No. 02-55825

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY A. WAXMAN, *et al.*,

Plaintiffs-Appellees,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(Case No. 01-CV-4530)

BRIEF OF AMICUS CURIAE HOUSE DEMOCRATIC LEADERSHIP

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STATEMENT OF INTEREST

House Rule II.8 provides for filings in court by the General Counsel of the House "pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships." That group consists of the majority and minority leaderships who may, or may not, reach agreement on a position to present. When they cannot agree, the minority leadership group may file separately. *See, e.g.*, Brief *Amicus Curiae* of the House Democratic Leadership in Support of Petitioner, Dickerson v. United States, 530 U.S. 428 (2000).[1] Accordingly, the House Democratic Leadership submits this brief.

ARGUMENT

The Act of 1928, 5 U.S.C. §2954, as amended, provides (underlining added):

> An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

In this case, Representative Henry Waxman, Ranking Minority Member of the

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[1] For purposes of House Rule II(8)'s reference to the "minority leadership," the Democratic Leadership consists of the Honorable Richard A. Gephardt, Democratic Leader, and the Honorable Nancy Pelosi, Democratic Whip.

House Committee on Government Reform (the current name of the House Oversight Committee)[2], and 15 other Members - i.e., the "Oversight Committee Members" - sued pursuant to this Act to obtain adjusted census information from the Commerce Department. These Members had every reason to invoke this venerable statute. Such information, developed by federal officials at government expense, affects billions of dollars in federal expenditures for states and localities.

The brief of the House majority leadership ("House Brief" or "House 'Bipartisan' Group Brief")[3] principally argues that the district court was wrong to vindicate §2954 because that provision's mechanism works differently than that of the contempt of Congress statute during non-recess periods, 2 U.S.C. §194. Significantly, even though the House majority leadership sides with the Secretary, it cannot join in either his brief's ("Def. Br.") constitutional arguments, or, its crabbed view that airbrushes out §2954's text and advocates instead a distorted reading based on a few committee report sentences. Like the defendant's extreme

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[2] When the Act of 1928 was enacted, the Committee - consolidated just six months earlier - had one name; when the Act was amended, another; today, a third. The lineage is clear and undisputed. For simplicity, this brief will refer to the Committee throughout as the Oversight Committee or the expenditure committee.

[3] That brief is entitled the House Bipartisan Legal Advisory Group's, and that is, of course, the title of the group in House Rule II(8). The brief does not have actual bipartisan support, since only the three leaders of the majority party, and not the two minority leaders, join the brief.

constitutional arguments, the alarms and doomsday scenarios in the House Brief are overblown. Congressman Waxman's suit against Secretary Evans based on §2954 does not differ materially from the same suit based on the FOIA. See generally EPA v. Representative Patsy Mink, 410 U.S. 73 (1973)(FOIA suit by 33 Representatives). The district court's straightforward reading of §2954 warrants affirmance.

I. THE ACT OF 1928 EXEMPLIFIES STATUTES MANDATING RELEASE OF EXECUTIVE INFORMATION CREATING RIGHTS THAT, IN A PROPER CASE, MAY BE VINDICATED IN COURT, AND ARE DISTINCT FROM CONTEMPT OF CONGRESS

A. As Nixon v. GSA Reflects, the Disclosure Statutes Address Problems of Unreleased, Though Typically Unprivileged, Executive Information, and Are Distinct from Contempt of Congress.

In this part, we place the Act back in its rightful tradition, namely, that of statutes mandating release of Executive information. This tradition led to the Act of 1928, and to the FOIA of 1966 and the legislative suits under that Act seeking Executive information.

The Supreme Court surveyed some of the main statutes mandating the release of Executive information in the course of sustaining the mandatory disclosure provisions of the Presidential records act in Nixon v. GSA, 433 U.S. 425,

445-46 (1977):

> [O]f course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e. g., the Freedom of Information Act . . . ; the Privacy Act of 1974 . . .; the Government in the Sunshine Act . . .; the Federal Records Act . . .; and a variety of other statutes. . . . Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. . . . Similar congressional power to regulate Executive Branch documents exists in this instance. . . .[4]

When the D.C. Circuit cited the Act of 1928 in the FOIA case of Soucie v. David, 448 F.2d 1067, 1072 n.9 (D.C. Cir. 1970) (underlining added), it correctly placed that Act in this tradition of statutes mandating the public release of unprivileged Executive information, without resort to contempt powers or processes, that traces back two centuries:

> Since 1789, Congress has frequently exercised the latter power in statutes requiring executive officers to transmit information to Congress. See, e. g., Act of Sept. 2, 1789 . . .; Act of May 29, 1928 . . . , 5 U.S.C. §2954 (Supp. V, 1970) (each executive agency must disclose certain information to Gov't Operations Committees of House and Senate on request).

