IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION OF THE HOUSE OF REPRESENTATIVES
FOR LEAVE TO FILE MEMORANDUM
OF POINTS AND AUTHORITIES IN EXCESS OF
PAGE LIMITATION OF LOCAL RULE 1-9(e)

Pursuant to Local Rule 1-9(e), a statement of Points and Authorities shall not exceed 45 pages (double spaced) if letter sized, and documents which fail to comply with this provision shall not be filed by the Clerk. The United States House of Representatives, the Honorable Thomas P. O'Neill, Jr., Speaker of the House; the Honorable James Howard, Chairman of the House Committee on Public Works; Honorable Elliott Levitas, Chairman of the Subcommittee on Oversight and Investigations; the Honorable Edmund L. Henshaw, Jr., Clerk, the Honorable Benjamin J. Guthrie, Sergeant-at-Arms, and the Honorable James Molloy, Doorkeeper, through their undersigned counsel, respectfully move this Court for permisssion to file a Memorandum of Points and Authorities in Support of their motion to

dismiss, the text of which exceeds the page limitation of Local Rule 1-9(e). As reasons for the foregoing Motion, we submit the following:

1. The action raises serious questions as to the jurisdictional basis of the suit, as well as the Speech or Debate Clause of the Constitution, all of which required extensive discussion to properly support the Motion to Dismiss.

2. This action is an unprecedented challenge to the lawful and constitutional processes of the House of Representatives and involves sensitive interbranch relationships requiring thorough discussion of relevant points of law.

For the foregoing reasons, the Memorandum of Points and Authorities exceeds the page limitation and we therefore seek permission to file notwithstanding the limit.

The Memorandum is being filed conditionally with this motion.

Respectfully submitted,

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

ORDER

It is this _____ day of _____, 19___, upon Motion of the House of Representatives defendants for permission to file a Memorandum the page limitations set out in Local Rule 1-9(e)

ORDERED, that said motion is hereby granted and it is further

ORDERED, that the Clerk shall file the Memorandum previously filed conditionally.

_____
United States District Judge

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

MOTION OF THE HOUSE OF REPRESENTATIVES
TO DISMISS AND TO EXPEDITE CONSIDERATION

The United States House of Representatives, Honorable Thomas P. O'Neill, Jr., Speaker, the Honorable James Howard, Chairman of the Committee on Public Works & Transportation and the Honorable Elliott Levitas, Chairman of its Subcommittee on Oversight and Investigations; the Honorable Edmund L. Henshaw, Jr., Clerk, the Honorable Benjamin J. Guthrie, Sergeant-at-Arms, and the Honorable James F. Molloy, through their undersigned counsel, hereby move the Court to dismiss the complaint against them in the above-captioned action pursuant to Rule 12(b), Federal Rules of Civil Procedure and state as grounds for the motion that the court lacks jurisdiction over the subject matter and over the person in that the defendants are protected from suit by virtue of the Speech or Debate Clause, Rule 12(b)(1) and (2), Fed.R.Civ.P.; that the court has no statutory jurisdiction

to hear the case; and that the action does not present a case or controversy under Article III of the Constitution. Id. In addition, defendants submit that the complaint fails to state a claim upon which relief can be granted. Rule 12(b)(6), Fed.R.Civ.P.

Based on the foregoing, defendants submit that the complaint should be dismissed forthwith.

In addition, pursuant to Rule 57, Fed.R.Civ.P., the defendants request that the hearing and consideration of this motion be advanced on the Court's calendar and that the Court consider and rule on the jurisdictional defenses raised herein before proceeding to consider any other motion or matters incident to this action. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 511 n.17 (1975).

In support of the motion, we respectfully refer the Court to the memorandum of points and authorities filed herewith.

Respectfully submitted,

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HOUSE OF REPRESENTATIVES MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

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HOUSE OF REPRESENTATIVES
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

Preliminary Statement

On two levels, this case is an unprecedented and historic first. On the surface level of the complaint, it is the first attack on the constitutional, legislative actions of the United States House of Representatives in a federal court proceeding "brought in the name of the United States as sovereign," United States v. Nixon, 418 U.S. 683, 694 (1974). This is a suit, in other words, instituted on behalf of "the United States as the sovereign composed of three branches," Id. at 696, against a constituent part of one of those three coordinate branches. As such, the suit collides with "the established principle that a person cannot create a justiciable controversy against himself." United States v. ICC, 337 U.S. 426, 431 (1949).

But, as the Court observed in the ICC case, 337 U.S. at 430, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." It is at that below-the-surface level that this case can be seen as the first instance in which the Executive Branch, or certain officers thereof, seek the aid of the federal judiciary to be excused from either the application or performance of federal statutes that the Executive Branch is sworn to obey and execute. It is also the first modern instance in which the Executive Branch seeks invalidation of a statute on an advisory basis, prior to its enforcement or application.

This lawsuit offends so many established principles of federal jurisdiction and Article III justiciability, and so totally fails to allege a cognizable cause of action, as to warrant dismissal of the complaint forthwith.

The House has included in its motion to dismiss two procedural prayers which we believe necessitate immediate action: (1) the court should expedite the briefing and consideration of the motion to dismiss; and (2) because of the serious and fatal jurisdictional flaws in the complaint, resolve those threshold issues first without proceeding to consider any other issues on the merits.

I. INTRODUCTION

A. The Contempt Citation

On December 16, 1982 the House of Representatives considered and passed by a vote of 259 yeas to 105 nays, H.R. Res. 632, 128 Cong. Rec. H10061 (daily ed. Dec. 16, 1982) (attached as Exhibit 1), citing the Administrator of the Environmental Protection Agency, Anne M. Gorsuch who was subpoenaed as a witness before a duly constituted committee of the House and failed to produce certain documents, for contempt of Congress pursuant to statute. 2 U.S.C. §192 et seq. The proceedings in the House were conducted under rules providing that "[q]uestions of privilege [of the House]. . .affecting the rights of the House collectively, its safety and dignity and the integrity of its proceedings . . .shall have precedence of all other questions. . ." H.R. Rule IX, Rules of the House of Representatives §661, reprinted in Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 398, 96th Cong., 2d Sess. 317 (1981). (A copy of the rule is attached as Exhibit 2).

The contempt resolution was accompanied by a committee report outlining in detail the events which preceded the finding of contempt by the House Committee on Public Works for non-compliance with a subpoena issued by its Subcommittee on Investigations and Oversight and served on November 22, 1982. Contempt of Congress: Report of the House Committee on Public Works and Transportation on the

Congressional Proceedings Against Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, For Withholding Subpoenaed Documents Relating To The Comprehensive Environmental Response, Compensation and Liability Act of 1980, H.R. Rep. No. 968, 97th Cong., 2d Sess. 1 (1982).

The recommendation to cite the Administrator for contempt was approved by the Committee on December 10, 1982 and the report, together with additional and minority views, was filed on December 15, 1982. 128 Cong. Rec. H9910 (daily ed. Dec. 15, 1982)

The subpoena was issued to obtain relevant information within EPA relating to the EPA's administration of the so-called "Superfund" law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub.L.No. 96-510, codified at 42 U.S.C. §9604 (Supp. V 1981), the purpose of which was to provide for the clean-up of abandoned hazardous waste sites through the establishment of a $1.6 billion trust fund and an enforcement mechanism for recovery of the costs of clean-up against the party responsible for creating the waste site. As the legislative history indicates, the legislation was adopted to provide "for a comprehensive scheme to provide for recovery of damages caused by oil spills, recovery of cleanup costs and establishment of liability and requirements for financial responsibility." H.R. Rep. No. 172, 96th Cong., 2d Sess. 2 (1980).

The investigation by the Subcommittee on Investigations and Oversight was commenced to determine whether the Environmental Protection Agency, charged with administering Superfund, is properly and vigorously enforcing the law, particularly with respect to obtaining or recovering the full costs of cleaning up abandoned hazardous waste dumps from the companies that are responsible.

The vote to cite the Administrator for contempt commenced at approximately 9:40 p.m., December 16, 1982, and was concluded at roughly 10:00 p.m. 128 Cong. Rec. H10061 (daily ed. Dec. 16, 1982) (Exhibit 1). Only moments later, and before the Speaker of the House had actually certified the resolution of contempt to the United States attorney for presentment to the grand jury, the Department of Justice filed the instant action seeking to enjoin and restrain the legislative defendants from taking any further action to enforce the subpoena and to declare the subpoena unconstitutional. 1/

Service of the complaint was not effected until the following day and no attempt was made to notify or serve the summons and complaint upon the House or any of its named officers, even though the House did not adjourn until 12:31 a.m., December 17, 1982, 128 Cong. Rec. D1456 (daily ed. Dec. 16, 1982), and its officers were present during the

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1/ The Speaker certified the contempt on the following day and it was delivered to the United States Attorney at 11:15 on December 17, 1982. 128 Cong. Rec. H10268 (daily ed. Dec. 17, 1982) (Exhibit 3).

session attending to the business of the House until adjournment to receive service had any effort to do so been made.

B. The Complaint

The complaint identifies the sole plaintiff as the sovereign "United States of America," described as residing at the following address: "c/o U.S. Department of Justice, 9th & Pennsylvania Ave., N.W., Washington, D.C. 20530." See Local Rule 1-5(b).

Jurisdiction is alleged to exist under two statutes, 28 U.S.C. §§1331, 1345. The complaint seeks declaratory relief under, but does not cite, the Declaratory Judgment Act. But that Act provides only remedies, not jurisdiction. Skelly Oil Co. v. Philips Petroleum Co., 339 U.S. 667, 671 (1950).

We vigorously contest, as shown below, the authority of the Attorney General or any other Executive official, to bring suit in the name of the sovereign against the Legislative branch, and therefore, refer throughout to "plaintiff" to signify the party or parties in interest bringing suit, whoever they may be.

The complaint names the "House of Representatives;" the "Committee on Public Works and Transportation;" the "Subcommittee on Investigations and Oversight;" the Honorable Elliott Levitas, Chairman of the Subcommittee, the Honorable James Howard, Chairman of the full Committee and the Honorable Thomas P. O'Neill, Jr., the Speaker of the

House, and the other elected House officers: the Honorable Edmund L. Henshaw, Clerk, the Honorable Benjamin J. Guthrie, Sergeant-at-Arms, and the Honorable James Molloy, Doorkeeper. 2/

As explained in the complaint, "[t]his is a civil action seeking a declaratory judgment and injunctive relief on the grounds that efforts to compel production of the documents discussed below are unconstitutional because the dissemination of such documents, which are part of open investigatory law enforcement files and deliberative decision making materials, outside of the Executive Branch would impair the President's constitutional obligation to ensure that the laws be faithfully executed. United States Constitution, Art. II, Sec. 1. See United States v. Nixon, 418 U.S. 683, 711 (1974)." Complaint ¶13. The Complaint further alleges that subpoena is "defective because it is overbroad," Complaint ¶39, and that Administrator Gorsuch cannot be subject to a criminal prosecution under 2 U.S.C. §194 because she "has been instructed by the President to withhold such privileged documents from . . . the Congress . . .." Complaint ¶41.

Finally, the Complaint seeks declaratory and injunctive relief, including restraint against the legislative defendants from taking further action to enforce the

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2/ The complaint does not name the Chaplain or the Postmaster, the two remaining elected constitutional House officers. See, U.S. Const., art. I, §2, cl. 5; H.R. Rule II, Rules of the House, supra §635 at 305; Buckley v. Valeo, 424 U.S. 1, 128 (1976).

subpoena; that 2 U.S.C. §194 cannot be invoked against an executive official and that the subpoena "is unconstitutional on its face and as applied." Complaint, Prayer for Relief, ¶D.

