Master Draft
1-7-83

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

INTRODUCTION

This suit for declaratory relief raises one legal issue: May Congress by subpoena compel an Executive Branch official to produce sensitive materials from open law enforcement files even though the disclosure of those documents would, in the opinion of the President and the Attorney General, impair the Executive's ability to carry out its constitutional mandate to execute the laws. Although the Executive Branch has historically withheld information of this sort from Congress under a claim of privilege, this is the first time in history that the Legislative Branch has ~~held~~ cited an official of the Executive Branch for contempt of Congress for such action. By this suit, therefore, we seek from the Judicial Branch a resolution of the unprecedented constitutional impasse which now exists between the other two coordinate branches of the federal government. Judicial intervention is essential to ensure that a stalemate between the other two branches does not result in a partial paralysis of governmental operations. Historically, judicial resolution of squabbles between Congress and the Executive have been rare, because confrontations such as the present one have been rare. Yet judicial intervention is now urgently needed, because it is the only way left to resolve in an acceptable fashion the critically important issues that give rise to this unique suit.

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

STATEMENT OF THE CASE

On December 16, 1982 -- for the first time in history -- a House of Congress held an official of the Executive Branch in contempt. That evening, the House of Representatives voted a contempt citation against Anne M. Gorsuch, as the Administrator of EPA, for her refusal to furnish a limited number of sensitive law enforcement documents as demanded by a subcommittee subpoena. Mrs. Gorsuch's refusal to produce these documents was based on a serious concern -- shared by the President and the Attorney General -- that their production would contravene the duty of the Executive Branch faithfully to execute the laws. The House's contempt vote occurred even though its subcommittee had no basis for concluding it had a particular need for the documents in question, since it had not yet reviewed the vast number of other documents EPA was producing for it. By certifying the contempt citation to the United States Attorney for this District pursuant to 2 U.S.C. §§192, 194*/ the House of Representatives has

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

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required,. . . [by] any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session,. . . it shall be

(FOOTNOTE CONTINUED ON NEXT PAGE)

demanded that the Executive Branch subject Mrs. Gorsuch to criminal prosecution for holding the documents. The Chairman of the Subcommittee has threatened the United States Attorney and even the Attorney General with impeachment unless such a criminal action is commenced. 128 Cong. Rec. H10046 (daily ed. Dec. 16, 1982) (Statement of Rep. Levitas); Washington Post, Dec. 30, 1982, at A17, cd. 5.

The events leading to this extraordinary situation are not in dispute. Since the Spring of 1982, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation [the "Levitas Subcommittee"] had been investigating EPA's efforts to enforce federal laws governing hazardous waste contamination of water resources. H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) p. 7. The investigation included the manner in which EPA was implementing the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq., known as the "Superfund" law.

---

*/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

> the duty of the . . . Speaker of the House, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the . . . House . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

A. Executive Responsibilities For Enforcing The Superfund Act

The Superfund Act was designed to provide the federal government with the tools to abate the risks posed by hundreds of inactive and abandoned hazardous waste sites across the country. The Act created a $1.6 billion trust fund, derived from congressional appropriations and taxes on crude oil, petroleum products and certain chemical products, and authorized the President to use that money to finance the cleaning up of hazardous waste sites and spills of hazardous chemicals. See 42 U.S.C. §§ 9653; 9631.

The Act has several unique provisions pertinent to the cleaning up of those hazardous waste sites, all of which may involve intense negotiations between the government and the responsible parties and may ultimately result in litigation. It grants authority to the Executive to act to control or eliminate hazardous waste sites when a responsible party cannot be identified in time or cannot or will not act. See 42 U.S.C. §9604. It authorizes the issuance of administrative orders requiring parties legally responsible for the waste at a site, including past and present owners and operators of hazardous waste facilities, transporters of hazardous waste and generators of hazardous waste, to conduct cleanup activities. See 42 U.S.C. §9606(a). It authorizes the President to assess monetary penalties against those who violate such orders. See 42 U.S.C. §9606(b). In addition, it grants authority to the President, through the Department of Justice, to initiate actions in federal

district court to require responsible parties to remove, treat, contain, or otherwise cleanup hazardous waste at a site. See 42 U.S.C. §9606(a). Moreover, it allows the President, through the Department of Justice, to initiate actions against those responsible for creating a hazardous waste site for reimbursement to the Superfund for costs that the government incurs in cleaning up the site. See 42 U.S.C. §9607.

Finally, the Act requires that at least 400 sites which pose the greatest risk to health and the environment be identified in the National Priority List. See 42 U.S.C. §9605(8)(B).

On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage." 46 Fed. Reg. 42237. By that order, the President delegated part of his authority to carry out the provisions of the Superfund Act to the Administrator of EPA. Pursuant to that delegation, EPA now has the authority to identify hazardous waste sites and to determine, ~~amount~~ among other things, the parties potentially responsible for the generation of the hazardous waste.

As the initial step in implementing the Act, EPA, in cooperation with the States, established in March of 1981 an interim priority list containing those sites that posed the greatest risk to health and the environment. That list, as amended, identified a total of 160 sites as warranting priority attention, pending compilation and promulgation in final form of the official National Priority List.

Pending completion of the National Priority List, EPA has focused its efforts on cleaning up sites listed on the interim priority list, either through its own actions or by persuading or compelling responsible parties to do so. The process of assuring that hazardous waste sites are rendered safe can be quite lengthy and extremely complex. Typically, EPA first tries to identify those persons who are responsible for the presence of hazardous waste at the facility. Perry Dec., para. 12. EPA then notifies such parties that it intends to take action at the site unless the private parties undertake an adequate program to clean up the site. Id., para. 13. Following the issuance of notice letters, EPA enters into negotiations with responsible parties to reach an agreement which would require those parties to clean up the site. Ibid. Such negotiations may involve hundreds of potentially responsible parties and millions of dollars in clean up costs. Affidavit. Moreover, EPA may settle the case with some but not all of the parties and have to continue negotiations as to the remaining parties. Id., para., 14.

When it becomes clear that negotiations will fail to reach an agreement, EPA then either initiates administrative action or judicial action in conjunction with the Department of Justice to mandate clean up. EPA may also remove the hazardous waste itself and then seek to recover the costs from responsible parties. Id., para. 15.

As the enforcement process can be lengthy and extremely complex, an enormous amount of paperwork is generated. This includes data on the amounts, nature, and origin of waste present at a site; records of interaction with State and local government

officials; records of the storage or disposal facility itself, as well as of the generators, treaters, transporters, and handlers of the substances which found their way to the sites. It also includes correspondence with responsible parties, contractors, State officials, and representatives of other federal agencies, legal opinions and interpretations; internal memoranda on such matters as negotiations, strategy rights and remedies, case strengths and weaknesses and notes and logs from meetings, telephone conversations, and private deliberations. Id., par. 17.

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

On March 10, 1982, the Subcommittee on Investigations and Oversight ("the Subcommittee") of the House Committee on Public Works and Transportation ("the Committee") opened hearings on certain environmental matters, including implementation of the Superfund Act. Perry Dec., para. 18.

As part of the Subcommittee's investigaton, members of the Subcommittee staff began to interview EPA officials and others and sought to review materials related to the agency's efforts to carry out the Superfund Act. Several EPA officials testified at numerous hearings before the Subcommittee and numerous documents were made available to the Subcommittee. H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) p. 9.*/ The only documents not made available to the Subcommittee were those identifying the names of parties potentially liable for generating hazardous waste sites or internal agencies memoranda containing enforcement strategy, settlement figures, or other such sensitive materials. Perry Dec., para. ____.

*/ The report, hereafter "the Report," is the Committe's official account of the alleged contempt of Congress by Mrs. Gorsuch and is attached to the Perry Declaration as a part of Exhibit G.

Apparently unhappy with this limitation Subcommittee Chairman Levitas, on behalf of the Subcommittee sent a letter to Mrs. Gorsuch on September 15, 1982, requesting "all [Superfund] information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency." Perry Dec. 19 and Exhibit A.

In order to respond to the Subcommittee's concerns, EPA made available to the Subcommittee almost all the documents from EPA's files on the 160 interrum priority sites. EPA declined, however, to produce a small number of documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. Those documents, which were part of open law enforcement files, included memoranda and notes reflecting enforcement strategy, legal analysis, list of potential witnesses, settlement considerations and similar materials. Perry Dec., para 20. In short, EPA withheld documents which may generally be characterized as sensitive attorney work-product material.*/ The nuber of documents withheld was substantially less than one percent (1%) of the number of documents made available. Ibid.

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

After this, there were a number of meetings, exchanges of letters and telephone conversations between the Subcommittee, on the one hand, and EPA and the Department of Justice, ~~with respect to~~ on the other, as part of an effort to work out an accommodation on the withheld documents. EPA continued to express concern about making available internal enforcement documents that "form the basis for ongoing or anticipated civil or criminal prosecutions. . . . These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material." Perry Dec., para. 27 and Exhibit B. In response, the Subcommittee attempted to assure EPA that, if EPA produced those documents to the Subcommittee, an effort would be made to preserve their confidentiality, but acknowledged that such documents, if produced, could be disclosed at least to other members of Congress. Perry Dec., para. 27, Exhibit B and Exhibit C at 14-15.

C. The Executive Branch Response To The November 22 Subpoena

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

> " all books, records, correspondence, memorandums, papers, notes and

> documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) P.L. 96-510, the 'Comprehensive Environmental Response, Compensation, and Liability Act of 1980.'"

Perry Dec., para. 28 and Exhibit D. Even though EPA had not promulgated its statutorily required list of sites, Mrs. Gorsuch nonetheless instructed her staff, as a matter of accommodation to the Subcommittee, to gather all documents pertinent to the agency's interim list of 160 sites. Some of these 160 cases were at that time ready for litigation; some were in the process of negotiation while others were in earlier stages of investigation. She also instructed her staff to segregate enforcement sensitive documents for separate review by EPA attorneys in consultation with the Department of Justice. Perry Dec., para. 29.

