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Department of Justice
Washington, D.C. 20530

March 8, 1978

Mr. Anthony A. Lapham
General Counsel
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Lapham:

Pursuant to conversations between [redacted] and John Gavin of this Office over the last several months, we are forwarding to you our thoughts on the CIA's proposed procedures regarding CIA investigations of United States persons in the United States. This informal discussion does not represent our final conclusions on this matter, but is meant to display our concerns and serve as a basis for future discussion. With the signing of Executive Order 12036 many of the issues touched upon by these procedures will, as you know, become the subject over the next few weeks and months of procedures promulgated under sections 2-206, 2-207, and 2-208 of that Order. The questions to be considered in that process are among the most difficult arising under the Order, and it is our intent here not to foreclose deliberation on any of those matters, but instead to give you the benefit of our preliminary thinking. On this basis, we believe the following issues raise problems in light of Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977).

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1. Delineation of individuals subject to investigation.

In our view, the decision in Weissman did not preclude entirely investigations by the CIA of those United States persons who have a "connection" with the agency. Several of the categories of individuals included in paragraph [1] of your proposed procedures will have an obvious connection

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with the CIA, and we entertain little question about the propriety of investigations in these cases. For example, employees of the agency, those who are detailed to the agency, those who apply for employment with the agency, or those who expressly consent to an investigation (including employees of contractors) would meet this criterion rather easily.

However, the "connection" of other categories of personnel listed in paragraph [1] with the CIA is not so clear. Our principal concern is with those individuals who do not know that they are subject to a CIA investigation and who have no reason to believe that they may be investigated. In particular, this would refer to employees (or applicants for employment) of proprietaries and instrumentalities who are unaware of their employer's connection; it would also include contractors' employees and others who have no reason to believe that the CIA may investigate them. Since these individuals have no such knowledge, their "connection" with the CIA must rest solely on the fact that they have become unwittingly involved in a situation where the CIA considers it necessary to subject them to some form of investigation. We believe this raises two different sorts of problems under Weissman. First, as we stated in our September 1, 1977 letter, while we do not believe that the court made an individual's awareness of an investigation an "invariable prerequisite" to an inquiry by the CIA, the court was clearly troubled by an investigation of an American citizen "without his knowledge" or "security investigations of unwitting American citizens." 565 F.2d at 695, 696. In our view, this concern of the court may not legitimately be entirely ignored. Second, since the individuals here cannot be taken to have even implicitly consented to a background investigation, the requisite "connection" in such cases becomes more tenuous than where they were aware of, and consented to, such investigation.

We do not now believe that these problems under Weissman will preclude investigations of such personnel entirely. Rather, we wonder whether an approach along the lines suggested in our previous opinion on this matter would prove administratively workable -- i.e., gearing the extensiveness and intrusiveness of the contemplated investigation to the degree that an individual has a "connection"

with the CIA. More specifically, in cases in which an individual's connection is limited, the CIA might promulgate more restrictive procedures than are applicable to those that the CIA employs directly. The restrictions which we have in mind would pertain to approval authority, duration of investigation, methods of investigation, disposition of records, etc.

2. Purposes of investigation.

At present the proposed procedures do not state the purposes for which an investigation may be conducted. While we have no substantial objection to this open-ended approach with respect to Agency employees and others close to the Agency (provided that the purposes are lawful), we are troubled by the application of this approach to those who have less of a connection with the CIA. With respect to such individuals, if the CIA is to justify an investigation by reference to some limited "connection," we believe that the regulations should clearly specify that the investigation will not go beyond whatever is required by reason of that connection. Otherwise, it might be claimed that the CIA is using a rather tenuous connection to justify an investigation serving other purposes. Such a departure from the investigation's underlying justification may be an abuse of that aspect of Weissman allowing an investigation predicated upon a connection.

3. Method of investigation.

The proposed procedures do not now specify which methods of investigation may be used, and we believe that it would be necessary in light of Executive Order 12036 to delineate explicitly what methods will be used. Perhaps more importantly, paragraph [3] implies that physical surveillance may be used in some instances. While the Executive Order itself places limits on physical surveillance, additional limitations may be necessary to fulfill the Attorney General's responsibilities under section 3-305 of the Order. Weissman suggests such limitations. For instance, the Executive

Order allows for physical surveillance of present employees of CIA contractors. If these individuals were unaware of the possibility of a CIA inquiry into their lives, we question whether their "connection" with the CIA would suffice to justify the intrusiveness of a physical surveillance.*/

4. Paragraph [2]

The exception contained in paragraph [2] may be too broadly written. The provisions of paragraph [2A] appear to allow exactly the sort of investigation that occurred in Weissman, except that it would be limited in duration and subject to records disposal requirements. The provisions of paragraph [2B] would allow for an exception in all other areas, and hence provide for a way to avoid the limitations of the proposed procedures entirely. Nothing is said to set forth the conditions under which this may occur or to impose restrictions on the use of this broad exception. While [redacted] of your office has suggested that this provision could be modified to apply only to certain sorts of personnel, the open-ended nature of this approach would still trouble us. The application of this approach to those with only tenuous connections with the CIA may, for the reasons discussed above, cause problems under Weissman.

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5. Coordination with [redacted]

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We would suggest that more consideration be given to how the proposed procedures are to fit in with [redacted]. As the situation presently stands, the CIA will have two different sets of procedures dealing with the problems raised in Weissman. In our view, these two sets of procedures are not now entirely consistent. For example,

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*/ The special concern about physical surveillance is one that was suggested by the Weissman court as we pointed out in our earlier memorandum. See 565 F.2d at 696 n. 8.

several provisions in the current regulations would appear to allow for investigations beyond those contemplated in your proposed procedures. See, e.g., [redacted] (g)(4) and (6). In order to prevent possible conflicts or confusion, it may be advisable to promulgate one set of guidelines to cover this entire area. Presumably, this will be done in formulating procedures under Executive Order 12036.

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6. Records retention.

Paragraph [2A] states that records of those investigated but not contacted will be disposed of in accordance with General Records Schedules. Since we do not know what these schedules provide for this type of information, we cannot now comment on the efficacy of this provision. We assume, however, that this question and others will be included in the preparation of procedures under Executive Order 12036 and, in that context, we would be pleased to provide whatever additional assistance we can.

Sincerely,

Larry A. Hammond

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Office of Legal Counsel