The summons served upon the House of Representatives and its Member and officer defendants purports to require a response by way of motions or answer within 20 days after service. Pursuant to Rule 12(a), Fed.R.Civ.P., the United States or an officer or agency thereof is entitled to 60 days after service within which to respond. Apparently, the Department believes that while the law provides 60 days, for example, to members of local draft boards, Totus v. United States, 39 F.Supp. 7 (E.D. Wash. 1941) and to agencies performing governmental service like the Tennessee Valley Authority, Ramsey v. United Mine Workers, 27 F.R.D. 423, 425 (E.D. Tenn. 1961), the House of Representatives, as a component of the United States, is not entitled to 60 days. The House, its officers and members have been customarily afforded the 60 day time limit in recognition of their self-evident status as "officers" for purposes of Rule 12(a), Sharrow v. Holtzman, Civ. Action No. 78-C-2407, (E.D.N.Y. issued March 26, 1979) slip op. at 2 n.1 (unpublished opinion) aff'd 643 F.2d 1292 (2d Cir. 1979) cert. denied 452 U.S. 939 (1981), and the Department itself has routinely claimed the 60 day limit in representing Members, officers and employees sued in their official capacity. The House of Representatives desires prompt

dismissal of this suit and so we have filed the motion to dismiss as expeditiously as possible. The prompt filing of the motion to dismiss should not be construed to mean agreement with or acquiescence in the Department's assertion that the House and its Member and officers are entitled only to the 20 days afforded private parties. 3/

C. Subsequent Events

Following the late night filing of the complaint, the Department of Justice announced its intention not to take the steps mandated by the criminal contempt statute, despite the nondiscretionary nature of the obligation imposed upon the United States Attorney to present the matter to the grand jury. 2 U.S.C. §194. In Re Frankfeld, 32 F.Supp. 915 (D.D.C. 1940).

Instead, the Department of Justice, at a press conference held the following day, announced the filing of this suit "seeking to block the contempt action" and "to enjoin any effort to pursue the criminal action against

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3/ The court might be aware that the summons filed by the former Senate Select Committee on Presidential Campaign Activities, the so called "Watergate Committee", provided then President Nixon the normal 60 days, however, the Committee moved to reduce the time the same day it filed the Complaint to 20 days. Prior to any action by the district court on the motion, the parties stipulated to a reduction of time to answer or respond to 20 days. The motions and stipulation are reprinted in Presidential Campaign Activities of 1972, Appendix to the Hearings of the Senate Select Comm. on Presidential Campaign Activities: Legal Documents Relating to the Select Committee Hearings, 93d, Cong., 1st and 2d Sess., Part I, 541, 637-643 (1974) (hereinafter "Senate Select Committee Legal Documents").

Gorsuch." Department of Justice Statement, p.1 (attached as Exhibit 4).

Unattributed Department spokesmen stated: "It would be a terrible dereliction of office to prosecute under [the] circumstances." Wall St. J., Dec. 20, 1982, at 6, col. 1.

On December 17, 1982 at 11:15 p.m., the Speaker's certification was delivered to the United States Attorney for the District of Columbia, and notification of delivery was presented to the House at approximately 1:00 a.m. on Saturday morning December 17, 1982 while the House was in session. 128 Cong. Rec. H10268 (daily ed. Dec. 17, 1982) (attached as Exhibit 3).

II. INJUNCTIVE AND DECLARATORY RELIEF ARE INAPPROPRIATE

A. The Speech or Debate Clause Bars The Request For Injunctive And Declaratory Relief

The instant Complaint seeks "injunctive relief on the ground that efforts to compel production of the documents discussed below are unconstitutional. . ." Complaint ¶13, and states that because "there is no legal basis for the House of Representatives to serve upon the United States Attorney a request for criminal prosecution under the provisions of 2 U.S.C. §194. . .the ["plaintiff"] has no adequate remedy at law. . .[and] is entitled to an injunction to prevent such action," Complaint ¶s 41, 42, and

43. [4/] In addition, the prayer for relief requests the court to "enjoin and restrain defendants from taking any further action to enforce the outstanding subpoena served by the Committee on Public Works and Transportation. . ." Complaint, Count II, ¶A.

The Speech or Debate Clause prevents Members not only from being "questioned" in court for actions performed in the chamber in terms of either testifying, McSurely v. McClellan, 553 F.2d 1277, 1299 (D.C. Cir. 1976) (en banc) cert. dismissed as improvidently granted, 438 U.S. 189 (1978); Gravel v. United States, 408 U.S. 606, 616 (1972), or in terms of liability, Doe v. McMillan, 412 U.S. 306 (1973), but even from "the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

The Speech or Debate Clause is the paradigmatic manifestation of the separation of powers, Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), designed to "preserve the

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[4/] At this point, as far as the House of Representatives, its Members or officers are concerned, there is nothing further to prevent since all action which can be taken in the House has been completed. The Department of Justice must understand, having prosecuted hundreds of prior cases under the statute, see generally, Sky, Judicial Review of Congressional Investigations: Is There An Alternative To Contempt?, 31 Geo.Wash.L.Rev. 399 (1962) that once certification is effected by the Speaker, no further action lies within or is necessary by the House. Although no full Committee or floor action had been taken before adjournment sine die of the 97th Congress with regard to a similar subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the complaint is drawn to include that committee's subpoena. Complaint ¶s 20, 31, 35, 36. Accordingly, the action could be read to seek injunction of ongoing legislative activity of another committee.

constitutional structure of separate, coequal and independent branches of government." United States v. Helstoski, 442 U.S. 477, 491 (1979). It protects "Member's conduct at legislative committee hearings," Gravel v. United States, 408 U.S. at 624, on the floor, Kilbourn v. Thompson, 103 U.S. 168, 200 (1882), and before other officially convened groups of legislators. Vander Jagt v. O'Neill, 524 F.Supp. 519 (D.D.C. 1981), aff'd. No. 81-1722 (D.C. Cir. Dec. 23, 1982).

The "plaintiff's" complaint makes no pretense in alleging anything but "pure" legislative acts taken in the chamber and in committee in relation to the issuance of a subpoena. See, e.g., Complaint ¶26 (subcommittee vote); ¶27 (full committee vote); ¶31 (service of subpoena by subcommittee of the Committee on Energy and Commerce), and ¶35 (subcommittee vote). It is beyond doubt that voting, reporting and debating or anything done in the chamber or committee cannot serve as a basis for suit. United States v. Brewster, 408 U.S. 501, 527 (1972) (a court cannot inquire into how a legislator "spoke, how he debated, how he voted, or anything he did in the chamber or in committee").

Members and staff are acting within the legislative sphere when conducting investigations, Tavoulareas v. Piro, 93 F.R.D. 11, 18 (D.D.C. 1981); 527 F.Supp. 676, 682 (D.D.C. 1981), and when authorizing or preparing subpoenas, McSurely v. McClellan, 521 F.2d 1024, 1037 (D.C. Cir. 1975) aff'd en banc by an equally divided court, 553 F.2d 1277, 1284

(1976); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 505 (1975). The "plaintiff" avers the power to perform, and the actual performance of, these very legislative acts in the action. See, e.g., Complaint ¶s 4-5 (Committee on Public Works and Transportation has power to issue subpoenas and to vote to cite a witness for contempt); Complaint ¶21 (service of subpoena); Complaint ¶27 (committee voted to cite Administrator for contempt); and Complaint ¶28 (House passed a resolution).

Once it is determined that Member's are acting within the legislative sphere, as clearly they are when voting or debating on a contempt resolution, Kilbourn v. Thompson, 103 U.. 168, 200 (1882) judicial inquiry is at an end and "the Speech or Debate Clause is an absolute bar to judicial interference." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975) (emphasis added).

As to non-legislator defendants, they are also immunized when performing acts within the legislative sphere either delegated to them by constitutional rule-making authority, Consumers Union of the United States, Inc. v. Periodical Press Correspondents' Ass'n., 515 F.2d 1341, 1343 (D.C. Cir. 1975), cert. denied 423 U.S. 1051 (1976). (legislative functionaries supervising seating in press galleries "performing delegated legislative functions. . .[which] were an integral part of the legislative machinery"), or which if performed by Members themselves would be immune. Gravel v. United States, 408

U.S. at 618. And the non-legislator agents are liable only for carrying into execution an unconstitutional order of the House outside the House of Representatives but not for acts which "if performed in other than legislative contexts, would in [themselves] be unconstitutional or otherwise contrary to criminal or civil statutes." Doe v. McMillan, 412 U.S. at 312-13. Kilbourn, supra at 200 (Members immune for debating, reporting and adopting resolution to arrest contumacious witness; sergeant-at-arms liable for false imprisonment in executing warrant where there was no valid legislative inquiry); Powell v. McCormack, 395 U.S. 484, 505 (1969) (Members immune for voting to exclude Representative elect; officers subject to declaratory relief for refusing to accord Representative elect rights and emoluments of office); Eastland v. United States Servicemen's Fund, supra (Members and staff immune for issuance of subpoenas which infringed First Amendment rights of plaintiffs); Doe v. McMillan, supra (Member and committee consultant immune for authorizing and preparing allegedly libelous report; remanded for determination whether public printer's actions exceeded legitimate legislative bounds). 5/

5/ Here it is unnecessary to even consider whether legislative functionaries could be subject to "coercive relief," for no House officer is required to do anything under the contempt statute. Powell v. McCormack, 395 U.S. 486, 514-515 (1969). It is the House which votes and the Speaker who certifies, 2 U.S.C. §194, and no officer is charged with any responsibility in either regard. The "plaintiff" has either named the officers in total disregard for the plain words of the statute, which do not implicate them, or in a transparent attempt to save the complaint from dismissal by naming non-legislator agents. The officers are simply not proper party defendants and cannot save an otherwise infirm complaint from dismissal.

The act of certification by the Speaker and its delivery to the United States attorney is intimately cognate to the vote and debate on the resolution of contempt; it is a legislative act by the narrowest definition because it forms "an integral part of the deliberative and communicative processes by which Members participate in. . .House proceedings with respect. . .to. . .matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. at 625. The Speaker, and Clerk of the House, regularly and by rule certify all bills and resolutions which pass the House and the certification of contempt is therefore, something "generally done in a session of the House by one of its members in relation to the business before it." Kilbourn v. Thompson, 703 U.S. at 204. See also H.R. Rule I, Rules of the House of Representatives, supra §624 (Speaker is authorized to sign enrolled bills whether or not the House is in session) and H.R. Rule III, id. §643 (Clerk to certify passage of all bills and joint resolutions).

Eastland also makes it abundantly clear that neither injunctive nor declaratory relief can lie against legislators and their aides in view of the absolute nature of the clause. 421 U.S. at 507.

In Eastland, plaintiffs sued the Chairman and nine Members of the Senate Subcommittee and its Chief Counsel for issuing and serving a subpoena upon a bank for plaintiff's records in alleged violation of the organization's First

Amendment associational and free speech rights. In a complaint remarkably similar to the "plaintiff's" action here,

> . . .USSF and its members. . .sought a permanent injunction restraining the Members of the Subcommittee and its Chief Counsel from trying to enforce the subpoena by contempt of Congress and other means and restraining the bank from complying with the subpoena. Respondents also sought a declaratory judgment declaring the subpoenas and the Senate resolutions void under the Constitution.

421 U.S. at 496.

The court of appeals stayed enforcement of the subpoenas pending consideration of the claims by the district court, id. n.9, and later during court of appeals consideration, id. n.10, and held that "although courts should hesitate to interfere with congressional actions even where First Amendment rights are clearly implicated, such restraint could not preclude judicial relief where no alternative avenue of relief is available other than 'through the equitable powers of the court.'" Id. at 497 quoting Eastland v. United States Servicemen's Fund, 488 F.2d 1252, 1259 (D.C. Cir. 1973).

The Supreme Court reversed, rejecting the power of the courts to enjoin implementation of the subpoenas on the "theory. . .that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights." Id. at 409. The Court rejected as well the "clear implication. . .that the District Court was authorized to

enter a 'coercive order' which in context would mean that the Subcommittee would be prevented from pursuing its inquiry by use of a subpoena to the bank." 421 U.S. at 500. Accordingly, the Court remanded with instructions to dismiss the complaint in its entirety. Id. at 512.

Similarly, in Doe v. McMillan, supra, public school children and their parents brought an action against Members of the District of Columbia committee to prevent publication by Congress of a committee report, which included derogatory information on absenteeism and disciplinary problems. The plaintiffs' "complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report containing the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation." Doe v. McMillan, 412 U.S. at 304-305.

The Court affirmed dismissal of the complaint on Speech or Debate Clause grounds "insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included material to the Speaker of the House and for voting for publication of the report." 412 U.S. at 312.

