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## Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials

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CONSTITUTIONAL CONFRONTATIONS:  
PRESERVING A PROMPT AND ORDERLY  
MEANS BY WHICH CONGRESS  
MAY ENFORCE INVESTIGATIVE  
DEMANDS AGAINST EXECUTIVE  
BRANCH OFFICIALS

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Congress possesses the inherent constitutional authority to inquire into all matters that potentially may be the subject of legislation.<sup>1</sup> This investigatory authority, however, would be quite meaningless absent "some means of compulsion . . . to obtain what is needed."<sup>2</sup> Accordingly, Congress has the power, also inherent in the Constitution, to issue investigatory subpoenas and punish witnesses who fail to comply therewith.<sup>3</sup> In addition, Congress has enacted legislation whereby a recalcitrant witness is certified as being in contempt of Congress, and the case is forwarded to a United States Attorney for criminal prosecution.<sup>4</sup>

One of the most important areas of congressional inquiry relates to oversight of the Executive Branch.<sup>5</sup> Although there is arguably no constitutional impediment to the use of compulsion against an Executive Branch official

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1. *Barenblatt v. United States*, 360 U.S. 109, 111, *reh'g denied*, 361 U.S. 854 (1959); *Watkins v. United States*, 354 U.S. 178, 187 (1957).

2. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

3. *Id.* at 160, 174. The authority of Congress to punish witnesses for contempt is discussed *infra* text accompanying notes 11-46.

4. 2 U.S.C. §§ 192, 194 (1982); *see infra* text accompanying notes 11-46.

5. *Cf. Watkins*, 354 U.S. at 187 (congressional investigatory power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste"); Van Alstyne, *Congressional Investigations*, 15 F.R.D. 471, 474 (1954) ("The very possibility that a government official may be called to account for his stewardship before a Congressional investigating committee undoubtedly exerts a beneficent influence for more responsible administration.").

who has refused to comply with a congressional subpoena,<sup>6</sup> there are nevertheless several practical constraints in such a case, especially where the recalcitrant witness is a high-ranking official claiming executive privilege. These constraints were illustrated by the recent confrontation between members of the Senate Judiciary Committee and the Attorney General during the confirmation hearings of William Rehnquist for Chief Justice of the United States.<sup>7</sup> Executive privilege issues have been also lurking during the recent congressional inquiries into the Reagan administration's arms shipments to Iran.<sup>8</sup> The problems in this area were, however, most dramatically illustrated by the confrontation between Congress and the executive branch regarding the legal obligation of former Environmental Protection Agency Administrator Anne Gorsuch Burford to deliver documents that had been subpoenaed by a House of Representatives subcommittee.<sup>9</sup>

This Article will discuss a legislative solution to resolve controversies in which legislative demands for information are disobeyed by executive branch officials. Part I of the Article will examine the current mechanisms available to Congress to enforce its demands for information. Part II will focus upon constitutional confrontations between the executive and legislative branches stemming from congressional demands for information. It will accord close scrutiny to the Burford controversy, which graphically illustrated that existing enforcement mechanisms are incapable of resolving such conflicts. Part III will discuss and critique proposals<sup>10</sup> aimed at improving the present situation. Finally, Part IV will discuss legislation that would provide for appointment of a special prosecutor in cases where a high-ranking executive official has thwarted the legislative will by refusing to produce materials demanded by Congress. The Article will conclude that a special prosecutor provision, in conjunction with Congress' inherent contempt power and its statutory authority to initiate a process leading to criminal prosecutions, provides the most effective means for resolving conflicts between the executive and legislative branches of government.

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6. See *infra* notes 85, 94.

7. See, e.g., *Reagan Uses Executive Privilege to Keep Rehnquist Memos Secret*, Wash. Post, Aug. 1, 1986, at 1, col. 3.

8. See, e.g., Taylor, *Legal Hurdles Seen in Effort for Disclosure of Iran Affair*, N.Y. Times, Nov. 17, 1986, at A10, col. 1.

9. See *infra* text accompanying notes 47-87.

10. See, e.g., Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145 (1984); Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333.

## I. CONGRESSIONAL ENFORCEMENT MECHANISMS

It has long been recognized that Congress possesses an inherent power to punish individuals for contempts committed against it. Indeed, as early as 1796, the House of Representatives itself tried, convicted and imprisoned a private citizen on charges of congressional bribery.<sup>11</sup> In 1821, the Supreme Court upheld congressional authority to punish contumacious individuals in the landmark decision of *Anderson v. Dunn*.<sup>12</sup> *Anderson* involved a civil lawsuit filed by a private plaintiff against the House Sergeant at Arms seeking damages for an arrest which plaintiff challenged as unlawful. The Court decisively rejected plaintiff's challenge, stating that the authority of Congress to punish for contempts committed against it must be inferred from the Constitution.<sup>13</sup>

In 1927, the Supreme Court confirmed a proposition that had been assumed for almost a century<sup>14</sup> when it held in *McGrain v. Daugherty*<sup>15</sup> that witnesses refusing to respond to legitimate inquiries from a congressional investigatory committee could be punished by Congress for contempt. In *McGrain*, the Court reversed the lower court's issuance of a writ of habeas corpus that ordered the Senate Sergeant at Arms to release a contumacious witness he had arrested. The Court stated that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>16</sup> The "inquiry" approved in *McGrain* was that of a Senate subcommittee that had subpoenaed the Attorney General's brother as part of an investigation into whether the Department of Justice had properly handled an antitrust investigation.<sup>17</sup> The Court stated that "[p]lainly th[is] subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."<sup>18</sup>

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11. See Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 190-91 (1967). Upon conviction at the bar of the House, the individual was placed in the custody of the House Sergeant at Arms and remained a prisoner of the House for approximately one week. *Id.* at 191.

12. 19 U.S. (6 Wheat.) 204 (1821).

13. See *id.* at 225, 228-30. The Court subsequently retreated from some of the expansive dicta in *Anderson* when it held in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), that Congress has no authority to punish witnesses who refuse to answer questions relating solely to their private affairs. See *id.* at 190, 195-96. A person convicted by Congress of contempt may challenge the legality of his conviction either by petitioning for a writ of habeas corpus, see, e.g., *Marshall v. Gordon*, 243 U.S. 521 (1917), or by filing a subsequent suit for money damages as was done in *Anderson* and *Kilbourn*.

14. See Moreland, *supra* note 11, at 219.

15. 273 U.S. 135 (1927).

16. *Id.* at 174.

17. *Id.* at 150-52.

18. *Id.* at 177.

