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July 20, 2009

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Florida Federal Judicial Nominating Commission  
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Wayne Hogan, Esq., Conference Chair  
Middle District Conference of the  
Florida Federal Judicial Nominating Commission  
Terrell Hogan  
233 East Bay Street, 8th Floor  
Jacksonville, Florida 32202

Members of the Middle District Conference of the  
Florida Federal Judicial Nominated Commission  
(names and addresses listed after the signature)

Re: Comments on Misleading or Inaccurate Statements in the  
Application of Robert E. O'Neill for Position of United States  
Attorney for the Middle District of Florida

Dear Mr. Fitzgibbons, Mr. Hogan, and Members of the Middle District Conference of the  
Florida Federal Judicial Nominating Commission:

By [letter of July 13, 2009](#),<sup>1</sup> I brought to your attention issues concerning the suitability of  
Robert E. O'Neill for the position of United States Attorney for the Middle District of  
Florida. When I wrote that letter, I was not aware that there existed a publicly available  
application filed by Mr. O'Neill for the position. I have since learned that such document  
exists and have secured a copy of it. The purpose of this letter is to comment, in light of  
matters addressed in my earlier letter, on certain information Mr. O'Neill provided or

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<sup>1</sup> As with my prior letter, the underlining of words or phrases in this letter indicates that the identified  
material can be directly accessed by a link in an electronic version of this document made available on  
jpscanlan.com. Such version may be found at the end of the narrative material that can be accessed by  
means of the "Robert E. O'Neill" tab on the "Misconduct Profiles" tab of that site.

failed to provide in response to application Items 8 (Litigated Matters), 19 (Disciplinary Matters), and 32 (Other Relevant Matters).

**A. Item 9 (Litigated Matters)**

Item 9 (Litigated Matters) of the application requests information on the ten most significant litigated matters that the applicant personally handled. Responding to that request, and apparently listing the matters chronologically, Mr. O'Neill lists as the third such matter the case of *United States of America v. Deborah Gore Dean*, No. 92-CR-181-TFH (D.D.C.). This case, which Mr. O'Neill discusses earlier in his application (at 9), there describing it as the "showcase trial for the Independent Counsel," is also the case involved in my letter of July 13, 2009.

A page 18 of his application, Mr. O'Neill describes the matter as follows:

United States v. Deborah Gore Dean, Case No. 92-CR-00181 (D.D.C.): I tried this case on behalf of the Office of Independent Counsel. I was the lead attorney for the United States. I was assisted at trial by a co-counsel, Paula Sweeney, who is now in the General Counsel's Office of the Central Intelligence Agency. Her address is Central Intelligence Agency, Washington, D.C. 20505, and her telephone number is (703) 482-1100. The defense attorney was Steve Wehner. His address is Wehner & York, PC, 11860 Sunrise Valley Drive, Suite 100, Reston, Virginia 20191, and his telephone number is (703) 476-8000.

The Office of Independent Counsel, headed by Arlin Adams, had been established to investigate allegations of fraud, waste, and abuse at the United States Department of Housing and Urban Development ("HUD") under then-Secretary Samuel Pierce. Many of the allegations were based upon claims that the ability to obtain government contracts with HUD was dependent upon political connections to prominent individuals with close ties to the Administration. The case against Deborah Gore Dean revealed her involvement in awarding these contracts to influential individuals with ties to her, including a former Attorney General of the United States, a former governor of a southern state, and the national head of a political party, among others.

The trial commenced in the fall of 1993, and it lasted for approximately three to four weeks. The trial was presided over by the Honorable Thomas Hogan in the United States District Court for the District of Columbia. At the conclusion of the trial, the jury found the defendant guilty of all charges. On appeal, the United States Court of Appeals for the D.C. Circuit affirmed Ms. Gore's [sic] convictions on the most serious charges, but reversed the convictions on several counts on the basis of an intervening Supreme Court decision holding that making false statements

to Congress could not form the basis of a conviction under 18 U.S.C. § 1001. *United States v. Dean*, 55 F.3d 640 (D.C. Cir. 1995), cert. denied, 516 U.S. 1184 (1996).

