CRC 1.8.3

NO.

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

MOTION OF APPELLANT FOR AN INJUNCTION PENDING APPEAL AND MEMORANDUM IN SUPPORT THEREOF

JOHN W. DOUGLAS
Assistant Attorney General

VERNOL R. JANSEN, JR.
United States Attorney

ALAN S. ROSENTHAL
DAVID L. ROSE
Attorneys,
Department of Justice,
Washington, D.C. 20530

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

MOTION OF APPELLANT FOR AN INJUNCTION PENDING APPEAL

The United States of America, by its attorneys, respectfully moves this Court for an order restraining, pending the disposition by this Court of the above-styled appeal, the appellees, their agents, servants, officers, employees, and attorneys and all persons acting in concert or participation with them from commanding or attempting to compel the attendance before the Grand Jury of the Circuit Court of Dallas County, Alabama, Fall Term 1963, on November 13, 1963, or any other day, of Burke Marshall, Assistant Attorney General, John Doar, First Assistant to the Assistant Attorney General, Richard Wasserstrom, Attorney, David H. Marlin, Attorney, Arvid A. Sather, Attorney, and Kenneth McIntyre, Attorney, attorneys of the Civil Rights Division of the Department of Justice, by any means, including, but not limited to, service or enforcement or attempts to enforce the subpoenas bearing the return date of November 13, 1963, previously issued. The basis for this motion, as appears in greater detail in the attached memorandum and supporting papers, is that (1) there is a substantial likelihood that this Court will reverse the order of the district court which is the subject of this appeal; and (2) the United States will suffer irreparable injury in the absence of injunctive relief from this Court pendente lite.

Respectfully submitted,

JOHN W. DOUGLAS
Assistant Attorney General

VERNOL R. JANSEN, JR.
United States Attorney

ALAN S. ROSENTHAL

DAVID L. ROSE
Attorneys,
Department of Justice,
Washington, D. C. 20530

November 12, 1963

CERTIFICATE OF SERVICE

I hereby certify that, on this day of November 1963, a copy of this motion, together with a copy of the attached memorandum and all supporting papers appended thereto, were personally served upon counsel for appellees as follows:

Blanchard McLeod, Circuit Solicitor
for the Fourth Judicial Circuit, State
of Alabama;

Henry Reese, County Solicitor for
Dallas County, State of Alabama.

JOHN W. DOUGLAS
Assistant Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.

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

MEMORANDUM IN SUPPORT OF MOTION OF APPELLANT FOR AN INJUNCTION PENDING APPEAL

STATEMENT OF THE CASE

This appeal by the United States is from the refusal of the United States District Court for the Southern District of Alabama to grant the application of the United States for a temporary restraining order restraining the appellees, their agents, servants, officers, employees, and attorneys and all persons acting in concert or participation with them from commanding or attempting to compel the attendance before the Grand Jury of the Circuit Court of Dallas County, Alabama, Fall Term 1963 on November 13, 1963, or any other day, of Burke Marshall, Assistant Attorney General, John Doar, First Assistant to the Assistant Attorney General, Richard Wasserstrom, Attorney, David H. Marlin, Attorney, Arvid A. Sather, Attorney, and Kenneth McIntyre, Attorney, attorneys of the Civil Rights Division of the Department of Justice, by any means, including, but not limited to, service or enforcement or attempts to enforce the subpoenas bearing the return date of November 13, 1963, previously issued. The basis of the appeal is that, in the circumstances of the case, this refusal was a clear abuse of discretion upon the part of the district court.

The facts underlying this action are set forth in the complaint filed by the United States, and the affidavit of Assistant Attorney General Marshall (and attachments thereto) appended to the Government's application for a temporary restraining order.[1/] They may be summarized as follows:

On October 28, 1963 the then Solicitor of the Fifteenth Judicial Circuit of Alabama, William F. Thetford, sent a letter to the United States Attorney for the Middle District of Alabama, with reference to the charge of the Governor of Alabama that the Civil Rights Division of the Department of Justice has been furnishing transportation for "racial agitators in Alabama." While expressly conceding that "there is no violation of State law involved", Mr. Thetford indicated that "such evidence as may be available" was being submitted to "our November Grand Jury as a matter of public interest." He went on to invite the Department of Justice to make witnesses available to testify before the Grand Jury.