All documents preliminarily identified as being enforcement sensitive were carefully reviewed by EPA and the Department of Justice. Perry Dec. 30, Declaration of Carol E. Dinkins ("Dinkins Dec."), paras. 9-11. A small group of documents from open law

enforcement files, were determined to be sensitive in that their disclosure might adversely effect enforcement of the Superfund Law.*/ Perry Dec., para. 11 and Exhibit A.

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

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

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

> "it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."

The Attorney General explained that

> "[o]ur policy is premised in part on the fact that the Committee vests in

*/ As of December 2, 1982, the return date of the subpoena, seventy-four such documents were identified. By December 15, 1982, further review reduced that number of sixty-four.

> the President and his subordinates the responsibility to 'take care that the laws be faithfully executed.' . . . At bottom the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch."

Ibid.

On December 2, 1982 Mrs. Gorsuch appeared before the Subcommittee as instructed by the subpoena. She advised the Subcommittee that the documents requested by the subpoena concerning "those sites listed as national priorities pursuant to Section 105(8)(B)" of the Superfund Act did not exist, because EPA had not yet listed any sites as national priorities pursuant to that section. Nevertheless, she explained that EPA had "in a spirit of cooperation and comity" already begun to gather its files on the 160 interim priority sites and would make approximately 787,000 pages of documents available to the Subcommittee. She brought with her to the hearing, and tendered to the Subcommittee, the first five file boxes of such documents, but the Subcommittee declined to accept delivery of those documents. Indeed, neither at that time nor at any subsequent time has the Subcommittee examined any of the documents Mrs. Gorsuch made available to it. Perry Dec., para. 34 and Exhibit C at _____.

At the hearing, Mrs. Gorsuch also advised the Subcommittee that "sensitive documents found in open law enforcement files will not be made available to the Subcommittee" citing the President's instructions to her. Perry. Dec., para. 35 and Exhibit C at 57.

D. The Contempt Resolution

At the conclusion of its December 2 hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch in contempt for failure to comply with its subpoena and reported the matter to the full Committee. Perry Dec., para. 36 and Exhibit G at 57.

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

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

Perry Dec. para. 37 and Exhibit H.

On December 10, 1983, the Committee reported Mrs. Gorsuch's alleged failure to comply with the subpoena to the full House of Representatives together with a recommendation that she be cisted for contempt of Congress. Perry Dec. para. 38 and Exhibit G at 20. On December 16, 1982, the House of Representatives passed a

a resolution citing Ms. Gorsuch for contempt of Congress. Perry Dec. para. 38 and Exhibit G at 20. On December 17, 1982, Speaker of the House Thomas P. O'Neill certified the contempt to the United States Attorney for this District, pursuant to 2 U.S.C. §§192, 194. Perry Dec., para. 40 and Exhibit G at i.

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

~~The Executive filed this action only minutes after the House vote of contempt, seeking both declaratory and injunctive relief.~~ On December 27, 1982, the United States Attorney for the District of Columbia advised Speaker O'Neill of his conclusion that "it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved." Cong. Rec., January 3, 1983 (daily ed.), H. 31 (attached hereto).

On December 29, 1982, the Executive filed an amended complaint, seeking declaratory relief, with respect to defendants' efforts to compel production of the withheld documents.

On the same day, Chairman Levitas called for the impreachment of the Attorney General and the United States. Cong. Rec., January 3, 1983 (daily ed.) H. 30 (attached hereto).

On December 30, 1982, defendants filed a motion to dismiss the complaint.

On January 5, 1982, Speaker O'Neill wrote a letter to the United States Attorney (attached hereto), asserting that the pending of this action did not alter his duty to prosecute Mrs. Gorsuch.

Representatives together with a recommendation that she be cited for contempt of Congress. See Exhibit __. On December 16, 1982, the House of Representatives passed a resolution citing Mrs. Gorsuch for contempt of Congress. H.R. Rep. 692, Exhibit __ attached hereto. On December 17, 1982, Speaker of the House Thomas P. O'Neill certified the contempt to the United States Attorney for this District, pursuant to 2 U.S.C. §§192, 194. See note ___, p. __, supra.

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

SUMMARY OF ARGUMENT

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

The House subpoena sought a broad array of documents concerning numerous open enforcement actions. ~~Although the subpoena sought documents which didn't exist,~~ EPA sought to accommodate the Subcommittee's needs by producing files on its 160 ~~highest~~ interim- priority cases. These files -- consisting of more than 750,000 pages of documents -- spell out in detail the technical background, parties, and procedural status of each matter. The

only papers the Executive ~~EPA~~ balked at turning over were a small minority of documents that may be described as the most sensitive kind of prosecutorial work-product. Obviously, any disclosure ~~leakage~~ of such documents could aid potential targets of EPA and the Justice Department and thus undermine law enforcement efforts. The Subcommittee was urged to review the files being produced to see whether the additional few documents being withheld were essential for any legitimate oversight function. In addition, the Subcommittee was promised that the withheld documents ~~in each case~~ would be made available once they were no longer enforcement sensitive. ~~case was closed.~~ However, without establishing any need for immediate access to the withheld documents, the House -- in the midst of the Lame Duck session -- rushed to cite ~~hold~~ Mrs. Gorsuch for ~~in~~ contempt of Congress and demand that she be criminally prosecuted.

Only the Judiciary can resolve the resulting constitutional controversy, which reached a total impasse when the House of Representatives took the unprecedented step of holding an Executive official in contempt of Congress solely for following the instruction of the President that certain documents not be disclosed in order to preserve the ability of the Executive branch faithfully to execute the law. By this motion for summary judgment,*/ the United States and Mrs. Gorsuch seek a declaration that the Executive Branch's refusal to release certain highly sensitive materials contained in open law enforcement files

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

is fully in accordance with the law so that the unseemly situation of a high-level Executive Branch official being ~~held in~~ cited for contempt of Congress and threatened with prosecution can be resolved.

Such relief is clearly available in this unique situation, as will be demonstrated below. First, the controversy is timely for judicial review, because no further steps remain in the subpoena enforcement process and the other two branches of government are at complete loggerheads. Second, this action may be pursued against the House and its members despite the Speech and Debate Clause of the Constitution, Art. I, §6, cl. 1, because the Court is not being asked to interfere with ongoing congressional action but merely to review a completed congressional act that has created a serious controversy. Third, political question principles do not preclude judicial intervention into this controversy, and prudential considerations strongly counsel in favor of judicial resolution. Finally, on the merits of the controversy, we will show that ~~the subpoena in question was fatally defective; that Mrs. Gorsuch fully complied with it and that the refusal~~ the refusal of the Executive Branch to produce the documents was properly based upon well-recognized separation of powers principles.

ARGUMENT

I.. This Case Presents a Justiciable Claim For Declaratory Relief

A. This Court Has Subject Matter Jurisdiction

Plaintiffs have alleged subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1345. Amended Complaint ¶1. Defendants challenge the jurisdiction of this Court to entertain this action.

insert from p. 24

have moved to dismiss for lack of subject matter jurisdiction, among other grounds. Fed.R.Civ.P. 12(b)(1).

Defendants rely upon the first decision in Senate Select Committee v. Nixon, 336 F. Supp. 51 (D.D.C. 1973), in which a Senate Committee's attempt to enforce a congressional subpoena was dismissed for lack of subject matter jurisdiction. Defendants' Brief at 33-34. As defendants recognize, the court in that case rejected jurisdiction under §1331 for failure to satisfy the $10,000 amount-in- controversy requirement then applicable. 366 F. Supp. at 59-61.*/ However, ~~defendants fail to mention that~~ §1331 was subsequently amended to eliminate the amount-in-controversy requirement for federal question jurisdiction with respect to any "action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." See 28 U.S.C. §1331 as amended October 21, 1976, Pub. L. 94-574, §2, 90 Stat. 2721; Dec. 1, 1980, Pub. L. 96-486, §2(a), 94 Stat. 2369. This amendment to the jurisdictional statute thus eliminates any barrier to federal question jurisdiction over the present case, since defendants themselves argue that they should be treated in litigation as agencies, officers or employees of the United States. See Defendants' Brief at 8-9.**/

*/ After enactment of a special jurisdictional statute, the court considered the Committee's claim and rejected it on the merits. 370 F. Supp. 521 (D.D.C. 1973), aff'd, 498 F.2d 725 (D.C. Cir. 1974).

**/ Decision on this ground was expressly reserved in ~~United~~ States v. A.T.&T., 551 F.2d 384, 390 n.7 (D.C. Cir. 1976).

insert

Defendants are highly critical of the fact that the Executive Branch has filed this suit in the name of the United States. This criticism is somewhat perplexing since, as defendants are aware, the Executive historically has participated in litigation against the legislative Branch in the name of the United States. See e.g. Clark v. Valeo, 559 F.2d 642

Defendants argue that there is no legislative history showing a specific congressional intent to confer jurisdiction on the federal courts to decide inter-branch suits. In particular, defendants advert to several proposals rejected by the Congress which ~~to confer~~ have contained upon the courts a specific grant of jurisdiction for the civil enforcement of legislative subpoenas ~~which were rejected by Congress~~. Defendants' Brief at 34-35, 39-41. Yet the ~~absence of specific~~ failure of Congress to enact such a statute legislative history is hardly surprising in view of the broad grant of jurisdiction created by §1331, as amended in October 21, 1976, Pub. L. 94-574, §2, 90 Stat. 2721. Congress could not have been expected to enumerate every cause of action covered by such a general jurisdictional statute and did not attempt to do so. See 1976 U.S. Code Cong. & Admin. News, p. 6121, 6134.*/ Indeed, this same argument was rejected by the Supreme Court in Powell v. McCormack, 395 U.S. 486 (1969). In that case, the defendants alleged that the Court lacked subject matter jurisdiction under 28 U.S.C. §1331 because the legislative history underlying that provision statute did not specifically mention application of the statute to suits questioning the exclusion of Congressmen from the House of Representatives. The Court first noted that "it has been generally recognized that the intent of the drafters was to provide a broad jurisdictional grant to the federal courts. . . ." Id. at 515. It then found that because

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

the resolution of that case "depend[ed] directly on construction of the Constitution [and] [t]he Court has consistently held such suits are authorized by [§1331]," id. at 516, the Court had subject matter jurisdiction over the lawsuit. Similarly, resolution of this dispute "depends directly on construction of the Constitution" and accordingly, subject matter jurisdiction lies under ~~Section~~ § 1331.

