The United States of America and Anne M. Gorsuch, by their undersigned attorneys, bring this civil action to obtain declaratory relief and for their complaint against the defendants allege as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331, 1345.

2. The plaintiffs are the United States of America and Anne M. Gorsuch, in her official capacity as Administrator of the Environmental Protection Agency ("EPA").

3. The defendant House of Representatives of the United States ("House of Representatives") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the House of Representatives.

4. The defendant Committee on Public Works and Transportation of the House of Representatives ("the Committee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

5. The defendant the Honorable James L. Howard is the Chairman of the Committee. He is sued in his official capacity only.

6. The defendant Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of

the House of Representatives ("the Subcommittee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

7. The defendant the Honorable Elliott J. Levitas is the Chairman of the Subcommittee. He is sued in his official capacity only.

8. The defendant the Honorable Thomas P. O'Neill, as the Speaker of the House of Representatives, has the power to certify to the United States Attorney a statement of facts of an alleged failure by a witness to testify or produce subpoenaed documents to Congress and to request criminal prosecution of the witness under 2 U.S.C. § 194 for contempt of Congress. He is sued in his official capacity only.

9. The defendant Edmund L. Henshaw, Jr., is the Clerk of the House of Representatives. He is sued in his official capacity only.

10. The defendant Jack Russ is the Sergeant at Arms of the House of Representatives. He is sued in his official capacity only.

11. The defendant, James T. Molloy, the Doorkeeper of the House of Representatives, has the duty to deliver the certification of the Speaker of the House of Representatives requesting criminal prosecution under 2 U.S.C. §194 to the United States Attorney. He is sued in his official capacity only.

12. Venue properly resides in this judicial district pursuant to 28 U.S.C. § 1391(b).

13. This is a civil action seeking declaratory relief pursuant to 28 U.S.C. §2201 with respect to defendants' efforts, discussed below, to compel production of certain documents.

14. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 et seq., authorizes the President to take action at sites that contain hazardous waste. This Act authorizes action to remove or arrange for the removal of hazardous substances, pollutants, or contaminants released into the environment to protect the public health or welfare. 42 U.S.C. § 9604.

15. Funds for the administrative activities under CERCLA are provided in part through a tax on chemical and crude oil producers.

16. Pursuant to Executive Order 12316, August 14, 1981, 46 Fed. Reg. 42237, the President's responsibility for carrying out the provisions of CERCLA have been delegated, in part, to the Administrator of EPA.

17. Under CERCLA, EPA identifies hazardous waste sites to determine, among other things, potentially responsible parties. EPA also has the authority to seek criminal and civil penalties against those parties at such sites.

18. EPA has generated an interim priority list that targets approximately 160 hazardous waste sites throughout the country for investigation.

19. If EPA deems that legal action is necessary, it refers the matter to the Department of Justice.

20. On March 10, 1982, the Subcommittee opened hearings on certain environmental matters, which included the implementation of CERCLA.

21. On September 15, 1982, Chairman Levitas, on behalf of the Subcommittee, wrote a letter to Administrator Gorsuch (Attachment 1 hereto), which letter stated in pertinent part:

> . . . this letter, in conformance with the provisions of section 104(e)(2)(D) of [CERCLA], is to request that all information being reported to or otherwise being obtained by [EPA] or any others acquiring such information on behalf of [EPA], be made available to the subcommittee.

22. In order to respond to the Subcommittee's concerns, EPA has offered either to produce or make available for copying by the Subcommittee approximately 787,000 pages of documents, which would cost approximately $223,000 and would require an expenditure of more than 15,000 personnel hours. The Subcommittee has declined to review most of those documents.

23. EPA withheld from the Subcommittee certain documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. Those documents, which are part of open law enforcement files, are sensitive memoranda and notes reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials.

24. On November 16, 1982, the Subcommittee issued, and on November 22, 1982, the Subcommittee served on Administrator Gorsuch a subpoena ("the Subpoena") calling for her to appear before the Subcommittee on December 2, 1982 and to produce at that time the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of [CERCLA].

(Attachment 2 hereto, emphasis supplied).

25. After careful review, EPA, the Attorney General, as well as the President found that documents such as those referred to in paragraph 22 of this Complaint, that is, memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials, might, if disclosed, adversely affect pending enforcement action, overall enforcement policy, or the rights of individuals.

26. On November 30, 1982, the President concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and, pursuant to the authority vested in him by the Constitution and laws of the United States, instructed Administrator Gorsuch that such documents should not be

made available to Congress or the public except in extraordinary circumstances.

27. Upon receiving this instruction EPA reviewed the documents previously withheld from the Subcommittee, which then totalled seventy-four. On December 14, 1982, ten of those documents were produced, based upon a determination that dissemination of them would not adversely affect pending enforcement actions, overall enforcement policy or the rights of individuals. EPA continued to withhold the remaining sixty-four.

28. As of December 2, 1982, the return date of the Subpoena, EPA had not listed any sites as national priorities pursuant to Section 105(8)(B) of CERCLA. Accordingly, no documents of the type described in the Subpoena were in existence at any relevant time.

29. On December 2, 1982, Administrator Gorsuch appeared before the Subcommittee and advised it that no documents of the type described in the Subpoena were in existence. That appearance and advice constitute full compliance with the requirements of the Subpoena. Administrator Gorsuch also advised the Committee that the documents referred to in paragraph 26 of this Complaint were being withheld from the Subcommitee pursuant to the President's instruction. She tendered to the Subcommittee approximately five file boxes of documents which were responsive to the Subcommittee's apparent concerns, as best as EPA could perceive them, but the Subcommittee refused to accept delivery of those documents.

30. At the conclusion of the hearing on December 2, 1982, the Subcommittee passed a resolution finding Administrator Gorsuch in

contempt for failure to comply with the Subpoena and reporting the matter to the Committee. (Attachment 4 hereto).

31. On December 10, 1982, the Committee reported an alleged refusal of Administrator Gorsuch to comply with the Subpoena to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. (Attachment 5 hereto).

32. On December 16, 1982, the House of Representatives passed a resolution directing the Speaker to certify to the United States Attorney for the District of Columbia the report of the Committee on the alleged contumacious conduct of Administrator Gorsuch in failing and refusing to furnish documents in compliance with the Subpoena. H. Res. 632 (Attachment 6 hereto).

33. Section 194 of Title 2 provides:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

34. On December 17, 1982, Speaker O'Neill and Clerk of the House Henshaw certified to the United States Attorney for the District of Columbia an alleged failure and refusal of Administrator Gorsuch to produce subpoenaed documents to the Subcommittee. (Attachment 7 hereto).

35. The Sergeant at Arms delivered said certification to the United States Attorney for the District of Columbia on December 17, 1982.

36. The Subpoena exceeds the jurisdiction of the Subcommittee.

37. If the Subpoena were deemed to include a request for the production of any documents other than those concerning sites listed as national priorities pursuant to Section 105(8)(B) of CERCLA, the Subpoena is unlawful because it fails to describe the requested documents with adequate specificity.

38. The Executive Branch has both the constitutional and a common law privilege to ensure the confidentiality of its law enforcement files and its deliberative processes. Producing to the Subcommittee the documents referred to in paragraph 27 would contravene those privileges. Accordingly, even if the Subpoena were deemed to require Administrator Gorsuch to produce those documents, her refusal to do so was lawful in all respects.

39. The plaintiffs have offered to attempt to compromise this dispute, but the defendants continue to demand that all of the documents referred to in paragraph 27 of this Complaint be produced.

40. The defendants have not and cannot show any compelling need for those documents sufficient to overcome the plaintiffs' need to prevent their disclosure.

41. The acts of defendants complained of herein have injured plaintiffs by impairing their ability to meet their obligation to execute the laws of the United States faithfully, by impeding them in the lawful exercise of the powers conferred upon the Executive Branch by the Constitution and laws of the United States, by creating inconsistent obligations, and by damaging their reputation for obedience to the rule of law.

42. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

A. Enter a judgment declaring that Administrator Gorsuch has fully complied with all requirements of the Subpoena; or, in the alternative,

B. Enter a judgment declaring that, insofar as Administrator Gorsuch did not comply with the Subpoena, her non-compliance was lawful; and

C. Grant plaintiffs such other, further and different relief as the Court may deem just and equitable.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

RICHARD K. WILLARD
Deputy Assistant Attorney General

LEWIS K. WISE

ANDREW M. WOLFE

BETSY J. GREY

Attorneys, Department of Justice
Civil Division - Room 3531
10th & Pennsylvania Avenue, N.W.
Washington, D. C. 20530
Tel: (202) 633-4020

Attorneys for Plaintiffs United States of America and Anne M. Gorsuch

JAMES J. HOWARD, N.J., CHAIRMAN

Committee on Public Works and Transportation

U.S. House of Representatives
Room 2165, Rayburn House Office Building
Washington, D.C. 20515
[illegible]

B-376 Rayburn Building
Washington, D.C. 20515
September 15, 1982

Honorable Anne M. Gorsuch
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mrs. Gorsuch:

In March of this year, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation initiated a series of hearings to examine the regulation of hazardous and toxic substance releases into the environment and their effects on ground and surface water quality. As part of this review, the Subcommittee is examining the efforts being made by federal, state and local governments, and others, to carry out the provisions of the "Superfund" law, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510.

The effective conduct of this investigation will necessarily require the review of the progress being made to cleanup specific abandoned waste sites. Accordingly, this letter, in conformance with the provisions of Section 104(e)(2)(D) of P.L. 96-510, is to request that all information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency, be made available to the Subcommittee.

In that the Subcommittee's inquiry is of an ongoing nature, and can be expected to involve all activities underway in your Agency's ten regions, I recommend that you have the appropriate person on your staff contact Bob Prolman (225-3274) of the Subcommittee staff to work out the arrangements necessary to facilitate this request.

Exhibit 1

I look forward to your full cooperation and assistance in this matter.

With best wishes, I am,

Very truly yours,

Elliott H. Levitas
Chairman
Subcommittee on
Investigations and Oversight

EHL/tjm
cc: Mr. Robert Perry

ORIGINAL

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Robert S. Prolman and/or Sante J. Esposito

You are hereby commanded to summon ANNE M. GORSUCH, Administrator, United States Environmental Protection Agency, 401 M Street, S. W., Washington, D. C. 20460 to be and appear before the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives of the United States, of which the Hon. Elliott H. Levitas is chairman, and to produce all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980,"

in their chamber in the city of Washington, on December 2, 1982, at the hour of 10:00 a.m. then and there to testify touching matters of inquiry committed to said Committee; and he/she is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 16th day of November, 19 82

James J. Howard
Chairman

Attest:

Edmund L. Henshaw, Jr.
EDMUND L. HENSHAW, JR., Clerk

Exhibit 2

ORIGINAL

Subpena for ANNE M. GORSUCH
Administrator,
U.S. Environmental
Protection Agency
before the Committee on the

Served 1-12-82
R S Dick

House of Representatives

U.S. GOVERNMENT PRINTING OFFICE 88-420-A

THE WHITE HOUSE

WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

Exhibit 3

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

Office of the Attorney General
Washington, D. C. 20530

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
>
> "Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> "I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> "[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto . . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully re-examined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,

William French Smith
Attorney General

CONTEMPT RESOLUTION REPORTED BY SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

Be it resolved that the subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

Exhibit 4

CONTEMPT RESOLUTION REPORTED BY COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Resolved, That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

Exhibit 5

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

Exhibit 6

The Speaker's Room
U. S. House of Representatives
Washington, D. C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Exhibit 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	Civil Action No. 82-3583
v.	)	
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,	)	
Defendants.	)	

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, et al., Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	)	Civil Action No. 82-3583

POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
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INTRODUCTION

This suit for declaratory relief raises one legal issue: May Congress compel an Executive Branch official to produce sensitive materials from open law enforcement files even though the disclosure of those documents would, in the opinion of the President and the Attorney General, impair the President's ability to take care that the laws will be faithfully executed. Although the Executive Branch has historically withheld information of this sort from Congress under a claim of privilege, this is the first time in history that the Legislative Branch has cited an official of the Executive Branch for contempt of Congress for doing so.

By this suit, we seek from the Judicial Branch a resolution of the unprecedented constitutional impasse which now exists between the other two coordinate branches of the federal government. Only judicial intervention can prevent a stalemate between the other two branches that could result in a partial

paralysis of governmental operations. Historically, judicial resolution of controversies between Congress and the Executive has been rare, because confrontations such as the present one have been rare. Yet judicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues that give rise to this unique suit.

We ask this Court to declare that the Executive acted lawfully in withholding under a claim of privilege, certain documents sought by Congress.

STATEMENT OF THE CASE

On December 16, 1982 -- for the first time in history -- a House of Congress held the head of an Executive agency or department in contempt. That evening, the House of Representatives voted a contempt citation against Anne M. Gorsuch, Administrator of EPA, for her refusal to furnish a limited number of sensitive law enforcement documents demanded by a subcommittee subpoena. Mrs. Gorsuch's refusal to produce these documents was based on a determination -- shared by the President and the Attorney General -- that their production would impair performance of the President's constitutional duty to "take care that the laws be faithfully executed." The House's contempt vote occurred even though its subcommittee had no basis for concluding it had a particular need for the documents in question, since it had not yet reviewed the vast number of other documents EPA was producing for it. By certifying the contempt citation to the United States

Attorney for this District pursuant to 2 U.S.C. §§192, 194*/ the House of Representatives has demanded that the Executive Branch subject Mrs. Gorsuch to criminal prosecution for withholding the documents. The Chairman of the Subcommittee has gone so far as to threaten the United States Attorney and even the Attorney General with impeachment unless such a criminal action is commenced. 128 Cong. Rec. H10046 (daily ed. Dec. 16, 1982); 129 Cong. Rec. H30 (daily ed. Jan. 3, 1983).

The events leading to this extraordinary situation are not in dispute. They stem from an investigation by the Subcommittee on Oversight and Investigations of the Committee on Public Works and Transportation [the "Levitas Subcommittee"] of EPA's efforts to enforce federal laws governing hazardous waste contamination of water resources. H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982). The investigation included the manner in which EPA was implementing the Comprehensive Environmental Response Compensation

*/ Section 194 of Title 2 provides in relevant part:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required,. . . [by] any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session,. . . it shall be the duty of the . . . Speaker of the House, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the . . . House . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

and Liability Act of 1980, 42 U.S.C. § 9601 et seq., commonly known as "the Superfund Act."

A. Executive Responsibilities For Enforcing The Superfund Act.

The Superfund Act was designed to provide the federal government with the tools to abate the risks posed by hundreds of inactive and abandoned hazardous waste sites across the country. The Act provides two basic mechanisms by which the federal government may effect the cleanup of such sites. One mechanism allows the government to expend money from the $1.6 billion "Superfund," which is derived from congressional appropriations and taxes on crude oil, petroleum products and certain chemical products. See 42 U.S.C. §9631. Once spent, the money may be recovered from parties made liable for the cleanup costs pursuant to Section 107 of the Act. See 42 U.S.C. §9607. The second mechanism authorizes the President to require the Attorney General to institute judicial proceedings to "secure such relief as may be necessary to abate" an imminent and substantial danger to the public health or welfare or the environment. See 42 U.S.C. §9606. See generally United States v. Charles Price, 688 F.2d 204 (3rd Cir. 1982); United States v. Reilly Tar & Chemical Corporation, 546 F. Supp. 1100 (D. Minn. 1982). Declaration of Robert M. Perry ("Perry Dec."), submitted herewith, para. 4.