By letter of November 4, 1963, Burke Marshall, the Assistant Attorney General in charge of the Civil Rights Division, declined the invitation, noting that, since no violation of State law was involved, there was "no point in furnishing witnesses to testify in a secret proceeding on a matter admittedly beyond the scope of the Grand Jury's legitimate inquiry."

On the same day, the Circuit Court of Dallas County issued subpoenas commanding the appearance before the Grand Jury of that County on November 13, of Mr. Marshall, his First Assistant John Doar, and five attorneys in the Civil Rights Division (one of whom subsequently resigned his position in the Department

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[1/] Copies of these documents are attached to this memorandum.

of Justice). These subpoenas were mailed to the individuals at the Department of Justice in Washington, D.C. Three days later, on November 7, the Circuit Solicitor in Dallas County made a public statement, published in a local newspaper, in which he announced the issuance of these subpoenas and stated that the principal business of the Grand Jury would be to investigate the role of the Department of Justice in the racial unrest in the area.

On November 8, 1963, one of the Civil Rights Division attorneys to whom a subpoena had been mailed, David H. Marlin, was personally served in Alabama with a subpoena commanding his appearance before the Dallas County Grand Jury on November 13, 1963. On November 12, 1963, this action was brought by the United States, naming as defendants the State and County Solicitors, the Sheriff, the Judge and the Clerk of the Circuit Court and the foreman of the Grand Jury. The relief sought was, inter alia, a temporary restraining order, preliminary injunction and permanent injunction restraining the defendants from compelling six of the subpoenaed officials to appear and testify before the Grand Jury. Since Mr. Henderson was no longer employed by the Government, no relief was sought on his behalf.

The complaint alleged the foregoing facts, as well as the fact that the subpoenaed officials had been in Alabama in recent months only in their official capacities and in the performance of their duties as attorneys in the Civil Rights Division. Assistant Attorney General Marshall's affidavit reflects that the presence of the subpoenaed individuals in that state was by direction of the Attorney General, the Deputy Attorney General or Mr. Marshall and for the purpose of investigations, conferences and litigation with respect to matters within the cognizance of the Civil Rights Division.

The complaint went on to assert that the proposed Grand Jury investigation and the issuance of the subpoenas was (a) in excess of the authority of such Grand Jury; (b) to obstruct, impede, and frustrate the Government of the United States in the proper enforcement of the laws of the United States; (c) an usurpation of the power of the United States in the enforcement of its laws; (d) designed to harass the agents of the United States in the performance of their duties in the enforcement of the laws of the United States. Additionally, it was alleged that, unless the requested relief was granted, the proper enforcement of the laws of the United States would be obstructed, impeded and frustrated.[2/]

Simultaneously with the filing of the complaint, the United States filed applications for a temporary restraining order and a preliminary injunction based, in part, upon the affidavit of Assistant Attorney General Marshall. In that affidavit, Mr. Marshall stressed that compliance with the subpoenas would impede and interfere with the Civil Rights Division's effective performance of its functions and responsibilities, to the irreparable injury of the United States.

In this connection, Mr. Marshall detailed the present workload of the attorneys on the trial staff of the Civil Rights Division who are responsible for voting rights cases. He pointed out that, because of the magnitude of that workload, the time of these attorneys is fully occupied by their official duties and, indeed, large amounts of overtime work is required. Mr. Marshall concluded that the diversion of

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2/ A second count in the complaint alleged a violation of the civil rights laws and sought an injunction against the continuance of the Grand Jury investigation. Since a temporary restraining order was not sought with respect to this count, it is not before the Court on the present appeal.

the time and energies of any of the staff attorneys to state grand jury appearances necessarily would interfere with and obstruct the conduct of the Civil Rights Division's overall program for enforcing voting rights.

Mr. Marshall also noted that the time and energies of his first assistant, Mr. Doar, and himself are fully consumed in supervising and directing the complex operations of the Civil Rights Division. Thus, their state grand jury appearances would interfere with and obstruct the operations of the entire Division in enforcing the civil rights statutes of the United States.

