



U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

FEB 14 2008

Steven Aftergood
Project Director
Federation of American Scientists
1725 DeSales Street, NW, 6th Floor
Washington, DC 20016

Dear Mr. Aftergood:

This responds to your letter of January 2, 2008, in which you alleged misconduct on the part of attorneys in the Justice Department's Office of Legal Counsel (OLC), including Principal Deputy Assistant Attorney General Steven G. Bradbury. You asserted that OLC improperly failed to issue an interpretation of Executive Order 12958 requested by the Director of the Information Security Oversight Office (ISOO) regarding the applicability of the order to the Office of the Vice President.

As you know, the Office of Professional Responsibility is responsible for investigating allegations of misconduct by Department of Justice attorneys. We have completed a review of your correspondence, as well as other materials.

Executive Order 12958, as amended by Executive Order 13292, prescribes a uniform system for classifying, safeguarding, and declassifying national security information. Section 6.2(b) specifies that the Attorney General shall render an interpretation of the order with respect to any question arising from its administration when requested to do so by the Director of ISOO.

By letter dated July 9, 2007, the Director of ISOO requested the Attorney General to determine whether the Office of the Vice President is an "agency" for purposes of Executive Order 12958 and, therefore, subject to the order's reporting and other requirements. By letter dated July 20, 2007, OLC advised the ISOO that the issue had been directly resolved in a written statement made to Congress on behalf of the President. OLC referred to a July 12, 2007 letter from Counsel to the President Fred F. Fielding to Senator Sam Brownback which stated, in pertinent part, that:

[t]he President has asked me to confirm to you that, as was made clear by the President's spokespersons on June 22 and June 25, 2007, the Executive Order deals with the President and the Vice President separately from agency heads and thus the Office of the Vice President, like the President's office, is not an "agency" for purposes of the Order.

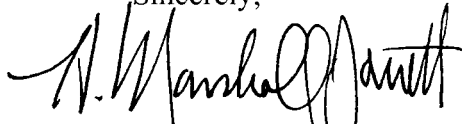
OLC's letter of July 20, 2007, reflects a determination that the written statement of the White House Counsel resolved the issue of whether the Office of the Vice President was an "agency" for purposes of Executive Order 12958. As a consequence, OLC concluded that it would not provide an opinion addressing the question. You contended that in taking this position OLC exceeded its authority and violated the terms of the Executive Order. You also asserted that the question raised by ISOO's request had not been fully resolved.

As a general rule, this Office does not investigate decisions made by Department components in the performance of their duties, unless a substantial issue of professional misconduct is involved. In addition, this matter does not involve an allegation of affirmative malfeasance, but rather, the alleged improper failure to perform an act. It is important to note that the Executive Order, as amended, was issued pursuant to the current President's executive authority and the President has the power to modify or revoke such orders. Therefore, the President's interpretation of the order is particularly significant. In view of the circumstances, we cannot say that the decision to consider the White House Counsel's statement on the question as dispositive raises a substantial issue of attorney misconduct. On its face, the decision appears to involve the regular exercise of decision-making authority by a Department component in the performance of its functions. As to the claim that the White House Counsel's statement did not fully resolve the question, the ISOO may request an opinion from the Department clarifying the matter.

Therefore, based on our review of the misconduct allegations we have concluded that the facts do not raise an issue of attorney misconduct that requires an investigation by this office. Accordingly, we are taking no further action in the matter and consider it to be closed.

We appreciate your bringing this matter to our attention.

Sincerely,

A handwritten signature in black ink, appearing to read "H. Marshall Jarrett". The signature is fluid and cursive, with the first name "H." and last name "Jarrett" clearly legible.

H. Marshall Jarrett
Counsel