

*This is a PDF version of the separately accessible version of [Section B.1](#) of the main [Prosecutorial Misconduct](#) page (PMP) of [jpscanlan.com](#). The endnotes have been converted to footnotes. This version reflects the section as it appeared when a link to it was provided in a January 13, 2010 letter to Judith B. Wish, Deputy Director of the Office of Professional Responsibility (which may be found on the [Letters \(Misconduct\)](#) sub-page of PMP).*

## **1. Implications of the Literal Truth of the Testimony of Supervisory Special Agent Alvin R. Cain, Jr. [b1]**

Mentioned throughout the materials discussed on this page is the testimony of Supervisory Special Agent Alvin R. Cain Jr., the author of the April 17, 1989 HUD Inspector General's Report that led initially to congressional hearings on abuses of HUD's moderate rehabilitation (mod rehab) program and ultimately to the appointment of Independent Counsel Arlin M. Adams to investigate the mod rehab program and related matters. Agent Cain's testimony as an Independent Counsel rebuttal witness on October 18, 1993, played a quite important role in the trial, and the actions of Independent Counsel attorneys with respect to Agent Cain are among the actions of those attorneys that I have suggested are most likely to have violated federal laws.

The focal point of the Independent Counsel's case against Deborah Gore Dean involved allegations that Dean had caused HUD to take actions on four matters in order to benefit former Attorney General John N. Mitchell, a person Dean considered to be a stepfather. Mitchell had died in 1987.<sup>1</sup> A critical issue in the case concerned whether Dean was aware that Mitchell earned HUD consulting fees. One immunized witness who retained Mitchell on a HUD matter testified that he deliberately concealed Mitchell's role from Dean. Mitchell's partner, also immunized, testified that Dean was shocked when he told her about Mitchell's HUD consulting. No one testified that he or she knew or thought that Dean was aware of Mitchell's HUD consulting.

Dean denied knowing that Mitchell earned HUD consulting fees until she read the HUD Inspector General's Report in April 1989 and saw an entry stating that Mitchell had received a fee of \$75,000 for assistance in securing the 1984 funding of a Dade County, Florida moderate rehabilitation project called Arama.

In her direct examination, on October 12, 1993, Dean described how she had secured a copy of the report from Agent Cain on "the day the report came out" in April 1989, and how she had then read in the report that Mitchell had earned a HUD consulting fee. Tr. 2616-17. Dean then provided the following testimony about what she did when she saw the discussion of Mitchell's fee in the report:

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<sup>1</sup> See [Arlin M. Adams profile](#) regarding Independent Counsel Arlin M. Adams' telling *USA Today* that he believed he might have been appointed to the Supreme Court in 1971 had he not offended then Attorney General John Mitchell and Dean's efforts to cause Adams to recuse himself from matters involving Mitchell; Section B.11 regarding the discussion in John Rosen's *The Strong Man* of other reasons Adams may have harbored animosity toward Mitchell; and Addendum 2 to the [Bruce C. Swartz profile](#) regarding Swartz's representations to the court of appeals concerning the Independent Counsel's handling of the fact that Mitchell was a former Attorney General.

Q. Did you place any telephone calls after you heard that in the report -- after you discovered that information?

A. Yes.

Q. Who did you call?

A. I called Al Cain.

Q. What did you say to Mr. Cain?

A. 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. 2616-18.

At this point, prosecutor Robert E. O'Neill rose to object. Before he actually said anything, the court stated: "I'll sustain the objection. Don't get into what he said." Tr. 2618. Thus, Dean was not permitted to testify as to what Agent Cain might have told her in response to her specific questions regarding the existence of a check showing the payment to Mitchell. She instead went on to testify about a subsequent call to Mitchell's partner. Dean's entire testimony on the matter may be found at [Dean Testimony](#).