However, that this Court has subject matter jurisdiction over this case is confirmed by the Court of Appeals' decision in United States v. A.T.& T., 551 F.2d 384 (D.C. Cir. 1976). There the court held that an action brought by the United States to vindicate a claim of Executive privilege asserted against a congressional subpoena presented a claim arising under the Constitution of the United States and, hence, under §1331. Id. at 389.*/ Using language applicable here the Court stated at 589 that:

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

In addition to federal question jurisdiction, §1345 also

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

provides a basis for subject matter jurisdiction of the present case.*/ That section provides as follows:

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

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

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

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

at 1298. See United States v. Solomon, 563 F.2d at 1126. The courts in both cases rejected a nonstatutory grant of authority to sue on behalf of mentally retarded patients in state hospitals because the government could not allege an injury in fact sufficient to grant standing to bring suit or to imply a nonstatutory cause of action on behalf of the United States. It is not argued here that section 1345 grants the United States a cause of action. Rather, as demonstrated below, the United States and Mrs. Gorsuch can demonstrate sufficient harm to judicially cognizable interests to demonstrate standing to maintain this lawsuit. Since they have an implied cause of action similar to that involved in A.T.&T. jurisdiction is available under § 1345 as well as §1331.

B. Plaintiffs Have Standing

Defendants argue that plaintiff United States has not suffered a legally cognizable injury-in-fact sufficient to confer standing for Article III purposes. Defendants' Brief 45-49. In addition, defendants argue that any such injury is not "fairly traceable" to acts of the defendants and, in any event, cannot be redressed by this court's remedial process. Defendants' Brief at 49-50. These arguments were undoubtedly prepared before defendants realized that an amended complaint had been filed adding Mrs. Gorsuch as a plaintiff in her capacity as Administrator of EPA. In light of this development, defendants' arguments about standing are unpersuasive.

Although as demonstrated below, the United States itself can maintain this action, any doubts in this regard have been entirely removed by the addition of Mrs. Gorsuch as a plaintiff.

In the instant situation, Mrs. Gorsuch has been held in contempt by the House, which has submitted the matter to the Executive for prosecution. Indeed, even if she is unlikely to

cited for

be prosecuted by this Administration, the House's contempt citation, in and of itself, more than amply establishes the immediacy of this controversy. The House vote represents the considered judgment of a co-equal branch of our government that a top Executive Branch offical has failed to comply with the law. That citation thus stands as an accusation by the House of Representatives that an Executive officer has committed a criminal act in discharging her official duties as Administrator of the EPA. That Mrs. Gorsuch has, at this juncture, suffered an injury sufficient to satisfy Article III case or controversy requirement s is clear beyond peradventure.

Indeed, under well-established common law principles, the imputation of criminal behavior to an individual is generally considered defamatory per se and actionable without proof of special damages. 53 C.J.S. Libel and Slander §14. The Court of Appeals for this Circuit has held that damage to one's good name and reputation" constitutes injury in fact for Article III purposes. Southern Mut. Help Ass'n v. Califano, 574 F.2d 578, 524 (D.C. Cir. 1977).*/ Here, Mrs. Gorsuch's reputation for fidelity to the rule of law has been seriously impugned by the contempt citation of the House. Not only does this constitute injury in and of itself but also it should be emphasized that the

*/ In Southern Mut. Help Ass'n v. Califano, 574 F.2d 578 (D.C. Cir. 1977), the government, in disapproving the plaintiff's application for a continuation of its grant, after three years of federal support, was highly critical of the manner in which the organization had administered its program. The injury which the court found permitted the plaintiff to sue was not the denial of its application for continued funding. It was, indeed, the damage to its "good name and reputation." 574 F.2d at 524.

effectiveness of any high-level executive official is, at least in part, dependent upon a reputation which is untarnished in this regard. It is also in large measure dependent upon the establishment of relations with the Legislative Branch free of the sort of coercion reflected by a contempt of Congress citation. These injuries are all concrete, direct and immediate and can only be redressed through judicial resolution.

In addition to the injury to Mrs. Gorsuch in her capacity as Administrator of EPA, the plaintiff United States has also suffered a legally cognizable injury. Defendants argue that such injury must involve either a contractual or proprietary interest of the government, or harm to the national security or public welfare. Defendants' Brief at 46-49. Assuming this to be the correct standard, the harm to the public welfare threatened by enforcement of defendants' subpoena is sufficient to confer standing upon the United States as plaintiff, in accordance with such cases as In re Debs, 158 U.S. 564 (1895), and New York Times v. United States, 403 U.S. 713 (1971).

The harm to the public welfare threatened by enforcement of defendants' subpoena is disruption of law enforcement activity by the Executive Branch. Of course, this argument in favor of standing presumes that plaintiffs have a good case on the merits. Such a situation is not uncommon, however, where the existence of a legally cognizable injury is effectively the same as the ultimate legal issue in the case. See Data Processing Service v. Camp, 397 U.S. 130 (1970).

Moreover, the United States -- unlike other plaintiffs -- has authority to sue on behalf of the public welfare under Debs and its progeny. For this reason, the United States can bring suit

to vindicate rights shared by the people in common or "generalized grievances," for which private individuals or organizations would not have standing. Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S.Ct. 752 (1982).*/

Finally, the United States also has standing by virtue of the injury suffered by the Executive Branch and its agencies. Here, the threatened injury to the Executive is an unprecedented interference with its responsibility for faithful execution of the laws and derogation of its independence from a co-equal branch of government. As with injury to the public welfare, of course, this basis for standing is coextensive with plaintiffs' claims on the merits. In this regard, it must also be emphasized that the protection of these sensitive law enforcement files is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). As the Supreme Court found in an analogous context, the purpose of the privilege "is to prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

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

NLRB v. Sears Roebuck & Co. involved Exemption 5 of the Freedom of Information Act, 5 U.S.C. §552 et seq., as applied to protect the deliberative and work-product process of the government from disclosure. 421 U.S. at 149. The Court found that the

> exemption is necessary to preserve the efficacy of the decisionmaking process and to encourage the free exchange of ideas within the agency without the threat of public scrutiny. Id. at 150. See Costal States Gas Corp. v. DOE., 617 F.2d 854, 866-69 (D.C. Cir. 1980); Bristol-Myers Co. v. FTC, 598 F.2d 18, 23-24 (D.C. Cir. 1978). In Costal States Gas Corp. v. DOE, the Court recognized another reason for the exemption; "to protect the adversary trial process itself. It is believed that the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case. Certainly less work-product would be committed to paper which might harm the quality of trial preparation." 617 F.2d at 864.

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

The ~~imminent~~ threat of premature disclosure of ~~these~~ sensitive law enforcement documents through enforcement of ~~the~~ a subpoena can well be expected to inhibit actions of all of the participants in the law enforcement process. It is likely, for example, that outside sources of information will not cooperte as

freely due to the fear of possible premature disclosure; that parties responsible for the hazardous waste sites will avoid settlement negotiations and await possible disclosure of the government's settlement strategies and that staff attorneys may shrink from conducting a candid and thorough evaluation of an enforcement action where those evaluations may be disclosed before the case has been completed. Affidavit. ~~Nor are these concerns merely subjective or speculative. Indeed, a staff attorney from EPA and his Supervisor have already been requested to appear before the Dingell Subcommittee for questioning concerning a memorandum generated during teh enforcement activities of the Superfund~~. Accordingly, the threat that Congress will eventually obtain enforcement file materials creates a constant uncertainty as to the overall independence and integrity of the law enforcement process carried out by the Executive. Such uncertainty and the consequent harm to the enforcement process constitutes an injury in fact to the Executive's ability to execute the law and, hence, to the welfare of the general public.

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

~~Under these circumstances, it is disingenuous~~ for defendants to argue that the

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

Defendants' Brief at 50. */

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

C. Declaratory Relief Is Both Necessary and Proper

Under the Declaratory Judgment Act, a federal district court in any actual controversy within its jurisdiction may declare the rights and other legal relations of any interested parties seeking such a declaration whether or not any such further relief is or could be sought. 28 U.S.C. §2201.**/

---

*/ Of course, as defendants observe, challenges to the constitutionality of statutes are not directed to the Legislative Branch. This argument, however, begs the question, which is the proprietary of declaratory relief when Congress holds an Executive official in contempt for acting on orders of the President. See pp. ____, infra.

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

The criteria for determining whether or not a case or controversy exists for purposes of a declaratory judgment are set forth in Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941), where the Supreme Court stated:

> Whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, or sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

See also Super Tire Engineering Co. v. McCorkle, 416 U.S 115, 112 (1974); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972). Thus, the Supreme Court has consistently stated that there are three criteria for the issuance of a declaratory judgment. First, there must be a "substantial controversy". Second, the controversy must be between parties having "adverse legal interests". Third, the controversy must be of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Although in many cases it might be thought premature to enter a declaratory judgment on the legality of a witness' refusal to comply with a subpoena except as a defense to a contempt proceeding, we will below show that, in view of the unique facts of the case before the Court, each of the factors which justify declaratory relief is present here.

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

rationale of the Executive Branch in refusing to turn over sensitive law enforcement materials. The full House of Representatives has ratified their position. The defendants take the position, and have so stated repeatedly, that a congressional committee is absolutely entitled to all documents contained in the open law enforcement files of the EPA, an executive branch agency. Mrs. Gorsuch, on the other hand, relying upon the advice and instruction of the President and the Attorney General has acted in the only way open to her, given the ~~upon her~~ conclusion that such documents should, consistent with the Constitution, be protected from disclosure. There is, then, without doubt a controversy both concrete and live between the parties.