Additionally, Mr. Marshall referred to the threat posed by the possibility that any Civil Rights Division attorney who was sent to Alabama might be required to appear before a state grand jury. This threat would serve as a constant deterrent to the dispatch of Division attorneys to that State because of the potential unproductive expenditure of their time and energies. Further, Mr. Marshall observed, the threat would be a source of harassment to these attorneys and would have an adverse impact on the efficiency and effectiveness with which they perform their official functions.

On November 12, 1963 the district court declined to enter a temporary restraining order. Notice of appeal was immediately filed in the district court and the appeal docketed in this court on a preliminary record.

REASONS WHY THE MOTION FOR AN INJUNCTION PENDING APPEAL SHOULD BE GRANTED

I

THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL

Although the denial of a temporary restraining order is not an interlocutory order refusing an injunction within the meaning of 28 U.S.C. 1292(a), and is ordinarily not otherwise

appealable, such a denial is a final order appealable under 28 U.S.C. 1291, when it will moot the case. United States v. Wood, 295 F. 2d 772 (C.A. 5), certiorari denied, 369 U.S. 850. For the Supreme Court has long given the finality provisions of that statute a practical, rather than a technical, construction. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541. And when the refusal to preserve the status quo by granting a temporary restraining order has the effect of making the case moot, it is, as a practical matter, a final disposition of the rights of the parties, and a de facto dismissal of the complaint. In such circumstances, therefore, this Court has held that an order denying a temporary restraining order is a final, appealable decision. United States v. Wood, supra, 295 F. 2d at 777-778. Similarly, in such circumstances the refusal to grant a temporary injunction constitutes an appealable order. United States v. Lynd, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893. See also United States v. Sylacauga Properties,(C.A. 5, No. 20157, October 1, 1963).

The denial of the temporary restraining order in the case at bar is a final, appealable order. Here, as in United States v. Wood, supra, the failure to grant the temporary restraining order will render the case moot.

The subpoenas in this case command the officials of the Civil Rights Division to appear and testify on November 13, 1963. Failure of the district court to grant interlocutory relief prior to that date will, as a practical matter, render this case largely moot. For if the officials of the Civil Rights Division do not comply with the subpoena, those who are in Alabama will be subject to possible arrest and other enforcement and contempt proceedings, and those who are not presently in Alabama will be subject to such prosecution every time they enter that State in the performance of their duties.

Thus, the very right which forms the basis for this complaint in this case, the right of the Federal government to have its officials perform their duties without interference or obstruction from the states, will be irreparably lost. On the other hand compliance with the subpoenas would render the case moot and, as the affidavit of the Assistant Attorney General reflects, would obstruct the enforcement of the acts of Congress and would therefore result in irreparable injury to the United States in its enforcement of those statutes.

In United States v. Wood, supra, the United States sought an injunction restraining Mississippi's prosecution for breach of peace of a person who was assisting Negros to register to vote, on the ground that the very prosecution, regardless of its outcome, would effectively intimidate Negroes from the exercise of their right to vote. This Court held that the failure of the district court to grant a temporary restraining order or preliminary injunction prior to the trial of the breach of the peace prosecution was, in such circumstances, a final appealable order. In the case at bar the United States seeks an injunction restraining Alabama's enforcement of subpoenas, on the ground that the very subpoenas themselves interfere with the Department of Justice's enforcement of the Civil Rights statutes. Thus, the district court's refusal in this case to restrain the enforcement of the subpoenas before their return date is similarly a final, appealable order.

II

AN INJUNCTION PENDING APPEAL SHOULD ISSUE

This Court's authority to issue an injunction pending appeal in the circumstances of this case is not open to question. United States v. Lynd, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893. In that case, the United States filed suit in the District Court for the Southern

District of Mississippi under the Civil Rights Acts of 1957 and 1960, alleging that the defendants, the State of Mississippi and the Forrest County registrar of voters, had engaged in racial discriminatory acts and practices which deprived Negro citizens of their right to register and vote without distinction of race or color. The Government filed a motion for a preliminary injunction. The district court refused to grant the motion and the United States appealed.

