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The Dilemmas Lurking In FBI Files

By Lawrence Meyer

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HOW CAN Congress judge whether the FBI is filing information about prominent Americans improperly without being shown the files and thus spreading their contents? How can it monitor the expunging of such material without specifying what information should be purged and why, thus invading the privacy of the files' subjects?

That is the dilemma facing Congress, the ultimate questions that lie beneath the current controversy over FBI information-gathering. What is at stake is not only the question of past FBI misdeeds, but whether Congress can ever know on a continuing basis whether the FBI's files contain information on prominent persons, public officials and ordinary citizens that has no business being in its records at all.

The issue is no academic matter. For years there were rumors, more recently corroborated by former FBI officials in news stories and now confirmed by Attorney General Edward H. Levi, that former FBI Director J. Edgar Hoover had "files" on prominent persons. Levi and the current FBI director, Clarence M. Kelley, disclosed in House testimony last month that Hoover had in his private office files on "Presidents, executive branch employees and 17 individuals who were members of Congress."

Levi told the House Judiciary Subcommittee on Civil Rights and Constitutional Rights that he has now begun preparing guidelines to define what information should be gathered and stored by the FBI.

FBI View

TO THOSE whose names show up in the FBI files, the issues are obvious. To be the subject of a statement in such a dossier—whether the information is substantiated or not—is to give the holder of the information a potential weapon. Even if a file on a person does not exist, the fear that it may exist can cause the individual to behave differently. In the case of congressmen, senators or other public offi-

cial, such a fear could cause them to bend their actions to suit the wishes of an unscrupulous FBI director or others with access to the files.

The problems for the FBI, as outlined by Kelley and Levi before the House Feb. 27, are that one never knows when information will be useful; one never knows how it will be useful; and even if the FBI wanted to purge information about prominent persons, especially members of Congress, it cannot do so without a change of regulations and perhaps federal law.

Levi has promised to show the FBI guidelines he prepares to the Judiciary Committees of both Houses. However, unless Congress actually jumps into the question with both feet, learning all it can about the activities that Levi's guidelines seek to control, it cannot know how adequate the guidelines are.

On the other hand, if Congress does learn all it can about what the FBI has in files on prominent persons, then the possibility increases for doing the very thing that needs to be avoided—letting out sensational information, whether or not substantiated, dealing with the private lives of prominent persons.

Some of the issues seem rather easy to resolve, but the dilemma facing Congress suggests how difficult some other questions are as Levi begins this first effort to define what should and should not be done.

Once In, It Stays In

THE FBI's authority to investigate falls into three broad categories—investigations where a crime is alleged, investigations of persons for federal office or for the judiciary and investigations concerning national security. Information gathered on prominent persons as a result of activities in any of these categories will be held by the FBI.

In some instances, however, the FBI receives unsolicited information that it does not substantiate but that it holds in its files. This is partly because the FBI is a captive of its own practices and regulations.

A private citizen, to cite a hypothetical example, approaches an FBI agent

in Chicago, asserting that Rep. X is a drunk, a habitual gambler and a womanizer. The FBI manual does not require the agent either to record such information or to forward it to Washington, but the likelihood is that he will, according to a knowledgeable FBI official. According to this official, virtually every agent would send such a report to Washington when it concerns a congressman or a senator on the theory "that the guy will be appointed to an executive position or the judiciary some time in the future."

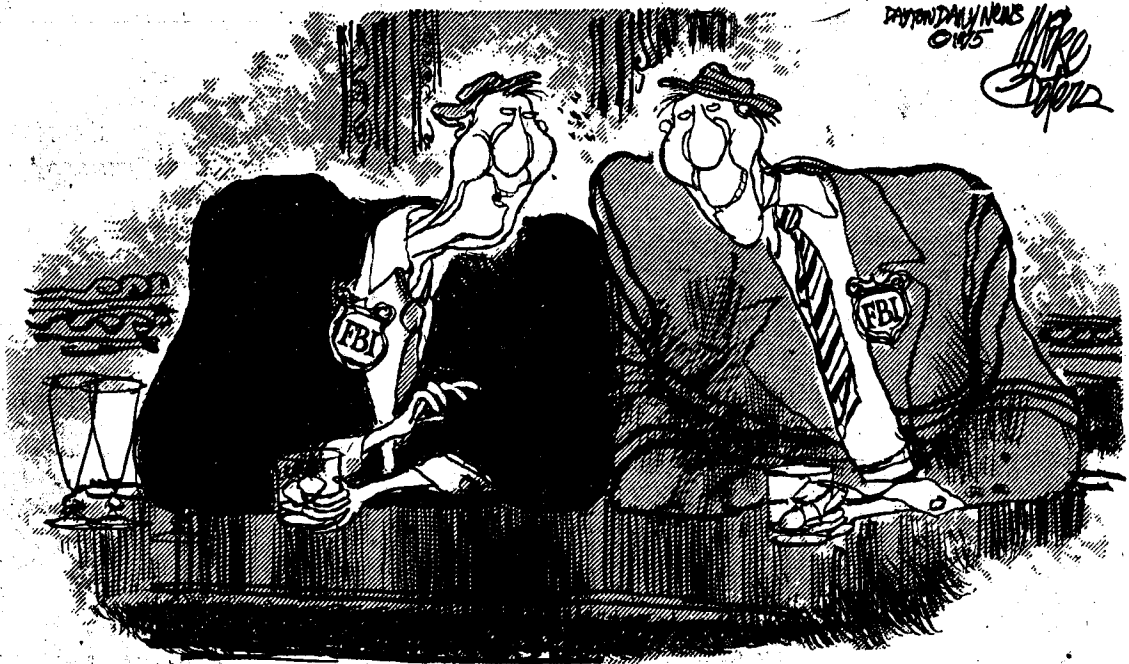
Once the information goes to Washington, under federal law and the FBI's interpretation of the law, it must be filed. And once filed, according to a statement released by the FBI to the House subcommittee, the information cannot be destroyed under present law and regulation.