Furthermore, because the defendant legislators did no "more than conduct the hearings, prepare the report and

authorize its publication," id. at 312, they were not subject to suit, and here the defendant legislators did no more than report and vote the privileged resolution of contempt and have the Speaker certify it to the United States Attorney. 6/

The court of appeals had declined to enter any injunctive relief because the Public Printer agreed not to seek republication or distribution beyond the internal needs of Congress, 459 F.2d 1304, 1315 (D.C. Cir. 1972), and the "plaintiff" is in no better position in this case to demonstrate the irreparable injury which would entitle it to injunctive relief because like the plaintiff in Doe, the "plaintiff" cannot show any "current activity by [Congress] which constitute[s]. . .an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized." Doe v. McMillan, 459 F.2d at 1316 quoting Cole v. McClellan, 439 F.2d 534, 536 (D.C. Cir. 1970). 7/

Of particular relevance to the facts alleged in the complaint is the court of appeals statement on remand

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6/ The House has certified hundreds of contempts to the United States Attorney for prosecution. During the period 1945-1957 the House alone referred over 100 contempt citations to the Department for prosecution. C. Beck, Contempt of Congress 14 (1959). We are unaware of the Department ever having raised the constitutionality of the statute on its face or as applied in any of these cases.

7/ This point vividly illustrates the patent absurdity presented by the "plaintiff's" complaint. It seeks nothing less than the exercise of the Court's equitable powers against itself and presumably, the United States Attorney.

affirming the District Courts' entry of judgment for defendants on speech or debate grounds that, "Restricting distribution of committee hearings and reports to Members of Congress and the federal agencies would be unthinkable." Doe v. McMillan, 566 F.2d 713, 718 (D.C. Cir. 1977).

The evolution of this Circuit's decisions on the inappropriateness of coercive relief against legislators in light of the Supreme Court's pronouncement in Eastland can be seen by contrasting the Circuit's opinion upholding the preliminary injunction in Eastland with Judge Leventhal's later statement in United States v. American Telephone & Telegraph, 567 F.2d 121, 129 (D.C. Cir. 1977) that: "The fact that the Executive is not in a position to assert its claim of constitutional right by refusing to comply with a subpoena [because the documents were in the possession of AT&T] does not bar the challenge so long as members of the subcommittee are not, themselves, made defendants in a suit to enjoin implementation of the subpoena." (emphasis added). Of course in the instant suit all the defendants are legislative entities and the "plaintiff" is seeking precisely what Judge Leventhal understood would be precluded by Eastland.

The "plaintiff's" complaint, filed by the Department of Justice, is diametrically opposite to its position in other cases, where it is defending the very legislative acts it now attacks. Only last month the Department asserted, on behalf of the "United States" and the House that the Clause

is an absolute bar to suit against the House and Senate and its officers in a suit challenging the enactment of the "Tax-Equity and Fiscal Responsibility Act of 1982," Pub.L.No. 97-248, 96 Stat. 324 (Sept. 3, 1982). There plaintiffs filed an action for injunctive and declaratory relief, before the bill which ultimately became law passed the House and was signed by the President. In defense of the suit the Department asserted that the clause was an absolute bar to maintaining suit against "officers and officials of the House and Senate as well as the institutions themselves." Memorandum In Support of Motion To Dismiss By United States and Senate Defendants at 18, W. Henson Moore v. United States House of Representatives, and Ron Paul v. United States, Consolidated Civ. Action Nos. 82-2318, 82-2352 (D.D.C.) 8/

The Department's memorandum unabashedly proclaimed that the "amendment of a bill by the Senate, the tabling of a proposed resolution by the House, and the signing of the bill by the Speaker of the House and the President of the Senate, is by any definition 'legitimate legislative activity' protected by the speech or debate clause." Id. at 19. The Department also argued that the act of certifying, the very same act in question in this case, by the Clerk of

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8/ The suit was dismissed by Judge Joyce Hens Green in a Memorandum Opinion issued on December 16, 1982, on the grounds that plaintiffs lacked standing to sue and upon the basis of the doctrine equitable discretion announced in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981).

the House "is certainly conduct related to the functioning of Congress itself, and thus within the protection of the Clause." Id. 9/

In summary, the Speech or Debate Clause absolutely bars injunctive or declaratory relief against the House of Representatives or its Members in this case.

B. Under These Circumstances Federal Courts Will Not Interfere By Way Of Declaratory Or Injunctive Relief In Criminal Prosecutions

Presaging the denial of both injunctive and declaratory relief in Eastland were a series of cases in this circuit denying exercise of the district court's equity powers to grant injunctive or declaratory relief against congressional committees. When applied in conjunction with the well established judicial principle that federal courts will not interfere with pending criminal prosecutions, Younger v. Harris, 401 U.S. 37 (1971); Steffel v. Thompson, 415 U.S.

9/ There is nothing unusual about the Department asserting the speech or debate clause on behalf of congressional defendants and it has done so in virtually hundreds of cases. See e.g., McSurely v. McClellan, supra. For a more complete list of cases in which the Department has done so see, e.g., Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 20, 22-27 (1976); and Report of the House Committee on the Judiciary Identifying Court Proceedings and Actions of Vital Interest to Congress, 97th Cong., 2d Sess. 208 (Comm. Print No. 14, 1981). Because the tax case is recent, we have attached the relevant portions of the Department's memorandum as Exhibit 5 as representative of the position which it has consistently taken.

452 (1974), it becomes apparent that "plaintiff" cannot invoke the court's equity jurisdiction under the present circumstances.

In Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972), plaintiff sought injunctive and declaratory relief against the Chairman and Members of the Permanent Subcommittee on Investigations with respect to a Senate resolution authorizing an investigation into the causes of civil disturbances and the issuance of a subpoena thereunder for records maintained in connection with a journal which he published. "The question pressed for decision is . . . whether plaintiff is entitled to an injunction or a declaratory judgment that would enable him to refuse to appear before the Subcommittee, free of the possibility of contempt citation, in response to the request for all records and documents . . .," 463 F.2d at 897, pertaining to the inquiry.

Although the court of appeals rejected the theory earlier expounded in Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960) that suits for declaratory relief against the legislature were "non-justiciable," Sanders v. McClellan, 463 F.2d at 897, it nevertheless determined that plaintiff was not entitled to declaratory relief for several compelling reasons equally applicable here.

The courts' analysis of the reason why declaratory relief is inappropriate is worth setting out in detail, for

it draws into precise focus the way in which section 194 provides all the necessary protection for a witness.

> We first note the existence, apart from resort to our jurisdiction in equity, of an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation. A witness may address his claims to the Subcommittee, which may sustain objections. Were the Subcommittee to insist, however, upon some response beyond the witness' conception of his obligation, and he refused to comply, no punitive action could be taken against him unless the full Committee obtained from the Senate as a whole a citation of the witness for contempt, the citation had been referred to the United States Attorney, and an indictment returned or information filed. Should prosecution occur, the witness' claims could then be raised before the trial court. See Wilson v. United States, 125 U.S.App.D.C. 153, 369 F.2d 198 (1966). See generally C. Beck, Contempt of Congress (1959); R.L. Goldfarb, The Contempt Power (1963).

463 F.2d at 899.

It is both premature and presumptuous to seek exercise of this court's equitable powers to abruptly cut off the "orderly and approved means" by which the "plaintiff's" constitutional claims can be asserted and vindicated. 10/

The court of appeals then went on to address plaintiffs' claims, which again bear remarkable resemblance to those asserted by the "plaintiff." First, the Sanders plaintiff claimed the invalidity of the authorizing resolution, 463 F.2d at 900, just as the "plaintiff" attacks the resolution of contempt here, Complaint ¶28; next

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10/ The President's claim of executive privilege throughout the investigation and prosecution of Watergate offenses was litigated in the criminal context. Nixon v. Sirica, 487 F.2d 1 (D.C. Cir. 1973) (en banc) (grand jury subpoena); United States v. Nixon, 418 U.S. 683 (1974) (17(c) subpoena during criminal trial).

plaintiff argued that the resolution was "overbroad," as the "plaintiff" argues here, Complaint ¶39; and finally "Mr. Sanders also attacks Resolution 308 as applied to him, that is, he attacks the subpoena duces tecum as unconstitutional." id; see Complaint, Prayer for Relief, ¶D. The court firmly dispensed with these claims: "To rule with him would require us to ignore the regular procedure for testing witness' claims." Id.

The decision went on to discuss the pre-Baker v. Carr cases, all of which were via appeal from contempt convictions, id., and the post Baker cases seeking to "bypass the regular procedure referred to, by invoking the equitable powers of the judiciary." Id. at 901. The court concluded that "in each of these cases finally decided by this court in which injunctive or declaratory relief has been sought with respect to an ongoing congressional investigation, the relief has been denied, if not always for the same reason." Id. (citations omitted).

Finally, the court dealt with Sanders' claim that protection of the significant constitutional interests in the confidentiality of news sources and the chilling effect on the news gathering process could not be vindicated in a criminal trial for contempt. The plaintiff relied for this claim on Dombrowski v. Pfister, 380 U.S. 479 (1965), where injunctive and declaratory relief were sought in federal court against prosecution by state officials alleged to be using a criminal statute in bad faith to deter plaintiff

from exercising legitimate civil rights. The Supreme Court had reversed the lower court's decision to abstain to permit a possibly narrowing state construction of the statute, on the ground that defending in a criminal prosecution did not offer adequate remedy in view of clearly threatened enforcement of the statute. The Sanders court rejected this plea as well, relying on the doctrine of Younger v. Harris, 401 U.S. 37 (1971), that as a matter of comity between federal and state governments, federal courts will not enjoin a state prosecution under a state statute alleged "to be void" on its face.

> Our's is not a case of comity between federal and state sovereigns. It does present, however, the analogous problem of the relationship between two coordinate branches of the same government, and so is akin to the comity between Nation and State relied upon in Younger. The judiciary has the duty "of not lightly interfering with Congress' exercise of its legitimate powers' . . . While we have held in Part III of this opinion that deference due to Congress does not render the issue nonjusticiable, nevertheless, the court must not intervene prematurely or unnecessarily.

463 F.2d at 903 (emphasis added).

There simply is no reason to grant the relief requested for any subsequent prosecution will "afford[ ] . . . an opportunity to raise [Administrator Gorsuch's] constitutional claims." 401 U.S. at 49. 11/

11/ We will address later the alternative basis for declining to entertain this suit, which like the reasons for narrowly construing the ability of federal courts to enjoin state prosecutions, resides in "the function of federal courts in our constitutional plan." Id. at 52. In turn, the

Younger reaffirms that the "settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions" 401 U.S. at 53, even against a "statute which 'on its face' abridges First Amendment rights retain vitality." Id.

Younger and its progeny do nothing to erode the principle that injunctive or declaratory relief is unavailable against pending prosecutions.

Indeed Samuels v. MacKell, 401 U.S. 37 (1971) held that declaratory relief is foreclosed when a state prosecution is pending.

In addition, Steffel v. Thompson, 415 U.S. 452 (1974) holds that declaratory relief may be granted when no state prosecution is pending and "a federal plaintiff demonstrates a genuine threat of enforcement of a disputed criminal statute" regardless of whether the challenge is to the statute on its face or as applied. 415 U.S. at 475. The certification by the Speaker renders the criminal prosecution "pending" for purposes of Steffel, for 2 U.S.C. §194 imposes the nondiscretionary duty upon the United

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11/ [Continued from previous page]
function of federal courts to resolve actual "cases or controversies" rather than accord the courts "an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them," id., deprives the action of any real Article III substance.

States Attorney to at least present the matter to the grand jury.

The law of this circuit establishes that "[c]riminal proceedings [under 2 U.S.C. §192] are begun by a resolution of the full House or Senate, citing the witness for contempt." United States v. American Telephone & Telegraph, 551 F.2d 384, 393 n.16 (D.C. Cir. 1976). Therefore, since the criminal proceeding has "begun" declaratory relief under Steffel is not available.

The principles that courts of equity will neither enjoin, nor declare the rights of parties in, criminal prosecutions enunciated in the foregoing cases are aptly summarized in Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943):

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

The policy of refraining from interference in pending prosecutions, particularly those begun under 2 U.S.C. §194, is not only sound judicial policy but is wholly consistent with the legislative intent of Congress in enlisting "the aid of the Judiciary to enforce its will." Eastland, supra at 509 n.16.

The investigative power of the Congress has been, from the earliest days of the Republic, exercised to examine and review the administration of executive departments of the government. Landis, Constitutional Limitations on The Congressional Power of Investigation, 40 Harv.L.Rev. 153, 170-175 (1926) and examples cited therein, including 10 Annals of Cong. 786-87 (1800) (investigation of Secretary Wolcott's administration of treasury); 21 Annals of Congress 1606-07 (1810) (investigation of Brigadier General Wilkinson and allegations of complicity in foreign intrigue).