It warrants note at this point that the Dean's having called Agent Cain was hardly probative that Dean was unaware of that Mitchell earned HUD consulting fees, since Dean could have called Cain merely to divert suspicion. And that would hold regardless of what Cain might have told Dean about a check. (In the trial there was no dispute that Mitchell had received a \$75,000 fee on the Arama project, and the check reflecting that payment had been introduced into evidence as an Independent Counsel exhibit.) Further, Dean knew that Agent Cain was then assigned to the Office of Independent Counsel and hence was readily available to contradict any part of her testimony about the call that was not true. And, given that Cain was an African-American federal agent, and Dean was being tried before an entirely African-American jury, any contradiction of substance might have been expected to have a substantial impact on the jury. In these circumstances, Dean would have had to be mentally unbalanced to fabricate the story about calling Agent Cain, leave aside planning to fabricate a story about what Cain told her about the check.

Dean remained on the stand for all or part of five more trial days, including three during which she was extensively cross-examined by Independent Counsel attorney Robert E. O'Neill. During that cross-examination, O'Neill asked no questions about the call to Agent Cain.

Shortly after Dean concluded her testimony on October 18, 1993, Agent Cain appeared as an Independent Counsel rebuttal witness. Questioned by Independent Counsel attorney O'Neill, Cain first responded to a question as to when the report was "published," stating that it "was published April 17, 1989." Cain then described a call he received from Dean "at or about that time," and provided details of his then providing Dean a copy of the report, which details closely conformed to those Dean had previously provided. O'Neill then conducted the following questioning of Agent 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. (Agent Cain's complete direct testimony may be found at [Cain Testimony](#).)

Agent Cain's firm denial of any recollection of the call from Dean then played an important role in prosecutor Robert E. O'Neill's [closing argument](#). Asserting that Dean's defense rested entirely on her credibility, O'Neill repeatedly and provocatively stated that Dean had lied on the stand.<sup>2</sup> Three quarters of the way through the first day of O'Neill's closing, he pressed the attack on Dean's credibility with particular acerbity, stating:

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<sup>2</sup> I am not aware of any cases where the pervasiveness of statements that a defendant lied was comparable to O'Neill's repeated statements that Dean lied on the stand. A fairly comprehensive summary of the remarks is set out in [Attachment 1a](#) to the Cain Appendix: A briefer sampling follows immediately below: Tr. 3416 ("It was a lie."); Tr. 3417 ("It was a lie ... out and out"); Tr. 3418 ("it was filtered with lies"); Tr. 3419 ("Then Miss Dean lied."); Tr. 3421 ("She lies when it benefits her...she lies about that.. if she's going to lie on that will she lie on anything else"); Tr. 3422 ("it's so clear why she would lie"); Tr. 3425 ("She lied about that ... It was just another lie"); Tr. 3426 ("And probably the biggest lie of all ..."); Tr. 3429 ("Just as she's deceived you, or attempted to do so, ladies and gentlemen ..."); Tr. 3431 ("She has lied to this court, to this jury ... 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 is lies piled upon lies..."); Tr. 3432 ("listen [to defense counsel's closing] and wonder why she lied to you throughout her testimony."); Tr. 3501 ("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 ..."); Tr. 3502 ("I'm saying that's where it belongs, in the garbage. Because it was a lie..... She lied to you."); Tr. 3507 ("They were lies ladies and gentlemen. Lies, blatant attempts to cover up what occurred, to sway you."); Tr. 3508 ("So you can throw her testimony in the garbage."); Tr. 3509 (... a series of misstatements, of falsehoods, of lies."); Tr. 3511 ("They unequivocally show that she lied to you, ladies and gentlemen, on the stand, under oath..."); Tr. 3518 ("... she lied about it."). See the May 31, document styled "[The Putatively Curative Instructions that Informed the Jury that the Prosecutor's Provocative Statements that the Defendant Had Lied Reflected the Prosecutor's Personal Opinion](#)" regarding the court's effort to address the jury's perception that these remarks reflected the prosecutor's personal opinion.

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, O'Neill derisively turned to Dean's denial that she knew Mitchell had earned HUD consulting fees until she read about it in the HUD Inspector General's Report:

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.