Second, it is likewise clear that the parties have adverse legal interests. The House of Representatives has already voted that Mrs. Gorsuch, the head of an executive branch agency be held in contempt solely for following the instructions of the President to withhold certain documents under a claim of privilege. Moreover, this matter has now been referred to the United States Attorney for prosecution, and the Chairman of the House Subcommittee has threatened the United States Attorney and the Attorney General with impeachment proceedings unless Mrs. Gorsuch is prosecuted. In light of the extraordinary seriousness of this unprecedented situation, which has created a constitutional impasse between co-equal branches of the government, it is obvious that the parties involved have adverse legal interests.

Third, this controversy has sufficient immediacy and reality to warrant declaratory judgment in the unique circumstances of this action. The full House of Representatives has already voted

to hold Mrs. Gorsuch in contempt for failing to produce certain documents. The legislative process is complete, thus rendering this controversy both immediate and ripe. In addition, this case involves an Executive Branch officer whose actions affect important national interests. The citation of such a high level official by the full House for contempt is unseemly, see United States v. Nixon, 418 U.S. 683, 691 (1974), and has created a confrontation between co-equal branches of the government over fundamental constitutional principles.

As to the immediacy of this controversy, Mrs. Gorsuch now stands in contempt of the House of Representatives. No further legislative action can resolve this matter. In such a situation, there is unquestionably an actual controversy under Article III of the Constitution. Under settled case law, it should be unnecessary that Mrs. Gorsuch be subjected solely to the alternative of actual arrest or prosecution before she can to challenge the validity of the congressional action involved.

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

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

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

Defendants concede that declaratory relief is available under Steffel v. Thompson when no state prosecution is pending and there is a genuine threat of enforcement of a criminal statute. However, defendants argue that:

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

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

---

*/ Defendants also rely upon dicta in United States v. A.T.&T., 551 F.2d 384, 393 n.16 (D.C. Cir. 1976) to the effect that "[c]riminal proceedings are begun" by a contempt resolution. Read in context, this statement has nothing to do with the determination required by Steffel.

It is by now well-setled that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." United States v. Nixon, 418 U.S. 683, 693 (1973), citing Confiscation Cases, 7 Wall. 454 (1869); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, sub nom Cox v. Hauberg, 381 U.S. 935 (1965). This fundamental power derives from Article II, Section 3, of the United States Constitution which vests the Executive Branch with the authority to see that "the laws are faithfully executed." By virtue of this provision, the law enforcement prerogative resides "squarely in the executive arm of the government." Pugach v. Klein, supra, 193 F. Supp. 630, 634 (S.D.N.Y. 1961). As the President's surrogate in discharging this executive function, Ponzi v. Fessender, 258 U.S. 254 (1921), the Attorney General is the chief law enforcement officer and possesses the "exclusive prerogative" to begin a criminal prosecution. United States v. Cox, supra, 342 F.2d at 190-91 (Wisdom, J. concurring). Because this power is constitutional in source, the Courts have consistently invoked the separation of powers doctrine to decide review of particular prosecutorial decisions:

> 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 exericses 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 power of the attorneys of the United States in their control over criminal prosecution.

United States v. Cox, supra, 342 F.2d at 171 (footnote omitted.) Accord, Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); Smith v. United States, supra, 375 F.2d at 247; Inmates of Attica, 477 F.2d at 379.

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

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

Contrary to defendants' assertions, therefore, §194 does not require the United States Attorney to initiate a prosecution. If that statute were interpreted to deprive the Executive Branch of its traditional prosecutorial discretion, it would represent an unconstitutional invasion of the Executive authority to faithfully execute the laws. For this reason, defendants argument that since the United States Attorney has no discretion a prosecution is now pending is simply wrong.

693 (1974). If §194 were interpreted as depriving the Executive Branch of prosecutorial discretion, it would represent an unconstitutional invasion of Executive authority under Article II of the Constitution. See Lee, Executive Privilege, 1978 B.Y.U. L. Rev. 231, 255-60. Indeed, the Court of Appeals for this Circuit has specifically recognizedd that the Executive Branch retains its traditional prosecutorial discretion under §194. As the court stated in Ansara v. Eastland, 442 F.2d 751, 754, n.6 (D.C. Cir. 1971)

> . . . the Executive Branch . . . may describe not to present the [contempt citation] to the grand jury (as occurred the case of the officials of the New York Port Authority);

Plaintiffs recognize that none of the ~~foregoing~~ discussed above theories of declaratory relief have ever been extended to permit a witness to challenge the validity of a congressional subpoena. As defendants point out, the "orderly and often approved means" of raising constitutional defenses to a subpoena normally requires presenting one's defense through the following process: review by the subcommittee, full committee, and full House of Congress, followed by referred to the United States Attorney and indictment or information. "Should prosecution occur, the witness' claims could then be raised before the trial court." Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972), cited in Defendants' Brief at 23.

Sanders and the cases in that opinion cited were all cases where "injunctive or declaratory relief has been sought with respect to an ongoing congressional investigation. . . ." Id. at 900 (emphasis added). The present case is readily distinguishable because the congressional process is complete. The resolution of contempt has been adopted, and the 97th Congress has

adjourned. Under these circumstances, declaratory relief would not interfere with any "ongoing congressional investigation."

There is another reason why declaratory relief is not only proper but necessary in the present case. The "regular procedure" for testing witness' claims referred to in Sanders, 463 F.2d at 900, is not available. The witness in this case, Mrs. Gorsuch, was held in contempt for withholding documents at the direction of the President and upon the advice of the Attorney General. Under these circumstances, it is ~~unlikely that~~ questionable whether the Department of Justice could properly prosecute Mrs. Gorsuch for contempt. See Principles of Federal Prosecution, U.S. Dept. of Justice, Part B(1) (July 1980). Because the "regular procedure" for resolving this dispute is not available, declaratory relief is necessary for its resolution.

In addition, the current case involves a contempt finding against the head of an Executive agency whose acts are the acts of the President in many matters. Indeed, the President instructed the Administrator to take the action at issue here. It is inappropriate to require such a high ranking official to be ~~held~~ cited for contempt before resolving such legal issues. This was emphasized in United States v. Nixon, which authorized judicial review even without a finding of contempt in a similar situation. In that case, the threshold question was whether the Supreme Court had jurisdiction over the appeal in view of the fact that the normal procedure for reviewing refusal to comply with subpoenas, a defense to a contempt prosecution, was not before it. The Court found, in view of the unique situation presented in that case, that traditional methods of review were not applicable:

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

A similar situation is present here. Here, as in the Nixon case, the "traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises." "It is particularly unseemly" that a high Executive official has been cited for contempt of Congress for following the instruction of the President. The purely legal issues giving rise to this controversy should be resolved now in a civil lawsuit, as in Nixon, in order to resolve and thereby render "unnecessary" any prolongation of the "Constitutional confrontation" which has already developed.

This case, therefore, involves far more than a dispute between an individual and the Congress. Instead, it involves a confrontation which has now reached an impasse between the Legislative and Executive branches of our government over fundamentally important constitutional principles. These truly

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

D. The Political Question Doctrine Does Not Required Abstention

This case involves a dispute between the Executive and Legislative Branches over fundamentally important constitutional principles. This dispute has now reached an impasse which threatens to impair the smooth functioning of the governmant as a whole. Moreover, the only way in which this controversy can be resolved is through the intervention of the Judiciary. Under these circumstances, the political question doctrine does not require the Court to abstain from adjudicating the issues raised by this action.*/

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

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

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

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

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

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

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

There is one additional factor here which strongly militates in favor of judicial intervention which was not present in A.T.&T. Here the House cited an Executive Branch official for contempt for following the President's instruction on a purely legal issue. The Supreme Court has cautioned that such confrontations are "unseemly" and should be resolved by the judiciary in an orderly manner. U.S. v. Nixon, 418 U.S. 683, 691 (1974). Unless this Court reviews the lawfulness of the Administrator's actions at issue here, however, this "unseemly" confrontation may never be resolved. The contempt citation has been referred to the United States Attorney for prosecution pursuant to 2 U.S.C. §194. The United States Attorney, of course, is part of the Department of

and is under the supervision of the Attorney General, 28 U.S.C. §519. The Attorney General, and, indeed, the President have already concluded that Mrs. Gorsuch ws obliged to withhold the documents at issue. As discussed above, The Attorney General is, therefore, not likely to prosecute an official for following his own advice.

It thus appears that this suit represents the only realistic means by which the important issues involved can be resolved. Indeed, this suit was filed because the Executive Branch believes that the confrontation which was developed is unnecessary and unseemly. The only way this confrontation can be resolved in an orderly way is for this Court to review the issues raised and declare the rights and obligations of the parties.

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

As explained more fully below, the Speech or Debate Clause of the Constitution serves two fundamental purposes. The first is to protect the independence of individual legislators by precluding civil or criminal suits which seek to hold them personally liable for their legislative activities. The second is to protect the integrity and independence of the legislative process by barring suits which would directly interfere with the legislative process. This suit obviously seeks no relief against any House members in their personal capacities. Moreover, since the legislative process has terminated, judicial review of the lawfulness of Mrs. Gorsuch's response to the subpoena would in no way interfere with the legislative process. Indeed, judicial review here ~~would~~ would no more interfere with the legislative process

than would review in the context of a criminal contempt prosecution. Consequently, the Speech or Debate Clause does not bar this action.

Indeed, the Court of Appeals for this Circuit has held that a suit such as this is not barred by the Speech or Debate Clause. In U.S. v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977), the court permitted the Executive Branch to obtain judicial review of a congressional subpoena which sought sensitive national security information subject to a claim of executive privilege. The court noted that the intent of the Clause is primarily to protect members of Congress "from personal suit[s] against them." 567 F.2d at 130. Where that is not the case, "the Clause does not and was not intended to immunize Congressional investigatory actions from judical review." 567 F.2d at 129.

