

Bush's Enduring Theories of Martial Law

The failure to hold anyone accountable for torture derives from extraordinary post-9/11 legal theories that made the President all-powerful during "wartime" and established what amounted to martial law in the United States, a condition that continues to this day, writes retired JAG Major Todd E. Pierce.

By Todd E. Pierce

On Oct. 23, 2001, the Office of Legal Counsel issued a legal opinion that would shock most Americans if they realized its full implications. By all appearances, it is still in effect, judging by military surveillance operations taking place in the U.S. by the Defense Department and its National Security Agency (NSA). The opinion was entitled: "Authority for Use of Military Force to Combat Terrorist Activities **within the United States**" (emphasis in original).

What is the Office of Legal Counsel, or "OLC" for short, that made such a bold move? It is a secretive office in the Justice Department. The purpose of the OLC is straightforward. It sits as a de facto court for the White House that decides the legal questions that set the boundaries for how the federal government runs day-to-day. Be they the highest presidential appointee or lowliest bureaucrat, a government official who complies with the OLC's opinion is generally immune from later prosecution or liability.

An official is immune, that is, if the lawyers were providing "good faith legal advice" and not, in fact, just following orders to "legalize" an otherwise criminal act. Such tainted "good faith legal advice" would not then serve to protect their clients. Lawyers can't help in committing crimes, and when they do, even OLC lawyers can be prosecuted for knowingly helping plan or commit a crime. In fact, a lawyer was prosecuted at Nuremberg for his role in committing war crimes.

The lawyers who wrote the OLC opinion about the use of military force within the United States were Robert Delahunty, now teaching "law" at St. Thomas University Law School, Minneapolis, and John Yoo, who is back teaching the same sort of "law" at Boalt Law School, University of California, Berkeley. By "the same sort of law" is meant their idiosyncratic belief that the President, acting as "Commander in Chief," has dictatorial-like powers.

This is the "unitary executive theory", a radically un-American, unconstitutional and extra-legal ideology that former Vice President and torture enthusiast Dick Cheney has been pushing since the Iran-Contra Affair. In other countries, but particularly Germany from 1933 to 1945, in which citizens lived under a dictatorship, this was called "prerogative" government, as described by

German Jewish lawyers. Both Delahunty and Yoo continue working to shoehorn this radical legal theory into respectability with prolific writing of law review articles promoting it.

The argument was that because of these prerogative powers, the President was subject to no law, neither constitutional law nor international law. The Oct. 23, 2001 opinion is particularly dangerous, as it essentially granted the President martial law authority, meaning the authority to act outside the Constitution.

To reiterate, the conclusion the OLC drew was that the President has constitutional authority to use the armed forces in military operations against those deemed to be terrorists *within the United States*. Consequently, "these operations generally would not be subject to the constraints of the Fourth Amendment, so long as the armed forces are undertaking a military function."

This is a frightening prospect since the Fourth Amendment is what protects us against unreasonable searches and seizures, which can lead to arbitrary arrests. (The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.")

Furthermore, according to Delahunty and Yoo, terrorists operate within the continental United States and "conceal themselves within the domestic society and economy," which makes it difficult to identify them. By this logic, everyone is now "suspect."

Furthermore, they wrote, 9/11 created a situation "in which the battlefield has occurred, and may occur, at dispersed locations and intervals within the American homeland itself. As a result, efforts to fight terrorism may require not only the usual wartime regulations of domestic affairs, but also military actions that have normally occurred abroad."

This opinion by Delahunty and Yoo formed a legal basis for a state of martial law which the Bush administration took to mean that they could fight a "war" against terrorism outside the U.S. Constitution but inside the U.S. geographic area as a "military state," operating just the way paragons of legality Mubarak's Egypt and Pinochet's Chile did.

Bush officials argued this was due to necessity, but in fact that was fallacious, as the U.S. military is not, and should not be, considered an antiterrorist force. Militaries exist to defend against foreign armies

attacking, not to conduct the police work required for counter-terrorism. But as we've seen, when a military takes control of a country, occupying it as in Iraq and Afghanistan, or the Israeli occupation of Palestine, it enforces martial law on the civilians living there, in other words, the military operates as a dictatorship, or as our Supreme Court called it, "martial rule."

So in writing an opinion authorizing martial law, Delahunty/Yoo asserted that the Fourth Amendment's protections do not apply to domestic military operations in the United States, regardless of citizenship. They wrote that Federal Armed Forces must be free to use force when they deemed it necessary without being constrained by the Fourth Amendment, "even though force would be intentionally directed against persons known to be citizens."

Additionally, as a final blow against the Constitution, Delahunty and Yoo stated: "First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.'"

This OLC opinion laid the foundation for all the extra-constitutional actions by the Bush administration that would follow. They are still carried on by the Obama administration today with their assertions that the President can kill American citizens with a drone without any due process whether inside or outside the U.S.

(The Fifth Amendment provides that no citizen should be deprived life, liberty or property without due process of law. However, in September of 2011, American-born and educated Anwar Al-Awlaki was targeted and killed in a U.S. drone strike in Yemen. Also killed in a drone strike was Samir Khan. Al-Awlaki's 16-year-old son, Denver-born Abdulrahman al-Awlaki, who died while attending a barbeque with cousins in Yemen the next month. For more information about the killings, see investigative journalist Jeremy Scahill's account in *Inside America's Dirty Wars* or *The Nation*, April 24, 2013)

<http://www.thenation.com/article/173980/inside-americas-dirty-wars>.

It would also explain the military operation currently being conducted against American citizens by the NSA, a component of the U.S. Defense Department, in violation of the Fourth Amendment.

The fruits of that opinion can be seen with an out-of-control CIA that has been on display in the Torture Report summary released by Senate Select Committee on Intelligence Chair Diane Feinstein in late 2014. The acts of torture described in this summary are war crimes because they were committed in the context of,

and associated with, wars beginning in 2001.

But the war criminals, which could include some lawyers, may believe that there is no accountability for the perpetrators of these war crimes because they are part of, and have the protection of what Professor

Michael Glennon describes as a “double government” in his book *National Security and Double Government*, and in an article by the same name. Glennon’s book puts into print, in the open and in the so-called mainstream, what some have known for years. The CIA and other national security agencies constitute a “deep state,” operating outside public view and, as we know now, without constitutional constraints or oversight.

But beyond setting the U.S. on a course of perpetual war and destroying democracy, the economy and the Constitution, the opportunity was there for those within the deep state to protect their power even more by placing the country under “martial law.” Though we don’t normally see troops on the streets controlling and keeping an eye on us, and most citizens have not felt the effects of a state of martial law, it is in effect with the constant NSA surveillance now permitted by law and the potential of military detention under Section 1021 of the 2012 National Defense Authorization Act (NDAA).

Even though these statutes seem to ratify the underlying military authority put into place, that doesn’t change its character as “martial law.” Martial law exists whenever the military assumes authority over civilian officials. When General DeWitt ordered the removal of the Japanese Americans from the West Coast in 1942, a martial law act, that character did not change because Congress, to its later shame, ratified it by providing penalties for violating DeWitt’s order.

In the Twenty-first Century, martial law was effectively imposed when the military (the Defense Department’s NSA) was given the military mission of surveillance of the population (us), the same mission they were given when Iraq was invaded by the U.S. and the NSA mission was to spy on Iraqi civilians.

In the U.S., the NSA was tasked to monitor all of our thoughts as expressed in our communications as if the military were conducting a counter-insurgency operation. The Minneapolis antiwar activists being investigated by a grand jury represent an example of what occurs when a country is under martial law, as is the persecution of Palestinian-American Rasmia Odeh for her nonviolent political activities which are critical of foreign policy in the Mideast. It is not required under martial law that only the military enforces it, civilian law enforcement authority is used to enforce it as well. [For more information, see stopfbi.net and uspcn.org.]

While seeming to withdraw portions of the Oct. 23, 2001 opinion, a 2008 OLC memo corroborates the meaning of the Oct. 23, 2001 opinion fundamentally, but offered that “appropriate caution should be exercised” before relying on the opinion.

Because everything is wrapped in secrecy, we have no way of knowing current interpretations, except that we know the NSA/military is still spying on us through all of our communications and Section 1021 of the 2012 NDAA is still on the books as public law, providing for military detention “pending disposition under the law of war.”

For anyone skeptical that this constitutes martial law, a vigorous advocate of martial law for World War II, Charles Fairman of Harvard University, considered a martial law expert, writing in 1942, justified it to include the removal of the Japanese-Americans from the West Coast that was conducted under the military authority of General DeWitt.

Fairman cited this routine aspect of martial law from World War II-era Hawaii: “No action should be maintained against a member of the armed forces for any act under color of duty, or against any person employed in an activity essential to the national defense for any act within the scope of such employment; nor should such a person suffer judgment by default, or be subpoenaed as a witness.”

We have seen this principle applied since 2001 in those numerous cases against various national security officials which are routinely dismissed on the grounds of “state secrets,” which can be presumed to be what the torturers are relying upon.

This is not the first instance of a “dual state” in what was once considered an enlightened, democratic country. A German-Jewish lawyer, Ernst Fraenkel, wrote as the opening line in 1939, in a book of the same name: “Martial law provides the constitution of the Third Reich.” Fraenkel broke German government into the “prerogative state” and the “normative state.” The prerogative state constituted that part of the German state under martial law and run by the security apparatuses. Prerogative power, which Delahunty and Yoo still advocate for, is martial law, or “martial rule” as our Supreme Court once described it.