On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage." By that order, the President delegated part of his authority to carry out the provisions of the Superfund Act to the Administrator of EPA. Pursuant to that delegation, EPA now has the authority to identify

hazardous waste sites and to determine, among other things, the parties potentially responsible for the generation of the hazardous wastes located there. The Administrator of EPA may request the Attorney General to institute judicial actions, but only the President may require him to do so. See 42 U.S.C. §9606. Perry Dec., para. 5.

At bottom, both mechanisms are part of an overall law enforcement effort designed to protect the public health and welfare and the environment from the effects of the release or threatened release of hazardous substances which may present an imminent and substantial danger. 42 U.S.C. §9604(a). In addition to the institution of judicial proceedings, the Act provides broad enforcement powers, authorizing the President or his delegate to issue administrative orders necessary to protect the public health and welfare or the environment and to require designated persons to furnish information about the storage, treatment, handling or disposal of hazardous substances. See 42 U.S.C. §§9606, 9604(e)(1). The Act also contains criminal penalties. 42 U.S.C. §9603. Perry Dec., para. 6.

As with any new program, the implementation and enforcement of the Superfund Act has required the government to put into place the policies and personnel needed to carry out the statutory mandates. In the two years since the Superfund Act became law, EPA has pursued the implementation of this new statutory mandate with vigor. It has developed and published the National Contingency Plan required by Section 105 of the Act, 42 U.S.C. § 9605, which serves as the basis for Superfund-financed cleanups.

See 47 Fed. Reg. 31180 (July 16, 1982). It has developed an Interim Priorities List identifying the 160 sites which pose the greatest risk to the public health and welfare and the environment. With assistance and input from the states, EPA has recently published a proposed National Priorities List identifying the 418 sites which, in EPA's judgment, require priority in use of the Superfund to effect cleanup. See 47 Fed. Reg. 58476 (December 30, 1982).*/ It has developed and published enforcement guidelines, as required by Section 106 of the Act, in consultation with the Attorney General. See 47 Fed. Reg. 20664 (May 13, 1982). Perry Dec., para. 7.

EPA has also pursued the enforcement of the Superfund Act. Since the passage of the Act, EPA has sent more than 1,760 notice letters, undertaken Superfund-financed action at 112 sites involving the obligation of more than $236 million, instituted Superfund claims in 25 judicial actions and obtained two criminal convictions. In its hazardous waste site efforts, the government has reached settlements in 23 civil actions providing for the expenditure of more than $121 million to conduct cleanup operations. In addition, the Agency and the Department are actively negotiating with responsible parties concerning the cleanup of 56 sites around the country. A recent judicial decision under the

*/ The National Priorities List is required by Section 105(8)(B) of the Act, 42 U.S.C. §9605(8)(B). Completion of the list must be preceded by notice and opportunity for public comment, 42 U.S.C. §9605, para. 1, and may also be subject to legislative veto. 42 U.S.C. §9655. It is not yet known when the preparation of the National Priorities List will be completed.

Superfund Act termed the government's approach in these cases "reasonable from the standpoint of the long-range public interest." United States v. Seymour Recycling Corporation, Civil Action No. IP-80-457-C, ___ F. Supp. ____, (S.D. Ind. Dec. 15, 1982) Slip Op. (Attachment A hereto), 17. Perry Dec., para. 8.

EPA's goal in the implementation of the Superfund Act is, of course, to effect cleanups as expeditiously as possible for the protection of the public health and welfare and the environment. Since the Superfund cannot pay for the cleanup of all sites and since enforcement litigation is complex and time-consuming, EPA has adopted an approach which seeks in the first instance to obtain cleanup from parties it has identified as being responsible for or having contributed to the presence of hazardous substances at the sites. If voluntary cleanup cannot be achieved, the Agency then determines whether it will spend Superfund monies and sue for cost recovery under Section 107 or use its enforcement authority under Section 106 to obtain cleanup. Perry Dec., para. 9.

Before any meaningful contact with responsible parties can occur or administrative or judicial enforcement proceedings can be initiated, substantial time must be spent on investigation and case preparation. Of necessity, this is a time-consuming, resource-intensive process. It includes studying the nature and extent of the hazard present at sites, identifying potentially responsible parties and evaluating the evidence which exists or must be generated to support government action. This initial investigation is conducted by EPA attorneys and technical staff. Since many sites have literally hundreds of "generators" --

parties who produced or sent hazardous substances to the site -- the initial investigation of such a site typically will consume hundreds of hours and involve the examination of tens of thousands of documents. Perry Dec., para. 10.

Each continuing investigation is treated by EPA as an enforcement matter, since the government will, in almost every instance, proceed against responsible parties either for cost recovery or for injunctive relief. Moreover, even where voluntary settlements are obtained, EPA develops a strategy for conducting negotiations which is part of its overall enforcement effort. The staff which conduct the investigations are part of the Office of Enforcement Counsel and the Office of Solid Waste and Emergency Response, which are charged with the development and implementation of EPA's enforcement program in the hazardous waste area. At an early stage in the case development process, prior to the time EPA formally refers a case for the institution of judicial enforcement proceedings, a Department of Justice attorney is assigned to assist in the case evaluation and development process. Perry Dec., para. 11; Declaration of Carol E. Dinkins ("Dinkins Dec."), attached hereto, para. 5.

Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at the site unless they undertake an adequate program to clean up the site. Typically, following the issuance of notice letters, EPA enters into negotiations with responsible parties to reach an agreement which would require those parties to clean up the site. Such negotiations may involve hundreds of potentially responsible

parties and millions of dollars in cleanup costs. Moreover, EPA may settle the case with some but not all parties and then have to continue negotiations as to the remaining parties. Perry Dec., para. 12.

Because the enforcement process can be lengthy and extremely complex, an enormous amount of paperwork is generated. This includes data on the amounts, nature, and origin of waste present at a site; records of interactions with state and local government officials; records of the storage or disposal facility itself, as well as of the generators, treaters, transporters, and handlers of the substances which found their way to the sites. It also includes correspondence with responsible parties, contractors, state officials, and representatives of other federal agencies, legal opinions and interpretations, internal memoranda on such matters as negotiation strategy, rights and remedies of the parties, case strengths and weaknesses, and notes and logs from meetings and telephone conversations. Perry Dec., para. 13.

B. EPA's Efforts To Cooperate With The Levitas Subcommittee Investigation

On March 10, 1982, the Levitas Subcommittee opened a series of hearings on certain environmental matters, including implementation of the Superfund Act. H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982).*/ Several EPA officials testified at numerous hearings before the Subcommittee and numerous EPA documents were made available to the Subcommittee. Id. at 9.

*/ That report, hereafter "the Committee Report," is the Committee's official account of the alleged contempt of Congress by Mrs. Gorsuch.

The only documents not made available to the Subcommittee were documents from certain law enforcement files. Id. at 11.

Apparently unhappy with this limitation, Subcommittee Chairman Levitas sent a letter to Mrs. Gorsuch on September 15, 1982 requesting "all [Superfund] information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency." Perry Dec. 15 and Exhibit A.

In response to the Subcommittee's concerns, EPA made available to the Subcommittee almost all the documents from EPA's files on the 160 interim priority sites. EPA declined, however, to produce a small number of documents generated by government attorneys and other enforcement personnel in the development of potential litigation. Those documents, which were part of open law enforcement files, include sensitive memoranda and other sensitive papers which identify parties potentially liable under the Act and which discuss the strengths and weaknesses of the government's case against them, legal issues, anticipated defenses, timetables and other enforcement plans, negotiation and litigation strategy, the names of potential witnesses, their anticipated testimony and other evidentiary matters. Perry Dec., para. 16. In short, EPA withheld documents which in litigation would be characterized as sensitive attorney work-product material.*/

*/ See Hickman v. Taylor, 329 U.S. 495 (1947). While we believe that the sensitive work-product nature of these documents is more than amply established by the declarations submitted herewith, we are willing to submit the documents to the Court for an in camera inspection should the Court determine that such an examination is necessary.

