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No. 21,475

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

BLANCHARD McLEOD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

BRIEF FOR APPELLANT

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CONSTITUTION AND STATUTES

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STATEMENT OF THE CASE

I

Pleadings and Procedure

On November 12, 1963, the United States filed the complaint, motion for a preliminary injunction, and application for a temporary restraining

order in the District Court for the Southern District of Alabama against Blanchard McLeod, Circuit Solicitor for the Fourth Judicial Circuit, State of Alabama; Henry Reese, County Solicitor for Dallas County, State of Alabama; James G. Clark, Jr., Sheriff of Dallas County, State of Alabama; James Hare, Judge for the Fourth Judicial Circuit, State of Alabama; M. H. Houston, Clerk of the Circuit Court of Appeals of Dallas County; Robert Wilkinson, Jr., Foreman of the Grand Jury of the Circuit Court of Dallas County, State of Alabama, Fall Term 1963; Dallas County Citizens' Council; Leon Jones, Chairman, Dallas County Citizens' Council; Robert Rentz, Vice Chairman, West Dallas, Dallas County Citizens' Council; G. R. Beers, Vice Chairman, South Dallas, Dallas County Citizens' Council; Archie G. Waugh, Vice Chairman, North Dallas, Dallas County Citizens' Council; Comer Sims, Vice Chairman, Selma, Dallas County Citizens' Council; Bill Arrington, Secretary, Dallas County Citizens' Council; William K. Hicks, Treasurer, Dallas County Citizens' Council. 1/

1/ At the hearing on December 5, 1963, the district court granted a severance, sought by the Attorney General of Alabama, between that part of the case involving defendants McLeod, Reese, Clark, Hare, Houston,

(Continued on following page)

The complaint alleged, inter alia, that the defendant officials of Dallas County sought to use the county grand jury to investigate and interfere with the operations of the Civil Rights Division of the Department of Justice, that the proposed investigation obstructed the government of the United States in the enforcement of its laws, and that it would harass agents of the United States in the performance of their duties. It was also alleged that the defendant officials sought to use the grand jury in an effort to intimidate potential Negro voters in violation of 42 U.S.C. 1971(b). The complaint further charged that defendants Clark and McLeod had violated section 1971(b) by other acts of intimidation against potential Negro voters. The relief sought was an injunction restraining the defendants McLeod, Clark, Houston, Hare, and Wilkinson from (1) commanding the attendance before the grand jury of six attorneys in the Civil Rights Division of the Department of Justice, including the Assistant Attorney General, Burke Marshall, who had been subpoenaed to appear before the grand jury

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1/ (Continued from preceding page)

and Wilkinson and that part of the case involving the Dallas County Citizens' Council and its officers Jones, Rentz, Beers, Waugh, Sims, Arrington and Hicks (R.112). The Citizens's Council case has not yet been set for a hearing.

on November 13, 1963; and (2) intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce any person for the purpose of interfering with the right of that person or any other person to become a registered voter and to vote in Dallas County for candidates for federal office (R. 24-26). The application for a temporary restraining order sought specifically to restrain the summoning of attorneys of the Civil Rights Division of the Department of Justice (R. 43).

The district court denied the application for a temporary restraining order that same day (R. 63), and it also denied a motion to shorten the time for hearing the plaintiff's motion for a preliminary injunction, setting the hearing for December 5, 1963 (R. 63-64). An immediate appeal was taken to this Court. On November 13, 1963, this Court ordered the district court to enter an order restraining the appellee officials of Dallas County from serving or enforcing or attempting to enforce the subpoenas bearing the return date of November 13, 1963, or from arresting or holding in custody, or attempting to arrest or hold in custody any of the named attorneys

of the Department of Justice as a result of any action by or under the authority of any of the appellees or as a result of any failure on the part of any said attorneys to appear before the grand jury of Dallas County. This restraining order was to remain in effect until the disposition of the motion for a temporary injunction set for hearing on December 5, 1963 (R. 65-66). On November 14, 1963, the district court entered the order as directed (R. 67-68).

On December 5, 6, 16, and 18, 1963, hearings were held on appellant's motion for a preliminary injunction (R. 77-648). On March 19, 1964, the district court denied the motion and dissolved the temporary restraining order then still in effect (R. 665-666). Appellant's motion for an injunction pending appeal was filed in the district court on March 25, 1964, (R. 667-669), and denied on March 30, 1964 (R. 683).[2/]

2/ Although in this case the date upon which the six subpoenas were returnable has passed, the possibility that additional subpoenas may be issued for future appearances is a very real one. After the district court had denied appellant's motion for a preliminary injunction, a new subpoena was personally served upon

(Continued on following page)

II

The Evidence

A. The Grand Jury Action

1. The summoning of the Civil Rights Division Attorneys

In 1963, Selma (Dallas County) Alabama was the scene of a stepped-up effort by Negroes to assert their rights. With the assistance of workers from the Student Nonviolent Coordinating Committee, the Dallas County Voters League, an organization dedicated to encouraging Negro voter registration, held mass meetings for that purpose.[3] Speakers from outside the

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2/ (Continued from preceding page)

Attorney Kenneth McIntyre, returnable April 13, 1964. This subpoena subsequently was withdrawn (R. 672-673), but unless enjoined appellees will presumably not refrain from serving other subpoenas on Civil Rights Division attorneys in the future. At the hearing in the court below on the appellant's motion for an injunction pending appeal, which the district court denied, counsel for appellees stated that the district court had found that the grand jury had "an unlimited right to investigate" (R. 677).

3/ For more extensive development of the background of events in this case, see the brief for the appellant in United States v. Dallas County, et al., No. 21477, a companion case to this one.

county, including the Reverend Martin Luther King, addressed some of the meetings. King's speech on October 15, 1963, was attended by statewide publicity that he had been driven to Selma, Alabama, in a car rented by an attorney of the Department of Justice. The Department initially denied this claim on the basis of misinformation it had received from the attorney involved (Plaintiff's Exhibit 10, p. 4/ 4; P. Ex. 15, p. 5; P. Ex. 27, pp. 5-6). The fact was that the attorney, Thelton Henderson, had, without authority, loaned his rented car to an associate of King, who then drove King from Birmingham to Selma in that car. On the night of November 5, 1963, the Department learned that Henderson in fact had loaned his rented car to an associate of King. The fact was made public by the Department on the following day. On that day, Henderson submitted his resignation and it was accepted (R. 47). This use of the car at government expense was unauthorized, and the United States has been reimbursed for the expense by the attorney involved.

4/ Hereafter referred to as "P. Ex. 10," etc.

On October 17, 1963, Governor George C. Wallace of Alabama made a public statement in which he charged that King had "been travelling throughout the state [of Alabama] in vehicles rented by the Justice Department," and stated that this was "a matter which should be called to the attention of the people of this country" (Affidavit of Burke Marshall, R. 45-46; and attached reproduction of article in Montgomery Advertiser, dated October 17, 1963, R. 57). Governor Wallace further stated in a letter dated October 23, 1963, to Ben Hardeman, United States Attorney for the Middle District of Alabama, that "a number of state investigators, as well as county law officials of Dallas County, Alabama, have publicly disclosed information indicating that Martin Luther King was furnished transportation on October 14, 1963, by officials of the United States Justice Department," and that, "[i]f the charges are true, the American people are entitled to know the facts and appropriate action against the Justice Department officials responsible should be taken." The letter stated that the matter would be presented to a Montgomery County grand jury on or about November 4, and requested that Mr. Hardeman "present this matter to the Federal Grand Jury" then subject to call. Plaintiff's Exhibit 12.

On October 28, 1963, William F. Thetford, the then Solicitor of the Fifteenth Judicial Circuit of Alabama, wrote a letter to Mr. Hardeman, which recited the Governor's charges and went on to state:

> "While there is no violation of State law involved, I am submitting such evidence as may be available to our November Grand Jury as a matter of public interest."

He invited the Department of Justice to provide witnesses for the grand jury proceedings (P. Ex. 13). By letter dated November 4, 1963, Assistant Attorney General Burke Marshall, acting for the Department of Justice, declined the invitation on the ground that there was "no point in furnishing witnesses to testify at a secret proceeding on a matter admittedly beyond the scope of the grand jury's legitimate inquiry" (Affidavit of Burke Marshall (R. 46), with letter from Marshall to Thetford attached (R. 59-60).

