieve Mr. Sankin, Mr.

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<sup>36</sup> O'Neill's discussion of Reynolds' testimony is set out in Appendix V-C.

<sup>37</sup> Reynolds had testified that he drove Dean two out every five trips, "about ten times a week," and to luncheon meetings "two, three times a week." Tr. 3239.

Shelby, Mr. Broussard, Mr. Altman, Mr. Rosenthal. All saying she knew he was a consultant.

Tr. 3426.

It is absolutely impossible, however, to construe Dean's testimony as denying that she knew Sankin was a consultant or that the named individuals' testimonies were inconsistent with Dean's in any respect on that point.<sup>38</sup>

Associate Independent Counsel O'Neill then turned again to the discussion of Secretary Pierce in the course of continued assertions that Dean had lied. He stated:

You might wonder why we took so long to cross-examine. As I said earlier, after the initial lie you should be able to say that's it. But we wanted to show you that wasn't the only time. Her entire testimony is fraught with lies and deception. It cannot be believed.

And probably the biggest lie of all is what she says about Secretary Pierce. That Secretary Pierce was responsible for all the actions she took. That Secretary Pierce was the person who was behind the funding of all these awards. That it wasn't her. That she was merely some sort of messenger. To believe that, you will have to disbelieve almost everyone.

Tr. 3426-27.

After discussing the testimony of persons who had described Pierce as a hands-off manager, but no testimony of anyone that Dean had ever taken an action unauthorized by Pierce, Associate Independent Counsel O'Neill stated:

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<sup>38</sup> When this matter was raised in support of Dean's Rule 33 Motion, the OIC cited a piece of cryptic testimony concerning Alameda Towers, one of five projects in Count 2, and asserted that "the statement provided ample basis for the prosecutor to argue in summation that defendant denied knowing that Sankin was a consultant." Gov. Rule 33 Opp. at 48-49. The statement did not even provide a basis for stating that Dean did not know that Sankin was acting as a consultant on Alameda Towers. In any case, it had nothing whatever to do with the other projects, which involved Shelby, as well as the developers Altman and Rosenthal.

She would have you believe that she brought out that there's this adjoining door between his office and her office, so therefore -- and I have no problem that there's a door separating their offices, but somehow he would sneak in, tell her things, sneak out, and nobody else would see it, that's why everybody else is mistaken and they all think Sam Pierce is not hands on, but he really was.

Tr. 3428 (emphasis added).

There was nothing whatever in Dean's testimony, or anyone else's, suggesting a clandestine element in her communications with Pierce, and certainly nothing in Dean's testimony supporting an image of Pierce "sneaking" in and out of her office.

Minutes later, Associate Independent Counsel O'Neill added:

Just as she's deceived you or attempted to do so, ladies and gentlemen, through a series of lies and deceptions, she misled Samuel Pierce and didn't tell him of her hidden interest because if this man who she said is such a fine man and prominent attorney, would he have allowed her to do this where she would have a hidden interest in these projects?

Tr. 3429.

Associate Independent Counsel O'Neill then concluded the initial day of his closing argument as follows:

In order to believe her you have to believe that John Mitchell is lying. That's what she said. He lied to her. Jack Brennan lied to her. Rick Shelby lied to her. Andrew Sankin, lied. Maurice Barksdale is mistaken. Janet Hale is mistaken. Andrew Sankin, lied. Lance Wilson, lied. Philip Winn, mistaken. Susan Zagame, mistaken. Thomas Demery, lied. Sherrill Nettles-Hawkins, mistaken. Everybody else lied or was mistaken, but not her.

But she's the only one we know who definitively did lie. Her story is built on a rotten foundation. It is rotten to the core. It doesn't square with common sense. It is lies piled upon lies. It crumbles to pieces the minute you look at it.

Now, I know I've gone on a long time. I apologize for that. But in representing the Government I do need to bring out all the facts. I'd ask you when Mr. Wehner gives his closing argument to be as attentive to him as you were to me and I will have an opportunity to talk to you again, but throughout that listen and wonder why she lied to you throughout her testimony.

Tr. 3431-32.

With regard to the some of the persons whose testimony Associate Independent Counsel O'Neill maintained the jury would have to disbelieve in order to believe Dean, there existed some genuine testimonial differences. With regard to Brennan, however, Associate Independent Counsel O'Neill knew Dean had told the truth when she stated that Brennan had not told Dean he (Brennan) was a paid consultant before Associate Independent Counsel O'Neill badgered her to try to make her say Brennan had lied. The only way Dean suggested Shelby had lied to her was in his concealment of Mitchell's involvement with Park Towers from her, which Shelby acknowledged that he had done. Associate Independent Counsel O'Neill also knew with moral certainty that whatever else Barksdale lied or was mistaken about, he was at least mistaken with regard to his testimony that he had no recollection that Lance Wilson had talked to him about Arama.

