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November 9, 1963

MEMORANDUM

re: Dallas County, Alabama, Grand Jury Subpoenas

As a result of the Thelton Henderson incident involving the transportation of Martin Luther King from Birmingham to Selma, Alabama on October 13 in a car rented by the Department of Justice for official use, the Dallas County Grand Jury was instituted an investigation. The only information available regarding the subject of the investigation is the statement of the County Solicitor that the principal business of the Grand Jury when it meets on November 12 will be to investigate the role of the Department of Justice in the racial unrest in the area. In an earlier letter of the then Solicitor of Montgomery County to the local United States Attorney he stated that while there appeared to be no violation of state law involved in the Henderson-King incident, he was submitting such evidence as may be available to our November Grand Jury as a matter of public interest".## The Clerk of the Circuit of Dallas County has issued subpoenas directing the appearance before the County Grand Jury of certain officials and attorneys of the Civil Rights Division of this Department to testify

4/## ##FN1

FN1 Presumably the reference was to the Montgomery County Grand Jury.

DLC #8

Wiretap Surveillance of Dr. King and the SCLC

Location	Installed	Discontinued
King's home	11/8/63	4/30/65
New York City apartment	8/14/64	9/8/64
Hyatt House, Los Angeles	4/24/64	4/26/64
Hyatt House, Los Angeles	7/7/64	7/9/64
Claridge Hotel, Atlantic City	8/22/64	8/27/64
SCLC, Atlanta	11/8/63	6/21/66
SCLC, New York	10/24/63	1/24/64
	7/31/64	7/31/64

(u)

Microphone Surveillance of Dr. King: Jan. 64-Nov. 65

Location	Installed
Willard Hotel, Washington, D.C.	1/5/64
Shroeder Hotel, Milwaukee	1/27/64
Hilton Hawaiian Village, Honolulu	2/18/64
Ambassador Hotel, Los Angeles	2/20/64
Hyatt House, Los Angeles	2/22/64
Statler Hotel, Detroit	3/19/64
Senator Motel, Sacramento	4/23/64
Hyatt House Motel, Los Angeles	7/7/64
Manger Hotel, Savannah	9/28/64
Park Sheraton, New York	1/8/65
Americana Hotel, New York	1/28/65
Park Sheraton, New York	3/29/65
Sheraton Atlantic, New York	5/12/65
Astor Hotel, New York	10/14/65
New York Hilton, New York	10/28/65
Americana Hotel, New York	11/29/65

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Returning to December 1963 the Bureau learned through one of the taps that King was going to meet with President Johnson. Hoover approved sending to the White House the monograph about King that had been previously disseminated but recalled by Attorney General Kennedy. Hoover did not advise the Attorney General of his intention. In fact, for some time after President Kennedy's assassination, Hoover communicated directly with the White House and did not always inform the Attorney General of what he was doing. (U)

Also in December, presumably sensing an opportunity because of a new President to become more aggressive in their effort to discredit King, the Bureau had a one day conference at Headquarters to explore the communist influence in racial matters and to "discuss avenues of approach to exposing King's unholy alliance with the CPUSA". A 21 item working paper was prepared in advance of the meeting. Sullivan characterized King as a "dupe of the communists but also a man of low character". Sullivan prepared a memorandum for his superiors reporting the results of the December 23 meeting. The meeting was attended by two agents from Atlanta, Sullivan and four other men from Headquarters. Sullivan reported that the meeting pointed up the need for further information on six points. Four dealt with SCLC, its money and its personnel. The other two dealt specifically with King and his personal life. Sullivan stated, "We will, at the proper time when it can be done without embarassment to the Bureau, expose King as an immoral opportunist who is not a sincere person but is exploiting the racial situation for personal gain... [We] will expose King for the clerical fraud and Marxist he is at the first opportunity". It was agreed to continue the security investigation of King for ninety days and to give the case priority attention. (u)