In this Court, the United States moved for an injunction pending appeal, restraining the alleged violation of the voting rights of Negro residents of Forrest County. In granting the motion, the Court noted at the outset (301 F.2d at 819) that power to grant such relief was conferred by the All - Writs Statute, 28 U.S.C. 1651, and Rule 62(g) of the Federal Rules of Civil Procedure.

Turning then to the question of the propriety of the exercise of that power in the circumstances of the case, the Court inquired at some length into the likelihood that the district court's refusal to grant the preliminary injunction would be reversed as an abuse of discretion. Its conclusion was that the likelihood was sufficiently great to warrant protection of the rights of the Negro registrants pending a decision by this Court. 301 F. 2d at 823. In arriving at this conclusion, the Court stressed the nature and purpose of a preliminary injunction and emphasized that its issuance "need not await any procedural steps perfecting the pleadings or any other formality attendant upon a full-blown case". Ibid. On the contrary, all that is necessary is a preliminary showing that the rights which are sought to be vindicated are being violated. Ibid. See also Miami Beach Fed. S & L v. Collander 256 F. 2d 410, 415 (C.A. 5).

In this case, as in Lynd, such a showing was made and there is the same substantial likelihood that the refusal of the district court to grant interim injunctive relief will be reversed by this Court. For the reasons developed at length in the Government's Memorandum filed in the court below in support of its application for a temporary restraining order, a copy of which is appended to this Memorandum and is incorporated by reference herein, the impending grand jury investigation and the subpoenas directed to the officials of the Civil Rights Division constitute an obstruction of the functioning of the Federal Government and are beyond the power of the State vis a vis the United States. In addition, as was also shown in our Memorandum below, the proposed grand jury investigation is invalid even as a matter of Alabama law.

Moreover, the other well-settled criteria for interim injunctive relief were fully satisfied in the district court and are likewise met in this Court.

The first of these criteria is that the injunction would not be harmful to the public interest. Yakus v. United States, 321 U.S. 414, 440; Virginian Ry. Co. v. United States, 272 U.S. 658, 673. Here, the public interest calls for the grant of the injunction to prevent the obstruction of vital functions of the Federal Government.

At the same time, the legitimate interests of the appellees will not be adversely affected by the grant of the injunction. Yakus v. United States, supra. If it so elects, the Grand Jury will be free to proceed without the subpoenaed Civil Rights Division officials. And, particularly since the investigation admittedly does not encompass possible violations of state law, a delay in the receipt of the testimony of these officials - or indeed in the institution of the investigation itself - can scarcely be deemed prejudicial to appellees.

Finally, as shown by the affidavit of Assistant Attorney General Marshall in support of the Government's application in the district court for interim relief, the United States will suffer irreparable injury in the absence of an injunction pending appeal. Cf. United States v. Wood, supra. There is, of course, no remedy at law for the disruption of the execution of the laws of the United States which the affidavit shows will accompany the enforcement of the subpoenas - viz, the action of the appellees which is sought to be enjoined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for an injunction pending appeal should be granted.

JOHN W. DOUGLAS
Assistant Attorney General

VERNOL R. JANSEN, JR.
United States Attorney

ALAN S. ROSENTHAL
DAVID L. ROSE
Attorneys,
Department of Justice,
Washington, D. C. 20530

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ALABAMA

NORTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO._____
BLANCHARD McLEOD, et al., Defendants.	)	

APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff applies to the Court for a temporary restraining order as set forth in the proposed order attached hereto and made a part hereof.

The application is based on the complaint, the affidavit of Assistant Attorney General Burke Marshall and a memorandum of law which is attached hereto.

JOHN W. DOUGLAS
Assistant Attorney General

VERNOL R. JANSEN
United States Attorney

HARLAND F. LEATHERS
Attorney, Department of Justice

Attorneys for Plaintiff

DISTRICT OF COLUMBIA) SS:

AFFIDAVIT:

BURKE MARSHALL, being duly sworn according to law, deposes and says:

1. That, at all times relevant to the acts alleged in the complaint, I was and now am the Assistant Attorney General in charge of the Civil Rights Division of the United States Department of Justice.