The only way Lance Wilson and Lynda Murphy, neither of whom testified, made statements that differed with Dean's testimony was by their statements on their expense records. Concerning that matter, Associate Independent Counsel O'Neill had to believe that Dean's testimony was more reliable. Wilson's hearsay statements--to Mitchell, as reflected on the telephone messages slips, and to Dean--were, of course, supportive of Dean's defense.

As shown in the Demery Appendix, whatever may have been Associate Independent Counsel O'Neill's belief concerning the truthfulness of the testimony he elicited from Thomas Demery on redirect, he knew with absolute certainty that Demery had lied several times under oath on cross-examination, lies Associate Independent Counsel O'Neill allowed to go uncorrected as he proceeded to elicit Demery's most important testimony on redirect.

Thus, whether or not he believed that Dean "definitively did lie"--and it is doubtful that he did with regard to many, if any, of the matters concerning which he told the jury she had lied--Associate Independent Counsel O'Neill knew with absolute certainty that Dean was not the "only one we know who definitively did lie."

F. Associate Independent Counsel O'Neill's Rebuttal Argument

On the following day, Associate Independent Counsel O'Neill began his rebuttal argument with similarly inflammatory rhetoric, stating:

What did I tell you, ladies and gentlemen?

Someone else's fault. It's always someone else's fault, it's Miss Sweeney's fault. It's now the prosecutors. That's why we're here. Not the evidence that's put forth. It's now a personal attack brought by us. You would think that you would get mad being attacked when you just presented the evidence, because you might remember in opening argument I told you what a prosecutor does is present the evidence. We're merely vehicles by which questions are asked, witnesses take the stand, documents are introduced. Both Miss Sweeney and myself.

But the problem is desperate times call for desperate measures. When your back's against the wall, when it's obvious the Government has put forth all this evidence, the only thing you can do is lie. And when that doesn't work, when the lies are shown to the jury, it becomes a personal attack. And that's what it is, nothing more, nothing less.

You can't argue the facts of the case. So you argue that someone is out to get you. That the prosecution is out to get you. Much like the FBI was out to get you on the background check when you asked for that background check because you wanted that job. Much like a United States Senator from the United States Senate was out to get Miss Dean because he didn't want her for some reason to get the job that she was seeking.

I told you during closing argument that Miss Dean lied to you very clearly and that she lied to you a series of times thereafter and, I repeat, you can take her testimony and throw it in the garbage where it belongs because someone --

[Defense objection to continued characterization is overruled. Tr. 3501-02.]

Since Mr. Wehner kept saying that it was not garbage, that I should not have said that, I'm saying that's where it belongs, in the garbage. Because it was a lie, ladies and gentlemen.

And then you must -- as I said earlier, there are two, two conflicting stories here, totally different. Irreconcilable. One or the other is correct. You must base it on what all the witnesses said on one hand or Miss Dean's credibility on the other, and that's what her whole case hinges upon, her veracity, her honesty, her credibility. But she lied to you.

Tr. 3500-03.

Shortly, thereafter Associate Independent Counsel O'Neill would again refer to the testimony of the OIC's rebuttal witnesses Cain, Bowie, and Reynolds, stating:

No idea that Mitchell was a consultant. But that was his occupation.

Shocked that Mitchell made any money. Al Cain told you, the Special Agent from HUD, that conversation never ever happened.

She denies that Lance Wilson sent the 600 to Joe Strauss in Puerto Rico. Special Agent Bowie had to come in here and say that's exactly what she told me.

Not close to Mitchell until after she left HUD. In fact, the record shows she was calling him Daddy five years earlier.<sup>[39]</sup>

Denied the HUD driver ever drove her to lunch. The record shows that he did.<sup>[40]</sup>

Again, the reason she would lie about that, she was in a trick bag. Either she lied to the Senate about using it for personal reasons or she lied to you about Mitchell doing business with her.

Tr. 3506.

Some minutes later, after asserting that Pierce relied on Dean to operate under an honor system, Associate Independent Counsel O'Neill again referred to Dean's testimony about Barksdale in the following context:

Mr. Wehner talked about the perjury counts. And you'll see I've listed them, counts five through 12 in the indictment and what those words are.

Mr. Wehner talked about 1987 and 'that goes solely on information provided by the secretary for housing.' That's not true, ladies and gentlemen, because once again we have a list, Government Exhibit 202. That's in Miss Dean's handwriting, and you heard, just like we saw at the beginning of my closing argument yesterday, the Government's exhibit 28, the letter to Louie Nunn at Global Research, referencing a conversation with John Mitchell. The defendant had to admit that that letter existed because we had it, but she denied being involved in that, saying Mr. Barksdale gave me that information. Just like this. This is a handwritten

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<sup>39</sup> This statement concerned a statement Dean made in explaining why she had never had lunch alone with Mitchell while she was at HUD. The OIC would eventually persuade the probation officer to recommend increasing Dean's sentencing level on the grounds that Dean's statement was an attempt to obstruct justice. The court initially accepted that recommendation, but then reversed itself after recognizing that the OIC had taken the statement out of context. See Mitchell Appendix.

<sup>40</sup> As discussed in the Reynolds Appendix, Dean did not deny that Reynolds ever drove her to lunch. She did not even deny that Reynolds ever drove her to lunch with Mitchell, although the record indicates that the possibility that Reynolds did is exceedingly remote.



list of the various projects, the amounts funded, and in fact on Metro-Dade, the exact bedroom configuration. It's in her handwriting.

So she says to you, well, yes, this is mine, this is my handwriting, but Thomas Demery is the one who told me this and I wrote it down very quickly.

Well, you remember Michael Dorsey's testimony, a witness testifying for the defense. He said that Miss Dean did speak during that meeting and was saying who was behind the project.

In her own handwriting she had the bedroom configurations and the number of bedrooms, and then it says "letter.]" They are funding 203 units to Metro-Dade before Metro-Dade even asks for them. Is that the way the way this system is supposed to operate.

There are four separate counts of perjury, four separate counts of concealment. There is no sense going into all of them because the Government contends that each of those was a lie and a misstatement in much the manner as you've seen during the course of this trial.

Tr. 3515 (emphasis added).

Concerning the underscored part of the above quote, the decision at an April 1987 meeting to allocate 203 moderate rehabilitation units to Dade County was one of the principal issues in Counts 3 and 4. As discussed in the Dade Appendix, Dean maintained that Demery had pushed the project saying it was for Louis Kitchin, and, after discussing with Pierce that she had a conflict concerning the matter, she had sat silent at the meeting when the allocation was discussed. Consistent with Dean's testimony, and contrary to what Associate Independent Counsel O'Neill stated to the jury, Dorsey had in fact testified that Demery had pushed the Dade County funding and that he did not remember Dean saying anything about it.

The discussion of the exact bedroom configuration was consistent with a theme pressed by the OIC that odd-numbered allocations were intended as a code to ensure

that the right developer would get the units, and the fact that the housing authority had not yet requested the units was consistent with the provocative theme repeatedly pressed by the OIC that "prominent, powerful people" and "rich powerful consultants" were usurping the authority of housing authorities, disabling them from promoting local priorities like the use of black developers. Associate Independent Counsel O'Neill knew with absolute certainty, however, that Dade County had requested that exact bedroom configuration in a letter dated February 13, 1987, two months before the April 7, 1987 selection committee meeting in which the funding decision was made. He had introduced that letter request into evidence as Government Exhibit 198. See Dade Appendix.

As discussed in the Dade Appendix (at 7), when this issue was raised in support of Dean's Rule 33 Motion, the OIC contended that when Associate Independent Counsel O'Neill stated that Dorsey had said that Dean "did speak during that meeting and was saying who was behind the project," he merely had meant to indicate that Dorsey had said that Dean had spoken regarding some "projects" (a matter relevant to the perjury discussed by Dean's counsel). Gov. Rule 33 Mem. at 44-45. With regard to the latter statements, the OIC argued that there was evidence supporting "the inference that defendant had promised the units for Metro Dade to Kitchen [sic] prior to the PHA's letter request dated February 13, 1987, giving the prosecutor a proper foundation on which to argue that the funding decision (albeit not formally) was made before Metro Dade asked for the units." Id. at 46-47.

The OIC was correct that Associate Independent Counsel O'Neill had commenced these remarks in discussing a perjury issue as to which whether Dean

spoke on behalf of certain projects was relevant. Yet, Associate Independent Counsel O'Neill had quickly altered the focus to the Dade County funding that Dorsey had said he did not remember Dean talking about. Thus, there is reason to believe that Associate Independent Counsel O'Neill did intend to lead the jury to believe that Dorsey said Dean spoke about that project, as the context would suggest even without use of the singular "project."

