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May 31, 2011

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Re: Subpoena for Boston College Interview Tapes

Dear Mr. Scholes:

I have been asked by the Brehon Law Society to communicate concerns about the subpoena issued to Boston College at the behest of the Police Service of Northern Ireland (PSNI). The subpoena was issued by the United States Attorney's Office acting through appropriate intermediaries. I understand the subpoena seeks tapes recorded by two individuals, Brendan Hughes and Delours Price, as part of the university's Oral History Archive on the Troubles in Northern Ireland. One of those individuals, Brendan Hughes, died in 2008. The oral history project focuses on events during the conflict in Northern Ireland between 1970 and 1998.

It is my understanding that counsel for the university is examining the basis for this subpoena, which threatens its academic mission and its important role in the peace process. Boston College is a highly respected university in the United States, which has long devoted institutional capital, faculty time, and archival resources to promote the peace process and preserve the historical record. The university has already publicly expressed its view that release of the tapes may threaten peace initiatives. I know their view was not lightly expressed. We have had no contact with the university or its counsel, although I suspect some of our Society's concerns will parallel those of the university. I will leave to university counsel its response to the serious threat to academic integrity and the follow-on implications of that threat posed by the subpoena. I can also see how forced disclosure of these tapes will make many sources of information for academics and the press very reluctant to make further disclosures, impeding both important academic research and vital press inquiries.

We anticipate the reason advanced to U.S. authorities in support of the subpoena is an investigation into dissident activities, and/or killings or disappearances

during the period of conflict. Neither ground would provide a good faith basis for the subpoena of archival tapes for reasons described below.

First, allow me to express one point of clarification. We do not support the activities of dissidents, which we view as dangerous to the peace process and the rule of law. But we view as equally dangerous any abuse of the rule of law.

I would first like to address the role of the tapes in any investigation of killings and disappearances during the conflict period.

Statements on tapes that were not sworn and were intended not to be disclosed until after the deaths of the people making the recordings have no legal value. It must be recognized that this is "information" and not "evidence". It is not sworn testimony which could be used in a court of law. These statements may be in whole or in part self-serving and, for all anyone knows, contain deliberate falsehoods designed to discredit or defame others.

Of more immediate concern is the Article 2 issue (right to life under the European Convention of Human Rights). Maintaining confidentiality of the tapes is not merely to protect the individuals whose information is recorded but to protect life, liberty and security of the person in relation to those whom that information might affect or implicate.

The Rosemary Nelson Inquiry noted that RUC "intelligence" about her was leaked before her murder, and threatening and abusive remarks by RUC officers became part of the public landscape. Further, violent sectarian elements felt legitimate in targeting her because of the police assault on Mrs. Nelson before her murder. We are also well aware of the history of disclosure by certain police personnel of personal information about other victims of those same sectarian elements. We recognize and applaud the efforts of Chief Constable Baggott and former Chief Constable Sir Hugh Orde, as we do the younger leadership they promoted, to reform the PSNI. But we are sufficiently practical to know elements of the old RUC remain in the PSNI with their own malevolent agendas.

It has been suggested in this country that one objective of unreformed elements within the PSNI and their political allies is to use information in the tapes to discredit senior figures committed to the peace process. It is well known that Mr. Hughes and Ms. Price harbored substantial reservations about the peace process. They also expressed strong views about what they viewed as failures by Her Majesty's Government to honor commitments and by Republican leadership to pursue Republican goals. These criticisms have a place in establishing historical context and recording the different views of significant participants in historical events. However these views have no legal value and those who seek their disclosure must be prepared to answer to the wider community why their enthusiasm about reaching into historical archives in a highly selective investigation of memoirs does not give evidence of another agenda.

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Our concern about selective, and bad faith, investigation also rests against the backdrop of history.

We are particularly mindful that the British government has refused to cooperate fully in turning over evidence to Irish investigators in the Dublin Monaghan bombings case, which witnessed the largest loss of life on the island of Ireland during the conflict. Please see the addendum to this letter for the basis of this view.