2. That 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 the following individuals: Burke Marshall, John Doar, Richard Wasserstrom, David H. Marlin (named as Dave Marland on the subpoena), Arvid A. Sather (named as Arvid Saither on the subpoena), Kenneth McIntyre and Thelton Henderson. Copies of these subpoenas (reproductions of which are attached) were mailed to the Department of Justice and received on November 6, 1963. 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.

3. That, upon information and belief, the following is the background of the issuance of the aforesaid subpoenas:

a. On October 17, 1963, Governor George C. Wallace of Alabama made a public statement (reported in the Montgomery, Alabama, Advertiser of that date, a reproduction of which is attached), in which he charged that the Reverend Martin Luther King "has been travelling throughout the state [of Alabama] in vehicles rented by the Justice Department." He further stated, "This * * * is a matter which should be called to the attention of the people of this country."

b. On October 28, 1963, William F. Thetford, the then Solicitor of the Fifteenth Judicial Circuit of Alabama, wrote a letter (a reproduction of which is attached) to Ben Hardeman, United States Attorney for the Middle District of Alabama, in which he recited the foregoing charge on the part of Governor

Wallace and stated, "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. By letter dated November 4, 1963 (a reproduction of which is attached), I, acting for the Department of Justice, declined the invitation on the ground that there was "no point in furnishing witnesses to testify in a secret proceeding on a matter admittedly beyond the scope of the Grand Jury's legitimate inquiry."

c. On November 7, 1963, Blanchard McLeod, Solicitor of the Fourth Judicial Circuit of Alabama, made a public statement (reported in the Selma, Alabama, Times Journal of that date, a reproduction of which is attached), in which he announced the aforesaid issuance of the subpoenas on behalf of the Dallas County Grand Jury. He stated that the principal business of the grand jury when it met on November 12 would be to investigate the role of the Justice Department 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 was quoted as having said, "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."

4. That the Civil Rights Division is charged with the enforcement of the civil rights statutes of the United States. It and the Department of Justice of which it is a part are, and at all times relevant hereto have been, units of the federal government engaged in the performance of federal functions.

5. That, at all times relevant to the acts alleged in the complaint, John Doar was and now is First Assistant to the Assistant Attorney General

in charge of the Civil Rights Division of the United States Department of Justice. As such, he is, in addition to being my principal assistant, 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 were and now are qualified attorneys at law on the Civil Rights Division's trial staff for voting rights cases. Prior to November 6, 1963, Thelton Henderson was a qualified attorney at law on the said trial staff. He resigned from that position on November 6, 1963, and his resignation was accepted, effective on that date.

6. That, at all times relevant to the acts alleged in the complaint, John Doar, Richard Wasserstrom, David H. Marlin, Arvid A. Sather, Kenneth McIntyre and I were and now are on the payroll of the United States of America, were and now are paid by checks drawn on the Treasury of the United States of America and were and now are subject, in the performance of our official functions, only to the control of our superior officers in the Department of Justice. The foregoing was true of Thelton Henderson prior to his resignation from the Department of Justice effective November 6, 1963.

7. That, during the times relevant to the acts alleged in the complaint, John Doar, Richard Wasserstrom, David H. Marlin, Arvid A. Sather, Kenneth McIntyre and I, and (prior to November 6, 1963), Thelton Henderson, were upon various occasions in the State of Alabama, pursuant to official instructions issued by the Attorney General, the Deputy Attorney General or me. Each of the above named individuals and I were there solely in the performance of our official duties as employees 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 United States Department of Justice.

