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TRANSCRIPT OF PROCEEDINGS United States Court of Appeals
For the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS **FILED FEB 06 1996**
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,	:
	:
Appellee,	:
	:
v.	:
	No. 94-3021
	:
DEBORAH GORE DEAN,	:
	:
Appellant.	:
	:
-----	X

Pages 1 thru 90

Washington, D.C.
November 15, 1994

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DEBORAH GORE DEAN,	:
	:
Appellant.	:
	:
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Tuesday, November 15, 1994
Washington, D. C.

The above-entitled matters came on for oral
argument, pursuant to notice, at 1:00 p.m.,

BEFORE:

CIRCUIT JUDGES WALD, SILBERMAN AND RANDOLPH, U.S.
COURT OF APPEALS FOR THE D.C. CIRCUIT.

APPEARANCES:

JAMES M. SPEARS, ESQ., Nudge, Rose, Guthrie,
Alexander and Ferdon, 2121 K Street, N. W.,
Washington, D. C. 20037; for the Appellant

BRUCE C. SWARTZ, ESQ., Deputy Independent Counsel,
Office of the Independent Counsel, 444 North
Capitol Street, N. W., Washington, D. C., 20001;
for the Appellee

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C O N T E N T S

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P R O C E E D I N G S

1
2 THE CLERK: Case No. 94-3021, United States of
3 America v. Deborah Gore Dean, Appellant; Mr. Spears for
4 Appellant, Mr. Swartz for Appellee.

5 Mr. Spears.

6 ORAL ARGUMENT OF JAMES M. SPEARS, ESQ.,

7 ON BEHALF OF APPELLANT

8 MR. SPEARS: Good morning.

9 May it please the court, in my presentation this
10 morning, I would like to cover three points specifically;
11 that is, the sufficiency of the evidence supporting the
12 conspiracy charges in this case, counts 1, 2 and 3; the
13 sufficiency of the evidence supporting the gratuity charge
14 in this case, count 4 and then the issues regarding
15 prosecutorial misconduct, which was raised in our briefs.

16 The elements of a conspiracy to defraud the United
17 States are quite clear. There has to be an agreement.
18 There has to be an agreement to defraud the United States
19 and there has to be an agreement that the defendant
20 knowingly and intentionally participates in and there must
21 be an overt act by one of the participates.

22 Examining the direct evidence and there was
23 substantial direct evidence in this case, there is
24 absolutely no support for any of these particular elements.
25 Perhaps, the best source of direct evidence in this case

1 were the statements by the alleged co-conspirators to each
2 of these conspiracies. Each one of the alleged co-
3 conspirators living at the time of trial was offered
4 immunity and came in and testified fully and completely.

5 None of those witnesses or none of the alleged co-
6 conspirators aver to the fact that any agreement existed
7 between them and the defendant, much less any agreement to
8 commit a fraud against the United States. None of them
9 suggested that there was any fraudulent or illegal motive on
10 their part or on the part of the defendant. None suggested
11 that there was any wrongful, improper or fraudulent act
12 committed on their behalf by the defendant.

13 Indeed, each of the co-conspirators contradicted
14 certain assertions that were central to the independent
15 counsel's case. So, this case rests then on circumstantial
16 evidence, circumstantial evidence, again, we submit, does
17 not support any of the elements established by the offense.

18 There was no circumstantial evidence of any
19 agreement between Ms. Dean and the alleged co-conspirators.
20 Now, independent counsel attempts to draw the inference of
21 guilt or the inference of agreement from acts that are
22 wholly consistent with the friendship that existed between
23 Ms. Dean and each of the co-conspirators. They tried to
24 draw inferences of illegal conduct--

25 QUESTION: What if inferences can be drawn from

1 ambiguous acts either in terms of a conspiracy or in terms
2 of non-conspiracy? Aren't we bound by the inferences that
3 the government can point to that suggest conspiracy? We
4 can't reexamine the facts.

5 MR. SPEARS: It's not a question of reexamining
6 the facts, Your Honor. What it is, is a question--

7 QUESTION: What about the inferences question? If
8 evidence is ambiguous from which you can draw one or two
9 inferences, either a conspiracy or it's a friendship, aren't
10 we bound by the jury's conclusion?

11 MR. SPEARS: No, Your Honor, I don't believe you
12 are.

13 QUESTION: Why?

14 MR. SPEARS: As a matter of fact, I think that it
15 is exactly the opposite. If you take a look at cases like
16 Recognition Equipment that were decided in the District
17 Court and in other cases, you have reason. There has to be
18 an inference. The inference has to support more likely than
19 not the inference of guilty, Your Honor, over one of
20 innocence. If it is essentially--the question is how could
21 anyone get to the point of finding proof beyond a reasonable
22 doubt, then indeed doubt was there. The element had been
23 met by a reasonable doubt.

24 Each one of the elements, Your Honor, have to be
25 met beyond a reasonable doubt by the prosecution. That is

1 their standard. On review, there is some deference that is
2 given to the evidence that is presented by the prosecutor
3 and supports the prosecutor's case.

4 When you have a situation where I do x and it is
5 equally likely that I did it totally innocently or I did it
6 totally as a part of a conspiracy, I think, Your Honor, to
7 infer and to presume guilt goes beyond the standard that is
8 established by this court. It is a reasonable inference,
9 Your Honor. If it is equally innocent or equally guilty, I
10 would submit that it is not reasonable to infer guilt from
11 that sort of conduct.

12 QUESTION: Let me take one specific instance and
13 let's do the Arama project, okay.

14 MR. SPEARS: Sure.

15 QUESTION: My understanding of the Arama project
16 is, Mitchell was a consultant and received a fee for that
17 and we do have evidence in the record of a relationship
18 between Mitchell--I mean, a friendly or a familial or
19 whatever relationship between--

20 MR. SPEARS: Yes, Your Honor.

21 QUESTION: --Mitchell and Ms. Dean. We also have
22 evidence of her writing to Governor Nunn, I think, a
23 consultant that says it will concern my recent phone
24 conversation with General Mitchell concerning Arama. The
25 key sentence is, let me assure you that all necessary

1 paperwork will be transmitted and that Arama Partnership
2 will definitely receive these units from HUD.

3 Now, not simultaneously, but also in the record is
4 a letter from her to a Sister Schulte [phonetic] of
5 Transitional Housing saying, federal regulations prohibit
6 her from making project-specific allocations. HUD has no
7 direct role in providing the moderate rehabilitation fund.
8 So, you have one letter to one person saying, we have no
9 role and the other saying, be assured that Arama is going to
10 get these particular--.

11 All I am suggesting is, isn't that enough for a
12 jury to infer that, in fact, she had--well, whatever the
13 word is--she had arranged or been implicated in the
14 arrangement of these projects getting directly, directly
15 being told that they would get it from HUD. That is the
16 sort of thing, it would seem to me, a jury could draw an
17 inference that would survive our review.

18 MR. SPEARS: Well, Your Honor, I guess if I could
19 go back and let's do Arama, because I am happy to do Arama.
20 Arama arose at a time when Ms. Dean had just become
21 executive assistant to the Secretary. The facts and the
22 testimony of Mr. Maurice Barksdale, who was Federal Housing
23 Commissioner at that time said, that he was the one who made
24 the decision to fund Arama. It was not Ms. Dean and that,
25 in fact, Ms. Dean had not even talked to him about

1 allocating those units to the--I think it was the Metro Dade
2 Housing Authority to support Arama.

3 So, we already have testimony in there that she
4 did not talk to him about it. She did not ask him to fund
5 it and that he, in fact, had funded it.

6 QUESTION: He also said that, if she had talked to
7 me about--

8 MR. SPEARS: He would have remembered it.

9 QUESTION: --it, I would have remembered.

10 MR. SPEARS: Yes, Your Honor, that's exactly
11 right.

12 So, what happens is, she goes and talks to
13 Mr. Barksdale. Mr. Barksdale says, oh, that one has been
14 approved. So, she writes or she calls Mr. Mitchell, who was
15 ostensibly calling her in Governor Nunn's behalf. He said,
16 would you please write a letter to Governor Nunn. She
17 obliges him. She doesn't understand the nature of this
18 thing at that time. She is still fresh in the process and
19 sends out a letter to Governor Nunn on her stationery.

20 I submit, Your Honor, if there was something
21 untoward going on here, there were some conspiratorial
22 activity, I doubt very seriously if she would have put it on
23 HUD's stationery.

24 QUESTION: When did the fiscal year run at HUD?

25 MR. SPEARS: I believe it is the normal federal

1 fiscal year, Your Honor. It ends at the end of September,
2 October.

3 QUESTION: October?

4 MR. SPEARS: Yes, Your Honor.

5 QUESTION: The letter that the prosecutor refers
6 to in regard to the Arama project about we approve, et
7 cetera, et cetera, which indicates joint approval between
8 Ms. Dean and whomever it was--was it Barksdale?

9 MR. SPEARS: Yes, it was Barksdale.

10 QUESTION: Only refers to Fiscal Year 1985, as I
11 recall.

12 MR. SPEARS: That's right, Your Honor.

13 QUESTION: The Arama project was during Fiscal
14 Year 1984, wasn't it?

15 MR. SPEARS: I would have to go back and take a
16 look at it, Your Honor.

17 QUESTION: It was July of 1984 that the letter
18 that Judge Wald referred to occurred.

19 MR. SPEARS: Yes, that was at the time, Your
20 Honor, when she was in the process of moving from being
21 executive in charge of the--

22 QUESTION: That was fiscal 1985?

23 MR. SPEARS: That was, that should have been
24 fiscal 1984; that's right.

25 QUESTION: Let me ask you about another incident

1 in count 1, Park Towers.

2 Your reply brief says that, there is a notation in
3 Ms. Dean's diary indicating that she had lunch with Shelby,
4 Mitchell, with Shelby and Mitchell. The prosecutor points
5 that out. You say in your reply brief that, Shelby
6 explained that, once he learned of the Mitchell-Dean
7 relationship during lunch, once he learned of the Mitchell-
8 Dean relationship, he ceased seeking material assistance
9 from Mitchell and went out of his way to avoid any
10 discussion of Park Towers in Mitchell's presence during the
11 lunch, right?

12 MR. SPEARS: Yes, Your Honor.

13 QUESTION: Well, that's truly not an answer,
14 because the lunch occurred on the 9th of September. There
15 is a letter in the record from Shelby to Dean on the 10th.
16 Now, he may have gone out of his way to deal with Mitchell,
17 but he sure didn't go out of his way to deal with Dean.

18 MR. SPEARS: No, Your Honor, I think, first of
19 all--

20 QUESTION: The very next day, he wrote her a
21 letter.

22 MR. SPEARS: That's absolutely right. I don't
23 think Shelby denied that he had--that he suggested that he
24 hadn't had some conversation with her about Park Towers.
25 The issue was, whether he had that conversation with her

1 about Park Towers in Mitchell's presence. Shelby learned of
2 the relationship between Mitchell and Dean only when he
3 joined the Keith and Company [phonetic] and his superiors in
4 that company told him about that relationship. He had
5 already agreed to have Mitchell serve as a consultant on
6 that project at that time. That was when he learned it.

7 Now, we didn't find out about any of this until we
8 saw the Jencks material on Shelby that was produced on the
9 day of trial. So, that is something that Shelby wasn't
10 tested on particularly closely in his examination or the
11 cross examination by defense counsel.

12 Shelby's testimony, after you piece together from
13 the various statements that he provided to the Independent
14 Counsel, all of which should have been produced over a year
15 before this trial, you can piece it together and see that,
16 Shelby learned of this and realized he had made a mistake.
17 He had lunch that day and made clear that he was not going
18 to talk about Park Towers with Dean in Mitchell's presence
19 and did not do so.

20 That doesn't exclude the fact that he may have
21 mentioned Park Towers to Ms. Dean. That's the whole, Your
22 Honor. It doesn't make--

23 QUESTION: I'm not sure I get it. He and Mitchell
24 are in business together. He says, I'm not going to talk to
25 you, Mr. Mitchell, anymore about Park Towers and the next

1 day, he writes a letter to Dean asking for her--that letter
2 is at what?