That the purpose of the criminal contempt statute, enacted in 1857, was to enlist the aid of the judiciary, is clear from the legislative history. One of the sponsors explained in detail the purposes and procedures implemented by the statute:

> The first section of the bill confers no summary power on any tribunal; it increases no power now existing in any committee, and confers no power to be exercised either by the committee or the House. It makes a mere substitution of a judicial proceeding for the ordinary proceeding by attachment by a parliamentary body. It substitutes a definite punishment for an indefinite punishment. It substitutes an efficient punishment for an inefficient punishment. It substitutes the quiet formality of judicial proceeding in lieu of the irregular proceedings which occurred in this House yesterday, in attempting to exercise such jurisdiction as is necessarily incident to any parliamentary investigation. It places in the court power to punish according to the gravity of the offense, and does not make it a question of time in relation to the beginning or the end of the session, whether the party shall be confined one day, one week, ten months, or two years, without any sort of reference to the merit or demerit of the party, and depending entirely on the accidental time of the duration of the

> Congress at which he may be called upon to testify. I presume, therefore, that it does not inflict any burden on the citizen; that it throws guards around him; that it causes punishment to be more equitably measured out according to the gravity of the offense, and makes it more sure than any punishment that can be inflicted by this House. In addition to the great security of the rights of the citizen, it removes him from the passions and excitement of the Hall, which may affect the duration of the punishment, and makes the question a matter of calm judicial consideration and reflection, to be passed upon by a jury of his countrymen, and not in this arena, where partisans may frequently, in political questions, carry into the measure of punishment their party hostilities. So much for the first section of the bill.

Cong. Globe, 34th Cong., 3d Sess. 427 (remarks of Rep. Davis).

The Congress fully intended and contemplated that the procedures prescribed by the statute would apply to executive officials and private persons alike:

> The bill proposes to punish equally the Cabinet officer and the culprit who may have insulted the dignity of the House. . .

Id. at 429.

The appropriateness of utilizing the criminal contempt statute as a means of enforcing congressional subpoenas to executive officials was recognized and endorsed only recently by the Ervin Committee in the Senate Select Committee's Watergate investigation. Chief Counsel, Sam Dash, in explaining to Judge Sirica the reasons for taking the unusual step of instituting civil suit to enforce a congressional subpoena for the Watergate tapes, stated that "[o]rdinarily we would have subpoenaed an official

subordinate to the President and then the proper route would have been either a recommendation for citation for contempt which we come [sic] the criminal route referring to the prosecutor or the extraordinary way of our common law powers to prosecute ourselves through the sergeant-at-arms." Transcript of Court Proceedings at 13, Senate Select Committee v. Nixon, supra, Senate Select Committee Legal Documents at 918.

Indeed, the Supreme Court has noted: "Congress, in enacting ¶192, specifically indicated that it relied upon the courts to apply the exacting standards of criminal jurisprudence to charges of contempt of Congress to assure that the congressional investigative power, when enforced by penal sanctions, would not be abused." Gojack v. United States, 384 U.S. 702, 707 (1966). See also Russell v. United States, 369 U.S. 749, 755 (1962).

The kinds of claims asserted by the "plaintiff" in the conplaint have previously been considered by the courts in reviewing prosecutions under the statute. For example, see McPhaul v. United States, 304 U.S. 372, 382 (1960) where the court resolved on appeal from a conviction under the statute a claim of overbreadth; and United States v. Tobin, 195 F.Supp. 588, 608-613 (D.D.C. 1961) where the court considered the witness' claim of executive privilege.

As we will demonstrate, each and every valid constitutional contention which can be advanced by the "plaintiff" may be adequately adjudicated in any ensuing

criminal proceeding and the assertion to the contrary is unsupported by any showing that the interests of the Executive in avoiding "great and immediate" harm will be prejudiced by following the statutorily prescribed method under the criminal contempt statute.

The essence of the executive's pleas seems to be that it wishes to unilaterally substitute a civil review mechanism, the instant suit for injunctive and declaratory relief, for the procedure which has been enacted into statute. This attempt to erect law by executive fiat, substituting ad hoc civil review for the duly enacted statutory and judicially approved provisions, not only represents an impermissible usurpation of the legislative function but also ignores the extensive history of legislative and executive consideration of this very question and the proper exercise of legislative judgment that proceedings pursuant to the statute provide the necessary and proper safeguards for the witness while serving the legislatures need to obtain information. 12/

What emerges, then, from the legislative history of the statute, contemporary understanding of its reach, and

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12/ The criminal contempt statute is also the preferred way to proceed because it avoids interference with the legislature. "Finally, what is sought--government by injunction--is anathematic to the American judicial tradition. . ." United States v. City of Philadelphia, 644 F.2d 187, 203 (3d Cir. 1980). What was said there is equally true here: the Executive cannot chose a means which Congress has rejected because of "convenience and political considerations." Id. citing New York Times, Co. v. United States, 403 U.S. 713, 742 (1971) (Marshall, J., concurring).

Supreme Court interpretation, is that the criminal prosecution under 2 U.S.C. §§192, 194 is preferred because it provides the witness, whether he or she is an executive official or private person, the full panoply of safeguards attendant to a criminal case. 13/

III. THE COURT LACKS JURISDICTION TO ENTERTAIN THE ACTION

The House of Representatives submits that the complaint is fatally defective in that there is no statutory basis for a suit by the Department of Justice, or the Executive against the Legislative Branch, or one of its houses, in the instant case the House of Representatives; that even if the statutes relied upon by the plaintiff confer a statutory grant of jurisdiction, the action does not satisfy the constitutional requirements for a "case or controversy" under Article III, §2 of the Constitution because neither the "United States" nor the Executive branch has standing, because neither has suffered any injury-in-fact traceable to the actions of the House of Representatives which is redressable by the courts; and in any event should the elements of standing be satisfied, the action is nevertheless premature and unripe for judicial review. Finally, there is no nonstatutory basis upon which the Executive can bring suit under any implied authority, which

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13/ Congress has even applied the criminal contempt statute to its own employees for contumacious conduct before committees. Contempt of O. Robert Fordiani, H.R. Res. 743, 96th Cong., 2d Sess., 126 Cong. Rec. H6177 (daily ed. July 21, 1980).

even if available, could not satisfy the Article III requisites for jurisdiction.

In Senate Select Committee v. Nixon, 366 F.Supp. 51 (D.D.C. 1973) the President defended a suit by the former Watergate Committee chaired by then Senator Sam J. Ervin and on precisely such fundamental and threshold jurisdictional grounds obtained quick dismissal of the suit. As we will demonstrate below, the instant suit is even more seriously flawed from a jurisdictional standpoint and must be dismissed.

At the outset of the jurisdictional argument, the House of Representatives wishes to again protest the presumptuous assumption by the "plaintiff" of the sovereign's mantle "United States". The House of Representatives has raised the issue of the Executive's entitlement to denomination as "United States" in suits where it has refused to defend the constitutionality of statutes in favor of advancing the narrower parochial goals of the Executive. In no case is it clearer that the Executive has forfeited its right to proceed as the "United States" by refusing to enforce a valid law, and in bringing a suit as plaintiff to challenge its constitutionality directly against the Legislative branch.

A. There Is No Statutory Jurisdictional Basis For The Suit

It is axiomatic that in "a civil complaint . . . jurisdiction is a threshold issue . . . [and] is not automatic and cannot be presumed." Senate Select Committee

on Presidential Campaign Activities v. Nixon, 366 F.Supp. 51, 55 (D.D.C. 1973) (Sirica, J.). Furthermore, "the presumption in each case is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies." Id. Finally, the federal judiciary "may exercise only that judicial power provided by the Constitution by Article III and conferred by Congress." Id. And of course, jurisdiction may not be conferred by agreement or waiver by the parties. Mitchell v. Maurer, 293 U.S. 237, 244 (1934). Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

The Department relies first on the basic "federal question" statute, 28 U.S.C. §1331, to support the jurisdiction of the court. 14/

The legislative history of section 1331 is barren of any indication that Congress intended or understood the section to vest jurisdiction in the courts to decide inter-branch suits.

14/ In Senate Select Committee, supra, the Ervin Committee similarly attempted to ground jurisdiction for its civil suit to obtain Presidential tape recordings in section 1331. 366 F.Supp. at 59. The Court rejected section 1331 as a basis for jurisdiction because the Ervin Committee failed to satisfy the $10,000 amount in controversy requirement then contained in the statute, primarily because neither the "intrinsic value" of the tapes nor the legislator's rights and responsibilities could be quantified in a manner which would satisfy the $10,000 threshold. 366 F.Supp. at 59-61. Rather than pursue an appeal, the Committee sought and obtained a statute granting jurisdiction to sue. Senate Select Committee v. Nixon, 370 F.Supp. 521 (D.D.C. 1973).

The Watergate Committee, in its final report, had recommended "that Congress enact legislation giving the United States District Court for the District of Columbia jurisdiction to enforce congressional subpoenas issued to members of the executive branch, including the President." The Final Report of The Senate Select Committee on Presidential Campaign Activities, S.Rep.No. 981, 93d Cong., 2d Sess. 1084 (1974). The recommendation was never implemented by the Congress, and as shown below, it was specifically omitted from the title of the bill which ultimately provided procedures for the civil enforcement power granted to the Senate. In the Matter of the Application of the Senate Permanent Subcommittee on Investigations, (Cammisano) 655 F.2d 1232, 1238 n.28 (D.C. Cir. 1981) ("The Act [Ethics in Government] does not, however, include civil enforcement of subpoenas by the House of Representatives.") The issue of authorizing federal courts to hear civil enforcement cases was at the fore of congressional discussion immediately after Watergate and during enactment of the Office of Senate Counsel, Ethics in Government Act of 1978 §705, Pub.L.No. 95-521, 92 Stat. 1878, 2 U.S.C. §288(d) (Supp. III 1979) 28 U.S.C. §1364 and the suggestion that Congress would enact an authorization

statute without comment is inconceivable. 15/

Nor could section 1331 be read to imply a cause of action. Where a statute does not clearly establish a civil cause of action, the Supreme Court has held that one will be inferred only after satisfaction of comprehensive standards. Cort v. Ash, 422 U.S. 66 (1967), Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). "Under these decisions the 'central inquiry' and the 'ultimate question' is congressional intent," United States v. City of Philadelphia, 644 F.2d 187, 191 (3d Cir. 1980), and the standard is no different for inferring a cause of action "in favor of the government than the standard applicable to private litigants." Id.

The Cort v. Ash criteria do not favor inferring a cause of action, because at least two of the criteria are absent. As articulated in Cort the critical inquiries are, first is the United States "one of the class for whose especial benefit the statute was enacted . . . [s]econd, is there any indication of legislative intent, explicit or implicit, either to create a remedy or deny one?" 422 U.S. at 78.

Of course, the "United States," assuming arguendo the entitlement of the Executive to clothe itself in the

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15/ Special Prosecutor Archibald Cox has written: "But resolving disputes between the President and Congress over the provision of evidence for the Congress is not part of, or incident to, any judicial business confided to the courts by the statutes that presently define their jurisdiction; and therefore the courts cannot now rule upon the effect of congressional subpoenas." Cox, The Role of the Supreme Court in American Government, 26-27 (Oxford Univ. Press 1976).

sovereign, is no part of a "class for whose especial benefit the statute was enacted," 16/ and there simply is no legislative intent explicit or implicit one way or another.

What does exist is 2 U.S.C. §§192 and 194 and the clear congressional intent to establish that as a mechanism to enforce its subpoena, repeatedly recognized by the Supreme Court as an appropriate invocation of judicial authority. Thus in Watkins v. United States, 354 U.S. 178, 207 (1957) the Court stated that "Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct [and] [i]t has become customary to refer these matters to the United States Attorneys for prosecution under criminal law," and in Russell v. United States, 369 U.S. 749, 755 (1962) the Court stated that by "enacting the criminal statute under which these petitioners were convicted Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct."

16/ In United States v. City of Philadelphia, supra, the United States asserted a "duty" under two criminal statutes to sue to prevent violations of constitutional rights. The court of appeals rejected this "duty" theory, taking the Supreme Court's admonition in a predecessor case brought against the mayor and other city officials that such "amorphous propositions" could not support a cause of action. Rizzo v. Goode, 423 U.S. 362, 376 (1976). See also, Clark v. Valeo, 559 F.2d 642, 654 (D.C. Cir. 1977) (en banc) (Tamm, J., concurring) ("Not only does this argument [that the Government has a constitutional duty to take care that the laws are faithfully executed] assume a role for the executive as the 'protector of the Constitution,' but it also presupposes a decision on the merits of this suit"). And so the "duty" theory has been thoroughly discredited.

The "central inquiry" concerning congressional intent in these matters is answered in favor of the statutory means already in place and not in implying a civil remedy.

