

I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

THE UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

BLANCHARD McLEOD, ET AL.,)

Defendants.)

Filed Nov 12, 1963
CIVIL ACTION NO. 3188-63

*(The brief in Plaintiff's petition
is incorporated in Application for
TRO)*

MEMORANDUM OF PLAINTIFF IN SUPPORT OF
APPLICATION FOR TEMPORARY RESTRAINING ORDER

Officials of Dallas County, Alabama have issued subpoenas for six attorneys in the Civil Rights Division of the United States Department of Justice, including Assistant Attorney General Marshall, and for certain Negroes, some of whom reside in Dallas County. These subpoenas call for the appearance of these individuals before the County Grand Jury which is currently in session; the subpoenas directed to the federal officials, one of whom was personally served on Friday, November 8, place the appearance date at Wednesday, November 13.

The United States has filed a complaint in this court in two counts: (1) that Dallas County officials seek to use the County Grand Jury to investigate and interfere with the operations of the Civil Rights Division of the Department of Justice in contravention of the limitation on state powers in our federal system; (2)nd that these officials seek to use the Grand Jury in an effort to intimidate potential voters in violation of 42 U.S.C. 1971(b).

While the United States has filed a motion for preliminary injunction against both the summoning of attorneys of the Civil Rights Division of the Justice Department and the contemplated investigation of the Grand Jury itself, the Government's application for a temporary restraining order is directed solely against the former. In other words, the requested temporary restraining

order would prevent the enforcement or service of subpoenas directed to Civil Rights Division attorneys pending a hearing by this court on the motion for preliminary injunction. By the same token, it would not otherwise prevent the functioning of the Grand Jury itself. This memorandum is confined to the request for a temporary restraining order.

The principal business of the Dallas County Grand Jury which will meet on November 12, as stated by County Solicitor McLeod, will be an impermissible investigation by a State Grand Jury of the Civil Rights Division of the Federal Government, Department of Justice. Such an investigation would interfere with the functioning of the United States Government and would reflect an excursion beyond the boundaries of state power in our federal system. It would also exceed the powers of the Grand Jury under Alabama law.

I. THE IMPENDING GRAND JURY INVESTIGATION
IS AN OBSTRUCTION OF THE FUNCTIONING
OF THE GOVERNMENT OF THE UNITED STATES
AND IS BEYOND THE POWER OF THE STATE.

Governor Wallace's statement of October 17, which was quoted in both the Montgomery and Birmingham papers, indicated the nature and purpose of the Dallas County Grand Jury's projected investigation. Discussing his allegation that the Department of Justice had provided Rev. Martin Luther King with transportation around Alabama, he said that this "is a matter which should be called to the attention of the people of this country." Dallas County Solicitor McLeod's statement of November 7 expanded on Governor Wallace's remarks. Responding to the disclosure by the Department of Justice that Mr. King had used an automobile rented by the Department, Mr. McLeod asserted a need to publicize the activities of a part of the executive branch of the Federal Government, saying,

"We do not intend to call off our investigation just because a part of the truth has been told. We intend to let the American people know who are the leaders in fostering the activities of Martin Luther King. We intend for that to be our main business and we intend to remain in session as long as necessary to get the facts."

So that there would be no mistake about the already obvious implication that Department of Justice personnel are "the leaders in fostering the activities of Martin Luther King," Mr. McLeod declared explicitly that the principal business of the Grand Jury will be to investigate the role of the Department in the area's racial unrest.

This declaration of intent has been borne out in fact. Preparations for the Grand Jury's inquiry began with the mailing of subpoenas to six Department of Justice attorneys, all of them in the Civil Rights Division, including Assistant Attorney General Burke Marshall and his First Assistant, John Doar. One of the attorneys, Mr. McIntyre, to whom a subpoena was addressed, has been with the Department only a few weeks. Another attorney, Mr. Marlin, who has been in Selma working on voter registration matters, was personally served on November 8.

The conclusion is therefore inescapable that the State of Alabama through the Dallas County Grand Jury has undertaken an investigation of the Civil Rights Division of the Department of Justice, and has done so in a manner calculated to harass that Division's attorneys in the performance of their duties. It is reasonable to assume that any attorney from the Civil Rights Division who comes to Alabama on federal business will be served with a subpoena, and possibly subjected to the threat of state sanctions if he refuses to divulge information derived while discharging his federal responsibilities. These are the intolerable prospects of an investigation by the State of an arm of the Federal Government.