The Speech or Debate Clause, therefore does not prevent this Court from reviewing the lawfulness of the Subcommittee's demand at issue here. The issuance of a declaratory judgment in this regard would in no way interfere with the legislative process but would instead fulfill the Court's judicial obligation "to say what the law is" in this unique factual context. United States v. Nixon, 418 U.S. 683, 705 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); United States v. A.T.&T, 567 F.2d 121 (D.C. Cir. 1977).

A. The Purpose of the Speech Or Debate Clause

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

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

The fundamental purpose of the Clause is to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S 501, 507 (1972). Thus, the clause in the American scheme of government is intended to "protect the legislative independence of Congress, within the three branches of our government "without altering the historic balance of the three co-equal branches of the Government." Id. at 508. In this regard, the clause is to be read broadly to include anything "generally done in a session of the House by one of its members relating to the business before it." Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). However, the Clause cannot be interpreted to cover conduct that is "in no way related to the due functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 1972 (1966). Thus, the Court has held that legislative acts covered by the Clause in addition to speech or debate are only those which constitute an "internal part of the deliberative and communicative process" of the Congress. Gravel v. United States, 408 U.S. at 625.

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

prosecution against a congressman, the Clause prevents any inquiries into his motives for making a speech before the House.*/ United States v. Johnson, 383 U.S. 169 (1966). Similarily in Kilbourn v. Thompson, 103 U.S. 168 (1881), the Clause was held to prevent a damage action for false imprisonment against certain congressmen arising from the arrest of the petitioner for contempt of Congress. See also Tenney v. Brandhove, 341 U.S. 367 (1951). This bar against civil and criminal suits against individual legislators bolsters the independence and integrity of the Legislature. Congressman may act with bold initiative without fear of being forced to answer in a court of law for their legislative activities.

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

It should be emphasized, however, that the Clause bars only those suits which would have the effect of interfering with the legislative process in some way.

*/ Indeed, as the Supreme Court has noted, the Speech or Debate privilege was born to guard against criminal proceedings instituted by the Crown against members of Commons. United States v. Johnson, 383 U.S. at 181.

Thus, for example, in Gravel v. United States, 408 U.S. 606 (1972), the Court held that the private publication by a Senator through the cooperation of a publishing house of materials received by a Senate Committee, was not entitled to Speech or Debate protection because such an activity is not essential to the legislative process:

> . . . As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." United States v. Doe, 455 F.2d at 760.
>
> Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impressibly exposing its deliberations to executive influence. [408 U.S. at 606].

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

Finally, the Speech or Debate Clause does not bar the determination by a court of the legality of the action of a person opposing a subpoena if the legislative process has essentially terminated. Thus, in Watkins v. United States, 354 U.S. 178, 208 (1957) and Barenblatt v. United States, 360 U.S. 109 (1959), the Court was required to fulfill its judicial function of determining the legality of declining to comply with a subpoena when the defendants were found in contempt under 2 U.S.C. §192 and prosecuted under 2 U.S.C. §194. Similarly in Senate Select Committee On Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974), the Speech or Debate Clause was no bar to

judicial resolution of an executive claim of privilege when the Committee brought suit to enforce the subpoena, even though that decision effectively prevented the committee from procuring information it requested. Moreover, if Congress orders the Sergeant-at-Arms to imprison a witness for failing to comply with a subpoena, see, Kilbourn v. Thompson, supra, a court clearly has the power under 28 U.S.C. 2241 et seq., to issue a writ of habeas corpus against the Sergeant-at-Arms and those imprisoning the witness, and to determine the validity of the recalcitrant witness' actions.

The overriding purpose of the Speech or Debate Clause is, therefore, not to immunize congressional actions from judicial review. It is, instead, to protect the legislative process from interference. Thus, the Clause prevents civil and criminal suits against legislators in their personal capacities for their legislative activities as well as suits which would interfere with ongoing legislative processes. The Clause is not, however, to be extended "beyond . . . its intended scope and its history, to include all things in any way related to the legislative process." United States v. Brewster, 408 U.S. 501, 516 (1972). To construe the Speech or Debate Clause as barring this suit would be inconsistent with this admonition because the relief sought here would in no way interfere with or impede any legislative activity.

B. Since the Relief Sought Here ~~Does~~ Would Not Interfere With the Legislative Process, the Clause is not Applicable

As stated above, plaintiffs in this action are not in any way attacking the authority of Congress to investigate. In fact, Mrs. Gorsuch has offered to cooperate with the Subcommittee

investigation except to the very limited extent that doing so would be contrary to well-established principles of executive privilege. In addition, plaintiffs are not seeking to enjoin or otherwise block the issuance or implementation of the subpoena or to prevent House members from exercising their rights to vote. Indeed, no injunctive or other compulsory relief of any kind is sought.*/ All that is sought in this action is a declaration of the lawfulness of Mrs. Gorsuch's actions in response to a congressional subpoena. Such a judgment would have no coercive effect upon the House at all.

Unlike the situation in Eastland, supra, therefore, this action will not interfere with the legislative process because that process has terminated. The full House has now considered this matter and resolved to hold Mrs. Gorsuch in contempt. The contempt citation has been certified and delivered to the United States Attorney. It is, therefore, critically important to emphasize that a declaratory judgment in this action would no more interfere with any legislative processes than would such a judgment in the context of a criminal contempt proceeding. In each, the court would review the lawfulness of Mrs. Gorsuch's actions which gave rise to the ~~finding of~~ citation contempt. Since it is well-established that Speech or Debate principles do not bar such review in the context of a criminal contempt proceeding, see Watkins v. U.S., 354 U.S. 178 (1957); Barenblatt v. U.S., 360 U.S. 109 (1959), there is no reason why, in the compelling and unique

*/ Nor, obviously are any members of Congress sued in their personal capacities for damages.

circumstances present here, such principles should bar review here.

In arguing that the Speech or Debate Clause bars this action, defendants focus largely on the impropriety of the issuance of any injunctive or "coercive" relief against members of the House. While it is true that the original complaint in this action contained a prayer for injunctive relief only, the amended Complaint seeks declaratory relief. Much of the defendant's arguments are therefore no longer applicable. For example, defendants argue that Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1974) bars this suit because the Supreme Court there rejected the proposition that a court could "enter a 'coercive order' which in context would mean that the Subcommittee would be prevented from pursuing its inquiry by use of a subpoena to the bank." 421 U.S. at 512. Defendants brief at 16-17. But in Eastland, injunctive and declaratory relief were sought immediately after the issuance of the Subcommittee subpoena. In that context, injunctive or declaratory relief would have effectively interfered with the ongoing investigation. Here, on the other hand, a declaratory judgment will have no such effect because the legislative process with respect to the subpoena has terminated. Thus, not only is no injunctive relief sought, but in addition, a declaratory judgment here will produce more of the coercive effects which would have resulted had such a judgment been entered in Eastland.

Indeed, as noted above, the situation here is similar to that in U.S. v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977)). There, the United States filed suit and invoked executive privilege to

prevent A.T. & T. from complying with a congressional subpoena which sought highly sensitive national security information in A.T. & T.'s possession. The House Subcommittee seeking that information intervened. It contended that Speech ~~and~~ or Debate principles barred the suit because a judicial resolution of the dispute would interfere with its investigatory activities.

The Court of Appeals for this circuit flatly rejected this contention. After reviewing Watkins, Barenblatt and Senate Select Committee v. Nixon, the court stated:

> . . . individual members of Congress are not impermissibly 'questioned in any other place regarding their investigatory activities merely because the validity and permissibility of their activities are adjudicated. . . . As is clear from Watkins, Barenblatt and Senate Select Committee, however, the [Speech or Debate] Clause does not and was not intended to immunize congressional investigatory actions from judicial review. Congress' investigatory power is not, itself, absolute. . . . [567 F.2d at 129].

The court, therefore, concluded that judicial intervention was not precluded by Speech or Debate principles because those principles are primarily intended to protect individual legislators from personal suits against them for legislative activities. Where that is not the case," the clause cannot be invoked to immunize the congressional subpoena from judicial scrutiny." 567 F.2d at 130.

The extraordinary circumstances present here are similar to those present in A.T.&T. As in A.T.&T., the legislative and executive branches have truly reached an impasse. The vote of the House of Representatives to hold Mrs. Gorsuch in contempt of Congress has created a constitutional crisis which, like that present in A.T.&T. should and, indeed, must be resolved through civil litigation so that the "unseemly" confrontation between two co-equal branches of our government can be speedily terminated. Since this action seeks only judicial review of the legality of Mrs. Gorsuch actions and does not seek to harass individual members of Congress or interfere with any legislative activities or process, it, like A.T.&T., is not barred by the Speech or Debate Clause.

Even if the Speech or Debate Clause is construed to require the dismissal of all the legislator defendants, it is well-established that judicial review of a congressional action is nonetheless available against employees of the Congress who implemented that action. Here, the defendant Clerk of the House, and the defendant Sergeant at Arms of the House each participated in the activities giving rise to this suit. As noted by the defendants in their brief at p. 15, the Clerk certified the contempt resolution to the United States Attorney for prosecution under 2 U.S.C. § 194. Moreover, the Sergeant at Arms delivered the contempt citation to the United States Attorney. Each of these defendants, therefore, was responsible for carrying out the House resolution that the contempt citation against Mrs. Gasuch be certified and delivered to the United States Attorney for prosecution. In these circumstances, the Supreme Court has held that suits can be maintained against the Congressional employee in order to review the legality of the underlying legislative order pursuant to which he was acting.

This principle was clearly recognized by the Court in Powell v. McCormack, 395 U.S. 486 (1969). There the House of Representatives passed a resolution excluding Rep. Powell from the House. Pursuant to that resolution, the Clerk of the House threatened to refuse to perform the duties due a Representative, the Sergeant at Arms refused to pay his salary and the Doorkeeper refused to admit him to the House Chamber. Powell filed suit against certain Congressmen as well as these employees challenging the legality of the House's exclusion order. The defendants moved

to dismiss arguing that the Speech or Debate Clause protected both the legislators and their employees from suit, the latter because they were acting pursuant to a House resolution. The Supreme Court refused to dismiss the employees and reaffirmed the doctrine that:

> . . . although an action against a Congressman may be barred by the Speech and Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts . . . That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision. [395 U.S. at 504].