During rebuttal the following day, O'Neill continued to assert that Dean had repeatedly lied on the stand, pursuing that approach with virulence at least equal to that of the day before. In listing a number of statements by Dean that he asserted were lies, O'Neill again noted the contradiction by Agent Cain:

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

Tr. 3506.

The [Introduction and Summary](#) and the narrative appendix styled "[Testimony of Supervisory Special Agent Alvin R. Cain, Jr.](#)" that I provided to the Department of Justice on December 1, 1994, address the matter of Agent Cain's testimony in great detail, including the events immediately following the trial. Such events include Dean's filing a post-trial motion asserting, among other things, that Agent Cain's denial of recollection of the call was false and that Independent Counsel attorneys had reason to know it was false. Dean supported her motion with her [affidavit](#) stating that when she called Agent Cain, he told her that a check existed but he could not show her a copy

because it was then maintained in the Regional Inspector General's Office. I also submitted an [affidavit](#) stating that, after calling Cain, Dean had called me and told me what Cain had told her about the check. Dean argued that information on the whereabouts of the check in April 1989 would corroborate her testimony about the call to Cain. After the Independent Counsel failed even to mention the check in its response, Dean sought discovery on the whereabouts of the check in April 1989, which the Independent Counsel opposed and which the court denied (as discussed in the third paragraph of the Introduction the main Prosecutorial Misconduct page).

These matters are discussed in the December 1, 1994 materials in the context of an argument that Agent Cain provided false testimony. The materials further argued that, if Independent Counsel attorneys did not know that the testimony was false at the time Cain testified, they certainly had reason to know it when they evasively responded to Dean's motions.

Then, in a meeting during the week of December 12, 1994, Associate Deputy Attorney General David Margolis raised with me the issue of whether, even though Dean called Cain just as she said, Cain's testimony might nevertheless be literally true. Referencing the content of Cain's denials of recollection (especially with respect to the words "mentioning John Mitchell"), I stated that I did not know how such content could be reconciled with Dean's description of the call. Margolis did not suggest any other way Cain's testimony might be literally true, assuming Dean did call Cain, or otherwise discuss the matter further.<sup>3</sup>

At least partly as a result of Associate Deputy Attorney General Margolis's suggestion concerning the possible literal truth of Agent Cain's testimony, I would eventually come to believe that Cain in fact provided the testimony because he was persuaded that it was literally true. The apparent rationale lay in the notion that Cain's testimony that he remembered no call from Dean concerning the discussion of Mitchell in the HUD IG Report would literally pertain only to "at or about" April 17, 1989, the date the report was published within HUD, not the day the report was released to the public and Cain provided a copy to Dean. That occurred at the end of April 1989, about ten days after the date Cain stated as the date the report was published.<sup>4</sup>

As reflected by the testimony itself, and as suggested by the discussion set out along with the testimony ([Cain Testimony](#)), many would question whether the testimony was literally true. Indeed, some would likely say that the testimony was not even close to being literally true and the securing of the testimony was the suborning of perjury – pure

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<sup>3</sup> See [Section B.8](#) *infra* regarding the implications Margolis's evident belief that the literal truth of the testimony would render conduct of Independent Counsel attorneys less, rather than more, egregious than I was portraying it to be.

<sup>4</sup> Dean's [letter to Agent Cain](#) requesting a copy of the report is dated April 26, 1989.

and simple. But such issues do not detract from my confidence that the notion that the testimony was literally true underlay Agent Cain's providing the testimony.<sup>5</sup>

I would later be informed by a former Independent Counsel employee (the former document manager discussed in [Section B.9](#)) that Agent Cain, who considered himself to be a highly principled person, had been pressured into giving the testimony in the course of several meetings with Associate Independent Counsel Robert E. O'Neill and Deputy Independent Counsel Bruce C. Swartz. As the former employee put it, Cain had been taken into a room on several consecutive days to be persuaded to provide testimony he was very reluctant to give. The former Independent Counsel employee also stated that there was considerable cheer or relief in the offices of the Independent Counsel attorneys when the fact that Cain had been coached to give the answers he gave was not brought out in court.

