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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES F. DAVEY, CLERK

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

O R D E R

Upon consideration of defendants' Motion to Expedite Consideration of their Motion to Dismiss, and the entire record of this action, it is by the Court this 14th day of January, 1983,

ORDERED that a hearing be held on defendants' Motion to Dismiss on February 1, 1983, at 10:00 a.m.

United States District Judge

U.S. Department of Justice

Civil Division

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

DEC 30 1982

MEMORANDUM

TO: Edward C. Schmults
Rex E. Lee
Kenneth S. Geller
Leonard Schaitman
John F. Cordes
Richard K. Willard
✓John Roberts
Royce Lamberth
Theodore B. Olson
Larry L. Simms
Carol Dinkins
Robert Perry

FROM: J. Paul McGrath

SUBJECT: U.S. v. House of Representatives, et al.

Attached is our draft brief in support of our Motion for Summary Judgment. Our goal is to be ready to file this motion on Thursday, January 6 so please get us your comments by noon on Wednesday, January 5.

Also attached is a copy of an Amended Complaint which we filed on December 29.

Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AMENDED COMPLAINT
(For Declaratory Relief)

The United States of America and Anne M. Gorsuch, by their undersigned attorneys, bring this civil action to obtain declaratory relief and for their complaint against the defendants allege as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331, 1345.

2. The plaintiffs are the United States of America and Anne M. Gorsuch, in her official capacity Administrator of the Environmental Protection Agency ("EPA").

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

4. The defendant Committee on Public Works and Transportation of the House of Representatives ("the Committee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

5. The defendant the Honorable James L. Howard is the Chairman of the Committee. He is sued in his official capacity only.

6. The defendant Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of the House of Representatives ("the Subcommittee") ordinarily has the power to summon a witness by proper subpoena to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to recommend that a witness be held in contempt of Congress for failing to testify or produce subpoenaed documents.

7. The defendant the Honorable Elliott J. Levitas is the Chairman of the Subcommittee. He is sued in his official capacity only.

8. The defendant the Honorable Thomas P. O'Neill, as the Speaker of the House of Representatives, has the power to certify to the United States Attorney a statement of facts of an alleged failure by a witness to testify or produce subpoenaed documents to Congress and to request criminal prosecution of the witness under 2 U.S.C. § 194 for contempt of Congress. He is sued in his official capacity only.

9. The defendant Edmund L. Henshaw, Jr., is the Clerk of the House of Representatives. He is sued in his official capacity only.

10. The defendant James T. Molloy, the Doorkeeper of the House of Representatives, has the duty to deliver the certification of the Speaker of the House of Representatives requesting criminal prosecution under 2 U.S.C. §194 to the United States Attorney. He is sued in his official capacity only.

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

12. This is a civil action seeking declaratory relief pursuant to 28 U.S.C. §2201 with respect to defendants' efforts, discussed below, to compel production of certain documents.

13. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 et seq., authorizes the President to take action at sites that contain hazardous waste. This Act authorizes action to remove or arrange for the removal of hazardous substances, pollutants, or contaminants released into the environment to protect the public health or welfare. 42 U.S.C. § 9604.

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

15. Pursuant to Executive Order 12316, January 19, 1981, 46 Fed. Reg. 42237, the President's responsibility for carrying out the provisions of CERCLA have been delegated, in part, to the Administrator of EPA.

16. Under CERCLA, EPA identifies hazardous waste sites to determine, among other things, potentially responsible parties. EPA also has the authority to seek criminal and civil penalties against those parties at such sites.

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

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

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

20. On September 15, 1982, Chairman Levitas, on behalf of the Subcommittee, wrote a letter to Administrator Gorsuch (Attachment 1 hereto), which letter stated in pertinent part:

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

21. In order to respond to the Subcommittee's concerns, EPA has offered either to produce or make available for copying by the Subcommittee approximately 787,000 pages of documents, which would cost approximately $223,000 and would require an expenditure of more than 15,000 personnel hours. The Subcommittee has declined to review most of those documents.

22. EPA withheld from the Subcommittee certain documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. Those documents, which are part of open law enforcement files, are sensitive memoranda and notes reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials.

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

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

(Attachment 2 hereto, emphasis supplied).

24. After careful review, EPA, the Attorney General, as well as the President found that documents such as those referred to in paragraph 22 of this Complaint, that is, memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analyses, lists of potential witnesses, settlement considerations and similar materials, might, if disclosed, adversely affect pending enforcement action, overall enforcement policy, or the rights of individuals.