In United States v. City of Philadelphia, supra, the Attorney General argued that since the legislative history of the Reconstruction era Civil Rights Act did not reveal that Congress considered providing a civil remedy for the United States one could be implied in favor of the government from two criminal statutes. The court of appeals rejected this argument for reasons particularly relevant to the present case:

> the extensive congressional consideration of the problem of enforcement and the comprehensive legislative program that it developed simply foreclose the possibility that it implicitly created an additional remedy without ever mentioning its existence in either the statutes or the debates. There certainly is no evidence of congressional intent to create an additional remedy with the incredible breadth and scope of this one. The responsible answer . . . is that Congress never intended to grant a civil action to the Attorney General.

644 F.2d at 194-195.

Likewise, in the present circumstance, implying an additional remedy would turn congressional intent on its head.

While a few courts have on occasion, sua sponte, entreated the Congress to enact civil enforcement provisions, they have nevertheless recognized that the decision to do so is a legislative judgment, which must be statutorily authorized by Congress, not invented and manufactured by litigants and thrust upon the court.

"Although this question is not before the Court, it does feel that if contempt is, indeed, the only existing method [for resolving disputes between Congress and witnesses], Congress should consider creating a method of allowing these issues to be settled by declaratory judgment." United States v. Tobin, 195 F.Supp. 588, 617 (D.D.C. 1961). (emphasis added) On appeal, the court of appeals requested "that Congress will first give sympathetic consideration to Judge Youngdahl's eloquent plea." 306 F.2d 270, 276 (D.C. Cir. 1962)

Despite these judicial supplications, Congress has declined to do so.

In fact, when the Congress proposed to subject executive officials to civil enforcement actions to enforce congressional subpoenas the Department of Justice opposed the measure and in view of its opposition, executive officials were stricken from the reach of the civil enforcement statute. 28 U.S.C. §1364, enacted as Title V, Ethics in Government Act, supra. As originally introduced, Senator Ervin's Watergate Reform Act, S. 495, 94th Cong., 1st Sess. §101, (1975) included a mechanism for enforcement of congressional subpoenas against executive officials. During consideration of S.495 in the Senate Governmental Affairs Committee the Department of Justice opposed the provision, arguing instead that there should be one-time only statutes if the need ever arose:

What remains as the position of the Department is

that a specially drawn statute for each specific situation would be preferable.

Watergate Reorganization and Reform Act of 1975: Hearings Before the Senate Comm. on Government Operations on S.495 and S2036, 94th Cong., 1st Sess., Part 2, 33 (1976) (testimony of Michael M. Uhlmann, Assistant Attorney General, Office of Legislative Affairs, Department of Justice).

The Department later explained that its opposition was constitutionally compelled because the provision represented an attempt by Congress "to exercise what is traditionally understood to be exclusively executive functions, namely, the litigation of cases in the courts." Id. at 34. See also, Representation of Congress and Congressional Interests In Court: Hearings Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, supra n.9 at 90-91 (1976) (Justice Department Statement on Constitutionality of S.2731 providing, inter alia, for civil enforcement mechanism.)

On the strength of these views, the final version of the bill did not contain any provision for civil enforcement against executive officials. Senator Abourezk, the chief sponsor of the civil enforcement provisions which ultimately became the Ethics In Government Act, Pub.L.No. 95-521, codified at 2 U.S.C. §§288 et seq. (Supp. III 1979), 28 U.S.C. §1364 (Supp. II 1978), explained the reason for deletion of the provision

> S.2569, S.4227, and S.495 also contained a provision authorizing Congress "to bring civil actions, without regard to the sum or value of the matter in controversy, in a court of the United States to require an officer or employee of the executive branch of the U.S. Government, or any agency or department thereof, to act in accordance with the Constitution and the laws of the United

> States . . . ." During the subcommittee hearings, the Department argued vigorously that bringing such suits would be unconstitutional in light of Buckley v. Valeo, 424 U.S. 1, 138 (1976) . . .. Due to this opposition to that section, it was deleted by the Senate Government Operations Committee when the bill was reported . . ..

123 Cong. Rec. S1913 (daily ed. Feb. 1, 1977) (statement of Sen. Abourezk).

The position of the Department during consideration of the bill creating the Senate Legal Counsel and vesting the courts with jurisdiction to enforce its subpoenas against private parties indicates its own conviction that the action brought against the House is constitutionally flawed. Coupled with the failure of Congress to follow the recommendations of the Ervin Committee to provide federal court jurisdiction to entertain enforcement suits, it is abundantly clear that Congress never intended to create an interbranch right of action under section 1331.

Section 1345, the other statutory basis alleged for "plaintiff's" suit, sheds further light on whether section 1331 provides jurisdiction of interbranch suits for it limits suits by the United States to those expressly authorized by law. Section 1345 provides

> 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).

In United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979), the court of appeals held that "the United

States may not bring suit to protect the constitutional rights of the mentally retarded without express statutory approval. . ." (emphasis added) And in United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977) the court found no explicit or implicit authority upon which the government could sue state officials responsible for the operation of a state hospital for the mentally retarded in alleged violation of the constitutional rights of patients. The court noted "while the United States points to numerous examples of federal legislation evidencing federal interest. . .it points to no statute which explicitly authorizes the bringing of this suit." 563 F.2d at 1124. Concluding that "interest in the generic sense, in the subject matter of the suit," id. at 1125, was insufficient with respect to "a question of authority," the court affirmed dismissal of the suit.

On its face, section 1345 is "merely a statutory expression of the Congress' constitutional power to define the jurisdiction of federal courts without which a federal court cannot entertain a suit regardless of how solidly a litigant establishes his standing." Clark v. Valeo, 559 F.2d 642, 657 (D.C. Cir. 1977) (en banc) (Tamm, J., concurring). It simply provides the district court with

jurisdiction, provided of course, "the United has the capacity and standing to bring suit . . ." Id. (emphasis added) 17/

The House of Representatives respectfully submits that section 1345 provides no additional capacity to the "United States" to sue, or the court to hear such suit, unless another statute expressly authorizes it. The court of appeals for this Circuit recognized the obvious limits of section 1345 in suits between the branches and in United States v. American Tel. & Tel. Co., 551 F.2d 384, 389 (D.C. Cir. 1976) when it proclaimed that "[a] question arises whether suit is brought 'by the United States' within §1345 when the executive branch is seeking to enjoin the legislative branch." 18/ It found alternatively that jurisdiction existed under section 1331 given the national security interests sought to be protected by the executive.

The A.T.&T. court's rendition of section 1331 as a jurisdictional basis is also inapposite because the Department did not sue a coordinate branch directly, but a private party to prevent compliance with a congressional subpoena, and the House subsequently intervened as a defendant in a pending suit.

17/ We address the lack of standing in the next section, Part III B1, infra.

18/ See also, New York Times v. United States, 403 U.S. 713, 753-54 (1971) (Harlan, J., dissenting) (a question is posed whether the Attorney General is authorized to bring these suits in the name of the United States).

B. The Suit Does Not Present A Case Or Controversy Within The Meaning of Article III

1. Lack Of Standing

In the novel and unprecedented fashioning of a suit directly by the Executive against the Legislature, it is not enough to allege statutory jurisdiction, for as the court has recently reaffirmed,

> The requirements of Article III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process.

Valley Forge Christian College v. Americans United For Separation of Church and State, 102 S.Ct. 752, 757-758 (1982).

President Nixon's counsel argued that Article III did not provide for suits by one branch against another when the Ervin Committee sued for declaratory relief in connection with its subpoena to the President in Senate Select Committee v. Nixon, supra,

> The suggestion that the proper manner to resolve the heretofore unresolved question of executive privilege as it applies to Congress by way of a declaratory judgment is not novel . . .. The suggestion flies in the face of the role of the courts in our constitutional system. For this is, quite simply, a dispute between Congress and the President, and to use the words of Justice Douglas, ' federal courts do not sit as an ombudsman refereeing disputes between the other two branches.'

Brief of Richard M. Nixon In Opposition To Plaintiffs' Motion for Summary Judgment at 10, Senate Select Committee v. Nixon, 366 F.Supp. 51 (D.D.C. 1973) reprinted in Senate Select Committee Legal Documents, supra n.9 at 814.

The position of the House of Representatives in this case is that the action does not satisfy the requirements of standing, which emanate "ex proprio vigore" from Article III, Valley Forge Christian College, supra at 758 and accordingly the action must be dismissed. No part of the House's argument is based on the "political question" doctrine, but on the "bedrock" requirements imposed by Article III.

Foremost among the ex proprio vigore requirements of Article III is that a plaintiff have standing to sue. Because constitutionally required, standing is a "threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975) (emphasis added). The standing inquiry "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968).

The first inquiry is whether any statute has explicitly conferred standing on "the United States" to sue in this instance; and second, whether in the absence of a statute "the United States" may maintain a nonstatutory suit because it has suffered a judicially cognizable injury.

As to the first inquiry, we have already indicated that the two statutes relied upon by the Department do not authorize suit; as to the second inquiry, we submit that the "United States" as a whole has suffered no injury in-fact and therefore has no standing to sue. Moreover, a plaintiff must show an injury which is "direct" and both "real and

immediate" not "conjectural" or "hypothetical." Golden v. Swickler, 394 U.S. 103, 109-110 (1969).

The complaint fails to allege any concrete injury in fact to the nation as a whole which has been recognized to provide standing to the "plaintiff" in the absence of any express statutory authority to sue.

The "United States" has not been injured in any "direct" and "immediate" way; nor will it be injured at all if the prosecution proceeds under 2 U.S.C. §194.

All the cases recognizing the nonstatutory authority of the Executive to bring suit are premised on injury to the proprietary or contractual interests of the government, e.g., Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818) (suit on bill of exchange); United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831) (suit for breach of contract); Cotton v. United States, 52 U.S. (11 How.) 229 (1850) (suit in trespass); or its right to protect the public. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). Whether acting to further a comprehensive legislative scheme in an area, United States v. Bell Telephone Co., 128 U.S. 315 (1888) (suit for recission of fraudulently procured patent); or to protect interstate commerce from obstruction or disruption, and thereby protect the general welfare, In Re Debs, 158 U.S. 564 (1895); or to protect against an injury to "national security," New York Times v. United States, 403 U.S. 713 (1971), United States v. American Tel. & Tel. Co., supra; there must be injury to the "United States, its

government and its people" Clark v. Valeo, supra at 655 to confer standing. There is no comparable injury-in-fact to the nation as a whole or the people sufficient, arising from the claim that the President's obligation to ensure confidentiality of law enforcement files will be impaired, to confer standing on "the United States."

Like the situation in Clark v. Valeo, "[t]he only injury alleged by the Government here is a conflict of views between the Executive and Legislative branches of the federal government as to the constitutional prerogatives of the Executive." 559 F.2d at 654.

The three concurring judges in Clark v. Valeo, supra rejected as a basis for the standing of the United States every case cited by the Department of Justice.

A review of the major suits brought on an implied nonstatutory basis by the Executive reveals the utter lack of standing to pursue the present action.

In Re Debs, 158 U.S. 564 (1895) "is the cornerstone for modern judicial recognition of nonstatutory executive power to bring suit," Note, Nonstatutory Executive Authority To Bring Suit, 85 Harv.L.Rev. 1566, 1568 (1972) and yet as the concurring judges pointed out in Clark v. Valeo, 559 F.2d at 654, "the Debs court specifically noted that the duty on which the standing of the United States rested arose not simply from the constitutional grant of power to regulate commerce but from congressional action expressly assuming and implementing that power." Id. at 586, 599.

Injury in fact sufficient to provide standing was present with respect to other nonstatutory suits filed by the Executive to relieve burdens on interstate commerce: United States v. ICC, 337 U.S. 426 (1949) where the United States filed suit in district court to obtain relief from an order of the Interstate Commerce Commission imposing allegedly unlawful railroad rates on the United States as shipper; United States v. California, 332 U.S. 19, 22-23 (1947), where the United States sued to enjoin California from trespassing on offshore lands over which the United States claimed fee simple ownership; [19/] and United States v. San Jacinto Tin Co., 125 U.S. 278 (1888), where the United States sued to set aside a land patent which was fraudulently procured and the injury to the loss of mineral rights and other property interests conferred adequate standing on the United States.

