Ronald Reagan Library

Collection Name ROBERTS, JOHN G.: FILES

Withdrawer CAS 8/25/2005

File Folder JGR/(DEPARTMENT OF JUSTICE) DOJ DAILY REPORTS (6)

FOIA F05-139/01 COOK 3KDB

Box Number 17

Doc No	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	FRED FIELDING TO J. ROBERTS RE JUSTICE DEPARTMENT NEWS (PARTIAL)	1	11/19/1984	B6	623

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

E.O. 13233

C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

November 19, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice Department News

Associate Deputy Attorney General Roger Clegg advised me of two developments at the Department of Justice of which you should be made aware. Brad Reynolds has written a letter (copy attached) to Secretary Pierce, advising him that the Civil Rights Division intends to review HUD policies under Title VI. Reynolds is reportedly concerned that HUD has adopted a racial quota system for public housing projects. You may recall the controversy that developed in Texas over Judge Justice's order that families be moved between two neighboring housing projects to achieve racial balance. HUD has reportedly adopted Judge Justice's approach, to which Reynolds objects. Reynolds's letter was sent out without review or clearance by the Attorney General or Deputy Attorney General; it seems obvious that the matter could have been better handled without producing a written document that will probably be leaked. There is now the potential for a news story on a rift between Reynolds and HUD on housing discrimination policy.

FOIA(b)(6)

In a more curious if less substantive development, the Department has been having problems with [redacted] has allegedly been guilty of several violations of Department policy with respect to the press, including wandering the halls after hours to drop in on people in their offices and even eavesdropping outside the offices. Tom DeCair's office has warned [redacted] that [redacted] pass may be revoked; it is unclear if [redacted] will take the warnings to heart. I doubt you will get any calls on this matter at this stage, but it may develop into something interesting.

b6

Attachment

ATTACHMENT B

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

November 16, 1984

Honorable Samuel R. Pierce, Jr.
Secretary
Department of Housing and Urban
Development
451 7th Street, S.W.
Washington, D.C. 20410

Dear Secretary Pierce:

This letter is to notify you that the Civil Rights Division of the Department of Justice will conduct a review of the activities of the Department of Housing and Urban Development (HUD) with respect to the implementation of the requirements of title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, as implemented in HUD's public housing programs in East Texas. This review is undertaken pursuant to our authority under Executive Order 12250, 3 C.F.R. 298 (1981), reprinted in 42 U.S.C. § 2000d-1 note, at 588 (Supp. IV 1980), to coordinate the implementation and enforcement by Executive agencies of various provisions of Federal statutory law that prohibit discrimination on the basis of race, color, national origin, religion, sex, or handicap in programs or activities receiving Federal financial assistance.

The review will focus on the activities of HUD's Region 6 office (Fort Worth, Texas) with respect to the 61 public housing authorities (PHA) in East Texas, and will examine past and present tenant assignment procedures utilized by each of these PHA's. As I have discussed with HUD General Counsel John Knapp, the Department of Justice has a particular interest under Executive Order 12250 in achieving consistency and harmony between the civil rights remedial policies HUD seeks to pursue and those similar policies advanced by other Federal agencies. We agreed that it is necessary to explore jointly HUD's public housing desegregation policy, with particular reference to the implementation of that policy in East Texas. This review constitutes one part of that effort.

The review also will focus on the activities of HUD headquarters in developing a nondiscriminatory conciliation policy, providing guidance and assistance to field offices, and monitoring and evaluating the implementation of title VI policies in Region 6 public housing programs. I have asked that every effort be made to complete the review in 30 days.

I have directed staff from the Coordination and Review Section to begin field work one week from this date. They will examine the regional office's compliance reviews of the East Texas PHA's, the voluntary compliance agreements that have been negotiated between HUD and the PHA's, and the phase one plans required by HUD. They will interview Region 6 staff who participated in these compliance reviews and members and staff of the Regional Office Public Housing Task Force.

Insofar as HUD headquarters is concerned, we are interested principally in Region 6 matters under the supervision, direction or oversight responsibility of the Office of Fair Housing and Equal Opportunity (FHEO) and the Headquarters Public Housing Task Force. The Coordination and Review Section staff will want to examine policy issuances, manuals and other documents relevant to the formulation, interpretation, implementation and evaluation of HUD's title VI policies in public housing programs in the Region 6 area. We are especially anxious to learn of policy changes that may have occurred with regard to these programs (or, indeed, any other such programs) in the last four years. We believe interviews with FHEO personnel and the members and working group staff of the Task Force will be most helpful in this latter regard.

We ask your assistance as we begin this review. Specifically, we request that the Region 6 office, FHEO and the Headquarters Public Housing Task Force be notified immediately of our review, and be advised of the need for full cooperation in making documents available for review and staff available for interviews. Also, please designate

and notify me of a HUD contact person who can work directly with the review team to make necessary logistical arrangements and contacts within the agency.

I appreciate your cooperation in this matter.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: John Knapp
General Counsel

Richard Willard
Acting Assistant Attorney General
Civil Division

TUESDAY STAFF:

Class report 11/26

- pocket vote case, 3:00 P.M. Friday, S.G. office — Cornell office invited. Views on how handled no quick decision needed — need to file soon to get S.Ct. decision this Term. Are we in position to get decision?

- potential notice of appeal, Penn Central case (today). Do plan to appeal.

- FFF concern on HUD matter conveyed; DAG + AG share concern + will try to keep it from becoming a fight.

- Reagan photo (hold)

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 30, 1984

TAX
202-633-2019

An undercover "sting" operation conducted by the Internal Revenue Service led today to the Department of Justice's filing of seven civil suits seeking to halt the activities of 12 tax shelter promoters.

Assistant Attorney General Glenn L. Archer, Jr., head of the Department's Tax Division, said the suits were filed in U.S. District Court in Oklahoma City, Oklahoma.

In each case, Archer said, IRS undercover agents posed as potential investors who needed tax relief for a tax year that had already ended. Meetings with tax shelter promoters were tape recorded or video taped.

The tax shelters involved activities as diverse as a California kiwi fruit farm, race horse breeding, nuclear waste disposal research, master tape recordings of classical music, and oil and gas limited partnerships.

IRS undercover agents paid from $25,000 to $175,000 to the promoters to participate in the tax shelter schemes, then stopped payment on the checks before they could be cashed.

The suits charged that the promoters -- some of whom were lawyers and accountants -- provided or arranged for backdated documents to substantiate fraudulent deductions or tax credits for the prior federal tax year.

(MORE)

By backdating the documents, the suits said, the promoters made false statements, aided in the preparation of documents that would result in the understatement of federal tax liability, and interfered with the proper administration of the internal revenue laws.

Named as defendants were Coy H. McKenzie, Larry C. Shaver, James D. Lang, and Charles Jenson, all of Norman, Oklahoma; Richard E. Hastings, of Washington, Oklahoma; Glen P. Vance, Willis Brown, Fourest I. Jacob, and Tyson Hopkins, of Oklahoma City; Jerrel R. Logan, of Terrell, Texas; and Kenneth J. Foster and the corporation he controls, National Headquarters, Inc., both of Dublin, California.

One suit charged Hastings and McKenzie with advising or providing backdated documents in 1984 to fraudulently substantiate deductions claimed for a race horse breeding program in 1983.

McKenzie, a lawyer, received a check for $25,000 from the undercover agent, and provided documents designed to show that in 1983 the undercover agent had invested $75,000 as prepaid stud fees, which yielded a three-to-one tax write-off, the suit said.

Hastings was also named in another suit charging him and Shaver, an investment banker, with arranging for an investment in a nuclear waste disposal program. The program was to yield a three-to-one write-off in the form of falsely backdated research and development expenditures, the suit said.

(MORE)

Brown was also named in two separate lawsuits. In one, he was accused of arranging a backdated transaction involving the sale of horses by Jenson for $85,000. The other suit charged that Brown arranged a backdated sale of horses by Logan for $175,000. The defendants represented that the undercover agent would receive a three-to-one tax write-off by executing sham promissory notes that would not be paid, the suit said.

Another suit charged Foster and National Headquarters, Inc. with promoting a backdated tax shelter involving the leasing of classical music master recording tapes.

The suit noted that Foster advised the undercover agent to use a different pen to cover the fact that the backdating took place. Foster received a check for $62,500, which he represented would substantiate a three-to-one tax write-off, the suit added.

Vance and Lang were charged in another suit with arranging and providing the backdate documents necessary to substantiate an investment in a California kiwi fruit farming operation. The undercover agent gave them a check for $50,000, and they provided false documents showing an investment of $200,000 in the farming operation, the suit said.

The investment scheme also used a promissory note with a secret side agreement that the undercover agent would not be required to pay the note, which would serve only as substantiation for the unwarranted federal tax benefits, the suit said.

(MORE)

In the seventh case, Fourest I. Jacob and Tyson Hopkins, certified public accountants in the Oklahoma City firm of Hopkins, Jacob and Associates, were charged with creating a fraudulent corporate salary bonus to be paid to the undercover agent by his corporation.

The salary bonus was fraudulent because the corporation's tax year had closed, the suit said, but Jacob and Hopkins, on July 31, 1984, created corporate minutes that they backdated to May 1, 1984, to substantiate deductions to be claimed by the corporation. This would have saved the corporation -- and cost the government -- about $60,000 in taxes, the suit added.