25. On November 30, 1982, the President concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and, pursuant to the authority vested in him by the Constitution and laws of the United States, instructed Administrator Gorsuch that such documents should not be made available to Congress or the public except in extraordinary circumstances.

26. Upon receiving this instruction, EPA reviewed the documents previously withheld from the Subcommittee, which then totalled seventy-four. On December 14 and 15, 1982, ten of those documents were produced, based upon a determination that dissemination of them would not adversely affect pending enforcement actions, overall enforcement policy or the rights of individuals. EPA continued to withhold the remaining sixty-four.

27. As of December 2, 1982, the return date of the Subpoena, EPA had not listed any sites as national priorities pursuant to Section 105(8)(B) of CERCLA. Accordingly, no documents of the type described in the Subpoena were in existence at any relevant time.

28. On December 2, 1982, Administrator Gorsuch appeared before the Subcommittee and advised it that no documents of the type described in the Subpoena were in existence. That appearance and advice constitute full compliance with the requirements of The Subpoena. Administrator Gorsuch also advised the Committee that the documents referred to in paragraph 26 of this Complaint were being withheld from the Subcommittee

pursuant to the President's instruction. She tendered to the Subcommittee approximately five file boxes of documents which were responsive to the Subcommittee's apparent concerns, as best as EPA could perceive them, but the Subcommittee refused to accept delivery of those documents.

29. At the conclusion of the hearing on December 2, 1982, the Subcommittee passed a resolution finding Administrator Gorsuch in contempt for failure to comply with the Subpoena and reporting the matter to the Committee. (Attachment 4 hereto).

30. On December 10, 1982, the Committee reported an alleged refusal of Administrator Gorsuch to comply with the Subpoena to the full House of Representatives together with a recommendation that she be cited for contempt of Congress. (Attachment 5 hereto).

31. On December 16, 1982, the House of Representatives passed a resolution directing the Speaker to certify to the United States Attorney for the District of Columbia the report of the Committee on the alleged contumacious conduct of Administrator Gorsuch in failing and refusing to furnish documents in compliance with the Subpoena. H. Res. 632 (Attachment 6 hereto).

32. Section 194 of Title 2 provides:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

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

34. The Subpoena exceed the jurisdiction of th Subcommittee.

35. If the Subpoena were deemed to include a request for the production of any documents other than those concerning sites listed as national priorities pursuant to Section 105(8)(B) of CERCLA, the Subpoena is unlawful because it fails to describe the requested documents with adequate specificity.

36. The Executive Branch has both the constitutional and a common law privilege to ensure the confidentiality of its law enforcement files and its deliberative processes. Producing to the Subcommittee the documents referred to in paragraph 26 would contravene those privileges. Accordingly, even if the Subpoena were deemed to require Administrator Gorsuch to produce those documents, her refusal to do so was lawful in all respects.

37. The plaintiffs have offered to attempt to compromise this dispute, but the defendants continue to demand that all of the documents referred to in paragraph 27 of this Complaint be produced.

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

39. The acts of defendants complained of herein have injured plaintiffs by impairing their ability to meet their obligation to execute the laws of the United States faithfully, by impeding them in the lawful exercise of the powers conferred upon the Executive Branch by the Constitution and laws of the United States, by creating inconsistent obligations, and by damaging their reputation for obedience to the rule of law.

40. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

A. Enter a judgment declaring that Administrator Gorsuch has fully complied with all requirements of the Subpoena; or, in the alternative,

B. Enter a judgment declaring that, insofar as Administrator Gorsuch did not comply with the Subpoena, her non-compliance was lawful; and

C. Grant plaintiffs such other, further and different relief as the Court may deem just and equitable.

Respectfully submitted,

J. Paul McGrath/pw

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard/pw

RICHARD K. WILLARD,
Deputy Assistant Attorney General

Lewis K. Wise

LEWIS K. WISE

Andrew M Wolfe

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BETSY J. GREY

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Washington, D. C. 20530
Tel: (202) 633-4020

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

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.

Exhibit 1

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

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, 19 82

James J. Howard
Chairman.

Attest:

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

Exhibit 2

ORIGINAL

Subpena for ANNE M. GORSUCH
Administrator,
U.S. Environmental
Protection Agency
before the Committee on the

Served 1-22-82
R S Ruckelshaus

House of Representatives

U.S. GOVERNMENT PRINTING OFFICE 80-622-h

THE WHITE HOUSE

WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

Exhibit 3

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

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

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

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, subsequently a Justice of the Supreme Court, restated this position 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 the 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."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are 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.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "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."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974).