Two circuits have recently found lack of standing where the United States brought non-statutory suits to enjoin state officials from violating the constitutional rights of institutionalized persons. In United States v. Mattson, 600 F.2d 1295, 1300 (9th Cir. 1979), the Court of Appeals found lack of injury to the United States to bar such an action and in United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977), the court found that the government had no interest

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19/ As the concurring judges characterized the case, "the alleged infringement of property rights by California in that case was clearly an injury to the United States as a whole" Clark v. Valeo, 559 F.2d at 655.

to warrant an implicit grant of authority. The court determined that in the absence of an "assertion of a property interest," id. at 1298 (like Dugan v. United States, supra; United States v. Tingey, supra or Cotton v. United States, supra), "interference with national security" id. 1298-99, (like United States v. New York Times, supra), or "a burden on interstate commerce" id. at 1299, (like In Re Debs, supra, or United States v. American Bell Telephone Co., supra, or United States v. Brand Jewelers, Inc., 318 F.Supp. 1293 (S.D.N.Y. 1970), no actual injury had been demonstrated.

The Mattson court concluded with reasoning particularly appropriate to this case:

> Any lesser standard than a showing of actual injury to those who assert standing would require a court to rule on important constitutional issues in the abstract, and allow a potential abuse of the judicial process. This could distort the role of the judiciary in its relationship to the executive and legislative branches. Schlesinger v. Reservists To Stop The War, 418 U.S. 208, 221, 94 S.Ct. 2925, 41 L.Ed. 2d 706 (1973).

600 F.2d at 1300.

In addition, in order to sustain standing, the injury of the "plaintiff" must be fairly traceable to the "putative illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). See also, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976) (plaintiff must show that the injury "fairly can be traced to the challenged action of the defendant") The "plaintiff's" complaint doesn't offer a

clue about how the present legislative defendants are responsible for its injury, for it is not the legislative defendants who are responsible for proceeding under 2 U.S.C. §192.

To say that the legislators have caused injury in the present context would be to say that legislators cause the injury in every case in which a plaintiff challenges the constitutionality of a statute; that is obviously incorrect, for the legislators do not cause the application or enforcement of the law, executive branch officials do. Riegle v. Federal Open Market Committee, 656 F.2d at 879 n.6 ("when a plaintiff alleges injury by unconstitutional action pursuant to a statute, his proper defendants are those acting unconstitutionally under the law. . .and not the legislature which enacted the statute").

Finally, "plaintiff" fails to satisfy the third prong of the standing requirement that "the judicial relief requested will prevent or redress the claimed injury." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74, 79 (1978). As demonstrated in Part II A, supra, because "plaintiff" seeks to restrain a legislative act, i.e., the act of certifying the contempt, judicial redress is precluded given the inability of the Courts to restrain legislative proceedings or actions. Eastland v. United States Servicemen's Fund, supra. Simply put, the "plaintiff's" claimed injury cannot be redressed by exercise of the court's remedial powers.

2. Lack of Ripeness

It is firmly established that federal courts may not render advisory opinions because Article III provides only for adjudication of actual "cases or controversies." "This is as true of declaratory judgments as any other field." United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947).

In 1793, the Supreme Court unanimously refused to grant the request of Secretary of State Jefferson, acting at the direction of President Washington, to construe treaties and laws of the United States arising out of wars of the French Revolution. The Court declined to answer these questions based on the separation of powers and the proper judicial function of deciding cases, not hypothetical abstractions. 3 Correspondence and Public Papers of John Jay 486-489 (New York: 1893) quoted in Muskrat v. United States, 219 U.S. 346, 351 (1911).

The "plaintiff" seeks nothing less than an advisory opinion, for the power "to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference a hypothetical is not enough." United Public Workers v. Mitchell, 330 U.S. at 90.

Under the formulation of the Complaint, anytime the "United States" or an executive or legislative official desired to have a judicial construction, by way of declaration or otherwise, of a statute before its

application in a given case, they could simply present the matter to the federal courts for an answer. This would mean not only a deluge of advisory questions upon the courts, but an essential alteration in the functions of the courts and relationships between the branches. "The federal courts were simply not constitued as ombudsmen of the general welfare, "Valley Forge Christian College, supra at 766-67, and the courts should not be asked to hear countless pre-enforcement challenges to legislative acts, whether that be subpoenas, committee hearings or the passage of statutes.

IV. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Apart from jurisdictional defects, the Complaint is fatally flawed within the meaning of Civil Rule 12(b)(6). The Complaint, in short, fails "to state a claim upon which relief can be granted." Or, put differently, the "plaintiff" fails to allege a cause of action, i.e., that the "plaintiff" is a "member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." Davis v. Passman, 442 U.S. 228, 239-240 n.18 (1979).

That the "plaintiff" has no cause of action under the circumstances presented is apparent for several reasons.

First, there is nothing in the Constitution or laws of the United States which gives the sovereign United States of America any cause of action to resolve inter-branch disputes

over the use of a privilege allegedly possessed by one of the coordinate branches.

Secondly, there is nothing in the Constitution or laws of the United States which purports to grant any cause of action to any executive officer to secure judicial recognition, prior to indictment or trial, that an alleged executive privilege insulates such officer from "criminal prosecution for contempt under 2 U.S.C. §194." Complaint ¶40. The assertion that Administrator Gorsuch "has the right not to be subject to criminal prosecution" is intolerable for no man or woman "in this country is so high that he is above the law. No officer of any law may set that law at defiance with impunity. All officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882).

It is clear that even Members of Congress, who have a textual privilege against being questioned for performance of their legislative acts, are subject to prosecution for acts defined as crimes by the laws of the United States. See, e.g., 18 U.S.C. §201 (federal bribery statute) and United States v. Brewster, supra. Even in a case where the Member seeks to vindicate his personal speech or debate privilege to prevent violations prospectively or to remedy abuses after they occur, his remedy is not to sue to enjoin prosecution or declare his rights, but to assert his rights incident to the criminal proceedings by way of motion to

dismiss the indictment, Helstoski v. Meanor, 442 U.S. 500 (1979); to seek protective relief from impermissible grand jury questioning, Gravel v. United States, 408 U.S. 606 (1972), to quash subpoenas emanating from the grand jury, In Re Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978) or to seek inspection of the grand jury minutes. United States v. Williams, 644 F.2d 950, 951 (2d Cir. 1981).

These are the judicially accepted means with which to assert constitutional rights, not the invention of unknown causes of action.

Third, there is nothing in the Constitution or laws of the United States which purports to create any cause of action in any executive officer to secure judicial relief against the House of Representatives by barring it from serving "upon the U.S. Attorney a request for criminal prosecution under the provisions of 2 U.S.C. §194 or from taking any further action to enforce the outstanding subpoena with respect to such documents." Complaint ¶41. Recognizing such a cause of action would invite executive attempts to avoid those laws that incur executive displeasure, on grounds that some kind of constitutional defense might be available should an executive officer be prosecuted under such laws. Compare Louisville and Nashville R.R. v. Mottley, 211 U.S. 149 (1908); Skelly Oil Co. v. Phillips, 339 U.S. 667 (1950).

Fourth, there is nothing in the Constitution or laws of the United States which purports to confer on any potential

defendant a cause of action to secure a judicial declaration that such potential defendant has a valid defense to the prosecution. Such a suit flies in the face of the historical doctrine that courts do not interfere with or enjoin criminal prosecution where the criminal action affords complete opportunity to present and resolve or legitimate defenses.

And finally there is nothing in the Constitution or laws of the United States which purports to confer on either the sovereign United States, the executive branch or any officer thereof any cause of action against the Congress of the United States, or either House thereof, for engaging in constitutionally lawful legislative action.

It has been the consistent opinion of the Attorney General that it does not lie within the province of an executive branch official to question the validity of a statute he is bound to apply, if it does not violate his personal constitutional rights.

As Attorney General Homer Cummings opined, a public officer entrusted with statutory duties cannot refuse to perform duties prescribed by law because he believes others may be injuriously affected and "'One administrative officer cannot attack the constitutionality of a statute because it may violate the constitutional rights of other administrative officers in order to avoid his own performance of a mandatory duty imposed upon him by that statute.'" 30 Op. Att'y Gen. 252, 254 (1935).

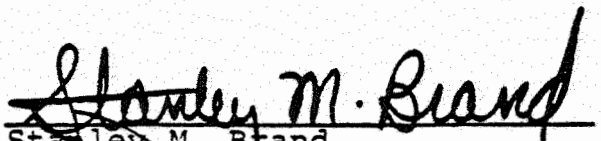
Accordingly, the "plaintiff" has utterly failed to state a cause of action under any provision of the Constitution or laws of the United States.

Conclusion

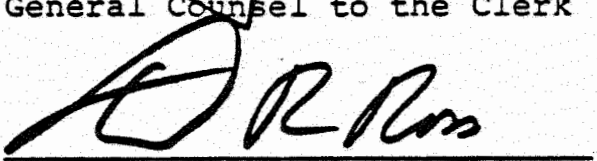
The House of Representatives submits that this unprecedented suit seeks to overthrow the precepts of jurisprudence established in the 200 year existence of the federal judiciary and which have governed legislative and judicial relations from the beginning of the Republic. The misguided attempt to restrain the operation of the legislative process and disrupt the judicially approved means of contesting congressional subpoenas violates the clear dictates of the Supreme Court. The "plaintiff" seeks, without jurisdictional basis, to usurp a legislative judgment to submit the matter to Article III in an "orderly and approved" manner and substitute instead the civil enforcement mechanism which the judicial, legislative and the executive branches have previously rejected.

All this to subvert and avoid application of an often invoked law of the United States which executive officials are duty bound to uphold for the purpose of delaying the expeditious resolution of the dispute so that Congress may proceed with a valid and vitally important inquiry.

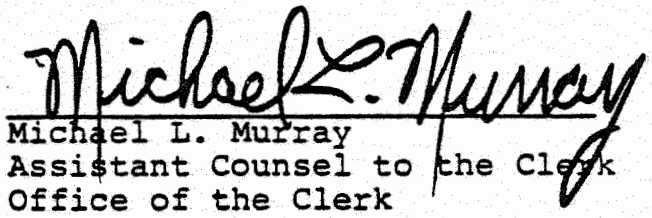
Respectfully submitted,



Stanley M. Brand
General Counsel to the Clerk



Steven R. Ross
Deputy Counsel to the Clerk



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Dated: December 30, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of the Motion of the House of Representatives to Dismiss and to Expedite Consideration thereof and of the opposition thereto, it is this ____ day of _____, 1983,

ORDERED, that the Motion is granted and it is further

ORDERED, that this action is dismissed with prejudice.

_____
United States District Judge

PROCEEDINGS AGAINST ANN M. GORSUCH

Mr. HOWARD. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER pro tempore. The question is on the resolution.

The question was taken; and the Speaker pro tempore announced that the ayes appeared to have it.