Then, to eliminate the bonus income from the undercover agent's individual tax return, Jacob and Hopkins sold him an interest in an oil and gas limited partnership that would yield a four-to-one tax write-off, the suit said. The multiple write-off was based upon the agent's assumption of a liability that Jacob and Hopkins orally guaranteed would not be enforced, the suit added.

The suits asked the court to permanently enjoin the promoters from engaging in any activity whose purpose is tax avoidance and involves making false statements relating to taxes.

Archer said the total cost to the United States Treasury resulting from these activities could run into the millions of dollars.

He stressed that backdating is illegal and warned that clients of the defendants who have engaged in similar transactions will be confronted with large federal income tax deficiencies, as well as substantial penalties and interest.

Archer said the investigation is continuing.

# # # #

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 30, 1984

AT
202-633-2016

Assistant Attorney General J. Paul McGrath, in charge of the Antitrust Division, said today that the Department had informed counsel for the G. Heileman Brewing Company of LaCrosse, Wisconsin, that it would not challenge an acquisition by Heileman of Pabst Brewing Company of Milwaukee, Wisconsin, if Pabst's brewery in Tumwater, Washington, and certain brands owned by Pabst were sold to a competitively unobjectionable third party.

Heileman has told the Department that it is currently negotiating such a sale.

Earlier, the Department had indicated it would have no competitive problem with a rival bid--in the form of a pending tender offer--by S&P Company of Vancouver, Washington, owned by Paul and Lydia Kalmanovitz.

Heileman and Pabst are the nation's fourth and sixth largest brewers, respectively. Kalmanovitz controls a number of brewing Companies, including Falstaff Brewing Company, General Brewing company, and Pearl Brewing Company. In 1983, these three companies collectively were the nation's ninth largest brewing organization.

# # # #

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 30, 1984

TAX
202-633-2019

The Department of Justice obtained a consent judgment today halting the sale of a Baltimore-based tax shelter involving the promotion and sale of master recordings.

Assistant Attorney General Glenn L. Archer, Jr., head of the Department's Tax Division, said the judgment was filed in U.S. District Court in Baltimore, resolving a civil suit filed at the same time. The judgment will become final upon approval by the court.

Named as defendants in this suit were Edward Astri and three corporations controlled by him, Astri Marketing Entrepreneurs, Inc., Fidelity Assurance Associates, Inc., and Award Masters, Inc. All consented to entry of the injunction.

The suit charged that they promoted and sold an abusive tax shelter plan involving the leasing to investors of master recording tapes that were inflated in value by up to 100 times their correct value.

The tapes are used to produce record albums, which were compilations of material previously recorded by such artists as Willie Nelson, Barbara Mandrell, and Liberace, the suit said. The artists did not participate in the shelter and were unaware their material was being used.

(MORE)

To achieve the overstatements of value the defendants would sometimes sell the tapes to another entity in a transaction lacking economic substance and would utilize blatantly inaccurate appraisals to justify those valuations, the suit said.

The purpose of the overvaluation was to artificially boost the tax benefits to the investors, who leased the master recording tapes on the pretext of making and selling phonograph records, the suit said. Because of the exaggerated value, the investors could purportedly claim tax write-offs, such as investment tax credits, greatly in excess of the amount of their investment, even without any effort to manufacture and sell the records, the suit added.

Some 310 taxpayers invested in the tax shelter, resulting in improper tax credits of about $4,236,163 and improper deductions of about $3,495,644, the suit said.

The judgment permanently enjoins defendants from further sale of the tax shelter and requires them to give advance notice to the IRS of plans to sell future tax shelters.

# # # #

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, NOVEMBER 30, 1984

TAX
202-633-2019

The Department of Justice filed a civil suit today seeking a permanent injunction against the California promoters of an abusive tax shelter involving the leasing of electronic pain-killing devices to investors.

Assistant Attorney General Glenn L. Archer, Jr., head of the Department's Tax Division, said the suit was filed in U.S. District Court in Los Angeles at the request of the Internal Revenue Service.

Named as defendants were Nelson Gross, Charles W. Lane, William L. Tucker, John P. Stroup, Harry L. Abercrombie, Ronald B. Meyers, Neuro-Electro Dynamics, Inc., Electrocaine Medical Systems, Inc., Safe and Natural Succor Distributors, Inc., S.D. Leasing, Inc., Theurgical Leasing, Inc., Medic Leasing, Inc., and Lynron Leasing Company, Inc., all of the Los Angeles area.

The suit charged that the defendants promoted an abusive tax shelter scheme involving the leasing to investors of Electrocaine XE-II devices at grossly overstated values. An investment tax credit (ITC) was then passed through to the investors based upon the falsely inflated value, the suit said.

(MORE)

For a payment of $6,000, investors were told they could claim an ITC of $12,000 and deductions of $6,000, allowing them to recover $14,800 in tax savings, the suit said.

The Electrocaine XE-II devices are transcutaneous efferent nerve stimulation devices used in the treatment of pain.

The suit said that to achieve and conceal the overstatement of the value of the devices the defendants transferred the devices to collusively operated corporations through transactions taking the form of a purchase and sale, and by using promissory notes that had no economic substance.

The suit further alleged that not all of the devices leased were manufactured or placed in service in 1983 and, accordingly, that the defendants had falsely advised investors to claim the overstated tax credits and other deductions in the 1983 tax year.

In 1983, approximately 1,300 investors leased approximately 25,000 Electrocaine XE-II devices, the suit said. It is estimated that the U.S. Treasury could lose as much as $17.5 million in tax revenues as a result of the tax shelter promotion.

# # # #

U.S. Department of Justice
Office of the Deputy Attorney General

11/30

To: John Roberts

From: Roger Clegg

The attached materials deal with a railroad right-of-way case that has engendered a fair amount of congressional interest. Senator Symms has called Carol Dinkins regarding this matter, so you may want to apprise Messrs. Fielding and Hauser about what is going on, in case they get calls.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 28, 1984

MEMORANDUM

TO : Carol E. Dinkins
Deputy Attorney General

Phil Brady
Associate Deputy Attorney General

Michael W. Dolan
Deputy Assistant Attorney General

FROM : Robert A. McConnell
Assistant Attorney General

RE : Attached Memorandum to Me From Assistant Attorney General Habicht

Attached you will find a copy of a memorandum Hank has provided me outlining the current status of the former Chicago, Milwaukee, St. Paul Pacific Railroad Company Right-of-Way case and congressional interest therein. Although I know that Hank has already talked to the Deputy Attorney General regarding this matter, I believe it would be useful for each of you to have this memorandum in your files.

This is a classic case of sensitive congressional relations. The give and take of the political world does not always allow for a clear understanding of the mission and duties of this Department. Certainly there will be further communications regarding this matter and I believe that each of you, together with the Lands Division, needs to be fully apprised of the matter as it progresses.

As the decision memorandum reaches Hank for final determination, it may also be appropriate to advise the White House, namely, Fred Fielding and B. Oglesby in anticipation of inquiries being directed at them.

Attachment

Memorandum

Subject	Date
Congressional Inquiry Regarding Former Chicago, Milwaukee, St. Paul Pacific Railroad Company Right-of-Way	November 23, 1984

To
Robert A. McConnell
Assistant Attorney General
Office of Intergovernmental
and Legislative Affairs

From
F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources
Division

We have recently received considerable Congressional expressions of interest regarding a matter which has been referred to us for litigation by both the U.S. Forest Service and the Bureau of Land Management to quiet title to portions of the former right-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company between Avery, Idaho and St. Regis, Montana.

Although the matter has not yet reached me for my decision, my staff tells me that there are many issues involved. The main issue, however, is the effect of termination and abandonment of rail service on the ownership of rights-of-way across federal land, and the well settled legal principle that such termination of railroad use terminates the easement so that the entire title to the underlying lands remains in the United States in fee simple, clear of any easement.

The Chicago, Milwaukee filed for bankruptcy in 1977 and subsequently abandoned rail service in Idaho and Montana. Nevertheless, numerous private parties who received quitclaim deeds from the bankruptcy trustee apparently believe that they acquired title to the underlying federal lands formerly subject to the right-of-way.

One of these private parties, Edwards Investment Co. ("Edwards"), has actively lobbied the Hill on this matter and Senators McClure and Symms and others have become very interested in the matter.

In response to concern expressed by Senator McClure to the Forest Service, I sent the attached letter dated October 1, 1984, explaining that any litigation should not interrupt continued use of the right-of-way for timber harvesting purposes.

We subsequently received a call from Mr. Frank Cushing, Subcommittee Staff Director, expressing the desire that there be an opportunity for settlement without litigation. My staff indicated that such an opportunity would be provided by way of a meeting on November 15, 1984.

After the staff attorney working on the case set up the November 15 meeting time, Edwards asked for the meeting to be held in Idaho rather than Washington and insisted that Forest Service personnel be present. Our staff attorney declined to hold the meeting outside Washington since it was a meeting held at the request of Edwards. He also indicated that the Forest Service or Department of Agriculture would have to make their own decision on who from their offices would be present.

I subsquently received a phone call from Senator Symms regarding the meeting with Edwards. He was concerned about the expense to Edwards of meeting in Washington and expressed his policy concerns regarding the importance of the right-of-way as a forest road and its impact on the local economy. I said I would check with my staff.