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.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed 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."

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

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

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which 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 . . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

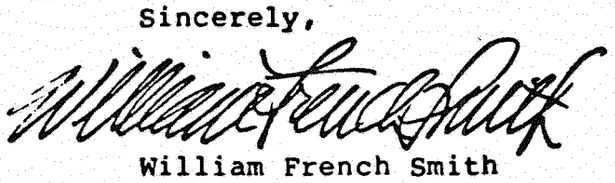
I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

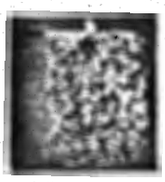
2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully re-examined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,



William French Smith
Attorney General



CONTEMPT RESOLUTION REPORTED BY SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

Be it resolved that the subcommittee finds Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, in contempt for failure to comply with the subpoena ordered by this subcommittee and dated November 16, 1982, and the facts of this failure be reported by the Chairman of the Subcommittee on Investigations and Oversight to the Committee on Public Works and Transportation for such action as that Committee deems appropriate.

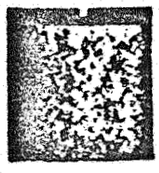


Exhibit 4

CONTEMPT RESOLUTION REPORTED BY COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Resolved, That the Committee on Public Works and Transportation report and refer refusal of Anne M. Gorsuch, Administrator, Environmental Protection Agency, to comply with the subpoena dated November 16, 1982, issued by the Subcommittee on Investigations and Oversight, together with all facts in connection therewith, to the House of Representatives with the recommendation that Administrator Gorsuch be cited for contempt of the House of Representatives to the end that she may be proceeded against in a manner and form provided by law.

Exhibit 5

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

Exhibit 6

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Exhibit 7

CERTIFICATE OF SERVICE

I certify that on this day I have served the foregoing Amended Complaint upon the defendants herein by mailing copies of same, postage prepaid, to:

The House of Representatives of
the United States of America
Washington, D.C 20515

Committee on Public Works and
and Transportation
House of Representatives
Room 2245
Rayburn House Office Building
Washington, D.C. 20515

Honorable James J. Howard, Chairman
Committee on Public Works and
Transportation
House of Representatives
Room 2245
Rayburn House Office Building
Washington, D.C. 20515

Subcommittee on Investigations and Oversight
Committee on Public Works and
and Transportation
House of Representatives
Room 2416
Rayburn House Office Building
Washington, D.C. 20515

Honorable Elliott J. Levitas, Chairman
Subcommittee on Investigation and Oversight
Committee on Public Works and
Transportation
House of Representatives
Room 2416
Rayburn House Office Building
Washington, D.C. 20515

Honorable Thomas P. O'Neill
Speaker
House of Representative
Room H-204
Washington, D.C. 20515

Edmund L. Henshaw, Jr.
Clerk
House of Representatives
Room H-105
Washington, D.C. 20515

James T. Mulloy
Doorkeeper
House of Representatives
Room H-154
Washington, D.C. 20515

Andrew M Wolfe
ANDREW M. WOLFE

DATED: December 29, 1982

ROUTING AND TRANSMITTAL SLIP

Date: 1/17/83

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. John Roberts		
2.		
3.		
4.		
5.		

	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate		For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

re: U.S. v. House of Representatives

Gorsuch

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FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
Betsy Grey	3531
	Phone No. 633-4020

5041-102

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☆ GPO : 1981 O - 341-529 (101)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NOTICE OF FILING AMENDED DECLARATION
OF ROBERT M. PERRY

The plaintiffs, by their undersigned counsel, hereby file an Amended Declaration of Robert M. Perry. Mr. Perry has amended his Declaration, filed in support of plaintiffs' Motion For Summary Judgment on January 10, 1983, in order to correct an inaccurate statement contained on page 4.

Respectfully submitted,

Paul M. Grath

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Richard K. Willard

RICHARD K. WILLARD
Deputy Assistant Attorney General

Lewis K. Wise

LEWIS K. WISE

Andrew M. Wolfe, fw

ANDREW M. WOLFE

Betsy J. Grey

BETSY J. GREY

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

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
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 one criminal conviction.**/ 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. I, 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.

**/ My original declaration incorrectly stated that two convictions had been obtained under Superfund when only one has been obtained to date. In preparing my declaration I was informed by the Department of Justice that a proposed plea agreement, which would have resolved a pending indictment under Superfund, had resulted in a conviction. However, the plea of the defendant had not been entered at the time of my declaration. The indictment is now pending.

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 interaction 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 negotiations 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 identified 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 14, 1983.

Robt M. Perry

ROBERT M. PERRY

CERTIFICATE OF SERVICE

I hereby certify that service of plaintiffs' Notice of Filing Amended Declaration of Robert M. Perry and Amended Declaration of Robert M. Perry was made this 14th day of January, 1983, by mailing a copy thereof, postage prepaid to:

Stanley M. Brand
General Counsel to the Clerk
Office of the Clerk
U.S. House of Representatives
H-105, The Capitol
Washington, D.C. 20515

Betsy J. Grey

BETSY J. GREY

THE WHITE HOUSE

WASHINGTON

December 23, 1982

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Amended Complaint in United States v. The House of Representatives

The Civil Division has requested comments by close of business today on a proposed amended complaint in the Gorsuch case. It intends to file the amended complaint on Monday, December 27, 1982. There are three major changes from the original complaint:

1. Anne Gorsuch is added as a plaintiff. This was done to lessen "case or controversy" problems, since some of the injury in this case -- needed to establish a Constitutionally adjudicable case or controversy -- is more readily conceived as an injury to Mrs. Gorsuch than to the United States qua United States. In addition, some of the arguments are personal arguments concerning Mrs. Gorsuch rather than general arguments of governmental privilege.

2. Demands for injunctive relief have been deleted. In the amended complaint, only declaratory relief is specifically requested. This change was made because there is really nothing to enjoin at present -- the U.S. Attorney is not taking any action with respect to the contempt citation, nor is he about to -- and a request for injunctive relief raises Speech and Debate Clause problems to a greater degree than a request for declaratory relief.

3. Paragraph 30 of the amended complaint is new. It presents the argument that it is impossible for Gorsuch to comply with the subpoena, because she has no authority to do so after having been directed by the President not to produce the documents. This argument is based on Touhy v. Ragen, 340 U.S. 462 (1951), which held that a subordinate Department of Justice official could not be held in contempt for failure to produce documents when the Attorney General, through a regulation, had directed him not to do so.

I see no objections to the first two changes outlined above. The addition of ¶ 30, however, does raise a concern of which you should be aware. The logical consequence of any argument based on Touhy v. Ragen is that the contempt citation should be directed against the President himself, not Mrs. Gorsuch. Should the court agree with this argument, the logical step would be for Congress to reframe its citation as one directed against the President, and the privilege issues would then be presented for decision. This is implicit in the majority opinion in Touhy v. Ragen, 340 U.S., at 467, 469, and explicit in Justice Frankfurter's concurring opinion, id., at 471-473.

I am not certain that Touhy v. Ragen applies to this case at all: there is a significant difference between a lower-level employee following the order of the Attorney General and a Presidential appointee carrying out a Presidential directive. If successful, the argument in ¶ 30 would simply delay ultimate resolution of the basic issue, assuming Congress responded to a decision based on Touhy v. Ragen by reframing its contempt citation. And the downside is significant: a Congressional contempt citation against the President -- the logical result of the argument in ¶ 30 -- could be very politically damaging. With Mrs. Gorsuch in the case there is at least a "buffer" separating the President from the dispute. I see no reason why the privilege issue cannot be decided in the context of a contempt citation against Gorsuch. We do not gain anything by reframing the dispute as one directly involving the President, and this is all that the argument in ¶ 30 would do.

I strongly recommend that you object to ¶ 30 of the amended complaint, perhaps in a call to Deputy Attorney General Schmults.

DEC 22 1982

ROUTING AND TRANSMITTAL SLIP Date WED. 12/22

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. FRED FIELDING,		
2. COUNSEL TO THE PRESIDENT		
3.		
4.		
5.		

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

PAUL McGRATH HAS ASKED ME TO RUSH THE ATTACHED DRAFT TO YOU. WE PLAN TO FILE THE AMENDED COMPLAINT ON MONDAY. PLEASE FORWARD ANY COMMENTS TO ME BY COB WEDNESDAY, 12/23. THANK YOU.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
LEWIS K. WISE	DOJ 3521
	Phone No. 633-3786

5041-102

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Lewis K Wise

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Subject: U.S.A. and Anne M. Gorsuch v. The House of Representatives of the United States, U.S. Civil Action No. 83-3553 Amended Complaint

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHolland	ORIGINATOR	82/12/22			/ /
	Referral Note:				
CWAT18	A	82/12/22		S	82/12/22
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S - For Signature
X - Interim Reply

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT
12/22/82

UNITED STATES OF AMERICA, c/o U.S. Department of Justice 9th & Pennsylvania Ave., N.W. Washington, D.C. 20530 and ANNE M. GORSUCH, Plaintiffs, v. THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUB-COMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS; CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES: and THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES, Defendants.	)	Civil Action No. 83-3583

AMENDED COMPLAINT

The United States of America and Anne M. Gorsuch, by their undersigned attorneys, bring this civil action for declaratory relief and for their complaint against the defendants allege as follows:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331, 1345.

2. The plaintiffs are the United States of America and Anne M. Gorsuch, who is the Administrator of the Environmental Protection Agency ("EPA").

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

4. The defendant, the Committee on Public Works and Transportation of the House of Representatives ("the Committee"), has the power to summon a witness to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to cite a witness in contempt of Congress for failing to testify or produce subpoenaed documents.

5. The defendant, the Honorable James L. Howard, is the Chairman of the Committee.

6. The defendant, the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation of the House of Representatives ("the Subcommittee"), has the power to summon a witness to give testimony or produce papers concerning matters properly under inquiry before the Committee and to vote to cite a witness ~~in~~ SDV contempt of Congress for failing to testify or produce subpoenaed documents.

7. The defendant, the Honorable Elliott J. Levitas, is the Chairman of the Subcommittee.

8. The defendant, the Honorable Thomas P. O'Neill, as the Speaker of the House of Representatives, has the power to certify to the United States Attorney a statement of facts of refusal by a witness to testify or produce subpoenaed documents to Congress and to request criminal prosecution of the witness under 2 U.S.C. § 194 for contempt of Congress.

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

10. This is a civil action seeking declaratory relief with respect to defendants' efforts, discussed below, to compel production of certain documents.

11. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9601 et seq., authorizes the President to take action at sites that contain hazardous waste. This Act authorizes action to remove or arrange for the removal of hazardous substances, pollutants, or contaminants released into the environment to protect the public health or welfare ~~of the environment~~, 42 U.S.C. § 9604.

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

13. Pursuant to Executive Order 12316, January 19, 1981, 46 Fed. Reg. 42237, the President's responsibility for carrying out the provisions of CERCLA have been delegated, in part, to the Administrator of EPA.

14. Under CERCLA, EPA identifies hazardous waste sites to determine, among other things, potentially responsible parties. EPA also has the authority to seek criminal and civil penalties against those parties at such sites.

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

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

17. The Subcommittee has been examining the implementation of CERCLA since its enactment in 1980.

18. On September 15, 1982, defendant Levitas, on behalf of the Subcommittee, wrote a letter to plaintiff Gorsuch (Attachment 1 hereto), which letter stated in pertinent part:

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

19. In order to respond to the Committee's concerns, EPA has either offered to produce or make available for copying by the Subcommittee approximately 787,000 pages of documents, which would cost approximately $223,000 and would require an expenditure of more than 15,000 personnel hours.

20. EPA declined, however, to produce approximately 74 documents generated by government attorneys and other enforcement personnel in the development of potential litigation against private parties. Those documents, which are part of open law enforcement files, are sensitive memoranda and notes reflecting enforcement strategy, legal analyses, lists of potental withnesses, settlement considerations and similar materials.

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

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

(Attachment 2 hereto, emphasis supplied).

22. After careful review, President Reagan found that documents such as those withheld, that is, memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials, might, if disclosed, adversely affect a pending enforcement action, ~~or~~ overall enforcement policy, or the rights of individuals. He found that such documents should not be made available to Congress or to the public except in extraordinary circumstances because the release of such information might prejudice the government's enforcement activities. He therefore concluded that dissemination of such documents would impair his solemn responsibility to enforce the law and instructed plaintiff Gorsuch, to withhold ~~the~~ such documents from the Subcommittee. (See Attachment 3 hereto).

23. Upon receiving this instruction, EPA reviewed the 74 documents previously withheld from the Subcommittee, produced 10 of them and continued to withhold the 64 remaining documents.

24. On December 2, 1982, plaintiff Gorsuch appeared before the Subcommittee in compliance with the Subpoena. At that time EPA had not listed any sites as national priorities pursuant to Section 105(8)(B) of CERCLA. Accordingly, plaintiff Gorsuch advised the Subcommittee, in response to that part of the Subpoena which required production of documents for such sites, that there were no such documents. Plaintiff Gorsuch has fully complied

with the requirements of the Subpoena. Plaintiff Gorsuch also advised the Committee that the documents referred to in paragraph 23 were being withheld from the Committee pursuant to the President's instruction.

25. At the conclusion of the hearing on December 2, 1982, the Sucommittee passed a resolution finding plaintiff Gorsuch in contempt for failure to comply with the Subpoena and reporting the matter to the Committee. (Attachment 4 hereto)

26. On December 10, 1982, the Committee reported the alleged failure of plaintiff Gorsuch to comply with the Subpoena to the full House of Representatives together with a recommendation that she be ~~constituted a failure to comply~~ cited for contempt of Congress. (Attachment 5 hereto)

27. On December 16, 1982, the House of Representatives passed a resolution citing plaintiff Gorsuch for contempt of Congress based upon the alleged failure to comply with the Subpoena. H. Res. 692 (Attachment 6 hereto)

28. Section 194 of Title 2 provides:

> Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

29. On December 17, 1982, defendant O'Neill certified to the United States Attorney the alleged failure of plaintiff Gorsuch to produce subpoenaed documents to the Subcommittee. (Attachment 7 hereto)

30. By directing plaintiff Gorsuch to withhold the documents referred to in paragraph 23 of this Complaint, the President divested her of any authority she may otherwise have had to

produce said documents to the Subcommittee. Accordingly, even if the Subpoena were deemed to require her to produce those documents, it was impossible for her to do so.

31. The Executive Branch has the constitutional privilege to ensure the confidentiality of its law enforcement files and its deliberative processes. Producing to the Subcommittee the documents referred to in paragraph 23 would contravene that privilege. Accordingly, even if the Subpoena were deemed to require plaintiff Gorsuch to produce those documents, her refusal to do so was lawful in all respects.

32. The acts of defendants complained of herein have injured plaintiffs by impairing their ability to meet their obligation to execute the laws of the United States faithfully, by impeding them in the lawful exercise of the powers conferred upon the Executive Branch by the Constitution and laws of the United States, by creating inconsistent obligations, and by damaging their reputation for obedience to the rule of law.

33. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

A. Enter a judgment declaring that plaintiff Gorsuch has fully complied with all requirements of the Subpoena; or, in the alternative,

B. Enter a judgment declaring that, insofar as plaintiff Gorsuch did not comply with the Subpoena, her non-compliance was lawful; and

C. Grant plaintiffs such other, further and different relief as the Court may deem just and equitable.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

LEWIS K. WISE

UNITED STATES EX REL. TOUHY *v.* RAGEN, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 83. Argued November 27–28, 1950.—Decided February 26, 1951.

1. Pursuant to Department of Justice Order No. 3229, issued by the Attorney General under 5 U. S. C. § 22, a subordinate official of the Department of Justice refused, in a habeas corpus proceeding by a state prisoner, to obey a subpoena *duces tecum* requiring him to produce papers of the Department in his possession. *Held:* Order No. 3229 is valid and the subordinate official properly refused to produce the papers. Pp. 463–468.
2. The trial court not having questioned the subordinate official on his willingness to submit the material "to the court for determination as to its materiality to the case" and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is here immaterial. P. 468.
3. Order No. 3229 was a valid exercise by the Attorney General of his authority under 5 U. S. C. § 22 to prescribe regulations not inconsistent with law for "the custody, use, and preservation of the records, papers and property appertaining to" the Department of Justice. *Boske* v. *Comingore,* 177 U. S. 459. Pp. 468–470.

180 F. 2d 321, affirmed.

In a habeas corpus proceeding by a state prisoner, the District Court adjudged a subordinate official of the Department of Justice guilty of contempt for refusal to produce papers required by a subpoena *duces tecum.* The Court of Appeals reversed. 180 F. 2d 321. This Court granted certiorari. 340 U. S. 806. *Affirmed,* p. 470.

Robert B. Johnstone argued the cause for petitioner. With him on the brief were *Edward M. Burke* and *Howard B. Bryant.*

Robert S. Erdahl argued the cause for McSwain, respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg* and *Philip R. Monahan.*

MR. JUSTICE REED delivered the opinion of the Court.

This proceeding brings here the question of the right of a subordinate official of the Department of Justice of the United States to refuse to obey a subpoena *duces tecum* ordering production of papers of the Department in his possession. The refusal was based upon a regulation [1] issued by the Attorney General under 5 U. S. C. § 22.[2]

Petitioner, Roger Touhy, an inmate of the Illinois State penitentiary, instituted a habeas corpus proceeding in the United States District Court for the Northern District of Illinois against the warden, alleging he was restrained in violation of the Due Process Clause of the Federal

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[1] Department of Justice Order No. 3229, filed May 2, 1946, 11 Fed. Reg. 4920, reads:

"Pursuant to authority vested in me by R.S. 161 U.S. Code, Title 5, Section 22), *It is hereby ordered:*

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified there in, on the

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Constitution. In the course of that proceeding a subpoena *duces tecum* was issued and served upon George R. McSwain, the agent in charge of the Federal Bureau of Investigation at Chicago, requiring the production of cer-

ground that the disclosure of such records is prohibited by this regulation."

Supplement No. 2 to that order, dated June 6, 1947, provides in part:

"TO ALL UNITED STATES ATTORNEYS

"PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. . . .

. . . . . .

". . . It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged."

[2] "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

tain records which, petitioner Touhy claims, contained evidence establishing that his conviction was brought about by fraud.[3] At the hearing that considered the duty of submission of the subpoenaed papers, the U. S. Attorney made representations to the court and to opposing counsel as to how far the Attorney General was willing for his subordinates to go in the production of the subpoenaed papers. The suggestions were not accepted. Mr. McSwain was then placed upon the witness stand and ordered to bring in the papers. He personally declined to produce the records in these words:

> "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." [4]

Thereupon, the judge found Mr. McSwain guilty of contempt of court in refusing to produce the records referred to in the subpoena and sentenced him to be committed to the custody of the Attorney General of the United States or his authorized representative until he obeyed the order of the court or was discharged by due process of law.

On appeal, the Court of Appeals reversed on the ground that Department of Justice Order No. 3229 was authorized by the statute and

> "confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege." 180 F. 2d 321 at 327.

[3] The subpoena was also addressed to the Attorney General. There is no contention, however, that the Attorney General was personally served with the subpoena; nor did he appear. See Fed. Rules Civ. Proc., 45.

[4] We take this answer to refer to both the original Department of Justice Order No. 3229 and the supplement.

The court then considered whether or not the privilege of nondisclosure was waived. It quoted from Supplement No. 2 to Order No. 3229 this language:

> "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged." 180 F. 2d at 328.

The Court of Appeals said that "this language contemplates some circumstances when the material called for must be submitted 'to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.'" The court found, however, that no such limited disclosure was requested but that Mr. McSwain was called upon "to produce all documents and material called for in the subpoena without limitation and that at no time was he questioned" as to his willingness to submit the papers for determination as to materiality and best public interests. Consequently, he was not guilty of contempt unless the law required the witness to make unlimited production. The court thought that, since this last would mean there was no privilege in the Department to refuse production, such a holding should not be made. It said:

> "Submission could only have been required to the extent the privilege had been waived by the Attorney General and for the purpose and in the specific manner designated." 180 F. 2d at 328.

We granted certiorari, 340 U. S. 806, to determine the validity of the Department of Justice Order No. 3229.

Among the questions duly presented by the petition for certiorari was whether it is permissible for the Attorney General to make a conclusive determination not to produce records and whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena *duces tecum*.

We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229.[5] The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers. Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States[6] or with

[5] Although in this record there are indications that the U. S. Attorney was willing to submit the papers to the judge alone for his determination as to their materiality, the judge refused to accept the papers for examination on that basis. There is also in the record indication that the U. S. Attorney thought of submitting the papers to the court and opposing counsel in chambers but changed his mind. For our conclusion none of these facts are material, as the final order adjudging Mr. McSwain guilty of contempt was based, as above indicated, on a refusal by Mr. McSwain to produce, as instructed by the Attorney General in accordance with Department Order No. 3229.

[6] Cf. *United States* v. *Andolschek*, 142 F. 2d 503.

the right of a custodian of government papers to refuse to produce them on the ground that they are state secrets [7] or that they would disclose the names of informants.[8]

We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. We agree with the conclusion of the Court of Appeals that since Mr. McSwain was not questioned on his willingness to submit the material "to the court for determination as to its materiality to the case" and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material in this case.

Department of Justice Order No. 3229, note 1, *supra,* was promulgated under the authority of 5 U. S. C. § 22. That statute appears in its present form in Revised Statutes § 161, and consolidates several older statutes relating to individual departments. See, *e. g.,* 16 Stat. 163. When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. Hence, it was appropriate for the Attorney General, pursuant to the authority given him by 5 U. S. C. § 22, to prescribe regulations not inconsistent with law for "the custody, use, and preservation of the records, papers, and property appertaining to" the Department of Justice, to promulgate Order 3229.