3 MR. SPEARS: Well, Ms. Dean, Your Honor, was at
4 the Department of Housing and Urban Development. She was a
5 person that he had every right to talk to. He was
6 representing his clients. He has a right to lobby anybody
7 he wants over there. The fact is, he and Mitchell were not
8 partners in terms of they sat in the same office. They were
9 not members of the same firm. He had asked Mitchell to come
10 into the contract to help him consult. He was with the
11 Keith and Company at the time he was doing that and Mitchell
12 was in his own firm. So, they were not business partners.

13 Shelby had sought Mitchell's assistance as an
14 outside consultant to help him with this contract. Once he
15 realized the relationship between Mitchell and Dean, he
16 ceased to seek Mitchell's advice. He ceased to seek
17 Mitchell's involvement. He also specifically said that he
18 made sure that Ms. Dean did not learn of his relationship
19 with Mitchell, because he did not want to taint that
20 relationship and he did not want to lose that contact.

21 Now, I have to tell you, at the end of the day,
22 Your Honor, that is something that is totally inconsistent
23 with what the Independent Counsel has charged in count 1,
24 because they charge that there is this seamless web of
25 conspiracy involving Mitchell, Dean and Shelby and that was

1 the nature of the relationship and that, in fact, Ms. Dean
2 did everything including writing the letters with the
3 specific intent of helping Mr. Mitchell. It is clear from
4 Mr. Shelby's testimony that she was unaware of Mitchell's
5 involvement in Park Towers.

6 QUESTION: What you are saying is that, after the
7 lunch, Shelby severed his relationship with Mitchell?

8 MR. SPEARS: No, he did not learn of the
9 relationship of Mitchell and Dean at lunch. He learned of
10 the Mitchell-Dean relationship, as best we can determine,
11 based upon the Jencks statements. He learned that when he
12 joined the Keith and Company several weeks earlier. He
13 learned of that relationship from his superior at the Keith
14 and Company. That is when he realized that he had a
15 problem.

16 He was already committed to the lunch. They had
17 the lunch. He did not talk about Park Towers.

18 QUESTION: What do we do with the JA 888, which is
19 the developer, the Martin Fein memorandum which says, at
20 about 4:30 today, Feinberg [phonetic] called and said he had
21 a very good conversation with Rick Shelby. Rick said he had
22 lunch with his friend at HUD and she indicated to be dealt
23 with in a favorable manner. She requested certain
24 information.

25 MR. SPEARS: I guess I come back to, Your Honor,

1 that it is not illegal. I am presuming that everything--we
2 are going to give the prosecutor the benefit of his
3 presumption. Assuming that Rick Shelby talked to Deborah
4 Gore Dean about what was going on at HUD, that he basically
5 said, hey, look, I want you to see this information. We are
6 putting these projects together. We have an application
7 there.

8 QUESTION: But she was simultaneously writing
9 other people and even testifying, I think, before Congress
10 that these kinds of allocations were made at the local
11 housing level.

12 MR. SPEARS: They are made at the local level.

13 QUESTION: It didn't do anybody any good to go
14 talk to people at HUD and that the specific allocations were
15 not made by HUD people. Yet, there is a lot of evidence in
16 the record suggesting that, it isn't like one contact.
17 There is a lot of contact.

18 MR. SPEARS: But, Your Honor, there is no--

19 QUESTION: There are a lot of projects in which
20 people--there is evidence that they came away thinking they
21 had a deal.

22 MR. SPEARS: Your Honor, there is no evidence in
23 this record at all that any specific allocation went to any
24 developer from HUD. That simply is not supported in the
25 record. It goes to a PHA, a local public housing authority.

1 QUESTION: I know. If you mean it went actually
2 through the local housing, yes, of course, it did. I am
3 sure it didn't--

4 MR. SPEARS: No, it doesn't go through. They have
5 an independent decision to make, Your Honor.

6 QUESTION: I know. That is the way the system
7 should work. The whole case is about whether or not that is
8 the way the system did work.

9 MR. SPEARS: Well, Your Honor, in two instances,
10 the two instances that are alleged here, the system did work
11 that way. I've got a--you know, at the end of the--

12 QUESTION: Well, that is the question about
13 inferences.

14 MR. SPEARS: Well, Your Honor, at the end of the
15 day, I guess the question is, are we suggesting that it is
16 illegal, it is inappropriate, it is illegal for Mr. Shelby
17 to come representing his clients before HUD and to say, I
18 would like to see--my client is doing work in Jacksonville
19 or in Dade County, Florida. I would like to see those
20 allocations made to Dade County, Florida, because my client
21 has a project that he would like to go to Dade County,
22 Florida and present to them and get funded.