But, as reflected in the Cain narrative appendix, in defending against charges that Cain's testimony was false and in resisting Dean's request for discovery to prove that she had called Cain, Independent Counsel attorneys (at this point Arlin M. Adams, Bruce C. Swartz, and Robert J. Meyer) never advanced the argument that, though Dean had called Cain, Cain's testimony was literally true. Had they done so, the court, which almost overturned the verdicts for other identified prosecutorial abuses, might well have dismissed the indictment and ordered the sanctioning of the involved prosecutors. So Independent Counsel attorneys instead maintained that Cain had testified truthfully and Dean had lied. Further, in a [January 18, 1994 letter](#) Independent Counsel Arlin M. Adams signed personally, he then persuaded the probation office to recommend an

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<sup>5</sup> The reader might note that Robert E. O'Neill's first characterization of Dean's testimony may have attempted to conform somewhat to the literal truth rationale, with its reference to "the day the I.G. Report came out" and its characterization of Cain's testimony as: "It didn't happen. It didn't happen like that." Possibly the latter sentence was intended to qualify the former. In any event, after considering the matter overnight, O'Neill abandoned such nicety in the characterization during rebuttal the following day: "That conversation never, ever happened."

From that point forward it seems that Independent Counsel attorneys always characterized Agent Cain's testimony as being that the call never occurred or at least that, to Cain's recollection, it never occurred, as first reflected in the Independent Counsel's October 29, 1993 supplemental opposition to Dean's motion for acquittal, signed by Independent Counsel attorney Paula A. Sweeney, which stated (at 14):

In this regard, the jury was entitled to consider defendant's testimony that she was shocked upon learning of the payments to Mitchell when she received the HUD-IG Report, and that she expressed her anger to HUD IG agent Al Cain, Tr. 2617; and the jury was further entitled to consider Agent Cain's testimony that this conversation never occurred. Tr. 3199.

This characterization, it might be noted, also ties the alleged conversation to the day Dean received a copy of the report rather than the date it came out, thus abandoning any deference to the notion that the Cain's denial of recollection was supposed to be tied to the day the report was released. Similarly, as discussed *infra*, Arlin M. Adams letter to the probation officer seeking to have Dean's sentence increased for lying about the call characterized Cain's testimony as that, to his recollection, the call never occurred. Independent Counsel attorneys characterized the testimony in the same way in the court of appeals. IC App. Brief at 25. `

increase in Dean's sentencing level for lying about the call, which increase would have resulted in an additional six months confinement. In doing so, notwithstanding that the rationale that had evidently underlain Cain's testimony was that Dean merely had not called Cain on or about the date the report was published, Judge Adams specifically represented to the probation officer that "Agent Cain testified on rebuttal that to his recollection this conversation never occurred." The varied actions of Independent Counsel attorneys in responding to Dean's charges, apart from being intended to falsely show that Dean had lied about the call, were also specifically intended to conceal actions of Independent Counsel attorneys that many, very likely including Judge Hogan, would regard as the suborning of perjury. It is for that reason that I have maintained the actions to conceal the circumstances of Cain's testimony constituted obstruction of justice if not other federal crimes.

Beginning in April 2009, profile were added to this site on Independent Counsel Arlin M. Adams, Deputy Independent Counsel Bruce C. Swartz, and Associate Independent Counsel Robert E. O'Neill and Robert J. Meyer. The [Robert E. O'Neill profile](#) addresses the way the effort to present testimony that was literally true in order to lead the jury to believe things he knew to be false comports with the casuistic ethic reflected in many of O'Neill's tactics. The [Bruce C. Swartz profile](#) and the [Robert J. Meyer profile](#) provide details of their post-trial efforts to deceive the court to cover up the actions of O'Neill and Swartz in the securing of Cain's testimony. The Swartz profile and the [Arlin M. Adams profile](#) address whether, while knowing with absolute certainty that Dean had not lied about the call, Swartz and Adams would have sought to have Dean's sentence increased for lying about the call in any event, or whether their doing so was part of an aggressive strategy in covering up the underlying conduct.