But we don’t need to permit our country to fall into the abyss as Germany did, or even to be a less severe version. We do not need to give up our constitutional rights any more in exchange for “safety,” knowing as we do that to suppress speech and intimidate the citizenry is really only to protect the incompetents of the “deep state,” who are driving the U.S. into an abyss, though different than the German example, an abyss nevertheless.

All we have to do is to demand accountability, starting with the torturers and

their legal enablers, whoever they may be shown to be. Demand accountability of our government for these war crimes committed by our government, or call on international organizations and foreign nations that may be willing to assert universal jurisdiction over war crimes.

That is what it took to bring war criminal Augusto Pinochet to justice. There is no statute of limitations for war crimes, so we must not give up until torturers and enablers are held accountable for what the Torture Report has shown to be war crimes. We can do no less unless we want future generations to demand of us: why didn't we do something?

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A Disappointing 'Selma' Film

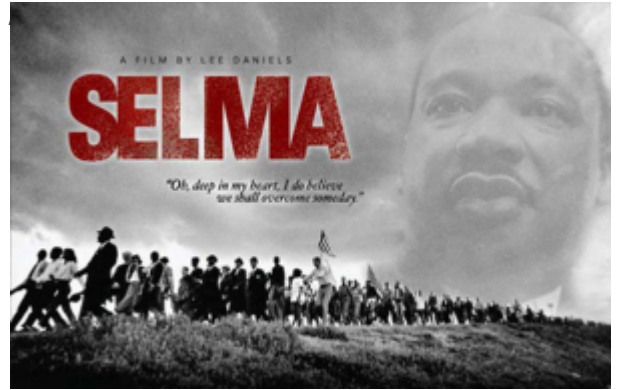
Exclusive: At a moment when voting and other civil rights are under attack in America, a new movie "Selma" recounts the struggle, led by Martin Luther King Jr., to secure the African-American right to vote. But the film falls short in both telling key facts and conveying the drama, says James DiEugenio.

By James DiEugenio

In post-World War II American history, with the exception of John F. Kennedy, perhaps no other figure grips the public imagination like Martin Luther King Jr. does. And as with Kennedy, questions about the original verdict in his assassination help fuel the interest in his life.

But unlike President Kennedy, King was never a politician. He was a Baptist minister by training and vocation. But once he did such a fine job organizing the Montgomery Bus Boycott of 1955-56, he launched himself into the political

arena by becoming the de facto leader of the



In other words, a man who had been trained as a religious pastor dedicated himself to breaking down the centuries old walls of segregation and discrimination in the South. And towards the end of his life, King had broadened his scope further. He spoke out in opposition to the Vietnam War and on the question of the distribution of wealth in America. A man trained in religion aimed his sights at political, social and economic goals.

Further, he refused to take any monetary gain for his efforts, even though his notoriety managed to bring millions of dollars to his cause. Because of all this, King has attained a status something like a secular saint in American culture, explaining why some of the books about him have religiously referenced titles e.g. David Garrow's *Bearing the Cross*, and Taylor Branch's trilogy: *Parting the Waters*, *Pillar of Fire* and *At Canaan's Edge*.

This aspect of King's career a kind of precursor to liberation theology is particularly accentuated because, unlike Malcolm X, King did not advocate or threaten violence in his protest campaigns. In fact, under the influence of Bayard Rustin, King had studied the effectiveness of the non-violent crusades of Gandhi against the British Raj in India. And in 1959, he actually visited India to study how Gandhi had done his work. (*Martin Luther King Jr.: The FBI File*, by Michael Friedly and David Gallen, p. 20)

King's Origins

King was born into a middle-class family in Atlanta in 1929, coming from a line of local Baptist preachers. King's father practiced at the famous Ebenezer Baptist Church in Atlanta, a church that had a strong influence on the local civil rights movement. (James Cone, *Martin and Malcolm and America*, pgs. 20-22)

King's father was proud to be a member of the black middle-class. He liked to say that his children never lived in a rented house, and he never owned a car for very long with payments due. But at the age of six, little Martin was stunned when a white school friend of his told him he could not associate with him anymore since he was "a colored boy." (ibid, p. 23)

King went home and told his parents. They sat him down and explained the terrible and true facts about what whites had done to black Americans since slavery began. King recalled later that the question in his mind after this was, "How can I love a race of people who hate me?"

His parents said that whatever he felt about it was irrelevant. He could not hate the white race for the simple reason that he was a Christian. But his father also demonstrated to him that he did not have to take personal insults by turning the other cheek. King Sr. said, "When I stand up, I want everyone to know that a *man* is standing there." (ibid)

For instance, once when his father was stopped by a policeman, the officer told him, "Boy, show me your license." To which King Sr., replied by pointing at young Martin and saying, "That's a boy there. I'm, a man, I'm Reverend King." (ibid, p. 24) He later told his son, "Nobody can make a slave out of you if you don't think live a slave."