23 Now, I have to tell you something, Your Honor. I
24 don't see anything illegal about that there. I don't see
25 anything inappropriate about that. I don't see anything

1 that is illegal about Ms. Dean receiving information
2 pertaining to that project. I don't see anything that
3 suggests that it is inappropriate for her to do so. I don't
4 see that there is inconsistency--

5 QUESTION: Is it appropriate if the jury were to
6 infer from the evidence that, in fact, she gave assurances
7 to these people that the individual project would get it?

8 MR. SPEARS: Well, Your Honor, if they can show
9 one shred of information where she did deliver a project to
10 the client through the PHA, then I would say that is a
11 reasonable assumption. They have not done that. They
12 haven't done it one time.

13 QUESTION: What about the inference that she did
14 this as a favor to Mitchell?

15 MR. SPEARS: Well, Your Honor, I guess the thing
16 is, what did she do. Let's start with that.

17 QUESTION: Right.

18 MR. SPEARS: She nothing but write a letter to
19 Nunn. That is what we have determined. She was not the
20 principle contact on Park Towers. Silvio DeBartolomeis was,
21 according to Richard Shelby. She didn't have any decision--

22 QUESTION: Is Silvio a male or a female?

23 MR. SPEARS: A male.

24 Silvio DeBartolomeis was Rick Shelby's primary
25 contact on Park Towers. That is that Rick Shelby said.

1 While Maurice Barksdale said he was the one who made the
2 decision--excuse me, Your Honor.

3 QUESTION: The letter talks about a she. The
4 letter that Judge Wald referred to talks--

5 MR. SPEARS: That's right. Richard Shelby had
6 contacts with a number of people at HUD and presumably and
7 including Ms. Dean. If you take a look at every one of the
8 alleged co-conspirators, they had a wide variety of
9 contacts. Mr. Kitchin--

10 QUESTION: I just don't want to lose this.

11 MR. SPEARS: Right.

12 QUESTION: The letter is written in February of
13 1986. The lunch that we referred to before was in September
14 of I don't know, 1985?

15 MR. SPEARS: Something like that.

16 QUESTION: This letter is February of 1986. So,
17 maybe it is the same lunch and maybe it is not the same
18 lunch.

19 MR. SPEARS: I would think it is.

20 QUESTION: The likelihood is, it is not the same
21 lunch.

22 Rick said he had lunch with his friend at HUD and
23 that she indicated. Now, we know it is not--what is his
24 name, DeBartolomeis?

25 MR. SPEARS: DeBartolomeis.

1 QUESTION: We know it is not him, what this refers
2 to, correct?

3 MR. SPEARS: Yes, Your Honor, that's right. I
4 don't know what that letter means. I don't know what we are
5 talking about in terms of what finds relating to somebody
6 else. This is hearsay on hearsay on hearsay.

7 QUESTION: To the file?

8 MR. SPEARS: Yes, to the file. What is this all
9 about? This is the basis we're going to send a young woman
10 to prison for 21 months. I mean, this is the question we
11 have. She has a legitimate right to listen to people that
12 are coming in and lobbying her agency. It is totally
13 legitimate for somebody to come in and say, my client has a
14 project that he wants to do in Metro Dade and I think those
15 allocations should be made to Metro Dade.

16 She is supposed to serve as an interface between
17 the Secretary and these groups and the people who are
18 interested in doing business.

19 No, she doesn't have the power; nobody has the
20 power to assign those projects ultimately to the developers.
21 That is something that is decided by the public housing
22 authority. The question is, by receiving that information,
23 is she guilty of a criminal conspiracy? Does she go to jail
24 for 21 months.

25 QUESTION: Is it an element of 371 that she has to

1 have gotten something out of this?

2 MR. SPEARS: No, you have to demonstrate that she
3 willfully and intentionally helped participate in a fraud.
4 In most instances, you demonstrate that by using
5 circumstantial evidence, by demonstrating that somebody
6 received something out of the transaction. That is one of
7 the ways you can demonstrate, using circumstantial evidence,
8 the elements.