My Deputy, Mit Spears, after clearing the contact with your office, met with Mr. Cushing to explain the status of this matter. Mr. Cushing, who is not an attorney, was very upset by what he viewed as intransigence of the Department and the Forest Service because of the firmness of our views of the law and the alleged unfairness of the situation to Edwards and others like him. Mit explained that we were bound by the law, and, despite the alleged unfairness, that our staff attorneys' research indicated that Edwards received only a quitclaim deed. Under the law, there was no right-of-way across fee lands of the United States that remained for the Bankruptcy Trustee to convey.

We acknowledged ownership by Edwards of some portions of the railroad right-of-way that were owned in fee by the railroad, and thus could be transferred. And the Forest Service was willing to make a reasonable offer for the lands consistent with established valuation priciples of condemnation law. But it appeared that the gap between the parties on valuation of the interests was great due largely to the basis Edwards used to compute its value. Mr. Cushing interpreted the firmness of our legal position as "recalcitrance" and that we were not meeting in "good faith" since our minds were "already made up." Mr. Lees indicated that the purpose of the meeting was to explore carefully the entire basis of the legal arguments made by Edwards to see if

they had any merit and that Edwards would have a full opportunity to present their arguments and these arguments would be given fair consideration. In addition, the Department staff attorney would be authorized to make an offer for settlement at the meeting based on our current view of controlling legal principles.

Mr. Spears and Mr. Lees had to inform Mr. Cushing that staff or members of Congress could not be present during settlement negotiations, due to Department policy against such Congressional involvement. It was explained that such a policy protected the Senators as much as the Department from later charges of undue or improper influence. Mr. Cushing apparently was upset by such a restriction, but appeared to understand, provided that Mr. Lees agreed to call Mr. Cushing after the meeting to give him a status report of what happened. Although Mr. Spears offered to speak to Senator Symms or his staff to explain this restriction to him as well, Mr. Cushing indicated that he (Cushing) would do so instead. Apparently, however, Mr. Cushing only passed along the end result without explaining the reason for it, because Senator Symms called me shortly thereafter to express his ire at his staff's being excluded from the meeting. I explained the reason for the policy and Mr. Symms indicated that such an explanation was satisfactory.

The meeting with Edwards was held on November 15, 1984 from 1:00 until 5:30 p.m. Our staff attorneys made an initial offer to settle the matter, based on our current view of the law and facts. Edwards made no counter offer but clearly believed the offer to be grossly inadequate. Although there was a wide disparity in positions on both the law and the facts, my staff listened carefully and gave Edwards every opportunity to present its positions. As a result of the meeting, my staff and the Forest Service are reviewing a few additional issues of law and fact which came out of the meeting.

In accordance with the previous discussion, Mr. Lees called Mr. Cushing to give him a status report on the results of the meeting. Mr. Cushing demanded to know the basis for the Department's initial offer, and a detailed breakdown of the factors considered at in arriving at an initial offer. He also reportedly made disparaging remarks about the Department and implied various threats about Congressional action to block any attempt to acquire properties through condemnation if agreement could not be reached. He repeatedly mischaracterized statements of Mr. Lees, who tried to explain our basic principles of following the law and treating similarly situated persons similarly. Mr. Lees declined to be

drawn into extensive arguments about the law and the facts. Mr. Cushing apparently is intent on trying to pressure the Department into making a very large offer of payment to Edwards, despite our views of the law, and may attempt to embarrass the Department by mischaracterizing the statements already made to him.

My staff intends to prepare a decision document for me in the near future, laying out the legal and factual issues involved in order for me to decide whether we should file this action. I anticipate continued Congressional interest and pressure and wanted you to be aware of the situation.

OCT 1 1984

Honorable James A. McClure
United States Senate
Washington, D. C. 20510

Dear Senator McClure:

We understand from the Forest Service that you have expressed concern regarding the former right-of-way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company between Avery, Idaho and St. Regis, Montana and potential use of that right-of-way for timber access. I wish to assure you that we are aware of, and will protect, the public interest in access to timber resources in that area.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, or its predecessors-in-interest, acquired rights-of-way across federal lands in Idaho and Montana, including a right-of-way between Avery and St. Regis, pursuant to the Act of March 3, 1875, c. 152, 18 Stat. 482, 43 U.S.C. 934, and the Act of March 3, 1899, c. 427, 30 Stat. 1233, 16 U.S.C. 525. Such rights-of-way are merely easements for railroad purposes, and upon termination of that use, the easement is extinguished and title to the underlying land remains in the United States. Great Northern Railway Co. v. United States, 315 U.S. 262 (1942). Nothing in the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101 (Nov. 4, 1979), 93 Stat. 736, or its legislative history, alters that well-settled legal principle or affects the title of the United States to such lands.

As you know, the Chicago, Milwaukee filed for bankruptcy in 1977 and subsequently abandoned rail service in Idaho and Montana. Rights-of-way across federal lands expired upon such abandonment. Nevertheless, numerous private parties, who received quitclaim deeds from the bankruptcy trustee, apparently believe (incorrectly) that they acquired title to the federal lands

formerly subject to the right-of-way. Our staff attorneys are reviewing this matter with the Department of Agriculture and the Department of the Interior.

We are aware of the strong public interest in continued access to timber resources in the St. Joe River drainage, but we do not expect title litigation, if filed, to interfere with such access. The United States presently has possession and use of the federal lands formerly subject to the Chicago, Milwaukee's right-of-way between Avery and St. Regis (and elsewhere in Idaho and Montana). Under well-settled legal principles, as confirmed in 28 U.S.C. 2409a(b), the United States' possession and control of such lands will not be disturbed during the pendency of title litigation. Consequently, the Forest Service can now use the former right-of-way between Avery and St. Regis for timber access and will be able to continue such use during any title litigation. Only a final judgment adverse to the United States could interfere with such use. Even then, the United States has the option to purchase.

In sum, we will not initiate unnecessary litigation if the interests of the United States can be protected through negotiation, and we will not allow title disputes with private parties to interfere with use of federal timber lands for the public benefit.

I hope that the above adequately addresses your concerns. If I can provide any additional information regarding this matter, please let me know.

Sincerely,

F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division

U.S. Department of Justice
Office of the Deputy Attorney General

12/3

To: John Roberts

From: Roger Clegg

Attached are materials regarding an important case for which the Supreme Court granted certiorari today.

U.S. Department of Justice

Civil Division

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

DEC 3 1984

MEMORANDUM

TO: Ron Blunt
Roger Clegg

FROM: Greg Walden

RE: Jean v. Nelson (Haitians case)

I have been informed by Michael Singer of our Appellate Staff that the Supreme Court has today granted a writ of certiorari to review the en banc Eleventh Circuit's decision in this case. Attached is a description of the procedural history of the litigation and a UPI report on the Supreme Court's action today.

Although we are not certain of the scope of the Supreme Court's review, we believe it will center on whether these excludable aliens have any due process rights concerning their applications for parole. We phrased the question presented in our op-cert memo as whether excludable aliens can invoke the Fifth Amendment to challenge the Attorney General's exercise of his parole authority. This will include an equal protection challenge. It is unclear whether the Court will also consider the broader question of the Fifth Amendment's applicability to asylum and admission matters, too. Petitioners did not raise the issue whether these aliens have either a statutory or due process right to notice of a right to seek asylum, and therefore this issue may be excluded from the Court's review. (This question has been decided adversely to the government in the 9th Circuit on statutory grounds only; our rehearing petition is pending.)

Attachments

Louis v. Nelson, No. 81-1260 (S.D. Fla.)

Jean v. Nelson, No. 82-5772 (11th Cir.).

This class action was brought by Haitian aliens to challenge INS's right to detain excludable, undocumented aliens who are seeking admission to the United States during the period of the exclusion and asylum determination process. The aliens have also attacked INS's right to conduct exclusion hearings involving Haitians who are not represented by counsel.

On April 23, 1983, a panel of the Eleventh Circuit found for the Haitians on virtually every issue. The panel ruled that the INS detention policy was adopted in violation of APA rule-making requirements; that that policy intentionally discriminated against the Haitians with its detention policy. On August 15, 1983, the Eleventh Circuit granted our petition for a rehearing with en banc consideration and heard argument on September 16. On February 28, 1984, the en banc court overruled the panel on every issue, holding that since excludable aliens have no constitutional rights in the admission process -- and only those statutory and regulatory rights Congress and the Executive choose to give them -- the Executive may discriminate against them for reasons of national origin for good reason. The court also held that excludable aliens have no right to be advised of their right to present an asylum claim to the district director; and, finally, that the Administrative Procedure Act issue is moot. Petitions for rehearing and a stay pending petition for writ of certiorari were denied. On June 8, the district court ordered briefing on minor remand issues. The court also closed the class as of the date of the final order, enabling INS to move Haitians detained after the final order. Plaintiffs filed a petition for a writ of certiorari in the Supreme Court on August 1, 1984. The Solicitor General's Office will shortly file a response. The case at the district court level was personally handled by Robert Bombaugh and Charles E. Hamilton, III.

Fiscal Impact--The fiscal impact is not immediately ascertainable. The case has seriously delayed exclusion hearings for some seventeen hundred Haitians for eighteen months, impacting on costs of detention and social services for paroled class members. In addition, plaintiffs' counsel are seeking a fee award under the EAJA.

UP833

R W

COURT

BY SPENCER SHERMAN

WASHINGTON (UPI) -- THE SUPREME COURT MONDAY ACCEPTED A PLEA FROM THOUSANDS OF HAITIAN REFUGEES TO DECIDE WHETHER THE U.S. GOVERNMENT HAS THE POWER TO JAIL ILLEGAL ALIENS INDEFINITELY WHILE THEY AWAIT DEPORTATION HEARINGS.