The justification the OIC offered for stating that a letter request for a certain number of units was secured subsequent to the award of the units is as preposterous an argument as one will find in a brief filed on behalf of the United States Government, or so one hopes. It is a further illustration of the OIC's refusal ever to acknowledge that its agents did anything improper.

In his closing argument, Dean's counsel had emphasized the Mitchell message slips, noting the failure to mention those contacts in the OIC's charts. Tr. 3461-62. In his rebuttal, Associate Independent Counsel O'Neill responded as follows:

I'd like to talk about the message to Lance Wilson from John Mitchell. The government has never said that other people didn't write to John Mitchell. First of all, we don't know what project they're talking about here. Arama is not mentioned and, of course, Maurice Barksdale is the Assistant Secretary at the time. We know that. Mr. Barksdale testified.

But you may recall Government's Exhibit 18, and this is the document that says -- has a little handwritten note on top of Miss Dean's letterhead and it says to Daddy.

And there's a memo from Philip Abrams, and you recall she identified the handwriting on the upper lefthand corner as being that of Lance Wilson. So Lance Wilson is helping her out here, giving her information. She's passing that on to John Mitchell.

Is that a defense to this charge? No, ladies and gentlemen, Because count one has three projects. Arama being the first, South Florida, the second, Park Towers, the third. Lance Wilson isn't even in the Department of Housing and Urban Development at any time when those three projects are funded.

Tr. 3517.

In the first quoted paragraph, Associate Independent Counsel O'Neill appeared to acknowledge that the OIC had no basis for questioning either that Wilson had talked to Mitchell or that Wilson had talked to Barksdale about 300 units. When stating that "First of all, we don't know what project they're talking about here. Arama is not mentioned," however, Associate Independent Counsel O'Neill knew with moral certainty, from the placement of the message slip in Mitchell's files and for other reasons as well, that the discussion reflected in the slips did refer to the project that would become Arama. He also knew that "Arama" was not mentioned by name, because there was nothing called "Arama" at the time, but simply a group of available housing units that Martinez wanted to pull together into a mod rehab project.

What Associate Independent Counsel O'Neill intended to convey by the second two paragraphs, and whether he was attempting to lead the jury to believe that the message slips pertained to some earlier matter, is not clear. But that Wilson passed on to Dean information that he knew Mitchell had an interest in would seem, more than anything else, further evidence that Mitchell had previously been contacting Wilson to seek assistance on certain matters.

The final paragraph is simply the unpersuasive argument that because Wilson had left HUD by the time Arama was funded, he could not have had a role in causing Barksdale to sign the funding documents. This argument also underlies the Associate

Independent Counsels' contentions that the messages, though in fact applying to Arama, were inculpatory not exculpatory. It apparently is in some manner involved in the OIC's claim that it was permissible for the OIC to fail to confront Barksdale with the information on the message slips because the government does not have "an obligation to seek out all potentially material evidence conceivably useful to the defense." Gov. Opp. at 16-17 (original emphasis). Presumably, it would in some manner also underlie the Associate Independent Counsels' claim that in failing to confront Barksdale with the information on the message slips, they were nevertheless fulfilling the government's obligation not to "intentionally avoid pursuit of evidence of information because it may damage the prosecution's case or aid the defense." D.C. Rules of Professional Conduct, Rule 3.8(d).

Moving then toward the close of his rebuttal, Associate Independent Counsel O'Neill would turn to the discussion of the evidence of conspiracy in the testimony that Eli Feinberg and Martin Fine were unaware of Mitchell's involvement in Park Towers. As already discussed in Part I, Associate Independent Counsels had elicited Feinberg's sworn testimony that he was unaware of John Mitchell's involvement with Park Towers, without confronting him with the three statements of the OIC's immunized witness Shelby that he (Feinberg) was aware of that involvement. Though knowing with absolute certainty that Shelby would contradict Feinberg, and having reason to believe that Feinberg's testimony was almost certainly false, Associate Independent Counsel O'Neill stated:

Mr. Wehner mentioned something about the conspiracies and saying, well, some of the people said they didn't know certain things. Jack

Brennan didn't know that John Mitchell was involved in Arama. Well, isn't that the hallmark of conspiracy? Secrecy? Where people don't know it?