9 This is the whole point. The Independent Counsel
10 has no direct evidence on it and then they try to run away
11 from every inference of circumstantial evidence. They say,
12 we don't have to show that there is any loss to the uns.

13 QUESTION: Would it be your position that, under
14 the Independent Counsel's theory of this 371 prosecution
15 that if you had an employee in the government that just
16 didn't do his or her job, that just wanted to help or wanted
17 to be nice and help a developer who came in and said, sure,
18 let's have lunch, oh, I'll help you out and so and so forth
19 and it was not exactly the way things ought to go or so on
20 and so forth, that that would turn into a five-year felony
21 every time?

22 MR. SPEARS: Yes, sir; yes, Your Honor, I
23 certainly do. That is our position. That is exactly what
24 this case is all about. I have to tell you something, Your
25 Honor. The elements have not been met, the elements showing

1 agreement. There is no evidence of an agreement. There is
2 no evidence of any kind of inappropriate intent.

3 This goes back to Judge Silberman's question.
4 These guys are either over there trying to subvert the
5 system or they are lobbying in behalf of their clients.
6 Which way is the prosecutor and which way is the jury
7 allowed to presume? That is the issue that is in this case.

8 I have a minute left. I would like to have some
9 response time at the end of my argument, if I could.

10 QUESTION: All right.

11 MR. SPEARS: Thank you.

12 QUESTION: Mr. Swartz.

13 ORAL ARGUMENT OF BRUCE C. SWARTZ, ESQ.,

14 ON BEHALF OF THE APPELLEE

15 MR. SWARTZ: Thank you, Your Honor.

16 My name is Bruce Swartz and I represent the United
17 States in this case. We meet today as Independent Counsel,
18 Arlin Adams. The trial counsel in this case have returned
19 to the Department of Justice or other federal agencies and,
20 therefore, are not at counsel table today.

21 Your Honors, this is not a case about lunches with
22 friends. This is a case about a high-ranking government
23 official who betrayed the public trust and then committed
24 perjury in order to conceal that betrayal.

25 The jury found that Defendant Dean, while she was

1 executive assistant to the Secretary of HUD, used a program
2 designed to aid low-income families to benefit her family,
3 herself and her co-conspirators. As the District Court
4 found in sentencing Dean, her conduct was intentional and it
5 was serious.

6 QUESTION: What is the best evidence of it,
7 Mr. Swartz? That is what we are fighting about here, I
8 think, or disputing or whatever.

9 MR. SWARTZ: Well, Your Honor, with regard to the
10 sufficiency of the evidence, I think it is clear that
11 Defendant Dean does misunderstand the standard. This court
12 has made clear from the outset in its rulings on sufficiency
13 of the evidence cases that, the question is not what this
14 court would find, but rather a reasonable jury could find--

15 QUESTION: Beyond a reasonable doubt.

16 MR. SWARTZ: --beyond a reasonable doubt in each
17 regard. In fact, in Herron, this court made clear that if a
18 reasonable person might decide one way or the other, it is
19 for the jury to decide. I think the evidence here is
20 compelling. It's not simply sufficient--

21 QUESTION: Why don't you go through what you think
22 are the major points of evidence on the conspiracy. Put
23 aside the perjury question for a moment.

24 MR. SWARTZ: Sure, Your Honor.

25 QUESTION: The major point of evidence on the

1 conspiracy counts.

2 MR. SWARTZ: I think with regard to all of the
3 conspiracy counts, there are four critical points. First,
4 the Defendant Dean had power over the mod rehab system.
5 That evidence was overwhelming. It came from a variety of
6 sources.

7 QUESTION: Okay, you're going to tell us what it
8 was?

9 MR. SWARTZ: Yes, Your Honor.

10 It came from the testimony of Acting Assistant
11 Secretary Hale, from Acting Assistant Secretary
12 DeBartolomeis, Susan Sagami, another HUD employee at the
13 time--

14 QUESTION: So, would you characterize their
15 evidence, a generic characterization? Obviously, we will
16 read it for ourselves, but as far as saying Deborah Dean
17 played a key role in the specific allocation of projects or
18 what.