At Booker T. Washington High School, King first became known for his remarkable speaking abilities. On a return trip one night from an oratorical contest, the bus driver demanded that King and his teacher give up their seats near the front of the bus to some newly boarding whites. King did not want to comply. The driver then started cursing at them "and calling us black sons of bitches." (ibid, p. 25)

King still would not move. But his teacher said they had to obey the law. The two stood in the aisle for 90 miles from Valdosta to Atlanta. King never forgot that humiliation. And he also added, "I don't think I have ever been so deeply angry in my life."

An Unlikely Course

King was such an exceptional student that he skipped two grades of high school. When local Morehouse College announced it would accept any high school student who could pass their entrance exam, King took them up on their offer. He graduated from Morehouse at age 19 in 1948, and enrolled at Crozier Theological Seminary in Chester, Pennsylvania.

Moving north, King found out that racism in America was not confined to south of the Mason-Dixon line. At Crozier, King had a gun pulled on him by a white student from North Carolina who accused him of messing up his room. Another time, he and his friends were refused service at a restaurant in New Jersey. The owner then removed them from the establishment at gunpoint. When King tried to file charges, none of the white witnesses would agree to testify in court. (ibid, p. 28)

At Boston University, during his Ph. D. studies, King was exposed to Walter Rauschenbusch's classic 1907 book, *Christianity and the Social Crisis*. This was a seminal work of the Social Gospel movement. (ibid, p. 29) One of its most famous dictums is, "Whoever uncouples the religious and the social life has not understood Jesus. Whoever sets any bounds for the reconstructive power of the religious life over the social relations and institutions of men, to that extent denies the faith of the Master." King now had the theological underpinnings to gird him for his career. This is why he always said he came to Gandhi through Jesus. (Garrow, p. 75)

King graduated from Boston University in 1955. He and his wife Coretta could have stayed in the Northeast. He was offered positions in New York and Massachusetts. (Cone, p. 32) Instead he chose the Dexter Avenue Baptist Church in Montgomery, Alabama, as his first posting. At first, King thought he would be a pastor for a few years and then step into the academic world and be a professor. (ibid, p. 33)

But in a colossal piece of serendipity, it was in that year and that place that both Claudette Colvin and Rosa Parks were arrested for refusing to give up their bus seats to whites. The local civil rights leaders decided that the Parks incident was an ideal vehicle with which to challenge both the law and the Montgomery bus company. (Garrow, p. 16)

A Reluctant Leader

Contrary to popular belief, King did not step in and take over the Montgomery movement. At first, he did not even want to get involved. He told his fellow minister, Ralph Abernathy, he would think over attending a local pastors' meeting. (ibid, p. 17)

Abernathy convinced King not to just attend, but to hold the meeting at his own church. As everyone knows, the success of the Montgomery bus boycott essentially created the civil rights movement. It also launched King's national career, and started the Southern Christian Leadership Conference, which was the fundraising and decision-making arm of the King/Abernathy organization.

What should not be forgotten is that this was a perfect example of a man growing into a moment. For example, during that year-long boycott, King visited a friend of his from the Crozier seminary. The friend later said he could barely recognize King from his college days. He said he had aged 20 years in just five. But further, "He wanders around in a daze, asking himself: Why has God seen fit to catapult me into such a situation." (Garrow, p. 76)

If ever there was an example of a stumbling into his great place in life, it was

King. But as most commentators would agree, after the Montgomery boycott, the SCLC did not really come close to repeating that kind of spectacular success until Kennedy's inauguration. This was because, even though the U.S. Supreme Court's *Brown vs. Board* court decision in 1954 on school integration had been handed down during Dwight Eisenhower's presidency (and two other civil rights landmarks the Civil Rights Acts of 1957 and 1960 also occurred during the Eisenhower administration), Eisenhower and Vice President Richard Nixon were not deeply interested in advocating for or advancing civil rights.

Laws also are only effective if they are enforced. And the enforcement of these new rules was, at best, tepid under the GOP administration despite the notable exception of Eisenhower's intervention in the desegregation of schools in Little Rock, Arkansas, in 1957. But the pace for change was about to accelerate.