The concept that the Executive has mandatory legal duties to disclose unprivileged documents in order to account for public expenditures dates back to

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[4] The disclosure statutes are too numerous to mention, but also include the Federal Advisory Committee Act, the Government in the Sunshine Act, and the Presidential Records Act.

the founding of the Republic. The Framers embedded it in the Constitution (directing that "a regular . . . Account of the . . . Expenditures of all public Money shall be published"[5]) and in the constitutionally significant milestone of the Treasury Act of 1789.[6] From the outset, Congress assigned the overseeing the expenditure documents to standing committees, which, by 1816, were the standing expenditure committees later consolidated into those named in the Act of 1928.[7]

By the twentieth century, the mechanisms for statutory Executive duties for information to go to committees and individual Representatives had expanded to the form discussed in Bush v. Lucas, 462 U.S. 367, 382 (1983). Several Presidents

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[5] U.S. Const., Art. I, sec. 9, cl. 7.

[6] This Act "required the Secretary . . . to report to either House of Congress any information asked of him . . . . provid[ing] a means for congressional oversight of all executive operations." Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U.L. Rev. 59, 71-72 & n.53 (1983)(hereafter "Checks on Executive Abuses").

[7] For discussions of this systemic progenitor to the Act of 1928, see Checks on Executive Abuses, supra, 63 B.U.L. Rev. at 72-74; Committee on Government Operations, United States Senate--50th Anniversary History, 1921-1971, S. Doc. 31, 92d Cong., 1st Sess. (1972), at 1-4; IV Asher C. Hinds, Precedents of the House of Representatives § 4315 (1907); Lauros G. McConachie, Congressional Committees 233-37 (1898). None of the privilege disputes cited in the House Brief concerned the mandatory document disclosure to the expenditure committees. Statutory disclosure duties were not subject to political dispute, but regarded as a legal mandate. 6 Op. Att'y Gen. 326, 333 (1854)(1789 Act).

imposed so-called "gag orders" to cut off individual Representatives from obtaining information directly from civil servants.[8] Congress responded by a definitive statute, the Lloyd-LaFollette Act of 1913, which "explicitly guaranteed that the right of civil servants 'to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.'" Id., 462 U.S. at 382-83 & n.22 (quoting statute) (underlining added). Like the Act of 1928, this conferred a legal right to obtain Executive information upon individual Representatives even of the minority party. Congressional oversight has elsewhere, too, such roles for committee minority rights, such as the minority's right to its own day of hearings in any investigation to propound legally binding inquiries to witnesses who may be summoned.[9]

B. The Text of the Act of 1928 Reflects the Progressive Era's Faith in Disclosure Rights to Minority and Majority Alike, Far Beyond Merely Foregoing Obsolete Reports.

The clear text of the Act of 1928 empowers requests by members of the "House and Senate Committees on Expenditures in the Executive Departments" by

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[8] Id., 462 U.S. at n.19.

[9] See, e.g., House Rule XI.2(j)(1)("the minority members of the committee shall be entitled . . . to call witnesses selected by the minority to testify . . . during at least one day of hearing").

mandating that an agency "shall submit any information required of it relating to any matter within the jurisdiction of the committee."[10] That provision was written into the 1928 bill by that House Committee itself, in the first six months of that House Committee's jurisdictional existence, like a new court or agency that drafts its own strong statutory charter. The 1928 Act was part of the historic three-element program in the 1920s of public expenditure accountability reform.[11] Supreme Court opinions and other sources discuss the first two elements, the enactment of the great Budget and Accounting Act of 1921, and, consolidating the appropriations committees.[12] The third element depended upon consolidating oversight of Executive Branch expenditures, in pursuance of economy and efficiency, in one pair of House and Senate expenditure oversight committees capable of fully looking over the Executive Branch's documents. This element started in the Senate in 1920, with the consolidation of the new Senate Committee

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[10] House Brief at 3 ("Nor do we agree with the Commerce Department's narrow construction of the Act of 1928, which, as the district court found, conflicts with the statute's plain language.").

[11] See Charles Tiefer, Congressional Practice and Procedure 926-27 (1989); Louis Fisher, supra at 29-35 (1975); and sources cited in each.