The direct adjudication and punishment of contempts by Congress itself had, by 1857, become unwieldy in many cases and time consuming.<sup>19</sup> Furthermore, the efficacy of this inherent process was limited by the Supreme Court's holding in *Anderson* that congressional authority to imprison contumacious witnesses expired at the end of each session of Congress.<sup>20</sup> Accordingly, in 1857, Congress enacted legislation that instructed the executive branch to prosecute contumacious congressional witnesses in the courts and also provided for longer and more severe penalties than Congress itself might be able to administer, especially toward the end of a session.<sup>21</sup>

The Act of 1857 has become the modern-day congressional contempt statute and is now codified in the United States Code.<sup>22</sup> Although Congress' inherent contempt power is still extant<sup>23</sup> and has even been invoked in this century,<sup>24</sup> it is this statute that is now almost exclusively used to punish witnesses for contempt of Congress. The most important provisions of the statute are sections 192 and 194. Section 192 makes it a misdemeanor criminal offense, punishable by a fine of \$100 to \$1,000 and imprisonment of one month to one year, for a witness under congressional subpoena to fail to appear or to withhold testimony or documents.<sup>25</sup> The procedural mechanism for enforcement of this provision is codified in section 194. Under section 194, the President of the Senate or Speaker of the House must certify the fact of contempt "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."<sup>26</sup>

In a prosecution brought under section 192, as with any criminal prosecution, the government has the burden of proving all the elements of the crime beyond a reasonable doubt.<sup>27</sup> Specifically, it must be demonstrated that the witness willfully refused to comply with a subpoena request which was "per-

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19. See CONG. GLOBE, 34th Cong., 3d Sess. 406 (1857) (remarks of Rep. Orr).

20. See 19 U.S. (6 Wheat.) at 231. An argument could be made that this aspect of the *Anderson* holding does not apply to the Senate because the Senate is a "continuing body" with a turnover of only one-third of its membership in each Congress. See Moreland, *supra* note 11, at 199 n.31. The Senate, however, apparently has acquiesced in this limitation of *Anderson*. *Id.* See also *id.* at 211 n.58.

21. See Act of 1857, 11 Stat. 155 (1857). See also CONG. GLOBE, 34th Cong., 3d Sess. 406 (1857) (remarks of Rep. Orr that inherent congressional contempt power was especially inadequate where session of Congress was nearing adjournment).

22. 2 U.S.C. §§ 191-196 (1982).

23. See *In re Application of the United States Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1238 & n.27 (D.C. Cir.), *cert. denied*, 454 U.S. 1084 (1981); *United States v. Fort*, 443 F.2d 670, 676 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

24. See, e.g., *Marshall v. Gordon*, 243 U.S. 521 (1917) (arrest of United States Attorney).

25. 2 U.S.C. § 192 (1982).

26. *Id.* § 194.

27. *Flaxer v. United States*, 358 U.S. 147, 151 (1958) ("[T]he courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases." (quot-

tinant" to a legitimate legislative objective.<sup>28</sup> The pertinency requirement essentially translates into two separate strands: (1) the subpoenaed testimony or documents must be related to an end that Congress itself may constitutionally pursue, and (2) the subpoenaed testimony or documents must fall within the grant of authority from the Senate or House to the requesting committee.<sup>29</sup> Although the first strand does not, as a practical matter, significantly restrain Congress,<sup>30</sup> the second strand may well preclude a successful contempt prosecution in a particular case. For example, in *Tobin v. United States*,<sup>31</sup> the United States Court of Appeals for the District of Columbia Circuit reversed a defendant's conviction because the House resolution authorizing a Judiciary Committee investigation did not, in the court's view, grant the committee authority to subpoena records of the type requested.<sup>32</sup> Assuming the government is able to prove its case, the defendant may, of course, raise constitutional privileges as a defense,<sup>33</sup> although the availability of nonconstitutional privileges is somewhat less certain.<sup>34</sup>

A subpoenaed witness seeking to challenge the legitimacy of a congressional demand, therefore, must generally assert such a challenge through defense of a criminal charge.<sup>35</sup> The courts have rejected attempts, by either

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ing *Watkins v. United States*, 354 U.S. 178, 208 (1957)); see generally *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 n.16 (1975).

28. *Van Alstyne*, *supra* note 5, at 476, 478-79. At one point, the Supreme Court suggested that the objective of the congressional inquiry was not an appropriate matter for judicial scrutiny. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225-27 (1821). Although the Court subsequently retreated from this expansive dictum, see *Kilbourn v. Thompson*, 103 U.S. 168, 190, 195-200 (1881) (refusing to sanction congressional inquiry into purely private affairs), it safely may be said that a modern-day witness challenging the legitimacy of the congressional objective engages in what is essentially a "fruitless task." *Van Alstyne*, *supra* note 5, at 478.

29. *United States v. Orman*, 207 F.2d 148, 153 (3d Cir. 1953).

30. See *supra* note 28.

31. 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

32. *Id.* at 275-76; see *United States v. Kamin*, 136 F. Supp. 791, 801 (D. Mass. 1956) (stating that the issue was not whether Congress could pursue such an investigation but was rather "whether Congress gave authority to this particular Committee" to pursue the investigation).

33. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, *reh'g denied*, 361 U.S. 854 (1959).

34. See generally *Moreland*, *supra* note 11, at 265-68. Furthermore, technical objections, such as the lack of a committee quorum, are waived unless asserted timely before the committee so that it has an opportunity to cure any defect. See, e.g., *United States v. Bryan*, 339 U.S. 323, 333, *reh'g denied*, 339 U.S. 991 (1950); cf. *Eisler v. United States*, 170 F.2d 273, 278-81 (D.C. Cir.) (methods employed by Congress in obtaining defendant's appearance may not be asserted as valid defense to contempt prosecution), *cert. granted*, 335 U.S. 857 (1948), *cert. dismissed*, 338 U.S. 883 (1949) (per curiam).

35. Sky, *Judicial Review of Congressional Investigations: Is There an Alternative to Contempt?*, 31 GEO. WASH. L. REV. 399, 428-29 (1962) (answering his own question in the negative).

the congressional committee<sup>36</sup> or the subpoenaed witness,<sup>37</sup> to avoid criminal proceedings by obtaining a ruling upon the legitimacy of the demand through some form of civil proceeding in advance of an actual contempt citation. In 1978, Congress passed the Ethics in Government Act,<sup>38</sup> granting the Senate and its committees authority to seek civil enforcement of its subpoenas from the District of Columbia federal district court.<sup>39</sup> This Act, however, specifically does not apply to subpoenas of federal government officials.<sup>40</sup> Furthermore, the passage of the Act buttresses the conclusion that civil enforcement is not available outside the context of Senate subpoenas directed at private persons.<sup>41</sup>

The general unavailability of a civil enforcement mechanism means that a recalcitrant witness is "bound rightly to construe the statute" when raising defenses to a contempt prosecution.<sup>42</sup> Furthermore, once convicted of criminal contempt, a defendant may not purge the conviction by belated compliance with the subpoena.<sup>43</sup> There are, however, at least two ways that a recalcitrant witness may mitigate the potentially harsh consequences of non-compliance in advance. First, the witness may stipulate with the prosecution that he will comply with the subpoena if ultimately adjudged guilty, which may allow the court to stay and suspend any eventual sentence.<sup>44</sup> Second, the witness may be able to convince Congress to exercise its inherent contempt power rather than forward the case to a United States Attorney for

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36. See, e.g., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973) (Sirica, C.J.) (dismissing committee's attempt to obtain subpoena enforcement for lack of subject matter jurisdiction).

