This is a PDF version of the separately accessible version of Section B.8 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).

8. The Department of Justice's Role in Perpetuating All Actions of the Independent Counsel [b8]

In approximately July of 1999, while Dean's February 1997 motion and her request for reconsideration of the ruling on her December 1996 motion were still pending, the case was transferred to the Public Integrity Section of the Department of Justice. The case was there assigned to Robert J. Meyer, the former Independent Counsel attorney who had signed the opposition to Dean's November 30, 1993 Rule 33 Motion. *See* the Robert J. Meyer profile. In addition to the December 17, 1999 letter to Robert J. Meyer,, the implications of the Department of Justice's assumption of responsibility for continuing the Dean prosecution are discussed in my letter of December 26, 1999, to Attorney General Janet Reno, Deputy Attorney General Eric Holder, and other officials of the Department of Justice and my letter of January 22, 2000, to H. Marshall Jarrett, Counsel for the Office of Professional Responsibility.

Robert J. Meyer left the Department of Justice some time in 2000 and by notice of August 30, 2000, responsibility for the case was assumed by Public Integrity Section attorney Raymond N. Hulser. In March 2001, Hulser moved for a hearing to resolve the case. When Dean argued that the government had not yet responded to her pending motions, in a document dated March 28, 2001, Hulser maintained that the Independent Counsel had provided detailed pleadings stating why Dean's request for reconsideration of the ruling on her motion to overturn Count One should be denied and her motion for a new trial should be stricken. Thus, while presumably knowing that the Independent Counsel had repeatedly attempted to deceive the courts, and that the Independent Counsel's representation in the motion to strike Dean's February 1997 motion that there had been no efforts to deceive the court previously in the case was false, the Department of Justice took an affirmative step toward continuing the concealment of Independent Counsel actions regarding such matter. But, even without such affirmative action on the part of the Department of Justice, assuming that it was aware that Independent Counsel attorneys had used false evidence or attempted to deceive the court previously in the prosecution of the case, it could fairly be said that the failure of Department of Justice attorneys to bring such matters to the attention of the court involved a perpetuation of that conduct.

Such points, however, pertain to the role of the Department of Justice in the prosecution of the case after it replaced the Independent Counsel as the prosecutor and the actions of the Independent Counsel became Department of Justice actions. Also deserving of examination are the actions of the Department of Justice when the case was still being

handled by the Office of Independent Counsel and the Department's role was limited to determining whether to investigate the Office of Independent Counsel and whether actions of Department of Justice attorneys while serving in the Office of Independent Counsel warranted their removal from positions in the Department of Justice In that regard, I suggest the reader examine the letters to me from Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. dated June 28, 1995, and January 30, 1996, and my responses dated August 15, 1995, and March 11, 1996, and, in light of those responses, consider whether the Shaheen letters either accurately characterize the matters at issue or reflect an appropriate concept of the role an overseer or prosecutorial conduct.

The March 11, 1996 letter explains that the only matter as to which the Shaheen's January 30, 1996 letter even accurately characterized the issues – that is, "that the jury chose to believe these government witnesses and to disbelieve as not credible the testimony of Ms. Dean" – involved the testimony of Supervisory Special Agent Alvin R. Cain, Jr. Shaheen never responded to my request that he explain to me whether the Department's decision not to take any action – whether with regard to an investigation of the Office of Independent Counsel or the removal of Robert E. O'Neill and Bruce C. Swartz from positions in the Department of Justice – was based on the view that their conduct was permissible because Agent Cain's testimony was, or was supposed to be, literally true.

In any event, particular attention should be given to the apparent view in the Shaheen letters that, if the extent of misconduct of government attorneys is not revealed in the court proceedings, the authority overseeing the conduct of those attorneys is absolved of responsibility in the matter – and that such view holds even when the government attorneys' misleading of the courts was the reason that the misconduct was not revealed. Further, implicit in Associate Deputy Attorney General David Margolis's raising of the issue of whether Agent Cain's testimony might be literally true – which was apparently suggested as a rationale by which the Independent Counsel actions would not have been as egregious as I was portraying them – is the view that it is permissible both for government attorneys to lead the court and jury to believe things those attorneys know be false as long as the testimony offered for that purpose is literally true and for government attorneys to mislead the court in effort to conceal the nature of the government attorneys' conduct. Thus, one must consider the possibility that actions such as those Independent Counsel attorneys apparently undertook with regard to Agent Cain and varied other matters may not in fact be unusual among federal prosecutors.

One should consider also the fact that, apart from Arlin M. Adams himself, most of the offending attorneys had been Department of Justice attorneys before they joined the Office of Independent Counsel, as some would also be after they left the Office of Independent Counsel. In the court of appeals, both orally and in writing, Deputy Independent Counsel Bruce C. Swartz, in denying that there had been any bad faith on the part of the prosecutors, would emphasize that all involved attorneys were experienced Department of Justice prosecutors. See generally the profile pages on Jo Ann Harris, Bruce C. Swartz, Robert E. O'Neill, and Paula A. Sweeney.