*See also* [Section B.11a](#) *infra* and the [Robert E. O'Neill profile](#) regarding whether attorneys not necessarily involved in deceiving the court in covering up the conduct during post-trial proceedings might nevertheless be involved in covering up the conduct when I raised it in a proceeding before the District of Columbia Office of Bar Counsel.

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Among materials provided to the Justice Department, a relatively succinct treatment of this matter that takes into account implications of Cain's giving the testimony he did because he was persuaded that it was literally true, even though he remembered the call from Dean, may be found in my [letter of December 17, 1999, to Robert J. Meyer](#), which references many other places where the matter is discussed at greater length. A further useful reference is Section B.1 of my [letter of May 25, 1995, to Associate Deputy Attorney General David Margolis](#), which addressed with Margolis the implication of his December 1994 suggestion that Cain's testimony might be literally true (though the letter does not address the potentially criminal nature of the actions of Independent Counsel attorneys in responding to Dean's claim that Cain's testimony was false). Also useful is my [letter of March 11, 1996, to Michael E. Shaheen, Jr.](#), Counsel for the Office of Professional Responsibility, which addresses implications of the Department of Justice's relying on the literal truth of Agent Cain's testimony in reaching certain conclusions

regarding this matter, as well as implications of the Department's refusal to inform me of the basis for its conclusions. Implications of the continued concealment of Independent Counsel actions regarding Agent Cain while the matter was being handled by the Public Integrity Section of the Criminal Division of the Department of Justice are addressed in my [letter of December 26, 1999 to Attorney General Reno](#), Deputy Attorney General Eric Holder, Public Integrity Section Chief Lee J. Radek and other Department of Justice Officials, and my [letter of January 22, 2000](#) to H. Marshall Jarrett, successor to Michael E. Shaheen, Jr. as Counsel for the Office of Professional Responsibility. *See also* [Section B.8](#) of PMP regarding the Department of Justice's varied actions regarding this and related matters.

I would also urge reading of the May 31, 2008 document styled "[The Independent Counsel's Use of Dean's Off-the-Stand Remark about David Barrett and the Judge.](#)" While the document may not do so definitively, it suggests how Independent Counsel attorneys may have caused the trial court to allow them to use Cain's testimony in the manner they did even though the court evidently believed Dean had in fact called Cain.

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Letters of [July 8, 2008](#), and [July 9, 2008](#), brought the above treatment to the attention of, respectively, former Supervisory Special Agent Alvin R. Cain, Jr. and the principal Independent Counsel attorneys, and requested that they advise on any matter where my account was inaccurate or unfair, are also posted.

In August 2008 the Cain matter was given a substantial [treatment](#) on powerlinblog.com. I brought this to the attention of Swartz, O'Neill, and Sweeney in the course of seeking their permission to disclose the DC Bar materials discussed in [Section B.11a](#), requesting again to be informed as to any way in which my interpretation regarding the Agent Cain matter or any other matter might be mistaken. I made the same request in an email of June 15, 2009 to Robert E. O'Neill and an [August 14, 2009 letter](#) to Bruce C. Swartz. There have been no responses.

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Robert E. O'Neill is a leading candidate for the position of United States Attorney for the Middle District of Florida. See my letters of [July 13, 2009](#), and [July 20, 2009](#) to the Chair of the Florida Federal Judicial Nominating Commission and the Chair and Members of the Middle District Conference of that Commission, among other things, suggesting that they address with O'Neill the essential accuracy of my account on these pages and in the [O'Neill profile](#).

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On August 15, 2009, [Section B1.a](#) was added to this page. It addresses certain circumstances that greatly facilitated Independent Counsel efforts to deceive the court

regarding Agent Cain's testimony and provides some further evidence as to the nature of those efforts.