37. See, e.g., Sanders v. McClellan, 463 F.2d 894 (D.C. Cir. 1972) (dismissing subpoenaed witness' complaint seeking declaratory and injunctive relief against members of congressional subcommittee on several grounds primarily dealing with comity). One of the most dramatic rebuffs to a plaintiff seeking civil relief from a congressional subpoena occurred in United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983). That case is discussed *infra* text accompanying notes 46-86.

38. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

39. 28 U.S.C. § 1364 (1982).

40. *Id.*

41. See, e.g., *In re* Application of the United States Senate Permanent Subcomm. on Investigations, 655 F.2d 1232, 1238 n.28 (D.C. Cir.) (noting that civil enforcement of subpoenas is unavailable to the House under the Ethics in Government Act), *cert. denied*, 454 U.S. 1084 (1981).

42. *Sinclair v. United States*, 279 U.S. 263, 299 (1929).

43. *United States v. Brewster*, 154 F. Supp. 126, 135-37 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958).

44. Such a procedure was successfully employed in *United States v. Tobin*, 195 F. Supp. 588, 617 (D.D.C. 1961), *rev'd on other grounds*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

prosecution.<sup>45</sup> This inherent contempt power works very much like a civil enforcement mechanism.<sup>46</sup> It must be stressed, however, that both of these mitigating schemes are dependent upon the voluntary cooperation of Congress, the prosecution and/or the courts.

## II. CONSTITUTIONAL CONFRONTATION: THE BURFORD CASE

Congressional demands for information from the executive branch are nothing new.<sup>47</sup> Indeed, disputes between Congress and the President regarding the latter's obligation to produce requested information date back to the administration of George Washington.<sup>48</sup> Until recently, however, no high-ranking official had ever been voted in contempt by the full House or Senate.<sup>49</sup> The legislative history of the congressional contempt statute nevertheless makes clear that it was intended "to punish equally the Cabinet officer and the culprit who may have insulted the dignity of th[e] House . . . ."<sup>50</sup> Furthermore, the Justice Department has recognized that instances might arise where an executive branch official would be cited for contempt of Congress, in which case the official would be forced to retain private counsel.<sup>51</sup>

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45. See *supra* notes 11-34 and accompanying text for a discussion of the distinction between Congress' inherent contempt power and the statutory contempt scheme.

46. See *Contempt Proceedings Against Secretary of Commerce Rogers C.B. Morton: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 81 (1975) (testimony of Prof. Raoul Berger).

47. See Landis, *Constitutional Limitations in the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 170-75 (1926).

48. See R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 168, 171 (1974) (describing President Washington's refusal to comply with one document request by House and agreement to comply with another). Historical accounts of clashes between Congress and the President regarding requests by the former for information and/or documents are contained in H.R. REP. NO. 968, 97th Cong., 2d Sess. 90-117 (1982) (attachment C to Minority Views) and STAFF OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS 1964-1973 (Comm. Print 1974).

49. See STAFF OF JOINT COMM. ON CONGRESSIONAL OPERATIONS, 94TH CONG., 2D SESS., LEADING CASES ON CONGRESSIONAL INVESTIGATORY POWER (Comm. Print 1976). See generally R. JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE (1976). In fact, there have been instances where high-ranking executive officials have been successfully prosecuted for contempt of Congress. See, e.g., *id.* at 149-56 (discussing guilty plea in *United States v. Kleindienst*, Cr. No. 74-256 (D.D.C. 1974)).

50. CONG. GLOBE, 34th Cong., 3d Sess. 429 (1857) (remarks of Rep. H. Marshall).

51. See *The Petroleum Import Fee: Department of Energy Oversight, Hearings Before the Subcomm. of the House Comm. on Gov't Operations*, 96th Cong., 2d Sess. 122 (1980) (testimony of Assistant Attorney General Hammond). The Assistant Attorney General stated:

The position of the Department of Justice in its representation guidelines has long been that if, at a later time, it becomes [sic] apparent that a prosecution of any official who testifies on behalf of the executive is in order—either through perjury, or con-

In 1982, however, a dispute broke out between a House subcommittee and the executive branch regarding the latter's duty to provide information pertinent to congressional oversight of the Environmental Protection Agency (EPA). The confrontation eventually resulted in the citation of EPA Administrator Anne Gorsuch Burford by the full House for contempt of Congress. The Burford case is deserving of close scrutiny, both for its historical import and for its dramatic exposure of the inadequacies in the present system of congressional compulsion against the executive branch.

The historic dispute in the Burford case had its genesis on March 10, 1982 when the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation (Levitas subcommittee) opened a series of hearings regarding EPA enforcement of federal environmental statutes,<sup>52</sup> including the so-called Superfund Act.<sup>53</sup> These hearings, according to a subsequent committee report, "raised a number of concerns about the adequacy of the Superfund law, and the extent to which the EPA's efforts to carry it out are both satisfactory and in keeping with the intent of the law."<sup>54</sup> In a letter to EPA Administrator Gorsuch (Burford) dated September 15, 1982, Chairman Levitas requested that certain Superfund information be made available to his subcommittee.<sup>55</sup> Although indicating a willingness to make some materials available to the subcommittee, EPA refused to make available any materials contained in files relating to open investigations.<sup>56</sup> After extensive negotiations proved unsatisfactory to the subcommittee, it caused a subpoena to be served upon EPA Administrator Burford on November 22, 1982.<sup>57</sup> The subpoena required Burford to appear

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tempt, or for other malfeasance—at that time it would be necessary for the official to seek private counsel.

*Id.*

52. HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, CONTEMPT OF CONGRESS, H.R. REP. NO. 968, 97th Cong., 2d Sess. 7 (1982).

53. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982).

54. H.R. REP. NO. 968, *supra* note 52, at 8.

55. *Id.* at 12, 27 (appendix A) (copy of letter).

56. See Points & Authorities in Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defendants' Motion to Dismiss at 10, *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) (Civ. No. 82-3583) [hereinafter Plaintiffs' Points & Authorities]. The Justice Department subsequently characterized the withheld materials as "sensitive attorney work-product material," and described the documents as including sensitive memoranda and other sensitive papers which identify parties potentially liable under the [Superfund] Act and which discuss the strengths and weaknesses of the government's case against them, legal issues, anticipated defenses, timetables and other enforcement plans, negotiation and litigation strategy, the names of potential witnesses, their anticipated testimony and other evidentiary matter.