Petitioner challenges the validity of the issue of the order under a legal doctrine which makes the head of a department rather than a court the determinator of the admissibility of evidence. In support of his argument

[7] See Wigmore, Evidence (3d ed.), § 2378.

[8] See Wigmore, Evidence (3d ed.), § 2374.

that the Executive should not invade the Judicial sphere, petitioner cites Wigmore, Evidence (3d ed.), § 2379, and *Marbury* v. *Madison,* 1 Cranch 137. But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling.[9] We think Order No. 3229 is consistent with law. This case is ruled by *Boske* v. *Comingore,* 177 U. S. 459.[10]

That case concerned a collector of internal revenue adjudged in contempt for failing to file with his deposition copies of a distiller's reports in his possession as a subordinate officer of the Treasury. The information was needed in litigation in a state court to collect a state tax. The regulation upon which the collector relied for his refusal was of the same general character as Order No. 3229.[11] After referring to the constitutional authority for the enactment of R. S. § 161, the basis, as 5 U. S. C.

[9] *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549. For relatively recent consideration of the problem underlying governmental privilege against producing evidence, compare *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624, with *Robinson* v. *State of South Australia,* [1931] A. C. 704.

[10] That case has been generally followed. See, *e. g., Ex parte Sackett,* 74 F. 2d 922; *In re Valecia Condensed Milk Co.,* 240 F. 310; *Harwood* v. *McMurtry,* 22 F. Supp. 572; *Stegall* v. *Thurman,* 175 F. 813; *Walling* v. *Comet Carriers, Inc.,* 3 F. R. D. 442, 443.

[11] The following excerpts will show the similarity:

"'Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. . . . In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of

§ 22, for the regulation now under consideration, this Court reached the question of whether the regulation centralizing in the Secretary of the Treasury the discretion to submit records voluntarily to the courts was inconsistent with law, p. 469. It concluded that the Secretary's reservation for his own determination of all matters of that character was lawful.

We see no material distinction between that case and this.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the judgment of the District Court should be affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

Issues of far-reaching importance that the Government deemed to be involved in this case are now expressly left undecided. But they are questions that lie near the judicial horizon. To avoid future misunderstanding, I deem it important to state my understanding of the opinion of the Court—what it decides and what it leaves wholly open—on the basis of which I concur in it.

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the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy.'" 177 U. S. 461.

"This case," the Court holds, "is ruled" by *Boske* v. *Comingore*, 177 U. S. 459. I agree. *Boske* v. *Comingore* decided that the Secretary of the Treasury was authorized, as a matter of internal administration in his Department, to require that his subordinates decline to produce Treasury records in their possession. In the case before us production of documents belonging to the Department of Justice was declined by virtue of an order of the Attorney General instructing his subordinates not to produce certain documents. The authority of the Attorney General to make such a regulation for the internal conduct of the Department of Justice is not less than the power of the Secretary of the Treasury to promulgate the order upheld in *Boske* v. *Comingore*, *supra*.

But in holding that that decision rules this, the context of the earlier decision and the qualifications which that context implies become important. The regulation in *Boske* v. *Comingore* provided: (1) that collectors should under no circumstances disclose tax reports or produce them in court, and (2) that reports could be obtained only "on a rule of the court upon the Secretary of the Treasury." 177 U. S. at 460–461. The regulation also stated that the reports would be disclosed by the Secretary of the Treasury "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy." *Ibid.* This portion of the regulation was not in issue, however, for the Court was considering the failure of the collector to produce, not the failure of the Secretary of the Treasury. This is emphasized by the Government's suggestion that:

> "[I]f the reports themselves were to be used this could be secured by a subpœna duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers

themselves in court for introduction as evidence in the trial of the cause." Brief for Appellee, p. 49, *Boske* v. *Comingore, supra.*

And the decision was strictly confined to the narrow issue before the Court. It is epitomized in the concluding paragraph of the *Boske* opinion:

> "In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character." 177 U. S. at 470.

There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers.

I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests. Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process.

Though he may be so reached, what disclosures he may be compelled to make is another matter. It will of course be open to him to raise those issues of privilege from testimonial compulsion which the Court rightly holds are not before us now. But unless the Attorney General's amenability to process is impliedly recognized we should candidly face the issue of the immunity pertaining to the information which is here sought. To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.