Initially, I correct or clarify certain points in this description. First, Steven Wehner, whom Mr. O'Neill lists as opposing counsel, passed away nine years ago. The defendant's last counsel in the matter is Joseph J. Aronica of Duan Morris LLP, 505 9th Street, NW, Washington, DC 20004-2166. His telephone number is (202) 776-7824. Though Mr. Aronica was not involved in the trial of the case, he did file the post-appeal motions discussed in the Introduction to the main [Prosecutorial Misconduct](#) page (PMP) of [jpscanlan.com](#), as well as in [Section B.3](#) and [Section B.5](#) of PMP. As discussed in those sections, and somewhat below, those motions raised various issues of prosecutorial abuse by Mr. O'Neill during the trial. Thus, Mr. Aronica, a former chief of the Criminal Division of the Office of the United States Attorney for the Eastern District of Virginia, is in a position to comment on Mr. O'Neill's conduct in the trial of the case.

Second, as Mr. O'Neill notes, on the basis of intervening law, the court of appeals reversed convictions of several (four) counts involving 18 U.S.C. §1001. The court of appeals also reversed a conviction on a perjury charge. And, in upholding three conspiracy counts, the court of appeals overturned the findings as to three of the four projects at issue in one of them and three of the five projects at issue in another. In light of these rulings, and a ruling on a sentencing issue, the court of appeals vacated the judgment and remanded the case for resentencing of the defendant. The ultimate consequences of these ruling can be better explained in the context of the several important aspects of the litigation that Mr. O'Neill fails to address in his description.

Following the trial conducted by Mr. O'Neill and Paula A. Sweeney,<sup>2</sup> on November 30, 1993, in addition to seeking to overturn the verdicts for insufficiency of evidence, the defendant moved for dismissal of the indictment or a new trial on grounds that pervasive prosecutorial abuses denied her a fair trial ([Rule 33 Motion](#)). At a [hearing on February 14, 1994](#), the Honorable Thomas F. Hogan specifically agreed with much of what the defendant asserted concerning prosecutorial abuses, including that Mr. O'Neill and his co-counsel failed to disclose exculpatory material while representing that no such material existed; that Mr. O'Neill and his co-counsel put on witnesses without attempting to determine whether their testimony was true; and that Mr. O'Neill and his co-counsel had reason to know that the testimony of two its witnesses was false. The court strongly criticized Mr. O'Neill for failing to reveal an off-the-stand statement of a witness that certain receipts introduced into evidence as if they applied to the defendant did not apply to her. The court observed that it would have expected every Assistant United States Attorney who had ever appeared before it to bring the statement immediately to the

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<sup>2</sup> The trial was somewhat longer than estimated by Mr. O'Neill. The opening argument took place on September 13, 1993, and the closing argument concluded on October 21, 1993, with the verdict rendered on October 26, 1993.

attention of the court and the defense. Tr. 27.<sup>3</sup> More generally, the court found that Mr. O’Neill and his co-counsel had acted in a manner reflecting “at least a zealotry that is not worthy of prosecutors in the federal government or Justice Department standards ....” *Id.* The court repeatedly noted its concerns about the “cumulative effect” of the prosecutorial abuses it identified, observing that it was “almost impossible to quantify the total impact” of such abuses on the defendant’s ability to defend herself. *Id.* 8-9, 28-29. But the court concluded that it did not believe the abuses it identified were sufficient to require new trial. *Id.* 29-30.

The defendant moved for reconsideration, requesting discovery into certain matters. These included whether Supervisory Special Agent Alvin R. Cain, Jr. – a government witness on whose specific contradiction of the defendant’s testimony Mr. O’Neill had placed great weight in provocatively attacking the defendant’s credibility in closing argument – had lied with knowledge of Independent Counsel attorneys. In a [February 22, 1994 hearing](#), the court denied the motion and the request for discovery, observing that, while the matter “could be argued either way,” the evidence put forward “doesn’t mean of necessity the government is putting on information they knew was false before the jury.” Tr. 21<sup>4</sup>

See discussion of this matter in [Section B.1](#) of PMP and the [profile of Bruce C. Swartz](#), as well as at pages 3-5 of my [letter to the Commission of July 13, 2009](#). These references explain that, though they knew the defendant had told the truth in court, Mr. O’Neill and Mr. Swartz pressured the agent into providing testimony that would seem to contradict her. The references also show that during the post-trial proceedings, in order to cover up his own conduct and the conduct of Mr. O’Neill in securing the agent’s testimony, Mr. Swartz attempted to lead the court to believe a number of things Mr. Swartz knew to be false.

On February 25, 1994, the court sentenced the defendant to be confined in a federal prison for a period of 21 months but allowed bond pending appeal. The defendant then appealed. In an [opinion](#) issued May 26, 1995, the United States Court of Appeals for the District of Columbia Circuit, though rejecting the appeal of the district court’s denial of

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<sup>3</sup> This matter is discussed at some length in [Section B.7](#) of PMP and materials it references as well as in the [O’Neill profile](#). The district court’s criticism of Mr. O’Neill’s conduct in this matter was expressed without the court’s recognizing that, even before the witness made the statement, Mr. O’Neill knew with virtual certainty that many of the receipts he intended to lead the jury to believe applied to the defendant in fact did not apply to her. Among other reasons, Mr. O’Neill knew these things because the receipts did not name the defendant or her position but instead named other positions such as the position of a person Sankin was known to be dating at the time. As discussed in the O’Neill profile, Mr. O’Neill defended his attempting to lead the jury to believe that the receipts applied to the defendant because “the Government did not say” they applied to her. The court of appeals’ criticism of Mr. O’Neill’s conduct (discussed *infra*) was also expressed without recognition that even before the witness said anything, Mr. O’Neill knew that many of the receipts did not apply to the defendant.

<sup>4</sup> While concluding that the evidence did not of necessity mean that the Mr. O’Neill had knowingly used false evidence, the court later indicated that it believed the testimony of the defendant that Agent Cain’s testimony appeared to specifically contradict. See Section N of the [Cain Appendix](#).

the defendant's Rule 33 Motion, sharply criticized the conduct of Independent Counsel attorneys. In particular, the court stated that it "deplore[d]" the government's failure to make certain *Brady* disclosures, impliedly finding that representations that Mr. O'Neill and other Independent Counsel attorneys had made during the course of the litigation were false. It also concurred with the district court in its view that Mr. O'Neill should have brought a witness's off-the-stand statement to the attention of the court and defense counsel. *See* note 3 *supra*.

As previously noted, in light of its overturning five counts in the indictment, and its finding insufficient evidence to support substantial parts of two conspiracy counts, as well as a ruling on a sentencing issue, the court of appeals vacated the judgment and remanded the case to the district court for resentencing of the defendant.

Following denial of a petition for certiorari in 1996, the defendant took a number of actions in the district court that led to the case's remaining open until 2001. The court of appeals had overturned the verdict as to three of the four projects in Count One of the Superseding Indictment (the count involving John N. Mitchell, the former Attorney General mentioned in Mr. O'Neill's description of the case). In December 1996, the defendant produced evidence that she was not guilty of a conspiracy with regard to the remaining project in Count One and sought to have the entire count dismissed. The evidence presented was related to documents that Mr. O'Neill failed to disclose as *Brady* material (which failure had been the subject of criticism by the court of appeals) and Mr. O'Neill's failure to confront a witness with evidence that his expected testimony was false (as discussed in [Section B.3](#) of PMP and the [O'Neill profile](#)). The court denied the motion on the grounds that the evidence the defendant presented was not newly discovered. The defendant moved to have the court reconsider the ruling. The motion for reconsideration remained pending until November 2001.<sup>5</sup>

In February 1997, the defendant again moved for dismissal of the entire indictment or a new trial on ground of prosecutorial abuse, citing (1) the cumulative effect of the previously identified prosecutorial abuses and additional abuses that had not been identified when she filed her original Rule 33 Motion, (2) Independent Counsel efforts to mislead the courts in responding to the earlier motion, and (3) the diminished evidence of guilt in the light of the rulings of the court of appeals. The Independent Counsel moved to strike the February 1997 motion and never responded to any allegations in the motion save to deny that there had been any efforts to mislead the court in responding to the

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<sup>5</sup> Whether the procedural basis for this ruling was sound or not, as discussed in [Section B.3](#) of PMP, the evidence presented in support of the motion would seem clearly to establish both that the defendant was not guilty with regard to the sole remaining project at issue in Count One and that the evidence used to convict her at trial included false testimony that Mr. O'Neill knew was almost certainly false at the time he elicited it. Thus, the section shows that, to the extent that Mr. O'Neill's statement that "[t]he case against Deborah Gore Dean revealed her involvement in awarding these contracts to influential individuals with ties to her, including a former Attorney General of the United States" is correct, it should be read as limited to the evidence presented at trial and with recognition that crucial evidence was false.

defendant's earlier motions. This motion also remained pending until November 2001. See [Section B.5](#) of PMP.

In November 2001, while both the motion for reconsideration of the denial of the December 1996 motion and December 1997 motion were still pending, a joint motion was filed by the defendant and the Department of Justice (which, in 1999, had replaced the Office of Independent Counsel in the prosecution of the case) whereby the defendant agreed to withdraw all pending motions and make no further direct or collateral attacks on her conviction. In return, the Department of Justice recommended that the defendant be sentenced to a term of probation that included six months of home detention, agreeing also to take no position as to the terms of the home detention. The defendant was then sentenced to three years of probation, including six months of home detention under terms that allowed her to work at her place of business during that period and to make business-related trips from Washington to New York. The defendant was not required to wear a device indicating her whereabouts during the period of home detention.

Thus, at a minimum, there was a great deal more to this case than Mr. O'Neill's description would suggest. And, though (as Mr. O'Neill notes) it was the showcase trial of Independent Counsel Arlin M. Adams, it was substantially clouded by the existence of many prosecutorial abuses that the courts recognized and many allegations of additional prosecutorial abuses that remained unaddressed at the time the government accepted an agreement whereby the defendant who had originally been sentenced to 21 months in prison received a far less severe sentence.<sup>6</sup> I am not in a position to know the extent to which in reaching this agreement the Department of Justice was influenced by a desire to avoid having to respond to allegations of prosecutorial abuse by Mr. O'Neill and his colleagues. Mr. Aronica may have a view on the issue.

## **B. Item 19 – Disciplinary Matters**

Item 19 (Disciplinary Matters) of the application requests the following information:

Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative office or agency, bar association, disciplinary committee or other professional group? If so, give the particulars.

Mr. O'Neill first states: "I have never been disciplined or cited for a breach of ethics or unprofessional conduct." Then, with regard to complaints, he limits his discussion of the *Dean* case to a District of Columbia Office of Bar Counsel complaint, which he states was filed by the defendant.

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<sup>6</sup> Of course, in the event that the defendant was wrongly convicted, the defendant would have to be regarded as being dealt with harshly rather than leniently.

Whether Mr. O'Neill is correct in failing to regard the criticism of his conduct in the *Dean* case by the district court and the court of appeals as his being "cited for a breach of ethics of unprofessional conduct" would seem to turn on the interpretation of the word "cited." Though some would err on the side of disclosure, Mr. O'Neill's interpretation of the word in its more formal sense may be a correct one.

With regard to complaints, however, it would seem appropriate to regard the varied motions in the *Dean* as complaints to courts about unethical or unprofessional conduct (or at least sufficiently arguably so that an applicant should err on the side of disclosure). Mr. O'Neill's failure to so regard these motions would seem also to indicate that he is failing to disclose such information as to any other cases in which defendants alleged that Mr. O'Neill engaged in prosecutorial misconduct. And my complaints to the Department of Justice, including its Office of Professional Responsibility (which are discussed prominently in the web materials I brought to Mr. O'Neill's attention by [letter of July 9, 2008](#) and letter of September 8, 2008), would seem to fall into the category of complaints to an administrative office or agency. Mr. O'Neill mentions none of these things.

In any event, Mr. O'Neill's description of the District of Columbia Office of Bar Counsel matter regarding the *Dean* case is misleading or incorrect in a number of respects. He describes that matter as follows:

(b) Deborah Gore Dean, Office of Bar Counsel, The Board on Professional Responsibility, District of Columbia Court of Appeals (1995):

I prosecuted Deborah Gore Dean on behalf of the Office of Independent Counsel. The trial occurred in Washington, D.C. After her conviction on all counts, Ms. Dean filed a bar complaint alleging a number of instances of prosecutorial misconduct during the trial. On June 27, 1996, Bar Counsel sent a letter stating that there was "insufficient evidence of professional misconduct" and Bar Counsel terminated the investigation.

The description provided by Mr. O'Neill suggests that, immediately following her conviction, a disappointed defendant filed a bar complaint.

To my knowledge, no one filed a complaint with the District of Columbia Bar Counsel regarding the *Dean* case until after the court of appeals ruled, and, in a published opinion, criticized the conduct of Mr. O'Neill and his co-counsel (as discussed above). Further, the defendant, Deborah Gore Dean, never filed a complaint with the Office of Bar Counsel.

I, as a member of the District of Columbia Bar and a person subject to its sanctions for making unfounded allegations against fellow members of the Bar, did file a complaint, as discussed in [Section B.11a](#) of PMP and my July 13, 2009 letter to the Commission. As also discussed in that section, District of Columbia Bar rules limit what I can say about such proceedings.

Thus, it may be inappropriate for me to disclose whether the proceeding was initially instituted by me or by another person or entity. But Mr. O'Neill ought not to be so limited in what he, as a respondent, may disclose. Presumably, the June 27, 1996 letter that Mr. O'Neill cites as exonerating him and that one assumes is in his possession will explain the precise nature of the proceeding including what person or entity initiated it.

