

*This is a PDF version of the separately accessible version of [Section B.1a](#) 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).*

### **B.1a. The Beverly Wilshire Diversion [b1a]**

The material below is mainly of interest with regard to the way a fortuity caused the Agent Cain matter discussed in [Section B.1](#) not to be addressed adequately in the courts (which, as discussed in [Section B.8](#), likely had a large role in enabling the Department of Justice to fail to address it). But it also involves a situation where the understanding that Independent Counsel attorneys knew from the outset that Dean's testimony was true casts additional light on the efforts of Independent Counsel Attorneys to deceive the court about the matter.

It is difficult to be certain that hindsight in this instance is not influenced by subsequent understandings such as are discussed in [Section B.1](#) and the profiles of [Robert E. O'Neill](#) and [Bruce C. Swartz](#). Nevertheless, looking back, it seems that even at the time that Robert E. O'Neill elicited testimony seeming to directly contradict the testimony of Deborah Gore Dean that she had called Supervisory Special Agent Alvin R. Cain, Jr. in April 1989 to complain about the treatment of former Attorney General John N. Mitchell in the HUD Inspector General's Report (and to demand to see a check showing payment to Mitchell on the Arama project),<sup>1</sup> it should have been obvious that O'Neill then knew that Dean had called Cain. There are several reasons for this.

The first is the fact that Dean would have had to be mentally unbalanced to testify about the April 1989 call to Cain, being also ready to testify about what Cain told her about a check showing the payment to Mitchell, if she had not called Cain, given that she knew that Cain was readily available to contradict her if her testimony were not true. Cain, who was then assigned to the Office of Independent Counsel, had even been on the Independent Counsel witness list and the Independent Counsel had provided Jencks material on him at the commencement of the trial.

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<sup>1</sup> Dean's testimony is set out in [Section B.1](#). For the reader's convenience, I present it below as well:

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 –

The second is the fact that, while O’Neill endeavored to make Dean’s testimony as vivid as possible to the jury while he was having Cain seem to contradict that testimony, O’Neill said nothing about the discussion of the check that had been the salient feature of Dean’s testimony. At least one obvious reason for the failure to mention that check was a concern that doing so might cause the jury (or the judge) to wonder why Dean would be ready to testify about what Cain told her about a check if the call never occurred.<sup>2</sup> But, in any case, had O’Neill not known that Dean had in fact called Cain and asked about a check, he would certainly have mentioned the check in trying to make Dean’s testimony as vivid as possible to the jury in the course of eliciting Cain’s testimony to contradict it.

Additional indication that O’Neill knew Dean had testified truthfully is found in the fact O’Neill failed to cross-examine Dean about the call. Had O’Neill believed Dean had not made the call, he would have cross-examined her in order to elicit more details of a fabricated story that Cain could then refute. But since O’Neill knew Dean had called Cain, he did not want her to have her amplify her account with details that, being true, would have a greater ring of truth.

The fact that O’Neill had risen to object to Dean’s attempt to testify as to what Cain told her when she asked about the check is another matter. It is unlikely that O’Neill at that point was already both contemplating the use of Cain to contradict Dean about the call and considering the implications of Dean’s having testified as to what Cain told her about the check. Rather, the hearsay objection that O’Neill started to make (and which the court granted as soon as O’Neill rose to make it), whether meritorious or not (given that Dean was not offering Cain’s statement to establish anything about the check), was intended simply to interfere with Dean’s developing her side of the story – much as O’Neill had done by occasionally interrupting Dean’s testimony to make what Judge Hogan called “smart comments” when Hogan, for the third time, suggested that O’Neill was playing to the racial differences between the defendant and the jury. Tr. 2776.<sup>3</sup> But the sustaining of the objection did make it far easier for Independent Counsel attorneys to use Cain in the manner they did. Had Dean testified, as she planned to, that Cain had said “Yes, Debbie there is a check and I have seen it but I don’t have a copy because it is in the Regional Inspector General’s office,” it would have been much more difficult to cause Cain to appear to persuasively contradict her.

By the time the trial was over, O’Neill’s failure to mention the check when, in closing argument, he provocatively reminded the jury of Dean’s testimony about the call to Cain,

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<sup>2</sup> It is possible that O’Neill also failed to mention the check out of concern that such mention might suggest to defense counsel an avenue for cross-examining Cain that would go beyond simply asking Cain whether his testimony was true.