It is an extremely rare occurrence in our federal system for a State to undertake a course of action so manifestly outside its power as an investigation into the activities of the Federal Government. When this did happen, in Pennsylvania in 1936, a Federal Court, at the instance of the United States, promptly enjoined the investigation. United States v. Owlett, 15 F. Supp. 736 (M.D. Pa. 1936). The facts underlying Owlett and the reasoning which the court there adopted are pertinent to the present attempt to subject the operations of the United States to state investigation. In that case, the Pennsylvania State Senate had become concerned that the Work Progress Administration was being used in Pennsylvania as an arm of the State Executive Administration for the purpose of building up a political machine instead of the agency's stated purpose of alleviating unemployment. It accordingly established a committee to investigate the organization and administration of the WPA in Pennsylvania. The committee began its task by subpoenaing the four top officials of the WPA operation in the State. These officials refused to appear, and the United States sued to enjoin the committee from pursuing its investigation, alleging, as we allege here, that the committee's charted path would be

"contrary to and in obstruction of the proper governmental functions of that agency and of the laws of the United States of America; and that unless respondents are restrained the United States of America will suffer irreparable injury for which there is no adequate remedy at law." 15 F. Supp., at 737.

The Court found that the contemplated inquiry was "contrary to and in obstruction of the proper governmental functions of the United States"; 15 F. Supp., at 740, as the Government had urged, and added the separate finding that the committee had "no jurisdiction to investigate" the WPA. Ibid. With the

additional finding that the United States had no adequate remedy at law and would suffer irreparable damage unless the committee were restrained from proceeding further, the injunction issued.

The impending Grand Jury investigation of the Department of Justice is on all fours with Owlett. One need only substitute the Department of Justice as the federal agency referred to, the Grand Jury as the investigatory body, and Alabama as the moving state, and the Court's reasoning in Owlett could as well be the ratio decidendi of the present case:

"The attempt by the respondents, a committee appointed by the Senate of a sovereign state, to investigate a purely federal agency is an invasion of the sovereign powers of the United States of America. If the committee has the power to investigate under the resolution, it has the power to do additional acts in furtherance of the investigation; to issue subpoenas to compel the attendance of witnesses and the production of documents, and to punish by fine and imprisonment for disobedience. When this power is asserted by a state sovereignty over the federal sovereignty, it is in contravention of our dual form of government and in derogation of the powers of the federal sovereignty. The state having the power to subpoena may abuse that power by constantly and for long periods requiring federal employees and necessary records to be before an investigating committee. This power could embarrass, impede, and obstruct the administration of a federal agency." 15 F. Supp., at 742.

The Court's reasoning as to why the United States had no adequate remedy at law is equally applicable here. In the present instance, as in Owlett, approval of state power to investigate might well result in the Department's "employees ... being constantly called from their duties, ... its records ... [being] constantly kept from official use, ... [and] its employees subjected to illegal fine and imprisonment." 15 F. Supp., at 743. Here, as in Owlett,

"The suggestion that federal employees could refuse to obey the subpoenas, or seek relief by habeas corpus from imprisonment for disobedience, is no relief. Although these remedies might in a measure protect

I

the individuals, they do not in any degree protect the United States of America from an invasion of its sovereignty or from vexatious interruptions of its functions. If the United States of America were left to such remedies, it would be subjected to confusion and a multiplicity of suits. The respondents, unless restrained, are free to resort to different courts of co-ordinate jurisdiction within the commonwealth of Pennsylvania in attempts to punish federal employees for disobedience to subpoenas, or to compel attendance of witnesses and the production of documents. A court of equity will not subject the United States of America to a multiplicity of suits or compel federal officers and employees to incur the risk of fine and imprisonment to protect the United States of America from an illegal invasion of its sovereignty." Ibid.

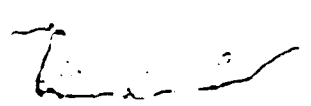
Both this case and Owlett reflect a more general doctrine, which the Court there stated at the outset:

"The complete immunity of a federal agency from state interference is well established." 15 F. Supp., at 741. It would be fruitless to discuss the many cases in which this doctrine has been applied.^{*/} It is crucial, however, to understand how fundamental is the principle which underlay the development of the doctrine. Its beginning, in fact, coincides with the beginning of American constitutional history. "The general government must cease to exist," said Justice Story for the Supreme Court in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 363 (1816),

^{*/} See, e.g., Oshorn v. Bank of United States, 22 U.S. (9 Wheat.) 735 (1824); Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1846); Van Brocklin v. Tennessee, 117 U.S. 151 (1886); Bowles v. Willingham, 321 U.S. 503 (1944); Shanks Village Committee Against Rent Increases v. Cary, 197 F. 2d 212, 217 (2 Cir. 1952); In re Turner, 119 Fed. 231 (S.D. Iowa 1902); Ex parte Shockley, 17 F. 2d 133 (N.D. Ohio 1926); Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578 (E.D. Pa. 1959), aff'd per curiam, 278 F. 2d 330 (3 Cir. 1960); Parry v. Delaney, 310 Mass. 107, 37 N.E. 2d 249 (1941); People ex rel. Brewer v. Kidd, 23 Mich. 440 (1871); Holms v. Emergency Crop & Seed Loan Office, 216 N.C. 581, 5 S.E. 2d 822 (1939); Board of Health v. Wilson, 181 S.W. 2d 999 (Tex. Civ. App. 1945).

