James P. Scanlan
Attorney at Law
1529 Wisconsin Avenue, NW
Washington, D.C. 20007
(202) 338-9224
jps@jpscanlan.com

June 16, 2010

The Honorable Patrick J. Leahy
Chairman
Senate Judiciary Committee
433 Russell Senate Bldg
United States Senate
Washington, DC 20510

[Corrected copy; see page 8]

Re: The Nomination of Robert E. O'Neill for the Position of United States Attorney for the Middle District of Florida

Dear Senator Leahy:

On June 9, 2010, President Barack Obama nominated Robert E. O'Neill for the position of United States Attorney for the Middle District of Florida. This letter is to call to your attention certain information regarding the suitability of Mr. O'Neill for that position.

The information concerns the conduct of Mr. O'Neill as lead trial counsel in the prosecution of *United States of America v. Deborah Gore Dean*, Criminal. No. 92-181-TFH (D.D.C.), an independent counsel case tried in September and October 1993 and ultimately resolved by an order entered in 2001. In his application[1] for the United States Attorney position filed with the Florida Federal Judicial Nominating Commission, Mr. O'Neill described the case as one his ten most important litigated matters (at 18). He also identified the case as the subject of one of a number of ethical complaints against him (at 43).

Since April 2008, I have maintained a substantial volume of material on the Prosecutorial Misconduct page (PMP) of jpscanlan.com relating to abuses committed by Mr. O'Neill and other Independent Counsel attorneys in the prosecution of the *Dean* case and my efforts to cause the Department of Justice to investigate those abuses and to cause the removal of Independent Counsel attorneys involved with the abuses from positions they later held in the Department of Justice. Commencing in April 2009, I added as adjuncts to this material a number of items

[1] Underlinings of words or phrases in this letter indicate links to referenced documents in an online electronic copy of this letter that may found by its date, and identified as Senate Judiciary Committee Letter, on the Letters (Misconduct) sub-page of the Prosecutorial Misconduct page of jpscanlan.com. While hard copy letters are addressed to individual senators (save those who preferred email), only the copy addressed to the Chairman is posted.

summarizing the conduct of particular attorneys in the case, including that of Mr. O'Neill (Robert E. O'Neill Profile, also available as PDF with endnotes converted to footnotes).[2] Both of these groups of materials generally provide electronic links to online copies of documents supporting the descriptions set out in the materials.

The profile on Mr. O'Neill addresses aspects of his conduct in the *Dean* case at some length. It and related documents raise issues of some complexity. But I suggest that those who carefully review the materials will have no doubt that Mr. O'Neill is an unsuitable candidate for the position of United States Attorney. Careful reviewers are also likely to question the circumstances that caused the Department of Justice to allow him to serve as an Assistant United States Attorney for fifteen years after the Department was made aware of his conduct in the *Dean* prosecution.

I will leave those materials largely to speak for themselves and confine this letter to six short discussions of matters warranting particular consideration.

First, appraisal of my descriptions of these matters should be undertaken with an awareness that both the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit strongly criticized the conduct of Independent Counsel attorneys in the case. At a hearing on February 14, 1994, in which it considered the defendant's allegations of pervasive prosecutorial misconduct, the district court (the Honorable Thomas F. Hogan) specifically agreed with many of those allegations, including that Independent Counsel attorneys failed to disclose exculpatory material while representing that no such material existed; that those attorneys put on witnesses without attempting to determine whether the witnesses' testimony was true; and that those attorneys had reason to know that the testimony of at least two government witnesses was false. The court noted with regard to a particular matter that lead trial counsel Robert E. O'Neill had acted in a manner that the court would not have expected from any Assistant United States Attorney who had ever appeared before it. More generally, the court found that Independent Counsel attorneys had acted in a manner reflecting "at least a zealousness that is not worthy of prosecutors in the federal government or Justice Department standards…." Reflecting the scope of the abuses it identified, the court repeatedly noted its concerns about the "cumulative effect" of those abuses, observing that it was "almost impossible to quantify the total impact" of the abuses on the defendant's ability to defend herself.[3] In "deplor[ing]" certain