On November 4, 1963, the Circuit Court of Dallas County, Alabama issued subpoenas commanding the appearance before the Dallas County Grand Jury on November 13, 1963, of Mr. Marshall; John Doar (Mr. Marshall's principal assistant and the operating head of the Civil Rights Division's trial staff for

voting rights cases); Richard Wasserstrom; David H. Marlin; Arvid A. Sather; and Kenneth McIntyre (qualified attorneys at law in the Civil Rights Division's trial staff for voting rights cases); and Thelton Henderson (until November 6, 1963, a qualified attorney at law on the said trial staff). Copies of these subpoenas were mailed to the Department of Justice and received on November 6, 1963 (R. 45). On November 8, 1963, David H. Marlin was personally handed a copy of a subpoena commanding his appearance before the Dallas County Grand Jury on November 13, 1963, by a deputy Sheriff of Dallas County (Affidavit of Burke Marshall, R. 46).

On November 7, 1963, Blanchard McLeod, Solicitor of the Fourth Judicial Circuit of Alabama, made a public statement in which he announced the aforesaid issuance of the subpoenas on behalf of the Dallas County Grand Jury (Affidavit of Burke Marshall, R. 46), with attached reproduction of an article from the Selma, Alabama, Times Journal of November 7, 1963 (R. 60-62). He stated that the principal business of the grand jury when it met on November 12 would be to

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5/ Affidavit of Burke Marshall (R. 45); P. Ex. 16.

investigate the role of the Department of Justice in the racial unrest in the area. His statement made it clear that the investigation stemmed from charges that the Department of Justice had furnished transportation to the Reverend Martin Luther King. He declared "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" (R. 60-62; R. 395-396).

On November 11, 1963, Burke Marshall sent a telegram to appellee McLeod, notifying him that on the morning of November 12, the United States would file the complaint in this case and seek a temporary restraining order (P. Ex. 20; R. 356-357, 463). This telegram was shown by McLeod to Sheriff Clark, Judge Hare, and County Solicitor Reese (P. Ex. 21, 22; R. 358, 463). After reading the telegram, Judge Hare stated that "people don't meddle with the Grand Jury" (R. 464). He also apparently stated that he already had his charge prepared and that he was going to read his charge and the telegram to the Grand Jury. [6/]

6/ When Judge Hare was on the stand, he testified as follows (R. 463-464):

(Continued on following page)

On November 12, 1963, Judge Hare charged the Grand Jury (P. Ex. 27). In the course of that charge, he referred to the allegation by Sheriff Clark and Governor Wallace that a car rented by the Department of Justice had been used to transport Reverend King from Birmingham to Selma; the initial denial of that allegation by Burke Marshall on October 18, 1963; and a public statement issued by the Department on November 6, 1963, acknowledging that a Department attorney had admitted that he had loaned his rented car to an associate of King who then drove King in that car from Birmingham to Selma. Judge Hare then charged the Grand Jury that (P. Ex. 27, p. 6):

6/ (Continued from preceding page.)

> Q. I would like to ask whether or not, after you read the telegram, you stated that you already had your charge prepared and that you were going to read your charge and the telegram to the Grand Jury?
>
> A. Well, I am at liberty to charge a Grand Jury at any time.

Now Gentlemen, this is an important matter and it is an important investigation. It is shoddy because it highlights men high in the circles of our Federal Government maliciously lying. It is corrosive because it goes to the integrity of our structure of government. If they have attempted to cover up, to conceal the truth, to evade the facts in the matter of a 100-mile trip in a Government automobile, to what extent have they gone in weighter and more costly matters? It is disturbing because it affects the faith of all of us in our government.

Judge Hare further charged the Grand Jury that "as to this particular item of investigation, if you can get the facts it will be an interesting determination for you to make as to whether Thelton Henderson was fired from the Department of Justice because he lied, or whether he was fired because he told the truth. You should be able to elicit sufficient facts to make that determination." Ibid, p. 6.

On November 14, 1963, having been served with a copy of the temporary restraining order issued by Judge Thomas at the direction of this Court, Judge Hare charged the Grand Jury again. This time he did not make reference to the previously expressed concern that the structure of the federal government was being corroded by official prevarication, but stated that the truth of the King incident should "be established in testimony, not only to determine the truth of the matter, but as a matter of protection of your own official" (Sheriff Clark) (P. Ex. 28, p. 4). Judge Hare further instructed the Grand Jury that (Ibid.):

> . . . You may investigate the conduct of representatives of the Department of Justice in Selma to determine whether they have consorted with and harbored known criminals here in Selma, whether they have participated in decoying or enticing children from school to march

> in defiance of law, to investigate any possible conduct on their part that might contribute to the delinquency of children.

This new theme was echoed the following day in a telegram sent by appellee McLeod to Burke Marshall (P. Ex. 14). Mr. Marshall had sent a telegram on November 14, 1963, to Judge Hare, proposing a method of giving informally, in Washington, D.C., the facts concerning the unauthorized use by Reverend King of the car rented by Henderson to a representative of the grand jury (see P. Ex. 15). McLeod responded with a telegram stating that it had "never been the purpose of the grand jury in Dallas County to inquire into the conduct of agents of the federal government" but that (P. Ex. 14):

> The Department of Justice has specifically charged that the sheriff of Dallas County has made no effort to ascertain the truth and that he has made false reports. A charge against the integrity of a county officer of Dallas County is specifically within the limits of investigation of the grand jury. A retraction of charges against the sheriff was made only after it was known to your Department that a grand jury would investigate this matter.

McLeon's telegram further declared that the grand jury was "interested in inquiring into the conduct of agents of the Department of Justice" while they were in Dallas County. The telegram went on to assert that

McLeod would direct the grand jury to inquire whether attorneys of the Civil Rights Division of the Department (1) "consorted with, concealed and harbored known criminals and dope addicts;" (2) "consorted and associated with admitted sex perverts;" (3)"had any part in enticing children away from school during school hours to participate in street demonstrations in defiance of law;" (4) "acted in any manner contributing to the delinquency of minors," or (5) "participated in any manner in fomenting riots, insurrection, and civil disobedience."[7/]

On November 18, 1963, appellee Wilkinson, foreman of the grand jury, sent a telegram to Attorney General Kennedy which also echoed the new theme. In this telegram, Wilkinson stated that the Attorney General had publicly offered to make available to the Dallas County grand jury in Washington, D.C., testimony of Civil Rights Division attorneys "with regard to their activities in Selma" and, more particularly, with

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7/ Plaintiff's Exhibit 14. On the stand McLeod told Mr. Doar that the subpoenas for the attorneys were prepared because "we wanted to go into the misconduct and violations of the state laws in the State of Alabama by you and other members of your force" (R. 324).

respect to the five questions recited in the McLeod telegram (P. Ex. 9). On November 20, 1963, Mr. Marshall sent a telegram to McLeod, with a copy to Wilkinson, noting that Wilkinson had misstated Mr. Marshall's offer; asking what factual basis existed for the grave charges leveled against Civil Rights Division employees, and observing that "it is hard to believe that these charges are seriously intended since no names, dates, or other identifying data are given" (P. Ex. 10, 15). The telegram, however, repeated the offer to make available in the District of Columbia for questioning by the grand jury's representative before a notary public all employees of the Civil Rights Division who had knowledge of the King incident. On November 22, 1963, appellee Wilkinson sent a telegram to Mr. Marshall (P. Ex. 8) refusing Mr. Marshall's request for a substantiation of the charges against the Civil Rights Division attorneys.[8/]

Burke Marshall stated in his affidavit, attached to the application for a temporary restraining order filed in the court below on November 12, 1963,

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8/ Wilkinson's telegram announced that the grand jury would meet on the morning of November 25, 1963, in a room in the New Senate Office Building, and that the presence of all Justice Department personnel who had knowledge of the facts of the King incident was expected. Subsequently, the room was rendered unavailable through the intervention of Senator Pastore (P. Ex. 7).

that at all times relevant to the acts alleged in the complaint, Burke Marshall, John Doar, Richard Wasserstrom, David H. Marlin, Arvid A. Sather, Kenneth McIntyre (prior to November 6, 1963) Thelton Henderson, were in the State of Alabama on various occasions pursuant to official instructions issued by the Attorney General, the Deputy Attorney General, or Assistant Attorney General Marshall. Each individual was in Alabama solely in the performance of his official duties as an employee of the Department of Justice for the purpose of investigating and preparing for and participating in conferences upon and litigation with respect to matters within the cognizance of the Civil Rights Division of the Department of Justice (R. 48).