[12] See the Budget Act of 1921, 42 Stat. 23, discussed in Bowsher v. Synar, 478 U.S. 715 (1986); Louis Fisher, Presidential Spending Power 29-35 (1975); Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress 89-94 (2001)(appropriations consolidation).

on Expenditure in the Executive Departments in place of its 1800s predecessors.[13]

The House followed suit on December 5, 1927, creating the parallel new House Committee on Expenditure in the Executive Departments in place of its own various separate (and largely moribund by this point) 1800s predecessors.[14] On that date, the new House Rule XI, sec. 34, conferred upon the new House Committee the following jurisdiction, which has continued, with minor changes, to the present:[15]

> 34. The examination of the accounts and expenditures of the several departments . . . of the Government and the manner of keeping the same; the economy, justness, and correctness of such expenditures; their conformity with appropriation laws; the proper application of public moneys; . . . the economy and accountability of public officers; . . . shall all be subjects within the jurisdiction of the Committee on Expenditures in the Executive Departments.

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[13] The Senate consolidation is described in Schickler, supra, at 95-86. That Senate Committee was referred the aforementioned 1921 Budget Act. Committee on Government Operations, United States Senate--50th Anniversary History, 1921-1971, S. Doc. 31, 92d Cong., 1st Sess. (1972), at 5.

[14] The House consolidation is recorded in VII Clarence Cannon, Precedents of the House of Representatives § 2041, at 830-31 (1935). In "1927 . . . .[i]n place of the expenditure committees, the House created the Committee on Expenditures in the Executive Departments, which had jurisdiction over expenditures in all the executive departments." 2 The Encyclopedia of the United States Congress 933 (1995); Schickler, supra, at 96.

[15] VII Cannon, supra, § 2041 at 831.

That jurisdiction nicely married the vision of public accountability that had developed during the Progressive Era with the expenditure committees' earliest mandate from the period 1789-1816 to oversee the documents reflecting expenditures of public monies.

A leading recent commentator expresses how the 1920 consolidation that created (inter alia) the Senate Committee on Expenditures in the Executive Branch, parallel to the 1927 House Committee, effectuated a view grounded in the shared interests and responsibilities of majority and minority alike:

> But even as GOP leaders initiated the consolidation, it is critical to note . . . . Democratic leaders Underwood and Robinson . . . . ma[de] a point of going on record in strong support of the consolidation . . . . [T]he coalition that adopted it was a universalistic one evidently grounded in all members' shared interest in enhancing the Senate's ability to respond to the daunting challenges it faced in the aftermath of the war and the concomitant growth of the executive branch.[16]

Thus, Congress enacted the 1928 Act to endow new oversight committees with the statutory mandate needed by their members to examine executive branch expenditures. In its introduced form, the bill, H.R. 12064, performed only the limited goal of abolishing obsolete reports, which the defendant focuses upon. However, the bill was referred deliberately to the new House Committee on

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[16] Schickler, supra, at 96 (underlining added). See Fisher, supra, at 31.

Expenditures in the Executive Departments just created the preceding December of 1927, which added the provisions at issue in this case. This newly consolidated House Committee had, in its freshly created jurisdictional mission of scrutinizing the Executive documents in search of economies, an unmistakable reason to mean exactly what it wrote into the bill's text about conferring a legal right for its Members to receive the Executive information within its jurisdiction, a right like FOIA's.[17]

The language added by the Committee bears this out. It used the key word "shall" to create a clear mandatory duty: "An Executive agency, on request of seven members . . . shall submit any information requested of it." (Underlining added.) A statute of the 1928 era, establishing a public official's legal duty with such a "shall" clause, created a mandatory duty understood by courts as making mandamus available. From its familiarity with Executive expenditure procedures, the Committee would have understood that mandamus was particularly available for the mandatory duties of those Executive officials who maintained the required records

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[17] The district court stated: "as the Leach court surmised, Section 2954 might have been contemplated by Congress as an antidote to possible domination of the legislative body by members of an opposing political party." Record Excerpts (RE) 139. See RE 63 (committee report)("information [] desired by any Member . . . can be better secured by a request made by an individual Member . . . .)

of expenditures.[18] The Committee would anticipate these same Executive officials answering to the same writ about mandatory statutory disclosures of documents to textually specified requesters.

C. The Evolution Since 1928 of §2954 Further Supports the District Court's Sound View.

During the following decades of the Great Depression and World War II, the Act seems to have been respected.[19] When the Eisenhower Administration began to claim unprecedented powers not to release information, the Oversight Committees responded with successful invocation of §2954[20] in a series of events

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[18] See, e.g., United States ex rel. Miguel v. McCarl, 291 U.S. 442 (1934); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[19] There is no commentary suggesting any Executive resistance to the Act of 1928 for the long period of the Great Depression, the New Deal, and World War II. The House Brief takes the absence of known controversy as somehow deprecating the Act of 1928, House Br. at 21, when it tends more to show that the Act was respected. That brief first finds a controversy in 1948, id., but that relates to the onset of a divided government, between President Truman and what he called the "do-nothing" (Republican) Congress.

[20] In 1958, the Department of Agriculture withheld, like this defendant, population estimates. Withholding of Information by Department of Agriculture - (Burning of 2,500 Copies of "Farm Population Estimates for 1957"): Hearing Before a Subcomm. Of the House Comm. On Government Operations, 85th Cong., 2d Sess. (1958)("Withholding Hearings"). A Subcommittee chair sent a request letter reciting "The right of the Committee on Government Operations to obtain information is clearly set forth, also, in title 5, section 105a of the United States Code," and then quoting the Act of 1928. Id. at 4-5.

leading to a decision not to invoke executive privilege.[21] More broadly, the Oversight Committee responded primarily by holding extensive hearings chaired by Rep. John Moss (D-Calif.), who then fathered the FOIA in 1966. Ensuing legislative uses of the two statutes in tandem - §2954 and FOIA - warrant a brief review.

In Soucie v. David, supra, seven Oversight Committee Members sent a §2954 request letter (see RE 42), and Representative Henry Reuss (D-Wisc.) sent a separate request letter, to the White House for a particular executive document. When they were all refused, a non-Congressional plaintiff (Soucie) brought a follow-up FOIA case, pressed it forward for several years, and won in the D.C. Circuit, partly on the basis that Congressman Reuss's document request put to rest some of the agency's procedural arguments.[22]

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[21] Initially, "[t]he [Agriculture Department] General Counsel indicated that the matter of executive privilege was concerned in this whole matter." Withholding Hearings, supra, at 32 (testimony of assistant secretary). Later, in part from the Oversight Committee's invocation of its authority including the Act of 1928, "I guess reluctantly, the document has come forward for review. I don't know that we thought of this in the last analysis as necessarily an exercise of privilege." Id. at 33 (testimony of departmental assistant general counsel).

[22] 448 F.2d at 148 n.6 (Rep. Reuss's "right as a Congressman is presumably greater").

As to legislative FOIA cases, see EPA v. Mink, 410 U.S. 73 (1973)(FOIA suit by Representative Patsy Mink (D-Hawaii) and 32 other Representatives); Senate of Puerto Rico v. Department of Justice, 823 F.2d 574 (D.C. Cir.

And, in 1994, U.S. Representatives sought Whitewater documents using both statutes. In Leach v. Resolution Trust Corp., 860 F. Supp. 868 (D.D.C. 1994), Representative Jim Leach (R-Iowa) sought the documents, which were otherwise FOIA-exempt, by a FOIA-related legal theory. The district court rejected his FOIA claim, but suggested "the House has in fact provided alternative procedures through which small groups can request information without awaiting formal Committee action. See 5 U.S.C. sec. 2954 . . . ." Id. at 876 n.7. Accordingly, the following month, allied Congressional Republicans on the Oversight Committee, including Rep. Dennis Hastert (R-Ill.), the current Speaker, invoked §2954 and received from the Executive the requested FOIA-exempt Whitewater records. RE 28-29.

It is quite ironic that Rep. Hastert, when in the minority, led the way in successfully invoking §2954, yet, as Speaker, he now files his amicus brief in opposition to the current minority relying upon §2954. Overblown alarms are expressed that the district court ruling will "radically," "profoundly," "drastically," produce "flooding" of the courts (House Br. at 3 (and 26), 25, 28, 30). Yet, Rep. Hastert's successful 1994 use of the same provision to obtain Whitewater records, a

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1987)(FOIA case won, after two years on backlog list); Assembly of the State of California v. U.S. Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992)(California Assembly and leading members won FOIA case for adjusted census data).

much more high-profile controversial use than to obtain FOIA-nonexempt adjusted census data, led to no such radical, profound, drastic effects. In that same vein, the Whitewater document release, like the 1958 document release, contradicts the contention in the defendant's brief that "the executive branch has long understood the provision to allow access only to the information that had previously been included in the reports that Congress had abolished." Def. Br. at 36. The Whitewater release shows the actual Executive understanding, namely, that §2954 worked like FOIA and is subject to executive privilege claims.[23]

Indeed, several sources reflect that §2954 is not a means of obtaining information that is subject to a claim of executive privilege. The House Brief notes how Attorney General Rogers argued in a 1957 memorandum that §2954 did not "compel heads of departments to surrender information or papers against the wishes of the President . . . ."[24] In 1958, as previously noted,[25] invocation of §2954

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[23] A document withholding case is quite unlike one about dissatisfaction over an inadequate report. Guerrero v. Clinton, 157 F.3d 1190 (9th Cir. 1998).

[24] House Brief at 23 (underlining added)(quoting memorandum put forth by Rogers entitled "The Power of the President to Withhold Information from the Congress"). The Rogers memo's comment that executive privilege could be invoked by department heads' "own better judgment," House Brief at 23, was not only condemned, id., but was supplanted by procedures still in effect which limit the invocation of executive privilege to the President himself in writing. RE 84-85.

[25] See Withholding Hearings, supra.

caused an executive department to decide against finalizing a tentative decision to raise executive privilege. Later Justice Department letters and testimony in the district court record confirmed its position that §2954 has "executive privilege" as "[o]ne exception."[26] This matters especially because in 1991, 1996, and 2001, subpoenas from the House Oversight Committee elicited formal claims of executive privilege from Presidents George Bush, Bill Clinton, and George W. Bush.[27] In 1994, the §2954 Whitewater documents request could have elicited, but did not, a claim of executive privilege from President Clinton. Like the FOIA, §2954 serves as a sensible mandatory disclosure statute for documents not subject to executive

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[26] RE 54 (questions propounded to Elliott L. Richardson as follow-up to his 1973 nomination hearing for Attorney General):

" Q: . . . .[As] to 5 U.S.C. 2954. . . ."

" Answer: . . . . [A]bout 5 U.S.C. 2954 . . . . One exception would be information subject to the Executive privilege doctrine . . . . [In the legislative history] [t]here is no indication of any intent to deal in any way with the question of Executive privilege." To somewhat the same effect is RE 41-42 (1970 Justice Department letter that recites legislative history argument to withhold a White House "memorandum of a confidential nature" (RE 41).

[27] Mark J. Rozell, Executive Privilege and the Modern Presidents in Nixon's Shadow, 83 Minn. L. Rev. 1069, 1110-1111 (1999) (1991 claim); Charles Tiefer, The Specially Investigated President, 5 U. Chi. Roundtable 143, 158 & n.79 (1998) and Charles Tiefer, The Fight's The Thing: Why Congress and Clinton Rush to Battle with Subpoena and Executive Privilege, Legal Times of Washington, May 27, 1996, at 25 (1996 claim); House Brief at 27 ("President Bush invoked executive privilege and instructed the Attorney General not to comply")(2001 claim).

privilege -- not to be confused with contempt of Congress for high-level privilege disputes -- and, like the FOIA, it does not create constitutional clashes or warrant those panic predictions.

II. A STATUTE CAN CONSTITUTIONALLY CONFER RIGHTS UPON OVERSIGHT COMMITTEE MEMBERS TO SEEK UNPRIVILEGED INFORMATION WITHOUT A PRELIMINARY HOUSE VOTE, AND WHEN A STATUTE DOES SO, THEY HAVE STANDING.

The defendant rather startlingly argues on appeal the new constitutional position that "Congress May Not Constitutionally Confer Standing On Individual Members of Congress To Sue To Compel [] The Production of Information Under Section 2954," Def. Br. at 29 (section heading).[28] "[I]f section 2954 were

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[28] The defendant's submission on the cross-motions for summary judgment did not say this, but simply suggested that the statute be narrowly interpreted to avoid constitutional doubts. Secretary's Opposition at 17-20. Of course the defendant would like victory just by statutory interpretation, but the courts, the Congress, and the public all expect to learn clearly whether the defendant does, or does not, take the position that an Act of Congress is unconstitutional. It disserved the district court for the Executive to withhold a clear position until after its ruling on summary judgment, and it would doubly disserve this Court now to continue to do so. Despite the brief's loose use of the words "constitutional" and "unconstitutional," the Attorney General has yet to provide the Senate and House with the formal notice that occurs in cases in which he contends that an Act of Congress is unconstitutional, as last prominently occurred in Dickerson v. United States, 530 U.S. 428 (2000). Among other reasons, the Administration seems not to want to confirm, at a time when it has taken many other controversial steps to close down openness in government, that it is attacking the Acts of Congress that provide this as unconstitutional.

construed" by its plain wording, it "would be unconstitutional." Id. at 24. Defendant maintains that this new constitutional assault would bar all such statutory authorizations of "subgroups of individual legislators" which act without a "vote of a whole House." Id. at 30-31. Defendant's brief does not suggest that the statute would be any less unconstitutional even if this case had been filed by the House Oversight Committee as a whole committee rather than by the §2954 statutory group of at least seven Oversight Committee Members, or even if the statute elaborated in detail about what is to occur in court. Rather, defendant's argument says that "if it is unconstitutional for Congress to delegate its lawmaking powers to a few members of either House (see INS v. Chadha, 462 U.S. 919 (1983)), it is equally unconstitutional for Congress to delegate to such members its investigatory powers . . . ." Def. Br. at 32. This constitutional assault, we note again, is one even the House Brief will not join.[29]

A. Pursuant to Statute, Congressional Committees Can Constitutionally Apply to Courts for Assistance With Investigative Aspects, as These Are "Auxiliary," Without the Votes by Which a Whole Chamber Enacts Bills.

While defendant cites Chadha to equate investigations with enactments, Def.

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[29] House Brief at 4 n.5 ("In particular, we disagree with any suggestion that civil enforcement of a congressional subpoena against the executive branch is constitutionally problematic").

Br. at 31-32, the courts have never equated investigative steps with the full process of enactment in that way. The investigative authority is not enactment, but is "auxiliary" to enactment. McGrain v. Daugherty, 273 U.S. 135, 174 (1927)("the power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function"); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821)("auxiliary"); Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875, 885 (3d Cir. 1986)("The Congress may conduct investigations either through Committees or through an official such as the Comptroller General."), cert. dismissed, 488 U.S. 918 (1988). As this Circuit noted in Lear Siegler v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988)(upholding CICA as had Ameron), "the congressional power to issue subpoenas to coerce testimony . . . 'binds' and 'directly affects' parties outside the legislative branch," yet committees acting that way are fully constitutional.

In diverse contemporary contexts, historically at least since 1851, and arguably in early formats since 1798,[30] congressional committees have regularly

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[30] Dornan v. Sanchez, 978 F. Supp. 1315 (C.D. Cal. 1977), describes an early statute, the House Contested Election Act (HCEA) of 1851, with its progenitors back to 1798. In the House, committees deal with election contests, using evidence gathered with the aid of applications to district courts. The HCEA, in its modern form, even provides for the Committee on House Administration to apply to court, without a prior House vote, for an order quashing or modifying a witness's

filed court proceedings in aid of their statutory rights to information, without first seeking a vote of their chamber, and in those cases the defendant's novel and hollow constitutional theory has never once been expressed as a holding, a dictum, or even a query. The best-known example of this is the judicial immunity order pursuant to 18 U.S.C. §6005. Dozens of times since enactment of statutory authority in 1970, Congressional committees have applied, without a prior vote of the whole chamber, for a court order that an immunized witness can no longer refuse to provide documents or answers on Fifth Amendment grounds.[31] The Justice Department may enter such a proceeding to obtain a twenty-day waiting period or to dispute that the requisite two-thirds of the committee members have voted, as the defendant in this case could raise a privilege or, if there were one available, some other defense. However, the Department cannot require the committee, before applying to court, first to obtain a vote of the chamber before the committee files for its statutory right to the order.[32] Committees proceed similarly

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evidentiary obligations. 2 U.S.C. § 388(e). That Dornan court accepted the House's successful defense that the contested election statute procedures, including the committee and court roles, do not transgress. INS v. Chadha.

[31] See, e.g., Senate Perm. Subc. on Investigations v. Cammisano, 655 F.2d 1232 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981).

[32] The immunity statute provides for no institutional pre-authorization by the whole chamber before the committee files in court for its order, but only, as in

in obtaining other judicial assistance, e.g., writs to produce incarcerated witnesses, rulings as to asserted grand jury secrecy issues, process for obtaining evidence for election contests or from overseas, and the like.[33]

An illustration is the process for committees to obtain rulings about Executive documents as to which there are Fed. R. Cr. P. 6(e) issues. The famous predecessor of such modern rulings occurred when the House Judiciary Committee, then inquiring about impeaching President Nixon, obtained the so-called "bulging briefcase" of Watergate grand jury evidence, after rulings in district and appellate court upholding the legitimacy of the committee's access. The combatants never suggested that it was unconstitutional to do this for lack of a prior House floor vote.[34] In 1984 and 1986, other proceedings occurred in which committees sought, and obtained, access to materials disputed on Fed. R. Cr. P. 6(e) grounds, without the Department of Justice objecting that court rulings for committees to obtain

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§2954, the express requirement that more than the prescribed minimum level of the Committee's membership support the request (two-thirds in that instance, seven in this).

[33] See, e.g., In re Grand Jury Impaneled Oct. 2, 1978, 510 F. Supp. 112 (D.D.C. 1981).

[34] In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227 (D.D.C.), mandamus denied sub nom. Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

evidence were unconstitutional for lack of a prior full chamber vote.[35]

To discuss a recent prominent example of this, in 1998 the House Judiciary Committee held the impeachment proceeding regarding President Clinton. The Judiciary Committee deliberately chose, for significant reasons, to forego waiting for the House to authorize court proceedings regarding its obtaining executive documents.[36] On December 1, 1998, the Committee voted, along party lines, to subpoena two Justice Department memoranda (the "Freeh" and "La Bella" memos) on the 1996 campaign finance matter which contained Fed. R. Cr. P. 6(e) material. The Freeh and La Bella memos involved an interbranch legal conflict over privilege (which the unprivileged adjusted census data in this case does not).[37]

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[35] In re Harrisburg Grand Jury, 638 F. Supp. 43 (M.D. Pa. 1986); Leah Y. Latimer, Dept. Yields to Senate on Shipbuilding Probe, Wash. Post, Oct. 5, 1984, at B3 (discussing application to court shortly ruled upon in In Re Grand Jury Proceedings, Newport News Drydock & Shipbuilding Co., (E.D. Va. Oct. 17, 1984)).

[36] See Charles Tiefer, The Controversial Transition Process from Investigating the President to Impeaching Him, 14 St. John's J. of Leg. Commentary 111, 124-25 (1999)(Committee's 1973 model for an initiating resolution; before Rule XI.2(m) was amended in 1975, these had authorizing language for depositions but not for court proceedings).

[37] Previously, Attorney General Janet Reno had been cited in criminal contempt of Congress for asserting a privilege against producing those memos. Moreover, this matter occurred during the period of near-anarchy on the majority side after Speaker Gingrich's announcing his retirement. A national uproar ensued about how effectuating those subpoenas would expand and prolong the impeachment

Obliging the Committee at that point to obtain a vote by the full House before the application for a court order would have been justified if any such requirement were really traditional, let alone a principle of constitutional dimensions. But, there was neither such a tradition nor such a constitutional principle. Instead, an application was made to the district court and granted, without any such House vote of authorization, for an order that the committee could review the subpoenaed Freeh and La Bella memoranda.[38] In sum, defendant cannot point to one single court before ever having held, or suggested, or even queried, that an Act of Congress is unconstitutional merely for authorizing a Congressional committee, without a chamber vote, to apply to court for a ruling on obtaining documents or evidence.

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inquiry. The House Minority Leader expressed well the national uproar about the committee roaming about that way at that time: "No one seems to be in charge. No one seems to be grabbing the reins." Alison Mitchell, Panel Seeks Fund-Raising Memos, Stirring Democrats, New York Times, Dec. 2, 1998, at A20.

[38] The court, which had ruled against a prior application seeking broader terms of 6(e) access, granted a very limited 6(e) order, namely, for one majority counsel and one minority counsel to read the committee-subpoenaed Freeh and La Bella memos without notes or copying, and, in a day, that was done. Elaine S. Povich & William Douglas, Judge Permits Review of Justice Memos, Newsday, Dec. 3, 1998, at A4; Frank J. Murray, Access Granted to Internal Memos in Reno's Office, Washington Times, Dec. 3, 1998, at A8.

B. Mandatory Disclosure Statutes Like FOIA and §2954 Operate Properly by a Different Mechanism Than Contempt-Based Subpoena Enforcement.

The thrust of both the DOJ Brief and the House Brief seems to be that the Court must not follow §2954's plain text because the provision operates differently than the statute for criminal contempt of Congress. What these briefs lack is some authority that would require statutory mechanisms like FOIA and §2954 to operate like criminal contempt. Both briefs seek support, albeit gingerly, in House Rule XI.2(m)(3)(C). Their selective quotation of only a part of the Rule, and their unwillingness to rely very much on the Rule, are understandable, for it is hard to imagine a House Rule worded less to apply to §2954. From 1789 until 1975, the House had no rule even suggesting any stricture whatsoever on this subject, consistent with the regular practices just described. Then, in 1975, the House adopted for the first time an amendment to Rule XI.2(m) conferring subpoena authority for private individuals on all standing committees and subcommittees, i.e., over one hundred House groups.[39] This plainly had the potential for many newly

[39] Constitution, Jefferson's Manual, and Rules of the House of Representatives of the 106th Congress § 805, at 536 (1999)(history of Rule XI.2(m))(until "1975 . . . only [certain named committees] . . . were permitted by the standing rules to perform the functions as specified in subparagraphs (1)(A) and (1)(B) [pertaining to subpoenas]. . . .".

empowered and hitherto inexperienced bodies to subpoena private individuals and businesses and to subject them to contempt enforcement. So, the amended Rule also stated (underlining added): "(C) Compliance with a subpoena issued by a committee or subcommittee under subparagraph (1)(B) may be enforced only as authorized or directed by the House."

Neither the defendant's nor the House's brief actually says that House Rule XI.2(m)(3)(C) applies to what the plaintiffs here are doing, let alone forbids it, and for at least four separate reasons, the rule clearly does neither. (1) A §2954 request letter is authorized under statute rather than "under subparagraph (1)(B)" of Rule XI.2(m);[40] (2) a "request" is not a "subpoena," because even wilful disobedience lays no predicate for contempt; (3) the statutory letter is not even analogous to a "subpoena" because it cannot go to private individuals with their sensitive individual civil liberties, as a subpoena can, but only to agencies; and, (4) any ensuing suit is not a suit for "enforcement" of "compliance" with a "subpoena," because it only produces, like a FOIA suit for a request letter, a ruling about the applicability of statutory disclosure obligations, not an imminent and forewarned

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[40] This is no technicality. The immunity statute, the contested election statute, and the FOIA are, like §2954, important examples that readily come to mind where the statute, not Rule XI.2(m)(1)(B), is the source of the authority.

threat of contempt sanctions for disobedience.

The defendant cites three cases in its stretch to make some overgeneralized version of Rule XI.2(m) into quasi-constitutional tradition. None is apposite; each comes from very unique circumstances. In brief, the old Senate election opinion, Reed v. County Commissioners of Delaware County, Pa., 277 U.S. 376 (1928), by its terms does not apply to any statutory case such as for §2954.[41] In re Beef Industry Antitrust Litigation, 589 F.2d 786 (5th Cir. 1979), similarly has nothing to do with a §2954 case, but applied House Rule XI in a case of subpoenas to private parties.[42] Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966), too, has

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[41] "Petitioners do not claim that any Act of Congress authorizes the committee or its members, collectively or separately, to sue." 277 U.S. 376, 388 (1928). Moreover, "the Senate adopted S. Res. 262 in response to the Supreme Court decision in Reed . . . . S. Res. 262 was "intended to correct that defect [in Reed]." Senate Sel. Comm. v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973). In other words, in response to Reed, the Senate acted in 1928 to resolve the Court's suggestion that the Senate actually might have, or might want to have, a tradition of requiring preliminary floor votes. The Senate did not want, and would not start, any such tradition.

[42] On its facts, the case concerned subpoenas issued to private parties, and the court quoted House Rule XI.2(m)(3)(B) (now C), warning what would happen "[i]f every subcommittee of the Congress" could act against that Rule. 589 F.2d at 791. Some comments in the case, suggesting the generalizing of that Rule to interventions beyond the Rule's precise terms regarding "enforc[ing]" "compliance" with "subpoenas," belong to the early years after the 1975 Rule XI.2(m) amendment when practice was irregular, and those comments have not, subsequently, been followed. See, e.g., Harris v. Board of Governors, 938 F.2d 720 (7th Cir. 1991).

nothing to do with a §2954 case; it addresses criminal contempt during recesses.[43]

Both the defendant's and the House's briefs complain at length that suits like this have not been brought, that these plaintiffs should use some other tools, or that this suit will produce a judicial resolution they want avoided. Each of these points could be debated, but the debate is empty. The Court is not asked to resolve a clash of Congressional authority and Presidential privilege. The Executive has made no privilege claim and, hence, presented no such clash. Rather, the defendant asks the Court to invent a wholly novel constitutional principle, completely at odds with prior practice, existing rules, and sound reason, apparently to declare unconstitutional a perfectly sound sunshine statute.

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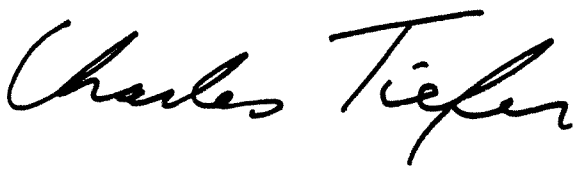
[43] We do not want to debate criminal contempt, which does not resemble either the FOIA or other document request letter statutes. Just to correct the misleading impressions left by defendant's brief, 2 U.S.C. §194 report certifications have required a chamber vote only during non-recess periods. Wilson requires that the Chair exercise discretion in recess report certifications, not that there be a chamber vote. Fields v. United States, 164 F.2d 97 (D.C. Cir. 1947)(upholding recess report certified without a chamber vote), cert. denied, 332 U.S. 851 (1948); see Russell v. United States, 369 U.S. 749, 752-53 (1962)(2 U.S.C.§ 194 case reviewed; no problem with recess report certification without chamber vote, but reversal on unrelated issues). However, this is all far beside the point. In criminal contempt of private individuals, the courts' high procedural requirements protect individual rights. The FOIA or this statutory request letter just seeks a ruling about nonprivileged agency documents.

CONCLUSION

For the foregoing reasons, the House Democratic Leadership suggests that the judgment of the district court should be affirmed.

Respectfully submitted,



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