The Court therefore permitted the suit to proceed against the House employees in order to review the legality of the exclusion order of the members of the House.

In reaching this conclusion, the Court specifically reaffirmed its decision in Kilbourn v. Thompson, 103 U.S. 168 (1881). There, the House had passed a resolution ordering the Sergeant at Arms to arrest and imprison a witness who had refused to respond to a House Committee subpoena. The witness filed a false imprisonment suit against certain members of the House as well as against the Sergeant at Arms who had actually executed the arrest warrant, contending that the House resolution was unconstitutional. The Court held that while the members were immune from a damage action based upon their legislative act, the Sergeant at Arms did not share in that immunity, even though he had merely implemented the House resolution. Indeed, the Court emphasized the importance of permitting the case to proceed against the House employee to ensure that the House's action not escape judicial review:

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U.S., at 199.

The instant case is indistinguishable from Powell or Kilbourn. Plaintiffs here, as in Powell and Kilbourn seek judicial review of a House resolution. Similarly, as in Powell and Kilbourn, the legislative process has terminated so that judicial intervention could not interfere with any ongoing legislative activity. Moreover, as in Powell and Kilbourn, the implementation of the resolution here required the participation of House employees. Without the certification and delivery of the contempt citation to the United States Attorney, the House resolution that Mrs. Gorsuch be prosecuted for contempt would have had no effect. This case, therefore, can proceed against the House employees who carried out the House resolution just as the Powell and Kilbourn actions were permitted against the House employees who implemented the House resolutions challenged in those cases.

Moreover, contrary to the House's assertions, this conclusion is perfectly consistent with the Supreme Court's Speech or Debate analysis in cases such as Gravel v. United States, 408 U.S. 606 (1972). In Gravel, the Court emphasized that Speech or Debate immunity attaches to either Members or employees if the action

they took was a protected legislative act. Thus, the Court held that

> . . . the Speech or Debate Clause applies not only to a Member but also his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself. [408 U.S. at 621]

Therefore, to determine whether the House employees here are immune from suit, it is necessary to decide whether they performed "protected legislative acts." As noted by the court in Gravel, and in United States v. Brewster, 408 U.S. 501 (1972). Members of Congress engage in a wide range of activities, including constituent "errands", pressuring federal agencies regarding their administration of programs, news releases and speeches outside the Congress. Indeed, the Court held in United States v. Johnson, 383 U.S. 169 (1966) that the Speech or Debate Clause did not immunize a Member's attempt to influence the Department of Justice.*/ In light of the wide range of congressional activities, the Court

*/ Had the member sought to influence the Department of Justice solely through legislative activities such as floor speeches, committee hearings, or voting on a resolution bill, Speech or Debate immunity would have attached. Similarly, here, had the defendants sought to pressure and coerce the Executive Branch through similar legislative activities, they would be immune from suit. However, when Congress took the unprecedented step of demanding that the United States Attorney prosecute Mrs. Gorsuch, it went beyond the legislative arena as did the member of Johnson who similarly sought to influence the Executive Branch through extra-legislative means.

in Gravel cautioned that:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. [408 U.S. at 625]

The test has been applied to immunize the issuance of a duty authorized Congressional subpoena, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) and the preparation of a Committee report, DOE v. McMillan, 412 U.S. 306 (1973), because those activities were held to be integral parts of Congress' deliberative and communicative processes. However, the private publication or public distribution of materials received or prepared by a Congressional Committee have been held to be unprotected activities. Gravel v. United States, supra; DOE v. McMillan, supra. Such activities are simply not essential to the internal processes of the Congress.

When the Gravel analysis is applied here, it is obvious that the certificrion and delivery of the contempt citation to the United States Attorney seeking criminal prosecution is not a protected legislative activity. Those acts have nothing to do with "speech or debate" nor are they an integral part of the House's internal deliberative and communicative processes. Indeed, those processes ran their course culminating in a contempt resolution

passed by the House. Instead, the certification**/ and delivery of the contempt citation constitute the result of the House process, just as the physical exclusion of Rep. Powell by the House doorkeeper in Powell and the arrest of the witness in Kilbourn constituted the results of the House processes involved in those cases. As the Court stated in Eastland, at 508, the arrest by the Sergeant at Arms of a witness who had been held in contempt was unprotected because it was not "essential to legislating." Similarly, the acts here which triggered a potential criminal prosecution, certifiction and delivery, are not essential to legislating, even if the House contempt resolution itself may be considered a protected activity. Therefore, even if the Speech or Debate Clause is construed to immunize the Member defendants for their legislative activities, that immunity extends only through the vote on the contempt resolution by the House. Actions beyond that point are outside the legislative process and can, therefore, form the basis for judicial resolution of the underlying controversy as in Powell and Kilbourn.

**/ The House argues that the certifiction of bills and resolutions are protected legislative actions and that the Department of Justice took this position in a recent case. See defendants' Brief at 15, 20. Ordinarly, this proposition is accurate because ordinarily the certification is part of the process by which a bill or resolution becomes law. Here, however, the certification was necessary in order to trigger a contempt prosecution by the United States Attorney, an activity quite separate from the legislative process.

III. Mrs. Gorsuch Properly Withheld The Documents In Dispute Under A Claim Of Executive Privilege

A. The Claim of Executive Privilege Is Rooted In Separation Of Powers Principles And Should Be Reviewed By This Court

In this suit, the Executive Branch seeks a declaration that certain documents are exempted by executive privilege from disclosure to the Subcommittee. The documents in question consist of highly sensitive materials from the open enforcement files of the EPA. After careful review the President, officials of the Department of Justice, and Mrs. Gorsuch each concluded that the disclosure of these documents would directly impair the ability of the Executive Branch to fulfull its constitutional responsibility faithfully to execute the law.

Executive privilege was invoked, therefore, in order to preserve the fundamental principle of separation of powers, "which is at the heart of our Constitution." Buckley v. Valeo, 424 U.S. 1,119 (1976) (per curiam). The judiciary has indeed often checked actions by the other branches which represent

> an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.

Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 425 (9th Cir. 1980). See Buckley v. Valeo, 424 U.S. 1, 118-24 (1976) (per curiam); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952);

Myers v. United States, 272 U.S. 52 (1926). Judicial intervention in these disputes was essential in order to maintain the delicate balance of powers among the branches created by the constitution.

Congress does have the power to investigate. That power is broad, but it is not without limitations. As the Supreme Court stated in Barenblatt v. United States, 360 U.S. 109 at 112:

> Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. [emphasis added].

When the Congress used its power to investigate in a manner that threatens to invade the domain of the Executive, as here, the courts have stepped in to resolve the dispute. As the Court of Appeals for this Circuit stated in Senate Select Committee v. Nixon, 498 F.2d 725, 729 (D.C. Cir. 1974) in which a claim of executive privilege was similarly invoked in response to a congressional subpoena, "it is the responsibility of the courts to decide whether and to what extent executive privilege applies." See also United States v. Nixon, supra. The court, after a thorough review of the issues raised, concluded that the materials in question were, indeed, subject to a claim of executive privilege. The court further held that the committee had failed to demonstrate that the materials were "demonstrably critical to the responsible fulfillment of the Committee's functions" so as to overcome the claim of privilege. 498 F.2d at 731. A similar determination is necessary here. As we will now demonstrate, the

documents here at issue are likewise subject to a valid claim of privilege. Since the committee has failed to demonstrate any compelling investigative need for them, the investigative interests of the Legislative Branch must yield to the interests of the Executive in preserving its ability faithfully to execute the law.

B. Executive Privilege May Be Invoked For Sensitive Documents In Open Law Enforcement Files

Here the Subcommittee's demands threatened damage to a fundmental responsibility of the Executive -- the obligation to enforce the laws. Therefore, in response to the demands of the congressional subpoena here at issue, Mrs. Gorsuch followed the instructions of the President in interposing a claim of executive privilege to protect from disclosure materials that consist of

> "sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals."

November 30, 1982 letter from Attorney General Smith, Exhibit __. This claim was based on a determination that dissemination of such documents to the public or to Congress would impair the Executive's constitutional duty to ensure that the laws be faithfully executed. See U.S. Const., Art. II, § 3; United States v. Nixon, 418 U.S. 683 (1974). Accordingly, the claim of executive privilege has been properly asserted in this instance.

The doctrine of executive privilege defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory processes of the legislative and judicial branches. See United States v. Nixon, 418 U.S. 683 (1974). The privilege protects two different Executive Branch interests. Executive privilege protects material where disclosure would either significantly impair the performance of the constitutional responsibilities of the Executive or where it would interfere with its functioning as an independent branch of government. Id.

Accordingly, executive privilege is invoked to protect several district aspects of the constitutional responsibilities of the Executive Branch. It may be invoked, for example, where there is a danger that disclosure of the material will impair the conduct of foreign relations or the national security. See e.g., United States v. Reynolds, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1979). See also United States v. Nixon, 418 U.S. at 706. This privilege may also be invoked to shield confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, unless there is a strong showing that access to the documents is critical to the responsible fulfillment of a constitutional function. See Nixon v. Administrator of General Services, 433 U.S. 425, 441-55 (1977); United States v. Nixon, 418 U.S. 683, 711-12 (1974); Senate Select Committee v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir.

1974) (en banc). Similarly, it may be invoked to protect from disclosure investigative files compiled for law enforcement purposes. See Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977).

As is the case with the other aspects of the executive privilege doctrine, this part of the privilege is based on the practical need for the confidentiality of communications within the Executive Branch to carry out its constitutional responsibilities in enforcing the laws, as well as the doctrine of separation of powers that provides that each branch of government is "suprem[e] . . . within its own assigned area of constitutional duties." United States v. Nixon, 418 U.S. at 705. In United States v. Nixon, the Court recognized the need for confidentiality within the Executive Branch to assist the President in the discharge of his constitutional powers and duties, by ensuring discussion that is free-flowing and frank, unencumbered by fear of disclosure or intrusion by the public or the other branches of government. It stated that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, supra, at 705. Such "temper[ed] candor" in executive deliberations clearly would impede the President's performance of his constitutional duty to exercise the Executive powers described in Art. II, § 3 of the Constitution. See Nixon v. Administrator

of General Services, 433 U.S. 425 (1977); United States v. Nixon, U.S. 425 (1977); United States v. Nixon, supra at 705.*/

Information protected by ~~the~~ executive privilege is deemed to be presumptively privileged from disclosure absent a showing of particular and compelling need by those demanding disclosure. See Senate Select Committee v. Nixon, supra, 498 F.2d at 730. Further, even when such a need for disclosure is asserted, it must be weighed against the possible injury to governmental and public policy interests to determine whether the privilege shall remain as a bar to disclosure. See id.

Because it is so infrequently invoked, there has not been much litigation in the area of executive privilege. Courts have recognized, however, the need for the privilege in two areas of civil discovery. First, courts have long recognized the need for the privilege with respect to "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd mem. sub nom. V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979, cert denied, 389 U.S. 952 (1967). See Kaiser Aluminum & Chemical Corp. v.

*/ The Supreme Court and lower federal courts have made clear that the presumption of confidentiality accorded executive communications is intended to protect not only the substance of sensitive communications but the integrity of the decision-making process within the Executive Branch as well. See Nixon v. Administrator of General Services, supra; Senate Select Committee v. Nixon, supra; Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (en banc).

United States, 157 F. Supp. 939 (Ct. Cl. 1958). The "deliberative process" privilege serves both interests of the executive privilege by protecting the performance of the Executives constitutional duties as well as by preventing interference with its functioning as an independent branch of government:

> This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of non-disclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate. . . . Nowhere is the public interest more vitally involved than in the fidelity of the sovereigns decisions - and policy-making resources. Carl Zeiss Stiftung, supra, 40 F.R.D. at 324-25.

A related privilege, commonly known as the law enforcement evidentiary privilege, protects from disclosure investigative files compiled for law enforcement purposes. Black v. Sheraton Corp. of America, 564 F.2d 531 (1977). See United States v. American Telephone & Telegraph Co., 86 F.R.D. 603, 639-42 (D.D.C. 1979). Courts have long recognized a strong public interest in minimizing the disclosure of documents which would tend to reveal law enforcement strategies, investigative techniques or sources. See e.g., Black v. Sheraton Corp., supra, 564 F.2d at 535, 536; Aspin v. Department of Defense, 491 F.2d 24 (1973); Jabara v.

Kelly, 62 F.R.D. 424 (E.D. Mich. 1974); Philadelphia Resistance v. Mitchell, 63 F.R.D. 125 (E.D. Pa. 1972). See generally 2 Weinstein's Evidence ¶509[07] (1975). This privilege is rooted in the same concerns as the privilege accorded to intra-governmental documents -- the need to minimize disclosure of documents the revelation of which would both impair the functioning of the Executive Branch in its law enforcement efforts and impair its ability to operate as an independent branch of government. See Black v. Sheraton Corporation of America, supra, 564 F.2d at 542.

Perhaps there is no power more critical to the constitutional duty of the Executive Branch faithfully to execute the laws than its "exclusive authority and absolute discretion to decide whether to prosecute a case. . . ." United States v. Nixon, 418 U.S. 683, 693 (1974). Effective law enforcement relies heavily on the assurance of confidentiality within the enforcement process. The need for confidentiality is even stronger, of course, while enforcement is being carried out and enforcement policies and strategies are still being developed. Without that assurance of confidentiality, efforts of the Executive Branch to enforce the law effectively would be undercut by disclosure of sensitive investigative techniques, methods or strategies; forewarning of suspects under investigation, deterrence of witnesses from coming forward, concern for the safety of confidential informants; or a premature disclosure of the facts of the government's case. Moreover, disclosure of investigative files in a particular case could interfere with ongoing administrative enforcement

proceedings and could obviously prejudice or harm the government's case. See e.g., Kinoy v. Mitchell, 67 F.R.D. 1, 11-12 (S.D. N.Y. 1975). Indeed, the government may shrink from conducting a thorough investigation if there is a risk that the information gathered may be prematurely disclosed. In addition, disclosure could prejudice the rights of those under investigation. Perhaps most importantly, the fear exists that the integrity, impartiality and fairness of the law enforcement process as a whole would be damaged if sensitive material was distributed beyond those persons necessarily involved in the investigation and prosecution process. See Exhibit ____, p.3.*/ Affidavit.

The disclosure of open law enforcement files could also seriously impair the Executive Branch's functioning as an

---

*/ Congress itself has recognized the vital importance for such a privilege in the Freedom of Information Act, which greatly expanded information that government agencies must make available to the public. That Act specifically contains an exemption for certain types of investigatory records compiled for law enforcement purposes. 5 U.S.C. §552(b)(7).

As the Second Circuit concluded in analyzing the purposes behind the §552(b)(7) exemption:

> [the Senate and House Reports] indicate that Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information. Both these forms of confidentiality are necessary for effective law enforcement. Frankel v. SEC, 460 F.2d 813 817 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972).

independent branch of government. Were the documents at issue here disclosed to congressional subcommittees, members of Congress would become partners in the enforcement process, possessing the information necessary to participate in or interfere with ongoing enforcement actions. Congress could thus reveal the strengths and weaknesses of the government's case to the targets of the case under development and to divulge the government's investigative techniques and procedures.

( )

As stated by the Attorney General, in explaining the bases for the invocation of the privilege in the instant case, the assertion of privilege in this case to preclude disclosure to the Congress of sensitive memoranda in files of ongoing law enforcement cases has ample historical precedent.

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

Exhibit ____, p. 3.

In fact, executive privilege has been invoked approximately 65 times in response to Congressional demands for information. See Memorandum for the Attorney General, History of Executive Privilege vis-a-vis Congress, December 14, 1982, attached hereto as Exhibit ____. Many of these claims were made to prevent the disclosure of investigatory files. See id., p.8 (President

Monroe); p.11 (President Jackson); p.14 (President Tyler); p.21 (President Buchanan); p.21 (President Lincoln); p. 22 (President Johnson); p.23 (President Cleveland); p.25 (President Theodore Roosevelt); p.26 (President Coolidge); pp.27, 28 (President Franklin Roosvelt); pp. 31, 32 (President Truman). See also Cox, Executive Privilege, 122 V. Pa. L. Rev. 1383, 1400-02 and nn. 61-67.

Thus, the policy of the Executive Branch generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances has been the policy of the Executive Branch throughout this Nation's history. For example, President Tyler invoked executive priviledge against a request by the House of Representatives to the Secretary of War to produce investigatory reports submitted to the Secretary by Lieutenant Colonel Hitchock concerning his investigation into frauds perpetrated against the Cherokee Indians. See Memorandum, pp. 14-15, Exhibit _____. Similarly, President Truman invoked the privilege and directed officials not to disclose files bearing on the loyalty of certain State Department employees after the Senate subpoenaed those files. See id. at 31. And President Franklin Roosevelt directed Attorney General Jackson to invoke the privelege concerning a House request to view certain FBI records. See id. at 27. As Attorney General Robert Jackson stated to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that

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

40 Op. A.G. 45, 46 (1941).

Attorney General Smith, in explaining the bases for the invocation of the privilege in the instant case, also relied upon the reasoning of former Deputy Assistant Attorney General Thomas F. Kauper who stated:

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

Exhibit __, p. 3.

The Attorney General found that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. He agreed with the position stated by Attorney General Jackson in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

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

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

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

Exhibit ____, p. 4.*/ There are, therefore, a number of compelling reasons why documents such as those at issue here must remain privileged and why "[a]t bottom, the President has the responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch." Exhibit __, p. 5.

C. The Documents At Issue In This Case Are Properly Subject To A Claim Of Executive Privilege

The administration of the Superfund Act involves a continuous process of investigation and law enforcement efforts. The process may ultimately result either in an administrative action, criminal

*/ Guarantees of confidentiality by the Levitas Subcommittee can not overcome the concern over the integrity of law enforcement files in this instance either. Rule XI cl.2 § 706c of the Rules of the House of Representatives provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all members of the House shall have access thereto . . . ." (emphasis added). Thus, Subcommittee access to the documents is equivalent to access by all of the members of the House of Representatives and, accordingly, to the general public. Nor will an offer to receive the privileged documents in "executive session" pursuant to Rule XI, cl.2, § 712 of the Rules of the House of Representatives alleviate that concern. The only protection given the documents by that provision is that they shall not be made public without the consent of the Subcommittee. Since such consent could be given any time in the future, this assurance fails to provide the Executive the protection and control to which he is constitutionally entitled.

Furthermore, there is always the possibility that information will be leaked to the public by House members or their staffs. Although the same danger exists in the Executive Branch, it is greatly minimized because the Executive can assert control over Executive Branch employees through a variety of potential sanctions, including loss of employment. With disclosure of documents to Congress, the Executive Branch loses that power to ensure the confidentiality of its records.

prosecution or civil litigation. As such, the enforcement functions of EPA under the Superfund are similar to those functions carried out by the FBI or the Department of Justice in criminal prosecution. Accordingly, the same concerns for protecting the law enforcement investigatory files of those agencies are equally applicable with respect to the enforcement of the Superfund program.

The documents which form the focus of this dispute are all part of active law enforcement case files. Many of the documents contain specific timetables based on the government's strategy for successful resolution of the case, including outlines of projected dates for the enforcement process. These include dates for the duration of the case development, for concluding negotiations and for the filing of an administrative action or complaint. They contain EPA's proposed settlement strategies, including the bottom-line figure it would accept from a particular responsible party. The memoranda also describe, in detail, anticipated defenses, the elements of proof required in a given case, the legal issues involved and possible precedential impact. Also included are lists of potential witnesses and descriptions of available evidence. Moreover, many of the memoranda describe anticipated allocation of costs among the various parties responsible for a given waste site. Affidavit.

In determining whether investigatory files are privileged in a civil litigation context the courts have balanced the strong public interest in confidentiality of such government information

against the needs of a litigant to obtain data. Black v. Sheraton Corporation of America, 50 F.R.D. 130 (D.D.C. 1970), see also Black v. Sheraton Corporation of America, 564 F.2d 531 (D.C. Cir. 1977). The following considerations are often examined: the extent to which disclosure will discourage people from giving the government needed information; the impact upon those persons who have given the information of revealing their identities; the degree to which future government programs will be chilled by disclosure; whether the information sought is factual or evaluative; whether the investigation has been completed; whether the information sought is available through other sources; and the importance of the information to the plaintiff's case. See Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (S.D.N.Y. 1972). All these considerations, when examined in the context of this case, show the need to protect the confidentiality of the law enforcement files in this instance.

First, the documents in question all stem from ongoing enforcement actions. The cases are all at the stage either where EPA and/or the Department of Justice are developing them for litigation or they are actually being litigated in the courts. It is far from hypothetical that disclosure of these documents could jeopardize these ongoing enforcement actions. Disclosure would reveal the strategy of the investigation and forewarn the suspects under investigation. It would also undercut the investigation of the hazardous waste sites by premature disclosure of the facts of the government's case. Such information would be of obvious

benefit to the targets of the investigation and destroy the adversarial element crucial to the law enforcement process. For example, the documents reveal EPA's settlement strategies in various cases. EPA would be at an enoumous disadvantage in attempting to negotiate an environmentally appropriate settlement agreement with a party who knew EPA's bottom-line settlement position, its negotiation strategy and its perception of the strengths and weaknesses in the government's case.

Second, the information sought is not factual data, which has already been made available to the Subcommittee. Rather, the documents withheld, a small percentage of the total number of documents requested by the Subpoena, consist of legal and strategical analyses of individual cases, lists of potential witnesses, settlement considerations and similar materials. Accordingly, those documents are all part of ongoing deliberations and do not represent either final decisions or factual data. Moreover, EPA has already informed the Subcommittee that the withheld information would become available to the Subcommittee as the cases were closed.

Third, the withheld documents include potential targets for enforcement actions. Accordingly, the disclosure of those names could have great impact upon those persons identified, by harming the reputation of innocent persons.

Fourth, the Subcommittee rejected the proposal of the Executive Branch and attempted to resolve the conflict only by means of the contempt citation. The Executive proposal offered a

means of accommodating the interests of the Subcommittee without a waiver of the rights of the Executive Branch. The Subcommittee declined, however, to pursue that avenue of fulfilling its need for information.

Thus, in this instance, the need for the privilege is very strong. As demonstrated below, Congress cannot overcome the presumption of the privilege in this instance because it cannot establish a compelling and specific need for the documents.

D. Congress Has Not Shown A Specific And Compelling Need for Disclosure of the Documents That Overcomes The Presumption of Executive Privilege

Congress seems to assert an absolute right to any documents held by the Executive; at least, Congress insists that it should be the sole arbiter of what documents the Executive may withhold. As discussed above, that simply is not the law. Instead, while ~~that~~ executive privilege is not absolute, it may be overcome only by a specific showing that Congress has a compelling need for the documents in question. In some cases, there may be a need for delicate balancing of competing interests. Here, however, the decision is an easy one because the Subcommittee has made no showing whatsoever of a specific need for the documents in question.

The power of Congress to conduct investigations is inherent in the legislative process. The legislative branch requires information in order to enact laws and appropriate funds for the conduct of Congress. That power "encompasses inquiries concerning

the administration of existing laws as well as proposed or possibly needed statutes." Watkins v. United States, 354 U.S. 179, 187 (1957). The grant of power under Article I to legislate is therefore held to carry implied authority to summon witnesses and to compel production of documents. Jurney v. MacCracker, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927). As the Supreme Court recognized in Watkins, however, "broad as is this power of inquiry, it is not unlimited. . . .No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." Watkins, supra, 354 U.S. at 187.

When this "power of inquiry" is directed at the Executive Branch, it is additionally bounded by principles imposed by the separation of powers doctrine. See Senate Select Committee v. Nixon, supra. This is so because while the implied power of Congress under Article I logically extends to the production of information by executive officials, the Executive Branch must retain a constitutionally protected interest in preserving the confidentiality of that information necessary to enable it faithfully to execute the laws as prescribed by Article II. Thus, the courts have recognized that the power of Congress to investigate is subject to claims by the Executive that the release of certain information would impair the President's obligation to discharge the responsibilities assigned to him by the constitution. See p. ___, supra. When such a claim is interposed, it cannot be overcome absent a showing of some compelling need for the

information sought. See Senate Select Committee v. Nixon, supra, 498 F.2d at 730; United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977). Indeed, this Circuit has held that the general oversight and fact finding functions of a particular congressional committee were insufficient to override the interests of the Executive Branch in protecting privileged information from disclosure. See Senate Select Committee v. Nixon, supra, 498 F.2d at 732. The Court in Senate Select Committee contrasted the general congressional interest in oversight and fact-finding with the specific and compelling need for disclosure in the face of a grand jury subpoena, such as that involved in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). As discussed below, the subcommittee here has not and indeed cannot show any compelling need for the withheld documents sufficient to overcome the valid claim of privilege invoked by the Executive Branch.

The Subcommittee issued the subpoena in question in order "to review the integrity and effectiveness of EPA's enforcement program and to evaluate the adequacy of existing law." Legal Memorandum of the General Counsel to the Clerk of the House of Representatives to Chairman Levitas Regarding Executive Privilege, December 8, 1982 [Exhibit __ attached]. While this is certainly a legitimate oversight function, the information requested is very broad in scope and the reasons for the request are very general. It is difficult to understand why the withheld documents, a small number of sensitive materials from open law enforcement files, are

necessary to enable the Subcommittee to conduct its investigation. It must again be emphasized that of the hundreds of thousands of documents that Congress has requested, only a very small percentage - less than 1% - has been withheld on the basis of the claim of Executive Privilege. Even more significant is the fact that the Subcommittee has refused to inspect the documents produced. Cite. Although its legislative needs may well be fulfilled by review of those documents, the Subcommittee nonetheless has insisted that all the requested documents must be disclosed. The unyielding position of the Subcommittee in this regard does violence to the spirit of accommodation required by the separation of powers doctrine.*/ Indeed, if the Subcommittee refuses to inspect the tremendous bulk of material which has been offered, how can it possibly show any compelling need for the miniscule number of documents which have been withheld.

Moreover, the access that has been denied to the Subcommittee is only temporary. EPA has offered to turn over those memoranda in the enforcement files as they lose their enforcement sensitivity. The Subcommittee has failed to demonstrate why its need to view these documents is critical at this point and cannot wait until the sensitive nature of the documents is abated.

---

*/ See United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977). This principle requires each branch to "take cognizance of an implicit constitutional mandate to seek optional accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation." Id. at 127.

Furthermore, the documents that have been made available to the Subcommittee may well fulfill its legislative needs. They consist of notes and internal memoranda from both open and closed cases involving enforcement of the Superfund. The documents include data on the amounts, nature, and origin of wastes present at harzardous waste sites; correspondence between EPA and the generators of the hazardous waste sites; records of interraction with State and local government officials; correspondence with responsible parties, contractors, State officials and representatives of other federal agencies; memoranda discussing the allocation of monies to particular sites by EPA; cooperative agreements arranged with the States involved; and memoranda reflecting the process of having the Superfund Office begin working on a site while initiating settlement negotiations with the contractor. [Affidavit]. A review of these materials would certainly enable the subcommittee to conduct a detailed and comprehensive investigation of the adequacy of EPA's Superfund enforcement efforts. They reflect the various steps that have been taken concerning numerous hazardous waste sites. An evaluation of the effectiveness of the law as it has been applied and implemented by EPA clearly may be culled from these documents.

In addition, given the nature of the withheld documents, it is certainly not readily apparent why they are even germane to the Subcommittee investigation. The development of both litigation

and negotiation strategy in particular open cases is not material to whether the law is effectively being enforced. Nor are settlement prospects in individual cases relevant to the adequacy of existing law. Instead, these congressional concerns may be satisfied by evidence of the results of such litigation and strategy. Indeed, as noted above, EPA has offered to turn over to the Subcommittee the enforcement files as cases are closed.

Finally, one of the purposes of the Subcommittee investigation is to review the integrity of EPA's enforcement of the Superfund program. Yet it must be emphasized that no allegations of criminal or unethical conduct on the part of any EPA official have ever been made during this dispute in connection with the documents in question. Indeed, the Dingell Subcommittee even reviewed 35 documents, which are among those also withheld from the Levitas Subcommittee, to ensure that the documents did not contain any evidence of misconduct by Executive Branch officials. Furthermore, the process established by the Executive Branch to review the documents described above was intended to ensure that the withheld documents do not contain any evidence of unlawful conduct by a government agency or government officials. [Affidavit]

Accordingly, Congress cannot meet its burden of demonstrating a specific, articulable need for the documents in question that would overcome the presumption of the asserted privilege. Congress has not even attempted to demonstrate such a specific need nor attempted to accommodate the interests of confidentiality

required by the Executive in its law enforcement efforts. Instead, it continues to rely on its generalized request for production of documents, failing to recognize that such a request is insufficient in and of itself to overcome the constitutionally protected interests of another branch of the government. Since Congress cannot establish any compelling need for the documents in question sufficient to overcome the claim of privilege, the Court should enter a judgment declaring that the Administrator acted lawfully in refusing to disclose them to the Subcommittee.

CONCLUSION

For all of the foregoing reasons, the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEWIS K. WISE

ANDREW M. WOLFE

BETSY J. GREY

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

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