"whenever it loses the power of protecting itself in the exercise of its constitutional powers." Brief reference to a few of the important applications of this principle, some of them cited by the Court in Owlett, will demonstrate their relevance both to that case and to the present case.

In Tennessee v. Davis, 100 U.S. 257 (1880), the Court considered and upheld the constitutionality of § 643 of the Revised Statutes (now 28 U.S.C. § 1442(a)(1)), which provided for removal to the federal courts of prosecutions and actions brought against federal officials in state courts for acts done by and under the authority of the revenue laws of the United States. In the Court's view, the reason for such a statute, as well as the very basis of its validity, was precisely the reason which underlies the need for injunctive relief here. A government can act only through its officers and agents, and our dual sovereignty makes it axiomatic that these persons must act within the States. If a State could arrest and try a Federal officer, "the operations of the general government may at any time be arrested at the will of one of its members." 100 U.S., at 263. The Court realistically recognized that a State's legislation "may be unfriendly, . . . may affix penalties to acts done . . . in obedience to . . . [the central government's] laws, . . . [and] may deny the authority conferred by those laws." Ibid. The Court's disposal of the idea that the exercise of constitutionally conferred authority can be thwarted by a State government in the following words: "We do not think such an element of weakness is to be found in the Constitution." Ibid. The State's projected utilization of its Grand Jury



in the present case amounts to exactly the kind of assertion of power which was discussed so profoundly by the Court in Tennessee v. Davis. For the preservation of our system of dual sovereignty the answer to that assertion of power must be the same as in Tennessee v. Davis -- that there is no such weakness in our Constitution.

A similar position was asserted by the Court in Tarble's Case, 80 U.S. (13 Wall.) 397 (1872). A court commissioner of the State of Wisconsin had attempted, by issuance of a writ of habeas corpus, to procure the discharge of a young man from the custody of a recruiting officer of the United States, with whom the young man had enlisted as a soldier. Justice Field phrased the question before the Court in terms of "whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus . . . for the discharge of a person held under the authority, or claim and color of the authority, of the United States. . . ." 80 U.S. (13 Wall), at 402. The Court answered the question by analyzing the interference with the affairs of the central government which would occur if the States had power to inquire into the validity of federal custody, and concluded that the existence of such a power in relation, for instance, to the raising of an army would have the effect of "greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." 80 U.S. (13 Wall.), at 408. The Court therefore held that the States have no jurisdiction in the questioned premises, and concluded its argument with the statement, equally applicable in the present circumstances, that "It is manifest

that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." 80 U.S. (13 Wall.), at 409. See also Ableman v. Booth, 62 U.S. (21 How.) 506 (1853).

Still a third relevant application of the general principle of Martin v. Hunter's Lessee is In re Neagle, 135 U.S. 1 (1890), where Justice Field's marshal, in the custody of California authorities after having killed a man who was attacking the Justice, was released on federal habeas corpus without having had to stand trial. In the course of its reasoning the Court quoted extensively from Tennessee v. Davis, supra, concluding ultimately that "if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California." 135 U.S., at 75. See also Ex parte Royall, 117 U.S. 241 (1886); Ex parte Beach, 259 Fed. 956 (S.D. Calif. 1919). Again, the principle is the same -- a State will not be allowed to frustrate the performance by federal officers of their duties. It is that principle which the Court in Owlett applied and which we urge the Court to apply today to prevent an otherwise inevitable and continuing pattern of interference with and harassment of Department of Justice attorneys who are in Alabama only for the purpose of performing their assigned duties.