8. That compliance with the aforesaid subpoenas by John Doar, Richard Wasserstrom, David H. Marlin, Arvid A. Sather, Kenneth

McIntyre and me or any of us would impede and interfere with the Civil Rights Division's effective performance of its functions and responsibilities in the following regards, among others:

a. The Civil Rights Division's trial staff for voting rights cases consists of 21 attorneys who are responsible for extensive and complex litigation to enforce the rights of United States citizens to participate in elections free from discrimination and intimidation. As of October 1, 1963, there were 33 voting discrimination suits and 12 voting intimidation suits in litigation. Members of the trial staff also perform most of the investigatory work in connection with voting rights cases. As of October 1, 1963, there were 56 discrimination and intimidation complaints under investigation; in addition, voting records of over 100 counties in six states have been inspected and have been or are being analyzed for evidence of discrimination. As a consequence of this tremendous workload, the time of these attorneys is fully occupied by their official duties. They work not only the specified eight-hour day but are required by the volume of work to put in extraordinarily large amounts of overtime; the voting rights trial staff puts in many thousands of hours of overtime. The diversion of the time and energies of any of these staff attorneys to state grand jury appearances would necessarily interfere with and obstruct the conduct of our overall program for enforcing voting rights.

b. I am in charge of the Civil Rights Division, and John Doar is my first assistant and deputy. Our time and energies are fully consumed in supervising and directing the complex operations of the Division. The diversion of the time and energies of either of us to state grand jury appearances would interfere with and obstruct the operations

of the entire Division in enforcing the civil rights statutes of the United States.

c. The threat that would be posed, if any attorney in the Civil Rights Division who was sent into the State of Alabama might be required to appear before a state grand jury, would stand as a constant deterrent to our dispatching attorneys there, because of the time and energy that would thus be expended unproductively. This threat, moreover, would stand as a source of harassment to attorneys performing the public business of the United States in the State of Alabama, and could not help but have an adverse impact on the efficiency and effectiveness with which they perform their official functions.

For these reasons, compliance with the aforesaid subpoenas by any of the federal officials and attorneys at whom they are directed would interfere with and obstruct, and hence irreparably injure, the proper enforcement of the civil rights statutes of the United States by the Civil Rights Division of the Department of Justice.

BURKE MARSHALL

Sworn to and subscribed before me
this 11th day of November, 1963.

Notary Public

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 19 63

You are hereby commanded to summon ... Burke Marshall .....

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the 13th. .....
day of November ..... 1963 to testify in regard to certain matters pending before them wherein
..... is defendant and make return thereof without delay.

this .....4th..... day of .....November..... 19 63

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 19 63

You are hereby commanded to summon ... John Doar .....

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the ....13th. .....
day of November ..... 19 63 to testify in regard to certain matters pending before them wherein
..... is defendant and make return thereof without delay.

this .....4th..... day of November 19 63

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 1963...

You are hereby commanded to summon ...Richard Wasserstrom.....

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the....13th.....
day of November..... 1963 to testify in regard to certain matters pending before them wherein
..... is defendant and make return thereof without delay.

this ....4th..... day of .....November..... 19.63

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 19.63..

You are hereby commanded to summon .....Dave Marland.....

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the...13th.....
day of November..... 1963 to testify in regard to certain matters pending before them wherein
..... is defendant and make return thereof without delay.

this .....4th..... day of .November..... 19.63

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 19 63

You are hereby commanded to summon Arvid Saither Alias Bud Saither

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the 13th. day of November 1963 to testify in regard to certain matters pending before them wherein ..... is defendant and make return thereof without delay.

this 4th. day of November 19 63

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY
To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY
Term 19 63

You are hereby commanded to summon Kenneth McIntyre

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the 13th. day of November 1963 to testify in regard to certain matters pending before them wherein ..... is defendant and make return thereof without delay.

this 4th. day of November 19 63.

M. H. HOUSTON, Clerk

No. .....

THE STATE OF ALABAMA
DALLAS COUNTY

To any Sheriff of the State of Alabama, Greetings:

THE CIRCUIT COURT OF DALLAS COUNTY

Term 1963

You are hereby commanded to summon Eaton Henderson Alias Thelton Henderson

Address United States Justice Department, Washington, D.C.

Address

Address

if to be found in your county, to be and appear before the Grand Jury, instanter, the 13th. day of November 1963. to testify in regard to certain matters pending before them wherein ..... is defendant and make return thereof without delay.

this 4th. day of November 1963.

