

THE WHITE HOUSE
WASHINGTON

Date _____

For

The President

From John Ehrlichman

A draft memo -
The only copy -
The Atty Gen's now
thinks he should
go with a
grand jury and
asks your advice.

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Department of Justice
Washington

November 24, 1970

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Kent State

The potential for indictments with respect to members of the National Guard who participated in this incident is highly improbable, and the potential for conviction, in my opinion, impossible. With the possible exception of one officer I am unable to find that the specific intent required by 18 U.S.C. 242 can be shown unless one were to assume a position that this statute can be used in the case of "assault". In light of this fact, I believe the options are as follows;

1. Issue misdemeanor complaints based on information against all of those guardsmen who admitted to firing into the crowd on the theory that this is a simple "assault". I find relatively little merit in that kind of prosecution, also difficulty in attempting to sustain the legal theory, that the discharge of the weapons by the guardsmen at "somebody" was done with the intent to deprive "somebody" of their constitutional rights, or to "intimidate". It might well be that this is a viable theory under 18 U.S.C. 242, but I believe that this is an extremely poor case to try it out on, because again, the potential for conviction is simply not there.

2. Present all of the evidence to a federal grand jury with the full expectation that the grand jury will "no bill". This, of course, relieves us of further responsibility, but it is a waste of resources.

3. Present all of the evidence to a federal grand jury with the purpose of writing a report, such report would, I believe, be highly critical of the guard leadership. This solution holds great promise, and would in the end place the blame where the blame belongs--on the guard leadership for failure to adequately train and command the troops under them.

4. On the theory found in In Re Debs and in the recent "Sewer Service" decision in New York, commence a civil action against the State of Ohio and the State Guard to require them by injunction to reform their guard procedures for handling riotous situations on campuses. Although this would give great opportunity to present testimony in open court, which thus far has not been done, it could well result in the trial turning into a "circus".

5. The file could be closed on the ground that the cases lack prosecutive merit. This, I believe, would be disasterous.

6. Another option is to delay doing anything about the case, but I believe this would also be disasterous as eventually some decision would have to be made, and in the meantime we would continue to take "heavy flack" for not disposing in some way of this matter.

Recognizing that the major problem is the confusion in the minds of the public because of the conflicting statements and reports, I believe that the best thing we can do is to get the truth known. There are three options for getting the facts out:

1. Take the matter to a grand jury and write a report.

2. File a civil suit and parade the witnesses in open court.

3. Turn over all of the files to selected writers so that total exposure of everything we know could be had.

I believe that the best procedure from our point of view is to take the matter to a grand jury and in the manpower necessary to lay the foundation for

writing a detailed report which shows the conflicts in the evidence, and also shows clearly the potential for indictment of the guardsmen is simply not there. At the same time, constructive criticism of the guard leadership could be had as well as calling for policies for and training of guardsmen who are called upon to handle riotous situations.

I have not discussed the potential for prosecution in the burning of the ROTC building but that case, of course, is made and is there and should be disposed of by taking it to a grand jury.

JERRIS LEONARD
Assistant Attorney General
Civil Rights Division

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get me Sayles' &
Taft's ~~private~~
opinion on what we
should do.
I incline to leave
it alone -