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SEP 25 1984

MEMORANDUM FOR D. LOWELL JENSEN
Associate Attorney General

Re: FBI Request for Authorization to Conduct Certain
Investigations at the Behest of Foreign Countries

This responds to your memorandum of August 10, 1984, requesting our review of an inquiry from the FBI regarding requests from friendly foreign intelligence services for the conduct of background investigations by the FBI. The FBI's authority to conduct background investigations at the behest of foreign countries has been considered on prior occasions by this Office. We have previously concluded, and the FBI has concurred, that absent a formal request from the Secretary of State pursuant to 28 U.S.C. § 533(3), */ the Attorney General does not have authority to direct the FBI to render such assistance. For your information, we summarize below our prior consideration of that issue and attach relevant documents.

The issue of the FBI's authority to conduct background investigations on behalf of foreign countries arose initially in connection with the formulation of guidelines on cooperation with agencies of foreign governments by the FBI Guidelines

*/ Section 533(3) provides that

The Attorney General may appoint officials --

...

- (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

Committee in 1976. In a memorandum to Attorney General Levi dated August 2, 1984 (Tab A), the Committee concluded that in background and civil matters "there is no legal basis for providing assistance absent a request from the Department of State" pursuant to 28 U.S.C. § 533. The Committee reasoned as follows:

[T]he authority to conduct investigations in the United States is limited to offenses against the United States and official matters under the control of the Department of Justice or the Department of State. 28 U.S.C. § 533. There is no basis for asserting that background, civil or criminal matters under investigation in a foreign country are "official matters under the control of the Department of Justice" that would warrant FBI investigative assistance in this country. The only basis we can find in existing law for providing assistance to foreign governments is the provision in 28 U.S.C. § 533(3) which authorizes investigations of official matters under the control of the Department of State. That Department has responsibility for the foreign relations of the United States and, if it were to request this Department to provide investigative assistance to foreign governments in the interest of promoting good foreign relations, it could be argued that investigations on behalf of foreign governments would be authorized.

In 1982, at the request of the Associate Deputy Attorney General, this Office reviewed a proposal by the FBI to assist certain foreign governments by conducting background investigations of employees of those governments. As reflected in an April 30, 1982 memorandum from this Office to the Department of State (Tab B), at that time the FBI did not assert independent authority under § 533 or any other federal statute to conduct such investigations, but rather relied upon the authority vested in the Secretary of State by § 533(3) to request the FBI to conduct such investigations. We noted in that memorandum that it would be most unlikely that we would conclude, if asked, that the FBI would have authority

to conduct such investigations, absent a formal request from the Secretary of State under § 533(3).

We therefore referred to the Legal Adviser's Office of the Department of State the question whether the Secretary of State has the authority under § 533(3), or any other relevant statute, to request the FBI to conduct background investigations on behalf of foreign governments. By memorandum dated June 22, 1982 (Tab C), the Department of State informed the Director of the FBI that, while the Department "has a general interest in furthering reciprocal assistance in criminal and other matters, it is our view that such assistance cannot be said to be under our 'control' . . . we are unable to conclude that such security clearance and personal background investigation agreements would be 'official matters under the control of . . . the Department of State'"

In light of the Department of State's conclusion, we advised the Associate Deputy Attorney General on July 9, 1982, that the Attorney General could not approve the FBI's proposal (Tab D).

The FBI would now like to attempt to persuade appropriate Department of State officials to revisit their legal conclusion and to recommend that the Secretary of State make a formal request pursuant to § 533(3) that the FBI assist in conducting background investigations on behalf of friendly foreign countries. In his memorandum to you of August 1, 1984, the Director requested Departmental review of this proposal. We have confirmed with the FBI that the Director does not want this Office to reconsider the legal conclusion that a formal request from the Secretary of State under § 533(3) is necessary to enable the FBI to conduct such investigations, and indeed that the FBI agrees with that conclusion. What the FBI seeks is consideration by the appropriate officials in this Department of the advisability of a renewed approach to the Department of State on this issue.

We have two reservations regarding the FBI's proposal. First, the Office of Legal Adviser has already considered the substantive point of law at issue regarding the Secretary of State's authority under § 533(3) and has concluded that the Secretary does not have authority to request background investigations of the type involved here. Nothing in the FBI's proposal suggests any clear basis on which to seek reconsideration of the issue by the Department of State, other than that the Department of State's conclusion prevents

the FBI from providing assistance it would like to be able to provide. Unless the FBI can develop significant new legal arguments as the basis for its proposal, we would be disinclined to recommend that the proposal be approved. This Office is generally careful to avoid entertaining requests to reconsider the result reached in our legal opinions absent persuasive argumentation that our opinion failed to take into account relevant laws or facts, and we believe that standard should generally be applied to this type of proposal.

Second, it may well be that the legal conclusion reached by the Department of State was influenced somewhat by the reasoning of this Office in prior memoranda regarding the tenuousness of the FBI's authority to conduct background investigations for staff of certain congressional committees. See generally Memorandum for Assistant Legal Adviser Smith from Deputy Assistant Attorney General Simms re: "Authority to Conduct Background Investigations of U.S. Citizens and Non-Citizens at the Request of Foreign Governments" (April 30, 1982) (Tab B). We believe the more prudent course to follow at this point would be to seek legislation authorizing the FBI to conduct such investigations as the Department believes the FBI should be undertaking, rather than seeking to have the Department of State revisit an issue that was settled over two years ago and, on the face of the FBI's proposal, not seriously challenged by new legal arguments.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

cc: John Mintz, FBI
Mary C. Lawton, OIPR

Enclosures