A White House Ally

In October 1960, Sen. John Kennedy, the Democratic presidential nominee, told his civil rights advisory board that he would use the two legislative acts to break the back of voting discrimination in the South. (Harry Golden, *Mr. Kennedy and the Negroes*, p. 139)

This was a stark contrast to Eisenhower telling a reporter in 1956 that the *Brown* decision had set back progress in the South by at least 15 years. Or Nixon saying, "If the law goes further than public opinion can be brought along to support at a particular time, it may prove to do more harm than good." (ibid, p. 61)

Kennedy's promise of action, plus his intervention for King during the 1960 campaign while King was in jail, raised expectations once Kennedy was in office. By openly allying himself with King, Kennedy was giving the civil rights movement ballast and hope. So when Attorney General Robert Kennedy began to file segregation and voting rights cases under the dormant laws that Eisenhower and Nixon had neglected, something unforeseen happened: the civil rights movement began to broaden and act on its own on multiple fronts.

The movement finally had someone in the White House who had sympathy for them and with whom they had some influence. In his first memo to Kennedy on the subject, civil rights adviser Harris Wofford wrote that the problem with the civil rights cause was that there had been no real leadership in the Executive Branch or Congress to supplement the work of the courts.

So when President Kennedy began ordering integration and affirmative action in government positions and business contracts and altering the composition of the Civil Rights Commission and Robert Kennedy began hiring more civil rights

lawyers and investigators and filing more and more state cases a synergy entered the calculus.

Soon, there was a powerful new momentum for racial justice. So much so that in June 1963, Kennedy made the clearest affirmation on the need for civil rights by a president in 100 years. He followed up by sending a new civil rights bill to Congress and then, in July, he made a surprise announcement at a press conference: He would back King's upcoming March on Washington in support of the bill. (Irving Bernstein, *Promises Kept*, p. 114)

Political Battles

After Kennedy's assassination on Nov. 22, 1963, Congress passed and President Lyndon Johnson signed into law much of Kennedy's civil rights bill with an emphasis on equal access to public places. But Johnson had stripped the act of an important voting rights aspect, since he thought it would be filibustered otherwise.

So there still needed to be further legislation on voting rights, which whites in parts of the Deep South staunchly opposed. One of those places was Alabama under the rule of segregationist Gov. George Wallace.

The voting rights battle would put King and civil rights activists back in the streets. Overall, there were four spectacular demonstrations that King was involved in: the Montgomery bus boycott, his showdown with police chief Bull Connor in Birmingham, his March on Washington and his face-off with Wallace and Dallas County Sheriff Jim Clark in Selma in 1965. The last is the subject of the new film *Selma* produced by Oprah Winfrey and Brad Pitt.

It's hard to believe considering the incredible historic drama around King's career that there have been few widely distributed movies either feature films or documentaries made about his life. In 1970, a cinema-verité-style documentary was produced for theaters by Ely Landau: *King: A Filmed Record from Montgomery to Memphis*. In 2004, PBS produced a more conventional documentary, *Citizen King*, which was a part of its *American Experience* series.

In 1978, writer-director Abby Mann made a three-night, 300-minute mini-series for NBC which starred Paul Winfield as King and Cicely Tyson as his wife. In 2001, HBO films produced a television movie called *Boycott* about the Montgomery movement, starring Jeffrey Wright as King and Terrence Howard as Abernathy. I have seen all of the above except the last (which, in fairness to it, is supposed to be the best.) To me, none of them really did justice to King, but the Mann mini-series was particularly poor.

Before addressing the current film, let us lay in the historical background

about the Selma demonstrations. Alabama, because of George Wallace's high profile, had been a target of the civil rights movement for years. Young organizers like John Lewis and Jim Bevel had tried to organize voting rights drives there prior to 1965.

But the white power structure was not going to give black citizens the franchise, keeping blacks from the polls with devices such as the poll tax, the grandfather clause, and literacy tests. Showing how effective these tactics were, Alabama had an all-white state legislature. (Garrow, p. 371)

Further, though Selma was 57 percent black, only 130 African-Americans were registered to vote in 1964. In that year, Lewis had tried to register 50 blacks, but they were arrested. Afterwards, a state judge imposed an order saying any gathering of more than three people in public to discuss civil rights was against the law. This unconstitutional edict was clearly aimed at preventing civil rights activists from organizing mass demonstrations. (Branch, *Pillar of Fire*, p. 553)

Taking to the Streets

Prior to Jim Bevel convincing King to take on the challenge, the two main voter rights organizations in Selma, which was located in Dallas County, were the Dallas County Voters League (DCVL) and the Student Non-Violent Coordinating Committee (SNCC). Dianne Nash, a young volunteer, was a major force in SNCC. (Although she is portrayed in the film, her presence is minimal. And the husband/wife relationship between her and Bevel is not noted.)

As many historians have written, King was really the glue that kept the civil rights movement together for two reasons: first, his remarkable oratorical powers combined with his genial personality made him indispensable to the outreach of SCLC, and second, he did not present himself as a radical like Malcolm X or Stokely Carmichael. He could work with the politicians inside the system.