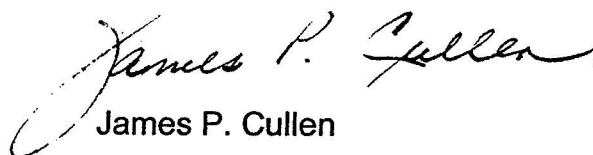
The Dublin Monaghan bombings and other direct attacks on the rule of law launched by rogue elements of the state security apparatus in Northern Ireland deserve primacy of attention if the PSNI and Public Prosecution Service are intent on investigating and prosecuting offenses that occurred during the conflict period. The hard won improvement in the reputation of the PSNI and successor to the DPP are put at risk by selective prosecution pursuits if the most serious offense of the conflict remains subject to obstruction of investigations of international terrorism conducted by an adjacent jurisdiction.

If the focus of the investigation that gave rise to the subpoena is any current (i.e., post conflict period) suspected criminal activities of dissidents, then the investigation should pursue those activities. Evidence relevant to any recent activities will not be found in historical tapes of events that occurred prior to 1998.

I recognize that the subpoena may be in aid of a "fishing expedition" that masks an inability to gather evidence of recent criminal conduct by dissident targets. Fishing expeditions played out through subpoenas seeking information that is not relevant to pending charges serves only to bring into disrepute police work that lacks professional energy and strategic valuation of its direction. Layering a political agenda into prosecutorial activities, such as the fiasco witnessed in a raid on legislative offices at Stormont during the absence of Sir Hugh Orde, should be left in history's dustbin.

Direct attacks on academic research and preservation of historical recollections are ill-suited prosecutorial activities unless the archival documentation is (a) admissible and non-cumulative; (b) no other source of critical evidence is available after diligent and professional police investigation; and (c) the societal cost of infringement of historical archives, the subsequent unwillingness of historical figures to trust historians or journalists, damage to the peace process and endangerment of people's lives is out weighed by the archival material. I earnestly invite you to review the balance of that scale.

Respectfully yours,


James P. Cullen

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cc: Rt. Hon. Owen Paterson, M.P.
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Addendum

Mr. Justice Henry Barron, a retired Justice of the Supreme Court of Ireland, was asked by the Taoiseach (Prime Minister of Ireland) to conduct an investigation into the Dublin/ Monaghan bombings ten years after Yorkshire Television and other sources indicated that Loyalists who carried out the bombing were assisted by elements in the British security forces.

After conducting his investigation, Justice Barron noted "A finding that members of the security forces in Northern Ireland could have been involved in the bombings is neither fanciful nor absurd, given the number of instances in which similar illegal activity has been proven." In referring to one key site at which preparations for the bombing were concluded, Justice Barron said "It is also likely that members of the UDR and RUC either participated in, or were aware of those preparations." Justice Barron further observed: "A number of those suspected for the bombings were reliably said to have had relationships with British Intelligence and / or RUC Special Branch officers. It is reasonable to assume that exchanges of information took place."

Most tellingly, Justice Barron noted that his official inquiry was obstructed by the British authorities. "Correspondence with the Northern Ireland Office has undoubtedly produced some useful information; but its value has been reduced by the reluctance to make original documents available and the refusal to supply other information on security grounds." A subsequent Dail (Irish Parliament) investigation revealed that a copy of one key document offered to Justice Barron had been redacted. British authorities refused to show Justice Barron or a subsequent Dail Commission investigator, Patrick McEntee, S.C., the original document without the redaction.

Justice Barron's report went on to state:

"In investigating allegations of collusion in relation to the Dublin and Monaghan bombings, this Inquiry faces all the problems identified by the Stevens Inquiry, with the additional complication that it has no authority or powers within the jurisdiction of Northern Ireland."

The then Assistant Commissioner of the London Metropolitan Police, Sir John Stevens, wrote frankly about obstruction in his three investigation reports of collusion between Loyalist death squads and security force personnel. Among the instances of obstruction was the arson attack on his evidence room in the most secure military/police facility in Northern Ireland. Other obstruction tactics by British Army Intelligence and the RUC Special Branch that he described included "willful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder."