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Phone (202) 484-5000

Details Pose A Large Hurdle For FBI Charter

By Robert Pear

Washington Star Staff Writer

When FBI Director William H. Webster announced disciplinary action against six agents earlier this month, he said a statutory charter for the FBI would help prevent similar abuses in the future.

For different reasons, FBI agents, Justice Department officials, members of Congress, civil liberties advocates and state and local law-enforcement authorities all say they want an FBI charter — a legal document defining the scope of the agency's responsibilities and the extent of its authority.

But they have different ideas about what it should contain. The drafting of a charter therefore could be one of the liveliest and most important controversies of the new Congress that convenes next month.

An FBI charter is a high-priority item for Sen. Edward Kennedy, D-Mass., who will become chairman of the Senate Judiciary Committee. His aides are exchanging preliminary drafts of a charter with Justice Department attorneys.

See FBI, A-7

KENNEDY PLANS to introduce a charter bill as soon as Congress convenes — about the same time three former FBI officials are scheduled to go on trial in federal court here for conspiring to violate the rights of citizens. The purpose of a charter is to prevent abuses.

At this early stage, the key issue is the degree of detail that a charter should contain.

Webster and Attorney General Griffin Bell want to keep the charter short, letting executive orders, guidelines and FBI manuals spell out details. Critics of the FBI want Congress to specify precisely what the FBI can and cannot do.

Unlike agencies established more recently, the FBI has little or no explicit statutory authority for some of its traditional duties, such as laboratory work, foreign counterintelligence and background investigations of presidential appointees and congressional committee employees.

"In the past, until five years ago, the whole attitude was: If it's not prohibited, you can do it," said Mary C. Lawton, deputy assistant attorney general in the Justice Department's Office of Legal Counsel. "But now it's completely reversed. People say, 'Where's your authority? Point to a statute.'"

THE IMPORTANCE of a charter, according to the people involved, is that it can help preserve freedom by defining the FBI's powers in relation to the rights of citizens.

Describing the need, Webster says: "The FBI urgently needs a clear and workable statement of its responsibilities, powers and duties. The men and women of the bureau need a charter that will allow them to act with confidence that what they are doing is lawful."

Current laws establishing the FBI's jurisdiction are "not sufficiently definitive," he says.

From a different vantage point, Jerry J. Berman of the American Civil Liberties

Union says, "The massive and disturbing public record of investigative abuse by the FBI is the primary impetus for charter legislation."

The abuses occurred, he asserts, because "the FBI's investigative powers are undefined, unchecked and unregulated by statutory standards and procedures."

In the Justice Department and at the FBI, there is a certain nervousness about writing an FBI charter. Lawyers must use considerable imagination to envision the emergencies for which the FBI must be prepared.

WHILE CRITICS would forbid certain types of investigation and certain techniques, the FBI wants to retain flexibility.

Justice's Lawton put the issue this way: "Are we prepared to say 'never' under any circumstances? If you put the question that way, the answer is no."

FBI officials tend to prefer guidelines issued by an attorney general because they can be changed more readily than a statutory charter.

Fortunately, the charter is being written in a period of domestic tranquility. The FBI's illegal activities — break-ins, wiretaps, mail openings — as well as the Coin-telpro campaign, designed to disrupt suspected subversive groups with "dirty tricks," were products of more tumultuous times.

In drafting a charter, FBI officials try to anticipate extraordinary needs, while civil liberties advocates try to imagine the strained interpretation that could be placed on each phrase.

As she hears recommendations to outlaw each past FBI abuse, Lawton asks, "Are we legislating for the future or are we rewriting the history of the bureau?"

Inevitably, past abuses figure prominently in the current debate. Following is a summary of key issues:

DOMESTIC SECURITY

The ACLU wants to "abolish the domestic intelligence jurisdiction of the FBI,"

which is used mainly to investigate suspected political terrorists in this country. There already has been a sharp decline in the FBI's activity in this area during the past few years, partly because protest groups are less militant, partly because the FBI has been bound by domestic security guidelines since 1976.

The problem with domestic intelligence investigations, according to the ACLU, is that they "require surveillance of lawful political activity," have a "chilling effect" on free speech and focus on political dissenters.

"A total change in emphasis is required," said a recent ACLU statement. "Instead of focusing on political dissent, the FBI should zero in on illegal conduct."

FBI Inspector John B. Hotis says domestic security cases differ from ordinary criminal cases because the FBI's purpose is to frustrate or minimize intended acts of violence. As a result, he says, "there may be no completed offense to provide a framework for the investigation."

In such cases, he says, FBI agents fit together bits and pieces of information to determine whether there is a "mosaic of criminal activity."

STANDARD FOR INVESTIGATIONS

Hotis says "the investigative process must begin well in advance of crime if it is to be effective." The FBI sometimes justifies early involvement on the ground that it is investigating a conspiracy or an attempt at crime.

The civil liberties union complains that "the FBI has conducted massive investigations of lawful political activity premised on the violation of conspiracy statutes."

To prevent open-ended intelligence-gathering, the ACLU proposes this standard: The FBI could not conduct an intrusive investigation unless it had a "reasonable suspicion," based on specific facts, that a person or group had committed, was committing or was about to commit a specific criminal act.

WARRANTS

The ACLU says the FBI should obtain judicial warrants before using paid informants and undercover agents. The ACLU contends that informants and undercover agents who infiltrate political groups often influence their activities.

Hotis of the FBI sees "enormous difficulties" in requiring warrants. The FBI fears that the identity of informants, a closely guarded secret, could be revealed in the warrant procedure. Also, FBI officials add, courts that adjudicate criminal charges should not be involved in the investigation.

The FBI's Hotis favors "internal management controls" rather than a flat statutory ban on the use of news reporters, attorneys and clergymen as informants.

BACKGROUND INVESTIGATIONS

Attorney General Bell favors reducing the FBI's responsibility for background checks of federal employees. Other agencies such as the Civil Service Commission already do similar investigations.

CIVIL CASES

The charter may provide a legal foundation for the FBI's work in civil rights, fraud and antitrust cases, as well as in various civil enforcement proceedings and in collecting evidence for the defense of lawsuits against the federal government.

AID TO OTHER AGENCIES

The charter probably will define the FBI's authority for exchanging information with state and local officials and with foreign law-enforcement agencies. This issue is particularly controversial because it involves data banks, computerized criminal histories and possible "message switching" between agencies. While the FBI helps local police departments in major cases, it is not supposed to be a national police force.

RECORDS

The charter might specify procedures to be followed by the FBI in seeking bank, telephone, hospital, employment and other confidential records. Persons with custody of such records are increasingly reluctant to release them.