AT ISSUE IN THE CASE, TO BE DECIDED BY EARLY JULY, IS WHETHER ALIENS HAVE THE SAME CONSTITUTIONAL RIGHTS AS U.S. CITIZENS TO CHALLENGE INCARCERATION BEFORE THEY APPEAR IN IMMIGRATION COURT TO PLEAD THEIR CASE FOR ASYLUM.

THE JUSTICES SAID THEY WOULD REVIEW A LOWER COURT RULING THAT SAID THE HAITIANS, WHO CLAIMED THEY WERE DETAINED BECAUSE THEY ARE BLACK, HAD NO RIGHT TO CHALLENGE IMMIGRATION AND NATURALIZATION SERVICE DETENTION POLICIES.

THE CASE CENTERS ON THE TREATMENT OF HAITIANS WHO COME TO SOUTH FLORIDA IN A HAPHAZARD FLOTILLA ABOARD RICKETY BOATS, BUT A RULING WILL HAVE AN IMPACT ON THE TREATMENT OF ALL ALIENS WHO ILLEGALLY ENTER THE UNITED STATES.

IN A RELATED CASE, THE COURT AGREED TO DECIDE IF THE INS CAN PROCEED WITH THE DEPORTATION OF AN ALIEN WHO, BY REASON OF APPEALS, HAS LIVED IN THE UNITED STATES FOR SEVEN YEARS AND IS THUS ELIGIBLE FOR LEGAL RESIDENCE.

IN OTHER ACTION, THE COURT:

--IN AN HAWAII CASE, AGREED TO DECIDE IF ANTI-WAR PROTESTERS CAN BE PREVENTED FROM ENTERING MILITARY INSTALLATIONS WHEN THE PUBLIC HAS BEEN ISSUED A BLANKET INVITATION TO ATTEND OPEN HOUSE FESTIVITIES.

--REFUSED TO RECONSIDER A 1983 RULING APPROVING POLICE USE OF SPECIALLY TRAINED DOGS TO SNIFF AIRPORT LUGGAGE FOR CONTRABAND AND DRUGS. THE JUSTICES SAID IN 1983 THAT SNIFF SEARCHES DID NOT VIOLATE PRIVACY RIGHTS.

--SAID IT WOULD REVIEW A $7.5 MILLION ANTITRUST JUDGMENT AGAINST COLORADO'S BUTTERMILK, AJAX AND SNOWMASS MOUNTAINS FOR DROPPING ASPEN HIGHLANDS FROM A LUCRATIVE FOUR-MOUNTAIN SKI PASS PACKAGE.

THE HAITIAN LEGAL BATTLE BEGAN ON JUNE 8, 1982, WHEN U.S. DISTRICT JUDGE EUGENE P. SPELLMAN ORDERED THE RELEASE OF NEARLY 2,000 HAITIANS WHILE THEIR IMMIGRATION STATUS WAS DEBATED.

SPELLMAN RULED INS OFFICIALS IN FLORIDA VIOLATED THE RIGHTS OF THE REFUGEES BY SHIPPING THEM TO REMOTE DETENTION FACILITIES, DENYING THEM ACCESS TO LEGAL AID AND KEEPING THEM CONFINED INDEFINETLY.

MOST OF THE HAITIANS WERE RELEASED ON PAROLE TO COMMUNITY GROUPS AFTER SPELLMAN'S RULING AND ARE STILL AWAITING WORD FROM THE INS ON THEIR CLAIMS OF POLITICAL ASYLUM, ACCORDING TO A LAWYER FOR THE AMERICAN CIVIL LIBERTIES UNION.

THE GOVERNMENT TOOK SPELLMAN'S RULING TO THE 11TH U.S. CIRCUIT COURT OF APPEALS, WHICH RULED THAT ILLEGAL ALIENS AWAITING DEPORTATION DO NOT HAVE A RIGHT TO PAROLE. DESPITE THE RULING, THE INS DID NOT MOVE TO INCARCERATE THE FREED REFUGEES.

THE APPEALS COURT SAID THE DECISION TO PAROLE OR DETAIN AN EXCLUDABLE ALIEN IS "AN INTEGRAL PART OF THE ADMISSIONS PROCESS" AND SAID THE GOVERNMENT MAY "DISCRIMINATE ON THE BASIS OF NATIONAL ORIGIN IN MAKING PAROLE DECISIONS."

LAWYERS FOR THE REFUGEES THEN CAME TO THE HIGH COURT SEEKING A RULING THAT ALIENS HAVE CONSTITUTIONAL PROTECTIONS AGAINST ARBITRARY INCARCERATION AND RACE DISCRIMINATION, EVEN THOUGH THEY ARE NOT CITIZENS.

THE JUSTICE DEPARTMENT ASKED THE HIGH COURT TO REJECT THE APPEAL, ARGUING THAT DETENTION AND INCARCERATION WERE METHODS, APPROVED BY PRESIDENT REAGAN, AIMED AT GAINING CONTROL OF THE MASSIVE INFLUX OF ILLEGAL ALIENS.

WHILE AN ESTIMATED 35,000 UNDOCUMENTED HAITIANS HAVE ARRIVED IN SOUTH FLORIDA SINCE DECEMBER 1972, THE INS ONLY BEGAN JAILING THOSE WHO ARRIVED IN THE SPRING OF 1981.

THE JAILINGS WERE INSTIGATED BY THE MARIEL BOATLIFT OR "FREEDOM FLOTILLA" WHICH BROUGHT 125,000 CUBANS TO THE UNITED STATES DURING THE SPRING OF 1980.

UPI 12-03-84 11:41 AES

U.S. Department of Justice
Office of the Deputy Attorney General

12/3/84

To: John Roberts

From: Roger Clegg

Per our conversation.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

30 NOV 1984

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Re: H.R. 2684, A Bill to Amend the Ethics in Government Act to Provide an Independent Counsel to Prosecute Contempts Certified by the House of Representatives; H.R. 3456, A Bill to Clarify the Duty of the United States Attorney to Bring Contempt of Congress Citations Before a Grand Jury

Dear Mr. Chairman:

This reponds to your request for the comments of the Department of Justice on the above-referenced bills. H.R. 2684 would amend the Ethics in Government Act 1/ to require the appointment of an independent counsel to prosecute contempts of Congress certified by the Speaker of the House of Representatives against certain designated Executive Branch officials. H.R. 3456 would amend the current contempt of Congress statute by making nondiscretionary the duty of the United States Attorney to refer a contempt of Congress citation to a grand jury.

Both of these bills raise significant constitutional issues with respect to the separation of powers required by the United States Constitution. These issues involve the limits that may be placed on the Executive's prosecutorial discretion, the constitutional propriety of requiring an independent counsel to prosecute these types of offenses,

---

1/ The provisions of the Ethics in Government Act relating to the appointment of an independent counsel came to be known as the "Special Prosecutor Act." However, since the title of the statutory official was changed to "independent counsel," at least in part to minimize the stigma to the individual under investigation associated with the word "prosecutor," these provisions will be referred to as the Independent Counsel Act in this memorandum.

and, at least indirectly, the constitutionality of prosecuting an official of the Executive Branch for asserting, on the President's behalf, the President's presumptively valid claim of executive privilege. In summary, our conclusions with respect to these issues are as follows: (1) it would be unconstitutional to require by law that the Executive actually prosecute a particular individual or take any particular prosecutorial steps, including referral to a grand jury, with respect to that individual; (2) extension of the Independent Counsel Act in the manner contemplated by H.R. 2684 would breach the separation of powers required by the Constitution by eliminating any Executive Branch supervision over the prosecution of a large number of Executive officials, would impair the President's powers to protect the confidentiality of presumptively privileged documents, and would vest excessive control over Executive Branch officials in Congress and in an appointee of the judiciary; and (3) it would be an unconstitutional restriction on executive authority to require the prosecution for contempt of Congress of an Executive Branch official who had asserted a claim of executive privilege at the direction of the President. For these reasons, as set forth more fully below, we strongly oppose passage of either of these bills.

I

BACKGROUND

These two bills deal with the procedures for prosecuting citations for contempt of Congress. The current statutory scheme for prosecuting such assertedly contumacious conduct is set out at §§ 192 and 194 of Title 2 of the United States Code. Section 192, which sets forth the criminal offense of contempt of Congress, provides in pertinent part:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Section 194 purports to impose duties on the Speaker of the House or the President of the Senate, as the case may be, and the United States Attorney, to take certain actions leading to the prosecution of persons certified by a House of Congress to have failed to testify or to respond to a subpoena. It provides:

> Whenever a witness summoned as mentioned in section 192 of this title 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 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.