After this, there were a number of meetings, exchanges of letters and telephone conversations between the Subcommittee, on the one hand, and EPA and the Department of Justice on the other. EPA sought to accommodate the Subcommittee's concerns about the withheld documents in a manner which would meet the need to prevent their premature disclosure. The Subcommittee attempted to assure EPA that, if EPA produced those documents to the Subcommittee, an effort would be made to preserve their confidentiality. However, such documents, if produced, could be disclosed to other members of Congress and that Congress could decide to make the documents public even if EPA objected. Perry Dec., para. 19, Exhibit B, Exhibit C at 1-2 and Exhibit E at 7.

C. The November 22 Subpoena

On November 22, 1982, the Committee served on Mrs. Gorsuch a subpoena calling for her to appear before the Subcommittee on December 2, 1982 and to produce at that time the following described documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of [the Superfund Act.]

Perry Dec., para. 20 and Exhibit D. Even though EPA had not promulgated the above-mentioned statutory list of national priority sites, EPA nonetheless undertook, as a matter of

accommodation to the Subcommittee, to begin to gather all documents pertinent to the Agency's Interim Priorities List of 160 sites. Some of those 160 cases were at that time in litigation while others were in earlier stages of development and negotiation. While gathering those documents, EPA segregated sensitive law enforcement documents for separate review. Perry Dec., para. 21.

Because the incipient controversy was assuming more critical significance, it was brought to the attention of the Attorney General and by him to the President at this time. Perry Dec., para. 22. After reviewing the matter, President Reagan wrote Mrs. Gorsuch instructing her to cooperate with the Subcommittee to the fullest extent possible. He also instructed her, however,

> that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittee in response to their Subpoena.

Perry Dec., para. 23 and Exhibit E.

On the day the President wrote his memorandum to Mrs. Gorsuch, the Attorney General sent a letter to Chairman Levitas indicating that

> "it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of

> Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."

Perry Dec., para. 23 and Exhibit F. The Attorney General explained that

> "[o]ur policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to 'take care that the laws be faithfully executed.' . . . At bottom the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch."

Ibid.

Upon receiving this instruction, EPA intensively reviewed sensitive law enforcement documents from its open Superfund law enforcement files to insure that no documents would be withheld from the Subcommittee except as instructed by the President. Those documents which EPA determined were subject to the President's instruction were also reviewed by the Department of Justice under the supervision of the Assistant Attorney General of the Land and Natural Resources Division. Perry Dec., para. 24. As of December 15, 1982, EPA and the Department of Justice identified sixty-four documents, the disclosure of which would impair the government's ability to enforce the Superfund Act. These documents were therefore withheld from the Subcommittee. Perry Dec. paras. 16-18 and 24; Dinkins Dec., paras. 5-9. The Subcommittee was provided with lists which identified each of those sixty-four documents and briefly explained why each document was being withheld. Perry Dec., para. 26 and Exhibit G.

On December 2, 1982 Mrs. Gorsuch appeared before the Subcommittee as instructed by the subpoena. She advised the Subcommittee that the documents requested by the subpoena (documents concerning "those sites listed as national priorities pursuant to Section 105(8)(B)" of the Superfund Act) did not exist, because EPA had not yet listed any sites as national priorities pursuant to that section. Perry Dec., Exhibit C at 3. Nevertheless, she explained that EPA had "in a spirit of cooperation and comity" already begun to gather its files on the 160 interim priority sites and would make more than 750,000 pages of documents available to the Subcommittee. Ibid. She brought with her to the hearing, and tendered to the Subcommittee, the first five file boxes of such documents, but the Subcommittee declined to accept delivery of those documents. Id. at 6. Indeed, neither at that time nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter. Perry Dec., para. 25.

At the hearing, Mrs. Gorsuch also advised the Subcommittee that "sensitive documents found in open law enforcement files will not be made available to the Subcommittee," citing the President's instructions to her. Perry. Dec., para. 26 and Exhibit C at 5.

D. The Contempt Resolution and This Lawsuit

At the conclusion of its December 2 hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch to be in contempt for failure to comply with its subpoena. The Subcommittee reported the matter to the full Committee. Perry Dec., para. 27 and Committee Report at 57.

A final attempt was made to resolve the impasse between the Subcommittee and the Executive Branch at a meeting on December 8, 1982, but that attempt was unsuccessful. The Subcommittee's final proposal contemplated that its members and staff would have unrestricted access to sensitive documents from open law enforcement files. The Executive Branch, although willing to subject all such documents to an elaborate screening process within the Executive Branch to insure that no document would be improperly withheld, was unwilling to permit the requested Subcommittee examination because it contemplates

> that the President will lose control over the contents of material which those who assist him in enforcing the law have determined to be in a narrow category of documents the release of which would adversely affect the Executive Branch's ability to enforce the law.

Perry Dec. para. 28 and Exhibit H; Committee Report at 22-23.

On December 10, 1982, the Committee reported Mrs. Gorsuch's alleged failure to comply with the subpoena to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. On December 16, the House of Representatives passed a resolution citing Mrs. Gorsuch for contempt of Congress. On December 17, the Speaker and Clerk of the House certified the contempt citation to the United States Attorney for this District for criminal prosecution pursuant to 2 U.S.C. §§192 and 194. Late that evening, the certification was delivered to the United States Attorney by the House Sergeant at Arms. Perry Dec., paras. 29-31; Declaration of Stanley S. Harris ("Harris Dec."), para. 2 and Exhibit A; Committee Report, 57 and 70.

On December 27, 1982, the United States Attorney advised Speaker O'Neill of his conclusion that "it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved." Harris Dec., para. 3 and Exhibit B. Chairman Levitas subsequently called for the impeachment of the Attorney General and the United States Attorney. 129 Cong. Rec. H30-31 (daily ed., January 3, 1983) (Attachment B hereto). On January 5, 1982, Speaker O'Neill wrote a letter to the United States Attorney, asserting that the pendency of this civil action did not alter the United States Attorney's duty to prosecute Mrs. Gorsuch. Harris Dec. para. 3 and Exhibit C.

The Executive filed this action on December 16, 1982, minutes after the House vote of contempt, seeking both declaratory and injunctive relief. On December 29, the Executive filed an amended complaint, seeking declaratory relief only with respect to defendants' efforts to compel production of the withheld documents. On December 30, defendants filed a motion to dismiss the complaint.

SUMMARY OF ARGUMENT

This case is unique. There has rarely been a sharper confrontation between the Legislature and the Executive, and never one quite like this. Accordingly, while we are seeking what may appear to be extraordinary relief, that is because this is an extraordinary situation.

The House subpoena sought a broad array of documents concerning numerous open enforcement actions. EPA sought to accommodate the Subcommittee's needs by producing files on its 160

interim-priority cases. These files -- consisting of more than 750,000 pages of documents -- spell out in detail the technical background, parties, and procedural status of each matter. The only papers the Executive balked at turning over were a small minority of documents that are the most sensitive kind of prosecutorial work-product. Any leakage of such documents to the public or potential targets of EPA and the Justice Department could seriously undermine the integrity and effectiveness of law enforcement efforts.

The Subcommittee was urged to review the files being produced to see whether the additional few documents being withheld were essential for any legitimate oversight function. In addition, the Subcommittee was promised that the withheld documents would be made available once they were no longer enforcement sensitive. However, without establishing any need for immediate access to the withheld documents, the House -- in the midst of the Lame Duck session -- rushed to cite Mrs. Gorsuch for contempt of Congress and to demand that she be criminally prosecuted.

