UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

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 an official of the Executive Branch in 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 -- Congress held an official of the Executive Branch in contempt. That evening, the House of Representatives voted a contempt citation against Anne M. Gorsuch, Administrator of EPA, for her refusal to furnish a limited number of sensitive law enforcement documents as demanded by a subcommittee subpoena. Mrs. Gorsuch's refusal to produce a small number of documents to the Subcommittee was based on a serious concern -- shared by the President and the Attorney General -- that production of the documents would contravene the duty of the Executive Branch faithfully to execute the laws. The House's contempt vote occurred even though the Subcommittee had no basis for concluding it had any 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

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*/ 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)

of Representatives has demanded that the Executive Branch prosecute Mrs. Gorsuch criminally for withholding 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).

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 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

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*/ (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.

the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq., known as the "Superfund" law. That Act, as described in more detail below, is intended to help the country clean up hazardous waste sites. See 42 U.S.C. §9604. It authorizes federal action to remove or arrange for the removal of hazardous substances, pollutants or contaminants released into the environment to protect the public health or welfare and it provides for both civil and criminal penalties against parties responsible for creating a hazardous waste site. See 42 U.S.C. §§9606; 9607; 9609. Where EPA deems that legal action is necessary it is to refer the matter to the Department of Justice. See description of the Statutory Scheme, p. __, infra.

In particular, the Subcommittee's investigation focused on whether the law enforcement provisions of the "Superfund" program were being fully carried out and whether adequate efforts were being made by EPA to recover the full costs of cleaning up sites from responsible parties. H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) p. 9. As a result, the Subcommittee began to interview EPA officials and others and sought to review materials related to the agency's efforts to carry out the Superfund law. Several EPA officials testified at numerous hearings before the Subcommittee and numerous documents were made available to the Subcommittee. Id.

As a part of this effort, an investigator from the Subcommittee Staff, Mr. Robert Prolman, visited the EPA regional Office in New York City to review agency case files on several

Superfund sites. H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) p. 12. Access to most of the Superfund files in that office was provided, except for documents identifying the names of parties liable for generating hazardous waste sites or internal agency memoranda containing enforcement strategy, settlement figures, or other such sensitive materials. [Affidavit].

Apparently unhappy with this limitation on his Subcommitte's access, on September 15, 1982, Chairman Levitas of the Subcommittee sent a letter to Administrator Gorsuch, requesting "all information being reported to or otherwise being obtained by the U.S. Environmental Protection Agency or any others acquiring such information on behalf of the agency" concerning the efforts being made to carry out CERCLA and progress being made to clean up specific abandoned waste sites. [Letter from Elliott H. Levitas, Chairman, Subcommittee on Investigations and Oversight to Anne M. Gorsuch, Administrator, EPA, September 15, 1982, attached hereto as Exhibit ___.*/ In other words, the Subcommittee was requesting every file and all the information that EPA had with respect to its Superfund enforcement program.

In response to this voluminous request, EPA offered to produce or to make available for copying by the Subcommittee approximately 787,000 pages of responsive documents, which would cost approximately $223,000 and would require an expenditure of

*/ This request was made pursuant to 42 U.S.C. §9604(e)(2)(D) which provides that "all information reported to or otherwise obtained by the President (or any representative of the President) under this Act shall be made available, upon written request of any duly authorized committee of the Congress, to such committee."

more than 15,000 personnel hours [EPA affidavit]. Accordingly, EPA attempted to comply as completely as possible to the Subcommittee's broad request. EPA declined, however, to produce approximately 74 documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. [Affidavit]. Those documents, which are part of open law enforcement files, include memoranda and notes reflecting enforcement strategy, legal analysis, list of potential witnesses, settlement considerations and similar materials. [Affidavit]. As an in camera inspection of the documents by this Court would show, they represent documents typically characterized as attorney work-product material.*/

After this, there were a number of meetings, exchanges of letters and telephone conversations between the Subcommittee, on the one hand, and EPA and the Department of Justice, on the other, as part of an effort to work out an accommodation on the withheld documents. EPA agreed to make information available to the Subcommittee on CERCLA hazardous waste sites, but expressed 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 continuing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material." (October 7, 1982 Letter from Robert Perry to Chairman Levitas,

*/ See Hickman v. Taylor, 329 U.S. 495 (1947).

October 7, 1982, Exhibit ___ attached hereto.*/ Several more meetings occurred after which the ~~Subcommittee was permitted~~ Subcommittee was permitted access to files in the New York and Boston regional offices. Access was denied, however, to the "enforcement sensitive" documents withheld earlier. [Affidavit].**/

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,

*/ In response to those concerns, Subcommittee members assured EPA that an effort to maintain the confidentiality of these records would be made but that the information could be disclosed to other members of Congress. Id.; Hearing transcript at 14, 15. See Letter from Robert Perry to Chairman Levitas, October 12, 1982 (Exhibit ___ attached hereto).

**/ On October 21, 1982, a Subpoena was served on Administrator Gorsuch by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce [the Dingell Subcommittee], seeking production of all agency documents pertaining to three CERCLA hazardous waste sites. See Exhibit ___ attached hereto. These documents were also sought by the Levitas Subcommittee. Consequently, EPA advised the Levitas Subcommittee that it could have access to most of the agency's records on those sites, but that neither Subcommittee would have access to the enforcement sensitive documents. Affidavit. The Dingell Subcommittee had been given limited access to those documents prior to this time to verify the "enforcement sensitive" nature of those documents and to enable the Subcommittee to articulate with more specificity its need for those few documents. Affidavit. See Letter to Chairman Dingell from Robert McConnell, October 8, 1982. (Attached as Exhibit ___ hereto).

> 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.'"

(Exhibit ____ attached hereto). 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. She also instructed her staff to segregate "enforcement sensitive" documents for separate review by EPA attorneys in consultation with the Department of Justice. See Memorandum of November 24, 1982 from Anne Gorsuch, Exhibit ___ attched hereto.*/

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. See Memorandum from President Reagan to the Administrator of EPA, November 30, 1982 (Exhibit ___ Attached hereto).**/ He also instructed her,

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*/ These documents were gleaned from files of cases ready for litigation, as well as files of cases at earlier investigative stages. Affidavit.

**/ The President recognized that this would mean producing or making available for copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. Exhibit __.

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." Id. These documents included "internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA."

Id.*/

On the very day the President wrote his memorandum to Mrs. Gorsuch, the Attorney General sent a letter to both Chairman Levitas and Chairman Dingell 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."

Letter from Attorney General William French Smith to Congressman Dingell, November 30, 1982, Exhibit ___ attached hereto. The Attorney General explained that

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

*/ Upon receiving this instruction, EPA reviewed the 74 documents previously withheld from the Subcommittee and produced 10 of them. Affidavit.

> 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." Id.

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 CERCLA did not exist, because EPA had not yet listed any sites as national priorities pursuant to that section. Hearing of December 2, 1982, Tr. p. 55. See description of Statutory Scheme, p. ___, infra. Nevertheless she explained that EPA had already begun that massive review effort, which would take about ___ months to complete, and she informed the Subcommittee that she had with her the first five boxes of case files which were available to the Subcommittee at that time. Affidavit. She advised the Subcommittee, however, that "sensitive documents found in open law enforcement files will not be made available to the Subcommittee" and cited the President's instructions to her. Hearing of December 2, 1982, Tr. p. 57. The Subcommittee refused to accept delivery of the five boxes of

documents proferred at the hearing. Affidavit.*/ Instead, at the conclusion of the hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch in contempt for failure to comply with its subpoena. See Exhibit ___ attached hereto. It reported the matter to the full Committee on Public Works and Transportation for such action as it deemed appropriate. Id.

A final attempt was made to resolve the impasse between the Subcommittee and the Executive at a meeting on December 8, 1982. See Letter to Chairman Levitas from Robert McConnell, December 9, 1982, Exhibit ___ attached hereto. At that meeting, Chairman Levitas proposed that the Subcommittee staff would have an unrestricted right to examine all EPA documents concerning the hazardous waste site enforcement program and determine what documents it wanted to copy or be made available. EPA and/or the Justice Department would then examine the documents that the staff had so designated and segregate the ones which the considered to be "sensitive." Members of the Subcommittee and staff would be permitted to examine those "sensitive" documents at EPA headquarters in Washington under Executive Session Rules. If the Subcommittee determined it needed to have copies of any of these documents, it would then have the right to attempt to obtain copies of those documents through the mechanism of a subpoena.

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*/ To date, the Subcommittee has not reviewed any of the documents made available to it. Affidavit. Instead, it has continued to assert its need to review all of the documents, including those withheld, before reviewing those which have been produced. Cite.

H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) p. 21. See Exhibit ___.

The next day, the Administration responded to Chairman Levitas by a letter from Mr. Robert McConnell, Assistant Attorney General. That letter rejected the proposal 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."

See Exhibit ___.*/ Mr. McConnell, however, offered a counter-proposal. He proposed that the Subcommittee would designate in advance which of the EPA enforcement files the Subcommittee wanted to examine ~~at their location~~, either at EPA headquarters in Washington or at the regional offices. EPA officials would isolate those files they deemed "sensitive" from an enforcement standpoint before they allowed access to the ~~remaining~~ balance of the EPA enforcement files. After examining

*/ The letter also noted that a problem with Chairman Levitas' proposal was that "it would be extraordinarily difficult to withhold access to a particular document to any committee or subcommittee of Congress if we made such access available to one Subcommittee and its staff or to some members of Congress. It is not for the Executive to distinguish between the rights of particular members of particular committees." Exhibit ___ p. 3.

those files and after having been advised what documents had been set aside and what generally those documents contained, the Subcommittee staff could determine whether it was necessary to examine the remaining files.

Those withheld documents considered sensitive would then be analyzed by at least four persons: two from EPA and two from the Land and Natural Resources Division of the Department of Justice. One person from each group would be a professional, career attorney engaged in the enforcement process of CERCLA, and the other person would be a person holding a policy level position. The Justice Department policy level official would be a Deputy Assistant Attorney General. If those four persons concurred that a particular document was sufficiently sensitive that its release would adversely affect the ability of the Executive to enforce the law, it would be withheld only if an additional member of the Department of Justice in the Office of Legal Counsel and an atttorney in the Office of Counsel to the President agreed with that assessment.

If the collective judgment of those individuals was that the document needed to be withheld, the document would be described to the Subcommittee in detail along with reasons why they believed the document should be withheld.*/

If the Subcommittee disagreed with that conclusion or if it cited additional reasons why the documents should be produced, the

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*/ The review procedure described above has, in fact, been followed by the Executive Branch in determining which documents to withhold from the Subcommittee. Affidavit.

the document in question would be reviewed again. If the foregoing procedure did not resolve the dispute, the Subcommittee could then pursue all lawful efforts to obtain the document in question.*/ Exhibit ___, pp. 4-5.

In his letter, Mr. McConnell submitted that the proposal does not involve a final determination by the Executive Branch nor does it leave the Legislative Branch without legal recourse. Instead, "[it] is the only approach which allows for each Branch to maintain a legitimate difference of opinion regarding the release of any particular document and, if necessary, enables the Judicial Branch ultimately to resolve the issue without an irreparable waiver of the rights of either the Legislative Branch or the Executive Branch." Id. at p. 5.

The Subcommittee rejected this counterproposal because "it was determined to be based on the premise that the Executive Branch has the right, through unilateral determination, to withhold any documents and information it so chooses from the Legislative Branch." H.R. Rep. No. 203, 97th Cong., 2d Sess. (1982) pp. 22-23.

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 cited for contempt of Congress. See Exhibit __. On December 16, 1982, the House of Representatives passed a resolution citing

*/ This proposal applies only to open enforcement cases. Mrs. Gorsuch made clear in her testimony that once a case is closed, either through settlement or litigation, access to the file would become available to the Subcommittee. Hearing of December 14, 1982, Testimony of Mrs. Gorsuch, Tr. p. 104.

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. An amended complaint was filed on December 29, 1982, seeking declaratory relief with respect to defendants' efforts to compel production of the withheld documents.

Statutory Scheme

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq. ["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. See Purpose Clause, id. 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.

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

hazardous wastes. The Act has several unique provisions pertinent to the cleaning up of those hazardous waste sites, all of which may involve intense negotiations between EPA and the responsible parties and may ultimately result in litigation.

First, the Superfund Act 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. The Act also 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). The Act also authorizes the Executive to assess monetary penalties against those who violate such orders. See 42 U.S.C. §9606(b). In addition, the Act grants authority to EPA, in conjunction with 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, the Act allows EPA, in conjunction with 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)9B).*/ As the initial step in implementing the Act, EPA, in cooperation with the States, established an interim priority list containing those sites that posed the greatest risk to health and the environment. That list identified 160 sites as warranting priority attention, pending compilation and promulgation in final form of the official National Priority List.

Once EPA completed its interim priority list, the agency began to clean up those sites 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. Affidavit. 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. 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. Affidavit. Such negotiations they 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. Affidavit.