<sup>3</sup> Hogan stated: 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?” For a fuller discussion of O’Neill efforts to play to the racial differences between Dean and the jury, see [Part I](#) of the DC Bar Counsel materials.

and Cain's contradiction of that testimony, would be a further indication that O'Neill knew Dean had made the call.

But at the time Dean filed her Rule 33 Motion – and keeping in mind that no one would imagine that Cain's testimony was elicited on the basis that it was literally true, among other reasons, because it was not literally true – that O'Neill would knowingly have elicited false testimony from Cain was hard to believe, or, in any event, was something it seemed hard to make the court believe. At any rate, in her Rule 33 [Motion](#) (Sec. B.3), Dean chose to argue the matter in terms that, if Independent Counsel attorneys did not know that Cain testified falsely when O'Neill initially elicited the testimony, they had reason to know it following Dean's counsel's cross-examination of Cain. That proved a disastrous course.

To put the matter in context, it is necessary to briefly address that cross-examination. Dean's counsel, Steven V. Wehner, who interpreted Agent Cain's response in the way Independent Counsel attorneys expected it be interpreted – that is, as a categorical denial that Dean ever called Cain to complain about the treatment of John Mitchell in the Inspector General's Report – did not cross-examine Cain about the call. Presumably, given the firmness of Cain's denial of any recollection of the call (attended by testimony suggesting he would have remembered the call if occurred), Wehner assumed that Cain would merely restate his categorical denial of any recollection of the call, perhaps even stating that he would have remembered the call if it occurred. Wehner did, however, examine Cain on a few unrelated matters.

Wehner asked Cain if Dean had approached him to call to his attention that certain HUD subsidies were being misused in a project called Castle Square. Cain responded merely by saying that, while there had been an investigation of that project, he did not recall whether he interviewed Dean in his office or in her office. Tr. 3199-3202. Wehner also questioned Cain as to whether he recalled attending a party at Hernando's Hideaway at the Beverly Wilshire Hotel celebrating awards to Cain and his partner (Clarence Day), which party was paid for by Dean. Cain stated that it was possible that he had been at the Beverly Wilshire with Dean and that he may have been at the Beverly Wilshire with Secretary Pierce on one or two occasions. He said, however, that, though he and Special Agent Day had received the Secretary's Excellence Award, he believed that Day may have received it on his (Cain's) behalf, and that he did not recall a party at the Beverly Wilshire paid for by Dean in celebration of those awards. Tr. 3201-02. It is my understanding that the purpose of the questioning about both matters was to elicit from Cain an acknowledgement that he regarded Dean as an honest person and would not have accepted anything from her if he did not.

As indicated, however, Cain's testimony on the failure to remember the call from Dean went unchallenged by Wehner. As discussed in [Section B.1](#), according to the former Independent Counsel employee who told me about the pressuring of Agent Cain by Bruce C. Swartz and Robert E. O'Neill, there was considerable joy and relief in the offices of Independent Counsel attorneys when the fact that Cain was coached to give the responses he gave was not revealed in cross-examination.

The following day, Wehner sought to recall Dean to the stand for surrebuttal in order to respond to Cain's testimony, as well as to the testimony of two of the other four Independent Counsel rebuttal witnesses. Wehner indicated that Dean would testify about the Beverly Wilshire party and about the Castle Square project. In the face of vigorous objection by Independent Counsel attorney [Paula A. Sweeney](#), however, the court refused to allow surrebuttal. Tr. 3269-71.

As discussed in Section B.1, in Dean's Rule 33 Motion, in asserting that Cain had lied in denying a recollection of the call, Dean stated that Cain had told her that the check showing payment to Mitchell on the Arama project was then (in April 1989) maintained in a field office. Arguing that she could only have learned such fact from the call to Cain, Dean maintained that evidence as to the whereabouts of the check in April 1989 would be highly relevant to whether Cain committed perjury.

Dean also presented evidence that she had paid for a party at the Beverly Wilshire Hotel at which she maintained Cain was present and evidence concerning her contacting Cain and other HUD officials on the Castle Square matter. Dean argued that, if Independent Counsel attorneys were not aware that Cain was lying about the call when he originally testified, they should have become aware of such fact because of Cain's evasiveness in responding to questioning on these matters during cross-examination.

It would turn out, however, that Dean was mistaken as to Cain's being at the Beverly Wilshire party, as the Independent Counsel was able to show, apparently conclusively. While presenting nothing from the HUD officials (including Cain) to whom Dean claimed she complained about the Castle Square project, they presented evidence that after leaving HUD she had been a consultant on the project. In their opposition to Dean's motion, Independent Counsel attorneys devoted their [Opposition \(Abbrev Opp\)](#)<sup>4</sup> largely to challenging Dean's testimony about the Beverly Wilshire.

The details of the matter are addressed in Sections F, G, and O of the [Cain Appendix](#) and, in rough summary, it might be said that, while conclusively showing that Dean was wrong about Cain's presence at the Beverly Wilshire party, they merely raised some issues about the Castle Square matter. The important point is that, given Dean's clear error with regard to the Beverly Wilshire party, Independent Counsel attorneys, while maintaining that Dean committed perjury on the matter, were able to raise an issue about her credibility, and while focusing on that matter (with a footnote devoted to Castle Square), were able to obscure the limited attention given to Dean's contentions regarding the call. Crucially, while maintaining that the issue about call was simply a matter of Cain's word versus Dean's and that the jury verdict showed that Dean could not be

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<sup>4</sup> Although the Opposition itself downloads easily enough, for the reader's convenience an abbreviated version limited to the pages (73-79) addressing this issue is also made available.

believed,<sup>5</sup> the Opposition made no mention whatever of Dean's argument that evidence on the whereabouts of the check in April 1989 would corroborate her testimony.

In a [Reply](#) (at 26-29) Dean then acknowledged she was mistaken as to Cain's presence at the Beverly Wilshire party. And she acknowledged that the fact that Cain was not being evasive as to the party vitiated her point that Cain's evasiveness should have led the prosecutors to recognize that his testimony about the call might have been false. But she argued that did little to undermine key claim as to the fact that Cain's testimony about the call was false and that Independent Counsel must have known it was false. Further, she pointed out that the Independent Counsel said nothing concerning her crucial point concerning the April 1989 whereabouts of the check that she maintained Cain, in April 1989, told her was maintained in a field office.

Nevertheless, Dean's mistake regarding the Beverly Wilshire part caused her argument as to Cain to be completely overlooked in the [hearing of February 14, 1994](#). There while seeming to be close to overturning the verdict for abuses unrelated to Cain, Judge Hogan mentioned the Cain matter only in passing, and as if the issue solely concerned whether Cain was present at a party, noting that Dean indicated that she was mistaken. Tr. 29. Hogan evidenced no familiarity with Dean's arguments as to the whereabouts of the check or even a recognition of Dean's crucial point that Cain had lied about the call on which O'Neill had placed such weight in attacking her credibility in closing argument.

Dean then filed a [Motion for Reconsideration](#), among other things, again noting the Independent Counsel's failure to address the whereabouts of the check in April 1989 and seeking discovery on the issue. She noted that the issue of whether Cain had lied had taken on additional significance in light of the probation officer's recommendation that Dean's sentence be increased for lying about the call to Cain. This ultimately forced the Independent Counsel to in some manner address the issue of the whereabouts issue at a [hearing on February 22, 1994](#). See Addendum 3 to the [Bruce C. Swartz profile](#).

But, even though Hogan had seemed close to overturning the verdict at the February 14, 1994 hearing, he now showed little interest in revisiting the issue. And, though evidently believing that Dean had told the truth about the call – hence, it would seem, that Cain's testimony on which O'Neill had placed such weight in attacking Dean's credibility was perjurious – Hogan denied discovery into the matter. Finding that the evidence “doesn't mean of necessity the government is putting on information they knew was false before the jury” (Tr. 21), he refused to determine whether in fact the government knowingly put false evidence before the jury. See the May 31, 2008 document styled “[The Independent Counsel's Use of Dean's Off-the-Stand Remark about David Barrett and the Judge](#).” Further, the Cain matter had been muddled enough that Dean's appellate counsel would not pursue it on appeal.

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<sup>5</sup> In doing so, they observed that “the jury must necessarily have concluded, as evidenced by its verdict, that defendant perjured herself before this court as well.” Opp. 75. That seems a correct observation. But there is much reason to believe that Cain's contradiction of Dean's testimony about the call played a large role in the jury's coming to that conclusion.