*Id.*

57. H.R. REP. NO. 968, *supra* note 52, at 13-15.

before the subcommittee on December 2, 1982 for the purpose of giving testimony and producing documents relating to EPA Superfund enforcement.<sup>58</sup>

When Burford appeared before the subcommittee on December 2, she refused to produce certain documents covered by the subpoena, citing a memorandum from President Reagan.<sup>59</sup> The Levitas subcommittee then voted to hold Burford in contempt.<sup>60</sup> After still further negotiations proved unsuccessful,<sup>61</sup> the full committee voted, on December 10, 1982, to certify Burford in contempt and to forward the matter to the full House for its consideration.<sup>62</sup> On December 16, 1982, the House passed, by a vote of 259 to 105, a resolution citing Burford for contempt of Congress.<sup>63</sup> The Speaker of the House, acting pursuant to 2 U.S.C. § 194, then certified the contempt, whereupon a copy of the certification was delivered to the United States Attorney for the District of Columbia.<sup>64</sup>

Immediately after the House vote and prior to the delivery of the contempt citation, however, the Justice Department filed a complaint in the name of the United States seeking declaratory and injunctive relief against numerous House of Representatives defendants.<sup>65</sup> The requested relief included an injunction that would have prevented "any further action to enforce the outstanding subpoena" against Burford.<sup>66</sup> The United States Attorney, whose name was listed on the Justice Department complaint,<sup>67</sup> declined to present the Burford matter to a grand jury, claiming that "it would not be appropriate for me to consider bringing this matter before a

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58. *Id.* at 15.

59. *Id.* at 16. The President's memorandum to Burford stated that "sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstance." *Id.*; see also *id.* at 42-43 (appendix I) (copy of memorandum).

60. *Id.* at 20.

61. *Id.* at 20-23.

62. *Id.* at 23.

63. See H.R. RES. 632, 97th Cong., 2d Sess., 128 CONG. REC. H10,061 (daily ed. Dec. 16, 1982).

64. House of Representatives Memorandum of Points & Authorities in Support of Motion to Dismiss at 10, *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) (Civ. No. 82-3583) [hereinafter House Memorandum]; see also 128 CONG. REC. H10,268 (daily ed. Dec. 17, 1982) (announcement to House regarding delivery of contempt citation).

65. Complaint at 7-8, *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983) (Civ. No. 82-3583) [hereinafter Complaint]. The House vote took place at approximately 10 p.m. on the evening of December 16, and the Justice Department complaint was filed moments thereafter in federal district court. See HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, RELATING TO THE CONTEMPT CITATION OF ANNE M. (GORSUCH) BURFORD, H.R. REP. NO. 323, 98th Cong., 1st Sess. 9-10 (1983).

66. Complaint, *supra* note 65, at 7.

67. See *id.* at 8.

grand jury until the civil action has been resolved."<sup>68</sup>

The House defendants almost immediately moved to dismiss the suit.<sup>69</sup> The memorandum in support of the House motion identified numerous jurisdictional and constitutional defects in the Justice Department complaint.<sup>70</sup> The barriers to suit identified by the House defendants included the speech or debate clause<sup>71</sup> and article III of the Constitution.<sup>72</sup>

On February 3, 1983, the court granted the House defendants' motion to dismiss.<sup>73</sup> Choosing to avoid most of the House's specific arguments, the court instead relied upon the more generalized notion in the House memorandum<sup>74</sup> that the Justice Department lawsuit was an inappropriate vehicle for resolving the merits of the constitutional confrontation. The court stated that "constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution."<sup>75</sup> Further, it added that resolution of the executive privilege claim would become necessary only if Burford became a defendant in either a criminal contempt proceeding or some other legal action initiated by Congress.<sup>76</sup> The court, therefore, held that the civil action should be dismissed.<sup>77</sup> In so holding, it distinguished *United States v. American Telephone & Telegraph Co. (AT &*

68. Letter from United States Attorney Harris to House Speaker O'Neill (Dec. 27, 1982), reprinted in *Examining and Reviewing the Procedures that Were Taken by the Office of the U.S. Attorney for the District of Columbia in Their Implementation of a Contempt Citation that was voted by the Full House of Representatives Against the then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford, Hearing Before the Comm. on Public Works and Transportation, 98th Cong., 1st Sess. 30 (1983) [hereinafter *Hearing*]*.

69. Motion of the House of Representatives to Dismiss and to Expedite Consideration, *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

70. See generally House Memorandum, *supra* note 64.

71. *Id.* at 10-21. The Speech or Debate Clause, U.S. CONST. art. I, cl. 6, generally protects congressional members and officers from suit for performance of legislative acts, including the authorization and issuance of subpoenas, if within the "legitimate legislative sphere." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

72. House Memorandum, *supra* note 64, at 32-52. Article III requires that a plaintiff have standing by virtue of having suffered some injury in fact as a result of the challenged action. *Allen v. Wright*, 468 U.S. 737 (1984). The House defendants claimed that any "injury" caused by their actions affected only an interest of the executive branch, and hence was constitutionally insufficient to support standing on behalf of the "United States." House Memorandum, *supra* note 64, at 47 (citing *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977) (en banc) (Bazelon, C.J., joined by Tamm & Wright, JJ., concurring)).

73. *United States v. House of Representatives*, 556 F. Supp. at 153.

74. House Memorandum, *supra* note 64, at 21-31.

75. 556 F. Supp. at 152. The court also noted that "[c]ourts have a duty to avoid unnecessarily deciding constitutional issues." *Id.* (quoting *United States v. Rumely*, 345 U.S. 41, 45-46 (1952)).

76. *Id.* at 153.

77. *Id.*

T),<sup>78</sup> in which the District of Columbia Circuit upheld jurisdiction over a lawsuit brought by the executive branch seeking to prevent a private party from complying with a congressional subpoena. According to the court, the *AT & T* case was distinguishable because, absent a need for prior judicial intervention in a civil context, the executive branch would never have been able to raise its claim of executive privilege.<sup>79</sup>

The Justice Department never took an appeal from this dismissal.<sup>80</sup> EPA Administrator Burford resigned from her position on March 9, 1983, and the disputed documents were turned over to a House committee that same day upon a promise by the committee to preserve confidentiality.<sup>81</sup> To date, there has been no criminal prosecution arising from the incident.

Although Congress eventually got what it wanted, several troubling issues remain in the wake of the Burford case. The most obvious of these is the delay engendered by the Justice Department's civil gambit; the materials were requested during the 97th Congress, but were not produced until the 98th Congress. Furthermore, the actions taken by executive branch officials in response to congressional investigatory demands and the subsequent contempt citation arguably manifest a questionable understanding of the proper role of the Executive under the constitutional scheme. A primary reason cited by the United States Attorney for his failure to heed the congressional directive that Burford be prosecuted was the conflict that such a prosecution would effectuate in light of the Justice Department's civil action.<sup>82</sup> It is somewhat disingenuous, however, for the executive branch to cite, as a basis for nonprosecution, a conflict that was entirely of its own making. Such disingenuousness is compounded by the Justice Department's discarding of earlier warnings regarding the potentiality of such a conflict, claiming either that conflicts were nonexistent<sup>83</sup> or that they were curable.<sup>84</sup>

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78. 551 F.2d 384 (D.C. Cir. 1976).

79. 556 F. Supp. at 152.

80. *Hearing, supra* note 68, at 29 (prepared statement of United States Attorney Harris).

81. Hoffman & Peterson, *Burford Quits as EPA Administrator*, Wash. Post, Mar. 10, 1983, at 1, col. 1.

82. *See Hearing, supra* note 68; *see also* Roberts, *Congress's Intent Held as Violated*, N.Y. Times, Mar. 14, 1983, at A13, col. 3.

83. The potential problem was raised presciently by Chairman Levitas at the time of his subcommittee's consideration of Administrator Burford's refusal to comply with the subpoena. In responding to an inquiry, the Justice Department disclaimed any conflict, stating: "[w]e do not believe that anything we have done to date or intend to do at this hearing would jeopardize the ability of the Attorney General to discharge his responsibilities under the Constitution and laws of the United States." *Hazardous Waste Contamination of Water Resources: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 97th Cong., 2d Sess. 54* (Dec. 2, 1982) (statement of Assistant Attorney General Theodore Olson). It also bears repeating in this regard that the concern about a potential

In addition, Burford's underlying privilege claim was questionable at best.<sup>85</sup> Furthermore, had the court not dismissed the case on the ground that it did, there was a host of other apparently insurmountable defects with the Justice Department complaint which would have most likely precluded any resolution on the merits.<sup>86</sup> More importantly, the idea of the Justice Department suing the House of Representatives on behalf of the "United States" is of dubious constitutional validity. In this vein, Professor Laurence Tribe was quoted as accusing the Justice Department of filing the case with "either abject ignorance of the Constitution or contemptible cynicism about constitutional separation of powers."<sup>87</sup>

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conflict predates the Burford controversy and had been anticipated by the Justice Department. See *supra* note 51 and accompanying text; see also *infra* note 84.

84. The Justice Department had suggested earlier that retention of private counsel was "one option available" to avoid the conundrum faced by an executive branch official advised to withhold documents. See JUSTICE DEPARTMENT RETENTION OF PRIVATE LEGAL COUNSEL TO REPRESENT FEDERAL EMPLOYEES IN CIVIL LAWSUITS, STAFF REPORT TO THE SUB-COMM. ON ADMIN. PRAC. AND PROC. OF THE SENATE COMM. ON JUDICIARY, 95TH CONG., 2D SESS. 375-76 (Comm. Print 1978). Of course, when Administrator Burford attempted to obtain outside counsel after it became apparent to her that the Department's hydra-headed representation might not adequately protect her interests, the Department, without explanation, terminated her authority to hire counsel. Russakoff, *EPA Abruptly Cancels Plans to Hire Lawyers*, Wash. Post, Jan. 5, 1983, at A1, col. 1.

85. The justification for the executive branch refusal to produce open files to Congress was a belief that Congress could not be entrusted to preserve the confidentiality of sensitive information. See *supra* notes 55-58 and accompanying text. Such a predicate, however, has been expressly rejected by the courts because it is not, in essence, a "public disclosure" which would represent a proper ground for refusal. See, e.g., *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

Furthermore, to the extent that a balancing of interests would have been necessary, see Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (public need must outweigh presumption of presidential privilege based on public interest and confidentiality), the leading Supreme Court decision in this area expressly validated congressional probes of executive branch enforcement policies. *McGrain v. Daugherty*, 273 U.S. 135, 177-78 (1927).

In contrast, the President's interest in withholding the documents was extremely weak because the documents were produced at lower and middle bureaucratic levels, see H.R. REP. NO. 968, *supra* note 52, at 54, and it was unclear whether the President himself had ever reviewed the documents. See Declaration of Robert M. Perry ¶¶ 22-24, Plaintiff's Motion for Summary Judgment, *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983). The executive privilege claim thus stood on extremely shaky constitutional ground. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (executive privilege can "apply at most to the . . . items with which the [President] was personally familiar"); *United States v. Nixon*, 418 U.S. 683, 711 (1974) (executive privilege protects items critical to "performance of the President's responsibilities"). The illegitimacy of the underlying privilege claim in the Burford case is perhaps best illustrated by the executive's eventual capitulation to the legislative demands.

86. See *supra* notes 70-72 and accompanying text.

87. Taylor, *House Contempt Citation for EPA Chief is Taken to Court by Justice Depart-*

The most troubling aspects of the case, however, are not the actions of a particular administration, but rather the systemic deficiencies in the existing system that were brought to light. It no longer may be seriously contended that the existing statutory system, as codified in sections 192 and 194, is equipped to resolve disputes between Congress and the Executive, regarding the latter's obligation to produce subpoenaed materials. The more difficult issue is how best to modify the present statute so that an orderly and prompt resolution of legislative/executive disputes is assured.

### III. CIVIL ALTERNATIVES TO THE PRESENT SYSTEM

In order to redress the shortcomings in the present system which were highlighted by the Burford case, one commentator has urged courts to take cognizance of civil declaratory judgment actions in such instances.<sup>88</sup> Others have advocated the enactment of legislation that would achieve a similar result. For example, a recent article proposed enactment of a new statute that would remedy "the pitfalls of using Congress' criminal contempt powers as the primary means to obtain compliance with congressional subpoenas issued to employees and officials of the executive branch."<sup>89</sup> The proposed statute would supplement current congressional enforcement options by providing federal district court jurisdiction over civil actions brought by Congress, or an authorized committee or subcommittee, seeking declaratory or injunctive relief regarding a subpoena directed to a federal employee acting in an official capacity.<sup>90</sup> The authors recognize that similar proposals have been introduced in prior sessions of Congress.<sup>91</sup> The primary gloss placed by the authors upon these prior proposals is a provision that would require the federal courts to expedite consideration of any cases brought under the statute.<sup>92</sup>

The views of the present administration with respect to a civil enforcement statute are somewhat unclear. It has been suggested that commencement of the civil action in the Burford case signals a "dramatic" shift away from the Justice Department's historic opposition to such a statute.<sup>93</sup> It re-

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ment, Wall St. J., Dec. 20, 1982, at 6, col. 1. Professor Tribe further accused the Justice Department of "turning the whole Constitution on its head." *Id.*

88. See generally Note, *supra* note 10.

89. Hamilton & Grabow, *supra* note 10, at 147.

90. *Id.* at 171-72.

91. *Id.* at 159-62 (discussing proposals that date back to 1953).

92. See *id.* at 165.

93. *Id.* at 170-71. Historically, the Justice Department has opposed the civil enforcement concept with respect to executive/legislative conflicts, and the concept was dropped from the Ethics in Government Act at the Department's insistence. See 123 CONG. REC. 2961, 2970 (1977) (remarks of Sen. Abourezk).

mains to be seen, however, whether this support is institutional or instead simply designed to address the exigencies of the moment.<sup>94</sup>

In any event, several flaws are apparent regarding these proposals to establish a civil enforcement mechanism as an alternative to the current system of criminal contempt. The most obvious flaw is that, even with an expediting provision, unacceptable delays are inherent in the civil process. It bears noting in this regard that it was not until the lapse of three months and a congressional session from the date the civil complaint was filed that the documents eventually were produced by the executive branch.<sup>95</sup> This delay occurred notwithstanding the fact that the case was decided on an expedited basis and at a threshold stage. If a court had been required to reach the merits of the dispute, possible discovery and other procedural wrangling undoubtedly would have dragged the case on even longer. In addition, any appeals of the district court decision would have caused still further delays.