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*/ EPA announced the proposed National Priority List, containing 418 sites, on December 20, 1982. Cite.

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.

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.

A very small percentage of those documents -less than 1% - form the basis of the instant controversy. The documents that have been withheld are all part of open enforcement files. They typically outline enforcement strategies for particular sites, including a timetable for case development, concluding negotiations and filing of a complaint. The memoranda also describe anticipated defenses, the elements of proof needed in a given case, potential witnesses and available evidence. They discuss the legal issues and precedential impact involved in the

individual cases. As many of the sites involve numerous potentially liable owners or operators, the memoranda also detail the projected allocation of costs among the responsible parties. Also included are discussions of possible agreements with the State to engage in a joint enforcement effort, as well as allocation of recovery with the State. Possible settlement agreements are also discussed in the memoranda. Affidavit.

The withheld documents, therefore, are all from open files and pertain to ongoing settlement efforts and litigation. The only materials withheld are those which are highly "enforcement sensitive," that is, their disclosure might well have a damaging impact upon the government's settlement or litigation efforts. For this reason, these documents, as explained more fully below, were properly withheld from the Subcommittee.

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 was technically defective, EPA sought to accommodate the Subcommittee's needs by producing files on its 160 highest-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 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 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 the 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 hold Mrs. Gorsuch 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 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 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 Case Or Controversy In Which 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.*/

> Basically, the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)."

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. [312 U.S. at 273.]

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

*/ 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).

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 those factors 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 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.

The Executive Branch is now confronted with competing obligations. On the one hand, it is ordinarily thought to have a duty to prosecute individuals who have been held in contempt by the House of Representatives.*/ On the other hand, to prosecute Mrs. Gorsuch in this situation would be inconsistent with the Executive Branch's determination that the documents in question were properly withheld under a claim of privilege. This dilemma serves to underscore the degee to which the legal interests of the parties are currently in issue.

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

*/ Although the question need not be resolved in this case, it is doubtful that 2 U.S.C. §194 can constitutionally be construed to permit one house of Congress to compel an Executive Branch prosecutor to prosecute an Executive Branch officer for contempt. Such a construction would raise serious Separation of Powers problems. See, Lee, Executive Privilege, 1978 Brigham Young Univ. L. Rev. 231, 255-260.

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 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, _____, 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. See also Zemel v. Rusk, 381 U.S. 1 (1965), where the Court stated that "[t]here are circumstances under which courts probably make exceptions to the general rule that equity will not interfere with the criminal process, by entertaining actions for injunctive or declaratory relief in advance of criminal prosecution." 381 U.S. at 19.

Cases holding that declaratory relief is not normally available except as a defense to a contempt proceeding are not applicable here. For example, a leading case of this type is Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960), cert. denied, 364 U.S. 900 (1960). There plaintiff Pauling was instructed (but apparently not subpoenaed) by the Senate Subcommittee on Internal Security to provide the Subcommittee with certain records. Faced with the choice of complying with the directive or refusing to comply and subjecting himself to a threat of being held in contempt, Pauling brought a civil action for declaratory and injunctive relief to have the court declare the directive void and enjoin any prosecution. 288 F.2d at 128. Both the lower court and the court of appeals dismissed his complaint for lack of a

justiciable controversy because the contempt process had just begun. Indeed, as the court of appeals pointed out, the date of compliance with the committee directive had not even arrived. No justiciable controversy was presented because of the prematurity of the action. See also, Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972.) These cases, however they control in another situation, are not applicable here because here the congressional process is complete and the controversy completely shaped.

In the instant situation, unlike that in Pauling, 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 be prosecuted, 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 official 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 requirements 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 damaged 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 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, 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 in 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

*/ 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.

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 held in 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.

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 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. 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 are only those which are part of the legislative process:

> 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. [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

*/ 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.

Congress." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-510, n.16.

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

Thus, for example, in Gravel v. United States, 408 U.S. 606 (1972), the Court held that, the private publication by a Senator 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, to protect the legislative process from interference. The Clause prevents civil and criminal suits against legislators in their personal capacities for their legislative activities and bars 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 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.

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

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

each, the court would review the lawfulness of Mrs. Gorsuch's actions which gave rise to the finding of 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 circumstances present here, such principles should bar review here.

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 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.*/

III. Judicial Abstention Under the Political Question Doctrine is Not Required

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

*/ Finally, even if the Speech or Debate Clause is construed to require the dismissal of all the legislator defendants, the suit can still proceed against the defendant Clerk of the House and the defendant Doorkeeper of the House, each of whom, participated in the activities giving rise to this suit. As the Supreme Court held in Powell v. McCormack, 395 U.S. 486, 506, (1969) the petitioners were "entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell." The Speech and Debate Clause, thus, did not bar "judicial review of the constitutionality of the underlying legislative decision" even though the "House employees [were] acting pursuant to express orders of the House. . . . " Powell v. McCormack, 395 U.S. at 504. Since the Clerk of the House has certified the contempt citation, see exhibit ___ and the doorkeeper has delivered it to United States Attorney, they may remain in this action despite the Speech or Debate Clause.

courts had often resolved disputes concerning the allocation of power between the branches, 567 F.2d 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 right to the documents in question. 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 propositon 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 held an Executive Branch official in 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

Justice 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 was obliged to withhold the documents at issue. 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 has 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.

IV. Mrs. Gorsuch Has Fully Complied With The Subpoena

On September 15, 1982, the Subcommittee made an initial request to Mrs. Gorsuch for information concerning abandoned waste sites. That request was very broad:

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

Amended Complaint, Attachment 1 (emphasis supplied). In substance, the Subcommittee requested all information obtained by, or on behalf of, EPA under the Superfund Act.

The subpoena which issued two months later, however, was narrower in one significant respect. It called for Mrs. Gorsuch

to appear before the Subcommittee on December 2, 1982, and to produce only documents

> for those sites listed as national priorities pursuant to Section 105(8)(B) of [CERCLA].

House Report 968, 33.

In response to the Subpoena, Mrs. Gorsuch appeared before the Subcommittee on the appointed date and advised the Subcommittee that no sites had yet been listed as national priorities pursuant to Section 105(8)(B) and, accordingly, that EPA had no documents which were responsive to the subpoena.*/ The subpoena has not been amended or superseded. These facts, which cannot be disputed, demonstrate that Mrs. Gorsuch has fully complied with the subpoena. The language employed by the Subcommittee in drafting the subpoena is clear and unambiguous. There is, therefore, simply no basis or reason to construe its language more broadly, as does the Subcommittee, as calling for the production of documents other than those concerning statutorily designated national sites. The subpoena draws a clear line of demarcation between documents which concern statutorily designated national

*/ Subcommittee Hearing, December 2, 1982 ("Hearing"), at 55, 61. (Declaration of _____, Exhibit ____). As Mrs. Gorsuch pointed out to the Subcommittee, EPA had previously prepared an interim priority list of 160 sites, but that list was not the same as the national priority site list required by Section 105(8)(B). Id. at 55. The latter is a list of no less than 400 sites to be designated after opportunity for public notice and comment and possibly subject to Congressional veto. 42 U.S.C. §§9605(8)(B), 9655. On December 20, 1982, EPA published a proposed national priority site list, for public notice and comment. Cite. There will be no national priority site list at least until the proposed list has been subject to public comment.

priority sites and those which do not, requiring production of the former and exempting production of the latter.

While it is true that Mrs. Gorsuch made large numbers of EPA documents available to the Subcommittee at the hearing, she made it clear that she was producing those documents as a matter of accommodation and in a spirit of cooperation, to meet the apparent concerns of the Subcommittee, rather than because they were subject to the subpeona. Hearing Tr. at 55. Indeed, by the date of the Hearing, EPA had already been producing such documents to the Subcommittee in response to the Subcommittee's initial request for documents on September 15, 1982.

Even if this Court concluded that the subpoena is susceptible of more than one reasonable construction, that fact would be fatal to the contempt citation. No conviction for failure to comply with a Congressional subpoena may be sustained unless the obligations imposed by the subpoena are conveyed to the alleged contemnor "with a reasonable degree of certainty." Flaxer v. United States, 358 U.S. 147, 151 (1958). See also Scull v. Virginia, 359 U.S. 344, 353 (1959); Watkins v. United States, 354 U.S. 178, 208-209, 214-215 (1957). Superimposing upon the subpoena a construction which is at variance with its plain terms

would deprive the subpoena of any reasonably certain meaning.*/

The plain language of the subpoena calls only for the production of documents concerning statutorily designated national priority sites. Since there were no such sites, Mrs. Gorsuch has fully complied with its terms.

V. 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.

*/ At the conclusion of the hearing in December 2, 1982, the Subcommittee indicated its disagreement with Mrs. Gorsuch's understanding of the scope of the Subpoena by citing her for contempt. Hearing, 145-48. But at no time during the hearing did the Subcommittee articulate what it considered to be the proper scope of the Subpoena. Hearing, 1-148 (esp. 55, 61, 91-92, 123, 134-35).

1,119 (1976) (per curiam). As the Supreme Court stated in Buckley v. Valeo: "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the Summer of 1787." Id. at 124. Accordingly, the Court emphasized that "[t]his Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." Id. at 123.

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); Humphreys' Executor v. United States, 295 U.S. 602 (1935). 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. As we will now demonstrate, the documents here at issue are similarly 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

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 can protect 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.

There are several distinct aspects of the executive privilege doctrine. 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). 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, 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 to 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 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).

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. 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 Executive 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. Id. at 324-325.

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. For example, the importance of not disclosing the identity of a confidential source or confidential information in both civil and criminal cases cannot be overstated. Where the government required to divulge identities despite a promise of confidentiality, the chilling effect of such a requirement would deprive the government of needed information in future law enforcement efforts. 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 independent branch of government. Were the documents at issue here disclosed to congressional subcommittees, members of Congress would then possess the information necessary to participate in or interfere with ongoing enforcement actions, a power that has been constitutionally delegated to the Executive Branch. Congress would possess the ability to 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.

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*/ 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).

As stated by the Attorney General in his letter to Chairman Dingell, the assertion of privilege in this case to preclude disclosure to the Congress of 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. 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. Id. at 2. 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."

Exhibit ____, p. 2.

The Attorney General, in explaining the bases for the privilege, 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 assurance 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

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*/ 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. Cite. Since such consent could be given any time in the future, this assurance fails to provide the Executive the protection 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 more control over its 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.

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 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. The majority of the documents contain specific timetables that outline 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. All of the documents that have been withheld describe projected events in the law enforcement process. Affidavit.

In determining whether investigatory files are privileged in a given case, 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 government 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. Knowledge of the government's bottom-line figure for settlement would eliminate any leverage the government would have in negotiating the best possible settlement. Furthermore, the documents also discuss possible allocation of costs among the various parties responsible for a given waste site. Incentive for those tentative allocations would be destroyed ~~here settling for an amount above~~ after each party became aware of the government's position concerning the other parties involved. (Affidavit)

Settling for an amount above

Second, the information sought is not factual data, which has already been made available to the Subcommittee. Rather, the documents withheld, which consist of less than 1% of the total number of documents requested by the Subpoena, consist of legal and strategical analyses on individual cases, lists of potential witnesses, settlement considerations and similar materials. Accordingly, the materials 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 become closed.

Third, the withheld documents include potential targets for enforcement actions and potential witnesses for those actions. Accordingly, the disclosure of those names could have great impact upon those persons identified, either by deterring the witness from coming forward or by harming the reputation of innocent persons. Since much of the information relied upon by EPA in investigating hazardous waste sites comes from outside sources, disclosure of witnesses could severly undercut enforcement efforts both in the present and in the future. (Affidavit)

Fourth, the Subcommittee rejected the proposal of the Executive 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

We recognize that executive privilege is not absolute and may be overcome by a specific showing that another branch of

government has a compelling need for the documents in question. 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 Repre-

sentatives 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 proferred documents. 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 small amount 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 the enforcement

*/ 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.

files to the Subcommittee as cases are closed. 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.

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; notes discussing the remedies considered by EPA to clean up particular sites; 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 guarantees 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,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, by their undersigned counsel, hereby move this Court pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for an order granting summary judgment in their favor in that there exists no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law. This motion is based upon the attached declarations, exhibits and supporting memorandum of points and authorities, to which the Court is respectfully referred.

Respectfully submitted,

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

O R D E R

Upon consideration of Plaintiffs' Motion for Summary Judgment, supporting memorandum of points and authorities, the declarations of Carol Dinkins, Robert Perry and Stanley S. Harris and the exhibits filed in conjunction therewith, and the Court finding that there exists no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law, it is this ____day of _____, 19___, hereby

ORDERED that Defendants' Motion to Dismiss is denied and it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is granted and it is further

ORDERED that judgment be entered in favor of plaintiffs.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' STATEMENT
OF MATERIAL FACTS

Pursuant to Local Civil Rule 1-9(h), plaintiffs submit that there is no genuine issue as to the following material facts:

1. On November 22, 1982, a subcommittee of the House of Representatives, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation ("the Subcommittee"), served a subpoena upon Anne M. Gorsuch, Administrator of the Environmental Protection Agency ("EPA"). Declaration of Robert M. Perry ("Perry Dec."), para. 20 and Exhibit D.

2. That subpoena, as interpreted by the Subcommittee, called for Mrs. Gorsuch to produce to the Subcommittee all documents (except shipping papers and other commercial, business, contractor or technical documents) from EPA's files on hazardous waste sites designated by EPA for priority enforcement of the Comprehensive Environmental Response, Compensation and Liability Act of 1980,

42 U.S.C. §9601 et seq., commonly known as the Superfund Act. Perry Dec., para. 20 and Exhibit D; H.R. Rep. No. 968, 97th Cong. 2d Sess. (1982) ("Committee Report").

3. On November 30, 1982, the President told Mrs. Gorsuch to cooperate with the Subcommittee to the fullest extent possible but, invoking Executive Privilege, also instructed her not to produce from open Superfund Act law enforcement files any sensitive law enforcement documents, i.e., documents generated by attorneys and other enforcement personnel reflecting enforcement strategy, legal anaysis, 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. Perry Dec., paras. 22 and 23 and Exhibit E at 1-2 and 4.

4. Upon receiving that instruction, EPA intensively reviewed sensitive law enforcement documents from its open Superfund Act law enforcement files to insure that no documents would be withheld from the Subcommittee except as instructed by the President. Documents determined by EPA to be subject to the President's instruction were also reviewed by the Department of Justice under the supervision of the Assistant Attorney General in charge of the Land and Natural Resources Division. As of December 15, 1982, EPA and the Department of Justice had identified sixty-four documents as being subject to the President's instruction. The disclosure of any of those documents would impair the government's ability to conduct Superfund Act enforcement proceedings effectively. Those

documents were therefore withheld from the Subcommittee. The Subcommittee was provided with lists which identified each of those sixty-four documents and briefly explained why each document was being withheld. Perry Dec., paras. 16-18, 24 and Exhibit G; Declaration of Carol E. Dinkins ("Dinkins Dec."), paras. 6-9.

5. On December 2, 1982, the return date of the subpoena, Mrs. Gorsuch appeared before the Subcommittee and advised it that, pursuant to the President's instruction, she would not produce sensitive law enforcement documents from open Superfund Act law enforcement files. She also stated that EPA had begun to gather for production to the Subcommittee all EPA files on the 160 hazardous waste sites designated by EPA for interim priority Superfund Act enforcement. Those files included more than 750,000 pages of documents. Perry Dec., paras. 25-26 and Exhibit C at 3-5.

6. Mrs. Gorsuch brought with her to the Subcommittee hearing, and tendered to the Subcommittee, the first five file boxes of such documents, but the Subcommittee declined to accept delivery of those documents. Perry Dec. para. 26 and Exhibit C at 6.

7. Neither at the hearing nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter. Perry Dec., para. 25.

8. At the conclusion of the hearing, the Subcommittee passed a resolution finding Mrs. Gorsuch to be in contempt for failure to comply with the subpoena and ordering that the matter be reported to the full Committee. On December 10, the Committee passed a resolution reporting the matter to the full House of Representa-

tives together with a recommendation that Mrs. Gorsuch be cited for contempt of Congress. On December 16, the House of Representatives cited Mrs. Gorsuch for contempt of Congress. The Subcommittee, Committee and House resolutions were all based on her refusal, pursuant to the instruction of the President, to produce sensitive law enforcement documents from open Superfund Act law enforcement files. On December 17, the Speaker and Clerk of the House of Representatives certified the contempt citation to the United States Attorney for the District of Columbia for criminal prosecution pursuant to 2 U.S.C. §§192 and 194. On the same date, the Sergeant-at-Arms of the House of Representatives delivered the certification to the United States Attorney. Perry Dec., paras. 27, and 29-31 and Exhibit I; Declaration of Stanley S. Harris ("Harris Dec."), para. 2 and Exhibit A; Committee Report at 55 and 70.

9. On December 27, 1982, the United States Attorney advised the Speaker of his conclusion that "it would not be appropriate for me to consider bringing this matter before the grand jury until the civil action [the action of bar] has been resolved." The Chairman of the Subcommittee subsequently called for the impeachment of the Attorney General and the United States Attorney. On January 3, 1983, the Speaker wrote to the United States Attorney, asserting that the pendency of this civil action did not alter the United States Attorney's duty to prosecute Mrs. Gorsuch. 129 Cong. Rec. H30-31 (daily ed. January 3, 1983) (Plaintiffs' Points and Authorities, Attachment A); Harris Dec., para. 3 and Exhibits B and C.

