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Data Banks and Justice

Taking Exception

The writer is a Washington attorney who works in the fields of privacy and criminal justice.

The Post's article, "FBI Computer Bank Safeguards Detailed," which appeared on page A2 on Jan. 3, was highly misleading.

The paper issued by the FBI upon which the article was based is a blatant attempt by FBI Director Clarence Kelley to legitimize an essentially unregulated system that the Congress and the federal courts have urged the Justice Department to subject to formal controls. Kelley's assurances concerning the adequacy of current policies pertaining to National Crime Information Center (NCIC) records do not represent new initiatives but instead a retrenchment from previous commitments made by the Department of Justice.

The policies he outlined are the same policies that have been in effect since 1971; they have been proved inadequate.

In the first place, as presently operated, the system permits broad access to the criminal offender files by credit and service agencies and by employers seeking to clear job applicants. Access is not, as Kelley would have us understand, limited to criminal justice agencies. Although the more than 45,000 terminals that feed data into and retrieve information from the files are based in law enforcement agencies, there are few restraints on the distribution practices of these agencies. For example, the state of Massachusetts, in implementing a new privacy law pertaining to its criminal offender files, recently found that more than 75 agencies with no relationship to the criminal justice system had been routinely receiving such information. These included a large number of public and private employers as well as credit agencies.

The problems raised by the wideranging access permitted to the NCIC criminal offender files are compounded by the fact that there are no procedures at present for insuring that the files are either accurate or complete. Although the FBI "favors" accuracy, it does nothing to insure it. The NCIC places full responsibility for file accuracy on the states. Recent surveys have shown that up to 20 per cent of state files are inaccurate or stale. The same situation pertains in regard to completeness of records. Both the NCIC file and its state counterparts contain records of persons who have been arrested with no indication of the disposition of the arrest—that is, whether it resulted in a conviction or was even followed by formal prosecution. (A typical state recently found that in roughly 70 per cent of the cases where arrests were filed, no disposition was recorded. Subsequent checks showed that in many of the cases, the individuals were found to be innocent.) An increasing number of lawsuits has been brought by individuals who were denied employment opportunities because their names appeared in the file as a result of an arrest that did not lead to a conviction. Because the final disposition was not indicated, the employer assumed criminality.

Kelley's representations are similarly incomplete in regard to the right of an individual to review and, if necessary, correct his file. This can only be done through a state or local law enforcement agency that has an NCIC terminal. It often requires a cumbersome legal proceeding to effect the right which, as a practical matter, renders the right almost meaningless.

Finally, Kelley's assertion that only "serious" crimes are maintained in the national files is hardly reassuring. The FBI includes as serious more than 420 offenses, including such wrongdoing as non-support and non-payment of alimony. More importantly, unlike the NCIC itself, the states are allowed to retain in their files *any* criminal information they choose. This means that once an inquirer is referred by the NCIC to a state, he has access to a broad range of offenses, including many

In short, Mr. Kelley has simply dished up more of the same old stuff. Glossing it with headlines and labeling it "the first detailed explanation of the (NCIC) system" —which it isn't— is only misleading. The real news story would have been that Kelley is apparently seeking to preserve the informality, and consequent potential for abuse, of the present system while avoiding the formal regulations and legislation promised by the Justice Department months, if not years, ago.

In 1970, in an amendment to the Safe Streets Act of 1968, the Congress called upon the Justice Department to prepare legislation that would ensure protection of the constitutional rights of all persons covered or affected by criminal justice data systems. In 1973, former Attorney General Elliot Richardson assured the Senate Judiciary Committee during his confirmation hearings that he would issue appropriate regulations and legislation to control the operation of criminal data files. In late summer 1973, the Congress enacted an amendment to the Safe Streets Act requiring states receiving Law Enforcement Assistance Administration (LEAA) grants for criminal offender data systems to develop regulations to insure individual rights of privacy. And in August 1973, in response to the petition filed by Massachusetts Governor Francis Sargent and others, the Attorney General issued a press release stating: "LEAA is drafting regulations" to insure the security of criminal data files and to safeguard individual rights of privacy. He stated that "the proposed regulations will be published within a few weeks and that public hearings will be held thereafter." He also stated that a Justice Department task force was drafting "comprehensive security and privacy legislation. It is anticipated that the legislation will be submitted to Congress shortly after it reconvenes in September." Because of these pledges, most of the states waited for Justice Department leadership before developing their own regulations.

September passed and neither the regulations nor the proposed legislation issued from the department, despite repeated urgings from a number of congressmen and governors. If Kelley's recent paper on the NCIC—issued five months later— is a substitute for the long awaited laws, it is a betrayal of both the Congress and the pledges of the Justice Department.

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