D. 1964

In January 1964 King was named "Man of the Year" by Time Magazine. On a UPI press release announcing the selection, Hoover wrote: "They had to dig deep in the garbage to come up with this one". On January 8, 1964 a memo was prepared by Sullivan recommending getting King off of his pedestal and replacing him with another of the Bureau's choosing. The idea was endorsed by Hoover. Headquarters told its Atlanta office to start sending daily memos about King. In a follow up to the December 23, 1963 meeting the Bureau began a review of the tax returns for the previous 5 years of King, SCLC and the Gandhi Society; the Director instructed Atlanta to seek information of adverse views of King or SCLC from within the Negro movement, stating these would be good four counterintelligence; (u)

the Director instructed New York to stay alert for tax evasion information on King or his organizations and to provide information of any effort to utilize the media to enhance King's image. Obviously, these instructions pertained to information that might be obtained through tesurs and misurs. (u)

The first microphone surveillances of King occurred in January 1964 at the Willard Hotel. An eight page summary of the tape was prepared and delivered to Walter Jenkins of the White House staff. [deleted pursuant to (b)(7)(C).....] Hoover rejected a recommendation that the Attorney General get a copy. Sullivan pointed out that Kennedy might reprimand King, thereby foreclosing the possibility of developing similar information. Sullivan said it was important to have such information in order to completely discredit King as a leader of the Negro people. In briefing Jenkins, Cartha DeLoach acknowledged that the Director wanted additional information prior to discussing it with certain friends-meaning, among others, the media. (u)

On January 27, 1964 Sullivan approved another misur at a Milwaukee hotel. The recommending memo pointed out that because police would be nearby, [deleted pursuant to (b)(7)(C) .....] Hoover wrote: "I don't share the conjecture - .....]. (u)

The Attorney General was advised that King met in New York with ...(b)(7)(C).... and others in January. Also in January, [(b)(7)(C) was overheard calling King a "sucker", "ignorant", "inexperienced", a "bad writer" and "without business sense". (u)

On January 17, 1964 Headquarters approved discontinuance of the coverage at SCLC in New York because of the office's inactivity. Coverage was to be reconsidered if the office became active. Hoover testified before the House Appropriations

Committee in January and made some off-the-record remarks about King and the communist influence in the racial movement, which caused a public furor when they were discussed in a Joseph Alsop newspaper column in April. (U)

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On February 12, 1964 the Director in a memo to the Atlanta office, referred to a conversation in which [deleted pursuant to (b)(7)(C).....] Hoover instructed Atlanta to be alert to [-(b)(7)(C)....]for counter-intelligence purposes. He indicated he wanted to capitalize on it and welcomed suggestions as to how it could be done. (U)

On February 13, 1964, Assistant Attorney General Burke Marshall sent files to the White House concerning King,[(b)(7)(C)]

[..(b)(7)(C)..He made particular reference to a September 1963 memo he sent to the Director concerning his, Marshall's, conversation with King in which he provided King with specific information about [...(b)(7)(C).....]. Marshall wanted President Johnson to know of King's background. He did not know that the Bureau had been providing the White House with such information. DeLoach sent Hoover a memorandum about Marshall's letter and a meeting DeLoach had with Bill Moyers and Walter Jenkins about the letter. He reported that the White House mistrusted Attorney General Kennedy's motives in providing the files. Personal marginalia written on the memo by Hoover indicates his dislike of Marshall and Deputy Attorney General Katzenbach.(u)

In response to information about a rumored plot to assassinate King, Headquarters sent Atlanta a memo on the eighteenth stating that the Bureau was to be advised promptly of information concerning violence to be directed against King. Finally in February the Director advised the New York and Atlanta offices to gather all previous references to King's forthcoming book and put them in one memorandum so that the Bureau could take some action in counterintelligence or otherwise "to discredit King or otherwise neutralize his effectiveness because of communist influence on him."(u)

King met on February 29 with [...(b)(7)(C)....] in New York City.(u)

When King went to Hawaii in February,, agents from San Francisco were sent to the island to install microphones in his hotel. Sullivan justified the installation as an attempt to obtain facts about King [..(b)(7)(C).so that ....' might be used against him.(u)

In March 1964, conversations continued to be intercepted and reported. Also in March King was approached by two people in government: one was an invitation from Sargent Shriver to consult on a poverty study being done by OEO; the other was a

discussion with a member of the State Department (friend of the Kennedy's) about King's participating in a civil rights memorial for President Kennedy. Among the comments on the Bureau memo about these contacts were that it was shocking, in view of Attorney General and White House knowledge of King's Communist Party connections, that is was disturbing, particularly because King was "...an individual so fraught with evil." (u)

On March 4, it was recommended to Sullivan and approved by Hoover that the Attorney General be given the results of the Willard Hotel misur and more recent misurs in Hawaii and Los Angeles. Evans was to tell the Attorney General that King shouldn't be told of the information. He was provided the information now because Berl Bernhard was scheduled to interview King in connection with a possible memorial to President Kennedy and it was thought that the Attorney General might cancel the interview. The White House was also provided with the more recent information. (u)

On March 9, 1964 (b)(7)(C) met with King in Atlanta. In March, the Bureau proposed and carried out several significant actions against King. They installed a misur on Sullivan's authorization in a Detroit hotel where King was staying. After learning that Marquette University was going to award King an honorary degree, Hoover approved having the SAC in Milwaukee give the Chancellor of the University a monograph about King that cited his communist party connections and referred to his being a moral degenerate. Marquette had previously honored Hoover and the Bureau memo that recommended this action thought it was "shocking" that the University would also honor King. (u)

(b)(7)(C) ....., whom King was considering adding to his staff, attended a party in New York at the Soviet Mission. As a counterintelligence activity, the FBI provided the New York Daily News with this information for a news article which was published. The Director turned down a request of Representative Smith of Virginia for information about ...(b)(7)(C) .....

with the notation, "not now". King was photographed by the FBI in Los Angeles with an aide and

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In April 1964, DeLoach briefed Senator Saltonstall (Mass.) and Springfield College President Glenn Olds (now President of Kent State University) about King in an unsuccessful effort to prevent the awarding of an honorary degree. Also in April Joseph Alsop published the article concerning King, communist connections, and Hoover's January testimony concerning communist influence on racial matters. King responded by criticizing the Bureau's concern with communism and not with racial problems.(U)

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in regard to certain matters pending before them. This memorandum considers (1) the extent to which the Attorney General, as head of the Department of Justice, may properly claim that the testimony of such officials and attorneys is privileged, and (2) the remedies which may be available in the event the claim of privilege is denied by the judges of the County Court. The discussion below indicates that in the circumstances here involved it will be necessary to file a somewhat excessive claim of privilege if it is to be at all effective and that doubt exists as to the availability of a speedy remedy for obtaining the release of witnesses incarcerated for contempt. This emphasizes the desirability of securing relief, if possible, through a federal court injunction rather than through reliance on a claim of privilege.

13 I.

10 THE PRIVILEGE QUESTION

The courts have recognized that in certain circumstances the executive branch of the Federal Government is entitled to claim a privilege against the disclosure in judicial proceedings of information in its possession. At the outset it should be noted that the Supreme Court has held that the claim must be formally made by the head of the agency involved and

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that the court itself is to determine whether the circumstances are appropriate for the claim. United States v. Reynolds, 345 U.S. 1. Circumstances which have been recognized by the courts as appropriate are the following:

10(a) State secrets, military and diplomatic. United States v. Reynolds, supra, 7; Wigmore, Evidence, (McNaughton rev. 1961), 2378.

10(b) The identity of informers. Roviaro v. United States, 353 U.S. 53, 59, Wigmore, op. cit., pp. 761-772.

10(c) Internal communications within the Government. Kaiser Aluminum Co. v. United States, 141 Ct. Cl. 38, 157 F. Supp. 939; Continental Distilling Corp. v. Humphrey, 17 F.R.D. 237 (D.D.C.); E.W. Bliss Co. v. United States, 201 F. Supp. 175 (N.D. Ohio).

10(d) Probably matters subject to a pending investigation which would be prejudiced by a disclosure and which may involve charges as yet uncorroborated. Wigmore, op. cit., pp. 807-808.

Much of the testimony to be sought by the Grand Jury from officers of the Department of Justice will undoubtedly fall within the last three of the privileged categories. On the other hand, it may well be that the Grand Jury will propound questions relating to the official duties of the witnesses or concerning matters they learned in their official capacity, neither of which fall within any of these categories of privilege. In this posture two alternatives are analytically open: (1) to claim privilege with regard to all matters involving official duties or knowledge; (2) to assert privilege only as to the recognized categories and instruct the witnesses that as to other questions, following the procedure specified in Departmental regulations, 28 CFR 16.1-2,[2] they are to ask the court for leave to refer the matter to the Attorney General for his determination as to whether it is

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2/ 28 C.F.R. 16.1 is probably not limited to documents and information contained in the files of the Department but is broad enough to cover information or material dealing with governmental information acquired in the course of the officer's official duties. Prior to the 1958 amendment to R.S. 161 (5 U.S.C. 22) that section was frequently regarded as a statutory basis for claiming privilege against disclosure of official information. Since the amendment it would appear that this privilege rests on rules 'established in the law of evidence' (United States v. Reynolds, supra, 6-7), or on the constitutional doctrine of separation of powers. (See Wigmore, op. cit., pp. 2378-2378, Schwartz & Jacoby, Government Litigation (1962 ed.) 529-530), or both.

privileged and, if so, whether he desires to claim it. It is evident that the latter procedure is neither desirable nor practical. First, since it concedes that some of the questions to be asked may not be privileged, it will encourage the Grand Jury to adopt a policy of prolonged harrassment, and embroil the Department in numerous and potentially endless controversies with the court. Second, it is apt to jeopardize the witnesses in that an unfriendly court may possibly refuse to grant the witness any opportunity to obtain a ruling from the Attorney General and then take the position that the witness has no valid excuse for not testifying since the Attorney General has not claimed privilege. The witness will either have to answer or be held in contempt. While the alternative procedure may involve an excessive claim of privilege in some marginal situations, it would seem to be the only realistic course to adopt if privilege is to be relied on at all.

It should also be noted that in Reynolds, involving the disclosure of military secrets, the Supreme Court stated that in ruling on the claim of privilege it is relevent to inquire into the necessity for the evidence; '[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot

overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori where necessity is dubious, a formal claim of privilege made under the circumstances of this case, will have to prevail." 345 U.S. at 11. In the context of the present circumstances it is difficult to see how a convincing showing of necessity can be made in behalf of the Grand Jury to overcome a formal claim of privilege made by the Attorney General.

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II.

10 Remedies

This portion of the memorandum examines the question of what remedies are available in the event the judge of the county court rejects the Attorney General's claim of privilege and initiates contempt proceedings against the witnesses for their failure to answer questions on the basis of the claim. The two possible federal remedies are removal of the contempt proceeding to the federal courts pursuant to 28 U.S.C. 1442, or in the event of commitment of witnesses for contempt their release through federal habeas corpus proceedings under 28 U.S.C. 2241.

a. Removal. 28 U.S.C. 1442(a) authorizes the removal to the federal courts of "a civil action or criminal prosecution commenced in a State court" against--

10 "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

The right of removal under section 1442 has been narrowly construed by the Supreme Court. Thus in Maryland v. Soper

(No. 2), 270 U.S. 36 (1926), the Court held that an indictment in a State court charging federal prohibition agents with a conspiracy to obstruct justice by giving false testimony at a coroner's inquest was not removable under that section since the response of the officers was not "an act . . . under federal authority" (p. 42), and hence not within the scope of section 1442. The State was therefore permitted to try the agents, even though the subject under investigation by the coroner had been a homicide allegedly committed by the agents in the course of a raid on an illegal still. Both Maryland v. Soper and Colorado v. Symes, 286 U.S. 510 (1932), make it clear that a federal officer, to remove a State criminal case against him to a federal court, must "be candid, specific and positive in explaining his relation to the transactions growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer," see Maryland v. Soper (No. 1), 270 U.S. 9, 33 (1926).

Here, the acts charged would be refusals to testify which in the view of the State court justified contempt proceedings. The federal officer, in order to remove those proceedings, would have to show that his refusal to testify was itself clearly

directed by the Attorney General and thus within the performance of his official duties. As indicated above, it is contemplated that the claim will extend to any testimony regarding the performance by the officer of his official duties or involving information acquired in the course of such duties. But the Grand Jury may be expected to propound questions about alleged activities of the officers which, if true, might not be protected by the claim of privilege. As to such questions a simple refusal to answer on the ground of superior orders would probably be inadequate under the decisions to justify removal of a contempt proceeding, whether civil or criminal, to the federal courts. Thus the officer's right to removal may not be perfectly clear in all cases, depending on the questions asked. Moreover, one District Court has held that contempt proceedings, even those involving federal officers, are inherently incapable of removal under section 1442, since they are neither "civil actions" nor "criminal prosecutions commenced in a state court." In re Haisig, 178 F. Supp. 270 (N.D. Ill., 1959). Although the court also relied on the insufficiency of the removal petition, the decision would support a denial of any contempt citation to the State court--

an order which is non-appealable. See 28 U.S.C. 1447(d). Moreover, the contempt may be tried summarily, with sentence passed and commitment ordered immediately. In such a case the application of section 1442 seems completely foreclosed since section 1446 provides that removal petitions may be filed only before trial. Accordingly, reliance on removal would seem to be dangerous.

b. Habeas corpus. Habeas corpus is probably unavailable to a federal officer held in custody pursuant to a State court contempt judgment. 28 U.S.C. 2254 declares that the writ shall not be granted in behalf of a person in custody pursuant to the judgment of a State court "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner". This section, adopted in 1948, no longer permits habeas corpus where adequate State corrective remedies are available.[3] It is difficult to argue that section 2254 would

44/ 3/ ### FN3 The decisional law prior to 1948 was to the effect that while habeas corpus would normally not issue before State appeal remedies were exhausted, in cases of urgency, in-

be inapplicable to the instant case, since 28 U.S.C. 2241(c), which specifies the cases in which habeas corpus may be granted, specifically refers to "custody for an act done or omitted in pursuance of an Act of Congress", and to "custody in violation of the Constitution or laws or treaties of the United States." Indeed, the Senate Report accompanying its amendment of section 2254 (in which form it was enacted) stated that its purpose as it related to federal officers was--

> "* * * to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty." S. Rep. 1559, 80th Cong., 2d Sess. (1948).

[redacted]

volving the authority and operations of the General Government," Ex parte Royall, 117 U.S. 241, 251 (1886), federal courts could exercise their discretion to discharge federal officers from State custody even though those remedies had not been exhausted. See Boske v. Comingore, 177 U.S. 459 (1900); Ohio v. Thomas, 173 U.S. 276 (1899); Hunter v. Wood, 209 U.S. 205 (1908); In re Neagle, 135 U.S. 1 (1890). In several cases the writ was refused prior to exhaustion of State remedies either because the officer appeared unimportant to government functioning or the alleged crime was serious (usually homicide). See Drury v. Lewis, 200 U.S. 1 (1906); Birch v. Humbleson, 31 F. 2d 611 (C.A. 4, 1929).

This seems to imply that federal officers are protected by habeas corpus only prior to judgment. Thus it is difficult to envisage habeas corpus as a remedy for obtaining the release of federal officers held in custody pursuant to a State court judgment of contempt prior to exhaustion of available State appellate remedies. Of course, if the local authorities should place the officer in custody prior to a judgment of contempt, whether the custody is valid or not, habeas corpus would be available. This would be a preferable remedy to removal, since a denial of habeas corpus is appealable.

In the event it is decided to invoke the claim of privilege or it is necessary to do so, a draft of a formal claim for the signature of the Attorney General is attached.