Thus, I encourage the Commission to secure from Mr. O'Neill or District of Columbia Bar Counsel the February 27, 1996 letter referred to by Mr. O'Neill.<sup>7</sup> I also encourage the commission to secure all responses submitted to District of Columbia Bar Counsel on Mr. O'Neill's behalf with respect to my complaint or the complaint of any other person or entity. Having secured such material, the Commission can evaluate whether Mr. O'Neill's description of the proceeding was intended to mislead the Commission. Further, the Commission can determine both what the letter in its entirety suggests as to the conduct of Mr. O'Neill in the *Dean* case and what the Bar Counsel materials, read in light of the information provided to the Commission in my letter of July 13, 2009, and related materials, indicate about whether Mr. O'Neill attempted to deceive Bar Counsel in responding to my allegations or to the allegations of any other person or entity.<sup>8</sup>

Even without such materials, however, as discussed at page 4 of my letter of July 13, 2009, the Commission should address with Mr. O'Neill precisely how he responded to my complaint regarding the testimony of Supervisory Special Agent Alvin R. Cain, Jr. and how that response comported with the underlying events – in the latter regard, whether Mr. O'Neill in fact elicited testimony from Agent Cain intended to lead the jury to believe something he (Mr. O'Neill) knew to be false. It should also address with Mr. O'Neill whether he, or anyone on his behalf, made any explicit representations to Bar Counsel concerning conduct of Mr. O'Neill and his colleagues, what those representations were, and whether they were true.

### **C. Item 32 – Other Relevant Information**

Item 32, Other Relevant Information, reads as follows:

Other Relevant Information. State any other information which may reflect positively or adversely on you, or which you believe should be disclosed, in connection with this application for U.S. District Judge or U.S. Attorney.

In response, Mr. O'Neill states: "I am not aware of anything else that should be disclosed."

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<sup>7</sup> If neither has it readily at hand, with appropriate permission, I can make it available by releasing a password to the page where it is maintained on my web site.

<sup>8</sup> The Commission is urged especially to consider how, given the findings of the district court and the court of appeals, District of Columbia Bar Counsel would fail to find an intentional violation of the government's *Brady* obligation or of a court order requiring immediate production of all exculpatory material.



John M. Fitzgibbons, Esq. *et al.*

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The latter part of my July 13 letter discusses the likelihood that my interpretation of the conduct of Mr. O'Neill and his colleagues will eventually be widely read and that letter, along with latter part of the [O'Neill profile](#), discuss the reasons why Mr. O'Neill should have brought the existence of the web materials to the attention of his superiors and anyone whose support he has sought for his effort to secure the position of United States Attorney. The same considerations should have caused Mr. O'Neill to address the matter in a response to Item 32, particularly in an application where he lists the *Dean* case as one of his ten most important litigated matters and describes it as a showcase trial for a prominent Independent Counsel investigation.

For that matter, even if materials on my web site did no more than discuss Judge Hogan's criticism of Mr. O'Neill's conduct – or even if such materials did not exist at all – a responsible attorney in Mr. O'Neill's position should have explained that in one of his highlighted cases, the courts had sharply criticized his conduct. He should also have fully explained the circumstances surrounding that criticism. That would hold whether or not the criticism was well-founded. It would hold especially, however, if not only was the criticism well-founded, but the matters identified by the court were but an intimation of the scope of the abuses in the case.

But regardless of what the Commission believes about the appropriateness of Mr. O'Neill's failure to address the matter in response to Item 32, I restate the suggestion at page 4 of my letter of July 13, 2009, that the Commission address with Mr. O'Neill whether he agrees with the soundness of the courts' criticism of his conduct in the *Dean* and with the essential accuracy of the more damning account of his behavior in materials posted in the referenced places on my web site – as well as, with respect to any matter that Mr. O'Neill does not dispute (or does not plausibly dispute), whether he engaged in similar conduct while prosecuting cases in the Middle District of Florida.

Sincerely,

/s/ **James P. Scanlan**

James P. Scanlan

Attachment: Addressees, Middle District Conference of the Florida Federal Judicial Nominating Commission

cc:

The Honorable Eric Holder  
Attorney General of the United States

John M. Fitzgibbons, Esq. *et al.*

July 20, 2009

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The Honorable A Brian Albritton

United States Attorney

Middle District of Florida

A. Lee Bentley, III, Esq.

First Assistant United States Attorney

Office of the United States Attorney

Middle District of Florida

Robert E. O'Neill, Esq.

Chief, Criminal Division

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