19 MR. SWARTZ: Absolutely, Your Honor and this
20 evidence is direct. It is not circumstantial evidence.
21 This is evidence of what these individuals saw and
22 experienced while they were at HUD.

23 Janet Hale testified flatly that it was Dean that
24 was making the decisions. DeBartolomeis testified that Dean
25 ordered him to sign the funding documents. Susan Sagami

1 testified along the same lines that DeBartolomeis did.
2 Dean's own secretary, Cherrelle Hawkins [phonetic],
3 testified that Dean said that, assistant secretaries should
4 obey her.

5 QUESTION: Is this through the whole period or
6 just part of the period?

7 MR. SWARTZ: This is through the whole period,
8 Your Honor.

9 As Your Honor knows, there were periods of time
10 when there were assistant secretaries in place and periods
11 of time in which there were simply acting assistant
12 secretaries. There is no doubt that, from the time Dean
13 came to HUD, even when she was still in the Executive
14 Secretariat and a special assistant, she involved herself in
15 HUD decisions. She would call HUD people, HUD employees to
16 her office and ask for explanation, particularly with regard
17 to matters involving John Mitchell.

18 QUESTION: Was that by itself, without the
19 conspiracy or why she did it, was that in itself a violation
20 of anything?

21 MR. SWARTZ: No, Your Honor, not--although
22 certainly it undercuts entirely her argument that she was
23 some kind of neophyte, unaware of what was happening at HUD.

24 QUESTION: No, no, no, the fact that she took a
25 very active, proactive role in these particular allocations,

1 even though she might have been telling people--

2 MR. SWARTZ: I'm sorry, Your Honor.

3 QUESTION: --or the program might have said, hey,
4 it's not determined at the HUD level. It is determined at
5 the local agency. Was that, leaving the conspiracy part
6 out, would that have been a violation of anything for her to
7 have actively, just because she liked this project or she
8 like that project said, I really want you to give favorable
9 treatment to this project?

10 MR. SWARTZ: Well, Your Honor, I think that cases
11 such as Hammerschmidt and cases in that line of cases make
12 clear that there is a problem if a government employee
13 subverts a lawful government function.

14 QUESTION: I don't want to--

15 QUESTION: Well, why would it be a subversion? Do
16 you mean the Secretary of HUD couldn't call down and say,
17 you know, I think that is a really good project, you ought
18 to take a hard look at it?

19 MR. SWARTZ: Yes, Your Honor. There is a
20 difference, I think, between saying you should take a good,
21 hard look at it and--

22 QUESTION: Well, if you are the Secretary of HUD
23 and you tell somebody to take a good, hard look at it, they
24 usually take a very good, hard look at it. So, you're not
25 suggesting that is illegal?

1 MR. SWARTZ: No, Your Honor. What I am
2 suggesting--

3 QUESTION: Well, why is that a subversion?

4 MR. SWARTZ: What I am suggesting the subversion
5 that went on here was that, there was an attempt to present
6 to the outside world--

7 QUESTION: But wait a minute. We are putting
8 aside the question of perjury. I said, you were going to
9 focus only on the conspiracy points. You said the first
10 point was that, the Defendant Dean had power--

11 MR. SWARTZ: That's correct, Your Honor.

12 QUESTION: --or influence, influence in the key
13 role of the allocations.

14 MR. SWARTZ: That's correct, Your Honor.

15 QUESTION: Judge Wald asked you if there is
16 anything separately illegal about that? The proper answer
17 to that is, no, that's not separately illegal, but it is one
18 of the elements in the conspiracy. Isn't that correct?

19 MR. SWARTZ: That is correct, Your Honor.

20 QUESTION: All right, then don't try to over-argue
21 your case.

22 MR. SWARTZ: I'm sorry, I misunderstood Judge
23 Wald's question.

24 QUESTION: Yes, I got two different answers there.
25 I mean, even if she sat up there in a program in which the

1 allocation to the outside world was supposed to be made by
2 the local agencies and for no conspiratorial reason just
3 said, I like the project in South Florida, I like this
4 project, I like that project. I want you people to fund
5 those. Is your answer still the same as to Judge Silberman,
6 nothing wrong with that?