Although § 194 uses the term, "it shall be the duty," with respect to the responsibilities of the Speaker of the House and President of the Senate to certify a contempt citation to the United States Attorney and the responsibility of the United States Attorney to bring the matter before a grand jury, we believe that these "duties" would be construed by the courts to be discretionary. The United States Court of Appeals for the District of Columbia Circuit has ruled that, at least with respect to the Speaker of the House, the duty to certify a contempt citation to the United States Attorney is not mandatory, and that, in fact, the Speaker has an obligation under the law, at least in some cases, to exercise his discretion in determining whether to refer a contempt citation. Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966). The same court of appeals has, on other occasions, recognized, at least in dicta, that the United States Attorney has discretion

not to refer a contempt citation to a grand jury. See United States Servicemen's Fund v. Eastland, 488 F.2d 1252, 1260 (D.C. Cir. 1973), rev'd on other grounds, 421 U.S. 491 (1975); Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971). The Department of Justice has consistently taken the position that § 194 does not divest the United States Attorney of his prosecutorial discretion in deciding whether to refer a case to the grand jury, and in several instances the United States Attorney has not referred such citations to a grand jury. 2/

The bills propose to alter and substantially eliminate the prosecutorial discretion that we, and apparently the authors of this legislation, believe now exists under the contempt of Congress provisions. H.R. 2684 would amend the Independent Counsel Act to require the appointment of an independent counsel to handle a contempt of Congress citation certified by the Speaker of the House of Representatives (but not the President of the Senate) with respect to any government official who is currently subject to the Independent Counsel Act or any official compensated at or above a rate equivalent to level V of the executive schedule. The bill also provides:

> It shall be the duty of an independent counsel appointed upon an application by the Attorney General under the last sentence of section 592(c)(1) of this title promptly to bring the statement of facts certified by the Speaker of the House of Representatives before the grand jury for its action and to prosecute any indictments resulting therefrom.

(Emphasis added.)

2/ In 1960, for example, the Department decided not to refer to the grand jury contempt citations adopted with respect to the refusual to testify of two officials of the Port of New York Authority. The Department proceeded against a third Port Authority official by information rather than indictment. See New York Times, Nov. 26, 1960, p. 1. In 1956, the cases of two other individuals who were cited for contempt of Congress

(cont'd)

H.R. 3456 would amend the contempt of Congress statute by adding the following provision at the end of § 194 of Title II of the United States Code:

> The duty of the United States attorney under the preceding sentence is non-discretionary and shall be carried out not later than sixty days after the date on which the President of the Senate or the Speaker of the House of Representatives, as the case may be, makes the certification.

II

ANALYSIS

These bills raise a number of significant constitutional issues. First, because they could be read to limit the prosecutorial discretion of the Executive Branch with respect to prosecution of contempts of Congress, the bills raise a separation of powers question concerning the extent to which Congress may limit the discretion of the Executive over the prosecution of crimes and require the Executive to prosecute specific individuals for specific offenses. Second, by

---

(footnote 2 cont'd)

were not referred to a grand jury. See File of Salvatore Santoro and Joseph Bendinelli, Department of Justice File No. 51-51-484 (1956). In 1983, EPA Administrator Anne (Gorsuch) Burford was cited for contempt of Congress, but the United States Attorney did not refer the citation to the grand jury until some seven months later, after the House had adopted a resolution withdrawing the contempt citation. In testimony before the House Committee on Public Works and Transportation, the United States Attorney stated that he had the right under the statute to defer referral. See Testimony of Stanley S. Harris Before the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. 100-107 (June 16, 1983). See also, Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, re: Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning an Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States (May 30, 1984).

broadening the scope of crimes for which an independent counsel is required, and by greatly increasing the number of officials who are subject to the Independent Counsel Act, H.R. 2684 raises the issue whether such a procedure would be consistent with the Constitution's assignment to the President of the Executive power, including the power to control the discretion of Executive Branch officials, and the duty faithfully to execute the laws. Finally, the bills raise, at least indirectly, the issue whether Congress may require the prosecution of an Executive Branch official who asserts the President's claim of executive privilege.

A. Criminal Contempt of Congress

These bills deal with the crime of contempt of Congress. The crime of contempt that is set forth in 2 U.S.C. § 192 must be clearly distinguished from the civil remedies available to Congress to enforce its right to obtain testimony and documents. These civil remedies include civil enforcement of a congressional subpoena, see Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), and Congress's inherent constitutional authority to arrest recalcitrant witnesses. See Marshall v. Gordon, 243 U.S. 521 (1917); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). These civil remedies protect Congress's interests and remedy breaches of congressional privilege. 3/

On the other hand, it is clear that the crime of contempt of Congress is an offense against the United States, not against Congress. Since the early part of the 19th century, it has been recognized that offenses against Congress that are punishable by Congress through its inherent contempt power may also be violations of the criminal laws and, as such, offenses against the United States, with respect to which the normal rules governing criminal prosecutions apply. See 2 Op. Att'y Gen. 655 (1834), which concludes that an assault against a congressman could be prosecuted

---

3/ Congress may not, however, conduct a trial or enforce a law, pursue an individual for punitive purposes, or abuse the procedural protections of the Constitution. Watkins v. United States, 354 U.S. 178, 187-88 (1957).

(consistent with the Double Jeopardy Clause) under the criminal laws, even if the defendant had already been punished by Congress, because the act created two separate offenses, one against Congress and one against the United States. This principle was adopted by the Supreme Court when it upheld the constitutionality of the contempt of Congress statute. In re Chapman, 166 U.S. 661 (1897). In Chapman the Court held that the contempt statute did not violate the Double Jeopardy Clause even though a defendant could be punished through Congress's inherent contempt power as well as under the contempt statute. The Court concluded that a refusal to testify involved two separate offenses, one against Congress and one against the United States, and that

> it is quite clear that the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another; and indictable statutory offences may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu and capable of standing together.

166 U.S. at 672.

The import of the Court's conclusion in this context is clear. Congress's inherent contempt power is the remedy for the offense against Congress, and that remedy remains within Congress's control. The crime of contempt of Congress, like any other federal statutory crime, is an offense against the United States that should be prosecuted as is any other crime. This basic principle provides the foundation for our analysis of the proposed changes to enforcement of the criminal contempt of Congress statute.

B. Prosecutorial Discretion

Art. II, § 1 of the Constitution states that the "executive Power shall be vested in a President of the United States of America." Art. II, § 3 states that the President "shall take Care that the Laws be faithfully executed . . . ." These constitutional provisions describe the essential core of the President's constitutional responsibility, the duty to enforce the laws. By virtue of this express constitutional mandate,

the Executive Branch has exclusive authority to initiate and prosecute actions to seek the imposition by the Judicial Branch of criminal penalties for offenses against the United States as defined in laws adopted by Congress. This principle was reaffirmed by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court invalidated a provision of the Federal Election Act that vested the power to appoint certain members of the Federal Election Commission in the President Pro Tempore of the Senate and the Speaker of the House. In so holding, the Court recognized the exclusively executive nature of some of the Commission's powers, including the right to commence litigation:

> The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.

424 U.S. at 138.

The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals. The general rule is that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974). See also Confiscation Cases, 74 U.S. (7 Wall.) 454 (1869). The Attorney General and his subordinates, including the United States Attorneys, have the authority to exercise this discretion reserved to the Executive. United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); The Gray Jacket, 72 U.S. (5 Wall.) 370 (1866). In general, courts have agreed with the view of Judge (now Chief Justice) Burger:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967). See also United States v. Batchelder, 442 U.S. 114 (1979); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

This principle was explained in Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967), in which the court considered the applicability of the Federal Tort Claims Act to a prosecutorial decision not to arrest or prosecute persons injuring plaintiff's business. The court ruled that the government was immune from suit under the discretionary decision exception of the Act on the ground that the Executive possessed prosecutorial discretion by virtue of the separation of powers under the Constitution:

> The President of the United States is charged in Article 2, Section 3, of the Constitution with the duty to "take care that the laws be faithfully executed . . . ." The Attorney General is the President's surrogate in the prosecution of all offenses against the United States. . . . The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute. . . .
>
> This discretion is required in all cases.
>
> * * *
>
> We emphasize that this discretion, exercised in even the lowliest and least consequential cases, can affect the policies, duties, and success of a function placed under the control of the Attorney General by our Constitution and statutes.

375 F.2d at 246-47.

A number of courts have expressly relied upon the constitutional separation of powers in refusing to force a United States Attorney to proceed with a prosecution. For example, in Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961), the court declined to order the United States Attorney to commence a prosecution for violation of federal wiretap laws on the ground that it was:

> clear beyond question that it is not the business of the Courts to tell the United States Attorney to perform what they conceive to be his duties.

(cont'd)

(cont'd)

> Article II, Section 3 of the Constitution provides that "[the President] shall take Care that the Laws [shall] be faithfully executed." The prerogative of enforcing the criminal law was vested by the Constitution, therefore, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.

193 F. Supp. at 634. See also Goldberg v. Hoffman, 225 F.2d 463, 464-65 (7th Cir. 1955). 4/ Although, most cases expressly avoid this constitutional question by construing statutes not to limit prosecutorial discretion, the cases that do discuss the subject make it clear that common-law prosecutorial discretion is strongly reinforced by the constitutional separation of powers. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d. Cir. 1973); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied 384 U.S. 906 (1966).