Most unsolicited information concerning public officials comes not from private citizens coming forward to make comments, but either during an investigation into a matter where the FBI has authority or from correspondence mailed to the FBI.

Information volunteered about a public official—especially a congressman or a senator—would be covered by the same logic as information volunteered by a private citizen stepping off the street. Correspondence, according to Kelley and Levi, is filed for a variety of reasons: because it may help the FBI solve a threat to the subject's life at some future date; because it may be used to show that the FBI did not have authority to proceed; because it might be useful if the person is appointed to a federal executive position or the federal judiciary; and because the letter may contain an allegation of a federal crime or some other matter that the FBI is authorized to investi-

Levi, Kelley and the FBI are faced with two questions—what to do with the information currently in the files and how to proceed in determining what is relevant in the future.

For example, how much discretion should agents in the field be given to determine that something they are told is or is not relevant?



"How about this one ... There once was a congressman from Nantucket ..."

On the one hand, a piece of personal information about a public official's private, sex or family life may be irrelevant by itself but could conceivably be part of a mosaic that might become relevant to a broader area where the bureau has legitimate concern.

On the other hand, the potential damage to the individual if unsubstantiated charges are leaked is enormous. Information coming out of the FBI files, substantiated or not, bears a certain authority which an anonymous charge does not have, even when an anonymous charge is the source of the FBI information. The likelihood of wrongful use or improper dissemination of such information has to be measured against the remote possibility that the information might at some time become useful.

"If an investigative agency destroys material it has received and later it is claimed the material should have alerted the agency to all kinds of serious problems, that criticism may be impossible to evaluate," Levi said in his House testimony.

All information, after all, at some time may become useful. But all information cannot be collected, much less stored. So the question becomes one of designing a standard. Should FBI agents be told simply to disregard information not clearly and immediately related to those areas where the FBI has authority to investigate?

Moreover, what should be done with the information in the files now to keep it from being misused? Hoover kept certain dossiers in his own office, which gave rise to rumors and apprehensions about his "secret" files. But it also kept a variety of clerks, agents and other high-level officials from reading the files. The fewer persons who see the files, the less chance for improper use or dissemination of the information.

Levi said that he and Kelley have agreed that Kelley should not keep such files in his own office and that they are not being kept there.

In fact, the private Hoover files are being kept where they were found—in the office suite of associate FBI Director Nicholas Callahan—because, according to one top Justice Department official, no one knows quite where to put them now.

Trying to Be "Gentlemen"

"THE QUESTION IS," Levi said about sensitive files in general, "are they kept secure by the bureau from improper use or dissemination? I realize that this information will not arise if the information is destroyed, but this seems to me to be too easy a circumvention of the central and broader inevitable question as to which the quality of the bureau and the appropriate guidelines and protective rules should give a reassuring answer."

The practicality of the matter is, however, that no matter how comforting the guidelines are and how limited the access to sensitive files, the files are kept to be read. Who will maintain the files and what kind of access will that person or persons have? A clerk will probably bring the file to the official asking to see it. Will the clerk be able to read it?

Finally, what of the official who is permitted to look at the files? What use will that person make of the information? Hoover was not above relishing a derogatory story. Hoover's successor, L. Patrick Gray, showed information from the files to White House counsel John W. Dean, thereby helping to perpetuate the Watergate cover-up.

Rep. Don Edwards (D-Calif.), chairman of the House Judiciary subcommittee that held the hearings, thinks

that whether Levi produces guidelines or not, his subcommittee will introduce legislation on the FBI's collection and retention of information. Yet the subcommittee members showed themselves reluctant to draw out the facts. Reporters at the hearing counted only one question from the subcommittee about Hoover's files. When Levi described five areas of "abuse" of the FBI by three different Presidents, no questions were asked to determine which Presidents were responsible or the precise nature of the abuse.

One subcommittee staff member explained after the hearing that the congressmen had tried to be "gentlemen," that they did not believe such questions would have been answered—even though Justice Department officials readily answered reporters' questions on the subject after the hearing—and that in any case such details were of more interest to reporters than to committee members.

It is not clear, however, how the committee expects to appraise Levi's guidelines or to prepare its own without at least going beneath the surface of the information offered by the FBI.

The problem does not end there. Once guidelines are drawn, it is not clear how they will be enforced. How much time will Congress spend monitoring the FBI? What insures that the oversight apparatus Congress establishes will be fully informed? In the final analysis, it seems clear, the good faith of the FBI is the only guarantee that the guidelines established and the subsequent monitoring of them will work.

The final dilemma is that the revelations about what Hoover had, and how he allowed the FBI to be used have raised official doubts about whether the good faith of the FBI can be assumed in the future.