Finally, even if expedited proceedings were a panacea for these problems of delay, it is not realistic to believe that a simple statutory expediting provision adequately would accomplish its intended goal. The statute books contained over eighty such expediting provisions<sup>96</sup> until Congress recognized the futility of blanket expediting provisions in 1984, when it passed legislation removing almost all such provisions from the books.<sup>97</sup>

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94. What is clear is that the Justice Department finds § 192 prosecutions of certain executive branch officials repugnant. In papers filed in the Burford case, the Department attempted to erect a sweeping constitutional construct that Burford could not even be prosecuted because: (1) she acted upon instructions of the President; (2) the Attorney General counseled her not to comply with the subpoena; and (3) prosecution would place a "heavy burden" upon the assertion of executive privilege. Plaintiff's Points & Authorities, *supra* note 56, at 36 & n.\*\*. It is far from certain whether Burford would be able to defend against criminal charges by arguing that she was merely following the President's orders. *See McCord v. Bailey*, 636 F.2d 606, 611-12 (D.C. Cir. 1980) ("official authorization" may, at times, be a defense to criminal charges). *Compare United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (per curiam) (separate opinion of Wilkey, J.) (defendant claiming defense must "show that his reliance was objectively reasonable under the particular circumstances of his case") (emphasis omitted); and *id.* at 955 (separate opinion of Merhige, J.) (official authorization defense available "if, and only if, an individual (1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field"); *with id.* at 957-73 (Leventhal, J., dissenting) (totally rejecting such a defense in context of Watergate proceedings). Although the presidential directive clearly placed Burford in an unenviable position, she nevertheless retained the ultimate option of resigning her cabinet position if she viewed the directive as unacceptable. *See Hearing*, *supra* note 68, at 59 (remarks of Rep. Levitas) (referring to resignation of William Ruckelshaus during Watergate era).

95. *See supra* text accompanying notes 52-87.

96. *See H.R. REP. NO. 985*, 98th Cong., 2d Sess. 7 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5779, 5785.

97. *See Trademark Clarification Act of 1984*, Pub. L. No. 98-620, § 401, 98 Stat. 3335, 3356 (1984) (removing over 80 expediting provisions from scattered sections of the U.S. Code).

It is, on the other hand, well established that federal courts resolve criminal matters much more expeditiously than civil cases.<sup>98</sup> More importantly, an underlying premise of our criminal laws is that such laws deter criminal behavior.<sup>99</sup> If, indeed, the threat of eventual criminal prosecution deters executive branch officials from raising insubstantial privilege claims, the need for time consuming litigation would be obviated.

That criminal sanctions may be severe in cases involving a good faith privilege claim is undoubtedly a factor lurking behind proposals to replace the current criminal contempt system with a civil enforcement mechanism in executive/legislative conflicts.<sup>100</sup> The emphasis upon the severity of the criminal contempt proceeding, however, ignores the substantial safeguards built into the present system. The District of Columbia Circuit has described the present system as "an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation."<sup>101</sup> The court correctly pointed out that a reluctant witness may not even be certified by Congress as in contempt until his or her privilege claims are rejected by a subcommittee, committee, and eventually the full House or Senate.<sup>102</sup> It is only at that point that an indictment or information is sought which, if issued, means that the witness still will have the opportunity for court review of the privilege claim.<sup>103</sup>

Any assumption that Congress will not take seriously a bona fide assertion of executive privilege is simply unwarranted.<sup>104</sup> The civil enforcement proposals err too far on the side of protecting legitimate claims of privilege without recognizing that a more serious threat is the assertion of unsupportable

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The Act specifically repealed a statutory provision that purported to give priority to civil actions seeking enforcement of Senate subpoenas. *See id.* § 402(29)(D), at 3359 (repealing 28 U.S.C. § 1364(c) (1982)). In place of these specific expediting provisions, the Act added a general section allowing expedition in any case for "good cause." *See* 28 U.S.C. § 1657(a) (Supp. II 1984).

98. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 129 (1984) (indicating that federal courts resolved criminal felony cases an average of between two and five months faster than civil cases during the period 1979-1984).

99. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 93 (1978).

100. *See* Hamilton & Grabow, *supra* note 10, at 151. Of course, a private citizen with a good faith privilege defense to a congressional subpoena, or at least a House subpoena is placed in the same conundrum. The civil enforcement proposals do not address the predicament. *See supra* notes 37-38 and accompanying text.

101. *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972).

102. *Id.*

103. *Id.*

104. *Cf.* Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707 (1985) (arguing that members of Congress have the duty and ability to consider constitutional issues raised by proposed legislation).

privilege claims which obstruct and delay congressional investigations.<sup>105</sup>

#### IV. STRENGTHENING THE PRESENT SYSTEM

We have demonstrated in Part III why the current congressional contempt system is preferable to a civil enforcement mechanism. In order for the current system to be efficacious with respect to legislative/executive conflicts, however, there are at least two issues that need to be addressed. First, a major sticking point in the Burford controversy involved the extent to which the prosecutor was legally bound to present the case to a grand jury once Congress had certified the witness in contempt.<sup>106</sup> The second issue that must be addressed is the conflict that arises when an executive branch prosecutor is directed by a House of Congress to seek indictment of a high-ranking official claiming executive privilege.<sup>107</sup> These issues will be discussed in turn.

In the Burford controversy, the executive branch relied heavily upon the argument that it had absolute discretion to decide whether a congressional contempt citation should be presented to a grand jury.<sup>108</sup> The principal case relied upon to support this absolute discretion, however, does not bear the weight placed upon it.<sup>109</sup> Instead, the better argument is that section 194

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105. Such a threat is by no means speculative. The disrespect for the congressional contempt statute engendered by the Justice Department's groundless Burford suit unfortunately spawned progeny. When another EPA official subsequently was subpoenaed to testify before a different House subcommittee, she declined even to appear and instead filed an unfounded suit patterned after the Department's complaint, which she subsequently dismissed voluntarily. See House Comm. on Energy and Commerce, Proceedings Against Rita M. Lavelle, H.R. REP. NO. 190, 98th Cong., 1st Sess. 19-20 (1983).

106. See *Hearing*, *supra* note 68, at 49-50.

107. Such a conflict, while not necessarily inevitable, see *supra* note 49 (citing cases in which executive branch officials claiming executive privilege have been prosecuted for contempt of Congress), is nevertheless a serious possibility.

