



# Department of Justice

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THE GOVERNMENT'S INTELLIGENCE FUNCTION --

A RIGHT OR OBLIGATION?

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## THE GOVERNMENT'S INTELLIGENCE FUNCTION --

### A RIGHT OR OBLIGATION?

This year's Law Day theme -- "Change Through Law and Reason" -- has an immediate relevance for all of us. For, in the past decade, we have been witness to a period of unprecedented and rapid transition. And yet despite, or perhaps because of, the changes that our society has undergone, the demands for even further transitions continue and grow more strident. Today's theme recognizes that change in a democracy such as ours, where citizens have strived for centuries to make their dreams a reality, is inevitable. Yet, at the same time, it points up the sole method by which such change must be accomplished if it is to be constructive.

There are those who insist that the changes needed now can only be effected through the destruction of existing institutions. Such a thought, borne of an essentially nihilistic philosophy, has in the past been found, and will be found in the future, to be repugnant to the American spirit and to the system of law wherein that spirit has found expression. The institutions which guarantee the cohesiveness of our democracy have been structured so that the power to effect or not to effect changes would reside not in an elitist

few, but rather with the people exercising rational processes of choice. The system whereby all citizens exercise this power through the institutional processes they themselves have ordained is the sole legitimate sphere for power struggles. It is by this method that over the years the American system of law has successfully kept our ever-changing society on the path of reason.

The role of the government, as society's primary institution for the maintenance of our system of law, in a period of rapid and at times violent transition such as we are now experiencing is a difficult one. Perhaps the most striking example of this perplexing dilemma of government is the current debate about governmental intelligence activities.

History has taught us that the balance between the rights of the individual on the one hand and society on the other is a delicate one, and that in most situations the precise fulcrum may never be found. Government has the responsibility to insure the right of all individuals to peaceably assemble and exercise their First Amendment rights. At the same time, government must guard against illegal conduct which impinges on the constitutional rights of the rest of society.

Only by coupling this fact with a recognition of the fragile nature of the rights being balanced can we fully comprehend the dilemma with which the government is faced. Notwithstanding the difficulty of the task, however, the government has the solemn duty to attempt, as precisely as possible, to mark this fulcrum and to jealously defend it before lawful dissent is allowed to escalate to civil disorder.

Most recent discussions about the government's role in intelligence-gathering have stated the question in terms of the government's "right" to collect intelligence information. Besides generating more heat than light, these discussions may also be confusing the real issues to be <sup>considered</sup> addressed.

The tragedies of history are repeated when the societies in which tragedies have occurred do not learn the hard lessons they teach. Recent ~~events~~ <sup>the</sup> events in the life of our nation and the ensuing investigation into the causes of such incidents <sup>which have occurred</sup> and ways to prevent their reoccurrence point to the role of government in intelligence-gathering as an obligation rather than a right, or privilege.

The death of President Kennedy scarred the American spirit. As you know, the Warren Commission examined meticulously the circumstances of Kennedy's assassination, and made

strong recommendations with respect to more effective protection for the President. The Warren Commission found, among other things, that compiling complete information and dissemination of such information between responsible government agencies was imperative.

In its report, the Warren Commission stated, on page 429, the following: "A basic element of Presidential protection is the identification and elimination of possible sources of danger to the President before the danger becomes actual. The Secret Service has attempted to perform this function through the activities of its Protective Research Section and requests to other agencies, Federal and local, for useful information. The Commission has concluded that at the time of the assassination, the arrangements relied upon by the Secret Service to perform this function were seriously deficient."

What was the nature of this <sup>serious</sup> deficiency? For one thing, according to the Commission, the Secret Service, prior to the assassination, concerned itself primarily with direct threats to the President. The primary source for information outside the Secret Service, noted the report, was the FBI. The FBI, the Commission found, knew about Lee Harvey Oswald's activities

before the tragedy in Dallas, but made no report to the Secret Service since Oswald had made no direct threat to the President.

Of this situation, the report stated that, and I quote, "The Commission believes ... that the FBI took an unduly restrictive view of its responsibilities in preventive intelligence work, prior to the assassination." On page 443, the Warren Commission states that "This conclusion may be tinged with hindsight, but is stated primarily to direct the thought of those responsible for the future safety of our Presidents to the need for a more imaginative and less narrow interpretation of their responsibilities."

The present administration and its successors represent the "future" to which the Warren Commission report referred. What are we now to conclude from the findings of this exhaustive study? What constitutes a "more imaginative and less narrow interpretation" of our responsibilities?

If, as the Warren Commission suggested, the behavior patterns of individuals with regard to their government and those who lead it may indicate their propensity for violence against the leaders, how can we be aware of such individuals

without accurate, detailed information? Are we not obligated to take every measure to see to it that a tragedy of the magnitude of a presidential assassination does not reoccur?

Five years after the assassination of President Kennedy, his brother was also slain by an assassin during a political rally in Los Angeles. There was an outcry of criticism of the responsible prevention and enforcement agencies for not being aware of the threat to Senator Kennedy. These agencies should have known, said the critics, about the presence of the assassin, whose earlier behavior, measured against the standards of the Warren Commission, might have suggested the possibility of violence.

But Senator Kennedy was ~~present~~<sup>not</sup> for a political rally. In the light of recent accusations against the FBI, I think it fair to pose a question. Had the ~~assassination~~<sup>senseless</sup> not occurred, and the presence of the FBI been publicly noted, would it have been accused of surveilling a political rally? Based upon the recent reactions of some politicians and ~~political~~<sup>some</sup> commentators, I can only conclude that the Government can never be right. It's damned, it seems if it does and damned if it doesn't.

Scarcely a year ago, four students were killed during demonstrations at Kent State University. The National Guard which had been called in to restore order on the campus,

was accused of overreaction in that tragedy. That event also teaches some hard lessons about the need of government to have full and accurate information.

Although the Grand Jury which investigated the Kent State shootings failed to return any indictment, it is to be noted that their reason for refusing to return any True Bills was that the men "fired their weapons in the honest and sincere belief ... that they would suffer serious bodily injury had they not done so."

The National Guard units called to Kent State had been used in several ghetto riots in Akron, Cleveland, and Youngstown. The Guardsmen had been transferred to Kent State after being activated because of a Teamsters union strike. They had heard of the presence of violence in connection with the strike, ranging from snipers shooting at truck drivers to rocks being dropped on windshields from overpasses.

When the Guardsmen arrived in Kent, they passed through sections of the town ravaged by disorders earlier that weekend. A National Guard intelligence officer had checked the situation at the campus. He was told that there were guns at Kent State. But there was no time to confirm the reports



During the ensuing riots, these rumors stuck in the minds of Guardsmen, along with the memories of previous assignments. To compound matters, firecrackers were exploding over their heads. On Monday, May 4, Guardsmen killed four ~~students~~ *young people*.

It is my belief that the tragedy at Kent State was the result of the men not knowing initially what to expect, and then building expectation on the only information they had -- rumor.

I cannot help but wonder: What would have happened, if because of thorough information, law enforcement personnel had known from the beginning who might be a potential disrupter and who might be a potential peacemaker? What would have been the outcome at Kent State if, because of complete data, the National Guard had known what to expect, had known conclusively whether or not there were guns on campus?

Such information could have been obtained only through a responsible and efficient intelligence effort -- an effort, unfortunately, which would probably have been attacked as an infringement on academic freedom or one having a "chilling effect" on First Amendment rights of the students and faculty.

The Kent State tragedy will no doubt be a topic of analysis for many years to come, But certainly one of the most carefully studied disasters in American history was that summer of 1967, when riots burned at the heart of American cities.

The National Advisory Commission on Civil Disorders -- known as the Kerner Commission -- was established to study the causes of riots and make recommendations for their prevention. Again, the need for an effective means of ascertaining information to aid in strategic planning for prevention, was woven throughout the report.

Rumor, the Commission found, had added to tension in at least 65 per cent of the disorders it studied. And that tension was shared by ghetto residents and law enforcement personnel alike. In the case of the latter, the Kerner Commission found evidence indicating that law enforcement response was sometimes gauged on the basis of such rumor.

One of these rumors taking its ugly toll was that of sniping against police officers. In truth, in some cases, the Kerner Commission found that the guns had been fired by law enforcement personnel. The Commission's report states, on page 180, and I quote: "The climate of fear and

expectation created by such exaggerated, sometimes totally erroneous, reports, demonstrates the serious risks of over-reaction and excessive use of force."

Again, we see raised the probability of law enforcement personnel reacting as at Kent State -- on a basis of expectation and not on the basis of complete information.

The Kerner Commission suggested ways of solving this problem. The report states: "Elected officials, police and National Guard officials must take effective steps to prevent false assessments and the tragic consequences that could follow. This will require improved communications. It will require reliable intelligence about ghetto problems and incidents. It will require, equally, assurance of steadfast discipline among control personnel."

Consistent with this view, former Attorney General Ramsey Clark, in December, 1967, had established in the Department of Justice, the Interdivision Information Unit (IDIU). In my testimony of March 17, before Senator Ervin's Subcommittee on Constitutional Rights, I quoted a statement of Mr. Clark's in which he set forth the need for the IDIU. I repeat those

statements now;

"It is imperative that the Department seek to obtain the most comprehensive intelligence possible regarding organized or other purposeful stimulation of domestic dissent, civil disorders and riots. To carry out these responsibilities we must make full use of and constantly endeavor to increase and refine the intelligence available to us, both from internal and external resources, concerning organizations and individuals throughout the country who may play a role in either instigating or spreading disorders or in preventing or checking them"

In order for the Department of Justice to carry out this commission, it must, at the very least, distinguish between fact and rumor.

Rumor, which is most frequently the child of specific disorders, is problem enough. The Kerner Commission also noted that police are often handicapped by the lack of adequate and reliable information which can lead to advance planning. In answer to this, the Commission report states, on page 173, and I quote:

"An effective police intelligence unit trained

and equipped to gather, evaluate, analyze and disseminate information is needed to rectify this deficiency."

But how can information be obtained? Certainly a valuable means is through effective police-community relations programs. A more thorough understanding of ghetto conditions, as the Kerner Commission so rightly suggests, is essential for reasonable response to disturbances there.

But the Commission goes even further. Noting again that civil authorities in the summer of 1967 were forced to make their decision "in an atmosphere charged with rumor," the Commission on page 177 of its report, called for "the use of undercover police officers, reliable informants and the assignment of police personnel to provide fast, accurate, on-the-scene reports ..."

The Kerner Commission in its specific recommendations, continued this theme. The report states, on page 269:

"The absence of accurate information both before and during a disorder has created special control problems for police. Police departments must develop

means to obtain adequate intelligence for planning purposes as well as on-the-scene information for use in police operations during a disorder.

"An intelligence unit staffed with full-time personnel should be established to gather, evaluate, analyze and disseminate information on potential as well as actual civil disorders. It should provide police administrators and commanders with reliable information essential for assessment and decision-making. It should use undercover police personnel and informants, but it should draw on community leaders, agencies and organizations in the ghetto."

The Commission also recognized that the nature of the response to the police sometimes determined the future intensity of civil disorders. In situations where law enforcement agencies underreacted, the disorder often escalated, requiring a much larger response than would have been necessary if, on the basis of fact, the police could have met their tasks after thorough planning.

Only through knowing the past conduct of individuals and the groups they lead can the responsible agencies determine whether an event planned by such a group will require a few

policemen on the National Guard.

Where, then, is the fulcrum on which the constitutional rights of the dissenters and the constitutional rights of society balance?

How can the Government find the proper balance if it is told on the one hand that it must be better informed and at the same time be criticized for its legitimate intelligence gathering activities? Today's theme indicates that only law and reason can provide the proper atmosphere in which to find the true fulcrum. If such an atmosphere is to be maintained -- if the rights of all citizens in our society are to be preserved, then the Government has the obligation, not merely the right to make the sensitive decisions that the theme of Law Day demands on a sound, well-informed, and factual basis.