This constitutionally based prosecutorial discretion unquestionably applies to the decision whether to prosecute a criminal case. Even if a grand jury returns a true bill,

---

4/ These conclusions are not inconsistent with Rule 48(a) of the Federal Rules of Criminal Procedure, which requires leave of court before dismissal of a criminal action. This provision is primarily to protect defendants against repeated prosecutions for the same offense, and a court's power to deny leave under this provision is extremely limited. See Rinaldi v. United States, 434 U.S. 22 (1977); United States v. Hamm, 659 F.2d 624 (5th Cir. 1981); United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973). The Fifth Circuit has stated that the constitutionality of Rule 48(a) is dependent upon the prosecutor's unfettered ability to decide not to commence a case in the first place. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Moreover, Judge Weinfeld has stated that even if a court denied leave to dismiss an indictment, the court "in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." United States v. Greater Blouse, Skirt and Neckwear Contractors Association, Inc., 228 F. Supp. 483 (S.D.N.Y. 1964).

a United States Attorney may refuse to sign an indictment and thereby prevent the case from going forward. United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965); In re Grand Jury, January, 1969, 315 F. Supp. 662 (D. Md. 1970). In Cox, the Fifth Circuit sitting en banc overturned a district court order that a United States Attorney prepare and sign an indictment that a grand jury had voted to return. The plurality opinion stated:

> The executive power is vested in the President of the United States, who is required to take care that the laws be faithfully executed. The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

342 F.2d at 171 (footnotes omitted). See also 342 F.2d at 182-83 (Brown, J. concurring); 342 F.2d at 190-93 (Wisdom, J. concurring). Even the three dissenting judges in Cox conceded that, although they believed that the United States Attorney could be required to sign the indictment, "once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward." 242 F.2d at 179. See United States v. Nixon, 418 U.S. 683, 693 (1974), citing, inter alia, Cox.

The prosecutorial discretion of the Executive extends beyond the question whether to bring a prosecution; it applies to any stage of the criminal investigative process, including the decision whether to refer a particular matter to the grand jury. The cases expressly recognize this point and have concluded that prosecutorial discretion applies even to the decision whether to begin an investigation at all. See Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Smith v. United States, 375 F.2d 243, 248 (5th Cir.), cert. denied, 389 U.S. 841 (1967). In the latter case, the court emphasized that prosecutorial discretion was protected "no matter whether these decisions are made during the investigation or prosecution of offenses." 375 F.2d at 248.

Recently Judge Bork of the District of Columbia Circuit, in a concurring opinion concerning the requirements of the Independent Counsel Act, stated:

> the principle of Executive control extends to all phases of the prosecutorial process. Thus, were this a case about an ordinary prosecution under a federal criminal statute, a plaintiff could not escape the principle discussed by demanding only an order that the Attorney General present facts to a grand jury but leaving the decision whether to sign any indictment to him. . . . If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.

Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (per curiam) (Bork, J. concurring).

When these principles are applied to the two bills under consideration, it seems clear that the bills could not constitutionally be construed to require the United States Attorney or an independent counsel to take any particular prosecutive steps with respect to any specific individual. First, with respect to H.R. 2684, these principles mean that the language of § 3 stating that "[i]t shall be the duty" of an independent

counsel to refer a contempt citation to the grand jury and "to prosecute any indictments therefrom" would probably be construed, as is the current contempt statute, not to deprive the prosecutor of ultimate discretion not to prosecute a particular individual. If it were not so construed (and the legislative history would undoubtedly provide useful illumination on this point), it would empower Congress to require the prosecution of specific individuals and vest in the Legislative Branch, indeed, in one house of Congress, the power to decide whom, whether, and when to prosecute. As a result, we believe the legislation would not be constitutional.

H.R. 3456 seems to be designed clearly to preclude a saving construction because its evident intent is to make referral to a grand jury nondiscretionary. For the reasons set forth above, we believe that such a statute would abridge the constitutionally required separation of powers by removing a clearly executive decision from the control of the Executive Branch and vesting it in one house of Congress. Under the Constitution, only the Executive may decide whether to proceed with a prosecution against a particular individual.

Moreover, H.R. 3456, by purporting to require prosecution of specific individuals to be identified by Congress, would present even greater constitutional problems than would a statute that permitted courts to order prosecutions based on a generally applicable criminal statute. In the case of a contempt of Congress citation, Congress (generally only one house of Congress) specifies a particular individual to be prosecuted. This "legislative" effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. See United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); see United States v. Brown, 381 U.S. 437, 446 (1965).

The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the

criminal liability of specific individuals. As the Supreme Court stated in Lovett,

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment.

328 U.S. at 317. Justice Powell recently echoed this concern: "The Framers were well acquainted with the danger of subjecting the determination of the rights of one person to the tyranny of shifting majorities." INS v. Chadha, 103 S. Ct. 2764, 2789 (Powell, J. concurring) (1983). As we have shown above, courts may not require prosecution of specific individuals, even though the Judicial Branch is expressly assigned the role of adjudicating individual guilt. A fortiori, the Legislative Branch, which is assigned the role of passing laws of general applicability and specifically excluded from questions of individual guilt or innocence, may not decide who will be prosecuted.

For all of the reasons discussed in the above constitutional analysis, we believe that Congress may not require the United States Attorney to refer a contempt of Congress citation to a grand jury. 5/ Even if the courts were to uphold a requirement to refer a matter to a grand jury, we are confident that they would strike down any provision which purported actually to mandate a prosecution.

5/ We also note that a statute giving one house of Congress the power to direct an Executive Branch official to take any particular action raises a separate issue under the Supreme Court's decision in INS. v. Chadha, 103 S. Ct. 2764 (1983). Under the current contempt statute, the role of the House or Senate in simply referring a matter to the United States Attorney for possible prosecution raises no substantial issue under Chadha to the extent that the House or Senate is acting as a private citizen would -- by referring a possible violation of federal criminal law to a prosecuting official. Thus, Chadha's proscription of unilateral congressional actions that are designed to have "the purpose and effect of altering

(cont'd)

C. Expansion of the Independent Counsel Act

H.R. 2684 would amend the Independent Counsel Act to require the appointment of an independent counsel to prosecute contempts of Congress certified by the Speaker of the House of Representatives with respect to certain specified Executive Branch officials. For the reasons discussed below, we believe this bill raises a signficant additional constitutional infirmity.

The Supreme Court has clearly stated that the President has the constitutional right and duty to supervise and, if he thinks necessary, remove officials who perform executive functions. In Myers v. United States, 272 U.S. 52 (1926), the Court stated:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide

(cont'd)

5/ (cont'd)

the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . outside the legislative branch" would be inapplicable. 103 S. Ct. at 2784. Under these bills, however, one house would purportedly be empowered to impose on the United States Attorney or an independent counsel (exercising the prosecutorial power of the Executive) an affirmative legal duty to initiate a prosecution and to take certain steps in that prosecution. To empower one house of Congress in that manner would appear to be contrary to the clear language and rationale of Chadha. This is not, of course, to say that Congress's attempt to overcome the Chadha problem and impose such an obligation on the United States Attorney or an independent counsel by plenary legislation in a specific case would be constitutional; it is to say that Congress's attempt to establish, as these bills would, a permanent mechanism to be triggered by the vote of one house that the expansion of the Independent Counsel Act in the manner contemplated by the bill would contravene the separation of powers established by the Constitution.

(cont'd)

> their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them.

272 U.S. at 135.

The prosecution of criminal offenses is unquestionably the kind of executive function that is subject to presidential direction and control. As we indicated earlier, the enforcement of the law through criminal prosecution and other court action lies at the heart of the President's executive power. See pp. 6-7, supra; Buckley v. Valeo, 424 U.S. 1 (1976). Thus, under the rubric of Myers, the President has both the right to direct and the right to remove those who perform prosecutorial functions. Only the most extraordinary circumstances would justify an interference with this constitutional authority.

Because of this vital constitutional principle, the Department of Justice has consistently expressed strong reservations concerning the establishment of prosecutorial authority that is independent of any responsibility to the normal chain of command within the Executive Branch. During the 93rd Congress, for example, at least five bills were introduced in Congress to create an office of a special prosecutor, who would be insulated from supervision by the President or others within the Executive Branch, to prosecute crimes committed by Executive Branch officials. At that time Acting Attorney General Robert Bork stated to Congress that such an office would violate the separation of powers established

by the Constitution. See Hearings Before the Subcommittee on Criminal Justice of the House Committee of the Judiciary, 93d Cong., 1st Sess. 251 (1973). Similar bills were introduced during the 94th Congress, at which time the constitutionality of the bill was seriously questioned by both Attorney General Levi and Assistant Attorney General Michael Uhlmann. See Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 2d Sess. 29 (1976) (Levi); Hearings on S. 495 Before the Senate Committee on Government Operations, 94th Cong., 1st Sess. (Part II) 4-5 (1975) (Uhlmann).

During the 95th Congress, Congress introduced legislation that eventually became the Independent Counsel Act. These bills contained more limited provisions than had their predecessors with respect to the permanence of the office, the number of people to whom the provisions applied, and the amount of continuing control by the Department of Justice. At that time, Assistant Attorney General (for the Office of Legal Counsel) Harmon stated that although the bill contained some restrictions on the Executive's power of appointment and removal, such restrictions might be justified by the extraordinary circumstances that would lead to the initiation of a request for an independent counsel. In particular, Assistant Attorney General Harmon noted that the Attorney General would retain some discretion with respect to whether an independent counsel would be appointed, 6/ and he recognized that there was a significant justification for the restrictions on presidential control because of the appearance of a conflict of interest in a situation involving possible criminal conduct by very high level officials. See Hearings on S. 555 Before the Senate Committee on Governmental Affairs, 95th Cong., 1st Sess. (May 3, 1977).

6/ The United States Court of Appeals for the District of Columbia Circuit has recently ruled that the Independent Counsel Act was specifically intended "to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate particular allegations and not to seek appointment of independent counsel." Banzhaf v. Smith, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (per curiam) (en banc).