Only the Judiciary can resolve the resulting constitutional controversy, which reached a total impasse when the House of Representatives took the unprecedented step of citing an Executive official for contempt of Congress solely for following the instructions of the President that certain documents not be disclosed in order to preserve the ability of the Executive Branch faithfully to execute the law. By this motion for summary judgment,*/ the United States and Mrs. Gorsuch seek a

*/ Summary judgment is appropriate pursuant to Rule 56, Fed.R.Civ.P. because there is no "genuine issue as to any material fact" and the plaintiffs are entitled to judgment as a "matter of law."

declaration that the Executive Branch's refusal to release certain highly sensitive materials contained in open law enforcement files is fully in accordance with the law, so that the "unseemly" situation of a high-level Executive Branch official being cited for contempt of Congress and threatened with prosecution can be resolved.*/

Such relief is available in this unique situation, as will be demonstrated below. First, the controversy is ripe for judicial review, because no further steps remain in the subpoena enforcement process and the other two branches of government are at complete loggerheads. The Executive has asserted a constitutional privilege to withhold the documents, and Congress is doing all it can to require the Executive to forego the privilege and to turn over the documents. Thus judicial review is necessary to determine the right of the Executive to assert the privilege and to vindicate that right if the Executive has properly asserted it. Second, this action may be pursued against the House and its members despite the Speech or Debate Clause of the Constitution, Art. I, §6, cl. I, because the Court is not being asked to interfere with ongoing congressional action but merely to review the validity of efforts to enforce a complete legislative act. Finally, on the merits of the controversy, the refusal of the Executive Branch to produce the documents was properly based upon well-recognized separation of powers principles.

*/ See United States v. Nixon, 418 U.S. 683, 691-92 (1974).

ARGUMENT

I. This Case Presents a Justiciable Claim For Declaratory Relief

A. This Court Has Subject Matter Jurisdiction

Subject matter jurisdiction for this suit is properly based on 28 U.S.C. §1331, because all of plaintiffs' claims arise from the Constitution and laws of the United States, and on 28 U.S.C. §1345, because this action was commenced by the United States. Defendants' arguments to the contrary are based on irrelevant cases and a confusion between subject matter jurisdiction and cause of action.*/

That this Court has subject matter jurisdiction over this case is confirmed by the Court of Appeals' decision in United States v. A.T.& T., 551 F.2d 384 (D.C. Cir. 1976). There the court held that an action brought by the United States to vindicate a claim of Executive privilege asserted against a congressional subpoena presented a claim arising under the Constitution

*/ Defendants make the strange assertion that the Executive did not properly sue in the name of the United States. That assertion is wrong because the Attorney General here seeks to vindicate constitutional and legal rights of the President and two Executive Branch agencies. See 28 U.S.C. §§515-19; Senate Select Committee v. Nixon, 336 F. Supp. 51, 56-57 (D.D.C. 1973). The Executive historically has participated in ligitation against the Legislative Branch in the name of the United States. See, e.g., Consumers Union v. FTC, No. 82-1737 (D.C. Cir., Oct. 22, 1982); Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977); United States v. A.T.& T., 551 F.2d 384 (D.C. Cir. 1976).

of the United States and, hence, under §1331. Id. at 389.*/ Using language applicable here the court stated at 389 that:

> Other decisions dealing with interbranch conflict have not discussed the problem of jurisdiction, but have nevertheless reached the merits. It seems to be assumed that these cases, dealing with the powers and relations of the branches of the United States, are maintainable in federal court, if justiciable at all. We need not resolve this question for we find subject matter jurisdiction under 28 U.S.C. §1331.

Defendants rely upon the first decision in Senate Select Committee v. Nixon, 366 F. Supp. 51 (D.D.C. 1973), in which a Senate Committee's attempt to enforce a congressional subpoena was dismissed for lack of subject matter jurisdiction. Defendants' Brief at 33-34. As defendants recognize, the court in that case rejected jurisdiction under §1331 for failure to satisfy the $10,000 amount-in-controversy requirement then applicable. 366 F. Supp. at 59-61.**/ However, §1331 was subsequently

*/ Defendants attempt to distinguish A.T.& T. on two grounds. Defendants' Brief at 43. First, they suggest that A.T.& T.'s jurisdictional holding should be limited to cases in which Executive privilege is claimed on national security grounds. However, this is an argument on the merits, i.e., that there is no Executive privilege for law enforcement materials. Defendants' second argument is that A.T.& T should be distinguished because the congressional party in that case intervened as a defendant and was not originally sued. This purported distinction is irrelevant since the requirement of subject matter jurisdiction is as applicable to intervenors as to original parties. See 3B Moore's Federal Practice ¶24.18.

**/ After enactment of a special jurisdictional statute, the court considered the Committeee's claim and rejected it on the merits. 370 F. Supp. 521 (D.D.C. 1974), aff'd, 498 F.2d 725 (D.C. Cir. 1974).

amended to eliminate the amount-in-controversy requirement for federal question jurisdiction. See 28 U.S.C. §1331, as amended Dec. 1, 1980, Pub. L. 96-486, §2(a), 94 Stat. 2369. This amendment to the jurisdictional statute thus eliminates any barrier to federal question jurisdiction over the present case.

Defendants also argue that there is no legislative history showing a specific congressional intent to confer jurisdiction on the federal courts to decide inter-branch suits. In particular, defendants advert to several proposals rejected by the Congress which would have conferred upon the courts a specific grant of jurisdiction for the civil enforcement of legislative subpoenas. Defendants' Brief at 34-35, 39-41. Yet the failure of Congress to enact such a statute is hardly surprising in view of the broad grant of jurisdiction created by §1331, as amended in Pub. L. 96-486, §2(a), 94 Stat. 2369, Dec. 1, 1980. Congress could not have been expected to enumerate every cause of action covered by such a general jurisdictional statute and did not attempt to do

so. Indeed, this same argument was rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969). In that case, the defendants alleged that the Court lacked subject matter jurisdiction under 28 U.S.C. §1331 because the legislative history underlying that provision did not expressly state that it applied to suits questioning the exclusion of Congressmen from the House of Representatives. The Court first noted that "it has generally been recognized that the intent of the drafter was to provide a broad jurisdictional grant to the federal courts." Id. at 515. It then found that because the resolution of that case "depend[ed] directly on construction of the Constitution [and the] Court has consistently held such suits are authorized by [§1331]," id. at 516, the Court had subject matter jurisdiction over the lawsuit. Similarly, resolution of this dispute "depends directly on construction of the Constitution" and accordingly, subject matter jurisdiction lies under §1331.*/

In addition to federal question jurisdiction, §1345 also provides a basis for subject matter jurisdiction of the present

*/ Defendants also argue that no cause of action should be implied from §1331. Defendants' Brief at 36-41. This perplexing argument confuses the issue of subject matter jurisdiction with the existence of a cause of action. Plaintiffs have never asserted that their cause of action is implied under §1331. See Powell v. McCormack, 395 U.S. 486, 512-516 (1969).

case.*/ That section provides as follows:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by act of Congress. (Emphasis added.)

Defendants argue that this jurisdictional basis is unavailable because the final clause -- "expressly authorized to sue by act of Congress" -- is not satisfied. However, defendants misconstrue this section because that clause modifies the phrase "any agency or officer thereof" and not the phrase "the United States." See generally Reviser's Notes, 28 U.S.C. §1345; Government National Mortgage Association v. Terry, 608 F.2d 614 (5th Cir. 1979). See also United States v. Mattson, 600 F.2d 1295, 1299 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121, 1126 (4th Cir. 1977); Note, 85 Harv. L. Rev. 1566 (1972).

Defendants rely principally on United States v. Mattson, supra, and United States v. Solomon, supra, for the proposition that §1345 provides no additional capacity to the United States to sue "unless another statute expressly authorizes it." Defendants' Brief at 43. Yet both those cases recognized that where no statute expressly authorizes suit, "the government can sue if it has some interest that can be construed to warrant an implicit grant of authority." United States v. Mattson, 600 F.2d at 1298.

*/ In United States v. A.T.&T., the court found it unnecessary to decide whether §1345 furnished a basis for jurisdiction, since it found jurisdiction under §1331. 551 F.2d at 388-89.

See United States v. Solomon, 563 F.2d at 1126. The courts in both cases rejected a claim of a nonstatutory grant of authority to sue on behalf of mentally retarded patients in state hospitals because the government could not allege an injury in fact sufficient to grant standing to bring suit or to imply a nonstatutory cause of action on behalf of the United States. It is not argued here that §1345 grants the United States a cause of action. Rather, as demonstrated below, the United States and Mrs. Gorsuch can demonstrate sufficient harm to judicially cognizable interests to demonstrate standing to maintain this lawsuit.

B. Plaintiffs Have Standing

Plaintiffs have standing to sue because they have sustained injury-in-fact that is directly traceable to the conduct of defendants and which only the courts can adequately remedy. Although defendants prefer that this controversy be resolved by subjecting Mrs. Gorsuch to a criminal prosecution, requiring such a draconian solution "would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the government." United States v. Nixon, 418 U.S. 638, 691-92 (1974).

Mrs. Gorsuch has been cited for contempt by the House, which has submitted the matter to the Executive for prosecution. Indeed, even if she is never prosecuted by the Executive, the House's contempt citation, in and of itself, more than amply

establishes the immediacy of this controversy. The House vote represents a formal determination by a co-equal branch of our government that the head of an Executive agency has failed to comply with the law. That citation thus stands as an accusation by the House of Representatives that an Executive officer has committed a criminal act in discharging her official duties as Adminstrator of the EPA.*/ The effectiveness of any high-level executive official is, at least in part, dependent upon the establishment of relations with the Legislative Branch free of the sort of coercion reflected by a contempt of Congress citation. These injuries are all concrete, direct and immediate and can only be redressed through judicial resolution.

In addition to the injury to Mrs. Gorsuch in her capacity as Administrator of EPA, the plaintiff United States has also suffered a legally cognizable injury. Here, the injury to the Executive Branch and its agencies is an unprecedented interference with its responsibility for faithful execution of the laws and derogation of its independence from a co-equal branch of government. The protection of these sensitive law enforcement files is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper

*/ Indeed, under well-established common law principles, the imputation of criminal behavior to an individual is generally considered defamatory per se and actionable without proof of special damages. 53 C.J.S. Libel and Slander §14. The Court of Appeals for this Circuit has held that damage to one's "good name and reputation" constitutes injury in fact for Article III purposes. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 524 (D.C. Cir. 1977). Here, Mrs. Gorsuch's reputation for fidelity to the rule of law has been seriously impugned by the contempt citation of the House.

candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). As the Supreme Court found in an analogous context, the purpose of the privilege "is to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

NLRB v. Sears Roebuck & Co. involved Exemption 5 of the Freedom of Information Act, 5 U.S.C. §552, as applied to protect the deliberative process and work-product of the government from disclosure. The Court found that the exemption is necessary to preserve the efficacy of the decisionmaking process and to encourage the free exchange of ideas within the agency without the threat of public scrutiny. Id. at 150. See Coastal State Gas Corp. v. DOE, 617 F.2d 854, 866-69 (D.C. Cir. 1980); Bristol-Myers Co. v. FTC, 598 F.2d 18, 23-24 (D.C. Cir. 1978). In Coastal States Gas Corp. v. DOE, the Court recognized another reason for the exemption:

> to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case. Certainly less work-product would be committed to paper which might harm the quality of trial preparation. [617 F.2d at 864.]

Without judicial intervention here, the threat to the integrity of the enforcement efforts and decisionmaking process of EPA and the Department of Justice under the Superfund law becomes very real.

The threat of premature disclosure if the Executive loses control over sensitive law enforcement documents can well be expected to inhibit actions of all participants in the law enforcement process. It is likely, for example, that outside sources of information will not cooperate as freely due to the fear of possible premature disclosure; that parties responsible for the hazardous waste sites will avoid settlement negotiations and await possible disclosure of the government's settlement strategies, and that staff attorneys may shrink from conducting a candid and thorough evaluation of an enforcement action where those evaluations may be disclosed before the case has been completed. Accordingly, the threat that the Executive will lose control over enforcement file materials creates a present uncertainty as to the overall independence and integrity of the law enforcement process. See Perry Dec., paras. 32 and 33. Such uncertainty and the consequent harm to the enforcement process constitutes an injury-in-fact to the Executive's ability to execute the law and, hence, to the welfare of the general public.

Defendants argue that the United States does not have standing, absent a statute, unless the case involves either a contractual or proprietary interest of the government, or harm to the national security or public welfare. Defendants' Brief at 46-49. Even if this were the correct standard, the harm to the public welfare threatened by enforcement of defendants' subpoena is sufficient to confer standing upon the United States as

plaintiff, in accordance with such cases as In re Debs, 158 U.S. 564 (1895), and New York Times v. United States, 403 U.S. 713 (1971). There could be no greater harm to the public welfare than disruption of law enforcement activity by the Executive Branch.*/ The United States -- unlike other plaintiffs -- has authority to sue on behalf of the public welfare under Debs and its progeny. For this reason, the United States can bring suit to vindicate rights shared by the people in common or "generalized grievances," for which private individuals or organizations would not have standing. Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).**/

*/ Of course, this argument in favor of standing presumes that plaintiffs have a good case on the merits. Such a situation is not uncommon, however, where the existence of a legally cognizable injury is effectively the same as the ultimate legal issue in the case. See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

**/ For this reason, United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977), cited by defendants, is inapposite. In Solomon, the court found that no nonstatutory grant of authority existed to sue on behalf of mentally retarded patients in state hospitals because, among other reasons, it could not be shown that "the immediate victims constitute 'the public at large.'" 563 F.2d at 1129.

The foregoing demonstration of injury-in-fact is easily traceable to the acts of defendants. It is the defendants who caused the subpoena to be served upon Mrs. Gorsuch, cited her for contempt of Congress, and certified the matter to the United States Attorney for criminal prosecution. Indeed, Defendants' brief to this Court repeatedly urges the criminal prosecution of Mrs. Gorsuch pursuant to 2 U.S.C. §194. Defendants' Brief at 9, 25, 26-27, 30-32, 46, 56. Chairman Levitas has threatened the United States Attorney and Attorney General with impeachment if they do not initiate criminal proceedings against Mrs. Gorsuch. See p. 3, supra. Under these circumstances, it is disingenuous for defendants to argue that the

> "complaint doesn't offer a clue about how the present legislative defendants are responsible for [plaintiff's] injury, for it is not the legislative defendants who are responsible for proceeding under 2 U.S.C. §192."

Defendants' Brief at 50.

Defendants' final standing argument concerns the utility of declaratory relief to redress the injuries suffered by plaintiffs. This argument is best considered together with the appropriateness of declaratory relief under the circumstances, which follows.

C. Declaratory Relief Is Both Necessary and Proper

Under the Declaratory Judgment Act, a federal district court in any actual controversy within its jurisdiction may declare the rights and other legal relations of any interested parties seeking such a declaration whether or not any further relief is or could be sought. 28 U.S.C. §2201.*/ There are three criteria for the issuance of a declaratory judgment. First, there must be a "substantial controversy." Second, the controversy must be between parties having "adverse legal interests." Third, the controversy must be of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); see also Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972). In most cases, it would be premature to enter a declaratory judgment on the legality of a witness' refusal to comply with a subpoena except as a defense to a contempt proceeding. On the unique facts of this case, however, declaratory relief is appropriate.