7 MR. SWARTZ: Your Honor, I think that I need some
8 additional facts or perhaps I should explain some additional
9 facts.

10 QUESTION: All right, all right, I don't want to--

11 QUESTION: What would your motive be? If the
12 motive is benign, you wouldn't have a criminal act there,
13 right?

14 MR. SWARTZ: If her motive was not to commit a
15 crime, yes, that's correct. If she had no criminal intent--

16 QUESTION: I mean, if her motive was she was just
17 interested in the project?

18 QUESTION: Yes, her motive was power, she liked to
19 exercise power?

20 MR. SWARTZ: Yes, Your Honor, but I think it is
21 important to emphasize how this system was supposed to work.

22 QUESTION: Yes, we know. I think we all know
23 that.

24 QUESTION: That's a different question. That's a
25 different question.

1 QUESTION: I don't want to eat up all your time,
2 so move on.

3 MR. SWARTZ: Fine, yes, Your Honor, that's fine.

4 QUESTION: What is the second point?

5 MR. SWARTZ: The second point is that, she agreed
6 to exercise her power to benefit her co-conspirators.

7 QUESTION: Where is the agreement?

8 MR. SWARTZ: That agreement, Your Honor, comes
9 through evidence both in the documents, which we consider to
10 be--

11 QUESTION: Well, let me ask you a key question
12 about the record and I will yield.

13 What we have in the record is evidence of her
14 using the power to help projects and obviously the ones you
15 have introduced evidence about it, projects in which
16 somebody she had some other kind of relationship or had had
17 some prior contacts with was interested in. How do we know
18 or why should the jury have inferred that those were the
19 only types?

20 Maybe for every one of those six projects in which
21 Mitchell or the other people that she knew were involved,
22 the alleged co-conspirators, maybe she was doing the same
23 for 55 projects in which she had no interests. Is there
24 anything in the record which suggests the exercise of her
25 power was channeled towards the projects in which these

1 people were involved?

2 MR. SWARTZ: Oh, Your Honor, there is no doubt
3 that with regard to these particular projects that she paid
4 particular attention to these.

5 QUESTION: Yes, okay.

6 MR. SWARTZ: It is also the case that she did get
7 involved in other projects. That is not to suggest that
8 there may not have been other motives and other reasons why
9 she was involved in particular projects beyond these
10 projects charged.

11 QUESTION: How many projects all together was
12 there evidence about her being involved in that involved
13 some kind of alleged co-conspirators, roughly?

14 MR. SWARTZ: That involved alleged co-
15 conspirators?

16 QUESTION: Yes.

17 MR. SWARTZ: I think that roughly we are talking
18 about eight to ten projects.

19 QUESTION: Eight to ten projects over a couple
20 year period?

21 MR. SWARTZ: That's correct, Your Honor.

22 QUESTION: Okay.

23 QUESTION: Is that it? Is there any more?

24 MR. SWARTZ: Excuse me, Your Honor, more projects?

25 QUESTION: No, no, you said--

1 MR. SWARTZ: Oh, more factors? Yes and I think
2 that--

3 QUESTION: --there are letters showing she did
4 something. She received a document. She sent audios. She
5 did whatever and she had power in general and that is--

6 MR. SWARTZ: No, Your Honor, it is not that she
7 just had power in general. The second point is, she agreed
8 to use that power for her co-conspirators.

9 QUESTION: When had she agreed to use the power?
10 What is the best evidence of her agreement to use the power
11 for her co-conspirators?

12 MR. SWARTZ: Well, Your Honor, I think if we, for
13 instance, look at the second conspiracy, the Sankin
14 conspiracy--

15 QUESTION: The which one, I'm sorry?

16 MR. SWARTZ: The Sankin conspiracy.

17 There, there was testimony that Mr. Broussard and
18 Mr. Sankin received 150 units, were promised 150 mod rehab
19 units, that is, funding for 150 mod rehab apartments and
20 were allowed to peddle those units, to sell them to the
21 highest bidder. In other words, really what the defendant
22 did here was to turn over the authority to decide where
23 these very scarce federal resources would go to her co-
24 conspirators.

25 Now, Ms. Dean insists that there is no direct