Given only what was known at the time the [Cain Appendix](#) was submitted to the Department of Justice, it was evident that Independent Counsel attorneys were attempting to focus on what they surely recognized was a mistake on Dean's part in order to obscure issues regarding Cain's contradiction of Dean's testimony about the call. And they did so quite successfully. But as with other matters, additional light is cast on the situation once one recognizes that Independent Counsel attorneys had all along known that Dean had called Cain just as she said in April 1989. One wonders whether, had Dean not raised the Beverly Wilshire issue at all, Independent Counsel attorneys would have believed they could get away with covering up their conduct regarding the securing and use of agent's Cain testimony seeming to contradict Dean about the call.

In any case, one will note that in Addendum 3 to the Bruce C. Swartz [profile](#), which addresses Swartz's efforts to deceive the court regarding the issue of the whereabouts of the check once he was ultimately forced to address the issue, the quoted testimony begins as follows:

That brings us, Your Honor, to the third suggestion, that Agent Cain perjured himself, and that is the supposed conversation with regard to John Mitchell.

Swartz refers to the "third suggestion," because he first addressed the issues of Dean's contentions concerning the Beverly Wilshire Party and the Castle Square matter, especially the former. He started out by listing the Beverly Wilshire party as the first of the matter that Dean had raised in her motion, terming it "the one that defendant particularly stressed in her motion." Tr. 4-5.<sup>6</sup> Noting that Dean acknowledged that her statement regarding Cain's presence was a mistake, Swartz stated that "we believe that it was more than simply a mistake, Your Honor," and asserted that Dean "never expected that we would be able to obtain HUD travel records from approximately nine years ago to rebut this claim." Adding that "at a minimum, this was reckless, particularly given the accusation against Agent Cain, a career government agent," Swartz would assert that "it also at a minimum completely undercuts her credibility on all other matter." Tr. 5-6.

Any modestly intelligent reader of this material, knowing only what was known in December 1, 1994, would recognize that while making these statements Swartz did not believe for an instant that Dean had been other than mistaken regarding the Beverly Wilshire party, but that Swartz was making these statements in order to obscure the issue of the check to which he would eventually turn. We now know, however, that these statements were made in order to assist Swartz cover up his own conduct regarding the securing of Agent Cain's testimony, conduct that most observers would regard as the suborning of perjury.

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<sup>6</sup> In the further seeking to lead the court to believe these were the main subject of Dean's motion, Swartz also observed: "indeed, these were also the two issues on which Agent Cain had been cross-examined at trial, as the Court will recall." Tr. 5. The reason that Dean's Counsel only examined Cain these matters, or rather to cross-examine him regarding the April 1989 case, has been noted supra.



Further, anyone who should address with Swartz whether he in fact caused Cain to give testimony that would lead the jury to believe things that he (Swartz) knew to be false should recognize that anything that Swartz states about the Beverly Wilshire matter – whether raised in terms of why Dean should not be believed about the call to Cain or in terms of why he (Swartz) did not recognize that Dean was telling the truth about the call – is stated by Swartz in order to deceive the persons to whom he makes such points.

Finally, both the Bruce C. Swartz and Robert J. Meyer profiles discuss the feigned outrage over Dean’s attack on Cain’s credibility. This might be a useful place also to set out the terms in which that outrage was initially presented in the [Opposition \(Abbrev Opp\)](#) (at 73).

Agent Cain, a career government employee, is currently a Supervisory Special Agent for the HUD Office of Inspector General. He has been detailed to the Office of Independent Counsel. Defendant would have this Court conclude not only that Special Agent Cain deliberately perjured himself, but that he did so with the complicity of this Office.

Such a charge should not be lightly made; and a false charge of this nature should not be dealt with lightly. As we show below, defendant's allegations against Agent Cain constitute at best a wholly unfounded and reckless slander against a career employee of the United States. But, as we further show, there is evidence here that defendant's allegations are not merely reckless, but perjurious and a deliberate fraud upon the Court .

It should be recognized that the persons who wrote these words knew that Cain’s testimony was crafted not only in a manner to make the jury falsely believe that Dean had lied in her testimony about calling Cain in April 1989, but, of necessity, also to make Dean believe that Cain committed perjury. Further, the word “complicity” that the document uses in expressing such umbrage actually fails accurately to capture the reality, inasmuch as Robert E. O’Neill and Bruce C. Swartz actually had to pressure Cain into giving testimony that he was evidently very reluctant to give.<sup>7</sup> Should any of the involved attorneys have the temerity to presently deny the accuracy of this or other account on these page, and in doing so take umbrage at the suggestion that they would do such things, the auditor would be wise to keep the above circumstances in mind.

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<sup>7</sup> Possibly one day Cain will reveal the extent of this coercion.