First, there is a substantial controversy between the parties present here. The House subcommittee and committee in their written documents and in their vote to recommend a contempt citation have made clear their total disagreement with the

*/ The Declaratory Judgment Act does not grant any additional jurisdiction to the federal courts, but rather allows them to declare the rights and obligations of parties where an actual case cause or controversy already exists. Golden v. Zwickler, 394 U.S. 103 (1969).

rationale of the Executive Branch in refusing to turn over sensitive law enforcement materials. The full House of Representatives has ratified their position. The defendants take the position, and have so stated repeatedly, that a congressional committee is absolutely entitled to all documents contained in the open law enforcement files of the EPA, an executive branch agency. On the other hand, the Executive Branch has taken the position that the Constitution requires it to maintain control over documents where their release would impair the President's ability faithfully to execute the law. There is, then, without doubt a controversy both concrete and live between the parties.

Second, the parties have adverse legal interests. The House of Representatives has already voted that Mrs. Gorsuch be cited for contempt solely for following the instructions of the President. Moreover, this matter has now been referred to the United States Attorney for prosecution, and the Chairman of the House Subcommittee has threatened the United States Attorney and the Attorney General with impeachment proceedings unless Mrs. Gorsuch is prosecuted. In light of the extraordinary seriousness of this unprecedented situation, the parties have sharply adverse legal interests.

Third, this unique controversy has sufficient immediacy and reality to warrant a declaratory judgment here. The House has voted contempt and has referred that citation to the United States Attorney. The legislative process is complete, thus rendering this controversy both immediate and ripe.

The current case involves a contempt citation against the head of an Executive agency whose acts are the acts of the President in many matters. Indeed, the President instructed the Administrator to take the action at issue here. Under such circumstances, it is unnecessary to require the agency head to be cited for contempt -- much less subjected to criminal prosecution -- before resolving the legal issues. This principle was emphasized in United States v. Nixon, which authorized judicial review without requiring contempt as a condition precedent. In that case, the threshold question was whether the Supreme Court had jurisdiction over the appeal in view of the fact that the normal procedure for reviewing a refusal to comply with subpoenas, a defense to a contempt prosecution, was not before it. The Court found, in view of the unique situation presented in that case, that traditional methods of review were not applicable:

> Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. [418 U.S. at 691-692.]

The same legal concept is applicable here. As in the Nixon case, the "traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises." It is particularly "unseemly" that a high Executive offical has been cited for contempt of Congress for following the instruction of the President. The purely legal issues giving rise to this controversy should be resolved now in a civil lawsuit, as in Nixon, in order to resolve and thereby render "unnecessary" further protraction of this "constitutional confrontation."

The propriety of declaratory relief in this case is further supported by the rationale of Steffel v. Thompson, 415 U.S. 452 (1974). There the plaintiff had been warned twice to stop handbilling and demonstrating on the sidewalk of a shopping center. He then brought an action for injunctive and declaratory relief in the district court claiming that the application of the law to him would violate his First and Fourth Amendment rights. In ruling that there was a sufficient case or controversy for purposes of the Declaratory Judgment Act, the Court stated:

> In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968). [415 U.S. at 459].

Again, in Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), the Court stated that when "compliance is coerced by the threat of enforcement, . . . the controversy is both immediate and real." 406 U.S. at 508.

Defendants appear to concede that declaratory relief would be available under the theory of Steffel v. Thompson if no prosecution was pending and there was a genuine threat of enforcement of a criminal statute. However, defendants argue that:

> the certification by the Speaker renders the prosecution 'pending' for purposes of Steffel, for 2 U.S.C. §194 imposes the non-discretionary duty upon the United States Attorney to at least present the matter to the grand jury.

Defendants' Brief, at 26-27.*/ This argument makes the dubious assumption that §194 must be interpreted in a literal manner to deprive the United States Attorney of any prosecutorial discretion in situations where a House of Congress has certified a finding of contempt. Such an interpretation would itself raise serious constitutional questions.

It is by now well-settled that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1973), citing Confiscation Cases, 7 Wall. 454 (1869); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, sub nom Cox v. Hauberg, 381 U.S. 935 (1965).**/ Indeed, the Court

*/ Defendants also rely upon dicta in United States v. A.T.&T., 551 F.2d at 393, n.16 (D.C. Cir. 1976) to the effect that "[c]riminal proceedings are begun" by a contempt resolution. Taken in context, this statement has nothing to do with the determination required by Steffel.

**/ This fundamental power derives from Article II, Section 3, of the United States Constitution which vests the Executive Branch with the authority to see that "the laws be faithfully executed." By virtue of this provision, the law enforcement prerogative resides "squarely in the executive arm of the government." Pugach v. Klein, 193 F. Supp. 630, 634 (S.D. N.Y. 1961). As the President's surrogate in discharging this executive function, Ponzi v. Fessender, 258 U.S. 254 (1921), the Attorney General is the chief law enforcement officer and possesses the "exclusive prerogative" (continued)

of Appeals for this Circuit has specifically recognized that the Executive Branch retains its traditional prosecutorial discretion under §194. As the court stated in Ansara v. Eastland, 442 F.2d 751, 754 & n.6 (D.C. Cir. 1971)

> We are aware that . . . the Executive Branch . . . may decide not to present the [contempt citation] to the grand jury (as occurred in the case of the officials of the New York Port Authority). . . .

Contrary to defendants' assertions, therefore, §194 does not require the United States Attorney to initiate a prosecution. For this reason, defendants cannot argue that the theory of Steffel v. Thompson is inapplicable to the present case.

Plaintiffs recognize that declaratory relief is not ordinarily available to permit a witness to challenge the validity of a congressional subpoena. As defendants point out, the "orderly and often approved means" of raising constitutional defenses to a subpoena normally requires presenting one's defense through the following process: review by the subcommittee, full committee, and full House of Congress, followed by referral to the United States Attorney and indictment or information. "Should prosecution occur, the witness' claims could then be raised before the trial court." Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972), cited in Defendants' Brief at 23. However, none of the

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**/ (continued from previous page)
to begin a criminal prosecution. United States v. Cox, supra, 342 F.2d at 190-91 (Wisdom, J. concurring). Because this power is constitutional in source, the Courts have consistently invoked the separation of powers doctrine to decline review of particular prosecutorial decisions. Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); Smith v. United States, 375 F.2d 243, 247 (5th Cir. 1967); Inmates of Attica v. Rockefeller, 477 F.2d 375, 379 (2nd Cir. 1973).

cases cited by defendants involved the peculiar facts present here, namely a completed legislative process which resulted in a contempt action against a top Executive Branch official.*/

There is another reason why declaratory relief is not only proper but necessary in the present case. The "regular procedure" for testing a witness' claims referred to in Sanders, 463 F.2d at 900, is not available. The witness in this case, Mrs. Gorsuch, was cited for contempt for withholding documents at the direction of the President and upon the advice of the Attorney General. Under these circumstances, it is questionable whether the Department of Justice could properly prosecute Mrs. Gorsuch for contempt.**/ Because the "regular procedure" for resolving this dispute is not available, declaratory relief is necessary for its resolution.

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*/ Sanders and the cases cited in that opinion were all cases where "injunctive or declaratory relief has been sought with respect to an ongoing congressional investigation. . . ." Id. at 901 (emphasis added). Here congressional action is complete.