In addition to the applicability here of the basic principles concerning the relationship of the central government to its member States, the principle underlying such cases as Barr v. Matteo, 360 U.S. 564 (1959), and Gregoire v. Biddle, 177 F. 2d 579 (2 Cir. 1949), cert. denied, 339 U.S. 949 (1950), is also instructive. These cases of course are the leading expressions of the official immunity doctrine, which protects federal officials from suit for acts done within the scope of their authority. The breadth of this protection is instructive as to why the threatened calling of Department of Justice attorneys here would be an undue interference in the performance of federal duties. The courts in the official immunity cases have felt that the interest in keeping all officials from the burden of a trial is so great that certain lines of inquiry must be kept completely closed. Thus, it is simply not open to a plaintiff to prove that the official, though acting within his powers, did so for personal motives or out of malice. Barr v. Matteo, *supra*, 360 U.S., at 575; Gregoire v. Biddle, *supra*, 177 F. 2d, at 581; see also Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Spalding v. Vilas, 161 U.S. 483 (1896); Yaselli v. Goff, 12 F. 2d 396 (2 Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927). Similarly, the definition of scope of authority is not limited to acts of an official which turn out to have been authorized, but extends to act which were done "in relation to matters committed by law to his control and discretion," Standard Nut Margarine Co. v. Mellon, 72 F. 2d 557, 559 (D.C. Cir.), cert. denied, 293 U.S. 605 (1934), or which had "more or less connection with the general matters committed by law to his control or supervision," Spalding v. Vilas, *supra*, 161 U.S., at

498; see also Cooper v. O'Connor, 99 F. 2d 135, 139 (D.C. Cir.), cert denied, 305 U.S. 643 (1938); Gregoire v. Biddle, supra, 177 F. 2d, at 581. This strong policy against inquiry into a federal officer's performance of his functions is applicable in all courts, federal and state. A similar concern should prevent the federal officials involved here from having to appear and testify before a State investigating body about their activities on behalf of the Federal Government.

II. THE UNITED STATES HAS NO ADEQUATE
REMEDY AT LAW AND A FEDERAL COURT
IS THE APPROPRIATE FORUM FOR THE
GRANTING OF EQUITABLE RELIEF.

The United States has no adequate remedy at law. That it will suffer irreparable injury if this Court does not issue its preliminary injunction to protect the subpoenaed attorneys from appearing before the grand jury and the hazards entailed therein is demonstrated initially by reference to the quoted discussion from Owlett, pp. 5, 6, supra, which explained why the Federal Government's remedy at law was inadequate in that case, and which, as noted at p. 5, is applicable here. Here, as in Owlett, a remission of the subpoenaed attorneys to whatever rights the State's courts would afford them will result not only in the basic interference with federal functions which is implied in the diversion of federal attorneys from their duties for an invalid purpose.

It could also result in the attempted subjection of these attorneys to state sanctions while they test, in the state courts, the power of the State to call them to testify. The fact is that Alabama has no procedure for challenging the authority of a grand jury to investigate in a particular area before it begins its projected

inquiry; the accepted manner of challenge is to assert objections in the contempt proceeding held after refusal to give the testimony demanded by the grand jury. See Ex parte Morris, 252 Ala. 551, 42 So. 2d 17 (1949); State v. Knighton, 21 Ala. App. 330, 108 So. 85 (1926). Particularly in view of Solicitor McLeod's announced intention "to remain in session as long as necessary to get the facts," it is evident that any federal employee's appearance before the grand jury, let alone one wherein he seeks to challenge the power of that body to summon him before it, will constitute a substantial interference with the proper performance of federal functions. Remedies other than the relief available in a Federal court in equity are manifestly inadequate to prevent this interference.

That a federal court should act to determine claims of federal officials as to the invalidity of state action is a conclusion in full accord with the long-established principle that in matters where the state and federal sovereignties collide it is the federal forum where the dispute should be resolved. Tarble's Case, *supra*, 80 U.S. (13 Wall.) at 407; In re Neagle, *supra*, 135 U.S., at 75. This principle -- that the Federal forum is the place for resolution of asserted state incursions upon the federal domain -- is the basis for the rule that 28 U.S.C. §2283, which prevents federal injunction of pending state-court proceedings (of which a grand-jury proceeding is certainly one), does not apply to suits for injunction brought by the United States. Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); United States

v. Wood, 295 F. 2d 772 (5th Cir. 1961), cert. denied,
369 U.S. 850 (1962).^{*/} In cases like the present one,

"The United States, as a litigant, may come into its own courts and seek relief against a proceeding to which it is not and cannot be made a party, but the judgment in which might affect acts of its executive officers and those acting under them." United States v. Western Fruit Growers, 34 F. Supp. 793, 796 (S.D. Calif. 1940), modified, 124 F. 2d 381 (9th Cir. 1941).

III. THE IMPENDING GRAND JURY INVESTIGATION IS INVALID AS A MATTER OF THE ALABAMA LAW RELATING TO THE POWERS OF GRAND JURIES.

The basic duties of a grand jury in Alabama are

"to inquire into all indictable offenses committed or triable within the county, which, as they may be advised by the court, are not barred by lapse of time, or some other cause; and to perform such other duties as are, or may be by law required of them."
30 Ala. Code § 77 (1958).

In the present case the announced purpose of the grand jury investigation is to publicize the activities of the Department of Justice of the United States Government in Alabama, an inquiry from which, by definition, no indictments relating to the substance of the investigation can possibly issue. That being the case, this investigation is only valid as a matter of Alabama law if the State permits grand juries to issue reports which merely contain criticism of public officials unaccompanied by any indictments, a practice which some states permit.^{**/}

^{*/} See also United States v. Inaba, 291 Fed. 416 (E.D. Wash. 1923); United States v. Hancock, 6 F. 2d 160 (D. Ind. 1925); modified and aff'd, 9 F. 2d 905 (7th Cir. 1925); United States v. McIntosh, 57 F. 2d 573 (E.D. Va. 1932), appeal dismissed as untimely, 70 F. 2d 507 (4th Cir. 1934); United States v. Western Fruit Growers, 34 F. Supp. 793 (S.D. Calif. 1940), modified 124 F. 2d 381 (9th Cir. 1941); United States v. Cain, 72 F. Supp. 897 (W.D. Mich. 1947).

^{**/} E.G., In the Matter of Camden County Grand Jury, 10 N.J. 23, 40-44, 89 A. 2d 416, 426-23 (1952).

However, even assuming that a State which allows such reports would permit its Grand Jury to "investigate" the Federal Government, Alabama, like the majority of states,^{*/} does not permit such reports at all. In Alabama a public official who is criticized by a Grand Jury without being indicted or impeached is entitled to have the Grand Jury report expunged from the records. Ex parte Robinson, 231 Ala. 503, 165 S. 582 (1936); Ex parte Burns, 261 Ala. 217, 73 So.2d 912 (1954). Thus, the prospective Grand Jury investigation is invalid as a matter of Alabama law. This, in turn, provides additional support for the intervention of this Court to protect the Federal Government and its officials from the burden and harassment of an invalid Grand Jury investigation -- particularly where the state, as here, affords no remedy under state law. Compare In re National Window Glass Workers, 287 Fed. 219 (N.D. Ohio 1922); McNair's Petition, 324 Pa. 48, 187 Atl. 498 (1936); 4 Wharton, Criminal Law and Procedure § 1687 (1957). See also Brown v. United States, 245 F.2d 549 (8th Cir. 1957).

IV. THE FIFTH CIRCUIT'S HOLDING IN UNITED STATES V. WOOD REQUIRES THIS COURT TO GRANT A TEMPORARY RESTRAINING ORDER IN THE PRESENT CIRCUMSTANCES.

In the United States v. Wood, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962), the Court of Appeals for this Circuit reversed the denial of a temporary restraining order in a case which, in the absence of such an order, would

^{*/} See Application of United Elec. Workers, 111 F. Supp. 858, 866-67 n. 28 (S.D.N.Y. 1953) & cases cited therein.

have been mooted by the time a full hearing on preliminary injunction could have been held. The Court's holding was that because the time element would have converted the trial court's denial of the temporary restraining order into a de facto dismissal of the action, the trial court had an obligation to preserve the status quo until a full hearing, either on the preliminary or permanent injunction, could be held, 295 F.2d, at 785.

The present situation involves the same kind of pressing time problem. Subpoenas have been issued calling for the appearance of six attorneys in the Civil Rights Division before the Dallas County Grand Jury on Wednesday, November 13. Unless this Court issues a temporary restraining order, the case will be mooted in that Attorney Marlin, who has been personally served, will be subject to sanctions if he does not appear. The other attorneys will be subject to similar sanctions if they are required by their official duties to go to Alabama. To prevent the important rights of the United States which are set forth in this memorandum from going unadjudicated, it is the Court's plain obligation under Wood to issue the temporary restraining order.

V. CONCLUSION

Invalid both as a matter of federal law and as a matter of state law, the impending Dallas County Grand Jury investigation of the Department of Justice has no basis for proceeding. Its announced purpose is to enter into an area which is forbidden to it by both federal and state law. The preliminary steps taken in preparing for it indicate that it will be con-

ducted in a manner calculated to interfere with attorneys of the Civil Rights Division who come to Alabama on the Government's legal business. In light of these facts and their legal consequences, this Court should issue the temporary restraining order sought by the United States.

Respectfully submitted

JOHN W. DOUGLAS
Assistant Attorney General

VERNOL R. JANSEN
United States Attorney

PETER B. EDELMAN
Attorney, Department of Justice

Attorneys for Plaintiff