

# STEVEN AFTERGOOD TAKES ON PIXIE DUST

Oh this ought to be fun.

You'll recall that when I was in my week-long Pixie Dust\* tizzie last year, I was the first to reveal the purported resolution of Cheney's Fourth Branch stand-off with Bill Leonard and Henry Waxman.

Finally, when Bill Leonard of IS00 appealed to DOJ for a ruling on Cheney's refusal to submit to the plain text meaning of Bush's EO, he was told (six months later) that the EO had turned to Pixie Dust. Specifically, he was told four years after the fact that President Bush did not intend for OVP to be an agency under the EO.

On July 12, 2007, the Counsel to the President wrote a letter to Congress stating that "[t]he President has asked me to confirm to you that ... the Office of the Vice President ... is not an 'agency' for purposes of the Order." ... That statement on behalf of the President resolves the question you presented to the Attorney General. Therefore, the Department of Justice will not be providing an opinion addressing this question.

Poof! Four years after Cheney stopped reporting his classification activities, three years after NA tried to do the original inspection, Bush got around to telling Bill Leonard that the plain text of the EO doesn't mean what it appears to mean. And Bush only told Leonard that news via Fred Fielding via Sam Brownback via Steven Bradbury. It took Congress threatening to withdraw funding from OVP

before the President decided to tell the guy whose job it is that the EO at the center of his mandate doesn't mean what it appears to mean—and what he has understood it to mean for all the years he has done the job.

But Steven Aftergood isn't satisfied with that resolution. In particular, he's not happy with Steven Bradbury's snotty refusal to provide a ruling on the underlying conflict, as is mandated by the Executive Order (unless, of course, that, too, has been turned to Pixie Dust).

Attorneys at the Justice Department Office of Legal Counsel violated the executive order on classification and damaged oversight of the secrecy system last year when they refused to process a request from the Information Security Oversight Office for an interpretation of the order, according to a [complaint filed yesterday \(pdf\)](#) by the Federation of American Scientists Project on Government Secrecy.

Last January, J. William Leonard, the Director of the Information Security Oversight Office (ISOO), wrote to the Attorney General seeking an opinion on the applicability of classification oversight requirements to the Office of the Vice President after that Office ceased to cooperate with ISOO oversight.

But in July, Steven G. Bradbury of the Office of Legal Counsel wrote back that the Justice Department "will not be providing an opinion addressing this question."

By refusing to provide an opinion, Mr. Bradbury appears to have violated the President's executive order, which requires that "the Attorney General... shall render an interpretation" of any

disputed matter when requested by IS00. A response is not optional, and yet no response was provided.

[snip]

And by yielding to the OVP's extreme view, the Justice Department has introduced new deformities in the classification system. So, for example, the classification activities of the Vice President's National Security Advisor are now said to be exempt from IS00 oversight even though the classification activities of the *President's* National Security Advisor must be reported to IS00.

The complaint makes a number of worthwhile points, including:

- "Shall" means "have to"
- Fielding's letter didn't resolve the conflict
- Dana "Pig Missile" Perino's public statements—which Fielding cited in his own letter—didn't resolve the conflict
- "Person" of the Vice President is not the same thing as "Office" of the Vice President

And, finally, this doozy: "not different" is not the same as "different":

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.

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 IS00, 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 IS00 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 IS00, 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 IS00 than does his own staff. Yet that is contrary to what the President’s spokeswoman indicated. [my emphasis]

I guess this is the nonsense you get when you send Dana "Pig Missile" Perino to address matters of ontology.

Aftergood is asking the Office of Professional Responsibility to investigate Bradbury’s snotty refusal to answer Leonard’s question, as Bradbury (actually, Gonzales was required to do it) is required to by Exeuctive Order.

Now, as always, I’m not holding my breath. OPR doesn’t have the independence of an Inspector

General's office, and it doesn't have to publicly report the outcome of any investigation. Furthermore, Pixie Dust is infinitely flexible, and if Bush so desires, he will just state (or have "Pig Missile" do so for him) that the requirement that the AG provide a ruling on EO 13292 has, like the requirements for the Office of the Vice President, been turned to Pixie Dust. Which is, I suspect, their currently operative understanding of what did happen, but it'd be nice to force them to say so publicly, so we could mock them for it.

But there's one thing that works in Aftergood's favor. Attorney General Mukasey has already gone on the record to state that he believes that, if a President wants to act contrary to an Executive Order, he has to actually change that executive order—he can't simply turn it into Pixie Dust.

2. Do you believe that the President may act contrary to a valid executive order? In the event he does, need he amend the executive order or provide any notice that he is acting contrary to the executive order?

ANSWER: Executive orders reflect the directives of the President. Should an executive order apply to the President and he determines that the order should be modified, the appropriate course would be for him to issue a new order or to amend the prior order.

Michael Mukasey managed to avoid stating an opinion about most features of the unitary executive. But not this one.

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\*Pixie Dust is the process by which, armed with an absurd ruling from OLC, the President doesn't have to change any Executive Orders he decides to ignore or violate, he can simply ignore or violate them, and it's the same, legally, as if he formally modified them.