**/ The inability to prosecute Mrs. Gorsuch for contempt has several dimensions. As we have shown, pp. 34-35, supra, 2 U.S.C. §194 cannot impose a mandatory obligation to prosecute Mrs. Gorsuch. Since the Attorney General counseled the President to instruct Mrs. Gorsuch to withhold the documents in question, it would also raise serious ethical questions for the Department of Justice to undertake a discretionary prosecution. See Principles of Federal Prosecution, U.S. Dept. of Justice, Part B(1) (July 1980). And, because Article II makes criminal prosecution an exclusive responsibility of the Executive Branch in most situations, it is doubtful that Mrs. Gorsuch could be prosecuted by anyone who is not subject to the direction of the President. Finally, the criminal prosecution of an Executive official for complying in good faith with the President's instructions to withhold documents could well be unconstitutional in any event, since it imposes a heavy burden on the assertion of executive privilege. In this regard, it is significant that civil litigation remains available as an alternative means of resolving such inter-branch disputes. See Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

The extraordinary and compelling circumstances of this case strongly militate in favor of departing from the usual rule that the validity of a congressional subpoena can be tested only in defense of a criminal prosecution. Accordingly, an immediate and concrete controversy exists; a declaratory judgment is not only a proper method of review but indeed the best method to determine the legality of the Administrator's action.

D. The Political Question Doctrine Does Not Require Abstention

This case involves a dispute between the Executive and Legislative Branches over fundamental constitutional principles. The only way it can be resolved is through the intervention of the Judiciary. Under these circumstances, the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action.*/

As noted above, a similar confrontation between the two branches was presented in United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977). There, the court considered political question principles at length in determining whether it was appropriate to intervene in the dispute between the two branches over a congressional subpoena. After noting that the courts had often resolved

*/ Defendants disclaim any argument based upon the political question doctrine. Defendants' Brief at 45. Nevertheless, this argument is addressed here in the event the Court raises the question sua sponte.

disputes concerning the allocation of power between the branches, 567 F.2d at 126, n.13, the court stated at 126:

> Where the dispute consists of a clash of authority between two branches, however, judicial abstention does not lead to orderly resolution of the dispute. No one branch is identified as having final authority in the area of concern.

If, the court went on to say, a stalemate results, judicial intervention is required to avoid the "detrimental effect on the smooth functioning of government." 567 F.2d at 126.

Abstention was rejected by the court in A.T.&T. because the court found those factors to be present. The identical factors are present here. As in A.T.&T., the Legislative Branch claims a power to investigate the manner in which an agency has administered a particular program. As part of that power, it contends that it has an unlimited right to any documents involved in that program. The Executive, on the other hand, as in A.T.&T., concedes that the Legislative Branch has the power to investigate, but contends that the right to investigate is not without bounds and cannot reach documents which, if disclosed, would impair its duty to faithfully execute the laws. Moreover, a stalemate has resulted over this dispute, since no further legislative action is possible. A.T.&T. stands for the clear proposition that when such a constitutional confrontation between the two branches has reached an impasse, the courts have a duty to intervene in order to provide for an orderly resolution of the dispute.

The Court of Appeals for this Circuit has reached essentially the same conclusion in two other cases involving a claim of executive privilege, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) and Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974). In Sirica, a claim of privilege was interposed in response to a grand jury subpoena while in Senate Select Committee, the claim was interposed in response to a congressional subpoena. In both cases the argument was made that judicial intervention was inappropriate because non-justiciable political questions were involved. That contention was rejected in each case, and in each case the court reviewed the merits of the privilege claim. Nixon v. Sirica, 487 F.2d at 716-718; Senate Select Committee v. Nixon, 498 F.2d at 728. The political question doctrine, therefore, does not preclude this Court from entertaining this action.

II. The Speech Or Debate Clause Does Not Bar This Action.

The Speech or Debate Clause does not bar this suit. The congressional action in question is complete, and the Court is in no way requested to interfere with any ongoing congressional activity. Moreover, in a decision fully applicable here, the Court of Appeals for this Circuit has held that a suit such as this is not barred by the Speech or Debate Clause. In United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977), the court permitted the Executive Branch to obtain judicial review of a congressional subpoena which sought sensitive national security information that was subject to a claim of executive privilege. The court noted that the intent of the Clause is primarily to protect members of Congress from "personal suit[s] against them." 567 F.2d at 130. Where that is not the case, "the Clause does not and was not intended to immunize Congressional investigatory actions from judical review." 567 F.2d at 129.

A. The Purpose of the Speech Or Debate Clause

The Speech or Debate Clause of the Constitution, Article I, Section 6, clause 1, provides:

> For any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place.

The fundamental purpose of the Clause is to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S 501, 507 (1972). In this regard, the clause has been expanded beyond a literal construction to include anything "generally done in a session of the House by one of its members relating to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). However, the Clause cannot be interpreted to cover conduct that is "in no way related to the due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 1972 (1966). Thus, the Court has held that legislative acts covered by the Clause in addition to speech or debate are only those which constitute an "integral part of the deliberative and communicative process" of the Congress. Gravel v. United States, 408 U.S. 606, 625 (1972).

The Clause has been applied to bar two different types of suits against members of Congress. The first includes civil or criminal suits which seek to hold individual legislators liable for their legislative activities. Indeed, the prevention of such suits is the primary intent of the Clause. See United States v. A.T.&T., 567 F.2d at 130. This bar against criminal prosecution or civil damage actions against individual legislators preserves their independence when engaged in legislative activities.

The Clause has also been applied to prevent a second type of suit -- one which would directly interfere with the legislative process. Thus, for example, the Clause prevents a court from enjoining the implementation of a congressional committee's subpoena. Such a suit is barred because the relief would "impede congressional action" and "interfere with an ongoing activity by Congress." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-510, n.16 (1975).

It should be emphasized, however, that the Clause bars only those suits which would have the effect of interfering with the legislative process in some way. Thus, for example, in Gravel v. United States, 408 U.S. 606 (1972), the Court held that the private publication by a Senator of materials received by a Senate Committee was not entitled to Speech or Debate protection because such an activity is not essential to the legislative process:

> As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." United States v. Doe, 455 F.2d at 760.
>
> Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. [408 U.S. at 625].

See also Doe v. McMillan, 412 U.S. 306 (1973).

Finally, the Speech or Debate Clause does not bar the determination by a court of the legality of the action of a person opposing a subpoena if the legislative process has essentially terminated. Thus, in Watkins v. United States, 354 U.S. 178, 208 (1957) and Barenblatt v. United States, 360 U.S. 109 (1959), the Court was required to fulfill its judicial function of determining the legality of declining to comply with a subpoena when the defendants were found in contempt under 2 U.S.C. §192 and prosecuted under 2 U.S.C. §194. Similarly in Senate Select Committee On Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), the Speech or Debate Clause was no bar to judicial resolution of an executive claim of privilege when the Committee brought suit to enforce the subpoena, even though that decision effectively prevented the committee from procuring information it requested. Moreover, if Congress orders the Sergeant-at-Arms to imprison a witness for failing to comply with a subpoena, a court

clearly has the power under 28 U.S.C. 2241 et seq., to issue a writ of habeas corpus against the Sergeant-at-Arms and those imprisoning the witness, and to determine the validity of the recalcitrant witness' actions. See, Kilbourn v. Thompson, supra.

The overriding purpose of the Speech or Debate Clause is, therefore, not to immunize congressional actions from judicial review. It is not to be extended "beyond . . . its intended scope and its history, to include all things in any way related to the legislative process." United States v. Brewster, 408 U.S. 501, 516 (1972). To construe the Speech or Debate Clause as barring this suit would be inconsistent with this admonition because the relief sought here would in no way interfere with any ongoing legislative activity.

B. Since the Relief Sought Here Would Not Interfere With The Legislative Process, The Clause Is Not Applicable

This action will not interfere with the legislative process because that process has terminated. The full House has considered this matter and resolved to cite Mrs. Gorsuch for contempt. The contempt citation has been certified and delivered to the United States Attorney. It is, therefore, critically important to emphasize that a declaratory judgment in this action would no more interfere with any legislative processes than would judicial review of the same issues in the context of a criminal contempt proceeding. In each, the court would review the lawfulness of Mrs. Gorsuch's actions which gave rise to the contempt citation. Since it is well-established that Speech or Debate principles do not bar such review in the context of a criminal contempt proceeding, see Watkins v. United States, 354 U.S. 178 (1957); Barenblatt