During this Administration, the Department of Justice has expressed serious reservations concerning the constitutionality of many of the instances in which the Independent Counsel Act might be applied. These reservations were first expressed in a letter from Attorney General Smith to Senate Legal Counsel Michael Davidson on April 17, 1981. Attorney General Smith stated:

> After a careful review of the Act within the Department of Justice and an analysis of its practical effect over the past few years, I have serious reservations concerning the constitutionality of the Act. In some or all of its applications, the Act appears fundamentally to contradict the principle of separation of powers directed by the Constitution. The power to enforce the law and to prosecute federal offenses is committed by the Constitution to the Executive Branch. Indeed, the courts have generally recognized that the prosecution of federal offenses is an Executive function within the exclusive prerogative of the Attorney General, and ultimately, the President. For that reason, federal prosecutors must be accountable to the President or the Attorney General. The [Independent Counsel] Act removes the responsibility for the enforcement of federal criminal laws from the Executive Branch and lodges it in an officer who is not appointed by, accountable to, or save in extraordinary circumstances, removable by the Attorney General or the President.

The basis for this position was further elaborated in May of 1981 by Associate Attorney General Rudolph Giuliani, who emphasized that "the President, as head of the Executive Branch, has the constitutional authority both to appoint and to remove all officials exercising executive functions." See Statement of Rudolph Giuliani, Associate Attorney General, Before the Subcommittee on Oversight of Government Management of the Senate Committee on Government Affairs Concerning Special Prosecutor Provisions of the Ethics in Government Act of 1978, 97th Cong., 1st Sess. 5 (May 22, 1981). In particular, the Associate Attorney General stated that the list of Executive

Branch officials to whom the Independent Counsel Act applied is too broad and that in many cases in which the Act might be invoked, the circumstances would not warrant such a serious breach of the President's supervisory and removal powers. Id.

Against this background of constitutional precedent and serious concern over the validity of the current Act, the proposed expansion of the Act as contemplated by H.R. 3456 presents substantial constitutional problems. The proposed amendment greatly increases the already significant interference with the President's constitutional authority that is entailed in the current statute.

First, although the current Act vests in the Attorney General the responsibility for investigating circumstances that might warrant the appointment of an independent counsel and permits the Attorney General to make a determination that appointment of such a prosecutor is unwarranted, the proposed amendment would leave the Attorney General with no power to exercise any executive discretion with respect to contempt of Congress citations against a wide range of federal officials. Currently, § 592 of Title 28 requires application for the appointment of an independent counsel only if the Attorney General, upon completion of a preliminary investigation, finds that a matter "warrants further investigation or prosecution." Thus, under the existing provision, if the Attorney General finds that the conduct at issue does not constitute a crime, he need not refer the matter to an independent counsel. Exercise of the discretion whether to seek appointment of an independent counsel remains with the Attorney General. See Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984) (per curiam) (en banc).

H.R. 2684, at least on its face, would permit no such exercise of prosecutorial discretion with respect to contempt of Congress citations. Section 2 of the bill states that "[n]otwithstanding any other provision of this chapter, the Attorney General shall apply to the division of the court for the appointment of an independent counsel within five days after the Speaker of the House of Representatives" certifies a contempt of Congress citation with respect to specified federal officials. This provision is not limited to any particular types of disputes or grounds for contempt. Any conduct cited for contempt, whether unauthorized or disapproved by the President or pursuant to express instructions, would be equally beyond his control to prosecute. The Attorney General would have no role other than to act as a ministerial agent of one house of Congress. In these circumstances, the removal of any Executive Branch control both over who should

be prosecuted and how the case should be prosecuted is unjustified by any extraordinary circumstances and would, we believe, be unconstitutional if adopted.

The second major defect of the proposed amendment is that it substantially enlarges the already broad list of Executive Branch officials to whom the Independent Counsel Act applies. The Department has long held the view that the list of Executive officials to whom the Independent Counsel Act currently applies (and the relatively unlimited class of alleged conduct that it would cover) is far too expansive to be warranted by the extraordinary and narrow circumstances that might constitutionally justify a breach of Executive Branch control over federal prosecutions. The proposed amendment would materially increase the number of Executive Branch officials subject to special prosecution. The current Act covers cabinet members, certain individuals in the Executive Office of the President, and high level Department of Justice officials. See 28 U.S.C. § 591 (1982). The bill, however, would extend coverage of the Act to "any person compensated at or above a rate equivalent to Level V of the Executive Schedule . . . ." It simply cannot be demonstrated that there would be a blanket overwhelming conflict of interest with respect to all of these officials so as to warrant such a substantial alteration in the constitutional structure for enforcing the law. To the contrary, we are aware of no compelling evidence or persuasive argument that, in the vast majority of cases, the Department of Justice would be not fully capable of responsibly carrying out its responsibilities under the contempt of Congress statute.

The only time there has ever been any meaningful dispute between the branches with respect to the Executive's enforcement of the criminal contempt of Congress statute has been in the context in which an Executive Branch official has asserted the President's claim of executive privilege. Such a situation does not, however, present the same type of conflict of interest that has been used to justify the Independent Counsel Act. Rather, this situation involves differing legal judgments on the part of Congress and the Executive with respect to the scope of the constitutional prerogatives of each branch. For the reasons that we discuss in more detail below, the Executive's decision not to prosecute in such narrow and peculiar circumstances is not only justified, but constitutionally unavoidable. Thus, there are no adequate reasons to justify the significant increase in the number of executive officials to whom the Independent Counsel Act would be applied.

Moreover, as we also discuss in some detail in the balance of this report, the threat of criminal prosecution itself, without the exercise of prosecutorial discretion and the other procedural safeguards of the separation of powers, would have a significant chilling effect on the exercise of Executive discretion. If one house of Congress could, without balancing the interests of the Executive Branch, compel the criminal prosecution of Executive Branch officials for failure to comply with requests of legislative committees or subcommittees, these officials could become subordinates of Congress's subcommittees. In a very real sense, they would be removed from the President's control and placed under Congress's control. This is not the scheme contemplated by the Framers of the Constitution.

D. Prosecution of Executive Branch Officials Who Assert Executive Privilege on Behalf of the President

We believe that it is appropriate to discuss the constitutionality of criminal prosecution under circumstances where an Executive Branch official asserts Executive Privilege on behalf of the President. As explained more fully below, if executive officials are subject to prosecution for criminal contempt whenever they carry out the President's claim of executive privilege, it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties. Therefore, the same separation of powers principles that underlie the doctrine of executive privilege also preclude a criminal prosecution to punish officials for taking the steps necessary to implement a President's claim of his constitutional privilege. 7/ Because we believe that the contempt of Congress

---

7/ In addition to the encroachment on the constitutionally required separation of powers that prosecution of an executive official in these circumstances would entail, there would be a serious due process problem if an executive official were subjected to criminal penalties for obeying an express presidential order, particularly if it were an order that was accompanied by advice from the Attorney General that compliance with the presidential directive was not only consistent with the constitutional duties of the Executive Branch, but also

(cont'd)

statute could not be constitutionally applied to an Executive official who merely implemented the President's assertion of privilege, we do not believe that these bills could constitutionally be applied in the instances that have apparently prompted the introduction of the bills.

The Supreme Court has stated that, in determining whether a particular statute

> disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S., at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Thus, in analyzing this separation of powers issue, one must look first to the impact that application of the congressional contempt statute to presidential assertions of executive privilege would have on the President's ability to carry out his constitutionally assigned functions. Then, if there is a potential for disruption, it is necessary to determine whether Congress's need to use criminal contempt sanctions in executive privilege disputes is strong enough to outweigh the potential impact on the Executive's constitutional prerogatives.

(footnote 7 cont'd)

affirmatively necessary in order to aid the President in the performance of his constitutional obligations to take care that the law was faithfully executed. See Cox v. Louisiana, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959); Memorandum to the Attorney General from Assistant Attorney General Scalia, Re: Liability for Contempt When the Person Charged has Relied Upon an Opinion From the Office of Legal Counsel or the Attorney General, December 2, 1975.

In this instance, at stake is the President's constitutional responsibility faithfully to execute the laws of the United States, to conduct its foreign policy, and to command its armed forces, and the necessarily included ability to protect the confidentiality of information vital to the performance of those tasks. The authority to maintain the integrity of certain information within the Executive Branch has been considered by virtually every President to be essential to his capacity to fulfill the responsibilities assigned to him by the Constitution. See Memorandum re Refusals by Executive Branch Officials to Provide Information or Documents Demanded by Congress, from Assistant Attorney General Theodore B. Olson, Office of Legal Counsel, to the Attorney General (January 27, 1983); Memorandum re History of Presidential Invocations of Executive Privilege Vis-a-Vis Congress, from Assistant Attorney General Theodore B. Olson, Office of Legal Counsel, to the Attorney General (December 14, 1982). The Supreme Court has recognized this authority as an executive privilege which is derived from the "supremacy of [the President] within [his] own assigned area of constitutional duties," and that it "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 705, 708 (1973).

Moreover, the President's assertion of executive privilege is presumptively valid and can be overcome only if a competing branch can demonstrate that it cannot responsibly carry out its assigned constitutional function without the privileged information. United States v. Nixon, 418 U.S. at 708. In Nixon, the Court stated that "[u]pon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged . . . ." 418 U.S. at 713. The United States Court of Appeals for the District of Columbia Circuit has stated that this presumptive privilege initially protects documents "even from the limited intrusion represented by in camera examination of the conversations by a court." Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974) (en banc). The court went on to state:

> So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government - a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's

(cont'd)

(cont'd)

> deliberations - we believed in Nixon v. Sirica, and continue to believe, that the effective functioning of the presidential office will not be impaired.

498 F.2d at 730. In order to overcome the presumptively privileged nature of the documents, a congressional committee must show that "the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731 (emphasis added). Thus, the President's assertion of executive privilege is far different from a private person's individual assertion of privilege; it is entitled to special deference and a presumption of validity due to the critical connection between the privilege and the President's ability to carry out his constitutional duties, and it may be overcome, if at all, only on a showing that the withheld information is demonstrably critical to the responsible functioning of another branch.

Application of the criminal contempt statute to presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the statute were construed to apply to presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a privilege that has been a part of the presidency since George Washington, that has been expressly recognized by a unanimous Supreme Court, and that the President found in a particular instance to be necessary to the performance of his constitutional duty. Even if the assertion of privilege were ultimately upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege. As Judge Learned Hand stated with respect to the policy justifications for a prosecutor's immunity from civil liability for official actions,

> to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to [sic] satisfy a jury of his good faith.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) cert. denied, 339 U.S. 949 (1950).

The Supreme Court has noted, with respect to the similar issue of executive immunity from civil suits, that "among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." Nixon v. Fitzgerald, 102 S.Ct. 2690, 2703 n.32 (1982); see also Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982); Butz v. Economou, 438 U.S. 478 (1978). Thus, the courts have recognized that the risk of civil liability places a pronounced burden on the ability of government officials to accomplish their assigned duties and have restricted such liability in a variety of contexts. Id. 8/ The even greater threat of criminal liability, simply for obeying a presidential command to assert the President's constitutionally based and presumptively valid privilege, unquestionably imposes significant, and perhaps insurmountable, obstacles to the assertion of that privilege. See United States v. Nixon, 418 U.S. 683 (1974).

By contrast, the congressional interest in applying the criminal contempt sanctions to a presidential assertion of executive privilege is comparatively slight. Although Congress has a legitimate and potentially powerful interest in obtaining any unprivileged documents necessary to assist it in its lawful functions, Congress could obtain a judicial resolution of the underlying privilege claim and vindicate its asserted right to obtain any documents by a civil action for enforcement of a congressional subpoena. 9/ Congress's use of civil

---

8/ See also Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896). Some officials, such as judges and prosecutors, have been given absolute immunity from civil suits arising out of their official acts. See Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

9/ It is arguable that Congress already has the power to apply for such civil enforcement, since 28 U.S.C. § 1331 has been amended to eliminate the amount-in-controversy requirement, which was the only obstacle cited to foreclose jurisdiction under § 1331 in a previous civil enforcement action brought by the Senate. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973). In any event, there is little doubt that at the very least, Congress may authorize civil enforcement of its subpoenas and grant jurisdiction to the courts to entertain such cases. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc); Hamilton and Grabow, A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas, 21 Harv. J. on Legis. 145 (1984).

enforcement power instead of the criminal contempt statute would not adversely affect Congress's ultimate interest in obtaining the documents. Indeed, because the conviction of an Executive Branch official for contempt of Congress for failing to produce subpoenaed documents would not result in any order for the production of the documents, the civil remedy may be more efficient. 10/ Thus, even if criminal sanctions were not available against an Executive official who asserted the President's claim of privilege, Congress would be able to preserve its legitimate right to obtain documents through judicial intervention if its need for the records outweighed the Executive's interest in preserving confidentiality.

The most potent effect of the potential application of criminal sanctions is to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process. Although this significant in terrorem effect would surely reduce claims of executive privilege and, from Congress's perspective, would have the perhaps desirable impact of reducing the obstacles to obtaining whatever records it might seek, it would be inconsistent with the constitutional principles that underlie executive privilege to impose a criminal prosecution and criminal penalties on the President's exercise of a presumptively valid constitutional responsibility.

The in terrorem effect of a criminal sanction may be adequate justification for Congress's use of contempt against private individuals, but it is an inappropriate basis in the context of the President's exercise of his constitutional duties. In this respect it is important to recall the statement of Chief Justice Marshall, sitting as a trial judge in the Burr case, concerning the ability of a court to demand documents from a President:

> In no case of this kind would a court be required to proceed against the President as against an ordinary individual.

United States v. Burr, 25 F. Cas. 187, 192 (C.C. Va. 1807). 11/

10/ See Hamilton and Grabow, supra, 21 Harv. J. On Legis. at 151.

11/ The Supreme Court thought this statement significant enough in the context of an executive privilege dispute to quote it in full at two separate places in its most thorough treatment of the subject of executive privilege. United States v. Nixon, 418 U.S. at 708, 715.

This fundamental principle, arising from the constitutionally prescribed separation of powers, precludes Congress's use against the Executive of coercive measures that might be permissible with respect to private citizens. The Supreme Court has stated that the

> fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.

Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935).

Congress's use of the coercive power of criminal contempt to prevent presidential assertions of executive privilege is especially inappropriate given the presumptive nature of the privilege. In cases involving congressional subpoenas against private individuals, courts start with the presumption that Congress has a right to all testimony that is within the scope of a proper legislative inquiry. See Barenblatt v. United States, 360 U.S. 109 (1959); McGrain v. Daugherty, 273 U.S. 135 (1927). As noted above, however, the President's assertion of executive privilege is presumptively valid, and that presumption may only be overcome if Congress establishes that the requested information "is demonstrably critical to the responsible fulfillment of the Committee's functions." See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d at 731; see also United States v. Nixon, 418 U.S. at 708-09. If Congress could use the power of criminal contempt to coerce the President either not to assert or to abandon an assertion of executive privilege, this clearly established presumption would be reversed and the privilege essentially nullified.

Congress has many weapons at its disposal in the political arena, where it has clear constitutional authority to act and where the President has corresponding political weapons with which to do battle against Congress on equal terms. By wielding the cudgel of criminal contempt, however, Congress seeks to invoke the power of the judicial branch, not to resolve a dispute between the Executive and Legislative Branches and obtain the documents it claims it needs, but to punish the Executive, indeed to punish the official who carried out the President's

constitutionally authorized commands, for asserting a constitutional privilege. 12/ That effort is inconsistent with the "spirit of dynamic compromise" that requires accommodation of the interests of both branches in disputes over executive privilege. See United States v. American Telephone & Telegraph Co., 567 F.2d 121, 127 (D.C. Cir. 1977). In the AT&T case, the court insisted on further efforts by the two branches to reach a compromise arrangement on an executive privilege dispute and emphasized that

> the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive modus vivendi, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

567 F.2d at 130. Congress's use of the threat of criminal

12/ One scholar (former Assistant Attorney General for the Civil Division, and now Solicitor General, Rex Lee) has noted that

> when the only alleged criminal conduct of the putative defendant consists of obedience to an assertion of executive privilege by the President from whom the defendant's governmental authority derives, the defendant is not really being prosecuted for conduct of his own. He is a defendant only because his prosecution is one way of bringing before the courts a dispute between the President and the Congress. It is neither necessary nor fair to make him the pawn in a criminal prosecution in order to achieve judicial resolution of an interbranch dispute, at least where there is an alternative means for vindicating congressional investigative interests and for getting the legal issues into court.

Lee, Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships, 1978 BYU L. Rev. 231, 259.

penalties against an executive official who asserts the President's claim of executive privilege, flatly contradicts this fundamental principle. 13/

The balancing required by the separation of powers demonstrates that the contempt of Congress statute cannot be constitutionally applied to an Executive Branch official who asserts the President's claim of executive privilege. Congress has no compelling need to employ criminal prosecution in this instance in order to vindicate its rights. The Executive, on the other hand, must be free from the threat of criminal prosecution if its right to assert executive privilege is to have any practical substance. Thus, when the seriously adverse impact on the President's ability to exercise his constitutionally mandated function is balanced against the fact that

---

13/ Even when a privilege is asserted by a cabinet official, and not the President, courts are extremely reluctant to impose a contempt sanction, and thus utilize it only after all other remedies have failed. In In Re Attorney General, 596 F.2d 58 (2d Cir.), cert. denied, 444 U.S. 903 (1979), the court granted the government's mandamus petition to overturn a district court's civil contempt citation against the Attorney General for failing to turn over documents for which he had asserted a claim of privilege. The court recognized that even a civil contempt sanction imposed on an Executive Branch official "has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." 596 F.2d at 64. Therefore, the court observed that

> holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted.

596 F.2d at 65. There is even more reason to avoid contempt proceedings when the privilege claim has been made as a constitutionally based claim by the President himself and the sanction involved is criminal and not civil contempt. Under this principle, the use of criminal contempt is especially inappropriate because Congress has the clearly available alternative of civil enforcement proceedings.

Congress has a civil alternative to enable it to pursue its legitimate needs, we believe that the criminal contempt of Congress statute may not be applied to presidential assertions of executive privilege. Without the ability to assert executive privilege, the President has no defense and no available recourse to the courts to restrain an overzealous Congress.

III

CONCLUSION

In conclusion, we strongly oppose the proposed amendments to the contempt of Congress statute. The changes would seriously upset the separation of powers prescribed by our Constitution. Moreover, there is insufficient reason to impose draconian and potentially destructive and unconstitutional provisions that have never before been necessary in the two-hundred year history of this nation. If Congress determines that it is necessary to adopt a more efficient mechanism for resolving executive privilege disputes, then we strongly urge that provision be made for civil adjudication of such disputes. The use of criminal prosecutions in this context can only heighten tensions between the branches of government and lead to dangerous and unnecessary constitutional confrontations.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs