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Mrs. Gauf ✓
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JUN 1 1977

MEMORANDUM TO THE HONORABLE DOUGLAS B. HURON
Associate Counsel to the President

Re: Impact of Weissman v. CIA on Executive
Order 11905.

This is in response to your request for our views on whether or to what extent Executive Order 11905 is affected by Weissman v. CIA, No. 76-1566 (D.C. Cir. Jan. 6, 1977).

In Weissman, an FOI case, the CIA attempted to invoke exemption 7, 5 U.S.C. § 552(b)(7), shielding from disclosure certain records "compiled for law enforcement purposes," in order to protect certain records it had compiled on Weissman in the course of a full background investigation undertaken because CIA was considering his possible use as a witting agent. The investigation was conducted without Weissman's knowledge or consent.

The court denied the use of this exemption to CIA because it is barred from having any "police, subpoena, law-enforcement powers, or internal-security functions," see 50 U.S.C. § 403(d)(3). However, the decision is unclear as to whether the court was denying the exemption because national security background investigations by CIA could not be "for law enforcement purposes," as required by exemption 7, because of CIA's disability from having any "law enforcement powers," or whether CIA was barred altogether from conducting background investigations of Americans without their knowledge and consent, and consequently the investigation was not a "lawful national security intelligence investigation" and hence not within the terms of exemption 7, see 5 U.S.C. § 552 (b)(7)(D). The thrust of the opinion, however, suggests the latter. The court in various places indicated its belief that such background investigations could not be conducted by CIA:

[The proviso in 50 U.S.C. § 403(d)(3)] was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency. Slip Op. at 5-6.

[The responsibility of the DCI to protect intelligence sources and methods] contains no grant of power to conduct security investigations of unwitting American citizens. Slip op. at 8.

A full background check within the United States of a citizen who never had any relationship with the CIA is not authorized
Slip Op. at 8-9.

The only language of the court to suggest that the investigation could not be considered "for law enforcement purposes", although perhaps otherwise lawful, was the final sentence in the portion of the opinion dealing with this issue:

The Agency simply has no authority in the guise of law enforcement to make such a background check of Weissman with a view to his possible recruitment. Slip op. at 9 (emphasis supplied).*/

The lack of clarity in the opinion coupled with language suggestive of the court's view that CIA is barred from background investigations of United States citizens in the United States without their knowledge or consent places in doubt the heretofore accepted lawful authority of CIA to engage in such activity. This substantive issue, as opposed to the FOI issue, is of considerable importance to the CIA.

Nevertheless, even if one assumes that CIA is barred from such background investigations, this does not require amendments of Executive Order 11905. Section 4(b) provides:

*/ Even more cryptic is a footnote to an earlier clause "whatever may be the power to check on its own personnel," which footnote quotes from the Rockefeller Commission Report and Church Committee Report the conclusion that investigations by the CIA of citizens in the United States "being considered for affiliation" or "as potential sources of information" are lawful. Slip op. at 8.

As authorized by the National Security Act of 1947, as amended, the CIA Act of 1949, as amended, and other laws, regulations, and directives, the Central Intelligence Agency shall:

(8) Protect the security of its installations, activities, information and personnel. In order to maintain this security, the CIA shall conduct such investigations of applicants, employees, and other persons with similar associations with the CIA as are necessary.

Nothing in this language specifically authorizes background investigations of United States citizens in the United States without their knowledge because of their potential recruitment. Inasmuch as the court's opinion is based on an interpretation of the National Security Act of 1947, as amended, 50 U.S.C. § 403(d)(3), upon which Section 4(b)(8) is based, that paragraph in the Order must be interpreted in light of the authorizations and prohibitions in that Act as interpreted by the courts. In short, if 50 U.S.C. § 403(d)(3) does not authorize, and in fact prohibits, as suggested by the court in Weissman, CIA background checks of United States citizens in the United States without their knowledge, then Section 4(b)(8) does not authorize such checks. But if 50 U.S.C. § 403(d)(3) does not bar those checks, then Section 4(b)(8) can be read to authorize them.

Section 5(b)(7) of E.O. 11905 prohibits U.S. foreign intelligence agencies from collecting information concerning the domestic activities of United States persons. Section 5(b)(7)(iii) exempts from this prohibition the collection of such information when it concerns "persons who are reasonably believed to be potential sources or contacts, but only for the purpose of determining the suitability or credibility of such persons." However, the exemptions provided in Section 5 to the prohibitions therein do "not provide exemption from any restrictions otherwise applicable." See Preamble to Section 5. To the extent that 50 U.S.C. § 403(d)(3) prohibits activity by CIA, nothing in Section 5 can be read to allow it.

In sum, while the court's decision in Weissman raises grave questions with respect to CIA's activities, however those questions are resolved, there will be no necessity for amending E.O. 11905.

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