Remember Martin Fine, the developer for Park Towers? He said he did not know John Mitchell was involved. The consultant he hired, Eli Feinberg, he did not know Mr. Mitchell was involved, And both of those testimonies was unimpeached. Nobody ever contended that they did know. So the evidence is neither individual knew, and Mr. Fine paid \$225,000, 50,000 of which went directly to John Mitchell, and he didn't even know he was involved. His role was secret. That's what conspiracies are about.

Tr. 3519.

Associate Independent Counsel O'Neill then turned to a discussion of Wehner's argument concerning a check stub that showed that Dean had written a check to Louis Kitchin (which Kitchin had not cashed) attempting to pay Kitchin back \$4000, and Wehner's claim that the OIC had time to analyze the check to prove that it was not false.<sup>41</sup> Associate Independent Counsel O'Neill stated:

Mr. Wehner talked about the \$4000. And the fact that he has shown that that is really what happened because they have a bank stub. Well, to believe this you'd have to believe that Mr. Kitchin gave her \$4000 to decorate an apartment he never owned, aside from the fact that we found these documents later on to absolutely disprove the claim that she was trying to sell it as of June 15th. So she'd have to prove that the apartment that he never owned he was going to have decorated and that this \$4000 check was written when she had no funds whatsoever to pay it with.

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<sup>41</sup> Concerning the \$4,000 Dean received from Louis Kitchin in 1987, Dean testified that on June 15, 1987, she wrote a check to Kitchin to return the money to him after he indicated that he was no longer interested in securing an apartment in Washington. Dean introduced into evidence the check stub reflecting that check. Tr. 2744-49. Though Dean did not have sufficient funds to cover the item in her account, it is undisputed that on the following day, she attempted to take out a loan for \$10,000. Tr. 2938.

And he told you that the FBI had time to analyze this and they would have shown that it was false. Well, that's not in evidence. There's no evidence here the FBI had time to analyze that check stub. Or that they looked and made sure that the ink was two years old or three years old or whatever. That is not in evidence. It's the evidence on which you must base your decision, ladies and gentlemen.

Tr. 3519.

It would seem safe to say that, at the time when Associate Independent Counsel O'Neill was attempting to lead the jury to believe that Dean had not written the \$4000 to check to Kitchin, he knew with moral certainty that Dean had written the check. He would know that both because of a number of factors related to the check stub<sup>42</sup> and because of the fact that on the following day, Dean had attempted to take out a loan in excess of the amount on the check.

Further, during the course of the trial, pursuant to the OIC's request, Dean had allowed the OIC to take possession of the original of the check stub for 48 hours.

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<sup>42</sup> Dean testified that she gave Kitchin a check for \$4250 on January 15, 1987, after he drove with her to pick up her car in Rockville. She introduced as Dean Exhibit 788 the group of 50 check stubs for check nos. 151-200 at NS&T Bank, which included the stub for check no. 160 that recorded the \$4250 item and some other information. Tr. 2744-48. There is no dispute that Kitchin went with Dean to pick up her car on that date, the two having been driven to Rockville by Hunter Cushing. There is no dispute that check no. 159 was a check to the Auto Salon in Rockville. There also is no dispute that check no. 160 is the only check between numbers 154 and 170 that was never cashed.

Apart from any issue of the age of the ink, a precondition to Dean's creating a false check stub at some point subsequent to June 15, 1987, when there might have been any purpose in doing so would have been the propitious circumstance that check no. 160 was never cashed. Then, Dean would have had to secure a new set of NS&T checks running from nos. 151-200 and again record the same information for nos. 151-159 and 161-200, using in each case the same kind of ink that was used on the checks that had been presented at NS&T, also ensuring that the tears on the stubs resulting from the removal of each check from the new set of nos. 151-200 would match exactly the tears on the checks that had been presented at the bank.

When Associate Independent Counsel O'Neill was seeking to lead the jury to believe that at the time F.B.I. did not have time to analyze the check stub and in fact had not analyzed the check stub, he probably knew with absolute certainty that the F.B.I. had ample time to analyze the check stub.<sup>43</sup> If the F.B.I. could have, but failed to, analyze the check stub, in a case where the OIC would find resources to send a helicopter to photograph Dean's family's estate, the sole reason for that failure would have been that Associate Independent Counsels believed that the analysis would prove the authenticity of the check. If the F.B.I. did make even a preliminary determination that the stub was authentic, that determination constituted Brady material that should have been provided to the defense.

In any event, after these two efforts to lead the jury to believe things that he had compelling reason to believe were false--one of which involved reliance on what Associate Independent Counsel O'Neill had to believe was the probable perjury of a government witness--O'Neill concluded the rebuttal portion of his argument with further discussion of the amounts of money involved and how "certain insiders," "prominent and powerful people" and "a select few" had abused a program meant for the poor, with further discussion of how "the select few" prevented the system from operating "the way Mel Adams told you it could" if local priorities played a role. Associate Independent Counsel O'Neill stated:

Ladies and gentlemen, during his opening statement Mr. Wehner told you that the Government is all fouled up. All fouled up. That's exactly what he said. He's wrong about that. The Government's not all fouled up. Private

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<sup>43</sup> That O'Neill focused on the absence of evidence as to how much time the F.B.I. had, rather than on the absence of evidence that it could have analyzed the check to determine when Dean's notations had been made, suggests that in fact the F.B.I. may have been capable of such an analysis.



individuals, certain individuals might be when they don't do their jobs as they should. When they don't properly perform a public function. When they corruptly favor certain people. That's when Government gets fouled up.

And he kept saying your Government, and that's right. It is your government. It's all our Government. Not for a select few, not for certain insiders who have access to high public officials like Mr. Shelby who Mr. Wehner mentioned who said I didn't do anything wrong, and you might recall that I had to go back at him in redirect and say didn't you tell the grand jury, and this time I got that right, you told the grand jury several years ago, didn't you, that you were wrong, and he admitted that, yes, in fact he had. He, too, was trying to tell you he had done nothing wrong but he told the grand jury he had done something wrong. He knew he had access to high ranking public officials.

Ladies and gentlemen, in the name of the United States of America, I will be asking you to find the defendant guilty as to each and every charge in the Indictment. All 12 of them.

In the Government's view the government has proven its case beyond all reasonable doubt, beyond any and all doubt. There can be no doubt that the defendant conspired with the people in counts one, two and three, accepted that illegal gratuity or loan in count four, and then lied and covered up and concealed what she had done so she wouldn't be known for what she had done. So people wouldn't -- it wouldn't become public. Because she didn't want people to know how she was using her office, using a public office for private gain.

And by your verdict tell her no more. You won't put up with corrupt public officials, people who use their office, public office, for private gain, who work for a select few and not for all of us, because it is as Mr. Wehner said your Government, our Government.

She was a public official entrusted with millions of dollars of taxpayers' money, for what purpose, To provide housing for the poor. Is that the way it worked. Did the local priorities play any role in this. No, ladies and gentlemen. It just depended on who you knew and how it worked out. And I say millions of dollars, Arama alone, the evidence shows, was over \$28,000,000 and that's still being paid to this day. They're 15-year contracts.

Think of the amounts of money that went for housing, and did it work the way it should have? The way Mel Adams told you it could have if priorities played a role? No. It worked the way a select few wanted it to work.

When you are paid by the United States you work for all of us. As Mr. Wehner said, it's your Government.

Mr. Wehner asked you what would you have Miss Dean do in the performance of her duty? What would you ask of her? Honesty. Faithfulness. Undivided loyalty. Remember what I said, it is we the people, by the people, for the people. We, the people. It is all of us. It is not if your [sic] prominent and powerful and you belong to a select few. It is for all of us.

And, ladies and gentlemen, Miss Dean did not work for all of us. She worked for herself, for her family, for her own enrichment, and because of that she's guilty. Not because of lunches and other matters. It's because of her corrupt actions as a corrupt public official.

Thank you.

Tr. 3520-23.

The fact that political consultants with access to high officials made large sums of money using their influence to cause scarce subsidies to go to localities where favored developers had projects is certainly a serious matter. Yet, even in other circumstances, Associate Independent Counsel O'Neill's remarks would be an invitation to the jury to improperly base its decision on public policy issues rather than the facts pertaining to the guilt or innocence of the defendant. See United States v. Monaghan, 741 F.2d 1434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1085 (1985); United States v. North, 910 F.2d 843 (D.C. Cir. 1990); United States v. Manning, 32 F.3d 570 (1st Cir. 1994).

Here those remarks were an invitation to a jury composed largely of unaffluent, if not poor, African-Americans to strike out at a system that allowed the "powerful and prominent" and "a select few" to grandly profit from a program intended to benefit the poor, while denying local authorities the opportunity, as Melvin Adams had put it in the

testimony to which Associate Independent Counsel O'Neill had repeatedly alluded, "to encourage black developers to get a piece of the pie."