[2] Similar documents of this nature, which are maintained as sub-pages to the Misconduct Profiles page of jpscanlan.com, pertain to, among others, Jo Ann Harris, who was the Assistant Attorney General for the Criminal Division when I sought her removal from that position in 1995, and Bruce C. Swartz, who has held a variety of positions in the Criminal Division since 1995, including, most recently, Deputy Assistant Attorney General. The Harris profile discusses the fact that the same month my allegations of misconduct by Ms. Harris as an Associate Independent Counsel in the *Dean* case were forwarded to the Department of Justice from White House Counsel Abner J. Mikva, Ms. Harris informed Attorney General Janet Reno of Ms. Harris's intention to resign. The Swartz profile is discussed with regard to various matters *infra*.

[3] The link in the text connects one to the complete hearing transcript. The court's criticisms are also quoted with page references in an online document. As discussed in the introduction to the document, the item may eventually be thoroughly annotated. But as of the posting of this letter, the document is still in draft form.

actions of Independent Counsel attorneys, the court of appeals not only recognized that the underlying misconduct was severe, but impliedly found that representations that Independent Counsel attorneys made in defense of their actions were false.

Neither court found the identified abuses sufficient to warrant overturning the verdict. But whether prosecutorial abuses are sufficient to warrant a new trial raises different issues from whether the abuses call into question the integrity of the prosecutors who committed them. At any rate, in considering the issues raised in this letter, please be mindful that this is a matter where the courts found serious abuses. And while the materials I have referenced raise many issues unaddressed or inadequately addressed by the courts – often because Independent Counsel attorneys effectively deceived the courts in responding to allegations of misconduct – many, and perhaps most, observers would regard just the findings of the courts to be sufficient to disqualify Mr. O'Neill from the position of United States Attorney.[4]

Second, the district court's observations that Mr. O'Neill had acted in a manner that the court would not have expected from any Assistant United States Attorney who had ever appeared before it involved Mr. O'Neill's failure to bring to the attention of the court and the defense an off-the-stand statement of a witness that certain receipts, which were being introduced into evidence as if they reflected meals or gifts purchased for the defendant, did not apply to, or may not have applied to, the defendant. As explained in Section A of the O'Neill profile, the court made the statement while unaware that before the witness made the off-the-stand statement Mr. O'Neill knew with virtual or absolute certainty that certain receipts he intended to lead the jury to believe applied to the defendant in fact did not apply to her.

Third, I encourage the Committee to give special attention to Addendums 5 and 6 to the O'Neill profile, which address the Department of Justice's recent refusal to consider the conduct of Mr. O'Neill and another attorney involved in abuses in the *Dean* case (Deputy Assistant Attorney General Bruce C. Swartz) because, in the Department's view, the issues were or could have been raised in litigation. The Addendums discuss the irrelevance of such justification to the fitness of Mr. O'Neill and Mr. Swartz to serve in their current positions and to the Department of Justice's responsibility to provide candid assessments to the President and others as to the suitability of an individual to serve as a United States Attorney. Inasmuch as Mr. O'Neill's nomination suggests that the Department of Justice may have failed to advise the President of either the materials I maintain online regarding Mr. O'Neill's conduct in the case or the courts' severe criticisms of Mr. O'Neill's conduct – or things Department officials would know as a result of the Department's own role in the prosecution of the *Dean* case – any failure of the Department in this regard would raise important issues about the Department as an institution. Such issues are related to those addressed in Section B.8a of PMP, which concern the Department's earlier

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[4] A number of serious allegations of misconduct, including allegations of efforts of Independent Counsel attorney to deceive the courts in responding to earlier misconduct allegations, were never addressed by the courts. As discussed in the Introduction to PMP and Section B.5 of PMP, in 2001 the Department of Justice (which had assumed responsibility for the matter) reached an agreement with the defendant whereby in return for her withdrawing all pending motions, the Department would recommend against her serving any time in prison.

actions both in initially considering the issues I raised and in perpetuating the misconduct of the Independent Counsel when the Department of Justice took over the prosecution.

Fourth, Section B.11a of PMP and Section B of the O'Neill profile discuss a District of Columbia Office of Bar Counsel proceeding in which were raised the same issues raised in the courts as well as some additional issues. While there is much discussion in the materials I created concerning Independent Counsel efforts to deceive the courts in responding to the defendant's allegations of prosecutorial misconduct, especially the efforts of Bruce C. Swartz, at least ostensibly Mr. O'Neill was not himself involved in these efforts because he had left the Office of Independent Counsel before the prosecutorial misconduct allegations were raised in post-trial motions. The record in the Bar Counsel proceeding thus can importantly demonstrate whether Mr. O'Neill sought to deceive Bar Counsel in responding to prosecutorial abuse allegations in the same way Mr. Swartz and others had sought to deceive the courts. Particular attention is given to this matter in several places with regard to the subject of the fifth item *infra* and in that item itself.

But the Bar Counsel record is also specifically germane to Mr. O'Neill's suitability for the United States Attorney position in the following regard. In his application for the United States Attorney position filed with the Florida Federal Judicial Nominating Commission (according to my understanding, a body created by Florida Senators to provide guidance on suitable candidates for federal judicial and law enforcement positions), Mr. O'Neill discussed the referenced Bar Counsel investigation by stating (at 43) that "after her conviction on all counts, Ms. Dean filed a bar complaint alleging a number of instances of prosecutorial misconduct during the trial."

This statement is not true. Ms. Dean never filed a Bar Counsel complaint against Mr. O'Neill. And, while I both filed a formal complaint and submitted various materials to Bar Counsel following Bar Counsel's request for Ms. Dean's counsel to comment on a response in an ongoing investigation, the investigation was already in progress when Ms. Dean's counsel and I learned of it. Bar Counsel rules may preclude me from disclosing what person or entity initiated the investigation. But I encourage the Committee to secure the record of the Bar Counsel investigation from Bar Counsel. On the basis of that record, including the June 27, 1996 letter Mr. O'Neill claimed exonerated him, the Committee can then determine what person or entity initiated the investigation and whether Mr. O'Neill deliberately misstated the origin of the investigation because he believed that a complaint filed by a convicted defendant would raise fewer concerns with the Nominating Commission than an investigation initiated by the person or entity that actually initiated it. The Committee may also determine whether Mr. O'Neill's description of the Bar Counsel findings was as forthcoming as it should have been.[5] And, while the Nominating Commission has no official role concerning the nomination or confirmation process, I suggest that this Committee should regard a deliberate false statement to the

[5] By letter dated June 14, 2010, to Bar Counsel Wallace E. Shipp, Jr., I suggested that Bar Counsel itself had an obligation to bring to the attention of the Committee information contradicting Mr. O'Neill's statement in the Nominating Commission application.

Nominating Commission as an offence of sufficient gravity to preclude the confirmation of Mr. O'Neill for the United States Attorney position.[6]

Fifth, a matter to which I give particular attention in many items made available on PMP (including especially Section B.1, but also Sections B.1a, B.2, and B.8), and which is discussed in Section B of the O'Neill profile, involves the Independent Counsel's use of the testimony of Supervisory Special Agent Alvin R. Cain, Jr.[7] Eventually, I may provide the Committee a more detailed summary of this matter. For present purposes the following will suffice.

Supervisory Special Agent Alvin R. Cain, Jr., was the agent in the Department of Housing and Urban Development (HUD) Inspector General's Office who, in April 1989, authored the Inspector General's report on abuses in HUD's moderate rehabilitation program that led first to congressional hearings on the matter and later to appointment of Independent Counsel Arlin M. Adams. The report revealed that former Attorney General John N. Mitchell had earned a $75,000 consulting fee for assistance in causing the 1984 funding of a moderate rehabilitation project in Dade County, Florida. Mr. Mitchell, who had died in 1987, had been regarded as a stepfather by Ms. Dean. A focal point of the prosecution involved allegations that while employed at HUD Ms. Dean took a number of actions to benefit Mr. Mitchell.