Mr. HOWARD. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The vote was taken by electronic device, and there were—yeas 259, nays 105, not voting 69, as follows:

[Roll No. 471]

YEAS—259

Addabbo	Fary	McCurdy
Akaka	Fazio	McHugh
Albosta	Fenwick	McKinney
Anderson	Ferraro	Mica
Andrews	Findley	Mikulski
Annunzio	Fish	Miller (CA)
Anthony	Fithian	Miller (OH)
Applegate	Florio	Mineta
Aspin	Foglietta	Minish
AuCoin	Foley	Mitchell (MD)
Bailey (PA)	Ford (MI)	Mitchell (NY)
Barnard	Ford (TN)	Moakley
Barnes	Fountain	Molinari
Bedell	Frenzel	Mollohan
Beilenson	Frost	Montgomery
Bennett	Gaydos	Moore
Bereuter	Gejdenson	Mottl
Bethune	Gephardt	Murphy
Bevill	Gibbons	Murtha
Biaggi	Gilman	Myers
Bingham	Ginn	Natcher
Boggs	Glickman	Neal
Boland	Gonzalez	Nelligan
Boner	Goodling	Nelson
Bonior	Gore	Nowak
Bonker	Gradison	Oakar
Bouquard	Gray	Oberstar
Bowen	Green	Obey
Breaux	Guarini	Ottinger
Brinkley	Gunderson	Panetta
Brodhead	Hall (IN)	Parris
Brooks	Hall (OH)	Patman
Burton, John	Hall, Ralph	Patterson
Byron	Hall, Sam	Paul
Chappell	Hamilton	Pease
Chisholm	Hance	Pepper
Clay	Harkin	Perkins
Coelho	Hefner	Petri
Coleman	Heftel	Peyser
Collins (IL)	Hertel	Pickle
Conable	Hightower	Porter
Conte	Hopkins	Price
Conyers	Howard	Pritchard
Courter	Hoyer	Rahall
Coyne, William	Hughes	Rangel
Crane, Philip	Hutto	Ratchford
Crockett	Hyde	Regula
D'Amours	Jeffords	Reuss
Daniel, Dan	Jones (OK)	Rinaldo
Daschle	Jones (TN)	Rodino
Davis	Kastenmeier	Roe
de la Garza	Kasen	Roemer
Deckard	Kennelly	Rostenkowski
Dellums	Kildee	Roukema
DeNardis	Kogovsek	Roybal
Dicks	LaFalce	Russo
Dingell	Leach	Sabo
Dixon	Leland	Savage
Donnelly	Levitas	Scheuer
Dorgan	Livingston	Schneider
Dowdy	Long (LA)	Schroeder
Downey	Lowry (WA)	Schumer
Dwyer	Luken	Seiberling
Dyson	Markey	Sensenbrenner
Early	Marks	Shamansky
Eckart	Martin (IL)	Shannon
Edgar	Martin (NY)	Sharp
Edwards (CA)	Martinez	Shelby
Edwards (OK)	Matsui	Simon
English	Mattox	Skelton
Erdahl	Mavroules	Smith (IA)
Ertel	Mazzoli	Smith (OR)
Evans (IA)	McCloskey	Snowe
Evans (IN)	McCollum	Solarz
St Germain	Volkmer	Wilson
Stark	Walgren	Wirth
Stenholm	Washington	Wolpe
Stokes	Watkins	Wright
Stratton	Waxman	Wyden
Studds	Weaver	Yates
Swift	Weber (MN)	Yatron
Synar	Weiss	Young (FL)
Tauke	White	Young (MO)
Tauzin	Whitley	Zablocki
Traxler	Whittaker	Zeferetti
Udall	Whitten	
Vento	Williams (MT)	

NAYS—105

Atkinson	Gingrich	Morrison
Bafalis	Gramm	Napier
Bailey (MO)	Gregg	Oxley
Benedict	Grisham	Pashayan
Bliley	Hammerschmidt	Quillen
Brown (CO)	Hansen (ID)	Ritter
Brown (OH)	Hansen (UT)	Roberts (KS)
Broyhill	Hartnett	Roberts (SD)
Burton, Phillip	Hendon	Robinson
Butler	Hiler	Rogers
Carman	Hillis	Roth
Carney	Hollenbeck	Rudd
Chappie	Hunter	Sawyer
Cheney	Johnston	Shaw
Clausen	Kindness	Shumway
Clinger	Kramer	Siljander
Collins (TX)	Lagomarsino	Skeen
Corcoran	Latta	Smith (AL)
Coughlin	Lent	Smith (NE)
Coyne, James	Loeffler	Smith (NJ)
Daniel, R. W.	Lott	Solomon
Dannemeyer	Lowery (CA)	Spence
Daub	Lujan	Stangeland
Derwinski	Lungren	Staton
Dickinson	Madigan	Stump
Dornan	Marlenee	Taylor
Dreier	Marriott	Trible
Duncan	Martin (NC)	Walker
Dunn	McClory	Wampler
Emerson	McDade	Weber (OH)
Emery	McDonald	Whitehurst
Erlenborn	McEwen	Winn
Fiedler	McGrath	Wolf
Fields	Michel	Wortley
Forsythe	Moorhead	Wylie

NOT VOTING—69

Alexander	Frank	Lehman
Archer	Fuqua	Lewis
Ashbrook	Garcia	Long (MD)
Badham	Goldwater	Lundine
Beard	Hagedorn	Moffett
Blanchard	Hatcher	Nichols
Bolling	Hawkins	O'Brien
Broomfield	Heckler	Pursell
Brown (CA)	Holland	Railsback
Burgener	Holt	Rhodes
Campbell	Horton	Rose
Coats	Hubbard	Rosenthal
Craig	Huckaby	Rousselot
Crane, Daniel	Ireland	Santini
Derrick	Jacobs	Schulze
Dougherty	Jeffries	Shuster
Dymally	Jenkins	Smith (PA)
Edwards (AL)	Jones (NC)	Snyder
Evans (DE)	Kemp	Stanton
Evans (GA)	Lantos	Thomas
Fascell	Leath	Vander Jagt
Flippo	LeBoutillier	Williams (OH)
Fowler	Lee	Young (AK)

□ 2200

The Clerk announced the following pairs:

On this vote:

Mr. Fuqua for, with Mr. Craig against.

Mr. Derrick for, with Mr. Badham against.

Mr. Flippo for, with Mr. Burgener against.

Mr. Williams of Ohio for, with Mr. Jeffries against.

Mr. RALPH M. HALL changed his vote from "nay" to "yea."

So the resolution was agreed to.

A motion to reconsider was laid on the table.

The result of the vote was announced as above recorded.

GENERAL LEAVE

Mr. LEVITAS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the resolution just agreed to.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Georgia?

There was no objection.

TWO FIGHTER PILOTS IN A DOGFIGHT

(Mr. DORNAN of California asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. DORNAN of California. Mr. Speaker, last week during debate on the Defense appropriations bill, the gentleman from Iowa (Mr. HARKIN) offered an amendment regarding the cutoff of funds to the CIA for the purpose of assisting any individual or group in carrying out military activities in or against the Sandinista Government of Nicaragua. The text of the amendment offered can be located in the CONGRESSIONAL RECORD of December 8 on Page H9148.

During the debate I rose in opposition to the amendment. Mr. Speaker, as you well know, often times in the heat of debate, Members say things which later, after contemplation and due consideration for the conduct of reasoned debate, one might wish had never been said. This is the situation I find myself in with regard to a small portion of an otherwise stimulating exchange of opinions.

The day after the debate my friend, TOM HARKIN—and I call him my friend even though we have quite different views on a broad range of issues—came to see me. TOM and I have traveled together not only to mainland China but to other countries, and let me just say that he has always conducted himself and presented himself in a manner that represents well our country and the best interests of our country. TOM and I have something else in common besides a burning desire to see things firsthand, up close and draw our own conclusions. IWT I call it, "I was there." We have both been fighter pilots and I know TOM shares my love and enthusiasm for aviation and the need for the United States to continue our lead in aviation throughout the world. This is one area in which we certainly agree. Even though we have different views on many issues, I have always found TOM to be reasonable and considerate of the views of others with whom he disagrees. So the day after the Nicaragua debate, TOM came to see me and brought to my attention the written words in the RECORD of what I had said the evening before. (CONGRESSIONAL RECORD, Dec. 8, 1982, on Page H9155 and continue through H9156.)

He asked that I reread those words and consider the impact of those

Department of Justice

DEPARTMENT OF JUSTICE STATEMENT

LAST NIGHT, IMMEDIATELY AFTER THE CONTEMPT CITATION WAS VOTED BY THE HOUSE AGAINST EPA ADMINISTRATOR GORSUCH, THE JUSTICE DEPARTMENT FILED A CIVIL SUIT SEEKING TO BLOCK THAT CONTEMPT ACTION.

THE JUSTICE DEPARTMENT CHARGED IN THE SUIT THAT THE SUBPOENA ISSUED BY THE HOUSE FOR EPA DOCUMENTS WAS UNCONSTITUTIONAL. WE ASKED THE U.S. DISTRICT COURT TO ENJOIN ANY EFFORT TO PURSUE CRIMINAL ACTION AGAINST GORSUCH.

THE SUIT NOTED THAT EPA WAS WITHHOLDING ONLY ABOUT 74 DOCUMENTS, LESS THAN ONE PERCENT OF WHAT WAS SUBPOENAED. AND THAT WAS BEING WITHHELD AT THE DIRECTION OF THE PRESIDENT, ON THE ADVICE OF THE ATTORNEY GENERAL.

WE FURTHER POINTED OUT THAT IN RESPONSE TO THE SUBPOENA EPA HAD PRODUCED OR MADE AVAILABLE FOR COPYING ABOUT 787,000 PAGES OF DOCUMENTS, AT A PROJECTED COST OF ABOUT $223,000. THIS AMOUNTED TO MORE THAN 15,000 PERSONNEL HOURS.

AFTER CAREFUL REVIEW, PRESIDENT REAGAN FOUND THAT THE WITHHELD DOCUMENTS ARE FROM OPEN LAW ENFORCEMENT FILES THAT ARE SENSITIVE MEMORANDA OR NOTES BY EPA ATTORNEYS AND INVESTIGATORS REFLECTING ENFORCEMENT STRATEGY, LISTS OF POTENTIAL WITNESSES, SETTLEMENT CONSIDERATIONS AND SIMILAR MATERIALS. THE DISCLOSURE OF SUCH DOCUMENTS MIGHT ADVERSELY AFFECT A PENDING ENFORCEMENT ACTION, OR THE RIGHTS OF INDIVIDUALS. SUCH DOCUMENTS SHOULD NOT BE MADE AVAILABLE TO CONGRESS OR TO THE PUBLIC EXCEPT IN EXTRAORDINARY CIRCUMSTANCES. IT IS A MATTER OF PROTECTING THE INTEGRITY OF THE LAW ENFORCEMENT PROGRAM.

(more)

WE REGRET THE HOUSE ACTION. SINCE THE MATTER APPARENTLY CANNOT BE SETTLED BY NEGOTIATION, IT BELONGS IN THE COURT. WE BELIEVE THE CRIMINAL CONTEMPT PROCEDURE CHOSEN BY THE HOUSE IS NOT AN APPROPRIATE ONE, AND WE SEEK TO HAVE THE MATTER DECIDED IN A CIVIL SUIT WHERE THE ISSUES CAN BE EXAMINED WITH CALM DELIBERATION.

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96th Congress, 2d Session - - - - - - - - - - House Document No. 96-398

CONSTITUTION

JEFFERSON'S MANUAL

AND

RULES OF THE HOUSE OF REPRESENTATIVES

OF THE UNITED STATES
NINETY-SEVENTH CONGRESS

WM. HOLMES BROWN
PARLIAMENTARIAN

U.S. GOVERNMENT PRINTING OFFICE
60-843 O WASHINGTON : 1981

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Washington, D.C. 20402

Member to vote after the call on the plea that he had refrained because of misunderstanding as to a pair (V, 6080, 6081). Discussion of the origin of the practice of pairing in the House and Senate (VIII, 3076). On questions requiring a two-thirds majority Members are paired two in the affirmative against one in the negative (VIII, 3088). (For Speaker Clark's interpretation of the rule and practice of the House of Representatives as to pairs see VIII, 3089.)

§ 660a. Voting.

3. (a) A Member may not authorize any other individual to cast his vote or record his presence in the House or Committee of the Whole.

(b) No individual other than a Member may cast a vote or record a Member's presence in the House or Committee of the Whole.

(c) A Member may not cast a vote for any other Member or record another Member's presence in the House or Committee of the Whole.

Clause 3 was added in the 97th Congress (H. Res. 5, Jan. 5, 1981, p. ——). The Committee on Standards of Official Conduct recommended this addition to the Rules in its May 15, 1980, report (H. Rept. 96-991) on voting anomalies which had occurred in the House.

RULE IX.

QUESTIONS OF PRIVILEGE.

§ 661. Definition and precedence of questions of privilege.

Questions of privilege shall be, first those affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; second, the rights, reputation, and conduct of Members, individually, in their representative capacity only; and shall have precedence of all other questions, except motions to adjourn.

This rule was adopted in 1880 (III, 2521). It merely put in form of definition what had been long established in the practice of the House but what the House had hitherto been unwilling to define (II, 1603).

that satisfactory under these difficult circumstances?

Mr. PHILLIP BURTON. Once again the gentleman from California finds, as is not to unique in my parliamentary experience, the minority side has a lot more judgment than the punitive majority side and I will yield, not because of the Chair's request, but because of our distinguished gentleman from Pennsylvania's suggestion.

So I would ask this be put over until the first order of business tomorrow.

The SPEAKER pro tempore. I thank the gentleman.

Mr. WALKER. Mr. Speaker, I thank the gentleman and I withdraw my reservation of objection.

ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. The Chair desires to announce that pursuant to House Resolution 632, agreed to on December 16, 1982, the Speaker did on December 17, 1982, make certification to the U.S. district attorney for the District of Columbia as required by House Resolution 632, of the failure and refusal of Ann M. Gorsuch, as Administrator, U.S. Environmental Protection Agency, to furnish certain documents to the Committee on Public Works and Transportation.

GENERAL LEAVE

Mr. WALKER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks and to include therein extraneous material on the subject of the special order today by the gentleman from Texas, (Mr. ARCHER).