At the hearing on the motion for a preliminary injunction, attorneys Sather, Marlin, Wasserstrom, and McIntyre testified. Each stated that his official duties had brought him to Dallas County, among several other Alabama counties (R. 132, 197, 235, 237, 250, 251), and that he had been in Dallas County on several occasions on official assignments in connection with the preparation or conduct of cases involving alleged discrimination against Negro applicants for registration or

alleged intimidation of potential Negro applicants for registration (R. 132-140, 198-201, 236-238, 251). These assignments included interviewing potential witnesses (R. 133-134, 200, 236-238); preparing affidavits (R. 198); assembling exhibits (R. 236), and observing voter registration lines at the county courthouse (R. 200, 239, 251). Many of these assignments were in connection with the preparation and conduct of a suit against appellees McLeod and Clark charging them with intimidation of Negroes with the purpose of interfering with their right to vote (R. 134-136, 198, 236-237)[9/], and all of them were related to the preparation and conduct of cases under 42 U.S.C. 1971 (with the exception of one assignment of Marlin's which was to interview a Negro who had complained to the FBI that he had been beaten up by Sheriff Clark) (R. 201).

2. The Summoning of Negro Voter Registration Workers

The evidence adduced further showed that not only were Department of Justice attorneys concerned

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9/ The case--United States v. Dallas County, et al., No. 21,477 in this Court--involved harassment of Negro voter registration mass meetings and the arrest and prosecution of three Negro voter registration workers. The entire record in that case is reproduced in the record in the present case as Plaintiff's Exhibit 1.

with voting discrimination matters subpoenaed but also Negroes prominent in voter registration activity in Dallas County. Indeed, these Negroes were required to attend the same day as the Justice officials--November 13, 1963.

One of those so subpoenaed (R. 176-177), was Albert Turner, President of the Perry County Civic League, an organization engaged in encouraging Negroes to register to vote (R. 176, 191). Turner had been in Dallas County "the latter part of August until the 1st of September" at which time he was the guest speaker for a mass meeting at the Tabernacle Church, a Negro church (R. 177-178), and there spoke on "the necessity for Negroes to vote and the importance of Negroes receiving an education," giving "some historical background of some Negro lives ...some of the great Negroes" (R. 182).[10/]

10/ Turner stated that after waiting to be called all day November 13 (from 9:00 A.M. until 5:30 P.M.) with Edward Turner, another Negro from Perry County active in voter registration there, he asked McLeod if he could be excused from appearing on November 14, as "it was very important" that he be back at work that day. Turner said McLeod told him that if he were excused he could not be paid for coming on November 13. Turner said this was alright with him if he did not have to return and McLeod excused him (R. 180).

Joseph E. Boone had addressed a meeting of the Dallas County Voters League at a church in Dallas County on November 4, 1963, on the subject of voter registration (R. 284). He was served with a grand jury subpoena as he was leaving the meeting at the church (R. 285).[11/]

Among those from Dallas County subpoenaed to appear were Edwin L. Moss, a member of the Dallas County Voters League (R. 276-277); Mrs. Amelia P. Boynton, an officer of the Dallas County Voters League (R. 290-291), who was a witness for the government in United States v. Atkins, a suit by the government against the Dallas County Board of Registrars alleging discrimination against Negro applicants for registration and in United States v. Dallas County, No. 21,477 (R. 290), and who has long been engaged in encouraging Negroes to register to vote in Dallas County and has helped organize and sponsor Negro mass meetings for that

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11/ Reverend Boone testified that prior to November 4, 1963, he had been in Selma only once during the year for an overnight stay to visit a sick friend (R. 281); that on that occasion he had meet a Mrs. Boynton, who had invited him to return and address the Dallas County Voters League and that he had come from Atlanta by plane and addressed the Dallas County Voters League that night (R. 282).

purpose (R. 292); Reverend William Thomas Menefee, an officer in the Dallas County Improvement Association (R. 444-446); Reverend Louis L. Anderson, a member of the Dallas County Improvement Association, who more than once had been featured speaker at the Negro mass meetings in connection with voter registration, at which he encouraged Negroes to register and to vote (R. 453-454);[12/] Worth W. Long, director of the Alabama voter registration project of the Student Nonviolent Coordinating Committee (R. 597), whose activities since coming to Selma on September 16, 1963, consisted of helping to organize voter registration clinics and directing the voter registration campaign, and who testified that since September 25, 1963, the entire effort of the Student Nonviolent Coordinating Committee had been on voter registration in Dallas County (R. 605);

12/ Reverend Anderson also testified that he had been arrested during the summer or fall of 1963 and charged with contributing to the delinquency of minors, but he had not been tried on that charge nor had he been informed on what the basis of the charge was (R. 452). He stated that he did not have anything to do with the children parading, sitting-in, or demonstrating in Selma, although the children had met at his church several times (R. 453, 457, 458).

and Avery Williams, Wilson Brown, Bennie Tucker, Claude Porter, and James Austin, all members of the Student Nonviolent Coordinating Committee (R. 602-604). Also subpoened to appear before the grand jury was Father Maurice F. Oullett, a white Catholic priest in Selma who had attended and spoken at mass meetings sponsored by the Dallas County Voters League and who on various occasions had spoken in his office on a personal basis with workers of the Student Nonviolent Coordinating Committee (R. 418).

B. Other intimidatory actions and evidence of a purpose to interfere with voter registration

There was also evidence of other related actions by Dallas County officials which were designed to intimidate those engaged in Negro registration efforts with a purpose to interfere with those efforts.

1. The record in the companion case to the present case, United States v. Dallas County, No. 21,477, (which was introduced as Exhibit 1 in the present case) showed that Sheriff Clark and Blanchard McLeod were involved in the arrest and trial of three Negro registration workers; that Sheriff Clark stationed deputies inside mass voter registration meetings, took notes and broadcast a running account of what was said therein (with the knowledge and apparent concurrence of Blanchard McLeod), and recorded license numbers of the automobiles of those who attended the meetings.

2. Sheriff Clark and his deputies engaged in unusual harassment of applicants for registration on October 7, 1963 -- the date on which a substantial number of Negroes applied for registration.

Mrs. Amelia P. Boynton was at the Dallas County courthouse on October 7, 1963, and spoke to

Sheriff Clark sometime between 12 noon and 2:00 p.m. (R. 292-294):

> After the people had been in line from morning until that time in the afternoon, I walked across to ask Sheriff Clark could we give them some sandwiches, as we had gotten quite a lot of sandwiches for them, and . . . [h]e told me, No, I could not give them anything and I could not talk to them or speak to them, because, if I did, I would be arrested . . .

Earlier that morning the Sheriff had threatened her with arrest because she was going to return the greetings to her from those standing in the line (R. 294).[13/]

Jean Ethel Pritchett, a 24-year-old Negro resident of Selma, testified concerning attempts to register to vote on October 7, 1963. She stated that although the line was very long and although the line lasted all day from 9:00 A.M. until 5:30 P.M., the Sheriff did not allow anyone to leave the line to eat or drink or go to the bathroom without losing his place (R. 223). Indeed, when because she was wearing high heels she became uncomfortable standing in the

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13/ Appellant offered to put in evidence a motion picture film of the events of October 7, 1963, but Judge Thomas refused, even after he was told that this Court had viewed moving pictures sitting en banc (R. 539-540).

long line, and left the line at 9:30 to call her husband to bring a more comfortable pair of shoes (R. 221-222), the Sheriff did not permit her to re-enter the line (R. 222). Mrs. Pritchett waited but did not reach the registration office that day. She returned for another try[14/] on the third Monday in November, at which time she eventually did get to the registration office (R. 225).

Mrs. Pritchett's testimony was corroborated by Evelyn Ruth Ethridge, a 25-year-old Negro resident of Selma (R. 226). Miss Ethridge also went to the courthouse on October 7, 1963, at 9:00 A.M. and stood in line all that day without being permitted to apply (R. 227-228). She heard the Sheriff announce that if anyone got out of line for any reason he would be sent to the end of the line (R. 228). Thus, she saw the Sheriff send Mrs. Pritchett to the end of the line (R. 228). She also saw one of the Sheriff's deputies send an old Negro man to the end of the line after the old man had left the line to rest because he could not do

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14/ Mrs. Pritchett had tried twice previously before October 7 (R. 224).

much standing, being afflicted with arthritis (R. 229). Miss Ethridge herself had nothing to eat or drink while standing in line all day (R. 229).

3. Appellee McLeod in consultation with Sheriff Clark decided on the arrest of pickets carrying voter registration signs on September 25, 1963, and October 7, 1963 (R. 365-366).[14A/] The pickets were arrested for inciting riots and charged with unlawful assembly (R. 366) because McLeod "saw people coming in on them." The people closing in on the pickets were not arrested because "they obeyed our orders . . . to get back and mind the officers" (R. 367-368). When asked what the pickets were doing to incite a riot, McLeod replied (R. 369):

> They were marching around with those signs. Now, these people not even eligible to register to vote were doing those things. These were people not even eligible under the laws of the State of Alabama to register to vote that were doing those things.

Sheriff Clark testified that he arrested pickets carrying voter registration signs on September 25

14A/ The following are examples of the messages carried on the signs: "Register to Vote;" "Register to Vote Now;" "Register Now for Freedom Now;" "Register to Vote - The American Way;" "Voteless People are Helpless People;" "The Ballot is What We Want - Register to Vote;" "The Ballot Talks - Register to Vote;" "We Want the Ballot - Register to Vote;" "We Want the Ballot and We Want it Now" (Plaintiff's Exhibits 34-38).

and 27, 1963, and October 1 and 7, 1963 (R. 616). He considered them to be "walking and inciting a riot, agitating" solely because they were carrying signs urging voter registration (R. 617).[15/]

4. The Reverend Thomas L. Brown, campus traveler for SNCC and project cordinator in Selma, testified he was arrested October 1, 1963, and charged with unlawful assembly because he carried two voter registration pickets to the federal building in his car (R. 571).

5. Appellee McLeod admitted on the stand that when Sheriff Clark first deputized his posse in March of 1960, McLeod addressed the posse and said to them "we must meet force with force, the day of passive resistance has passed" (R. 331-332). McLeod also told the posse that although he had been able to guarantee justice in Dallas County prior to 1954, he had not been able to do so after that time (R. 332). Father Oullett testified that McLeod told him, in response to the priest's objection to the arrest of pickets carrying voter registration signs, "that if Negroes were allowed

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15/ The sheriff also said he arrested SNCC worker Benny Tucker because he entered the white restroom in the courthouse "on provocation" -- i.e., in the presence of the sheriff and a lady (R. 614-615).

to take an inch, they would take a mile, and that the next thing they would want would be to go to school with whites, and that he would see to it that every school in the county was closed before that was allowed, and further, they would want to intermarriage, and he asked did I approve of intermarriage" (R. 419). This admonition was given the third week in September, and, at another conference to which he was called one Monday night by Judge Bernard A. Reynolds of the juvenile court in Selma, where, again in the presence of McLeod, Father Oullett was asked if he did not think it were wise that he leave town, that people were upset because he had attended the voter registration meetings (R. 422).[16/]

6. Appellee Judge Hare testified that following the demonstrations and the picketing that had taken place in September and early October, he had stated publicly

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16/ The district court would not permit further inquiry into the conversation because Father Oullett testified that he replied "no" to the suggestion that he leave town (R. 424).

"that the Kennedy Administration started the Selma racial trouble" (R. 464). Judge Hare stated that "we had information that the Department of Justice has sent a bunch of operators on down here to blueprint Selma for the knockoff" and that the source of this information was "largely telephone calls from the members of the Negro population here" (R. 464-465). Judge Hare also testified that "we started preparing . . . for that eventuality . . . before May, the first meeting here" (R. 465). He said that he would "listen to every word" that was broadcast by the Sheriff's deputies from the Negro mass meetings and he also reviewed the notes taken by the deputies (R. 477). Father Oullett testified that at a meeting called by Judge Hare, with the Negro leaders and Father Oullett, Judge Hare had become angry when the priest told him that the police at the mass meetings frightened the Negroes (R. 442).

Mrs. Boynton testified that at this same meeting Judge Hare told the Negroes to stop the demonstrations and threatened to let "hoodlums" take over if the demonstrations were not stopped (R. 294). Both Judge Hare and Mrs. Boynton testified that the Judge threatened to issue an injunction if the demonstrations were not stopped (R. 476, 306).

7. Under the supervision of appellee McLeod, Dallas County voter registration records were subpoenaed and impounded allegedly for the grand jury in 1958 after the United States Commission on Civil Rights had issued subpoenas for them in connection with its investigation into allegations of racial discrimination in the registration process.[17/]

8. In 1961, after a decision had been reached in the case of United States v. Atkins, for the inspection and copying of Dallas County voter registration records, McLeod declined to produce any records related to transactions prior to December 15, 1958. McLeod represented at that time that although no action had been taken by the grand jury and no subsequent grand jury had directed the issuance of any subpoena for voter registration records, the custody of the records under subpoena since 1958 had been "passed on" to each successive grand jury, and that when the grand jury was not in session he had the responsibility for maintaining custody and control of the records (P. Ex. 18, R. 340-343). On the day of this conversation, all of the registration records,

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17/ Hearings before the United States Commission on Civil Rights, on voting, December 8, 1958, December 9, 1958, and January 9, 1959, pp. 178, 189; Plaintiff's Exhibit 17; R. 326.

both prior and subsequent to December, 1959, were in the office of the Board of Registrars in five filing cabinets (R. 344). The grand jury reports for the period in question do not mention the records (P. Ex. 23), and McLeod could not recall any instance in which the grand jury had returned an indictment for violation of Alabama laws relating to voter registration (R. 372-373).[18]

III

Opinion of the District Court

In denying the preliminary injunction sought by the appellant, the district court filed an opinion (R. 656-663). The opinion did not deal "with the alleged abuse and misuse of the power of their office by various Dallas County officials contrary to the provisions of 42 U.S.C. 1971", referring its disposition of that aspect of the case to its opinion in United States v. Dallas County, No. 21,477 (R. 659). On the "Dallas County Grand Jury phase of the case", the court noted that the testimony of the four Civil Rights Division attorneys "indicated that their only activity in the

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18/ In the early part of 1962, the district court in the Atkins case held that those records were not in the custody of the grand jury and ordered them turned over to the Department of Justice (R. 345).

state concerned the carrying out of their official duties as Justice Department attorneys" (R. 659, 660). It also observed that one of the attorneys "testified on cross examination that he believed that his appearance before the Dallas County Grand Jury would have the effect of intimidating or coercing Negroes into not attempting to become registered voters" (R. 660). But the court concluded that in order to justify an interference with the processes of the grand jury, there must be clear proof that the inquiry was not instituted in good faith or that the object was to use the subpoenas for ulterior purposes (R. 662). The court held that "there has been a complete absence of any showing that the grand jury was not acting in good faith when it issued the subpoenas to the attorneys of the Justice Department. There has been no showing that the object was to use the subpoenas for ulterior purposes, rather than to conduct a lawful inquisition" (R. 662).[19/]

19/ Although Judge Thomas stated that his docket attested to the fact that attorneys of the Civil Rights Division are "very busy men", he did not think this was justification for clothing them "with immunity from having to submit to the investigative powers of a duly convened lawful grand jury" (R. 661).

SPECIFICATION OF ERRORS

1. The district court erred in refusing to enjoin the Dallas County officials from subpoenaing Civil Rights Division attorneys to appear before the county grand jury.

2. The district court erred in refusing to enjoin the intimidatory actions of the Dallas County officials which interfered with the efforts of Negroes to register to vote and to vote.

STATUTORY PROVISIONS INVOLVED

Article VI of the Constitution of the United States provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. 1971(b) provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other persons to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector,

> Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

42 U.S.C. 1971(c) provides:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

ARGUMENT

I

The district court erred in not granting an injunction to restrain the Dallas County officials from subpoenaing the Civil Rights Division Attorneys to appear before the County Grand Jury

The subpoena of the Department of Justice attorneys violated federal law in two respects: (1) it interfered with a federal function and thus violated the Supremacy Clause of the United States Constitution (Article VI); (2) it was part of a larger scheme to harass and intimidate Negro citizens of Dallas County, Alabama, in their efforts to become registered voters, and it thus violated 42 U.S.C. 1971(b). On both grounds the district court should have enjoined the effort to require the attendances of these federal officials before the grand jury. Additionally, the evidence concerning harassment and intimidation compelled the issuance of a broader injunction against violations of Section 1971(b) (see Point II, infra).

A. Federal agencies and federal officials are not subject to investigation by a State agency whose purpose is to determine whether the federal agency is violating federal law or is exceeding or abusing its federal authority. Any attempt to do so violates the Supremacy Clause of the Constitution (Art. VI).

In the celebrated case of United States v. Owlett, 15 F. Supp. 736 (M.D. Pa., 1936), the Pennsylvania State Senate had become concerned that the Works 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. The state senate 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. The court found that the contemplated inquiry was "contrary to and an obstruction of the proper governmental function of the United States" (15 F. Supp. at 740), and concluded that the committee had "no jurisdiction to investigate" the WPA (Ibid). The court said (15 F. Supp. at 742):

> 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 state soveregnty over the federal sovereignty, it is in contravention of our dual form of government and in derogation of the powers of the federal soveregnty. The state having the power of subpoena may abuse that power by constantly and for long periods requiring federal employees and necessary federal records to be before an investigating committee. This power could embarass, impede, and obstruct the administration of a federal agency.

Many other decisions have followed this rule. Thus, in Tarble's Case, 13 Wall. (80 U.S.) 397, 402 (1872), the Court held that a judicial officer of a state has no "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 . . . ." Said Mr. Justice Field (Id. at 409):

> * * * 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.

In McClung v. Silliman, 6 Wheat. (19 U.S.) 598 (1821), the Supreme Court decided that a state court had no right to issue a writ of mandamus to a federal official

(the register of the government land office). In Keely v. Sanders, 9 Otto (99 U.S.) 441, 443 (1879), the Court said that "[N]o State Court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action . . . ." And in Rogers v. Calumet National Bank, 358 U.S. 331 (1959), the Court upset an Indiana court decision which had reviewed a vesting order issued by the Attorney General under the Trading With The Enemy Act, stating "a state court is without power to review the discretion exercised by the Attorney General of the United States under federal law." See also Abelman v. Booth, 21 How. (62 U.S.) 506 (1858); State Board of Health v. Wilson, 188 S.W. 2d 999 (Tex. Civ. App. 1945); Parry v. Dalaney, 310 Mass. 107, 37 N.E. 2d 249 (1941); Brewer v. Kidd, 23 Mich. 440 (1871).

Professor Warren restated the guiding principle in this area in "Federal and State Court Interference," 43 Harv. L. Rev., 345, 358 (1930), as follows:

> * * * it has been conclusively determined that the state courts possess no power to enjoin a federal official * * *.

Nor can this lack of power be cured by simple allegation that the federal official was acting illegally

or unconstitutionally. As the Supreme Court pointed out in Tennessee v. Davis, 10 Otto (100 U.S.) 257 (a case involving the attempt by the State of Tennessee to try a deputy collector of internal revenue for the alleged murder of the operator of a still), at 263:

> No state government can exclude it [the United States] from the exercise of any authority conferred on it by the Constitution, obstruct its authorized officers against its will, or withhold from it, even for a moment, the cognizance which that instrument has committed to it.

Similarly, in both Tarble's Case, supra, and Bowles v. Willingham, 321 U.S. 503 (1943), involving allegations of illegal and unconstitutional action, the Court refused to permit a state court to exercise jurisdiction. If the rule were otherwise--if, in fact, allegation of illegality or unconstitutionality could suffice to give jurisdiction to a state tribunal--the basic rule would lack any practical validity.

Since a grand jury is merely "an appendage of the court within whose jurisdiction it sits" and its jurisdiction is coextensive with the jurisdiction of that court (Application of the United Electrical Radio and M Workers, 111 F. Supp. 858, 864 (S.D. N.Y., 1953)), it cannot scrutinize by the writ of subpoena, any more than the court of which it is an appendage can control

by writ of mandamus, or injunction, the matter in which federal officials carry out their responsibilities.

B. It is clear, therefore, that appellees were acting contrary to federal law in attempting to carry out their announced purpose of investigating the Department of Justice and its officials for allegedly furnishing transportation to the Reverend Martin Luther King to enable him to come to Selma to speak at a voter registration rally on October 15, 1963. Appellees apparently realized this when this Court directed the District Court to enter a temporary restraining order, and they then purported to change the course of the proposed grand jury investigation by including the claim that the Justice Department attorneys might be able to supply evidence of possible violations of local law. In this respect, too, the inquiry was foreclosed as a matter of federal law.

The testimony adduced at the hearings on the preliminary injunction clearly shows that the attorneys subpoenaed had come to Dallas County in response to official orders (R. 132, 197, 235, 237, 250, 251); and that they had been in Dallas County only on official assignments in the performance of their official duties

(R. 132-140, 198-201, 236-238, 251), including the interviewing of potential witnesses (R. 133-134, 200, 236-238), the preparing of affidavits (R. 198), the assembling of exhibits (R. 236), and the observing of voter registration lines (R. 200, 239, 251).

Attorneys for appellees extensively questioned these attorneys at the hearings below but they were unable to produce even the slightest bit of evidence to suggest that these persons did any thing or knew of anything concerning Dallas County which was not strictly related to their official duties. In fact, the district court itself recognized that the testimony given by the Civil Rights Division attorneys "indicated that their only activity in the state concerned the carrying out of their official duties as Justice Department Attorneys" (R. 659, 660). The official duties of the subpoenaed officials included, of course, inquiry concerning Negro civil rights activity insofar as it was protected by federal law, and, to the extent that appellees may have had any interests other than the bare harrassment of the Department in its civil rights work in Dallas County and the intimidation of Negroes in the exercise of their right to vote, they were intent on discoving what the

Justice officials had learned in this regard.[20] That this is so is perhaps most vividly demonstrated by the following statement of Alabama Assistant Attorney General Gordon Madison at the hearing on the motion for an injunction pending appeal following the district court's denial of the preliminary injunction (R. 679):

> These attorneys, who have been down in Selma, your Honor found in the performance of their duties, under the Civil Rights Division or the Justice Department, may have discovered any number of things in the performance of those duties, which might have been of vast importance to the People of Dallas County and to the Grand Jury of Dallas County, in ascertaining what anybody else may be doing in that county and why they are there. It does not necessarily mean that the people, in most all instances, it does not mean that the people who are summoned as witnesses to appear before the Grand Jury, are the ones likely to wind up as defendants, although there may be a great desire in some places that some of them may be defendants in some place, but there may be lots of things they know (emphasis added.)

The grand jury in Dallas County has no more right to obtain from officials of the Department of Justice, without the consent of the Department, testimony concerning knowledge which they have gained during

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20/ This information would, of course, be useful for further and future acts of intimidation and harassment.

the course of their official duties in Dallas County than it has to investigate these officials for alleged violations of federal law or of state laws committed while in the discharge of their official duties. For it is well settled that federal agents are not subject to questioning by state agencies regarding information which is gained as a result of the carrying out of their official duties.

In Boske v. Comingore, 177 U.S. 459 (1900), the Supreme Court held that the United States Collector of Internal Revenue had properly refused to produce for a state court copies of official records showing the liquor which the defendants in a state court proceeding had deposited in and withdrawn from bonded warehouses. Likewise, in Tuohy v. Ragen, 340 U.S. 462 (1951), the Supreme Court followed and applied Boske v. Comingore, supra, in a case in which an FBI agent, in reliance upon Department of Justice Order No.3229, refused to obey a subpoena duces tecum of a federal court ordering production of papers of the Department in his possession. The lower federal courts have uniformly followed this rule, whether the state agency involved was a grand jury (Stegall v. Thurman, 175 Fed. 813 (N.D. Ga., 1910); In re Lamberton, 124 Fed. 446 (W.D.

Ark., 1903)), or a state court (In re Huttman, 70 Fed. 699 (D. Kan., 1895); In re Weeks, 82 Fed. 729 (D. Vt., 1897)).

C. In any event, the alleged inquiry into violations of state and local laws was an obvious afterthought designed to camouflage the real purpose.

The first indication that actions of federal officials were to become the subject of inquiry by a grand jury in Alabama came in a letter from Governor Wallace shortly after the alleged furnishing of transportation to Dr. King in vehicles rented by the Department of Justice and referred only to that incident (October 23, 1963, letter of Alabama Governor Wallace to United States Attorney Ben Hardeman, Plaintiff's Exhibit 12). This letter referred to the taking of "appropriate action against the Justice Department officials responsible" and stated that the matter would be presented to a grand jury in Montgomery County, Alabama, on or about November 4, 1963 (Ibid[21]). Significantly, it was on November 4, 1963, that the Circuit Court of Dallas County, Alabama, issued the

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21/ William F. Thetford, Solicitor of the Fifteenth Judicial Circuit of Alabama (which includes Montgomery County), conceded in his letter of October 28, 1963, to Ben Hardeman, United States Attorney for the Middle District of Alabama, that there was "no violation of State law involved" in the furnishing of transportation by the Justice Department to Reverend King (P. Ex 13).

subpoenas herein sought to be enjoined (R. 45). On November 7, 1963, appellee McLeod announced the issuance of the subpoenas, stating (R. 60-62; 395-396):

> 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.

On November 12, 1963, Judge Hare, who had been shown a telegram sent to McLeod informing him that the United States was filing an action seeking to enjoin the subpoenaing of its attorneys, read his previously prepared charge to the grand jury, in the course of which he referred to the allegation by Sheriff Clark and Governor Wallace that a car rented by the Department of Justice had been used to transport Reverend King from Birmingham to Selma; the initial denial of that allegation by Burke Marshall on October 18, 1963; and the statement issued by the Department on November 6, 1963, acknowledging that Thelton Henderson had admitted that he had loaned his rented car to an associate of King who then drove King in that car from Birmingham to Selma. Judge Hare then charged the jury that this was "an important matter" and "an important investigation,"

describing the incident as "shoddy," "corrosive" and "disturbing" (Plaintiff's Exhibit 27, p. 6). Judge Hare also told the grand jury that "if you can get the facts * * * you should be able to elicit sufficient facts to make that determination" ("whether Thelton Henderson was fired because he lied . . . or whether he was fired because he told the truth") (Ibid). It was not until November 14, 1963, at which time Judge Hare again charged the grand jury, that any mention was made that the grand jury's investigation would include not only "the truth of the matter" ("the King incident") but also the "protection" of Sheriff Clark (Plaintiff's Exhibit 28, p. 4). Then for the first time, Judge Hare instructed the grand jury concerning alleged misconduct of the Justice Department attorneys (consorting with criminals, contributing to the delinquency of children, etc.). On the following day the new theme was repeated -- by appellee McLeod this time--in a telegram to Burke Marshall (Plaintiff's Exhibit 14). And on November 18, 1963, Appellee Wilkinson, the foreman of the grand jury, sent a telegram to Attorney General Kennedy also echoing the new theme. Appellees' lack of sincerity in these charges became evident immediately by their refusal to furnish

any names, dates, or other identifying data to support them, despite the request of Mr. Marshall for a substantiation of these charges (Plaintiff's Exhibits 8, 10, 15).

The foregoing sequence of events leaves little doubt but that what legitimate and inquisitorial purpose there was in issuing the grand jury subpoenas to the Justice officials, that purpose was to elicit information only about the incident involving Dr. Martin Luther King. The other alleged purpose was not introduced until after this Court had issued a temporary restraining order to prevent the subpoenas of the Justice officials and thus obviously was done as an attempted justification of an otherwise clearly illegal act. Appellees did not attempt to substantiate that this afterthought was part of the original purpose, but instead objected to the introduction of any testimony of what transpired before the grand jury at the time the subpoenas were discussed and even objected to answering whether Blanchard McLeod had received any reports from state or local officials regarding the activities of the Justice Department

attorneys or anyone connected with voter registration (R. 370-371).[22/]

Appellees contend that a grand jury must be presumed to be acting lawfully. We have no quarrel with that as an abstract proposition. But where, as here, it is shown -- and indeed it cannot be denied -- that at least initially the grand jury was proceeding to inquire into matters forbidden to it under federal law, then the presumption of lawful action is dissipated and the burden shifts to those seeking to justify the grand jury inquiry to demonstrate clearly and unequivocally that the initial

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22/ Although appellant does not seek to reverse the district court on this point, it should be noted that Judge Thomas repeatedly cut off efforts to solicit testimony as to the proceedings before the grand jury, even after being informed that it was within his discretion to do so (R. 264, 267). In United States v. Byoir, 147 F. 2d 336 (C.A. 5, 1945) this Court held that it was within the court's discretion to permit disclosure of what happened before the grand jury "when necessary to advance the cause of justice." The same rule certainly should apply where a suit is brought in a federal court to enjoin use of the grand jury for the purpose of intimidating persons in order to interfere with their right to vote. In such a case, the most important evidence may consist of what transpired before the grand jury. Here the court excluded not only the grand jury proceedings but also a list of grand jury witnesses (R. 351).

unlawful purpose has been displaced by a legitimate inquiry. A proper respect for the federal system and the role of federal officials within that system demand no less.

Judge Thomas erred in not recognizing these principles but instead being content simply with finding that the grand jury acted in good faith. Whatever may be the propriety of that finding -- we submit it was clearly erroneous[23/] -- the fact is that the court did not take into consideration any of the factors referred to above and it therefore erred.

23/ In United States v. Gypsum Company, 333 U.S. 364 (1948) the Supreme Court held: "the finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." Accord, Guzman v. Pichirilo, 369 U.S. 698 (1962); C.I.R. v. Duberstein, 363 U.S. 278 (1960). This Court has held that the clearly erroneous concept of Rule 52(a) of the Federal Rules of Civil Procedure "requires findings to be set aside if the court is left with the impression that the result is not the truth and right of the case." W.R.B. Corporation v. Geer, 313 F. 2d 750 (C.A. 5, 1963). See also, United States v. Kaplan, 277 F. 2d 405, 408 (C.A. 5, 1960); Manufacturers Cas. Ins. Co. v. Intrusion-Prepakt Inc., 264 F. 2d 758, 760 (C.A. 5, 1959); and Sanders v. Leech, 158 F. 2d 486, 487 (C.A. 5, 1946).

II

The Appellees Should Have Also Been Enjoined From Issuing The Subpoenas And From Other Intimidatory Acts Because These Acts Violated 42 U.S.C. 1971(b)

Not only should appellees have been restrained from issuing the subpoenas because of the Supremacy Clause, the executive privilege involved, and the proof that the Department officials were acting within the scope of their official duties in Dalas County, but the issuance of the subpoenas should also have been enjoined because there subpoenas constituted part of an overall plan and purpose of action of intimidating Negroes for the purpose of interfering with their right to vote in Dallas County and as such should have been enjoined under 42 U.S.C. 1971(b).

A. The subpoenas were issued to the Justice Department attorneys against the background of determined and repeated attempts by these Dallas County officials to stem the Negro voter registration drive by any and all means. Among the tactics of intimidation used were the following. On October 7, 1963, appellee Clark used repressive tactics in requiring Negroes to stand in the voting registration line all day without food or water or being able to go to the bathroom--

even the aged and infirm--at the risk of losing their place in line if they left (R. 221-229, 292-294).

Both McLeod and Clark admittedly had Negro pickets arrested for doing no more than carrying the voter registration signs in the vicinity of the courthouse.[24/]

The Reverend Thomas L. Brown, a SNCC voter registration worker, was arrested because he carried two voter registration pickets to the federal building in his car (R. 571).

Additional efforts of Sheriff Clark along this line as brought out in United States v. Dallas County et al., No. 21,477, (Plaintiff's Exhibit 1 in the instant case) include the arrest without pretext of three Negro voter registration workers; the stationing

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24/ McLeod claimed that the pickets were inciting riots because people were closing in on the pickets, but he did not order the arrest of the persons closing in on the pickets (R. 365-368). Clark, too, admittedly arrested the pickets solely because they were carrying signs urging voter registration (R. 617). F.B.I. Agent Vincent P. Doherty was present when the pickets were arrested on September 25, 1963, and testified that he saw no disorder (R. 537). Doherty also testified that he saw no violence on October 1, 1963, when some pickets were arrested (R. 537).

of deputies inside mass voter registration meetings; the running broadcast over walkie-talkies of what went on at those meetings and the taking of notes of what was said therein, and the recording of the license numbers of the automobiles of those who attended the meetings. The record in that case also shows that prosecution by McLeod of the three Negro voter registration workers arrested by Clark, even though McLeod knew that the arrest and prosecution were without any valid basis. As the brief filed by the United States in this Court in that case shows, these acts of intimidation were clearly done for the purpose of interfering with the Negro voter registration drive.

B. That these activities were not mere isolated excesses but part of a careful scheme of intimidation to interfere with Negro voting is proved by McLeod himself. As McLeod said in defending the arrest of Negroes carrying voter registration signs, "we must meet force with force" (R. 331-332), for "if Negroes are allowed to take an inch, they would take a mile . . ." (R. 419).

C. Use of the grand jury for these purposes is a device much favored by McLeod. Thus, when the United States Commission on Civil Rights issued subpoenas for the Dallas County voter registration records in 1958, McLeod selected that very time to have the records subpoenaed and impounded (allegedly because he was having the grand jury investigate to see whether or not any crime had been committed by the Board of Registrars) (R. 326, 329, 364; P. Ex. 17).[25/]

In 1961, the United States sought to obtain these records for inspection and copying in connection with the case of United States v. Atkins, 323 F.2d 733

25/ McLeod could not recall any instance in which the grand jury had returned an indictment for violation of Alabama laws relating to voter registration, and he refused to answer whether he had used the grand jury in 1959 and 1960 to see if there were any violations of state law with respect to the registration of voters in Dallas County (R. 329, 372-373).

(C.A. 5, 1963). At that time, McLeod represented that the custody of the records under subpoena since 1958 had been "passed on" to each successive grand jury (P. Ex. 23) although the records were actually in the office of the Board of Registrars in five filing cabinets (R. 344).[26/]

D. It is no coincidence that the Justice Department attorneys engaged in working on denials of the right to vote were selected for subpoena.

Wilkinson (the grand jury foreman) testified that the request for the subpoenas did not apply to all Department of Justice lawyers, but only those "that were involved in this question" (R. 273). Wilkinson refused, and the court did not require him, to answer what he meant by "involved in this question" (R. 274).

McLeod, in response to a question by Mr. Doar as to whether he remembered saying "we intend to let the American people know who are the leaders

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26/ In 1962, the district court in the Atkins case held that those records were not in the custody of the grand jury and ordered them turned over to the Department of Justice (R. 345).

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Judge Hare boasted that "we had information ("largely telephone calls from members of the Negro population") that the Department of Justice had sent a bunch of operators on down here to blueprint Selma for the knockoff" and that even prior to the first mass Negro voter registration meeting in May, "we

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27/ The extent of McLeod's personal interest in these subpoenas was demonstrated in a dramatic way during questioning of one of the Justice Department attorneys, David Marlin. Marlin testified that although he had been personally served with the subpoena, he did not appear as it directed him to on November 13, 1963, because on November 12, 1963, he had been told by Alabama Assistant Attorney General Leslie Hall that he (Marlin) would not be required to appear the following day (R. 216). At this point appellee McLeod asked Marlin whether Marlin had checked to see whether Hall was lying to him and Richmond Flowers, Attorney General of Alabama, was constrained to interject "wait a minute, now, that is a reflection on my office" (R. 216).

started preparing at that time for that eventuality" (R. 464-465).

Finally, evidence of the illegal purpose of appellees in subpoenaing the Civil Rights Division attorneys is shown also by their transparent attempts to clothe this grand jury investigation with some sort of legality by ex post facto broadening of the investigation to include implied broad violations of local state laws by the attorneys acting outside the scope of their duties and by those with whom the attorneys had been in contact. See pp. 48-49 supra.

E. Not content to subpoena only the Justice Department attorneys, in the furtherance of their efforts to use grand jury subpoenas as an intimidatory device, appellees supplied what details of purpose might have been missing by also subpoenaing a number of the Negro leaders active in the voter registration drive. Not only were Negro leaders from Dallas County subpoenaed, but also other Negroes who came to Dallas County to address local Negroes on the subject of voter registration, such as Albert Turner (president of the Perry County Civic League, an organization engaged in urging Negroes to register to vote (R. 176, 181)), who

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had spoken to Negroes in Selma about the necessity of voting and the importance of receiving an education (R. 182); and Joseph E. Boone, another visiting speaker on the subject of voter registration (R. 284). Negroes from Dallas County itself who were subpoenaed included members of Negro organizations in Dallas County whose purpose was to encourage Negro voter registration (R. 276-277, 444-446); Negroes who had testified for the government in the Atkins case and who had helped organize and sponsor Negro mass meetings and who had spoken at these mass meetings (R. 290, 292, 453-454); and members of the Student Nonviolent Coordinating Committee who had worked on voter registration in Dallas County, including helping to organize the voter registration clinics (R. 597, 602-604). Also subpoenaed was a white Catholic priest in Selma who had attended and spoken at the Negro mass voter registration meetings (R. 418).

The pattern of intimidation for the purpose of interfering with voting is plain. What is equally plain is that attorneys of the Department of Justice are entitled to protection from the type of harrassment

to which appellees are seeking to subject them. If appellees are permitted to succeed with their scheme, local officials wherever there is discrimination will be emboldened to bring Department of Justice personnel before grand juries for purposes of harrassment, intimidation, and humiliation, in order that the federal effort may be impeded and the Negro population be placed on notice that they may expect no help in their effort to escape discriminatory treatment. The district court was totally indifferent to this purpose and to the serious threat to federal law enforcement it represents. We submit that this Court should reverse with instructions to enter judgment for appellant in order that there may be no incentive for schemes of this sort.

III

The District Court Had Jurisdiction to Grant the Relief Requested in this Case

The relief sought in this case is to enjoin the appellees from continued interference with the voter registration drive by, inter alia, the arrest and prosecution of voter registration workers without pretext and for the obvious purpose of interfering with

voting rights; the subpoenaing of leaders in the voter registration drive to appear before the county grand jury where the purpose of such subpoena is to intimidate Negroes from exercising their right to vote; and the subpoenaing of Justice Department attorneys to appear before the county grand jury where no legitimate basis exists therefor. The district court clearly has the power to grant this relief under the authority of United States v. Wood, 295 F. 2d 772 (C.A. 5, 1961), cert. denied, 362 U.S. 850 (1962).

1. In Wood, the United States brought an action under 42 U.S.C. 1971 to enjoin the criminal prosecution of John Hardy, a Negro voter registration worker, before a Justice of the Peace in Walthall County, Mississippi. Two days before the trial was to commence, the United States sought to enjoin the prosecution on the theory that the continued prosecution of Hardy was designed to intimidate qualified Negroes in their attempts to vote. The district court denied the motion for a temporary restraining order. On appeal, this Court reversed. Although recognizing the general rule that state criminal proceedings may not be enjoined by

a federal court, this Court properly held that the rule did not apply in that case. Moreover, since the United States, rather than a private party, was seeking the injunctive relief, 28 U.S.C. 2283[28/] had no application. Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

This Court further stated that the policy against interference with state criminal proceedings, which applies even where section 2283 does not, was outweighed by the federal interest asserted by Congress in passing section 1971 of the Civil Rights Act. Examining the language and legislative history of the Civil Rights Act of 1957, the Court concluded that the district court was "not operating under common law equitable and discretionary doctrines, but under a mandatory jurisdictional statute. * * * Where a federal statute has specifically created a cause of action for preventive relief for intimidation, it may no longer be said that this intimidation will not be judicially

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28/ "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

recognized for the purpose of establishing an equitable cause of action." 295 F. 2d at 783, 784.

2. Cases brought under 42 U.S.C. 1971 are not controlled by the usual principles supporting the federal judicial practice of non-interference with state criminal proceedings.[29/]

a. The legislative history of section 1971 clearly demonstrates that Congress intended to permit equitable relief in those situations susceptible to action under the criminal civil rights statutes.[30/] One

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29/ The federal judicial practice of non-interference with state criminal proceedings stems from two principles. The first is that a court of equity should not invade the domain of the common law court whose function it is to grant relief in criminal proceedings. In Re Sawyer, 124 U.S. 200, 211 (1888); Harkrader v. Wadley, 172 U.S. 148 (1898). The second is that in a federal system of two sovereignties, each court system must respect the functions of the other in order to avoid undue conflicts. Wilson v. Schnettler, 365 U.S. 381 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951); Douglas v. Jeannette, 319 U.S. 157 (1943); Ponzi v. Fessenden, 258 U.S. 254 (1922). But, as the Wood decision carefully points out, actions brought under 42 U.S.C. 1971 are not controlled by either of these principles.

30/ 18 U.S.C., sections 241, 242.

situation reached by the criminal statutes was the prosecution of persons on false charges or for an ulterior purpose. See Culp v. United States, 131 F. 2d 93, 99 (C.A. 8, 1942); Brown v. United States, 204 F. 2d 247, 249 (C.A. 6, 1953); Screws v. United States, 325 U.S. 91, 126 (1945) (concurring opinion of Mr. Justice Murphy); United States v. Wood, supra, at 781-782. Thus the Congress, in enacting section 1971, deliberately gave equity courts a role in the domain traditionally occupied by common law courts, thereby overriding any customary relationships previously governing courts of law and equity.

b. Underlying the principle of comity between state and federal courts is the notion that, since the decision of the state court is subject to ultimate review by the Supreme Court, the state judicial system should be permitted to complete its function undisturbed by premature interference by the federal courts.[31/] Spielman

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31/ The decisions frequently distinguish between threatened criminal proceedings and criminal proceedings already begun by a state court, holding that only in the former instance may a federal court enjoin them. (Unless, of course, a federal suit on the same subject matter is already pending.) See Ex parte Young, 209 U.S. 123, 162 (1908); Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927). But see the recent decision of a three-judge court in this Circuit, Aelony v. Pace, No. 530 (M.D. Ga., Nov. 1, 1963); Cooper v. Hutchinson, 184 F. 2d 119 (C.A. 3, 1950).

Motor Sales Co. v. Dodge, 295 U.S. 89, 95-96 (1935); Fenner v. Boykin, 271 U.S. 240, 244 (1926). But this doctrine of withholding federal action until state processes have been exhausted is a rule of comity, "not a rule distributing power as between the state and federal courts." Fay v. Noia, 372 U.S. 391, 425 (1963). Thus, it may at any time be abrogated by Congress. This is precisely what was done when 42 U.S.C. 1971 was enacted.[32/] Subsection 1971(b) provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." Whatever

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32/ This Court and the district courts of this Circuit have held that the rule of non-interference in state criminal proceedings was also abrogated when Congress passed another civil rights statute, 42 U.S.C. 1983. Morrison v. Davis, 252 F. 2d 102 (C.A. 5, 1958); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala., 1956), aff'd 352 U.S. 903 (1956). See also Anderson v. City of Albany, 321 F. 2d 649 (C.A. 5, 1963); Bailey v. Patterson, 323 F. 2d 201 (C.A. 5, 1963), cert. denied, 376 U.S. 910 (1964).

might be the requirements of comity under other statutes, it is clear that subsection 1971(d) permits federal courts to give equitable relief under section 1971 even in matters still pending before state courts and certainly as well to threatened future prosecutions. United States v. Wood, supra, at 784.[33/]

33/ The cases frequently give two other reasons for not interfering with state criminal proceedings. Neither is applicable to a suit brought under section 1971. The first is that irreparable injury has not been demonstrated. Spielman Motor Sales Co. v. Dodge, supra; Douglas v. Jeannette, supra. But, as the Wood decision indicates, all that must be proved in a section 1971(b) suit is that the statute has been violated, i.e., that there has in fact been intimidation. Congress, in enacting the statute, has made the determination that a violation of it constitutes irreparable injury. Furthermore, it is settled that when a plaintiff seeks injunctive relief pursuant to statutory authority, there is no requirement that irreparable injury be proved. Federal Trade Commission v. Rhodes Pharmacal Co., 191 F. 2d 744 (C.A. 7, 1951); Shadid v. Fleming, 160 F. 2d 752 (C.A. 10, 1947); Henderson v. Burd, 133 F. 2d 515 (C.A. 2, 1943).

Secondly, it has been held that no citizen is immune from prosecution, in good faith, from alleged criminal acts even though the prosecution may be unauthorized. Douglas v. Jeannette, supra; Watson v. Buck, 313 U.S. 387 (1941); Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45 (1941). But an action under section 1971 to enjoin state criminal proceedings presupposes that the criminal proceeding was brought in bad faith.

3. It is likewise clear that the courts have inherent power to prevent abuse by a grand jury of its powers. See Hale v. Henkel, 201 U.S. 43, 65 (1906) ("doubtless abuses of this [inquisitorial] power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But where such abuse is called to the attention of the court, it would doubtless be alert to repress them"). See also Hoffman v. United States, 341 U.S. 479, 485 (1951), emphasizing "the continuing necessity that . . . courts . . . be 'alert to repress' any abuses of the investigatory power invoked . . . .". Thus, what was said in the foregoing sections with respect to state criminal proceedings applies no less to the actions of a state grand jury.

The United States, of course, has standing to bring this suit for an injunction, even aside from its standing under 42 U.S.C. 1971(b), because the subpoenaing of its attorneys by the state grand jury constitutes an "illegal invasion of its sovereignty." Owlett v. United States, supra, p. 743; and see point I, supra. Like the threatened investigation in the Owlett case, the carrying out of the threat to subpoena the Justice attorneys would "embarrass, impede,

and obstruct the administration of a Federal agency." 15 F. Supp. at 742. In such circumstances, the United States may sue for injunctive relief. Thus, in Mayo v. United States, 319 U.S. 441 (1943), state officers, who were complying with state law prohibiting the distribution of uninspected fertilizer, were enjoined at the behest of the United States from interfering with such distribution by Federal agents acting under Federal law.

The standing of the United States also is derived from the obligation of the executive branch to execute the laws of the United States, including the investigation of violations of those laws. Where the government has a constitutional duty, it has the right to apply to its own courts for any proper assistance in the fulfillment of that duty. In re Debs, 158 U.S. 564, 584 (1895).[34/]

34/ The relief sought here should have been granted even though this was a proceeding for a preliminary injunction. Cf. United States v. Fox, No. 20398 (C.A. 5), decided July 21, 1964. A full evidential hearing was held in the district court, taking four trial days--December 5, 6, 16 and 18, 1963--and extending over a period of almost a month. At these hearings 27 witnesses testified and over 50 exhibits were introduced. The court thereafter, on March 19, 1964, entered detailed findings of fact, conclusions of law, and its judgment denying a preliminary injunction.

(Cont. on following page.)

CONCLUSION

The record in this case clearly demonstrates that the United States is entitled to an injunction against the appellees to restrain them from their continued acts of intimidation. Therefore, we respectfully submit that the decision of the district court be reversed and the district court be directed to grant the relief sought herein.

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34/ (Cont. from preceding page.)

In short, the district court disposed of all issues, both factual and legal, involved in the case. Upon the basis of its legal conclusions no different result could be reached after a trial on the merits. Indeed, the hearing on the motion for preliminary injunction was, in essence, a trial on the merits.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by official United States mail in accordance with the rules of this Court to each of the attorneys for appellees addressed as follows:

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