M. H. HOUSTON, Clerk

MONTGOMERY, ALABAMA, ADVERTISER, OCTOBER 17, 1963

Cars Rented By Justice Dept. Used To Haul King

By BOB INGRAM

Automobiles rented by the U.S. Department of Justice were used Tuesday to transport Dr. Martin Luther King, Negro leader in the civil rights movement, from Birmingham to a rally in Selma and thence to Montgomery's municipal airport.

Dallas County Sheriff James G. Clark told The Advertiser that he personally saw King being driven into Selma in a 1963 four-door blue Chevrolet Impala bearing license tags (No. 3-51403) issued to Hertz U-Drive-It of Montgomery.

He added that an investigation, triple-checked by his department, revealed that this automobile was rented Sept. 14 at 7:37 p.m. by Kenneth G. McIntyre, a member of the staff of the Civil Rights Division of the Justice Department (rental No. 462006).

* * *

FURTHER INVESTIGATION showed that a charge card (code No. 1909-237-0007-0-NA) was used to rent the car. The card was issued to the Justice Department, Civil Rights Division, Washington 25, D.C.

The sheriff said another automobile, a 1964 Ford, also rented by Hertz to the Justice Department, was used to bring King from Selma to Montgomery following the rally.

Clark's statement brought a quick denial from a Justice Department spokesman in Washington.

Edwin Guthman, the department's information officer and one of Attorney General Robert F. Kennedy's right hand men, told The Advertiser that Felton Henderson, a Negro departmental staff member, picked up King at the Gaston Motel in Birmingham and drove him to the New Pilgrim Baptist Church in that city.

* * *

"HENDERSON NEEDED to interview King and the only chance he had was in driving him from the motel to the church," Guthman said.

"King got out of the car at the church and he did not go to Selma in that vehicle. The story to the contrary is absolutely false."

Guthman added that the car did not leave Birmingham Tuesday.

Informed of this denial Wednesday night, Clark replied:

"I personally saw King being driven into Selma in the Chevrolet rented by the Justice Department. As a matter of fact, I have four witnesses, travelling with me in two unmarked cars bearing Dallas County tags, who followed this vehicle for 8.2 miles on Highway 22 north of Selma right onto the grounds of the church where King spoke.

* * *

"I RECOGNIZED King as a passenger riding on the right front seat of this car. A Negro man was driving the car and two other Negro men were on the back seat."

"In the confusion following the rally, we lost surveillance of the Chevrolet," the sheriff continued, "but we have information that he subsequently was transported to Dannelly Field in a 1964 white Ford Galaxie bearing license plates No. 3-19040. We have determined that this automobile was rented by Kenneth McIntyre from the Montgomery Hertz station at 8:55 p.m. Tuesday."

In further rebutting Guthman's denial, Clark said he also could produce witnesses who saw King being driven from Birmingham in the first car.

* * *

Gov. George C. Wallace, when informed of the matter, issued a statement in which he said he was "not surprised" that King was being transported by the Justice Department.

Said Wallace:

"I have been informed that Atty. Gen. Kennedy's Justice Department has provided Martin Luther King with transportation while he is in the State of Alabama. In fact, he has been travelling throughout the state in vehicles rented by the Justice Department.

* * *

"This is not surprising to me—but it is a matter which should be called to the attention of the people of this country. A racial agitator and troublemaker who has caused demonstrations to occur throughout the United States can now apparently travel at the expense of the U. S. government."

It was further learned that on at least one occasion the rented Chevrolet used by King was used by John Doar, one of the Justice Department's top civil rights attorneys. Doar has spent much time in Alabama in recent months, during the school integration developments.

A crowd of about 1,200 heard King's speech at the First Baptist Church in Selma, a city torn by disorder in recent weeks.

King urged the Selma Negroes to continue their efforts to become registered voters.

OFFICE OF THE SOLICITOR
FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA
COUNTY COURT HOUSE
MONTGOMERY 4, ALABAMA

WILLIAM F. THETFORD, SOLICITOR
MAURY D. SMITH, DEPUTY SOLICITOR
FRANK W. RIGGS, III, DEPUTY SOLICITOR

October 28, 1963

Honorable Ben Hardeman
U. S. District Attorney
Post Office Building
Montgomery, Alabama

Dear Mr. Hardeman:

The Governor of Alabama has charged that the Civil Rights Division of the United States Department of Justice has been furnishing transportation for racial agitators in Alabama. This charge has been denied by the Department of Justice.

