ROBERT D. McCALLUM, JR.
Assistant Attorney General

JOHN S. GORDON
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

ROGER WEST
First Assistant United States Attorney
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2461

DAVID J. ANDERSON
D.C. Bar No. 36988
ANNE L. WEISMANN
D.C. Bar No. 298190
GAIL WALKER
Va. Bar No. 23590
United States Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 616-0673

Attorneys for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

HENRY A. WAXMAN, et al.,

Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant.

CV No. 01-04530-LGB (AJWx)

SECRETARY'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Date: March 25, 2002
Time: 10:00 a.m.
Courtroom: No. 780
Location: Los Angeles-Roybal

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION

As the Secretary demonstrated in his opening memorandum, there are a number of compelling reasons why this Court lacks the authority to resolve the quintessentially political dispute before it and why its Order of January 22, 2002 should be reconsidered. Lacking any persuasive authority countering the Secretary's arguments, plaintiffs strive to convince the Court not to reach the merits of his motion for reconsideration. But, in the interests of justice, the merits cannot legitimately be avoided, and the authorities cited by the Secretary dictate that plaintiffs' request for relief be denied on the grounds that plaintiffs lack not only Article III standing but also a constitutionally valid right of action.

The dramatic impact of this Court's summary judgment ruling presents just the sort of "highly unusual circumstances" that warrant reconsideration of that decision. See McDowell v. Calderon, 197 F.3d 1253, 1255 (9th Cir. 1999). The case is a first of its kind, resting on an obscure statutory provision that has never been judicially enforced at any time before in its nearly 75-year existence. The reach of that provision and the many flaws in plaintiffs' novel claim simply did not become apparent until the Court's ruling.

Nevertheless, having carefully considered this Court's ruling and its potentially far-reaching implications, the Secretary urges the Court to reconsider that ruling for several reasons that implicate this Court's very authority to issue the relief sought. Principal among those reasons is that the plaintiffs – all of whom are legislators seeking relief for injuries purportedly suffered in their capacity as legislators – lack Article III standing to sue under the rule of Raines v. Byrd, 521 U.S. 811 (1997). In their opposition brief, plaintiffs essentially concede that the injury purportedly suffered arises from their status as members of Congress, a concession that is fatal to their ability to seek relief in federal court. Their attempts to confine the scope of Raines' limitations on legislative standing are unavailing here.

Plaintiffs also fail to demonstrate that they have a statutory right to enforce the disclosure requirements of 5 U.S.C. § 2954. Indeed, in opposing the motion for reconsideration, plaintiffs do not attempt to argue that § 2954 provides a right of action, either express or implied. Nor can they credibly argue that such a cause of action is provided by either the Administrative Procedure Act or the federal mandamus statute. Plaintiffs have no answer to the case law cited by the Secretary in his opening memorandum, which plainly establishes that there is no "agency action" to support an APA claim where an agency declines to provide information to Congress or a congressional committee. And the federal mandamus statute, 28 U.S.C. § 1361, does not itself create an independent cause of action where, as here, the underlying statute sought to be enforced does not provide an express or implied cause of action.

Finally, plaintiffs have no valid response to the serious constitutional issues raised by this Court's January 22, 2002 ruling. Plaintiffs' reading of the statute would result in the unconstitutional delegation of the House's collective investigative power to a small group of members, thus circumventing traditional congressional subpoena rules designed to ensure that the enforcement of congressional demands for information from the Executive Branch is the result of the deliberations of the whole Chamber.

For all these reasons, and in the interest of conserving judicial resources in the long run, the Secretary respectfully urges the Court to reconsider its grant of relief to plaintiffs and to vacate its January 22, 2002 Order. If allowed to stand, the Court's ruling would invite not only additional suits by legislators under 5 U.S.C. § 2954 to resolve routine political disputes over information demanded from the Executive Branch, but also suits to enforce the "veritable cornucopia of [congressional] reporting requirements." Natural Resources Defense Council, Inc.

v. Hodel, 865 F.2d 288, 317 & n.30 (D.C. Cir. 1988). [1]

ARGUMENT

I. PLAINTIFFS LACK STANDING.

Plaintiffs' entire standing argument rests on a misunderstanding of the nature of the statutory right they seek to enforce.[2] Plaintiffs contend that 5 U.S.C. § 2954 creates a "personal" right of access to the information which they have demanded from the Secretary and that the refusal to provide this information has injured them in some "personal" way.. But § 2954 merely establishes a reporting obligation for agencies to report to particular congressional committees or groups of their members. It clearly does not create any "personal" rights for any individual. It is only because of plaintiffs' official status as legislators and, indeed, members of a particular, designated committee, that they can even claim a right to request the information sought. Furthermore, the reporting obligation established by § 2954 cannot be asserted by any individual – even an individual member of a designated committee – but must be asserted by the collective action of a specified number of legislators. These status-based, collective features make clear that the reporting obligations imposed by § 2954 do not run to the benefit of

---

[1] Plaintiffs question the timing of the Secretary's motion for reconsideration, suggesting that it was filed more than 10 days after the Court's ruling. See Plaintiffs' Opposition to Defendant's Motion for Reconsideration ("Pl. Opp."), at 3. The Secretary, however, filed his motion on February 5, 2002, exactly 10 days (not including weekends) after the entry of the court's ruling on January 22. See Fed. R. Civ. P. 6(a) ("When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.").

[2] This Court has an "independent obligation to examine [its] own jurisdiction," whenever that issue is raised, and ascertaining a plaintiff's standing "'is perhaps the most important of [the jurisdictional] doctrines.'" FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). See also United States v. Hays, 515 U.S. 737, 742 (1995); Arizona Cattle Growers' Ass'n v. United States Fish and Wildlife, 273 F.3d 1229, 1235 (9th Cir. 2001).

plaintiffs as individuals but are intended solely to facilitate the institutional interests of Congress as a whole.

Accordingly, plaintiffs' attempt to analogize § 2954 to statutes creating a public right of access to government information, such as the Freedom of Information Act (FOIA) and the Federal Advisory Committee Act (FACA), is specious. Unlike § 2954, those statutes create rights in an individual member of the public and neither statute was enacted to enhance the power of Congress as a whole to extract information from the Executive Branch. Were a member of Congress to seek information from an agency under either statute, any rights that member of Congress might have would arise *solely* from his status as a member of the public and would not derive from his *official capacity as a legislator.* [3]/

Plaintiffs concede that they are suing in their official capacity as members of Congress and that the right they seek to enforce "relates as much to the oversight role that their Committee performs as it does to the legislative process itself." Pl. Opp. at 8-9. Nevertheless, plaintiffs suggest that their interest in enforcing 5 U.S.C. § 2954 is not shared by Congress as a whole but is a "personal" interest that only they have. See id. This argument stands the statute on its head. There is no basis for believing that Congress, in enacting § 2954, intended to advance the personal interests of its members. On the contrary, that provision could not have been enacted *but for* Congress' legislative interest in conducting investigations to determine the need for legislation. Accordingly, there can be no serious dispute that the statute advances an *institutional* right of access. The deprivation of this right has, if anything, resulted in an "institutional injury" that "damages all members of Congress and both Houses of Congress equally." Raines

---

[3]/ Thus, the Secretary does not, as plaintiffs suggest, argue that the plaintiffs' status as legislators would prevent them from having standing to bring suit under the FOIA or the FACA whenever they sought information in the "course of their duties as members of Congress." Pl. Opp. at 10 n.2.

v. Byrd, 521 U.S. 811, 821 (1997). Consequently, despite plaintiffs' attempts to avoid its application, the Supreme Court's decision in Raines controls here. See Def. Mem. at 5-7. [4]/

In a last-ditch attempt to sidestep Raines, plaintiffs seek to limit that decision's reach to instances in which the injury asserted by the plaintiff legislators involves the right to vote on the final passage of legislation. Plaintiffs maintain that they are not claiming a "dilution or deprivation of their votes" in their "lawmaking capacity," but rather a harm to their "entitlement to information that runs to members of a single committee in each House of Congress designated by statute . . . ." See Pl. Opp. at 8. But Raines does not limit its scope to the narrow class of legislative interests identified by plaintiffs. Instead, its general rule against Article III standing for legislators applies whenever legislators seek to vindicate *any* institutional interest enjoyed by them "solely because they are Members of Congress" and which is widely dispersed among all legislators. Raines, 521 U.S. at 821. While the alleged harm in Raines was the dilution of voting power of the legislator plaintiffs caused by the Line Item Veto Act, there is nothing in Raines that would indicate that the Supreme Court meant to limit its ruling or to suggest that other abstract institutional injuries would suffice to confer Article III standing. To the contrary, the Court stressed that congressional plaintiffs hold no privileged status for purposes of the standing inquiry and that due deference to separation of powers principles dictates "strict compliance" to the fundamental requirement of "personal" injury-in-fact. 521 U.S. at 819-20. In short, Raines' limitation on congressional standing applies in any circumstance where a legislator seeks to vindicate a shared congressional interest, such as the

---

[4]/ Even in the case principally relied on by plaintiffs, FEC v. Akins, 524 U.S. 11 (1998), the Supreme Court stressed that the denial of information at issue there was directly related to a personal right guaranteed to those suing, the right to vote. Id. at 21, 24-25.

investigative interest at issue in this case.

Plaintiffs' acknowledgment that individual legislators cannot demonstrate the requisite personal injury if they are "really only complaining of a failure to persuade fellow colleagues" to take certain action is a virtual admission that they lack standing. See Pl. Opp. at 10, *quoting* Lawrence H. Tribe, *American Constitutional Law* (Third ed. Vol. 1), § 3-20 at 462. That is precisely what has happened here. Plaintiffs filed suit because they were unable to persuade their congressional colleagues to pursue potential legislative alternatives to compel the disclosure of the information sought, such as issuing a subpoena for that information (and enforcing that subpoena if necessary through appropriate procedures) or taking political action. Because these alternate legislative remedies were (and remain) available, this suit is, at bottom, about a "loss of political power" on plaintiffs' part, and not about the loss of any "private" right.

Indeed, the very section of the Tribe treatise cited by the plaintiffs directly undermines their claim of standing in this case. In Professor Tribe's view, "a legislator has no greater claim than any other citizen to complain of governmental action which may interfere indirectly with the legislative process. Thus, *a legislator probably should not have standing to challenge actions that may incidentally deprive him or her of information helpful in exercising constitutional powers*." Tribe, *supra*, at 462 (Emphasis added).

II. PLAINTIFFS LACK A STATUTORY RIGHT OF ACTION TO ENFORCE § 2954.

Turning to the question of whether plaintiffs have a right to seek judicial enforcement of the statute at issue, plaintiffs concede, as they must, that 5 U.S.C. § 2954 does not in itself create a right of action.[5/] As the Secretary explained in his

---

[5/] Plaintiffs have no response to the Secretary's argument that § 2954 does not provide a cause of action other than to assert (Pl. Opp. at 13 n.4) that the question of whether there is an implied right of action arises "only when third parties seek

opening memorandum (Def. Mem. at 11-14), nothing in the language of § 2954 or its history evinces any intent by Congress to confer on individual legislators a judicially enforceable right to compel the disclosure of information from the Executive Branch. On the relatively infrequent occasions when the Executive Branch determines that it would be contrary to the public interest to provide requested information, the relevant congressional committee may determine to issue a subpoena. A decision to enforce that subpoena by contempt is made by a vote of the whole Chamber. Only at that point is judicial process invoked to resolve a dispute between the two political branches. The existing arrangements by which Congress may obtain information from the Executive reflect the interests and accountability of Congress as a whole. Section 2954 did not purport to confer coercive power on individual congressmen to compel disclosure of Executive Branch information any time that they ask for information that the Executive Branch declines to provide. Indeed, the courts have been reluctant to use their coercive power on less than a vote of a full House even where the literal terms of a statute compelled a contrary conclusion.[6/]

---

to enforce federal mandates against private entities." This is not correct. Indeed, courts have not limited the application of the rule of Alexander v. Sandoval, 532 U.S. 275 (2001), to the context of suits against private defendants but have applied that rule in suits against the federal government as well. See, e.g., Dewakuku v. Martinez, 271 F.3d 1031, 1037 (Fed. Cir. 2001) (applying Sandoval to determine whether there was an implied private right of action to sue the Department of Housing and Urban Development to enforce the Indian Housing Act of 1937); The Commonwealth of Puerto Rico v. Rumsfeld, 180 F.Supp.2d 145, 152-57 (D.D.C. 2002) (applying Sandoval to determine whether there was an implied right of action to sue the Department of Defense to enforce an alleged duty under the Noise Control Act). See also Smith v. Reagan, 844 F.2d 195, 200-01 (4th Cir. 1988) (analyzing whether there was an implied right of action to sue the President and federal officials to enforce an alleged duty under the Hostage Act).

[6/] See Wilson v. United States, 369 F.2d 198, 202-03 (D.C. Cir. 1966) (construing contempt-of-Congress statute to require a vote of the full House,

There being no express or implied right of action created by § 2954 itself, the question for the Court becomes whether either of the two statutes cited by plaintiffs, the Administrative Procedure Act (APA) or the federal mandamus statute, independently creates a cause of action for plaintiffs. Neither statute does.

The Administrative Procedures Act: Contrary to plaintiffs' contention, the enactment of the Administrative Procedure Act nearly two decades after the enactment of § 2954 in no way alters the analysis. Whether a particular statute gives rise to APA review requires examination of its nature and purpose. In enacting § 2954, Congress acted to further the interests of Congress as a whole, not to allow individual members to short-circuit customary political checks and demand information in court. In the absence of a judicially enforceable right to the information they seek, plaintiffs have no cause of action under the APA.

The question of whether the APA grants plaintiffs a right to seek judicial enforcement of 5 U.S.C. § 2954 turns on whether a failure to provide information to Congress as required by statute constitutes "agency action" within the meaning of the APA. See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review"). Courts have recognized that a failure to comply with a congressional reporting requirement generally does not constitute "agency action" within the meaning of the APA. The reasons for this were explained by

---

when Congress is in session, before a witness could be found in contempt by a court and noting that committees might manipulate their processes in order to "insulate their actions on contempt matters from any further consideration within the legislative branch"). See also Watkins v. United States, 354 U.S. 178, 205 (1957) (areas of inquiry for congressional committees should be clearly delineated by the authorizing House because"[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need").

the D.C. Circuit in Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 318-19 (D.C. Cir. 1988), and endorsed by the Ninth Circuit in Guerrero v. Clinton, 157 F.3d 1190, 1195-96 (9th Cir. 1998). See Def. Mem. at 16-18.

Plaintiffs have no real response to these decisions, instead declaring them "irrelevant" because they were brought by third parties rather than legislators (Pl. Opp. at 13). But this is a distinction without a difference. There is no logical reason why a failure to comply with a congressional reporting requirement would constitute "agency action" for the purposes of legislator suits but not for a non-legislator plaintiff. As the D.C. Circuit reasoned in Hodel, noncompliance with a congressional reporting requirement is "an entirely different sort of action" than the prototypical exercise of agency power whereby individual rights or obligations are determined and, indeed, is the type of action that is "quintessentially within the province of the political branches to resolve as part of their ongoing relationships." Hodel, 865 F.2d at 318-19. If anything, this rationale, which leaves the political branches of government to devise a solution to their dispute, is even more applicable when a suit is brought by a member of Congress than it is when the suit is brought by a private individual, who has little power to bring about such a political resolution.

Notwithstanding plaintiffs' suggestion to the contrary (Pl. Opp. at 13), an Executive Branch failure to provide information pursuant to a statutory obligation imposed on the Executive Branch is not analogous to a failure to provide information pursuant to the FOIA or other statutes which require that certain information be made available to the public. The former directly implicates the relations between the two political branches – and thus is more appropriately redressed through legislative or political means – whereas the latter obviously does not. See Hodel, 865 F.2d at 317 n.30 ("Needless to say, a reporting-to-Congress obligation is entirely different [from] a congressionally imposed requirement that an Executive Branch department or agency gather information

and make that information, upon compilation, publicly available,").

Plaintiffs' alternative assertion, that a failure to comply with 5 U.S.C. § 2954 "determine[s] the 'rights' of plaintiffs" (Pl. Opp. at 13), is equally weak. As the Secretary explained in the context of standing, whatever right of access § 2954 created, that right was not granted to plaintiffs in their personal capacities, but rather is an institutional right created for the benefit of Congress as whole. To the extent that this institutional right is "determined" by the Secretary's refusal to turn over requested information, Congress is "not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives." Hodel, 865 F.2d at 319. In any event, no individual rights have been implicated within the meaning of Bennett v. Spear, 520 U.S. 154, 177-78 (1997), to warrant judicial intervention.[7/]

The Federal Mandamus Statute: Plaintiffs' attempt to gain review under the mandamus statute does not fare any better than their attempt to invoke the APA. As an initial matter, as the Secretary explained in his opening brief (Def. Mem. at 8-9 n.5), this statute only confers subject matter jurisdiction on federal district courts and does not in itself create any new cause of action that did not exist prior to its enactment. This is clear from the face of the statute, see 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or

---

7/ Because there is no "agency action" within the meaning of the APA, the presumption of judicial review relied on by plaintiffs (Pl. Opp. at 11) is overcome here. In short, because Congress did not intend for "agency action" to encompass an Executive Branch failure to comply with a congressional reporting requirement, this is "persuasive reason" to conclude that Congress did not intend for there to be judicial review under the APA. Id., *quoting* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). See also United States v. Fausto, 484 U.S. 439, 452 (1988) ("[T]he presumption favoring judicial review is not to be applied in the 'strict evidentiary sense,' but may be 'overcom[e] whenever the congressional intent to preclude review is "fairly discernible in the statutory scheme."'"), *quoting* Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984).

any agency thereof to perform a duty owed to the plaintiff"), and has been recognized by a number of courts. See, e.g., Mead Corp. v. United States, 490 F. Supp. 405, 407 (D.D.C. 1980) (28 U.S.C. § 1361 does not in itself create substantive rights or causes of action but only confers jurisdiction on district courts to hear certain kinds of cases); International Fed'n of Prof'l & Technical Engineers v. Williams, 389 F. Supp. 287, 290 (E.D. Va. 1974), *aff'd without opinion*, 510 F.2d 966 (4th Cir. 1975) (28 U.S.C. § 1361 "broadened the venue" where mandamus-type actions could be brought and did not create any new causes of action).

In addition, of those courts which have directly addressed the question, the weight of authority holds that, in order to establish a right to mandamus relief, a plaintiff must have a right of action, either express or implied, under the statute allegedly giving rise to the duty that he or she seeks to enforce. See, e.g., Gonzalez v. INS, 867 F.2d 1108, 1109-10 (8th Cir. 1989) ("[Petitioner for mandamus] has no private cause of action under [statute he seeks to enforce] and mandamus is therefore not available."). See also Aguirre v. Meese, 930 F.2d 1292, 1293 (7th Cir. 1991) (affirming denial of petition for mandamus where statute giving rise to alleged duty did not create a private right of action); District Lodge No. 166, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. TWA Servs., Inc., 731 F.2d 711, 717 (11th Cir. 1984) (same); Sanchez v. INS, 899 F.Supp. 866, 867 (D. Puerto Rico 1995) (same); Idowu v. INS, 1994 WL 660511 (N.D.N.Y. 1994) (same); Medina v. United States, 785 F. Supp. 512, 514 (E.D. Pa. 1992)(same).[8/]

[8/] Plaintiffs dismiss these cases as irrelevant, apparently under the impression that they all concerned an attempt to enforce a duty imposed on a non-governmental party. See Pl. Opp. at 15 n.7. This is not accurate. Virtually all of these cases address petitions for mandamus to compel a statutory duty imposed on a federal official. Moreover, even if plaintiffs' characterization were true, there is no reason why the principle that a separate cause of action must exist in order to warrant the

Plaintiffs concede that they must demonstrate a "clear right to relief" to establish mandamus jurisdiction, yet apparently believe this means that review under the mandamus statute is available even when no other statute grants them a right of action. Pl. Opp. at 13-14. This is not logical. Where, as here, an alleged statutory duty is at issue, the "clear right to relief" prerequisite is simply another way of limiting judicial review to those instances where an express or implied right of action is created by another statute. Cf. CETA Workers' Org. Comm. v. City of New York, 617 F.2d 926, 936 (2nd Cir. 1980) (affirming denial of petition for mandamus where no APA review available). After all, the exercise of mandamus jurisdiction must be consistent with Congress' intent, as even one of the cases cited by plaintiffs stresses. See American Cetacean Society v. Baldridge, 768 F.2d 426, 434 (D.C. Cir. 1985) (a court considering a request for mandamus relief "must be careful to ascertain as precisely as possible the exact contours of congressional intent. . .."), *rev'd on other grounds sub nom.* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986). See also Wilbur v. United States, 281 U.S. 206, 218-19 (1930) (courts should not compel the performance of a statutory duty if there is "implication to the contrary").[9/]

In sum, because plaintiffs do not have a cause of action under the APA, or any other statute, review is not independently available under 28 U.S.C. § 1361.[10/]

---

exercise of mandamus jurisdiction would not also be applicable here.

[9/] The exercise of mandamus jurisdiction should also show due deference to the proper role of the courts in disputes between the two political branches. See, e.g., National Wildlife Federation v. United States, 626 F.2d 917, 923-26 (D.C. Cir. 1980) (declining to grant the requested mandamus relief because the dispute in question was an "archetype of those [disputes] best resolved through bargaining and accommodation between the legislative and executive branches").

[10/] Plaintiffs' reliance on Swan v. Clinton, 100 F.3d 973 (D.C. Cir. 1996), is misplaced. That case simply did not hold that "mandamus review is available even where APA review is not," as plaintiffs suggest. See Pl. Opp. at 14. Indeed,

III. CONGRESS MAY NOT CONSTITUTIONALLY DELEGATE THE POWER TO SUE THE EXECUTIVE BRANCH TO A FEW MEMBERS OF CONGRESS.

Plaintiffs' response to the Secretary's non-delegation argument – that Congress may not constitutionally delegate to a few members of Congress the power to sue the Executive Branch for failure to comply with an investigatory request (Def. Mem. at 19) – is flawed at every turn.

First, in suggesting that the delegation to a few members of Congress the right to invoke the powers of the Court to further Congress' investigatory function is no different than Congress creating a cause of action for individuals who are denied information to which they are allegedly entitled under the FOIA, the FACA, or similar statutes, see Pl. Opp. at 16, plaintiffs ignore the fundamental difference between these actions. Giving individuals the right to sue to gain access to government information does not delegate any legislative power so as to directly implicate separation of powers concerns, whereas suits by individual legislators like the instant one do.

Second, plaintiffs' assertion that the Supreme Court has not placed any limits on Congress' investigatory powers as it has on Congress' legislative power, see Pl. Opp. at 16, reflects a profound misunderstanding (or overstatement) of the investigatory powers. Article I of the Constitution vests in Congress "legislative Powers." Any other authority that Congress possesses is incidental to that

---

the ultimate holding of the case was that *no mandamus relief* was available to the plaintiff. The court's only discussion of mandamus jurisdiction came in the context of its standing analysis, where it reasoned in *dicta* that plaintiff had satisfied the prerequisites for mandamus jurisdiction. However, in doing so, the court emphasized that the plaintiff would have to demonstrate a "clear right to relief." Swan, 100 F.3d at 977 n.2. The court did not address the question of whether the mandamus statute itself could provide that clear right to relief. Indeed, it is equally plausible that the court assumed that the statute creating the National Credit Union Administration provided such a clear right. But for the reasons addressed above, § 2954 does not provide that right in this case.

legislative power – it exists only as a result of and in furtherance of the power to legislate – and thus cannot logically be broader than that power. Thus, any limits that the Constitution imposes on the legislative power necessarily limit Congress' investigatory powers. If it would be unconstitutional for Congress to delegate its lawmaking powers to a few members of either House (as the Supreme Court has indicated it would be, see INS v. Chadha, 462 U.S. 919 (1983)), then it follows that it would be also unconstitutional for Congress to delegate its investigatory powers, insofar as they have coercive effects outside of Congress, to a few members of Congress.

Third, the fact that Congress has purported to grant the authority to sue to the Comptroller General, in his or her discretion, in the several instances cited by plaintiffs (31 U.S.C. §§ 716(b)(2) and 716(c)(2); 2 U.S.C. § 687) does not make this kind of delegation constitutional.[11]/ See Pl. Opp. at 17-18. The rationale of the two Circuits that have upheld the constitutionality of 31 U.S.C. § 716(c)(2) (granting the Comptroller General the authority to bring a civil suit to compel the production of records) – see United States v. McDonnell Douglas Corp., 751 F.2d 220, 224-25 (8th Cir. 1984); McDonnell Douglas Corp. v. United States, 754 F.2d 365, 368 (Fed. Cir. 1985) – is fundamentally flawed because, *inter alia*, neither court took into account the critical difference between *issuing* a subpoena and

---

[11]/ While these provisions are constitutionally suspect, it bears noting that in all the provisions cited by plaintiffs, authorization to bring a civil action is expressly stated. See 31 U.S.C. § 716(b)(2) ("the Comptroller General may bring a civil action . . . ."); 31 U.S.C. § 716(c)(2) "the Comptroller General . . . may bring a civil action . . . ."); 2 U.S.C. § 687 ("the Comptroller General is hereby expressly empowered . . . to bring a civil action . . . ."). This shows that when Congress intends to authorize someone to bring suit to enforce a statutory command, it expressly states this authorization. Such express intent is conspicuously lacking in 5 U.S.C. § 2954, providing further support for the Secretary's position that Congress did not intend for this provision to be judicially enforced by individual legislators such as plaintiffs.

invoking the powers of the courts to enforce a subpoena. See 751 F.2d at 224-25; 754 F.2d at 368. As the Supreme Court said long ago, "[a]uthority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose." Reed v. County Commissioners of Delaware County, Pa., 277 U.S. 376, 389 (1928). Moreover, both of these decisions were rendered prior to several opinions of the Supreme Court which undercut their assumptions about what the "legislative" function is or how it may be exercised.[12]/ In any event, neither of these cases addressed the argument being advanced here, which is: even assuming the bringing of a lawsuit is a legislative rather than an executive function, Congress cannot vest in a few members of Congress the discretion and power to sue the Executive Branch without the assent of the majority.[13]/

---

[12]/ For example, in Bowsher v. Synar, 478 U.S. 714 (1986), the Supreme Court concluded: "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of laws . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Id. at 726. See also Morrison v. Olson, 487 U.S. 654, 691 (1988) (activities such as prosecuting violations in court "are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch"). Cf. INS v. Chadha, *supra* (Congress may only affect the administration of laws through legislation); Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 267 (1991) (same) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it.").

[13]/ The Supreme Court's decision in Bowsher v. Merck & Co., 460 U.S. 824 (1983), see Pl. Opp. at 16-17, has no relevance here. Among other things, in that case, the Justice Department intervened and counterclaimed, in the name of the United States, to enforce the Comptroller General's demand for records. 460 U.S. at 826, 829. As a result, no separation of powers concerns were presented and the right of the Comptroller General to bring an action on his own was never

Finally, in emphasizing that Congress has the power to grant individual members the power to issue a subpoena (Pl. Mem. at 18-19), plaintiffs themselves ignore the fundamental difference between Congress deciding, as an internal management matter, who may issue a subpoena on its behalf, and delegating to individual members the power to invoke the powers of the Court to enforce a subpoena (or otherwise resolve an intra-branch dispute). The Supreme Court has recognized this distinction, see Reed, 277 U.S. at 388, as has Congress. Even though a single member of Congress, with proper authorization, may issue a subpoena to demand compliance by the Executive Branch with a request for information, that subpoena cannot be *enforced in court* without the assent of the relevant subcommittee and full committee, as well as the full House or Senate (unless Congress is not in session, in which case the presiding officer may give the requisite consent). See 2 U.S.C. § 194 (enforcement of subpoena through action brought by United States Attorney); In re Chapman, 166 U.S. 661, 667 (1897); Wilson v. United States, 369 F.2d 198, 202-03 (D.C. Cir. 1966). See also 2 U.S.C. § 288d (providing for enforcement of Senate subpoena through action brought by Senate Counsel, pursuant to Senate resolution). This process ensures that the courts' powers are invoked only when a majority believes that disclosure is in the public interest and that judicial resolution of a dispute between the two political branches is warranted. That political "check" is completely lacking when a few members of Congress are allowed to sue the Executive Branch whenever they fail to convince enough of their colleagues or their committee chair that a subpoena is warranted.

---

confronted. Plaintiffs' representations in this regard reflect a misreading of that case.

The constitutionality of 31 U.S.C. § 716(b)(2), the statute at the heart of Walker v. Cheney, Civil Action No. 1:02CV00340 (JBD) (D.D.C.), is not at issue, and need not be resolved, here.

In sum, the authority to invoke the powers of the courts to compel compliance with a request for information or documents from the Executive Branch, as a constitutional matter, can only be exercised pursuant to a collective determination by the respective Chamber. Because § 2954, as construed by plaintiffs, would run afoul of that requirement, plaintiff's construction of the statute would be unconstitutional.[14]/

IV. SECTION 2954, TO THE EXTENT THAT IT DESIGNATES WHO MAY DEMAND INFORMATION FROM THE EXECUTIVE BRANCH, HAS BEEN SUPERSEDED BY HOUSE RULES AND IS CONSEQUENTLY UNENFORCEABLE.

With respect to the Secretary's final argument – that the statute in question is, in relevant part, a "rule of proceeding" that has been superseded by the rules of the current House of Representatives (see Def. Mem. at 21-22) – little more need be said than what the Secretary previously stated in his opening brief. This is because plaintiffs do not have any real answer to the Secretary's argument other than to mischaracterize it.

The Secretary is not arguing that rules of proceeding may never be adopted by statute, as plaintiffs suggest (Pl. Mem. at 20), but rather that each Chamber retains the power – pursuant to Art. I, § 5, cl.2 – to revise or abandon any rule that

---

[14]/ Plaintiffs appear to suggest that a subpoena issued by a single member of Congress has been previously enforced by the courts at the initiative of that legislator without the consent of the majority. See Pl. Mem. at 18-19 ("So long as the subpoena seeks material that is relevant to Congress' legislative and oversight purpose, and does not intrude into matters of Executive Privilege, the subpoena will be enforced by the Courts."). This is not at all the case, and neither case cited by plaintiffs supports this proposition. In Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503-07 (1975), the question was whether a Senate subcommittee should be enjoined from implementing a subpoena on First Amendment grounds, and in Wilkinson v. United States, 365 U.S. 399, 408-09 (1961), the question was whether a conviction for refusing to comply with a congressional subpoena (a conviction obtained by the Justice Department) should be set aside under the First Amendment.

is embodied in a statute without the consent of the other Chamber or the President. It follows that, because the current Rules of the House of Representatives do not incorporate the internal procedural rule embodied in 5 U.S.C. § 2954 – a point plaintiffs do not dispute – that provision has been superseded and is thus no longer enforceable.

The closest plaintiffs come to addressing the merits of the Secretary's argument is to cite INS v. Chadha, *supra*, for the proposition that, when the "decision to delegate certain fact-gathering powers to members of two committees" is embodied in a statute, that decision cannot be overturned by either House of Congress acting on its own. See Pl. Opp. at 20. The Chadha decision, however, is inapposite to the question at hand. To the extent that 5 U.S.C. § 2954 adopts a rule of proceeding, it is not an exercise of Congress' lawmaking power, but rather an exercise by the Senate and the House of the internal rulemaking authority of each.[15]/ As such, the ability of either the House or the Senate to amend or repeal that rule is not subject to the same limitations that Chadha imposes on statutory provisions enacted through Congress' lawmaking powers.

CONCLUSION

For the foregoing reasons, as well as those stated in the Secretary's opening memorandum, the Secretary respectfully urges the Court to reconsider its Order

---

[15]/ That § 2954 is a rule of proceeding that each House can supersede is conclusively established by the fact that each House has previously superseded it via unilateral action. As the notes to § 2954 state, "The words 'Committee on Government Operations of the House of Representatives [were] substituted for 'Committee on Expenditures in the Executive Departments of the House of Representatives' on authority of H. Res. 647 of the 82d Congress" (*i.e.*, a unilateral House resolution), and "The words 'Committee on Government Operations of the Senate' were substituted for 'Committee on Expenditures in the Executive Departments of the Senate' on authority of S. Res. 280 of the 82nd Congress" (*i.e.*, a unilateral Senate resolution).

granting Plaintiffs' Motion for Summary Judgment, vacate that order, and then dismiss plaintiffs' claim for lack of jurisdiction or failure to state a claim upon which relief can be granted.

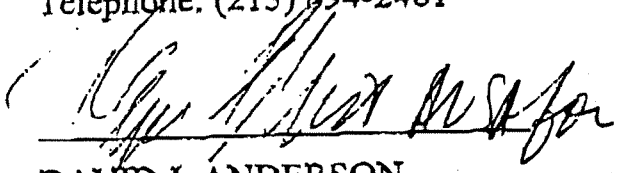
Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

JOHN S. GORDON
United States Attorney

SHANNEN W. COFFIN
Deputy Assistant Attorney General

ROGER WEST
First Assistant United States Attorney
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2461



DAVID J. ANDERSON
D.C. Bar No. 36988
ANNE L. WEISMANN,
D.C. Bar No. 298190
GAIL WALKER
Va. Bar No. 23590

United States Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 616-0673
Facsimile: (202) 616-8470

Dated: February 18, 2002

Attorneys for Defendant

PROOF OF SERVICE BY FAX AND MAIL

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On March 18, 2002, I served **SECRETARY'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION** on each person or entity named below by faxing and enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of fax and mailing: March 18, 2002. Place of fax mailing:

Los Angeles, California.

Person(s) and/or Entity(s) to Whom faxed and mailed:

Marvin E. Krakow
Krakow & Kaplan, LLP
1801 Century Park East
Suite 1520
Los Angeles, CA 90067-0912
Fax No. (310) 229-0912

David C. Vladeck
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001
Fax No. (202) 588-7795

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: March 18, 2002 at Los Angeles, California.

FRANCIS DIAZ