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MEMORANDUM TO THE HONORABLE MICHAEL RAOUL-DUVAL

Re: Interpretation of Section 4(a)(5) of E.O. 11905.

This is in response to your request for the views of this Department concerning Section 4(a)(5) of the President's Intelligence Executive Order.

That Section provides in pertinent part:

In carrying out their duties and responsibilities, senior officials . . . shall:

(5) Report to the Attorney General that information which relates to detection or prevention of possible violations of law by any person, including an employee of the senior official's department or agency.

The preamble to Section 4 states that:

Unless otherwise specified within this section, its provisions apply to activities both inside and outside the United States, and all references to law are to applicable laws of the United States.

Reading these provisions together, it is clear that only information relating to possible violations of the "laws of the United States" is required to be reported to the Attorney General. The D. C. Code is, of course, enacted by Congress, and its provisions are literally "laws of the United States," albeit of local application. The courts have so held, when the issue has been relevant. See, e.g., Clemmer v. Alexander, 295 F.2d 176 (D.C. Cir. 1961). Since,

in addition, the Department of Justice has responsibility for prosecuting violations of the D.C. Code, in some cases in Federal district court, I would interpret the requirement of Section 4(a)(5) to include violations of the D.C. Code.

Section 4(a)(5) does not limit the requirement to violations of the criminal laws of the United States or to serious violations of law. It could be read literally, therefore, to require reports of possible violations of any civil or criminal law, any executive order, rule or regulation, no matter how inconsequential. We do not believe, however, that such a broad interpretation would be correct. If the Executive Order's reporting requirement is to serve any purpose, the violation in question must in some way implicate the functions of the Department of Justice or the Attorney General. The Attorney General is not an Inspector General for the government, and has no general mandate by statute or executive order to enforce the laws of the United States in the broadest sense. Applying, then, the principle that a provision should be interpreted in light of its obvious purpose, I would read Section 4(a)(5) to require reports of possible violations of any law of the United States, civil or criminal, with respect to which the Department of Justice has either investigative or prosecutorial jurisdiction.

Applying this rule to the specific examples of problems raised: Crimes relating to currency, for which the Secret Service has primary investigative jurisdiction, should be reported to the Attorney General because the Department of Justice has prosecutorial jurisdiction. See 28 U.S.C. §§ 519, 547. Violations of the Uniform Code of Military Justice need not be reported to the Attorney General because the Department of Justice has no responsibility for investigation or prosecution. See 10 U.S.C. §§ 877-934. Possible violations of the D.C. Code pose a particularly difficult problem, since although the Department generally has jurisdiction only over such violations punishable by a term of imprisonment for more than one year, there are some exceptions. D.C. Code § 23-101. Since there is in our view no prohibition on reporting information to the Attorney General which is not required to be reported, so long as it involves a possible violation of law over which Federal jurisdiction and the Department's

jurisdiction is at least unclear to the reporting agency, 1/ we suggest that, generally speaking and in this area in particular, it would be advisable to err on the side of inclusion rather than omission; and that unless it is apparent that no Justice Department jurisdiction exists, all serious violations of the D.C. Code should be reported.

A few further comments are in order. Senior officials subject to the Order may obtain information relating to possible violations of State law. There is no requirement in the Executive Order that such violations be reported to anyone. Nevertheless, it should be noted that many State law violations, particularly when Federal agents or employees are involved, may raise questions of possible Federal law violations. For example, burglary by government agents may constitute a violation of 18 U.S.C. §§ 241, 242. Similarly, while, as noted above, there is no requirement that UCMJ violations as such be reported to the Attorney General, many acts which constitute violations of the UCMJ also constitute Federal crimes. In short, crimes which on their face do not appear to be within the jurisdiction of the Department of Justice may indeed be so. Intelligence agencies and senior officials should be alerted to this.

It should also be noted that "senior officials" or their organizations may acquire information concerning possible violations of United States law in the course of duties which are not foreign intelligence duties. For

1/ When such lack of clarity exists, we would think that the Department is the "appropriate" agency to resolve the doubt, not only as to whether it has jurisdiction over a Federal offense, but also as to whether activity which "may be" a Federal offense (see the last clause of Section 5(c)(1)) is indeed so. Thus, the general prohibition on dissemination contained in Section 5(b)(7) would be subject to the exception of Section 5(c)(1).

example, the Treasury Department has investigatory responsibilities entirely unconnected with foreign intelligence, relating to the protection of the President and others. The duties and responsibilities of senior officials to which Section 4(a)(5) is applicable are only "the duties and responsibilities enumerated for their organizations which relate to foreign intelligence." 2/ Thus, it is our view that only when information concerning possible violations of law is acquired by an agency or department in the exercise of any of its functions under the Executive Order must that information be reported to the Attorney General pursuant to Section 4(a)(5). Of course, violations of Federal law generally should be reported to the Department of Justice, even in areas not required by the Executive Order.

Finally, procedures approved by the Attorney General pursuant to Section 5 of the Order may provide for limitations on the dissemination of information acquired which would bar reports to the Attorney General or other law enforcement agencies concerning certain violations of law. These approved procedures will govern even if they conflict with the reporting requirement of Section 4(a)(5).

In reviewing the Order for purposes of this memorandum, we have discovered what we are sure is an unintended but nonetheless explicit prohibition on the dissemination of incidentally acquired information indicating involvement in violations of State law. While Section 5(c)(1) allows dissemination to "appropriate law enforcement agencies" of information indicating involvement in activities "in violation of law," the preamble to Section 5 states that "references to law are to applicable laws of the United States." Because there is a general prohibition on the "collection" (which includes dissemination, Section 5(a)(1))

2/ In arriving at this interpretation, we read the first and second sentences of Section 4(a) in pari materia, as we think the text requires.

of information on the domestic activities of Americans (Section 5(b)(7)), information relating to a planned murder not covered by Federal law could not be reported to anyone. You should consider an amendment to the Order to allow for dissemination of incidentally acquired information relating to State crimes.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel