v. United States, 360 U.S. 109 (1959), there is no reason why, in the compelling and unique circumstances present here, such principles should bar review in this case.

In arguing that the Speech or Debate Clause bars this action, defendants focus largely on the impropriety of the issuance of any injunctive or "coercive" relief against members of the House. While it is true that the original complaint in this action contained a prayer for injunctive relief, the amended complaint seeks declaratory relief only.*/ Much of the defendants' arguments are therefore no longer applicable. For example, defendants argue that Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), bars this suit because the Supreme Court there rejected the proposition that a court could "enter a 'coercive order' which in context would mean that the Subcommittee would be prevented from pursuing its inquiry by use of a subpoena to the bank." 421 U.S. at 512. Defendants' brief at 16-17. But in Eastland, injunctive and declaratory relief were sought immediately after the issuance of the Subcommittee subpoena. In that context, injunctive or declaratory relief would have effectively interfered with the ongoing investigation. Here, on the other hand, a declaratory judgment will produce none of the coercive effects that would have resulted had either an injunction or a declaratory judgment been entered in Eastland.

*/ At the time the original complaint was filed, the contempt resolution had not been certified or delivered to the United States Attorney.

Indeed, as noted above, the situation here is similar to that in United States 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 or Debate principles barred the suit because a judicial resolution of the dispute would interfere with its investigatory activities.

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

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

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

C. The Clause May Not Be Asserted To Immunize Non-Legislative Activities.

It is well-established that judicial review of a congressional action is available if employees of the Congress take steps to implement that action beyond the purely legislative sphere. As noted by the defendants in their brief at p. 15, the defendant Clerk of the House certified the contempt resolution to the United States Attorney for prosecution under 2 U.S.C. § 194. Moreover, the defendant Sergeant-at-Arms of the House*/ delivered the contempt citation to the United States Attorney. Each of these defendants, therefore, was responsible for carrying out the House resolution that the contempt citation against Mrs. Gorsuch be certified and delivered to the United States Attorney for prosecution. In these circumstances, the Supreme Court has held that suits can be maintained against the congressional employees in order to review the legality of the underlying legislative order pursuant to which they were acting.

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

*/ The Sergeant-at-Arms was mistakenly omitted from the Amended Complaint. We have, therefore, moved to amend the Complaint to join him as a party defendant to this action.

arguing that the Speech or Debate Clause protected both the legislators and their employees from suit. The Supreme Court refused to dismiss the employees and reaffirmed the doctrine that:

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

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

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

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

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

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

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

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

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*/ The Gravel analysis suggests that a distinction between legislators and legislative employees may not be appropriate, particularly in an action for declaratory relief. But see Powell v. McCormack, 395 U.S. at 517-18. Under the Gravel approach, however, plaintiffs would be entitled to seek declaratory relief against all defendants who participated in conduct outside the scope of "protected legislative acts," including Members of Congress.

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

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

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

Under the Gravel analysis, the certification and delivery of the contempt citation to the United States Attorney in an attempt to compel criminal prosecution is not a protected legislative activity.*/ Those acts have nothing to do with "speech or debate" nor are they an integral part of the House's internal deliberative and communicative processes. Instead, the

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*/ The Speaker's letter of January 5, 1983 (Harris Dec., Exhibit C), which explicitly seeks to compel the United States Attorney to bring a criminal prosecution against Mrs. Gorsuch, is also not a protected legislative act. See United States v. Johnson, 383 U.S. 169 (1966).

certification*/ and delivery of the contempt citation constitute an effort to enforce the legislative decision, just as the physical exclusion of Rep. Powell by the House doorkeeper in Powell and the arrest of the witness in Kilbourn constituted efforts to enforce the legislative decisions reached in those cases.**/ As the Court stated in Eastland, 421 U.S. at 508, the arrest by the Sergeant-at-Arms of a witness who had been held in contempt was unprotected because it was not "essential to legislating." For the same reason, the certification and delivery in the present case are not protected legislative activities. Therefore, although the Speech or Debate Clause may immunize the Member defendants for their legislative activities in this case, that immunity extends only through the vote on the contempt resolution by the House. Beyond that point, the legislative process ends and the enforcement process begins; any acts by the defendants beyond that vote can therefore form the basis for judicial resolution of the underlying controversy as in Powell and Kilbourn.

*/ The House argues that the certifiction of bills and resolutions are protected legislative actions and that the Department of Justice took this position in a recent case. See Defendants' Brief at 15, 20. Ordinarly, this proposition is accurate because the certification is part of the process by which a bill or resolution becomes law. Here, however, 2 U.S.C. § 194 provides that certification is a necessary step in obtaining criminal prosecution by the United States Attorney, an activity which is not part of the process by which a bill or resolution becomes law.

**/ Indeed, the statutes pursuant to which the contempt citation was certified and delivered, 2 U.S.C. § 192 and 194, were enacted to provide Congress with an additional means to enforce its contempt resolutions as an alternative to the method employed in Kilbourn. See Cong. Globe, 34th Cong., 3d Sess. 427 (remarks of Rep. Davis) (the statute "makes a mere substitution of a judicial proceeding for the ordinary proceeding by attachment by a parliamentary body"), quoted in Defendants' Brief, at 28-29.

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

The Executive has asserted a privilege to withhold only a smattering of hard-core, enforcement sensitive documents. That action was ordered by the President because he and the Attorney General believed disclosure of the documents could compromise effective law enforcement, a responsibility given the Executive by the Constitution. The defendants have done nothing to satisfy their burden of showing that the privilege was wrongly asserted or that they had a compelling need for the documents.

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

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

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

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

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

Congress does have the power to investigate. That power is broad, but it is not without limitations. Watkins v. United States, 354 U.S. 178, 187 (1957). 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 uses its power to investigate in a manner that threatens to impair the Executive's ability to fulfill constitutional responsibilities, 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 of Appeals, 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.

This case is like Senate Select Committee. As will be demonstrated below, the documents are 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 necessity for the Executive to preserve its ability faithfully to execute the law.

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

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

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

Perry Dec., Exhibit E at 4. 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.

The doctrine of executive privilege defines the constitutional authority of the Executive Branch to protect documents or information in its possession from public disclosure and from the compulsory processes of the legislative and judicial branches. See United States v. Nixon, 418 U.S. 683 (1974). The privilege protects two different constitutional 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.

Executive privilege may properly be invoked to protect several distinct aspects of the Executive's constitutional responsibilities. 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. 1978). See also United States v. Nixon, 418 U.S. at 706. It may also be invoked to shield confidential deliberative communications which have been generated within the Executive Branch from compulsory disclosure, unless there is a strong showing that access to the documents is critical to the responsible fulfillment of a constitutional function. See Nixon v. Administrator of General Services, 433 U.S. 425, 441-55 (1977); United States v. Nixon, 418 U.S. 683, 711-12 (1974); Senate Select Committee v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974)

(en banc). Similarly, it may be invoked to protect from disclosure investigative files compiled for law enforcement purposes. See Ass'n For Women In Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977).

The assertion of a claim of executive 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 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 "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. at 705. Such "temper[ed] candor" in executive deliberations would impede the President's performance of his constitutional duty to exercise the Executive powers granted in Art. II, § 3 of the Constitution. See Nixon v. Administrator of General Services,

433 U.S. 425 (1977); United States v. Nixon, 418 U.S. at 705.*/

Because its invocation is infrequently challenged in court, there has not been much litigation in the area of executive privilege. However, courts have long recognized the need for the privilege in the area of civil discovery with respect to "intragovernmental 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).

In addition, the courts have recognized that 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 (D.C. Cir. 1977). See United States v. A.T.&T., 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., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224-25 (1978); Black v. Sheraton Corp.,

*/ 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).

564 F.2d at 535, 536; Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.), cert. denied, 409 U.S. 882 (1972); 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 Corp. of America, 564 F.2d at 542.

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, endangering the safety of confidential informants or prejudicing the rights of those under investigation. 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., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224-25 (1978); Center for National Policy v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974); Aspin v. Department of Defense, 491 F.2d 24, 29-30 (D.C. Cir. 1973); Frankel v. SEC, 460 F.2d 813, 817-18 (2d Cir.), cert. denied, 409 U.S. 882 (1972); 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. 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 were distributed beyond those persons necessarily involved in the investigation and prosecution process. See Perry Dec., paras. 17, 18, 24, 32 and 33; Dinkins Dec., paras. 6-9.*/

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

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

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

independent branch of government. Were the documents at issue here disclosed to congressional subcommittees, members of Congress would become partners in the enforcement process, possessing the information necessary to participate in or interfere with ongoing enforcement actions. The Executive Branch would lose control of the documents and thus would be unable to ensure that the strengths and weaknesses of the government's case not be revealed to the targets of the case under development.

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

> 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.

Perry Dec., Exhibit E at 5.

Executive privilege has been invoked throughout the history of the United States by virtually all of our Presidents in response to Congressional demands for information. See The Committee Report, p. 90 (Memorandum for the Attorney General, History of Executive Privilege vis-a-vis Congress, December 14, 1982). Many of these claims were made to prevent the disclosure of investigatory files. See id., p. 94-95 (President Monroe); p. 96-97 (President Jackson); p. 99-100 (President Tyler); p. 103

President Buchanan); p. 103-04 (President Lincoln); p. 104 (President Johnson); p. 105 (President Cleveland); p. 106-07 (President Theodore Roosevelt); p. 107 (President Coolidge); p. 107-08 (President Franklin Roosevelt); p. 109-110 (President Truman). See also Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1400-02 and nn. 61-67.

Thus, it has been the general policy of the Executive Branch throughout this Nation's history to withhold from Congress sensitive documents from open law enforcement files except in the most extraordinary circumstances. For example, President Tyler invoked executive privilege against a request by the House of Representatives to the Secretary of War to produce investigatory reports submitted to the Secretary by Lieutenant Colonel Hitchcock concerning his investigation into frauds perpetrated against the Cherokee Indians. See The Committee Report, p. 99-100. Similarly, President Truman invoked the privilege and directed officials not to disclose files bearing on the loyalty of certain State Department employees after the Senate subpoenaed those files. See id. at 109-110. And President Franklin Roosevelt directed Attorney General Jackson to invoke the privilege concerning a House request to view certain FBI records. See id. at 107-08. As Attorney General Robert Jackson stated to Congress over forty years ago:

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

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

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

Attorney General Smith also relied upon the reasoning of former 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 F, 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, Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

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

Perry Dec., Exhibit F, p. 6.*/ There are, therefore, a number of compelling reasons why documents such as those at issue here must remain privileged and why "[a]t bottom, the President has the responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch." Id., p. 7.

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

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

*/ Guarantees of confidentiality by the Levitas Subcommittee can not overcome the concern over the integrity of law enforcement files in this instance either. Rule XI, cl.2, § 706c of the Rules of the House of Representatives provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all members of the House shall have access thereto . . . ." (emphasis added). Thus, Subcommittee access to the documents is equivalent to access by all of the members of the House of Representatives and, accordingly, to the general public. Nor will an offer to receive the privileged documents in "executive session" pursuant to Rule XI, cl.2, § 712 of the Rules of the House of Representatives alleviate that concern. The only protection given the documents by that provision is that they shall not be made public without the consent of the Subcommittee. Since such consent could be given any time in the future, this assurance fails to provide the Executive the protection and control to which it 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, the Executive can assert control over Executive Branch employees through a variety of potential sanctions, including loss of employment. With disclosure of documents to Congress, the Executive Branch loses that power to ensure the confidentiality of its records. Ultimately, it is the Executive's responsibility to enforce the law and to maintain the confidentiality of information that is necessary for this purpose.

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 a 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. Cf. Center for National Policy Review v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974).

The documents which form the focus of this dispute are all part of open law enforcement case files. A number of cases are in early stages of investigation, where public disclosure could be particularly destructive. Many of the documents 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. Perry Dec., para. 16.

Threatened disclosure of these documents raises serious fears. The documents in question all stem from ongoing enforcement actions which EPA and/or the Department of Justice are developing for litigation or which are actually being litigated in the courts. Thus, disclosure of these documents 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, EPA would be at an enormous disadvantage in attempting to negotiate an environmentally appropriate settlement agreement with a party who knew EPA's bottom-line settlement position, its negotiation strategy, and its perception of the strengths and weaknesses in the government's case. In addition, the withheld documents identify potential targets for enforcement actions; the disclosure of those names could have great impact upon those persons identified, by harming the reputation of possibly innocent persons.

Moreover, the information sought is not factual data, which has already been made available to the Subcommittee. Rather, the documents withheld consist of legal and strategic analyses of individual cases, lists of potential witnesses, settlement considerations and similar materials. These are the kind of work product documents that would be immune from production under Fed. R. Civ. Proc. 26(b)(3).

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

Defendants seem to assert an absolute right to any documents held by the Executive; at least, they insist that the House should be the sole arbiter of what documents the Executive may withhold.

As discussed above, that simply is not the law. Instead, while executive privilege is not absolute, it may be overcome only by a specific showing that Congress has a compelling need for the documents in question. See pp. 54-55, supra. In some cases, there may be a need for delicate balancing of competing interests. Here, however, the decision is an easy one because the Subcommittee has made no showing whatsoever of a specific need for the documents in question.

The power of Congress to conduct investigations is inherent in the legislative process. When this "power of inquiry" is directed at the Executive Branch, however, it is bounded by principles imposed by the separation of powers doctrine. See Senate Select Committee v. Nixon, supra. Thus, 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. 54, 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. A.T.&T., 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).

The subcommittee here has not and indeed cannot show any need -- much less 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." The Committee Report, p. 61. (Legal Memorandum of the General Counsel to the Clerk of the House of Representatives to Chairman Levitas Regarding Executive Privilege, December 8, 1982). 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. What is critical, however, is that the House cannot possibly make a showing that they are necessary because the House has not reviewed the documents actually made available to it. In fact, the Subcommittee actually refused to inspect the documents produced. Perry Dec., para. 25. Since the Subcommittee refuses to inspect the tremendous bulk of material that has been offered, it cannot possibly show any compelling need for the miniscule number of documents that have been withheld.*/

*/ Moreover, the Subcommittee has not shown that whatever information it may have wanted from EPA could not have been obtained by some means other than the production of sensitive law enforcement documents from open Superfund Act enforcement files.

Moreover, the access that has been denied to the Subcommittee is only temporary. EPA has offered to turn over memoranda in the enforcement files as they lose their enforcement sensitivity. The Subcommittee has failed to demonstrate why its need to view these documents is critical at this point and cannot wait until the sensitive nature of the documents has 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 hazardous waste sites; correspondence between EPA and the generators of the hazardous waste; records of interraction with state and local government officials; correspondence with responsible parties, contractors, state officials and representatives of other federal agencies; memoranda discussing the allocation of monies to particular sites by EPA; cooperative agreements arranged with the states involved; and memoranda reflecting the process of having the Superfund Office begin working on a site while initiating settlement negotiations with the contractor. Perry Dec., para. 16. 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.

Accordingly, defendants have not and cannot meet their burden of demonstrating a specific, articulable need for the documents in question that would overcome the presumption of the asserted privilege. They have 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, they continue to rely on the Subcommittee's 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 defendants 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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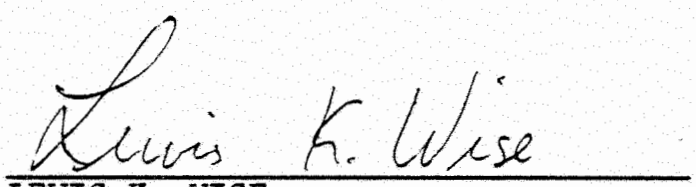
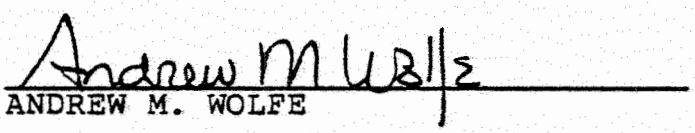


LEWIS K. WISE



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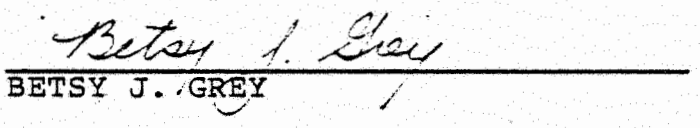

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA Plaintiff, v. SEYMOUR RECYCLING CORP., et al., Defendants.	)	Civil Action No. IP 80-457-C

MEMORANDUM

This matter comes before the Court for consideration of a proposed Consent Decree which the United States has lodged with the Court. The proposed Consent Decree provides for a surface cleanup of the approximately 60,000 barrels of toxic chemicals, bulk storage, and contaminated soil at the Seymour Recycling Site in Seymour, Indiana.

The United States filed the original complaint in this action on May 19, 1980, alleging violations of Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973 and Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321 against various parties including those who owned and operated the Seymour Recycling Site. Named defendants answered the complaint, and discovery proceeded.

On October 26, 1982, the United States filed with this Court an amended complaint adding additional allegations as to the original defendants under the Comprehensive Environmental Response, Compensation, and Liability Act (known as "CERCLA" or "Superfund"), 42 U.S.C. § 9606 and § 9607, enacted after the filing of the original complaint. In addition, the United States named in the amended complaint 24 new defendants, who are alleged to have "generated and caused to be transported solid and hazardous wastes and hazardous substances to the Seymour Site for handling, storage, treatment, or disposal." Motions to intervene were filed by the State of Indiana and the County of Jackson on October 26, 1982. On the same day the United States, the State of Indiana, the County of Jackson, Indiana, the City of Seymour, Indiana, the Board of Aviation Commissioners of Seymour, Indiana, and the 24 companies who were the new defendants added by the amended complaint filed a proposed Consent Decree with the Court.

This Consent Decree provides a mechanism by which the surface cleanup of the Seymour Recycling Site may promptly occur. The Decree provides that each of the 24 companies shall, within 15 days after the entry of the Decree, pay to the Seymour Site Trust Fund, established at a bank in Indianapolis, the sum for that company which is shown in Exhibit A to the

Decree.[1] The Trustees of the Fund shall use the money in the Trust Fund to pay Chemical Waste Management, a firm specializing in hazardous waste removal, to perform the surface cleanup at the Seymour Site. The precise scope of work to be done by Chemical Waste Management is set forth in detail in Exhibit B to the Consent Decree. The Decree also provides that Chemical Waste Management shall be responsible for the completion of the work regardless of its ultimate actual cost and that Chemical Waste Management shall purchase a performance bond in the amount of $15,000,000, which bond shall further assure completion of the work. The Decree specifies the obligations of Chemical Waste Management to purchase and to maintain in force insurance policies to protect the United States, the State and the public. It is contemplated that this project shall take

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[1]The 24 companies and the amount which each shall pay is as follows: International Business Machines Corporation -- $2,241,001; General Motors Corporation -- $1,032,961; E.I. du Pont de Nemours & Company, Inc. -- $682,805; General Electric Company -- $665,297; Western Electric Company, Inc. -- $385,172; United Technologies Corporation -- $350,156; Atlantic Richfield Company on behalf of The Anaconda Company, Anaconda Wire & Cable Company, Anaconda Aluminum Company, Anaconda Industries, and Anaconda Magnet Wire -- $245,109; Borg-Warner Chemicals, Inc. -- $245,109; RCA Corporation -- $175,078; Bemis Company Inc. -- $175,078; Ford Motor Company -- $175,078; Whirlpool Corporation -- $140,062; McDonnell Douglas Corporation -- $105,047; Dow Corning Corporation -- $105,047; Pennwalt Corporation -- $100,000; Owens-Illinois, Inc. -- $100,000; The Procter & Gamble Company -- $100,000; General American Transportation Corporation -- $100,000; American Can Company -- $100,000; Olin Corporation -- $100,000; AM General Corporation -- $100,000; Cummins Engine Company Inc. -- $100,000; NCR, Corp. -- $100,000; Waste Resources of Tennessee, Inc. (an affiliate of Chemical Waste Management, Inc.) -- $100,000.

approximately one year to complete. The Decree provides for continuing observation and monitoring of the progress of the work by the United States and the State as well as their approval of the satisfactory completion of the work.

The Decree contains a provision requiring the preservation of documents relating to their business transactions with Seymour Recycling Inc. by the 24 companies. It contains a provision by which the United States, the State and the local governments covenant not to sue, execute judgment or take any civil judicial or administrative action against the 24 companies.

At the time of lodging, the Court set a hearing on the Consent Decree for November 10, 1982. On October 29, 1982, pursuant to its regulations published in 28 CFR 50.7, the United States Department of Justice published notice in the Federal Register, 47 Fed. Reg. 49107, of the lodging of the Consent Decree and invited public comment on it. The public comment period which is normally thirty (30) days was shortened to ten (10) days, pursuant to these regulations, because in the judgment of the Department of Justice there was a need to begin the surface cleanup expeditiously to abate a serious public health hazard because the advent of winter in the Seymour area could adversely affect the ability of the contractor to begin work at the Site.

In response to the Federal Register notice, comments were received from sixteen corporations. No comments were received

from any individual citizens. On November 10, the United States filed with the Court copies of comments which it had received as well as its Response to those comments.

At the November 10 hearing, the United States explained the background to the Decree, and all interested persons, including those who were objecting to the entry of the Decree and were not a party in the action, were provided with an opportunity to participate in the hearing and to present their various positions to the Court. At this hearing, representatives of several objecting companies made statements to the Court. At the conclusion of the hearing the Court indicated, in response to objections that the comment period was too short, that the period for public comment would be extended to November 26, 1982, and that a further hearing would be scheduled by the Court for November 30. Several additional comments were received during this period. These were filed with the Court along with the Response of the United States to the Comments.

At the hearing on November 30, the Court once again permitted all interested persons, including those who were not parties in the action, to participate and to present any objections which they might have to the Decree. Again, several objectors made statements to the Court. There were no requests made for formal intervention, notwithstanding the government's statement that it would not oppose such intervention. Those participating in the hearing on November 30 included, in addition to the United States, representatives of the City of

Seymour and the Seymour Aviation Board, the State of Indiana, the Seymour Chamber of Commerce, the League of Women Voters of Seymour, representatives from companies within the group of 24, and representatives of companies opposing the decree. The United States presented sworn testimony from an official of Chemical Waste Management, from an official of the Environmental Protection Agency of the United States Government, and from two officials from the State of Indiana. An opportunity was provided for cross-examination of these witnesses. Finally, in addition to the materials submitted by the Department of Justice and the information presented at the hearings on November 10 and November 30, a number of comments about the Consent Decree were submitted directly to the Court. The United States filed its Supplemental Response to Comments as it is required to do so by its regulations. See 28 C.F.R. 50.7. After consideration of the comments, the United States continues to advocate the entry of the proposed Decree and gives its consent to the entry of the Decree.

The Court has concluded, based upon a careful review and consideration of all the information presented to it, that the Court should approve the Consent Decree. The surface cleanup authorized by this Decree is a very valuable and important part of the overall cleanup of the Seymour Site, which is in the public interest and particularly in the interest of those citizens affected by the Site. The Court is persuaded that time is of the essence in commencing this cleanup before the

onset of winter. Accordingly, this cleanup should proceed as promptly as possible without any further delay.

In deciding whether to approve a proposed decree, a court must inquire whether the decree is consistent both with the Constitution and with the mandate of Congress. See United States v. Kitchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977); United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). Second, the court "must assure itself that the terms of the decree are fair and adequate." See United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. at 1072. Finally, the court must inquire whether the settlement is a reasonable one. See In re Corrugated Container Antitrust Litigation, 659 F.2d 1322, 1325 (5th Cir. 1981), cert. denied, 102 S.Ct. 2283 (1982), cert. denied, 102 S.Ct. 2308 (1982). The underlying purpose of the court in making these inquiries is to determine whether the decree adequately protects the public interest. United States v. Ketchikan Pulp Co., supra, 430 F. Supp. at 86. The court "must eschew any rubber stamp approval in favor of an independent evaluation," United States v. Hooker Chemicals and Plastics Corp., supra, 540 F. Supp. at 1072, but because of the clear public policy favoring settlements the court must not substitute its judgment for that of the parties. See Airline Stewards v. American Airlines, 573 F.2d 960, 963 (7th Cir. cert. denied, 439 U.S. 876 (1978).

(1) Legality. With regard to the factors of legality and constitutionality, no objection has been raised to the entry of the Decree. Those statutes under which the amended complaint has been filed empower the United States to bring enforcement actions. See 42 U.S.C. § 9606, 42 U.S.C. § 6928, 42 U.S.C. § 1321(e). Furthermore, the authority of the United States and the Attorney General to compromise during litigation is well established. See United States v. Hooker Chemicals and Plastics Corp., supra, United States v. Kitchikan Pulp Co., supra. Here the Consent Decree is not violative of any law; indeed, it furthers compliance with the statutes under which the action was brought, most particularly with Superfund. In addition, all of the parties to the Decree have consented to the jurisdiction of the Court for the purposes of this Decree.

(2) Fairness. With respect to the rights and obligations of the parties consenting to the Decree, there is no objection as to fairness. All of these parties have urged its entry. This Court has, however, looked beyond the parties consenting thereto and considered the arguments raised by non-parties, both in comments filed with the Department of Justice and in arguments presented to this Court that the entry of the Decree is unfair to them. However, no objecting party requested an opportunity to intervene in this action to offer any evidence of alleged unfairness nor asked to cross-examine any witness.

No citizen of Seymour has objected to the entry of the Decree. However, the unfairness issue has been raised by

companies who also generated and/or caused to be transported hazardous waste to the Seymour Site, but who are not included within the group of 24 companies who are a party to the Consent Decree. These objecting companies argued to this Court that the 24 companies who are parties to the Consent Decree and who shipped approximately 50% of the waste to the Site will be paying $7.7 million for the surface cleanup, while the remaining more than 300 companies who shipped the other 50% of the waste to the Site are being asked to pay in separate settlement negotiations with the United States, which are unrelated to this Consent Decree, the sum of $15 million for ground water cleanup at the Site. The Court has considered carefully and in detail the arguments being advanced by these objectors. It has decided, however, to reject these arguments on the basis of the evidence presented to the Court and arguments by counsel for the United States and for one of the 24 companies.

These facts show that the United States, mindful of its responsibility to clean up the Seymour Site in an expeditious manner in the public interest, decided to split the task into two separate parts, each of which the United States estimates comprises approximately one-half of the work required to achieve a total cleanup of the Site. The first of these parts is the cleanup of the surface at the Site. The evidence presented demonstrated that this surface cleanup must necessarily proceed before any subsurface or ground water cleanup because only when the barrels have been removed from the Site

will it be possible to clean-up the subsurface. Moreover, the evidence showed that the continued presence of leaking barrels of waste on the surface will exacerbate any groundwater contamination.

The group of 24 companies came to the United States with a proposal by which they would arrange with a contractor to perform the surface cleanup in accordance with specifications agreed to by the companies, the United States and the State, regardless of the cost of that work and regardless of cost overruns. Specifically, the Consent Decree provides a $7.7 million cash fund plus a $15 million completion bond for a total cash fund of $22.5 million to pay for completion of the work described in Exhibit B to the Consent Decree. In addition the United States may look to the contractor's assets to require completion of the work, and the contractor is obligated by the terms of the Decree to complete the surface cleanup set forth in Exhibit B to the Decree regardless of its ultimate cost.

At the same time, the United States has set in motion, through negotiation, a procedure by which each of those companies who sent waste to the Site, but are not parties to the Consent Decree may pay a fixed sum of money, based upon the volume of material which they sent to the Site, and thereby obtain a covenant not to sue by the United States. This is a "cash out" proposal which does not require these parties to arrange for the performance of any work. While in total the

sum being asked from those who are not a party to the Consent Decree is greater than the sum being paid by the 24 who are parties to the Decree, this does not render the government's approach unfair to any parties. Those who are parties to the Consent Decree took upon themselves the obligation to hire the contractor and to develop a work proposal by which the surface cleanup is to be completed without active management (but with monitoring) by the United States and without respect to cost. Those companies who are not parties to the Decree have a number of choices. They may accept the government's offer for a cash settlement in return for a covenant not to sue; they may try to form a group of their own to deal with the ground water cleanup in a manner comparable to that dealt with by the 24 companies with respect to the surface; or they may choose to litigate with the United States in which case they may end up with a smaller payment on a proportional basis than those who are in the group of 24.

One of the factors that the Court found persuasive on this issue of unfairness is that by the time of the November 30 hearing approximately 140 companies of those not part of the group of 24 decided to accept the government's "cash out" offer. Their total sum of payment will be in excess of $3 million. To the Court, the large number of acceptances of the government's "cash out" offer indicates that this offer was not unfair and that the government was dealing fairly with those who were not parties to the Consent Decree.

There is a public interest in encouraging parties to come forward first in an effort to settle enforcement cases. This is consistent with the general policy favoring the compromise of claims.

Finally, with respect to the fairness issue, no evidence, such as sworn testimony (as opposed to written statements or arguments of counsel) was ever presented to the Court on this issue by the objectors. Based upon the record before the Court as a whole, the Court finds that the United States has not dealt unfairly with those companies who are not parties to the Consent Decree.

(3) Reasonableness.

In considering the reasonableness of the consent decree, the Court has considered five factors: 1) the nature and extent of the potential hazards at the site; 2) the availability and likelihood of alternatives to the Consent Decree which would result in cleanup of the surface of the site; 3) the adequacy of the technical proposal of the work which will be undertaken; 4) the extent to which the Consent Decree furthers the goals of the statutes which form the basis for this litigation; 5) the extent to which the Court's approval of the Consent Decree is in the public interest.

At the hearing on the Consent Decree, the United States presented the testimony of Beverly Kush, employed as on-scene

coordinator for the Seymour site by the United States Environmental Protection Agency, James Hunt, Division of Land Pollution Control of the Board of Health of the State of Indiana, David Lamb, Director of the Division of Land Pollution Control of the Board of Health of the State of Indiana and Raymond W. Bock, Director of Sales and project supervisor for Chemical Waste Management, Inc. which will perform the actual cleanup work at the Seymour site. No other evidence was presented by any other party or participant in the hearing. No one chose to cross-examine the government's witnesses.

The unrebutted testimony of Kush, Hunt and Bock established that there are approximately 60,000 barrels of hazardous chemicals, numerous bulk storage tanks and laboratory chemicals present at the Seymour site. Although fenced, the site is relatively unsecure and is susceptible of vandalism or easy entry. The site is located within one-half mile of a residential area which depends on wells for drinking water. The runoff of rainwater from the site flows into a drainage ditch which leads off the site and ultimately connects with the East Fork of the White River. Beverly Kush testified that the flow of underground water in the aquifer beneath the site is away from the site towards the residential drinking water wells and the White River.

Through the testimony of Hunt, Bock and Kush the government established that the drums on the site were in an extremely deteriorated condition. The witnesses estimated that between

35-75% of all drums on site were corroded and rusting and were leaking materials into the ground. Government's exhibits 1-27 (a video-tape and twenty-six slide photographs of the site) graphically depicted the dilapidated condition of the barrels on the site. Through the testimony of Hunt and Bock the government showed that the conditions of the barrels had significantly deteriorated during each of the past two years. Kush and Hunt testified that, in their opinions, the site presented an immediate, substantial endangerment to public health and the environment and that fire, explosion and ground water contamination were possible hazards which the conditions at the site could cause.

In the opinion of Kush, Hunt and Bock it is essential that the surface cleanup of the site begin as expeditiously as possible. Bock testified that delaying the beginning of the project until the on-set of winter would make timely completion substantially more difficult if not impossible. He further testified that if frozen ground conditions occurred before the initial site preparation (such as road grading and construction of barrel crushing facilities) was completed, the cleanup activities would in all likelihood not be able to begin until Spring of 1983. Hunt, Kush and Bock all testified that many of the barrels might not withstand another winter at the site and that the condition of the barrels was continuing to deteriorate and would do so if allowed to remain on site.

The Court is persuaded that clean-up of the surface of the site must start as soon as possible to protect against the potential hazards testified to by Kush, Hunt and Bock. The court is very concerned that delay in clean-up will exacerbate the potential for groundwater contamination from the leakage and spillage of chemicals and other substances onto the surface of the site. The government's evidence showed that chemicals and substances which are spilled on the ground at the site may and are getting into groundwater under the site. The Court believes that a prompt cleanup of the surface coupled with analysis of the potential groundwater contamination is essential to the protection of public health and the environment. Kush and Hunt testified that both the federal and state governments place high priority on the determination of the existence and scope of groundwater contamination and the undertaking of the appropriate remedy for it. Both testified that completion of groundwater studies and implementation of a groundwater remedy cannot take place until the surface cleanup is completed. Accordingly, the Court finds the hazardous conditions at the site require an expeditious cleanup of the surface of the Seymour site.

Through the testimony of David Lamb from the Board of Health of the State of Indiana the government established that the State of Indiana lacks any fund with which to match federal expenditures at the site which could come from the Hazardous Response Trust Fund (of "Superfund"). Matching funds are

required under Section 104(c)(3) of the Statute, 42 U.S.C. 6904(c)(3). Mr. Lamb testified that the earliest time the State could realistically expect to provide as much as $1 million in matching funds would be the summer or fall of 1983. Matching funds in the amount of $3.5 million would, in Mr. Lamb's opinion, be available no sooner than the summer of 1984. Ms. Kush from EPA testified that no Superfund monies were available to undertake the surface clean-up. Thus, it appears to the Court that the expenditure of funds under authority of Superfund is not a viable alternative to the Consent Decree as a method of insuring expeditious cleanup of the surface of the site.

The Court judicially notices, and it is the unrebutted testimony of Kush and Hunt, that prior to the clean-up plan embodied in the Consent Decree, no plan insuring full cleanup of the surface had been forthcoming from any party to the litigation or any other persons, other than a temporary, emergency action by EPA. No objecting party could assure the Court that the surface cleanup could promptly be accomplished through any other mechanism than the Consent Decree. Government counsel represented to the Court that previous negotiations for cleanup had proved unfruitful. The oral and written representations of counsel for both objecting parties and counsel for one of the defendants which are parties to the decree confirm the past failure of negotiations.

No party disputes the technical adequacy of the plan for surface cleanup. The testimony offered by the government from

Kush, Hunt and Bock convinces the Court that the plan submitted to the Court is acceptable to the state and federal agencies charged in the first instance with assuring that the proposal is adequate to protect public health and the environment. The Court has satisfied itself through expert testimony that the plan is adequate to accomplish the surface cleanup of the site consistent with the protection of public health and the environment which are the goals of the Resource Conservation and Recovery Act (RCRA); Comprehensive Environmental Response Compensation Liability Act and the Clean Water Act.

In addition, the Court has determined that the approach taken here by the United States with respect to hazardous waste cases generally is reasonable from the standpoint of the long-range public interest. It is desirable to settle such cases, without the necessity for litigation.

In considering the reasonableness of the approach taken by the government, the Court has inquired of counsel as to how the group of 24 was developed. The Court is satisfied that the approach taken by the government in negotiating with this group was a reasonable one, having in mind the statutory goals of Superfund. Counsel has represented to the Court the following: As a part of the surface cleanup the 24 companies have created a Trust Fund utilizing a Trust Agreement as their legal mechanism and that IBM, General Motors, Cummins Engine and Merchants National Bank & Trust Company of Indianapolis will be the Trustees. The purpose of this Trust Agreement is to

provide for the creation of the Fund which will make payments to Chemical Waste Management to perform the work described in Exhibit B to the Consent Decree. In this regard, the Trust Fund has an agreement with Chemical Waste Management to perform the work described in Exhibit B. This agreement contains a schedule for payments to Chemical Waste Management, and it establishes rights and responsibilities as between Chemical Waste Management and the Trust Fund. The purpose of both of these agreements is to create a funding mechanism to insure prompt completion of the work. Neither the United States nor the State is a party to either of these two agreements. There is a further agreement being negotiated between the United States and the City of Seymour and the Seymour Aviation Board pertaining to the covenant not to sue being given to those companies who are not a party to this group of 24. Counsel has represented to the Court that the United States has no other agreements with the 24 consenting companies listed in Exhibit A to the Consent Decree concerning the cleanup of the Seymour Site.

Under the standards enunciated above, the Court finds that the government's action in entering into this decree is reasonable and is in the public interest. In reaching this determination, the Court has particularly considered the need to abate the hazardous conditions at the site as expeditiously as possible and the unavailability of any other prompt plan to undertake the cleanup.

In its review of the Consent Decree, as originally filed with the Court, the Court observed that the Decree provided that the 24 companies were required to preserve records and documents relating relating to Seymour Recycling Corporation only for a six month period after the effective date of the Decree. In response to a proposal by the Court, the companies agreed to modify that provision (which is in Paragraph XI of the Decree) to require that the companies will each preserve "pending further Court order" records and documents relating to Seymour Recycling Corporation. By this modification of the Decree, the Court has insured the availability of documents and records should a discovery request be made for them in the ongoing litigation with those who are not a party to the Consent Decree. Of course any party to whom a request for the production of documents is made may assert any claims which he has under the Federal Rules of Civil Procedure.

In summary, for the foregoing reasons, the Court believes that the Consent Decree (as modified in Paragraph XI), is in accordance with the public interest. It satisfies the requirements of legality, fairness and reasonableness. Accordingly, the Court has this date signed and entered the Consent Decree.

Dated this 15th day of December, 1982.

William E. Stecklo

UNITED STATES DISTRICT JUDGE

feet. Under this bill, Panhandle can get a handle on that contract. Or, like Columbia under Judge Levant's ruling, it can face the music.

Mr. Speaker, in the many months since my good friend Bud Brown first introduced this bill, many interested parties have suggested certain changes to this text. I do not want anyone to think that I have forgotten this because the original text is being reintroduced verbatim. These suggestions have been duly noted and are on file. But it was important to me to reintroduce the bill today, the very first day of the new Congress. For this reason, I employed the original text.

Thank you, Mr. Speaker.●

CONSTITUTIONAL AMENDMENT FOR A 6-YEAR PRESIDENTIAL TERM

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Texas (Mr. BROOKS) is recognized for 5 minutes.

● Mr. BROOKS. Mr. Speaker, nearly 200 years ago, at the Constitutional Convention in Philadelphia, our Founding Fathers debated the idea of providing for a chief executive who would serve one single 6-year term. As we know, this proposal was set aside in favor of 4-year terms, with a limit of two such terms placed on our Presidents under the 22d amendment to the Constitution. Events of our recent history have shown that it is time to give additional consideration to single 6-year Presidential terms.

The stresses and complexities of the office of President of the United States have grown to almost unimaginable proportions in recent times. It is vital that we do everything that we can to make this office as effective as possible and to relieve those pressures that we can. We would all benefit if the occupant of the Oval Office were free to concentrate on running the country instead of running for a second 4-year term.

Mr. Speaker, too often we have seen how distracting and damaging to effective governance the pressures of reelection can be. Our Presidents have been forced to spend the entire year before an election undergoing grueling primary and general election contests, while at the same time attempting to carry out their constitutional responsibilities. I think it is clear that these dual demands have been one source of our failed Presidencies, and may in part account for the fact that no President since Dwight Eisenhower has completed two terms in office.

Mr. Speaker, we must not add to the burdens of the Presidency. The job will call upon the full range of talent and capability of whoever holds the office. A 6-year term will give our Presidents the time they need to carry out their programs. Limiting them to a single 6-year term will allow them to focus on the job they were elected to do—leading the Nation—rather than on the next election.

I hope that the 98th Congress will give serious attention to this proposal.

FURTHER INFORMATION ON CONTEMPT CITATION OF ADMINISTRATION OF EPA

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Georgia (Mr. LEVITAS) is recognized for 10 minutes.

● Mr. LEVITAS. Mr. Speaker, in an effort to keep the Members of this House informed about the proceedings of the contempt citation of the Administrator of the Environmental Protection Agency, I am inserting for the RECORD a copy of a letter with enclosures, that I sent on December 29, 1982, to the Honorable PETER W. RODINO, JR., chairman of the House Judiciary Committee:

HOUSE OF REPRESENTATIVES,
Washington, D.C., December 29, 1982.

Hon. PETER W. RODINO, Jr.,
Chairman, House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: In furtherance of our conversations about the contempt citation of the Administrator of the Environmental Protection Agency (H. Res. 632) and the response of the Attorney General, I am enclosing a copy of a statement I made on the floor of the House on December 20.

Subsequently, I received a copy of the enclosed letter, dated December 27, 1982 from the United States Attorney for the District of Columbia addressed to The Speaker concerning the same matter.

In addition to the matter of possible impeachable offenses by the Attorney General and the U.S. Attorney, the question also arises whether a Special Prosecutor should be appointed to handle this case.

The U.S. Attorney's letter clearly spells out his conflict of interest. Furthermore, his conclusion that there is no requirement as to any time (e.g. timely manner) when he is required to present the case to the grand jury under Section 194 of Title 2 USC is obviously an abandonment of his statutory duties since under his interpretation he could take 5 or 10 or 20 years or more to get around to doing his duty. His statement that he recognizes "the likelihood" that he is in disagreement with the House "over the underlying merits of the controversy" further raises questions about his ability or willingness to discharge his statutory responsibilities.

The civil action to which the U.S. Attorney refers is frivilous to begin with, but beyond that, the suit has no preliminary injunctive relief prohibiting the U.S. Attorney or the House from proceeding under 2 USC 194. His startling decision that it would not be "appropriate" to bring the matter before the grand jury while the civil action is pending is simply joining in with the Attorney General's flaunting of the law and reflects a determination by both individuals not to take care that the law is faithfully executed.

Finally, I enclose for your consideration copy of a portion of the transcript of the hearing at which our Subcommittee cited the Administrator for contempt. The pertinent, sworn testimony is that of Assistant Attorney General Ted Olson, who stated, under oath, that the role of the Justice Department in advising the EPA Administrator would not inhibit the Justice Department from carrying out its responsibilities in prosecuting under the Congressional Contempt Statute . . . which is exactly what they have failed and refused to do.

Under the circumstances, I renew my request that your staff consider whether impeachable offenses may have been committed and also whether a Special Prosecutor should be appointed.

Very truly yours,

ELLIOTT H. LEVITAS,
Member of Congress.

[From the Congressional Record, Dec. 20, 1982]

RECENT OFFENSIVE LAWSUIT FILED AS UNITED STATES GOVERNMENT VERSUS HOUSE OF REPRESENTATIVES OF THE UNITED STATES

Mr. LEVITAS. Mr. Speaker, I take this time to update the Members on the Gorsuch contempt of Congress matter that is now in process.

Subsequent to the action of the House last week in citing for contempt the Administrator of the Environmental Protection Agency, the Department of Justice filed lawsuit unprecedented in the history of this Nation entitled the United States of America versus the House of Representatives of the United States et al. which in and of itself is not only unprecedented, it is obviously offensive by its very name.

This Justice Department suit has been described by Lawrence Tribe, a professor of law at Harvard University, as totally without basis or merit. He accused the Justice Department officials who filed the case with "either abject ignorance of the Constitution or contemptible cynicism about constitutional separation of powers."

By instructing the U.S. attorney of the District of Columbia not to fulfill his duties to prosecute the contempt as required by the law, the Attorney General of the United States has failed to faithfully execute the law and is engaging, in my judgment, in an obstruction of justice.

I would hope that the Judiciary Committee will take action as promptly as possible to inquire into whether the actions of the U.S. attorney and the Attorney General of the United States constitute inpeachable offenses for failing to carry out and faithfully execute the law.

This is a very serious and grave matter raising the most fundamental constitutional questions, Mr. Speaker, and I think that when the highest law officer of this land fails to obey the law, it brings the entire system into discredit and into disrepute.

Accordingly, I would hope that the Judiciary Committee would promptly look into this matter to determine what further action might be taken.

The truth is that what we really want is the information from EPA to proceed with our oversight investigation of the Superfund program to clean up the hundreds of dangerous abandoned hazardous waste dumps. This investigation is our constitutional duty. It affects the health of the American people.

We do not want subpenas. We do not want contempt citations. We do not want impeachment proceedings. We do not want confrontation. We only want the facts so that we can do our job.

However, the administration seems to want a fight. They have failed to cooperate; failed to respond to a subpena; and now are failing to faithfully execute the law. That is

our only way to get the facts. we must go forward.

U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEY, DISTRICT OF COLUMBIA,
Washington, D.C., December 27, 1982.

Hon. THOMAS P. O'NEILL, Jr.,
Speaker, U.S. House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER. This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discreation which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest—namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

STANLEY S. HARRIS,
U.S. Attorney,
District of Columbia.

Mr. LEVITAS. Also, I want to direct this to the representative from the Justice Department, Mr. Olson.

Mr. OLSON. Yes, Mr. Chairman.

Mr. LEVITAS. Since I am going to ask you a question, I am required that I administer the oath to you for your response, if you would.

[Witness sworn.]

Mr. LEVITAS. Thank you, Mr. Olson.

Let me just ask you this question again. It is preliminary in nature. I don't want to get down the line and see if there is any problem. As you are aware, these proceedings may, as a matter of law, hopefully not but may lead to prosecution under the congressional intent statute. I am trying to inquire whether it is the Department of Justice's position that you may furnish information to Mrs. Gorsuch notwithstanding the fact that later prosecution for contempt may result from these proceedings and that furnishing such representation will neither inhibit nor prevent the department from carrying out its statutory responsibilities.

Mr. OLSON. This is not the appropriate time for the Attorney General or Department of Justice to make a determination as to who might represent an individual in a particular case or what particular case may be prosecuted under circumstances that have not yet developed, Mr. Chairman.

Mr. LEVITAS. Therefore, it is your position, as I understand it, that the fact that you have advised Mrs. Gorsuch, as I understand it, concerning this matter and the Attorney General has, and your participation in these proceedings today, would not prevent the Justice Department from discharging its statutory responsibilities under the congressional contempt statute if that should, which we hope it will not, eventuate?

Mr. OLSON. We do not believe that anything we have done to date or intend to do at this hearing would jeopardize the ability of the Attorney General to discharge his responsibilities under the Constitution and laws of the United States.●

BANKRUPTCY COURT ACT OF 1983

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from New Jersey (Mr. RODINO) is recognized for 5 minutes.

● Mr. RODINO. Mr. Speaker, today, I am introducing a bill to resolve the constitutional crisis created in the bankruptcy courts by the inaction of the 97th Congress and the denial by the Supreme Court of the application of the Solicitor General of the United States for an extension of the stay granted by the Court in the Northern Pipeline Construction Co. against Marathon Pipe Line Co.

Congress inaction undermines respect for the law by blatantly ignoring a constitutional mandate handed down by the highest court in the land.

I believe resolution of the constitutional problem in the bankruptcy court system needs to be the first legislative item on the agenda of the Judiciary Committee in the 98th Congress and, for that reason, I am introducing legislation which solves the problem with the least cost and with the least change and displacement in the present system. This bill simply provides that U.S. bankruptcy judges be appointed by the President during good behavior, rather than for 14-year terms as is the case under the existing law.

This bill does not create a new court, does not authorize additional numbers of judges or personnel, and does not in any way alter the jurisdiction of the bankruptcy courts, which encompasses only bankruptcy and bankruptcy-related cases as under present law.

Article III bankruptcy judges would receive an annual salary of $65,000. The current salary of a bankruptcy judge is $58,500. It is important that the level of salary be raised slightly in order to attract article III bankruptcy judges of the highest caliber and qualifications, particularly experienced, mid-career practitioners from the private sector.

Somewhat improved retirement benefits are provided under the bill to former bankruptcy judges who are not appointed to the article III court provided that they meet certain service qualifications and provided that they remain on the bench during the transition to the article III bankruptcy court. It is important that there be a smooth and orderly transition to the article III court system and that can only occur, particularly under the current workload, if experienced judges remain on the bench for the transition period. These retirement provisions provide an incentive for bankruptcy judges—particularly many who may not be appointed solely for political reasons—to continue to serve during the transition period.

The retirement provisions of the bill are less generous than those contained in H.R. 6978 as it was reported by the committee last year. Qualifying transition judges would receive retirement pay at a rate equal to 2½ percent of average pay times years of service, never to exceed 80 percent of salary.

There are several other amendments to the bill as it is being introduced today from the version that was reported by the Judiciary Committee last year. The bill provides that bankruptcy judges cannot be even temporarily assigned to the district or circuit court. Article III bankruptcy judges are not authorized to hear any nonbankruptcy related case.

One of the major reasons for the separate bankruptcy court, which has long been in existence, is the need for expedition in bankruptcy cases. While all litigation should be expeditiously terminated, by the nature of bankruptcy, assets are deteriorating in value. In a liquidation case, the faster a case is terminated the more creditors will receive. In a reorganization case, speed is absolutely essential if there is to be any chance for a successful reorganization. If bankruptcy judges are authorized to sit on nonbankruptcy cases, there is a real danger that they will be assigned to criminal cases because of Speedy Trial Act considerations or used to clear up the large civil case backlog in the district courts. If these matters took precedence over bankruptcy cases there would not be any effective bankruptcy law—since speed is critical.

This bill also provides that the appointment of the 227 article III bankruptcy judges authorized under the bill be staggered over a 3-year period—

ATTACHMENT B

PAGE 2 OF 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF ROBERT M. PERRY

I, Robert M. Perry, declare:

1. I am the Associate Administrator for Legal and Enforcement Counsel and the General Counsel of the United States Environmental Protection Agency ("EPA"). I have held this combined position since March of 1982.

2. The Office of Enforcement Counsel is within my supervisory responsibilities and is headed by Michael A. Brown, Enforcement Counsel. It has as its primary responsibility the conduct of enforcement litigation actions, both civil and criminal, against persons who violate environmental protection legislation and regulations.

3. One such environmental law is the Comprehensive Environmental Response, Compensation and Liability Act of 1980, P.L. 95-510, 94 Stat. 2767, December 11, 1980, codified at 42 U.S.C. §§9601, et seq. and commonly known as "The Superfund Act."

Administrative Enforcement Of The Superfund Act

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

5. 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 to the Superfund Act to the Administrator of EPA. Pursuant to that delegation, EPA now has the authority to identify hazardous waste sites and to determine, among other things, the parties potentially responsible for the generation of the hazardous wastes located there. The Administrator of EPA may request

the Attorney General to institute judicial actions, but only the President may require him to do so. See 42 U.S.C. § 9606.

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

7. As with any new program, the implementation and enforcement of the Superfund Act has required the government to put into place the policies and personnel needed to carry out the statutory mandates. In the two years since the Superfund Act became law, EPA has pursued the implementation of this new statutory mandate with vigor. It has developed and published the National Contingency Plan required by Section 105 of the Act, 42 U.S.C. § 9605, which serves as the basis for Superfund-financed cleanups. See 47 Fed. Reg. 31180 (July 16, 1982). It has developed an Interim Priorities List identifying the 160 sites which pose the greatest risk to the public health and welfare and the environment. With assistance and input from the states, EPA has recently published

a proposed National Priorities List identifying the 418 sites which, in EPA's judgment, require priority in use of the Superfund to effect cleanup. See 47 Fed. Reg. 58476 (December 30, 1982).*/ It has developed and published enforcement guidelines, as required by Section 106 of the Act, in consultation with the Attorney General. See 47 Fed. Reg. 20664 (May 13, 1982).

8. EPA has also pursued the enforcement of the Superfund Act vigorously. Since the passage of Superfund, EPA has sent more than 1,760 notice letters, undertaken Superfund-financed action at 112 sites involving the obligation of more than $236 million, filed Superfund claims in 25 judicial actions and obtained two criminal convictions. In its hazardous waste site efforts, the government has reached settlements in 33 civil actions calling for the expenditure of more than $121 million to conduct cleanup operations. In addition, the Agency and the Department are actively negotiating with responsible parties concerning the cleanup of 56 sites around the country. A recent judicial decision under the Superfund Act termed the government's approach in these cases "reasonable from the standpoint of the long-range public interest." United States v. Seymour Recycling Corporation, Civil Action No. IP-80-457-C, ___ F. Supp. ___, (S.D. Ind. Dec. 15, 1982), Slip. Op. (Attachment A to Plaintiffs' Points and Authorities) at 17.

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

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

10. Before any meaningful contact with responsible parties can occur or administrative or judicial enforcement proceedings can be initiated, substantial time must be spent on investigation and case preparation. Of necessity, this is a time-consuming, resource-intensive process. It includes studying the nature and extent of the hazard present at sites, identifying potentially responsible parties and evaluating the evidence which exists or must be generated to support the government's action. This initial investigation is conducted by EPA attorneys and technical staff. Since many sites have literally hundreds of "generators" -- parties who produced or sent hazardous substances to the site -- the initial investigation of such a site typically will consume hundreds of hours and involve the examination of tens of thousands of documents.

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

12. Once a case strategy has been developed, EPA notifies responsible parties that it intends to take action at the site unless they undertake an adequate program to clean up the site. Typically, following the issuance of notice letters, EPA enters into negotiations with responsible parties to reach an agreement which would require those parties to clean up the site. Such negotiations may involve hundreds of potentially responsible parties and millions of dollars in cleanup costs. Moreover, EPA may settle the case with some but not all parties and then have to continue negotiations as to the remaining parties.

13. Because the enforcement process can be lengthy and extremely complex, an enormous amount of paperwork is generated. This includes data on the amounts, nature, and origin of waste

present at a site; records of 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 site. It also includes correspondence with responsible parties, contractors, state officials, and representatives of other federal agencies, legal opinions and interpretation, internal memoranda on such matters as negotiation strategy, rights and remedies, case strengths and weaknesses and notes and logs from meetings, telephone conversations, and private deliberations.

The Subpoena

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

15. On September 15, 1982, Chairman Elliott J. Levitas, on behalf of the Subcommittee, wrote a letter to the Administrator of the EPA, Mrs. Gorsuch, which letter stated in pertinent part:

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

Exhibit A hereto.

16. In response to the Subcommittee's concerns, EPA made available to the Subcommittee almost all documents from EPA's files on the 160 interim priority sites. Those documents, from open and closed Superfund enforcement cases, include data on the amounts, nature, and origin of wastes present at hazardous waste sites; correspondence between EPA and the generators of the hazardous waste; records of interraction with state and local government officials; correspondence with responsible parties, contractors, state officials and representatives of other federal agencies; notes and memoranda discussing the allocation of monies to particular sites by EPA; cooperative agreements arranged with the states involved; and notes and memoranda reflecting the process of having the Superfund Office begin working on a site while initiating settlement negotitions with the contractor. EPA declined, however, to make available to the Subcommittee certain sensitive law enforcement documents generated by government attorneys and other enforcement personnel in the development of potential litigation. Those documents, which are part of open law enforcement files, are memoranda, notes, correspondence and other written material discussing:

(a) the strengths and weakness of the government's case against potentially responsible parties;

(b) legal issues presented by cases;

(c) anticipated defenses to the government's claims;

(d) timetables and other enforcement plans;

(e) negotiation and litigation strategy; and

(f) the names of potential witnesses, their anticipated testimony and other evidentiary matters.

17. EPA's ability to conduct settlement negotiations with, or litigation against, responsible parties would be seriously hampered if sensitive law enforcement documents about such cases were prematurely released to them. EPA would, for example, be at an enormous disadvantage in attempting to negotiate an environmentally appropriate settlement agreement with a party who knew EPA's bottom-line settlement position, its negotiation strategy, and its perception of the strengths and weaknesses of the government's case. An enormous disadvantage would also be imposed if the government had to litigate cases against parties who were aware of the government's litigation strategy, its evidence, its plans and its perceptions of the strengths and weaknesses of its case.

18. Premature disclosure of sensitive enforcement documents might also have an adverse effect upon the reputation of persons whom EPA has preliminarily determined to be potentially responsible parties.

19. After EPA made its decision not to make sensitive law enforcement documents available to the Subcommittee, there were a number of meetings, letters and telephone conversations between the Subcommittee on the one hand and EPA and the Department of Justice on the other in an effort to work out an accommodation with respect to those documents. EPA sought to accommodate the Subcommittee's concerns about the withheld documents in a manner which would satisfy the need to prevent their premature disclosure. The Subcommittee attempted to assure EPA that, if EPA produced the documents to the Subcommittee, an effort would be made to maintain their confidentiality. However, such documents, if produced, could be disclosed to other members of Congress

and that Congress could decide to make the documents public even if EPA objected. See my letter of October 7, 1982 to Chairman Levitas, Exhibit B hereto; Transcript of Subcommittee Hearing, December 2, 1982, at 14-15;*/ Exhibit E at 7.

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

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

Exhibit D hereto.

21. Even though EPA had not promulgated the above-mentioned statutory list of national priority sites, EPA undertook to meet the Subcommittee's apparent concerns by beginning to gather all documents pertinent to EPA's Interim Priorities List of 160 sites. Some of those 160 cases were at that time in litigation and others were in earlier stages of development and negotiation. While gathering those documents, EPA segregated sensitive law enforcement documents for separate review.

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*/ Cited portions of this lengthy hearing transcript are attached hereto as Exhibit C. The entire transcript is available upon request.

22. Because the controversy with the Subcommittee was assuming more critical significance, it was brought to the attention of the Attorney General and by him to the President. Thereafter the Attorney General and the President found that sensitive law enforcement documents from open Superfund Act law enforcement files might, if disclosed, adversely affect pending Superfund enforcement action, overall enforcement policy or the rights of individuals. Exhibit E hereto.

23. On November 30, 1982, the President concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and, pursuant to the authority vested in him by the Constitution and laws of the United States, instructed Mrs. Gorsuch that such documents should not be made available to Congress or the public except in extraordinary circumstances. Exhibit E. On the same day, the Attorney General wrote to Chairman Levitas advising him of that policy. Exhibit F hereto.

24. Upon receiving this instruction, EPA intensively reviewed sensitive law enforcement documents from open Superfund Act law enforcement files to insure that no document was withheld from the Subcommittee except as instructed by the President. Michael Brown or I personally reviewed every such document preliminarily identified by EPA staff. We concluded that certain of those documents, if prematurely disclosed, would impair the government's ability to enforce the Superfund Act. Those documents were also reviewed by the Department of Justice. As of December 15, 1982, we had jointly decided to withhold sixty-four such documents. The Subcommittee was provided with lists, Exhibit G hereto, which identifed each of those documents and briefly

explained why each document was being withheld. The harm which disclosure of such documents would cause is discussed in paragraphs 16-18 above.

25. On December 2, 1982, Mrs. Gorsuch appeared before the Subcommittee and advised it that, because no National Priorities List of sites had yet been designated, no documents of the type described in the Subpoena were in existence. Exhibit C at 1. Nevertheless, in "a spirit of cooperation and comity," Mrs. Gorsuch advised the Subcommittee that she had instructed her staff to gather all documents concerning the 160 interim priority sites for production to the Subcommittee. Ibid. Such production would include more than 750,000 pages of documents and, if expedited, would cost approximately $245,000 and take more than two months to complete it would cost $145,000 and take more than five months to complete if done without overtime. Id. at 1-2. She tendered to the Subcommittee the first five file boxes of such documents, which she had brought with her to the hearing, but the Subcommittee declined to accept delivery of those documents. Id. at 4. Neither at that time nor at any subsequent time has the Subcommittee asked to examine any of the documents Mrs. Gorsuch brought to the hearing or offered to produce thereafter.

26. At the hearing, Mrs. Gorsuch also advised the Subcommittee that, pursuant to the President's instructions, sensitive law enforcement documents from open Superfund Act law enforcement files would not be made available. Id. at 3.

27. 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 reporting the matter to the full Committee. H.R. Rep. No. 968, 97th Cong., 2d Sess. (1982) ("Committee Report") at 57.

28. A further attempt was made to resolve the impasse between the Subcommittee and the Executive Branch at a meeting on December 8, 1982, but that attempt was unsuccessful. See letter from Assistant Attorney General Robert McConnell to Chairman Levitas, December 9, 1982, Exhibit H hereto; Committee Report at 22-23.

29. On December 10, 1982, the Committee reported the matter to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. Committee Report at 70.

30. On December 16, 1982, the House of Representatives cited Mrs. Gorsuch for contempt of Congress. Exhibit I hereto at 3.

31. On December 17, 1982, 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. Exhibit I.

32. To develop cases effectively, EPA personnel both at Headquarters and the Regions must discuss each case in an open and candid manner among themselves and with the Department of Justice. The defendants' demand for sensitive law enforcement documents from open Superfund Act law enforcement files and their efforts to

prosecute Mrs. Gorsuch for her refusal to produce such documents have impaired EPA's ability to enforce the Superfund Act by impairing EPA's ability to assure its enforcement personnel that sensitive enforcement information, if reduced to writing, will not be prematurely disclosed.

33. The effective development of enforcement cases sometimes involves the use of information provided by confidential informants. The defendants' demand for sensitive law enforcement documents from open Superfund Act law enforcement files and their efforts to prosecute Mrs. Gorsuch for her refusal to produce such documents impair EPA's ability to enforce the Superfund Act by impairing EPA's ability to assure informants that, if they cooperate with the Agency, their identities and the information they provide will be effectively protected from premature disclosure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on January 10, 1983.

Robert M. Perry

ROBERT M. PERRY

Committee on Public Works and Transportation

U.S. House of Representatives
Room 2165, Rayburn House Office Building
Washington, D.C. 20515
TELEPHONE, AREA CODE 202, 225-4472

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

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

Dear Mrs. Gorsuch:

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

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

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

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

With best wishes, I am,

Very truly yours,

Elliott H. Levitas
Chairman
Subcommittee on
Investigations and Oversight

EHL/tjm
cc: Mr. Robert Perry

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

Oct 7

Honorable Elliott H. Levitas
Chairman
Subcommittee on Investigations and Oversight
Committee on Public Works and Transportation
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Levitas:

I would like to express my appreciation to you and the other members of your Subcommittee and staff who met with Dr. Hernandez, John Daniel, members of my staff and me last Friday morning. I realize that your schedules were extremely crowded, particularly at that time, but I believe that the time spent was very productive.

On behalf of the Administrator, I acknowledge receipt of your letter to her of September 15, 1982, requesting that information being reported to or otherwise being obtained by this Agency, or any others acquiring such information on behalf of the Agency, within the purview of §104(e)(2)(D) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, be made available to the Subcommittee.

As you know, in addition to our meeting last Friday, we have had other meetings and telephone conferences with representatives of your Subcommittee in an effort to understand the general universe of information you wished to have made available, and in order that our concerns regarding the sensitivity and confidentiality of enforcement-related material in our files be expressed and understood. We believe that we have embarked on an aggressive and effective enforcement program which is producing positive environmental results, and are most concerned that nothing jeopardize that program. Our discussion with you helped alleviate our concerns.

Pursuant to our discussions, we have contacted our Regional offices in New York and Boston, which we understand to be the two which your staff will visit first. We have instructed our Regional attorneys to cooperate fully with your staff, and to make available documents or information in our files regarding the sites or facilities in which you are interested.

Internal enforcement documents which form the basis for on-going or anticipated civil or criminal prosecutions are extremely sensitive. These documents include, for example, memoranda by Agency or Department of Justice attorneys containing litigation and negotiation strategy, settlement positions, names of informants in criminal cases, and other similar material. Should you feel the need to review these documents, we would be very willing to discuss further with you the need or desirability of review of such documents, safeguards for protection of confidentiality, Agency policy regarding release or disclosure of such material, and the effect such disclosure may have on the enforcement or prosecution of the case. I am confident that, as we continue to work with you on this matter, we will be able to satisfy your Subcommittee's need for information, while at the same time, fully protecting the internal Executive Branch deliberative process associated with our execution of the law.

From our discussion, I know that you are fully aware of the sensitive nature of much of the information which will be reviewed or made available to you. For example, you will undoubtedly have access to the names of persons, firms or corporations who may, for a variety of reasons, be thought initially to have contributed hazardous substances to a site, only to find upon further investigation that the person, firm or corporation was not involved in such contribution. Any release of that information prior to its use in litigation could cause substantial damage, not only to the person, firm or corporation involved, but to the credibility of EPA's enforcement program.

You, the other Subcommittee members and your staff have all assured us that the information which you will receive or review will be treated with the utmost confidence, and will not be released to the press, the public or even to other members of Congress until the Agency has advised you in writing that such release would not jeopardize our enforcement efforts. I sincerely appreciate those assurances, which are being relied upon most heavily by us as the basis for our agreement.

Some of the documents in our files may be entitled to protection under 18 USC §1905, and improper disclosure of such documents can result in criminal penalties under that statute and §104(e)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. We will endeavor to identify such documents at the time they are made available, but your staff should also be aware of the potential consequences of improper disclosure of such material.

I believe that it is important to maintain close communications between your Subcommittee and the Agency regarding any issue which might arise regarding your request. Should your staff need to discuss any problem which arises, please have them contact Richard Mays, Special Assistant to the Enforcement Counsel, whose number is FTS 382-4146. Of course, I hope that you will call me directly if I can be of service.

Sincerely,

Robert M. Perry
Associate Administrator
and General Counsel

cc: Anne M. Gorsuch

312 latter advising us that it was the Department of Justice's
313 opinion that the subcommittee did not have the authority
314 under the Superfund law to review the EPA's program
315 enforcement related files.
316 On September 30, 1982, the subcommittee met in executive
317 session and authorized the issuance of a subpoena to the EPA
318 Administrator, and other Agency officials as necessary, and
319 for documents, if EPA refuses the subcommittee access
320 request.
321 This took place at that time due to the pending recess of
322 the Congress and the fact that there were still outstanding
323 matters to take place, specifically a response to the
324 subcommittee chairman's earlier letter to the Administrator.
325 On October 1, 1982, EPA Deputy Administrator, John
326 Hernandez, General Counsel Robert Perry, and other EPA staff
327 with the subcommittee's chairman, Ranking Minority Member
328 and Congressman Molinari, and subcommittee staff at Dr.
329 Hernandez's request.
330 The EPA officials present assured the subcommittee that
331 they would cooperate and provide access to, and copies of
332 pertinent Superfund enforcement related files, and that they
333 would so indicate in a response to the subcommittee
334 chairman's earlier letter to the Administrator.
335 In response to questions bythe EPA officials present, the
336 subcommittee members and, as usual, you, yourself, Mr.

Chairman, assured that the confidentiality of the Agency's sensitive materials would be maintained.

On October 7, 1982, the subcommittee received a response to the chairman's letter to the EPA Administrator, signed by EPA Associate Administrator and General Counsel, Robert Perry, advising that the Agency would make their files available to the subcommittee, with the exception of enforcement related material.

On October 8, 1982, the subcommittee staff met with Mr. Perry and his staff at EPA headquarters to clarify the above-mentioned letter. Mr. Perry advised that he would send an additional letter clarifying the points of concern, and that the subcommittee would have access to the information it desired.

On October 12, 1982, the above-referenced follow-up letter from EPA, signed by Mr. Perry, was received by the subcommittee. The letter did not clarify or eliminate the enforcement-related information access exception noted in Mr. Perry's October 7 letter.

October 13-15, 1982, the subcommittee staff traveled to EPA Regions I and II (Boston and New York) to review certain Superfund site enforcement-related cases and attempted to obtain these enforcement-related documents.

This trip was taken at that time based on the comments that were being taken in good faith by the subcommittee that

Administration's response to your subpoena of November 16 and to offer the reasons for that response.

Your subpoena, which I accepted personally on November 22, required ''all books, records, correspondence, memorandums[sic], papers, notes and documents'' created by EPA since December 11, 1980, for all hazardous waste sites ''listed as national priorities pursuant to Section 105(8)(B) of Public Law 96-510, the 'Comprehensive Environmental Response, compensation, and Liability Act of 1980.'''

As the committee is no doubt aware, no sites have been listed pursuant to that public law which requires, among other things, public notice and comment, and is finally subject to congressional veto. To date, the Agency has issued only an interim priority list, not under Section 105(8)(B). The subpoena, however, does not apply to any documents, therefore, in the possession or custody of EPA.

Nevertheless, in a spirit of cooperation and comity, and trying to assume the intent of the subcommittee, I have directed my staff to begin to gather all documents pertaining to the 160 sites now on EPA's interim priority list.

Applying the wording of your subpoena to the interim priority list would require the location, segregation, duplication, photocopying and shipping of more than 787,000

pages of documents. This material would fill more than 260 standard government file drawers--or about 52 filing cabinets.

Although I personally have grave doubts about the wisdom and the cost of requiring EPA to deliver such a volume of paper, following the direction of the President to cooperate with Congess wherever possible, the Agency is prepared to produce the majority of these documents as soon as possible.

The time and cost of providing all the documents associated with the interim priority list obviously depends on the importance placed on the request by the subcommittee. We estimate that a ''rush'' job, with the use of contractors, overtime, and the reassignment of resources and personnel within the Agency, could be completed between February 15th and March 1st, and would cost approximately $245,000. This will also require the virtual halt of some segments of our enforcement programs for several weeks.

Complying with the request without overtime, without neglecting the vital aspects of enforcement, and without the reassignment or reallocation of personnel or resources, would take more than 10,000 hours of staff time, which will cost roughly $145,000 and could probably be completed between May 15th and June 15th.

At this point, we estimate that EPA has already devoted nearly 1,000 staff hours and spent roughly $15,000 in our

efforts. I believe certain documents have already been produced for the committee today.

In the interest of being perfectly candid with the subcommittee, however, I would like to inform you that sensitive documents found in open law enforcement files will not be made available to the subcommittee. To date, at least 23 such documents from our headquarters have been preliminarily identified, and a list of these is attached.

As the Attorney General stated in his letter of November 30:

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

Attorney General Robert Jackson, later Justice of the Supreme Court, wrote to Chairman Vinson in April of 1941:

''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 was neither a new policy nor an innovative one, but one that dates from the founding of our nation. Even in the specific terms of law enforcement investigations, as early as 1904, Attorney General Knox refused to supply to the

further to say or members of the committee would care to pursue it further. But I am going to try to restrict repetitious covering of the same subject.

Mrs. GORSUCH. I understand.

Mr. LEVITAS. As far as the documents that you have brought with you today, insofar as the committee is concerned they are not fully responsive to the subpoena of the committee. Under the circumstancs I would suggest that they be held in abeyance until the matter is resolved one way or the other, and that they be maintained in your custody until that time.

Mrs. GORSUCH. All right, Mr. Chairman. Thank you very much.

Mr. LEVITAS. Thank you very much.

Mr. Prolman, Mr. Esposito.

Mr. BONER. Mr. Chairman, while they are making their way up may I ask an inquiry to Representative Molinari? Did I hear him say that you had sought a particular case in your State, had sought information and on the grounds of what I would assume to be enforcement sensitive you were denied right to see that and that the cleanup of the disposal site was even approved by EPA itself. Yet finally after once again being told no, for whatever reason, I assume under the auspices of enforcement sensitivity, that you realized that the company that was cleaning up the site, in fact was

ORIGINAL

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

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

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

in their chamber in the city of Washington, on December 2, 1982, at the hour of 10:00 a.m.

then and there to testify touching matters of inquiry committed to said Committee; and ~~he~~ she is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 16th day of November, 1982

James J. Howard
Chairman.

Attest:

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

PERRY DEC. EXH. D

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ORIGINAL

Subpena for ANNE M. GORSUCH

Administrator,

U.S. Environmental

Protection Agency

before the Committee on the

Served 1-12-82

R S Ruch

House of Representatives

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PERRY DEC. EXH. D

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