108. See Plaintiff's Points & Authorities, *supra* note 56, at 34-35.

109. The Justice Department relied, see *id.* at 35, upon dictum from a D.C. Circuit case wherein the court stated its "aware[ness]" that "the Executive Branch . . . may decide not to present the [contempt citation] to the grand jury (as occurred in the case of the officials of the New York Port Authority)." *Ansara v. Eastland*, 442 F.2d 751, 754 & n.6 (D.C. Cir. 1971). Others have correctly pointed out that the court's language in *Ansara* is somewhat mysterious in view of the fact that there does not appear to be any such Port Authority case in which grand jury presentment failed to occur following congressional referral. See Hamilton & Grabow, *supra* note 10, at 154 n.58. More importantly, virtually all other cases are of the view that grand jury presentment is mandatory following congressional referral. See, e.g., *United States v. Brewster*, 154 F. Supp. 126, 136 (D.D.C. 1957), *rev'd on other grounds*, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958); *Ex parte Frankfield*, 32 F. Supp. 915, 916 (D.D.C. 1940); see also Hamilton & Grabow, *supra* note 10, at 154; Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231, 257; Sky, *supra* note 35, at 401.

requires that all witnesses cited by a House of Congress for contempt and referred to the United States Attorney be brought before the grand jury.<sup>110</sup>

It was further argued by the Executive Branch during the Burford controversy that Congress could not constitutionally interfere with the Executive's prosecutorial discretion in determining what cases to bring before a grand jury.<sup>111</sup> There are serious questions, however, as to whether the Executive Branch truly exercised prosecutorial discretion in the Burford matter.<sup>112</sup> In a more general vein, constitutional claims of prosecutorial discretion are, in any event, unpersuasive in this context. As recently stated by a leading commentator, article II of the Constitution<sup>113</sup> "is a duty, not a license; it imposes an obligation on the President to enforce duly enacted laws."<sup>114</sup> Even as-

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110. Section 194 provides that the President of the Senate or Speaker of the House shall certify the fact of contempt to the United States Attorney "whose duty it shall be to bring the matter before the grand jury for its action." The word "shall" in statutes generally is interpreted by the courts as imposing a mandatory duty upon the executive branch. *See, e.g.*, *Community Nutrition Inst. v. Young*, 757 F.2d 354, 357-58 (D.C. Cir. 1985), *rev'd*, 106 S. Ct. 2360 (1986); *but see Heckler v. Chaney*, 105 S. Ct. 1649, 1658 (1985) (dictum suggesting that use of word "shall" in typical criminal provision does not by itself require prosecution of every statutory violation); *Hearing, supra* note 68, at 28 (copy of Harris letter arguing that congressional "contempt statute is like any other criminal statute passed by Congress"). Outside the congressional contempt field, however, Congress does not typically, after a full vote by the affected House, certify matters to the United States Attorney for prosecution. Furthermore, the typical criminal statute does not contain language stating that the United States Attorney has a "duty . . . to bring" cases before the grand jury.

111. Plaintiff's Points & Authorities, *supra* note 56, at 34-35 & n.\*\*.

112. "Prosecutorial discretion" concerns, *inter alia*, a determination to decline prosecution where no substantial federal interest would be served, the putative defendant is subject to prosecution in another jurisdiction, or there exists an adequate noncriminal alternative. UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 5-14 (July 1980). Among the factors that a prosecutor may consider are the likelihood of conviction, the choice of a strong case to test uncertain law, the degree of criminality, the weight of evidence, precedent, policy, the climate of public opinion, and the gravity of the offense. *See Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967). The elements of the congressional contempt statute are not difficult or complicated to prove, and none of the factors identified by the courts as relevant to the exercise of discretion were present. On the contrary, the only articulated reasons for the bold and unequivocal refusal of the Justice Department to proceed was that prosecution would impose a "heavy burden" upon the assertion of executive privilege. Plaintiff's Points & Authorities, *supra* note 56, at 35 n.\*\*. This is hardly the exercise of discretion; it is simply a variation upon the theory that any executive official following orders is excused from the obligation to respond to valid congressional demands.

113. *See* U.S. CONST. art. II, § 3. This "take care" provision of article II was the constitutional provision relied upon by the Justice Department in *Burford* in support of its prosecutorial discretion argument. *See* Plaintiff's Points & Authorities, *supra* note 56, at 34 n.\*\*.

114. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985); *see also id.* ("the 'take care' clause does not authorize the executive to fail to enforce those laws of which it disapproves").

suming that Congress could not constitutionally interfere with the Executive's prosecutorial discretion based upon the individualized facts of a given case (an assumption that itself is far from clear),<sup>115</sup> there should be little doubt as to the constitutionality of a statutory scheme constraining the Executive's discretion over broad categories of cases.<sup>116</sup> It is constitutionally permissible, therefore, for Congress to decree that every person cited by a House of Congress for contempt be brought before a grand jury.

It should be noted, however, that arguments as to whether section 192 imposes a mandatory duty upon the United States Attorney and, if so, whether it is constitutional, ultimately generate a lot of heat but very little light. Even if section 192 technically imposes such a duty, there is, under the current system, no practical way of enforcing it. The existence of a mandamus action,<sup>117</sup> in which the United States Attorney could be compelled to institute grand jury proceedings, is at best unclear.<sup>118</sup> More importantly, even if the United States Attorney could be compelled to bring the case before a grand jury, it would be virtually impossible to ensure that good faith efforts were made to see that an indictment was returned.<sup>119</sup> Finally, it may well be that the United States Attorney could refuse to sign an indictment

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115. In *INS v. Chadha*, 462 U.S. 919 (1983), a decision holding the legislative veto unconstitutional, the Supreme Court expressly declined to rule on whether Congress could pass legislation overriding executive branch decisions to deport individual aliens. *See id.* at 935 n.9.

116. Indeed, such is the clear import of *Dunlop v. Bachowski*, 421 U.S. 560 (1975), wherein the Court held that the Secretary of Labor had an absolute duty to file a civil suit to set aside a union election if certain statutorily specified factors were present. *See id.* at 567 n.7 (agreeing with lower court that Labor Secretary did not enjoy "an unreviewable exercise of prosecutorial discretion"); *see also supra* notes 110, 114, and accompanying text. The most pertinent examples may be the impoundment controversies of the early 1970's, during which courts uniformly rejected the President's claim that he had the constitutional authority to refuse to spend funds that Congress had mandated be spent. *See generally* Mikva & Hertz, *Impoundment of Funds—The Courts, The Congress, and The President: A Constitutional Triangle*, 69 *Nw. U.L. REV.* 335 (1974).

117. *See* 28 U.S.C. § 1361 (1982).

118. *See, e.g.,* *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied sub. nom., Cox v. Hauberg*, 381 U.S. 935 (1965) (holding that "courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions"). Of course, if it is determined that the United States Attorney has no discretion to decline to bring congressional contempt cases before a grand jury, *see supra* notes 108-10 and accompanying text, the *Cox* rationale against mandamus may be inapposite. Even so, mandamus would not be a viable remedy in congressional contempt cases in light of the delay that would be engendered. Furthermore, it may be somewhat inconsistent for a House of Congress to institute a mandamus suit while at the same time arguing, as was done in the *Burford* case, that the flip-side of a mandamus action (i.e., a declaratory judgment action by the Executive) is improper. *See, e.g.,* *Hearing, supra* note 68, at 12.

119. *See Hearing, supra* note 68, at 36 (testimony of United States Attorney Harris) ("I could have gone through the charade, for example, of starting to present it to a grand jury and then just withholding everything.").

even if one was returned.<sup>120</sup> Therefore, additional legislation is needed to preserve the viability of the congressional contempt statute in the face of executive recalcitrance. The ideal solution would be to amend title VI of the Ethics in Government Act<sup>121</sup> to provide for court<sup>122</sup> appointment of independent counsel whenever Congress votes a contempt citation against a high-ranking executive official. That act, which currently provides for appointment of independent counsel whenever there is specific evidence of criminal wrongdoing by certain executive branch officials,<sup>123</sup> has now been applied in a number of instances without successful challenge to its constitutionality.<sup>124</sup> The enactment of such legislation would remove United States attorneys from the political line of fire which may result when Congress cites an executive branch official for contempt.<sup>125</sup>

Legislation along these lines was in fact proposed during the 98th Congress. One bill, introduced by Representative Frank and others, would have amended the Ethics in Government Act to require that the Attorney General

apply to the division of the court for the appointment of an independent counsel within five days after the Speaker of the House of Representatives, acting pursuant to section 194 of title 2 of the United States Code, has certified to the appropriate United States attorney that any [high-ranking executive branch official<sup>126</sup>] has

120. See *Cox*, 342 F.2d at 171 (5th Cir. 1965) ("If the [United States] attorney refuses to sign, as he has the discretionary power of doing, we conclude there is no valid indictment.").

121. Pub. L. No. 95-521, title VI, 92 Stat. 1867 (1978) (codified as amended at 28 U.S.C. §§ 591-598; *id.* § 49; *id.* §§ 528-529 (1982)).

122. The Ethics in Government Act vests appointment authority in a special panel of the District of Columbia Circuit Court of Appeals. See 28 U.S.C. §§ 49, 593 (1982). Such a procedure is consonant with the Appointments Clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2. See *Ex parte Siebold*, 100 U.S. 371, 397 (1879).

123. The Act applies to the President and Vice-President, cabinet-level officers, certain White House and Justice Department officials, and other high-ranking government or presidential campaign officials. See 28 U.S.C. § 591(b) (1982).

124. See *Special Prosecutor Provisions of Ethics In Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter *Special Prosecutor Hearings*]. Although certain Attorneys General have at one time or another sought to raise doubts regarding the Act's constitutionality, the majority and better view is in favor of constitutionality. See Kramer & Smith, *The Special Prosecutor Act: Proposals for 1983*, 66 MINN. L. REV. 963, 973-83 (1982); see also L. TRIBE, *supra* note 99, § 4-10, at 192 n.4 (1978).

125. See *Hearing, supra* note 68, at 50 (testimony of United States Attorney Harris) ("I feel a little bit as though I am a nonvolunteer player in a play called—well, 'Is It Half Empty or Half Full?' subtitled, 'The U.S. Attorney is Damned If He Does and Damned If He Doesn't.'").

126. The bill defined the class of covered officials as those persons "described in § 591(b) of [28 U.S.C.] or any person compensated at or above a rate equivalent to level V of the Executive Schedule under section 5316 of title 5 . . ." H.R. 2684, § 2, 98th Cong., 1st Sess. (1983).

been found in contempt of Congress.<sup>127</sup>

The bill further made clear the duty of this independent counsel to bring the case promptly "before the grand jury for its action and to prosecute any indictments resulting therefrom."<sup>128</sup> A similar bill was introduced in the 99th Congress.<sup>129</sup>

A separate bill introduced in the 98th Congress would have amended the congressional contempt statute to clarify that "[t]he duty of the United States attorney [under 2 U.S.C. § 194] is nondiscretionary and shall be carried out not later than sixty days after the date on which the President of the Senate or the Speaker of the House of Representatives, as the case may be, makes the certification."<sup>130</sup> This bill is somewhat flawed because it is doubtful, for reasons previously discussed,<sup>131</sup> that a recalcitrant United States Attorney can be compelled to bring an effective and good faith prosecution. As former Senate Watergate Chief Committee Counsel Samuel Dash has stated, "the Attorney General, an appointee of the President and usually a close political ally of the President, simply cannot be depended upon to forcefully prosecute the assistants of the President, or high executive officials in the Government."<sup>132</sup>

The better means for Congress to enforce its investigative demands against the President, therefore, is through the current congressional contempt procedure augmented by an independent counsel mechanism. It should be noted, however, that there are cases where Congress need not invoke contempt procedures in order to perform its legislative role. Thus, for example, during the recent controversy involving the President's short-lived refusal to divulge certain documents arguably relevant to the nomination of William Rehnquist as Chief Justice,<sup>133</sup> there was no need for the Senate Judiciary Committee to resort to a contempt mechanism. Instead, the Committee quite simply could have refused to recommend confirmation of Chief Justice Rehnquist to his new position unless and until the President divulged the materials at issue.<sup>134</sup> There are nevertheless situations (the Burford case be-

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127. *Id.*

128. *Id.* § 3.

129. H.R. 3836, 99th Cong., 1st Sess. (1985).

130. H.R. 3456, 98th Cong., 1st Sess. (1983).

131. *See supra* notes 117-20 and accompanying text.

132. *Special Prosecutor Hearings, supra* note 124, at 69.

133. *See supra* note 7.

134. In 1973, Senator Ervin, then Chairman of the Judiciary Committee, delayed consideration of and held hostage President Nixon's nomination of Richard Kleindienst as Attorney General until the President agreed to allow Peter Flanagan, a White House staff assistant, to testify. Randolph & Smith, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621, 649 (1973).

ing the prime example) where such a political power play is untenable and the last resort is contempt of Congress.<sup>135</sup> It is for these situations that the independent counsel mechanism is necessary.

#### V. CONCLUSION

The Burford controversy dramatized that the current system of congressional contempt may suffer a serious breakdown when the contemnor is a high-ranking executive branch official. Proposals for replacing the existing criminal enforcement mechanism with a civil process, however, unjustifiably fail to recognize that a civil process would engender unnecessary delay and frivolous privilege claims which would thwart the congressional need for timely information. A better solution would be to retain the present system supplemented with a mechanism providing for appointment of independent counsel in cases where high-ranking executive branch officials have been cited for contempt by Congress. It is only in this way that the ability of Congress to obtain necessary and timely information from executive branch officials effectively may be preserved.

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135. Congress conceivably could, of course, use its appropriations authority to enforce its investigative demands against the executive branch in virtually every case. For example, in the *Burford* case, Congress could have refused to appropriate any more EPA funds until the President divulged the Superfund enforcement materials at issue. The inefficacy of this appropriations weapon, however, is apparent: Congress would be crippling the very programs its oversight was intended to strengthen.