King also was in the center of the movement, with the NAACP on his right and groups like SNCC on his left. So, as the film depicts, when King decided on the Selma drive, some of those representing other factions did not welcome his, or the SCLC's, presence.

King decided to take on Selma because he noted some factors in his favor. First, the newly elected mayor was a moderate. His police chief, Wilson Baker, was also a relatively reasonable man. But the sheriff, Jim Clark, was another Bull Connor: an inveterate, violent racist determined to stop King.

Baker was planning to employ the soft-line tactics used so adroitly against the

SCLC by Laurie Pritchett in Albany, Georgia. But King understood that the courthouse in Selma was under Clark's jurisdiction. So this is where the SCLC planned its first marches. The idea was to make Clark into another Connor: a symbol of the ugly, near-psychotic racism of the Old South and to use that image in the media to shame the consciences of Northern liberals.

This approach had worked to give Kennedy the votes he needed to submit his Civil Rights Act. The SCLC was going to use Clark and Selma to give Johnson the boost he needed to pass a Voting Rights Act. The fact that Clark had both Klansmen and National States Rights Party members on his force made this tactic naturally enticing.

The Battle Begins

Sheriff Clark controlled not just the courthouse square, but also the outlying areas. The SCLC understood the tactical importance of this division in duties as did police Chief Baker, who favored a less confrontational strategy. But Baker and the mayor could not overcome the stubbornness of the state police officers and Wallace, who had a lot invested in this conflict. In 1963, Wallace had been forcibly removed from the front gate of the University of Alabama when Kennedy enforced a court order to integrate the college. The governor did not want to suffer another public reversal.

In January 1965, the SCLC began with marches on the courthouse in order to get their people registered. Accompanied by the likes of Nazi George Lincoln Rockwell and states rights fanatic J. B. Stoner, Sheriff Clark escorted the demonstrators to a nearby alley and said applicants would be registered one by one. (Garrow, pgs. 378-79) But that did not happen.

The next day, when the marchers arrived again, they refused to move to the alley as requested. When Clark forcibly removed them from the sidewalk, there was mild resistance. This quickly escalated into police brutality and mass arrests. The arrests were based on the previously mentioned ruling by the state judge. This repeated itself the next day. By that time, there were over 200 people in jail, including King. The SCLC paid for an ad in the *New York Times* saying that Clark had more people in the Selma jail than were registered to vote.

Since there were 60 newsmen on the scene, the media attention worked. President Johnson began to talk about both a voting rights bill and an amendment. Further, U.S. District Judge Daniel Thomas issued a restraining order barring Selma authorities from hindering applicants. But Clark would not let up. He arrested people with writs saying "charges to be named later". (Branch, p. 562)

When Annie Lee Cooper and others showed up the next day, Clark pushed some of

the demonstrators. Cooper punched him. As the deputies threw her to the ground, she screamed up at Clark, "I wish you would hit me, you scum!" Clark did. And it made the front pages. (Garrow, p. 381. The film shows this incident, but strangely, her great line is not in the film.)

As more and more national attention focused on the confrontation, King began to direct the crusade from inside the jail. He asked for congressional visits, more of Johnson's intervention, and also for private citizens to join in from all areas of America.

Federal Judge Thomas issued another order, saying Selma must drop Alabama's difficult literacy test and at least 100 new applicants must be registered per day. Johnson made a public statement approving this new policy and endorsing the demonstrators' aims. (ibid, p. 385. LBJ's powerful statement is eliminated by the screenwriter, a revealing excision that I will return to later.)

The SCLC could have bailed King out of prison the first day. However, in order to heighten the tension, they didn't. When he did leave, he flew to Washington and met with Vice President Hubert Humphrey, Attorney General Nicolas Katzenbach and Johnson to discuss the specifics of a voting rights bill. (ibid, p. 387. Again, this is not in the film.)

An Expanding Confrontation

The demonstrations spread outside of Selma, to places like Camden and Marion. At night, in Marion which was under Clark's control newsman Richard Valeriani had his skull fractured and demonstrator Jimmie Lee Jackson was shot and killed. Wallace then banned all nighttime protests and labeled the SCLC as "professional agitators with pro-Communist affiliations." (ibid, p. 392)

In the wake of Jackson's death and Wallace's smear, the SCLC decided to cap the drive with a march to Montgomery from Selma, a distance of over 50 miles. King returned to Washington before the march and was told by Johnson that that he thought he could get the voting rights bill through. They also talked about protection for the march. (ibid, p. 395)

There ended up being three attempts at a march. King was absent from the first attempt which, as the film shows, was led by Hosea Williams and John Lewis. As the march crossed the Edmund Pettus Bridge, it was stopped by a large detachment of state troopers. They ordered the marchers back. When the marchers hesitated, they were attacked by batons, tear gas and troopers on horseback. In the background, white Southerners cheered the violence. Over 70 people went to the hospital, including Lewis. Police Chief Baker finally arrived at the scene to berate Sheriff Clark.

King led the second march. This time, he stopped in front of the troopers. Wallace had ordered the troopers to open up an alley for the procession to pass. (ibid, p. 404) But King did not utilize it. He led a chorus of "We Shall Overcome" and turned around.

That evening a group of three visiting Massachusetts ministers were attacked by white thugs. One, the Reverend James J. Reeb of Boston suffered a blow to the skull from which he later died. Johnson issued a statement condemning the violence and said he was writing a bill on voting rights. He would address Congress himself on the issue. (ibid, p. 405) He did so, and most believe he gave the best speech of his life, echoing the words, "We shall overcome."

For the final march, Gov. Wallace said he could not guarantee the demonstrators' safety, so Johnson mobilized the National Guard under the direction of the Justice Department. The march proceeded successfully and King made a powerful speech in Montgomery, but not before there was one more death, Viola Liuzzo, a Northerner who came to Selma at King's urging. She was transporting some of the SCLC marchers back and forth during the procession and was killed by a Klan member.

The Movie's Narrative

The movie *Selma* begins with King dressing to accept the 1964 Nobel Peace Prize. We then cut to the bombing of four young black girls in Birmingham, murders that actually occurred the year before, after Kennedy's submission of his civil rights bill. To me, this was an acceptable use of dramatic license, since it showed that even though King was being honored abroad, there was still much violence awaiting the movement at home.

We then move to Selma where Annie Lee Cooper is being denied the right to vote by a registrar because she cannot name all 67 judges in Alabama. Next, the SCLC begins to move into Selma in preparation for the crusade. We watch as one of Nazi Rockwell's henchmen punches King in the lobby of a (now integrated) hotel.

Throughout the film, director Ava DuVernay posts facsimiles of FBI teletypes showing the surveillance that FBI Director J. Edgar Hoover was conducting on King. The FBI file on King went back as far as 1958 (Friedly and Gallen, p. 110), and it was greatly intensified in 1962 when King criticized Hoover about the lack of protection the FBI was giving civil rights workers.

The ultra-sensitive FBI Director promptly retaliated by calling a news conference and calling King the most notorious liar in America. (ibid, p. 43) Although there was an attempt at public reconciliation, it was only done for public appearances. Hoover's resentment toward King persisted until King's death

and some would say beyond that.

Hoover's effort to destroy King culminated in the manufacture of a so-called "suicide package," a message telling King that he was a "complete fraud" and a "moral imbecile." After two paragraphs of insults and invective, the letter said King's end was approaching and "you are done," repeating that phrase three times.

The letter concluded with: "there is only one thing for you to do. You know what that is. . . . There is but one way out for you. You better take it before your filthy, abnormal fraudulent self is bared to the nation." (Garrow, p. 373)

Enclosed with the letter was an audiotape of King telling some bawdy jokes and making some unkind comments about some friends and public figures. There were also the sounds purportedly of King engaging in sex with other women besides his wife. The film depicts Coretta King playing the tape for her husband but does not include the letter, whose absence is symptomatic of a serious failing of the film.

By not having the letter read verbatim, DuVernay passes up what surely would have been a dramatic highlight. But it also dilutes just how vicious the battle was between Hoover, King and the civil rights movement. Further, Hoover is barely depicted in the film. When he is, he is played by Dylan Baker, who does not resemble him and is not made up to look like him.

Misunderstood Role

And in Hoover's one scene, screenwriter Paul Webb portrays the FBI Director as some kind of efficient civil servant who reports to President Johnson on the surveillance and intelligence that he has on King. This is simply not accurate. In addition to the aforementioned "suicide package," during the time frame of the film, Hoover tried to get the business and political leaders of Atlanta not to follow through on a dinner to honor their most famous citizen.

Hoover also tried to prevent King from getting an audience at the Vatican. (Branch, pgs. 483, 569) By all accounts, these maneuvers had a serious deleterious psychological effect on King. He was deeply troubled that, one day, he would wake up and see these accusations splashed across the front page of a major newspaper, which is what Hoover tried to do on more than one occasion.

But, for some reason, screenwriter Webb and director DuVernay decided to leave almost all of this out. Instead, they do something just as inexplicable: They transfer the animus and obstructionism from Hoover to Johnson.

Johnson historian Mark Updegrave has complained about [this inaccuracy](#). If

anything he is too mild. For instance, the film clearly implies that the celebrated "suicide package" was sent to the SCLC Atlanta office because Hoover was abiding by Johnson's wishes. In other words, it was a joint venture to stop King's Selma drive.

In no account that I have read of this despicable act is there even the pretense for this being accurate, including the Church Committee Report where it first surfaced, down through the two leading biographies of King by Branch and Garrow, and even books which focus on this very subject, that is the campaign by Hoover against King.

At the time depicted in the film, Johnson was actually on friendly terms with King. On the eve of the Selma drive, he called King for some advice on presidential appointments. (Branch, p. 560) It's true that when King met with Johnson on his return from Oslo, Johnson told him that he did not think he had the votes to pass a Voting Rights Act.

As Andrew Young recalled, when King told him about this, Young asked what they should do in that case. King replied that they had to get the power for Johnson, which was one reason the Selma campaign began. (op. cit. Updegrave)

Further, unlike what the film depicts, Johnson did not need to call Hoover in to be briefed on what the FBI had on King because Hoover voluntarily would send Johnson reports on this activity. He did this for the same reason he sent the material to Attorney General Robert Kennedy. Hoover was trying to drive a wedge between these two national leaders and King. (Branch, p. 545)

The film also discounts the real reason that King passed up the chance to go through the opening left by Sheriff Clark on the second attempt to march to Montgomery. Johnson and his aides had been working with the federal judge to hold a hearing so that he could legally provide protection for the marchers.

King wanted to march before that hearing was held. So Johnson sent in a team of mediators, among them Kennedy's civil rights lawyer John Doar, to negotiate a truce so that no one would get hospitalized again. The film only shows this very briefly and it does not make clear Johnson's role in it.

To be sure, there was a falling-out between King and Johnson. But this occurred later after King began to rail against the administration for shortchanging the War on Poverty while spending billions of dollars on the Vietnam War. But that break occurred in 1967 when King made his blistering speech against the war in New York City.

No one has more disdain for President Johnson than I do for reversing so many of Kennedy's policies, but voting rights was not an example of this. And,

therefore, this is not a legitimate use of dramatic license.

It is instructive to compare the depiction of Hoover in this film with his portrayal in Mario Van Peebles' 1995 *Panther*. That was an accurate and honest portrayal of what Hoover's FBI did through its COINTELPRO attacks to decimate the Black Panther movement. That much-ignored film much more honestly than *Selma* depicts Hoover's role against the civil rights movement.

Other Shortcomings

Beyond that cheap shot against Johnson, *Selma* has other shortcomings. It contains most of the conflicts that occurred during the voting rights campaign and those moments presented remarkable opportunities in cinematic terms. I wish I could say DuVernay was up to them. But in my view, the direction, editing, and music scoring were all pretty much conventional and prosaic.

In fact, from what I have seen of HBO's *Boycott*, that television film holds its own technically and aesthetically with *Selma*. This film, with a more capable director, would have had much more brio and fire to it.

And this criticism extends to the acting. The best I can say about the major performances is that they were adequate, including Tim Roth as Wallace, Tom Wilkinson as Johnson, Carmen Ejogo as Coretta and David Oyelowo as King. With these kinds of roles at hand and with so much archival material available the director should have pushed the performers into the very breath of their characters, such as has occurred in other historical movies, i.e., Daniel Day-Lewis as Lincoln and Jack Nicholson as Jimmy Hoffa.

To put it mildly, I never got that feeling watching the film. In fact, the best performance in the film is by Oprah Winfrey as Annie Lee Cooper. She really understood and planned her character, and then got to the outer reaches of sensitivity to empathize with her. For me the best scene in the film is the early one with Cooper being denied her voting rights and much of that quality is due to Winfrey's acting.

And finally, the film passed up a real opportunity to add some electricity to the film. During the crusade in Selma, Malcolm X had a speaking engagement in nearby Tuskegee and was invited by two SCLC workers to visit Selma. He appeared at a press conference, met with staff members, gave a speech, and talked to the wives of King and Abernathy. Pretty much all we see of this is the last.

In my opinion, this would have been a great opportunity to dramatize the splits in the civil rights movement, to contrast Malcolm with King, and to show how Malcolm was not changing his approach and he was beginning to play a "good cop/bad cop" routine with King. Meaning that, if you don't give this American

Gandhi what he wants, you will have to deal with me.

The film ends with King giving his speech in Selma and captions denoting progress made that, for example, Andrew Young went on to be voted mayor of Atlanta twice and John Lewis a long-term congressman.

The film is supposed to be a commemoration of a long and brutal struggle, as well as a distillation of a great man. In this writer's opinion because of the script's biases and the director's lack of inspiration and imagination it does not do justice to its subject. We should have felt like we were being forced to the ground and pounded by Clark's baton. We should have been shaking with rage at Wallace's plotting in the state house. Most of all, we should have been outraged at Hoover's attempts to break King's spirit.

The film doesn't do these things. Therefore, I still await a picture that does justice to the great subject of Martin Luther King.

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