10. The defendants' demand for sensitive law enforcement documents from EPA's open Superfund Act law enforcement files

and their effort to prosecute Mrs. Gorsuch for her refusal to produce such documents have impaired EPA's ability to enforce the Superfund Act by: (1) impairing EPA's ability to assure enforcement personnel that sensitive law enforcement information, if reduced to writing, will not be prematurely disclosed; and (2) impairing EPA's ability to assure potential informants that, if they cooperate with the Agency, their identities and the information they provide will be effectively protected from premature disclosure. Perry Dec., paras. 32 and 33.

11. The Subcommittee has not demonstrated that the production of sensitive law enforcement documents from open Superfund Act law enforcement files is needed by the Subcommittee in order for it to perform its investigative or oversight functions. Perry Dec., para 25 and Exhibit C at 4.

Respectfully submitted,

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

The plaintiffs, by their undersigned counsel, respectfully move this Court for permission to file a Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, and in Opposition to Defendants' Motion to Dismiss, the text of which exceeds the 45 page limitation of Local Rule 1-9(e). In support of this motion, plaintiffs submit that this action raises critically important constitutional issues that have given rise to this unique suit. By this suit we seek from the Judicial Branch a resolution of the constitutional impasse that now exists between the other two coordinate branches of the federal government. Consequently, the memorandum requires a thorough discussion of the legal issues raised by the suit.

For the foregoing reasons, plaintiffs seek permission to file this Memorandum notwithstanding the page limitation. The Memorandum is being filed conditionally with this Motion.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

RICHARD K. WILLARD
Deputy Assistant Attorney General

LEWIS K. WISE

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of Plaintiffs' Motion for Leave to File a Points and Authorities in Excess of the Page Limitation of Local Rule 1-9(e), it is this ____ day of _____, 19__, hereby

ORDERED, that Plaintiffs' Motion is granted and it is further

ORDERED, that the Clerk shall file Plaintiffs' Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss previously filed conditionally.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT AND JOIN THE SERGEANT-AT-ARMS OF THE HOUSE OF REPRESENTATIVES AS A PARTY DEFENDANT

Pursuant to Federal Rules of Civil Procedure 15(a) and 19(a), plaintiffs, by their undersigned attorneys, hereby move this Court for leave to file their Second Amended Complaint. The Second Amended Complaint joins as a party defendant in his official capacity the Sergeant-At-Arms of the House of Representatives, Mr. Jack Russ. Plaintiffs had included the Sergeant At Arms as a party defendant in their original complaint, filed December 16, 1982, but mistakenly omitted the Sergeant-At-Arms as a party in the First Amended Complaint, filed December 29, 1982. Because the Sergeant-At-Arms participated in the delivery of the certification of the contempt resolution by the House of Representatives to the United States Attorney,*/ he is a necessary and proper party to this action.

The Second Amended Complaint also alleges that defendant the Clerk of the House participated in certying the contempt resolution to the United States Attorney. Plaintiffs mistakenly

*/ See Declaration of Stanley S. Harris, ¶2, submitted in support of Plaintiffs' Motion for Summary Judgment.

omitted that allegation in the First Amended Complaint.

The Second Amended Complaint is being filed conditionally with this Motion.

Respectfully submitted,

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Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

RICHARD K. WILLARD
Deputy Assistant Attorney General

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of Plaintiffs' Motion for Leave to Amend the Complaint and Join the Sergeant At Arms of the House of Representatives as a party defendant to this action, it is this ____ day of _____, 19___, hereby

ORDERED that plaintiffs' motion is granted and it is further

ORDERED that the Clerk shall file Plaintiffs' Second Amended Complaint previously filed conditionally.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, c/o U.S. Department of Justice 9th St. & Pennsylvania Ave., N.W. Washington, D.C. 20530 and ANNE M. GORSUCH, ADMINISTRATOR, 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., CLERK OF THE HOUSE OF REPRESENTATIVES; JACK RUSS, SERGEANT AT ARMS OF THE HOUSE OF REPRESENTATIVES; AND JAMES T. MOLLOY, DOORKEEPER OF THE HOUSE OF REPRESENTATIVES, Defendants.	Civil Action No. 82-3583

SECOND AMENDED COMPLAINT
(For Declaratory Relief)