But there was no evidence that Ms. Dean knew of Mr. Mitchell's HUD consulting and testimony of those associated with Mr. Mitchell suggested that she did not know of it. Ms. Dean denied knowing that Mr. Mitchell had earned a HUD consulting fee until she read about it in the HUD Inspector General's on the day the report was released in 1989. She testified that she then called Agent Cain to express her disbelief that Mr. Mitchell had earned a HUD consulting fee and to demand to know whether there existed a check showing the payment to Mitchell. A hearsay objection prevented Ms. Dean from testifying as to what Agent Cain told her in response to her question about the existence of a check.

Agent Cain then appeared as rebuttal witness and seemed to categorically deny any recollection of the call from Ms. Dean. In closing argument, Mr. O'Neill then placed great weight on Agent Cain's testimony in repeatedly (approximately 50 times) and provocatively ("You can throw [her testimony] out the window into a garbage pail for what it's worth, for having lied to you.") asserting that Ms. Dean had lied on the stand.

I would eventually come to understand that Mr. Swartz and Mr. O'Neill had pressured Agent Cain into giving testimony that he was very reluctant to give. They evidently persuaded Agent Cain that, even though he remembered the call from Ms. Dean, his denial of any recollection of the call could be deemed literally true. The apparent rationale was that Agent Cain's denial of

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[6] Section B of my July 20, 2009 letter to John M. Fitzgibbons and other members of the Florida Federal Judicial Nominating Commission raises a number of issues concerning Mr. O'Neill's candor in advising the Commission of issues raised about his professional conduct. Section A of the letter also raises issue concerning whether Mr. O'Neill's description of the *Dean* prosecution was a candid one.

[7] The matter was also the subject of a lengthy August 2008 entry on powerlineblog.com,

recollection of the call would be tied to April 17, 1989, the day the report was released internally at HUD, not the day near the end of the month when it was released to the public and Ms. Dean secured a copy of it.

Unaware of the possibility of any literal truth rationale for Agent Cain's testimony, in her post-trial motion Ms. Dean maintained that Agent Cain must have lied. She provided information that, she asserted, she could have only learned from the call to Agent Cain, including information as to the whereabouts, in April 1989, of the check showing the $75,000 payment to Mr. Mitchell. The Independent Counsel, then represented by Deputy Independent Counsel Bruce C. Swartz (Mr. O'Neill having returned to the position of Assistant United States Attorney in the Middle District of Florida), did not have the temerity to advise the court that, although Dean's testimony was true, Agent Cain's testimony was also true because it literally applied to a different date. Had Mr. Swartz proffered such defense, the court, which almost overturned the verdict for other identified prosecutorial abuses, might well have dismissed the indictment and recommended that Mr. Swartz and Mr. O'Neill, and perhaps other Independent Counsel attorneys be sanctioned or prosecuted for the suborning of perjury. So Mr. Swartz instead endeavored to cover up his own conduct and that of Mr. O'Neill by leading the court to believe that the testimonies were irreconcilable and that the agent's testimony was true while the defendant's testimony was false. As part of an aggressive strategy in covering up that conduct, Mr. Swartz even persuaded the probation officer to recommend that Ms. Dean's sentence be increased by six months for lying about the call to Agent Cain. In addition to Section B.1 of PMP, Mr. Swartz's effort to cover up this conduct is addressed in Section B.1.a of PMP and materials it references and Section [5] and Addendums 3 and 4 to the Swartz profile. And, as I point out in various places, whether or not there was any underlying suborning of perjury, Mr. Swartz's actions in deceiving the court and probation officer regarding this matter may well have constituted obstruction of justice or other federal crimes.

