Jo Ann Harris – Prosecutorial Misconduct
in *United States of America v. Deborah Gore Dean*
(May 4, 2009; rev. Feb. 23, 2011)

[This is a PDF version of the Jo Ann Harris profile on jpscanlan.com with endnotes converted to footnotes.]

Note: This and other items under the Misconduct Profiles page of jpscanlan.com are adjuncts to that site's main Prosecutorial Misconduct page (PMP), *which addresses prosecutorial abuses in* United States of America v. Deborah Gore Dean, *Criminal No. 92-181-TFH (D.D.C.). The treatment below assumes a general familiarity with the subject of that material and frequently references parts of the material, with links provided to such parts. It is recommended that the reader review Sections B.3, B.4, and B.8 of PMP and the Bruce C. Swartz profile in conjunction with the review of this profile. But a detailed understanding of the material on PMP ought not to be essential to an appraisal of the conduct described here.*

Inasmuch as Harris initially hired Bruce C. Swartz into the Criminal Division, it might be useful to consider in conjunction with this item the Truth in Justice articles primarily about Swartz dated September 4, 2010 ("Doubtful Progress on Professional Responsibility at DOJ") and February 6, 2011 ("Bruce Swartz – Our Man Abroad"). Since Harris was in charge of the case when the Independent Counsel brought the Arama charge involving John Mitchell while knowing with virtual certainty that the charge was false (the subject of Section B.3 of PMP), it might also be useful to read the item of February 22, 2011 ("Unquestionable Integrity versus Unexamined Integrity: The Case of Arlin M. Adams"), which discusses Independent Counsel Arlin M. Adams' belief that John Mitchell had kept him from the Supreme Court and Adams' statements made in connection with his refusal to recuse himself from the matter involving Mitchell.

Jo Ann Harris was the lead trial counsel who, under the supervision of Deputy Independent Counsel Bruce C. Swartz and Independent Counsel Arlin M. Adams, developed the Independent Counsel's position regarding the production of exculpatory materials in the Dean case. The substance of that position, as articulated by Swartz in response to questioning by Judge Laurence Silberman in oral argument in the court of appeals, was that exculpatory information in materials that were to be produced during the trial in connection with a witness's testifying (Jencks and *Giglio* materials) did not have to be provided to the defense prior to the production at the time the witness testified. Swartz described the position as possibly involving "too fine a distinction" (Tr.42); Judge Silberman described it as "ridiculous." Tr. 46.

The entire transcript of the November 15, 1994 appellate argument is available here. An easier-to-download excerpt of the relevant pages is available here. The transcript (which does not identify the judges by name) fails to indicate that it is Judge Silberman who is primarily questioning Swartz on these issues. It also fails to capture Judge Silberman's evident consternation when, in what seemed an attempt to secure a certain deference to

the Independent Counsel's position on production of exculpatory materials, Swartz stated that the attorney who developed the position was at the time of the appellate argument the Assistant Attorney General for the Criminal Division of the United States Department of Justice. Tr. 41.

I am not sure whether I ever possessed complete transcripts of the May 6, 1992, and June 3, 1992 hearings where Harris, somewhat obliquely, advanced this position to the Honorable Gerhard A. Gesell, apparently intending to create a record whereby she could adhere to that position notwithstanding Judge Gesell's instruction that exculpatory information had to be provided to the defense "right away, as soon as you know it." But important passages are set out in Section C of Part I of my complaint to the District of Columbia Bar Counsel, which is posted with some redactions (as discussed in Section B.11a of the main Prosecutorial Misconduct page (PMP)) (and the referenced page from the former and pages from the latter hearing are posted). Part I also addresses, in the context of efforts of Independent Counsel attorneys to prove at trial things they knew to be false and the relevance to those efforts of the materials belatedly or never made part of a *Brady* disclosure and the various misleading or false representations Independent Counsel attorneys made in defense of their actions.

The portions of the transcript quoted or paraphrased in Part I seem not to include the instances where Harris insisted to Judge Gesell that she knew just what the defendant would need to fairly defend herself and when the defendant would need it. Possibly, when secured, the transcript itself will reflect the arrogance with which those statements were made. But the arrogance was evident enough in the courtroom.

In any case, all of Harris's statements to Judge Gesell must be appraised with an appreciation that Harris was then crafting a Superseding Indictment containing statements and inferences that were specifically contradicted by materials in Independent Counsel files, and that, had Judge Gesell's instruction been followed, a large volume of contradicting materials would have to be provided to the defense contemporaneously with the July 7, 1992 issuance of the indictment. That Independent Counsel attorneys regarded Judge Gesell's instructions on the production of exculpatory material as presenting difficulties for the Independent Counsel's planned approach to the case is reflected in the remarks within the Independent Counsel offices on the death of Judge Gesell (as discussed in the profile page on Paula A. Sweeney), and the outcome of this matter might have been very different had not terminal illness forced Judge Gesell to turn the case over to the Honorable Thomas F. Hogan.

Even were one to regard Harris's position as both sound and not contrary to Judge Gesell's specific instruction, however, the position would apply only to exculpatory information in witnesses' statements. It would not apply to things like the Mitchell telephone message slips discussed in Section B.3 of PMP or the Sankin Harvard Business School application discussed in Section B.7a of that page. Because Harris had left the Office of Independent Counsel before the case was tried, she was never required to indicate whether she believed, like the other Independent Counsel attorneys represented they believed, that the Mitchell message slips were not exculpatory and were in fact

incriminating. That the court of appeals would "deplore" the Independent Counsel's failure to identify the message slips as exculpatory material indicates that it did not believe those representations. Sections B.3 and B.3a and the materials they reference show why no one could believe those representations, and show as well that Harris and other Independent Counsel attorneys knew with virtual certainty that charge to which the message slips pertained was false at the time they included it in the indictment.

As discussed in Sections B.5 and B.8 of PMP, no Independent Counsel attorney (or any Justice Department attorney later defending Independent Counsel actions) was ever required to state why the Sankin Harvard Business School application (which had been individually faxed to Independent Counsel attorneys on May 29, 1992) was not provided as part of a *Brady* disclosure upon issuance of the Superseding Indictment on July 7, 1992. Nor were any of those attorneys ever required to explain why, as seems clearly enough the case, the application was in fact calculatedly hidden in a place where it was least likely to be discovered. *See* Dean 1997 Mem. at 86-88 and Section B.7a of PMP. Whether or not the hiding of that application in materials eventually provided on Sankin occurred while Harris was in charge of the case, the earlier failure to include the document among the discovery materials initially provided on Sankin seems clearly to have occurred while Harris was in charge.[1]

Harris is the person whom the former Independent Counsel document manager discussed in Section B.9 of PMP accused of steering to a friend a lucrative contract for analysis of Dean's handwriting exemplars, a matter that, according to the former document manager, Independent Counsel Arlin Adams stated it would be difficult to explain. There exists the possibility that having the analysis conducted by someone with whom Harris was acquainted, rather than by the FBI, would provide greater flexibility as to producing or not producing any results that might be exculpatory of the defendant. *See* my January 16, 1996 letter to Larry D. Thompson. While not a legitimate reason for retaining the friend, such purpose would be different from one of steering federal moneys to the friend solely in order to benefit the friend.

Harris became Assistant Attorney General for the Criminal Division on November 21, 1993. A January 1994 biography of Harris provides her background at the time, including that she had previously headed the Criminal Division's Fraud Section, had been twice an Assistant United States Attorney, and had served on three Independent Counsel staffs.

Harris's appointment to the position of Assistant Attorney General occurred at approximately the same time that the document manager in the Office of Independent Counsel was raising with the Office of Special Counsel (OSC) allegations of improper

[1] *See* Section B.9a of PMP regarding a false entry in the Superseding Indictment where, not only would there be no *Brady* disclosure of the documents contradicting the entry, but Independent Counsel attorneys would fabricate a document to support the entry. The fabrication of the document occurred after Harris left the Office of Independent Counsel (unless it was also fabricated for use with the grand jury). But the false entry in the Superseding Indictment and the failure to immediately make a *Brady* disclosure of the documents contradicting it occurred while Harris was in charge.

conduct within the Office of Independent Counsel, which included the allegation previously raised with Independent Counsel Adams that Harris had steered a lucrative handwriting analysis contract to a friend. As discussed in Section B.9 of PMP, in 1994, the Department of Justice began an investigation of the document manager for allegedly disclosing grand jury testimony and breach of a nondisclosure agreement for action taken while trying to bring the conduct of Harris and others in the Office of Independent Counsel. When in early 1994 the Office of Special Counsel commenced to investigate the matter, Deputy Assistant Attorney General John C. Keeney (apparently with the knowledge of Harris but without the knowledge of the Public Integrity Section trial attorney handling the document manager's case) sought to have the OSC hold is investigation in abeyance while the Department investigated the document manager. The Department of Justice's investigation of the former document manager dragged on until September 1996, concluding with a decision not to prosecute. When the document manager complained to the Office of Professional Responsibility that Harris's office had interfered with the investigation of Harris herself, the allegation was ignored. See Section III.B of my December 23, 1997 letter to Department of Justice Inspector General Michael R. Bromwich.

While serving as Assistant Attorney General, according to May 6, 1994, *Washington Post* article (McGee J, "Justice Dept. Opens Disciplinary Report"), Harris was viewed by some as having imposed inadequate discipline on a prosecutor who failed to produce exculpatory evidence to the defense. Harris explained her actions on the basis that, in her view, the prosecutor had failed to appreciate the significance of the withheld material.[2]

A *Legal Times* story of September 12, 1994 (Klaidman D, "Prosecutorial Abuse Target of Reno Plan"), which describes Attorney General Janet Reno's launching of a "broad based ethics initiative," highlights the appointment of Harris to the newly-created Department of Justice Advisory Board on Professional Responsibility. It is not known what Harris did in connection with that Board either before or after her conduct in the Dean case was brought to the attention of the Department of Justice on December 1, 1994. But, as discussed below, within approximately six months of her appointment to the advisory board, Harris would advise the Attorney General of her (Harris's) intention to resign her position.

Harris would later be criticized in testimony before the House Judiciary Committee that was generally critical of the conduct of federal prosecutors and the Department of

[2] As reported in McGee's book *Main Justice* (232), Harris's reprimand to the prosecutor stated: "The basis of my finding is that in the summer of 1990, you did not re-review and recognize the significance of the prior testimony of a crucial witness. As a consequence, you failed to produce a document you should have produced for the defense, and exposed the United States Department of Justice to damaging allegations of professional misconduct." The reprimand's description of the circumstances seems at odds with the discussion at page 230 of *Main Justice*, which indicates that, while the prosecutor recognized the significance of the testimony, he had failed to disclose it because he had taken the position that he was not obligated to disclose as *Brady* material information that was part of the public record. Notably, the reprimand identifies the harm in the embarrassment the conduct might cause the Department of Justice, not in the prosecutor's interfering with the defendant's right to a fair trial.

Justice's oversight of that conduct. The specific criticism of Harris involved her issuance of a press release during the summer 1995 House hearing on the events at the Waco Branch Davidian compound. In the press release, which defended the Department of Justice against charges that it interfered with Treasury Department efforts to investigate those events, Harris termed the Department's actions "Prosecution 101." See NACDL Testimony (Sep. 16, 1996). The testimony alleged that the Harris's press release had mischaracterized the Department of Justice's actions. I am not in a position to evaluate whether the press release in fact mischaracterized the Department's actions. But the tone of the release is precisely that observed in Harris's statements to Judge Gesell that she (Harris) was the one who knew what a defendant needed for a fair trial and when the defendant would need it. Further, of course, the practice that Harris condones in the press release – the Department of Justice's causing other entities not to investigate a matter while it is investigating anything related to the matter – is the same practice attempted with regard to the OSC's investigation of allegations of improper conduct by Harris and others within the Office of Independent Counsel.

I have found no indication that during her tenure as Assistant Attorney General Harris attempted to cause all federal prosecutors to adopt the position that exculpatory information in materials that would eventually be provided when a witness testified did not have to be provided to the defense any earlier – the position, as noted above, that Judge Laurence Silberman had termed "ridiculous." The peculiar utility of that approach, it should be recognized, is limited to those situations where (a) an indictment contains false statements or inferences and (b) the government is possessed of materials contradicting those statements or inferences. That is not every case.

When I provided the December 1, 1994 materials to the Department of Justice, I noted in the transmittal that Assistant Attorney General Harris was involved in the matters addressed in the materials. Harris was not mentioned in my meeting with Associate Deputy Attorney General David Margolis during the week of December 12, 1994 (discussed in Sections B.1 and B.8 of PMP). By letter of February 9, 1995, I provided the same materials I had provided the Department to White House Counsel Abner J. Mikva, asserting that the information in the materials indicated that Harris was not fit to serve as Assistant Attorney General for the Criminal Division. Judge Mikva forwarded those materials to the Department of Justice in early March 1995, advising me, by letter of March 8, 1995 (with copy to the Deputy Attorney General), that, given my having earlier brought the information to the attention of the Department of Justice, he "had every confidence that the Department of Justice will consider the matter carefully and take appropriate action."

Apparently, sometime later that month, Harris informed the Attorney General that, for personal reasons, she (Harris) was resigning at the end of the summer. Unaware of the March 1995 conversation, on May 17, 1995, I delivered a letter to Judge Mikva complaining of Harris's continued service as Assistant Attorney General for the Criminal Division. The letter detailed matters in which Harris was involved and presented some additional considerations as to why she should not be allowed to serve as Assistant Attorney General.

By letter dated May 18, 1995, referencing the March 1995 conversation, Harris formally advised the Attorney General of her resignation "effective around the end of summer." The Department of Justice issued a press release the following day attaching a copy of the resignation letter. The letter states that on taking the position, Harris had made a firm commitment to her husband to serve only two years, but does not suggest that she had at any time previously (or previous to March 1995) informed the Attorney General or anyone involved in the appointment process of such commitment. According to the former Independent Counsel document manager discussed in Section B.9 of PMP, the position of Assistant Attorney General for the Criminal Division had been Harris's dream job and persons from the Office of Independent Counsel with whom the former document manager remained acquainted were surprised to hear of Harris's resignation.

In any case, the timing of Harris's March 1995 informing of the Attorney General of her (Harris's) intention to leave the Department of Justice suggests at least a possibility that knowledge of the forwarding of the materials by Judge Mikva influenced Harris's decision to resign or that the forwarding of the materials caused the Attorney General to suggest that Harris resign. It is not inconceivable that the May 17, 1995 letter to Judge Mikva had some role in causing Harris to formalize her resignation on May 18, 1995, and the Department of Justice to publicize it on May 19, 1995. But one generally would not expect a letter like mine of May 17, 1995, even if read immediately, to prompt action so soon thereafter.

It warrants note that, as suggested in Judge Mikva's letter of March 8, 1995, upon the Department of Justice's review of the materials I provided it on December 1, 1994, Attorney General Janet Reno should have addressed with both Harris and the White House the appropriateness of Harris's continued service as Assistant Attorney General for the Criminal Division regardless of whether anyone else raised the issue with the White House. Perhaps Attorney General Reno in fact did do that. But my impression, based on the experiences discussed in PMP, especially Section B.8, and the materials underlying that discussion, is that the Department of Justice would be unlikely to act in such circumstances unless some external force required it to act.

After resigning from the Department, but before actually leaving, Harris hired Bruce C. Swartz as special assistant effective June 26, 1995. In an undated memorandum, apparently drafted on or prior to September 12, 1995, Harris recommended Swartz for a $3,500 monetary award (a type designated as "based on a specific act of service") for "exceptional performance while serving as my Acting Special Assistance since May [*sic*] of this year." Swartz received such award on September 17, 1995. He then remained in the Justice Department after Harris's departure.

Robert K. Bratt was the Criminal Division Executive Officer under Harris. The Department of Justice Inspector General would eventually find that Bratt and other managers committed serious acts of misconduct, as detailed in September 21, 2000 testimony before the House Judiciary Committee. All of the acts occurred after Harris's resignation. But one of the matters involved Bratt's retaining of Harris, by means of a

December 1996 sole-source contract, to perform certain services regarding a conference in Budapest conducted by the Office of Overseas Prosecutorial Development, Assistance and Training. The Inspector General found that the sole-source contract was justified for some of the services performed by Harris. But as to others the Inspector General found that the terms of the work statement were crafted on the basis of discussions between Harris and Bratt regarding what services Harris could perform, in violation of the principle whereby a contract should be based on the tasks to be performed rather than the desire to hire a particular consultant. The Inspector General also found that the payment to Harris of $27,000 for 42 days work was more than the rates generally paid in the circumstances and that the absence of clear record to support the fee raised the appearance that Harris had been given preferential treatment by her former subordinate.

Certainly there are cases of improper sole-source contracts where the contractor is unaware of any impropriety in the actions that led to his or her securing the contract. But such occurrences are less common where the contractor recently directed the entity awarding the contract.

By letter of July 9, 2008, I advised Harris of the creation of the main Prosecutorial Misconduct page, requesting to be advised as to any matter where my treatment was inaccurate of unfair. Harris did not respond.

Harris is presently a Scholar in Residence at Pace Law School. A current profile of Harris may be found at http://www.pace.edu/page.cfm?doc_id=23172.

Addendum (Aug. 11, 2009; rev. Feb. 23, 2011)

Because there exists an actress named Jo Ann Harris, internet searches for "'Jo Ann Harris'" do not yield materials from the prosecutorial misconduct pages of jpscanlan.com among the first few dozen entries. But as of February 23, 2011, searches on the major search engines for "Jo Ann Harris Attorney" yield this page as one of the first few results. As with various addendums to other profiles, I note these facts as indications of the likelihood that my interpretation of the conduct of Jo Ann Harris in the Dean prosecution will become widely known among persons or entities having an interest in Harris.