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

□ 0110

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. COLLINS) is recognized for 45 minutes.

[Mr. COLLINS of Texas addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

A TRIBUTE TO JIM COLLINS

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. ARCHER) is recognized for 60 minutes.

● Mr. ARCHER. Mr. Speaker, I would like to take this opportunity to salute my good friend, JIM COLLINS, for his 15 years of distinguished service to the residents of the Third District of Texas in the U.S. House of Representatives.

When I scheduled this special order honoring JIM, I thought it would be highly appropriate to salute him on his last day in the Congress. However, since the Members of the other body don't seem to be cooperating in this effort, it looks as though JIM will just have to stick it out a few more days. Knowing how much he has enjoyed his 15 years here, I don't think he will mind putting up with us all a little while longer.

JIM COLLINS is more than just a colleague to me—I count him as a very great friend, and I will always be grateful to him for his counsel and support during the years I have been privileged to serve with him. He cares passionately about our country, and treasures the traditional values upon which our great Nation was founded. These values have guided his work in this body, and JIM has never been afraid to voice and vote his convictions—even in the face of great adversity.

American taxpayers have had great reason to be grateful for JIM's service here. He has been one of their staunchest champions in the Congress, and has always fought to protect the rights and freedom many of us have come to take for granted. JIM is a man of honor and great integrity, and I will miss his presence among us very much.

I would like to close by saying that the fine new Representative for the Third District of Texas, Steve Bartlett, will have some mighty tall Texas size boots to fill. JIM, my friend, it has been an honor and a pleasure to serve with you.●

● Mr. RODINO. Mr. Speaker, I want to take this opportunity to honor a dedicated public servant and distinguished Member of this House who will not be returning next year. Ever since JAMES COLLINS first came to Congress in 1969, he has dignified this House by his concern for people and his dedication to principle.

I have often found myself on the opposite side of issues from my friend from Texas, but I have never doubted the sincerity of his convictions or his sensitivity toward the people of his district. A man of integrity and wit, JAMES COLLINS has been a conscientious statesman for his State and his country.

I am grateful for his friendship and I wish him all the best in the future.●

● Mr. BROOKS. Mr. Speaker, I know the people of Texas' Third Congressional District in Dallas are proud of the record Congressman JIM COLLINS has established since entering Congress in 1968. During his 15 years as a Member of the U.S. House of Representatives, the people of Dallas have always known they have a friend here in Washington with whom they could work on many projects of vital importance to the city of Dallas and the State of Texas. He has been a hard-working, capable member of the Texas legislative delegation and he demonstrated time and again a spirit of independence and determination to pursue goals important to his constituency and to his party.

While we have not always agreed o every issue confronting our country those of us who value his independen perspective will miss the reasoned ar guments that he has brought to ou deliberations as a legislative body.

We will miss his presence when th 98th Congress convenes in January and I want to wish JIM COLLINS and his lovely wife, Dee, the very best tha the future has to offer.●

● Mr. LEATH of Texas. Mr. Speaker a few years ago, the dean of our Texa delegation, JACK BROOKS, was quoted as saying something like this: If a bil was up to reinvent the wheel, JIM COLLINS would vote "no." JIM has been so unafraid to voice opposition, even when opposition was not the politically safe move to make, I am surprised he did not rise in opposition to this special order in his honor. But, he did not, so he is just going to have to sit there and listen to us sing his praises.

If we were allowed to sing in the Chamber of the House, quite a few of us would raise our voices and serenade JIM with good Texas music. But we cannot sing here. Instead, I will go by the rules and just take a moment to thank JIM for his many kindnesses and courtesies and especially for the excellent representation he has given the fine people in the Third District.

We all know that JIM COLLINS has never avoided a disagreement and is totally committed to speaking his mind. And we have learned from him that, in the long run, this is best. JIM is always accessible, open to discussion, and available to share his time and thoughts. The Third District has been the beneficiary of caring, attentive representation, and the Congress has also profited by the association. We will all miss JIM COLLINS and he has our best wishes for happiness and success as he returns to private life. Serving with JIM has been a pleasure. His friendship has been a blessing.●

● Mr. SAM B. HALL, JR. Mr. Speaker, JIM COLLINS has achieved much in life, and even by Texas standards, he is a huge success. But one of his great accomplishments is one that he had nothing to do with; it was his birth in Hallsville, Tex. Not only is Hallsville my ancestral home, but it is located in the First Congressional District of Texas. So whether JIM likes it or not, I still consider him a constituent. Now that he has decided to return to Texas he is entitled to contact his Congressman on the critical issues of our times. Knowing JIM COLLINS as we all do, I have no doubt that he will be just as active in this regard as he has been on the House floor for the past 15 years.

It is hard to imagine this body without JIM COLLINS, and it is going to take some getting used to when we return in January. He has been my friend for a long time, and for the past 6½ years here in the House we have established a rapport and mutual respect of the most endearing and lasting quality imaginable.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RON PAUL, Plaintiff, v. THE UNITED STATES OF AMERICA THE UNITED STATES HOUSE OF REPRESENTATIVES, THE UNITED STATES SENATE, THOMAS P. O'NEILL, JR., SPEAKER OF THE HOUSE OF REPRESENTATIVES, THE HON. PRESIDENT OF THE SENATE, GEORGE HERBERT WALKER BUSH, WILLIAM F. HILDENBRAND, SECRETARY OF THE SENATE, EDMUND L. HENSHAW, JR., CLERK OF THE HOUSE OF REPRESENTATIVES, Defendants.	Civil Action No. 82-2352

MOTION TO DISMISS PLAINTIFF'S COMPLAINT
FOR LACK OF JUSTICIABILITY AND FOR FAILURE
TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
SUBMITTED BY SENATE DEFENDANTS AND THE UNITED STATES

Defendants The United States of America, The United States Senate, George H. W. Bush, President of the Senate, and William F. Hildenbrand, Secretary of the Senate, by their undersigned counsel, hereby move, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of plaintiff's complaint as the Court lacks subject matter jurisdiction over the question presented and the complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Lawrence C. G. Moloney
LAWRENCE A.G. MOLONEY

concerns have been directly addresed by Congress, the Court should exercise its equitable discretion and dismiss plaintiffs' actions.

III. Congressional Defendants Are Immune From These Suits Under the Speech Or Debate Clause.

The plaintiffs have named as defendants, officers and officials of the House and Senate, as well as the institutions themselves,*/ although each are clearly immune from suit under the speech or debate clause of the Constitution. U.S. Const., Art. I, § 6. That clause provides that: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."**/

The speech or debate clause "serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178 (1966). "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502 (1975), and to secure for the legislative Branch freedom from executive and judicial encroachment. Gravel v. United States, 408 U.S. 606, 617 (1972); Tenny v. Brandhove, 341 U.S. 367, 372 (1951). The clause protects the institutional interests of the Congress; "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process . . . ." United States v. Brewster, 408 U.S. 501, 507 (1972).

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*/ In the Moore and Paul suits, congressional defendants include: the Speaker and Clerk of the House of Representatives, the President and Secretary of the Senate, and the institutions of the House and the Senate.

**/ Plaintiffs apparently name congressional defendants on the theory that passage of the bill by the two Houses, and presentation to the President, would be unlawful. They did not seek temporary relief, however, and the Act was approved by the President on September 3, 1982. As we note, infra, there is at this point no relief which can be obtained from the Congressional defendants. For this additional reason, plaintiffs have failed to state a claim upon which relief can be granted.

Once it is determined that the challenged actions of congressional defendants fall within a "legitimate legislative sphere," the speech or debate clause is an absolute bar to judicial interference or inquiry. Eastland v. United States Servicemen's Fund, supra. Protection provided by the clause protects against intrusion in either criminal or civil proceedings [Id. at 503] and shields congressional defendants not only from the consequences of litigation, but from the burden of defending themselves as well. Davis v. Passman, 442 U.S. 228, (1979); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

The "consideration and passage or rejection of proposed legislation" is at the core of the legitimate legislative activity protected by the clause [Gravel v. United States, supra at 625], and there can be no doubt that the congressional defendants are protected under the immunity created by the speech or debate clause. The conduct complained of in the complaint, i.e., the method by which the Tax Equity and Fiscal Responsibility Act of 1982 was enacted, including the amendment of a bill by the Senate, the tabling of a proposed resolution by the House, and the signing of the bill by the Speaker of the House and the President of the Senate, is by any definition "legitimate legislative activity" protected by the speech or debate clause. Thus, judicial inquiry into the conduct of Speaker of the House O'Neill or President of the Senate Bush is absolutely prohibited. Similarly, plaintiffs' complaint that the Clerk of the House and the Secretary of the Senate will certify the Act is certainly conduct related to the functioning of Congress itself, and thus within the protection of the clause. Eastland v. United States Servicemen's Fund, supra at 507. Finally, to the extent that plaintiffs' allegations are somehow directed to the House and Senate as institutions, for passing the bill, the immunity is applicable in that it is institutional independence which is served by the clause. Accordingly, the complaints must be dismissed with respect to all congressional defendants.

ROUTING AND TRANSMITTAL SLIP

Date 12/28/82

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REMARKS

PLEASE COMMENT BY NOON 12/29:

THANKS.

called A. Wolfe, 12/29: no comments other than typos

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT
12/28/82

UNITED STATES OF AMERICA, c/o U.S. Department of Justice 9th & Pennsylvania Ave., N.W. Washington, D.C. 20530 and ANNE M. GORSUCH, c/o Environmental Protection Agency 401 M Street, S.W. Washington, D.C. 20460 Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUB-COMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS, CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; and THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES; EDUMUND L. HENSHAW, JR., THE CLERK OF THE HOUSE OF REPRESENTATIVES; JAMES T. MOLLOY, THE DOORKEEPER OF THE HOUSE OF REPRESENTATIVES, Defendants.	Civil Action No. 82-3583

AMENDED COMPLAINT
(For Declaratory Relief)

The United States of America and Anne M. Gorsuch, by their undersigned attorneys, bring this civil action for 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, who is the Administrator of the Environmental Protection Agency ("EPA").

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

4. The defendant, the Committee on Public Works and Transportation of the House of Representatives ("the Committee"), ordinarily has the power to summon by a witness 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, the 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 by a witness 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. Defendant, Edmund L. Henshaw, Jr., is the Clerk of the House of Representatives. He is sued in his official capacity only.

10. 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.

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

12. 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.

13. 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.

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

15. Pursuant to Executive Order 12316, January 19, 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.

16. 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.

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

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

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

20. 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.

21. 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.

22. EPA withheld from the Committee 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.

23. 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).

24. On the dates of issuance and service of the Subpoena and on the return date thereof (December 2, 1982), 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.

25. After careful review, EPA, the Attorney General, as well as the President ~~Reagan~~ found that documents such as those ~~withheld as~~ referred to in paragraph 22 of this Complaint, that is, memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, 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. (Attachment 3 hereto).

27. Upon receiving this instruction, EPA reviewed the documents previously withheld from the Subcommittee, which then totalled seventy-four. Ten of those documents were subsequently 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. On December 2, 1982, Administrator Gorsuch appeared before the Subcommittee and advised it that, for the reason stated in paragraph 24 of this Complaint, no documents of the type described in the Subpoena were in existence. Her 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 27 of this Complaint were being withheld from the Subcommittee 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.

29. At the conclusion of the hearing on December 2, 1982, the Sucommittee 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).

30. 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).

31. 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. 692 (Attachment 6 hereto).

32. 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.

33. On December 17, 1982, Speaker O'Neill certified to the United States Attorney the alleged failure and refusal of Administrator Gorsuch to produce subpoenaed documents to the Subcommittee. (Attachment 7 hereto).

34. 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.

~~35. By directing Administrator Gorsuch to withhold the documents referred to in paragraph 27 of this Complaint, the President divested her of any authority she may otherwise have had to produce said documents to the Subcommittee. Accordingly, even if the Subpoena were deemed to require her to produce those documents, it was impossible for her to do so.~~

~~35~~ 36. If the Subpoena were deemed to include a request for the documents referred to in paragraph 27 of this Complaint, that request is not germaine to any proper Subcommittee inquiry.

~~36~~ ~~37~~. 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.

~~37~~ ~~38~~. 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.

~~38~~ ~~39~~. The defendants have not and cannot show any compelling need for those documents sufficient to overcome the plaintiffs' need to prevent their disclosure.

~~39~~ ~~40~~. 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.

~~40~~ ~~41~~. 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,

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Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

ROYCE C. LAMBERTH
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