Jo Ann Harris was lead counsel in the Dean case at the time that the Independent Counsel decided to draft a superseding indictment containing statements or inferences Independent Counsel attorneys knew or believed to be false, and with the evident intention of failing to make *Brady* disclosures in a timely manner, or at all, of statements or documents that would interfere with the Independent Counsel's efforts to lead the jury and the courts to believe those things Independent Counsel attorneys knew or believed to be false, and, equally important, with the intention of failing to confront government witnesses with information that would cause them to acknowledge that the testimony the Independent Counsel planned to elicit was false. See my May 17, 1995 letter to Abner J. Mikva and the Jo Ann Harris profile.

Prior to serving as an Associate Independent Counsel, Harris had held the position of chief of the fraud section of the Criminal Division and had twice been an Assistant United States Attorney. After her service with the Independent Counsel, Harris would hold the position of Assistant Attorney General for the Criminal Division. While there she would be noted in the press for imposing very modest discipline upon a prosecutor who had withheld important evidence from the defense, apparently asserting as the basis for the modest discipline that the prosecutor had failed to recognize the significance of the material withheld. In 1994, she would be appointed, along with, among others, Deputy Assistant Attorney General Margolis and Counsel for the Office of Professional Responsibility Shaheen, to a newly-created Advisory Board on Professional Responsibility.

Swartz, whose efforts to deceive the district court and the court of appeals are discussed in some detail in the Cain and Park Towers appendixes, and more recently summarized in the Swartz profile, including (with regard to Park Towers) the way *Brady* violations assisted in those efforts (see also the profiles on Jo Ann Harris, Paula A. Sweeney, and Robert J. Meyer), would be called upon orally to defend the Independent Counsel conduct with regard to its *Brady* obligations in court of appeals in response to concerned questioning from Judge Laurence Silberman. In defending a position on disclosure of *Brady* materials that Judge Silberman termed "unconscionable" or "ridiculous," Swartz would seek deference to the position by noting that the approach was developed by a trial counsel who was now the Assistant Attorney General for the Criminal Division. Judge Silberman seemed to take little comfort in such fact. *See* Transcript 40-41, 46.

At any rate, both those who may be skeptical of my allegations as to the nature of Independent Counsel conduct and those who may be skeptical of the ethics of federal prosecutors generally (or of the role of the Office of Professional Responsibility of the Department of Justice in overseeing such conduct) should be aware that the Office of Professional Responsibility is on record that the conduct identified in the December 1, 1994 materials did not call into question the fitness of the involved prosecutors to continue to represent the United States.[1]

[1] The December 23, 1997 letter to Department of Justice Inspector General Michael R. Bromwich referenced in the Introduction requested an investigation of the handling by Department of Justice officials of the allegations of misconduct in the Dean case. In the letter, among other things, I maintained that the

See also (1) Section B.9 *infra* regarding implications of the former Independent Counsel document manager's complaint; (2) my emails to the Department of Justice of July 14, 2008 and July 17, 2008 regarding whether Deputy Assistant Attorney General Bruce C. Swartz and (then) interim United States Attorney Robert E. O'Neill should be permitted to remain with the Department of Justice should they now (a) acknowledge their conduct in the Dean case or (b) continue to deny it; and (3) my email to the Department of Justice of April 8, 2009 regarding whether the current Attorney General's asserted commitment to correcting prosecutorial abuses can be taken seriously if Swartz and O'Neill are permitted to continue serving in their current positions.

Department failed to investigate the allegations in good faith out of a concern that an investigation would establish that high-ranking officials of the Department had violated federal laws while serving as attorneys for the Office of Independent Counsel. By letter dated April 8, 1998, Inspector General Bromwich advised that he could not review the allegations because his office did not have jurisdiction to investigate matters concerning Department of Justice attorneys' exercise of their authority to investigate, litigate, or provide legal advice.

Meanwhile, by letters dated January 14, 1998, and March 2, 1998, I requested Attorney General Jane Reno to consider the removal of Larry D. Thompson from the position of Office of Independent Counsel, maintaining both that the Department of Justice did not previously consider the allegations of Independent Counsel misconduct in good faith and that developments subsequent to the Department's last communication to me on the matter provided independent justification for reconsideration of the earlier determination. The March 2, 1998 letter addressed the Independent Counsel's actions regarding the complaint by the document manager (*see* Section B.9) and Independent Counsel actions regarding my effort to review an interview report I had reason to believe had been altered (as the document manager's complaint suggested in fact occurred in some instances). By letter dated May 4, 1998, Inspector General Bromwich advised that my March 2, 1998 letter to Attorney General Reno had been forwarded to his office for response. Referencing his April 8, 1998 letter me, Inspector General Bromwich advised that the Office of Inspector General did not have jurisdiction to address the matters raised in my March 2, 1998 letter to the Attorney General.

By June 17, 1998 letter to Attorney General Reno, I noted that it is an unusual thing for the head of an agency of the United States who has the authority to address a matter to refer the matter to a division of her agency that does not have such authority. I requested clarification of whether the Attorney General intended that Inspector General. Bromwich should respond on her behalf by advising me of the lack of jurisdiction of his office. I suggested that, if such had been her intention, it would not discharge her responsibilities over the matter. I therefore requested that the Attorney General either address the matter herself or refer it to a division of the Department of Justice that does have jurisdiction. Attorney General Reno did not respond to that letter.