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. It is our desire to conduct a completely fair and impartial investigation in this matter. Should the Justice Department have witnesses available to testify, I will be glad to bring them before the Grand Jury.

Yours very truly,

William F. Thetford

WILLIAM F. THETFORD

WFT/bbj

November 4, 1963

AIR MAIL-SPECIAL DELIVERY

Honorable William F. Thetford
Solicitor
Fifteenth Judicial Circuit of Alabama
County Court House
Montgomery 4, Alabama

Dear Mr. Thetford:

Mr. Hardeman has forwarded to me your letter of October 28, in which you state that you are submitting evidence to the November Grand Jury "as a matter of public interest" relating to charges concerning the use of automobiles rented by Department of Justice lawyers.

Your letter states that no violation of state law is involved.

In view of this fact, I see no point in furnishing witnesses to testify in a secret proceeding on a matter admittedly beyond the scope of the Grand Jury's legitimate inquiry. The facts on this matter have been given to the public through a statement issued by the Department on October 18, 1963.

For your information I enclose a copy of the statement.

Very truly yours,

Enclosure

BURKE MARSHALL
Assistant Attorney General
Civil Rights Division

cc: Hon. Don Hardeman
U. S. Attorney
Montgomery, Ala.

SELMA, ALABAMA, TIMES-JOURNAL, November 7, 1963

The principal business of the Dallas County Grand Jury, which will meet on November 12, will be to investigate the role of the Justice Department in the racial unrest in this area, Circuit Solicitor Blanchard McLeod declared today.

"We do not intend to call off our investigation just because a part of the truth has been told," McLeod said. "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."

McLeod's statement came on the basis of an admission by the Justice Department that a car rented by the department had been used to transport Martin Luther King from Birmingham to Selma for a speaking engagement in mid-October. The Justice Department had earlier denied the charges.

McLeod disclosed that subpoenas had been sent to several Justice Department officials, ordering their appearance before the grand jury, and he speculated that,

"As soon as they found out what we were doing and realized that they would have to tell the truth under oath, they decided to admit that a Justice Department car had been used to bring King to Selma."

Since some of the Justice Department officials and employees to whom the subpoenas were sent do not live in Alabama, they cannot be required to appear before the grand jury, McLeod explained, but he added that he was interested to see if the federal government would honor the requests for their appearances. The subpoenas were sent by registered mail, he said.

"At the time that we gave information to the Justice Department that one of the cars rented by them was used to transport King to Selma, they denied it and accused us of lying. Yet at that time the Justice Department had all the facts they have now and they also had all their employees available for questioning."

McLeod called Justice Department Attorney Thelton Henderson the "scapegoat" in the case, pointing out that Henderson doubtless did not make arrangements for King's ride to Selma alone.

Sheriff Jim Clark had earlier called Henderson the scapegoat of the affair. In a statement issued yesterday, Clark said.

"In the light of the over-all activity of the Justice Department in fomenting civil disobedience in Alabama, it is particularly regrettable that they have seen fit to make Thelton Henderson, a Negro Justice Department lawyer, the official scapegoat of its misconduct.

"The lie that was told in denying the charge made by officials of the State of Alabama and the sheriff's department of Dallas County is indicative of many other untrue statements made by the civil rights division of the Justice Department and racial agitators such as Martin Luther King."

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ALABAMA

NORTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. _____
BLANCHARD McLEOD, ET AL., Defendants.	)	

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) 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, indicat 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

> 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),

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*/ See, e.g., Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (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); Helms 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 disposed 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 (1858).

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 harrassment 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.**/

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*/ See also United States v. Inaba, 291 Fed. 416 (E.D. Wash. 1923); United States v. Babcock, 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, 426-28 (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

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*/ See Application of United Elec. Workers, 111 F. Supp. 858, 866-67 n. 26 (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