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January 3, 2008
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H. Marshall Jarrett, Counsel
Office of Professional Responsibility
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

Dear Mr. Jarrett:

I am writing to file a complaint concerning professional misconduct by Justice Department attorneys.

Summary

I believe that attorneys at the Office of Legal Counsel (OLC), including Principal Deputy Assistant Attorney General Steven G. Bradbury, violated an explicit provision of an executive order which they were obligated to fulfill.

Executive Order 12958, as amended, on Classified National Security Information requires the Attorney General, “upon request by the head of an agency or the Director of the Information Security Oversight Office, [to] render an interpretation of this order with respect to any question arising in the course of its administration” (section 6.2(b)).

But when presented with such a request by the Director of the Information Security Oversight Office, Mr. Bradbury refused to render the required interpretation on behalf of the Attorney General. By violating the executive order in this way, Mr. Bradbury caused significant damage to the integrity of the national security classification system.

Background

By letter dated January 9, 2007, J. William Leonard, the Director of the Information Security Oversight Office (ISOO) wrote to the Attorney General formally requesting an interpretation of the applicability of Executive Order 12958, as amended, to the Office of the Vice President (OVP). The request,

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which invoked Section 6.2(b) of the Order, stemmed from a dispute with the OVP over the terms of the Executive Order, including whether the OVP is obliged to submit an annual report on classification and declassification activity to ISOO.¹

By letter dated July 20, 2007, Mr. Bradbury of OLC replied, indicating that he would “not be providing an opinion addressing this question.”² I believe this was a violation of the Executive Order, for reasons discussed below.

1. By Refusing to Render an Opinion, OLC Exceeded Its Authority

Compliance with Executive Order 12958, as most recently amended by Executive Order 13292, is not optional. Section 6.2(b) of the Order states that when presented with a request from ISOO (or an agency head), “the Attorney General... shall render an interpretation” of any disputed portion of the order (emphasis added).³

By refusing to provide such an opinion after it was properly requested by ISOO, Mr. Bradbury exceeded his authority and violated the executive order.

2. The Dispute Was Not Resolved

Mr. Bradbury explained his failure to provide the required interpretation by stating that the disputed matter had been resolved. But that is not true. It remains unresolved to this day.

Mr. Bradbury cited a July 12, 2007 letter from White House Counsel Fred Fielding which, Mr. Bradbury said, “directly resolves the question you presented to the Attorney General.”

But inspection of the Fielding letter (which is attached to Mr. Bradbury’s letter) shows otherwise.

Mr. Fielding cited the statements of Presidential spokespersons on June 22 and June 25, 2007 to the effect that the President intended the President and the Vice President to be treated separately

¹ A copy of the ISOO letter to the Attorney General is attached, and may also be found online here: <http://www.fas.org/sgp/isoo/isoo-ag.pdf>. The letter was prompted by a complaint that I filed with ISOO, which was included as Tab A in the ISOO letter to the Attorney General.

² A copy of the OLC letter is attached, and may also be found online here: <http://www.fas.org/sgp/isoo/olc072007.pdf>. The July 20, 2007 letter did not become public until December 11, 2007 when it was published by Marcy Wheeler on her blog Empty Wheel (<http://emptywheel.firedoglake.com>). One day later, the document was released to me under the Freedom of Information Act by OLC.

³ This provision (in a previous executive order) was invoked by ISOO to resolve a dispute at least once before, in a letter to the Attorney General dated March 23, 1999. The Office of Legal Counsel responded with an interpretation, as it was obliged to do, on October 5, 1999. See: http://www.fas.org/sgp/advisory/iscap/olc_opinion.html.

from agency heads. But those statements do not indicate any resolution of the conflict with ISOO.

To the contrary, the Presidential spokesperson confirmed that there was a continuing dispute about the significance of the statements. Thus, on June 22, 2007, White House spokeswoman Dana Perino stated:

“I am not disputing that there is a dispute in regards to how this executive order should be -- who should comply with the executive order in regards to ISOO's questions about the Vice President's office. They have the right to seek a clarification from the Department of Justice, which they've asked for.”⁴

Thus, the White House explicitly confirmed the existence of the dispute, and also affirmed the President's mechanism for resolving such disputes, namely seeking an interpretation from the Department of Justice.

By refusing to provide such an interpretation, Mr. Bradbury and the Department of Justice improperly circumvented this Presidentially-sanctioned procedure. As a result, the dispute between ISOO and the OVP still remains unresolved.

3. The Fielding Letter Contains Factual Errors and is Internally Inconsistent

Had Mr. Bradbury performed a professional review of the issue, he would likely have realized that the letter from White House Counsel Fielding upon which he relied contained factual errors producing an internally inconsistent result.

It is true, as Mr. Fielding wrote, that the White House Press Secretary stated (and the President apparently confirmed) that the President intended for the Vice President and himself to be treated separately from agency heads for purposes of the executive order.

Thus, spokeswoman Perino stated that “in this executive order the President is saying that the Vice President is not different than him.”⁵

But while the person of the Vice President (like the President) is beyond the scope of ISOO oversight, it does not follow (and the Press Secretary did not say) that the Office of the Vice President (or the Office of the President) is beyond ISOO oversight, as Mr. Fielding mistakenly inferred.

What Mr. Fielding failed to recognize is that some members of the President's office do report to the Information Security Oversight Office. These include the President's National Security Advisor, the President's Science Advisor, and others.

⁴ White House Press Briefing, June 22, 2007, available at: <http://www.whitehouse.gov/news/releases/2007/06/20070622-4.html> .

⁵ White House Press Briefing, June 25, 2007, available at: <http://www.whitehouse.gov/news/releases/2007/06/20070625-5.html> .

So if the Vice President is “not different” from the President, then at least some of the Vice President’s staff would be expected to report their classification and declassification activity to ISOO, as do some of the President’s staff.

The executive order provides no basis for concluding that the President’s National Security Advisor, for example, must report to ISOO every year, as he does, while the Vice President’s National Security Advisor should not. That makes no sense at all. Yet this incongruous result reflects the Justice Department’s failure to correctly analyze the requirements of the executive order, which is a professional lapse.

Alternatively, if the Vice President’s National Security Advisor (among others) does not have to report to ISOO, this would contradict the President’s expressed intent that the Vice President is “not different” than the President for purposes of the executive order. It would mean that the President intended the Vice President’s staff to receive less oversight from ISOO than does his own staff. Yet that is contrary to what the President’s spokeswoman indicated.

Either way, Justice Department attorneys have failed in their professional responsibility to reconcile the contradictions raised in the ISOO request for an interpretation of the executive order.

4. DoJ Misconduct Has Damaged the Integrity of the Classification System

By failing to honor the Presidentially-mandated procedure for resolving disputes over classification oversight, Mr. Bradbury and his superiors have weakened the very oversight mechanism (i.e. the Information Security Oversight Office) that the President created to monitor classification and declassification activity in the executive branch.

Defying an explicit Presidential requirement, Mr. Bradbury improperly rejected ISOO’s attempt to pursue a resolution of an ongoing dispute, leaving that organization poorly positioned to conduct effective oversight of any noncooperative agency now or in the future.

Worst of all, the Justice Department’s failure to properly and respectfully process the ISOO request has apparently led to the early departure of Mr. Leonard, the ISOO director, from government service.

Mr. Leonard is held in exceptionally high regard in the defense and national security agencies where he has served for decades, and also among the attentive public. According to the Archivist of the United States, Mr. Leonard represents “the gold standard of information specialists in the federal government.”

But his professional dispute with the Office of the Vice President, which the Justice Department improperly refused to adjudicate, was a “contributing factor” in his decision to leave government, according to a recent interview in Newsweek.⁶

⁶ “Challenging Cheney,” by Michael Isikoff, Newsweek, December 24, 2007, available at <http://www.newsweek.com/id/81883/> (attached).

Mr. Leonard's early retirement is apparently irreversible. But some of the other damage caused by the Justice Department's unprofessional handling of this dispute can still be rectified.

Conclusion

The proper functioning of the national security classification system is a matter of considerable public interest, since classification policy regulates what the public may know regarding the most fateful of government affairs. The erosion of the President's internal oversight of the classification system is therefore cause for alarm, since it leaves government information policy increasingly susceptible to self-serving abuse.

I request that the Office of Professional Responsibility undertake an investigation into the Justice Department's handling of the ISOO request to determine if it complied with the executive order. If OPR determines, as I believe, that Justice Department attorneys failed to properly fulfill their professional responsibilities, I request that all appropriate remedial actions be taken, including issuance of reprimands, if warranted, and preparation of the required interpretation of the executive order to resolve the continuing dispute between ISOO and the Office of the Vice President.

I do not require that this letter or my identity be held confidential.

Thank you for your attention to this matter.

Sincerely,

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