U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, NW, Suite 3266
Washington, DC 20530
(202) 514-3365

August 22, 2022

Geoffrey C. Shepard, Esq.
535 Gradyville Road, Unit S-118
Newtown Square, PA 19073

Dear Mr. Shepard:

This is in response to your October 3, 2021, complaint, supplemented by several subsequent submissions, alleging that Watergate Special Prosecution Force (WSPF) attorneys engaged in misconduct during the investigation and prosecution of the defendants in *United States v. Mitchell*, 74-cr-1492 (D.D.C.) (the "Watergate cover-up case"). You requested that the Office of Professional Responsibility (OPR) initiate an investigation into your misconduct allegations.

As you know, following the revelations of the Watergate scandal, in confirming Elliot Richardson as Attorney General, Congress demanded the appointment of a special prosecutor independent of the Department of Justice. Attorney General Richardson appointed Archibald Cox from outside the Justice Department to serve as the Special Prosecutor and to oversee the criminal investigation and prosecution of offenses arising out of the scandal. Pursuant to guidelines promulgated by the Attorney General, in order to ensure the independence of the Special Prosecutor, Mr. Cox was given full authority to investigate and prosecute offenses arising out of the scandal and to assemble his own staff. Shortly afterwards, the WSPF, headed by Mr. Cox, was established by order of the Attorney General. The Attorney General's order confirmed that the Special Prosecutor had full authority to investigate and prosecute offenses related to the Watergate scandal. In addition, the order specifically provided that the Special Prosecutor had full authority "to organize, select, and hire his own staff of attorneys" and that the staff "shall be responsible only to the Special Prosecutor."

Mr. Cox's tenure as the Special Prosecutor lasted less than five months, when President Nixon ordered that he be fired. The firestorm that followed the "Saturday Night Massacre" forced President Nixon to appoint Leon Jaworski as Mr. Cox's replacement and to abandon the attempt to have the investigation handled from within the Justice Department. The WSPF, which had been abolished, was reestablished by order of Acting Attorney General Bork. Bork's order afforded the Special Prosecutor and WSPF attorneys the necessary independence to complete the ongoing investigation. The order incorporated the Cox guidelines and amended the removal provision in the Richardson order to provide that the Special Prosecutor could not be discharged even for extraordinary improprieties unless there was a consensus among certain specified congressional leaders that his discharge was appropriate. Bork's order once again specifically

provided that the Special Prosecutor had full authority "to organize, select, and hire his own staff of attorneys" and that the staff "shall be responsible only to the Special Prosecutor." Courts have interpreted these provisions to mean that the WSPF was "an independent investigatory and prosecutive agency within the Department of Justice." *Niemeier v. Watergate Special Prosecution Force*, 565 F.2d 967, 970 (7th Cir. 1977) (footnote omitted); *see also Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973) (finding that Cox, who was appointed in accordance with Justice Department regulations, was illegally discharged from office).

At the time of the Watergate scandal, OPR did not even exist. It was established in the wake of the scandal by Attorney General Edward Levi, who succeeded Mr. Richardson as Attorney General. In 1975, Attorney General Levi issued an order establishing OPR and authorizing it to "receive and review any information concerning conduct by a Department employee that may be in violation of law, regulations or orders, or applicable standards of conduct." Even if OPR had been in existence at the time of the events about which you have complained, it would have had no authority to investigate the alleged misconduct of WSPF attorneys, as they were not considered Department employees. Pursuant to Department regulations, the Special Prosecutor was given full authority to hire his own staff of attorneys, who were responsible only to the Special Prosecutor. The courts have subsequently interpreted these provisions to mean that the WSPF was "an independent investigatory and prosecutive agency," and OPR lacks the authority to investigate the alleged misconduct of WSPF attorneys.

In addition, in 1978, Congress enacted the Independent Counsel Act, 28 U.S.C. §§ 591-599, which established a statutory structure for the investigation and prosecution of crimes committed by high-ranking government officials. Pursuant to 28 U.S.C. § 594(c), an independent counsel was authorized "to appoint, fix the compensation, and assign the duties of such employees [including attorneys] as the independent counsel considers necessary . . . ." The provisions of the Independent Counsel Act did not contain the expansive provision previously found in Acting Attorney General Bork's order specifying that the Special Prosecutor's staff of attorneys "shall be responsible only to the Special Prosecutor." Nevertheless, when authorizing OPR to investigate the alleged misconduct of attorneys serving under an independent counsel, the Attorney General instructed OPR to conduct the investigation pursuant to the Attorney General's authority under 28 U.S.C. § 596(a)(removal of an independent counsel) and § 594(j)(standards of conduct applicable to independent counsel), not 28 C.F.R. § 0.39a, the regulation that authorizes OPR to investigate allegations of misconduct against Justice Department attorneys. Thus, even under the less expansive provisions of the Independent Counsel Act, in the absence of a directive from the Attorney General authorizing it to do so, OPR lacked the authority to investigate allegations of misconduct against attorneys serving under an independent counsel,

Today, OPR's primary mission is to ensure that Department attorneys perform their duties in accordance with the highest professional standards expected of the nation's principal law enforcement agency. Each year, OPR receives hundreds of allegations of misconduct against Department attorneys from a wide variety of sources, including U.S. Attorneys' Offices and litigating divisions, private individuals and attorneys, defendants and civil litigants, other federal agencies, state and local government agencies, judicial and congressional referrals, media reports,

and self-referrals from Department attorneys. OPR also conducts weekly searches of legal databases to identify, review, and analyze cases involving judicial criticism and judicial findings of misconduct to determine whether the criticism or findings warrant further inquiry or investigation. In determining what matters warrant further action given its limited resources, OPR considers many factors, including the recency of the conduct, whether the subject attorneys continue to be employed by the Department, and the likelihood of repetition of the conduct by other Department attorneys.

Your allegations that WSPF attorneys engaged in misconduct are related to events that occurred nearly 50 years ago during the investigation and prosecution of offenses arising out of the Watergate scandal. To the best of our knowledge, there are no former WSPF attorneys currently serving as Department attorneys, and none would be subject to disciplinary action by the Department. Moreover, in all likelihood, few, if any, former WSPF attorneys are still actively practicing law, and even if OPR determined that they engaged in misconduct, a referral to bar disciplinary authorities would futile. Given the pressing demands on its limited resources, OPR determined that it is unable to investigate misconduct allegations that are of purely historical interest.

Accordingly, we are unable to assist you regarding these allegations.

Sincerely,

William J. Birney
Senior Associate Counsel