Because Mr. O'Neill had left the Office of Independent Counsel before Independent Counsel attorneys had to respond to Ms. Dean's motion concerning Agent Cain and other matters, however, Mr. O'Neill was not called upon personally to address the Agent Cain issue before the court. But as discussed in Section B.11a of PMP and Section B of the O'Neill profile, Mr. O'Neill would be called upon to address the matter in responding to my complaint to District of Columbia Office of Bar Counsel, and thus was placed in the position of either advancing the literal truth rationale or attempting to deceive Bar Counsel in the same way that Mr. Swartz had sought to deceive the court. As previously indicated, I am limited in what I may disclose about the DC Bar Counsel investigation. But I encourage the Committee to secure that record from Bar Counsel and determine the nature of Mr. O'Neill's response and whether he endeavored to deceive Bar Counsel on the Agent Cain matter (as well as any other matter). And I suggest that when the Committee secures such record, the Committee would find it useful also to secure my July 30, 2009 letter to Bar Counsel and review that letter's discussion of the matter.

Sixth, given the significance of former Attorney General John N. Mitchell's role in the matter, the Committee would usefully give special attention to the many actions Mr. O'Neill undertook to lead the jury to believe things he knew to be false in pressing the Mitchell claims, as well as

the substantial evidence Independent Counsel attorneys possessed indicating that such claims were false, as discussed among many other places, in Sections B.3 of PMP and Sections C and D of the O'Neill profile.[8] And I suggest that the Committee should take some interest in the contrast between the representations Bruce C. Swartz made to the court of appeals regarding the discussion of Mr. Mitchell in the case and the reality of Mr. O'Neill's actions in that regard, as discussed in Addendum 2 to the Swartz profile.

Persons who should be knowledgeable about these matters, in addition to Mr. Swartz and Mr. O'Neill, include Associate Deputy Attorney General David Margolis, who in a meeting during the week of December 12, 1994, first suggested to me that Agent Cain's testimony may have been elicited on the basis that, even though Ms. Dean was telling the truth about the call to Agent Cain, Agent Cain's testimony might also be literally true.[9] Agent Cain retired shortly after the trial. His last known address may be found in my letters to him dated July 8, 2008, and July 11, 2008. Faced with the simple questions of whether my accounts/interpretations of the Agent Cain matter or any other matters addressed in the materials I created are essentially correct, Mr. Swartz and Mr. O'Neill should recognize that, whether or not they committed any crimes in the prosecution of the *Dean* case or in subsequent efforts to cover up their conduct in the case, any false denials of the accuracy of the materials would likely violate federal laws, including 18 U.S.C. § 1001.

Please contact me if you require any further information related to this matter.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

cc: Robert Bauer, Esq.
Assistant and Counsel to the President

[8] In fairness to Mr. O'Neill, it warrants note that, though apparently then working on the case, Mr. O'Neill was not the lead trial counsel at the time the Superseding Indictment was issued containing a number of inferences or statements concerning the Mitchell matters that Independent Counsel Attorneys knew or believed to be false. *See* Jo Ann Harris profile. Once in charge of the case, however, Mr. O'Neill did endeavor to lead the jury and the courts to believe many things he knew or believed to be false concerning the Mitchell matters and varied other matters.

[9] See Section B.1 to my May 25, 1995 letter to Mr. Margolis; see also the Alvin R. Cain, Jr. section of my March 11, 1996 letter to Michael E. Shaheen, Jr., Counsel for the Office of Professional Responsibility.

This is a corrected version of the June 16, 2010 letter. The original may be found here. The following corrections were made on July 2, 2010:

Page 1, last line of second paragraph: "19" changed to "43"

Page 2, line 4 of first full paragraph: "review" changed to "reviewer"

Page 2, line 10 of third paragraph: "its' changed to "government"

Page 2, note 2, line 5: "that fact" changed to "the fact"

Page 3, second full paragraph, line 7, "court's statement was made" changed to "court made the statement"

Page 4, second full paragraph, line 6: "19" changed to "43"

Page 7, first full paragraph, line 1: "about" inserted after "knowledgeable"