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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HENRY A. WAXMAN, et al.,

Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant.

No. 01-04530-JGB (AJWx)

SECRETARY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

Date: November 26, 2001
Time: 10:00 a.m.
Courtroom: No. 780
Location: Los Angeles-Roybal

INTRODUCTION

In this action, plaintiffs ask that the Court interpret 5 U.S.C. § 2954, a statute enacted in 1928 but "yet to be adjudicated in court," to permit access by a minority of the members of the House Committee on Government Reform to any information contained in the files of any agency within the committee's jurisdiction. At its core, then, this action is a controversy between the Executive and Legislative branches over access to information in the possession of executive officials, and a controversy between the minority and majority members of the House Committee on Government Reform. The Court should decline to wade into this political thicket. Separation of powers principles dictate that this controversy be sorted out in the political realm, not in this or any other court. Accordingly, the Court should decline to interpret Section 2954 and dismiss this action.

Even if the Court were to entertain this intra- and inter-branch dispute, plaintiffs cannot prevail as a matter of statutory interpretation. Plaintiffs interpret Section 2954 solely with reference to two words in the text of the statute, disregarding entirely Congress's readily ascertainable purpose, which is completely at odds with the interpretation plaintiffs advance. Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Mem."), at 13. This is not the manner in which any court, including the current Supreme Court and the Ninth Circuit, interprets statutory language, even purportedly "plain" language. Read in its proper context, Section 2954 is far from the sweeping grant of authority plaintiffs advocate. Rather, the statute was enacted to preserve access to a limited universe of agency reports for members of two of Congress' numerous committees. This is not simply the convenient "litigating position" of the Executive Branch, Pl. Mem. at 2, but a longstanding interpretation of Section 2954 that is consistent with Congress's plain intent. Indeed, the Congressional Research Service itself has consistently interpreted Section 2954 in the same, narrow manner. Adjusted census data, the information sought by plaintiffs, does not fall within Section 2954's narrow scope. Accordingly, the Secretary is entitled to judgment.[1]

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[1] Because the Secretary has presented matters outside the pleadings, this motion is styled, in the alternative, as one for summary judgment. However, those matters consist only of

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Moreover, to interpret Section 2954 as plaintiffs propose would raise serious doubts about the constitutionality of the statute, which, in plaintiffs' view, admits of no exceptions, even for materials that are protected by Executive privilege. If Congress had intended to vest such sweeping authority in the minority, indeed in only a fraction of the members of only one House and one Senate committee, raising obvious and substantial separation of powers concerns, one would expect that the legislative history would at least hint at such an intention. To the contrary, however, Congress had no such intention, and never believed that it was vesting in these members alone a power Congress itself does not possess as a body. The grave constitutional doubts attributable to plaintiffs' interpretation of Section 2954 may easily be avoided by interpreting the statute in light of its plain purpose. For this additional reason, plaintiffs' constitutionally doubtful interpretation should be rejected, and judgment should be granted in favor of the Secretary.

BACKGROUND

Plaintiffs seek adjusted Census 2000 data based on 5 U.S.C. § 2954, which provides in pertinent part:

> An executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof . . . shall submit any information requested of it relating to any matter within the jurisdiction of the committee.[2]

Section 2954 is derived from section 2 of the Act of May 29, 1928, 45 Stat. 996. Section 1 of that Act provided for the repeal of 128 statutes requiring the submission of reports to Congress,

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legislative history, which the Court may notice, and documents created by the Congressional Research Service which, although instructive, are not critical to the Court's disposition of this action. Thus, the Secretary also maintains that he is entitled to judgment on the pleadings. See Fed. R. Civ. P. 12(c).

[2] As plaintiffs note, the House Committee on Government Operations has since been renamed the Committee on Government Reform.

most of which either had become obsolete or served no useful purpose. See S. Rep. No. 1320, 70th Cong., 1st Sess., p. 2; H.R. Rep. No. 1757, 70th Cong., 1st Sess., p. 3 (attached as Exhibit A to the Declaration of Timothy Zick). A study by the Bureau of Efficiency had recommended that many of these reports be eliminated. S. Rep. No. 1320, at 1; H.R. Rep. No. 1757, at 2 (Zick Decl. Ex. A, at 3, 8). In addition, some of the subject reports contained information that Congress determined could be more efficiently provided in some other form, upon request by the named committees. See S. Rep. No. 1320, at 3; H.R. Rep. No. 1757, at 4 (Zick Decl. Ex. A, at 5, 10).

Section 2, which has been re-enacted as 5 U.S.C. § 2954, was intended to enable Congress to obtain, if needed, the information theretofore contained in the discontinued reports. The House Report accompanying Section 2954 states:

> To save any question of the House of Representatives to have furnished to it *any of the information contained in the reports proposed to be abolished*, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments or upon the request of any seven members thereof[.]

H. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (Zick Decl., Ex. A, at 12) (emphasis added). Similarly, the Senate Report states:

> This section makes it possible to require *any report discontinued by the language of this bill* to be resubmitted to either House upon its necessity becoming evident to the membership of either body.

S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (Zick Decl., Ex. A, at 6)(emphasis added).

Section 2954 is codified in a subchapter entitled "Reports" (5 U.S.C. Chapter 29, Subchapter II). It is one of four sections in the subchapter; the other sections concern reports to the Office of Personnel Management, when to submit annual reports to Congress, and a requirement that certain reports to Congress contain information on additional employee requirements. See 5 U.S.C. §§ 2951-2953.

As plaintiffs note, in light of this plain legislative history, the Executive Branch has long

interpreted Section 2954 to preserve the right of the members of the respective committees to obtain the information contained in the reports abolished by Section 1 of the Act. See Declaration of Michael Yeager, Exhibits J-L. For example, then Assistant Attorney General Scalia testified: "The legislative history of this provision . . . shows that it did not represent a Congressional judgment that such a minority should have the power to demand all information, but rather only the information which was formerly contained in annual reports which the Congress abolished." Yeager Declaration, Ex. K, at 29.

The Congressional Research Service has also consistently interpreted Section 2954 in a similar fashion. *See* Memorandum from American Law Division to Senate Government Operations Committee, dated January 15, 1975, at 2 ("The legislative history . . . indicates that the purpose of the 1928 Act was not to assert a sweeping right of Congress to obtain any information it might desire from the executive branch.") (Zick Decl., Exhibit B). See also "Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, CRS Report No. 95-464A (April 7, 1995), at 24-25 (same) (Zick Decl., Exhibit C, at 39).

ARGUMENT

The Court should decline to referee what is essentially a political skirmish, pitting the desire of the minority party for information contained in the files of an executive agency against the agency's own desire to maintain the confidentiality of information in its files. If, however, the Court decides to entertain plaintiffs' claims, it should reject their sweeping interpretation of Section 2954. The ultimate issue in construing the statute is Congress' purpose. That purpose, which is readily apparent from Section 2954's context and history, is directly contrary to plaintiffs' interpretation. Moreover, plaintiffs' interpretation casts grave doubts on the constitutionality of the statute, and should be rejected for that additional reason.

I. THE COURT SHOULD EXERCISE ITS REMEDIAL DISCRETION AND DISMISS THIS ACTION

Plaintiffs, sixteen minority party members of the House Committee on Government Reform have requested, purportedly under the authority of Section 2954, the adjusted data

compiled during the 2000 census. Stripped to its essence, this controversy is two-fold. Plaintiffs' desire for information held by an executive agency pits a minority party's request against the desires of the majority party, and aligns sixteen members of the Committee against the Secretary of Commerce.[3] Similar disputes have come before the D.C. Circuit from time to time. As that court has recognized, disputes over congressional access to Executive Branch records and information are neither novel nor matters for which judicial involvement is appropriate, considering the proper separation of powers among the branches and the array of political remedies available to settle intra- and inter-branch disputes. To the contrary, courts have been loathe to intervene in such disputes and, by refraining from judicial review, have left matters such as this for resolution between the political branches.[4] This matter is no different and the Court should refrain from adjudication as a matter of its equitable discretion.

The D.C. Circuit first applied what later came to be known as the doctrine of remedial, or equitable, discretion in United States v. AT&T Co., 551 F.2d 384 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977). In that case, the Justice Department sought to block production of a telephone company's records of national security wiretaps to a congressional committee in response to a subpoena. Acknowledging the interests of both branches and the inherent difficulty in any judicial effort to balance those interests, 551 F.2d at 394, the court

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[3] Although eighteen minority members of the committee signed the original request for census information, only sixteen members have joined this lawsuit as plaintiffs.

[4] As plaintiffs note, on some occasions Congress and the subject agency have managed to come to an agreement on the production of information, even where the committee's jurisdiction over the matter was doubtful. See Pl. Mem. at 14. These examples in no way compromise the Justice Department's consistent, and longstanding, narrow interpretation of Section 2954. For one thing, the agencies involved in those instances all operated to some extent as independent agencies, and in Leach two of the agencies – OTS and FDIC – were not even represented by the Department. In addition, the agencies did not simply accede to a blanket request for all information requested, but rather sought and obtained assurances that privileged and personal information would be protected from disclosure. Moreover, these disclosures in no way waived the right of any agency to object to a request under Section 2954. Rather, these disclosures appear to illustrate the core of the doctrine of remedial discretion – the viability of political compromise, even under trying circumstances.

noted that "[t]he legislative and executive branches have a long history of settlement of disputes that seemed irreconcilable," id., and declined to resolve the case, requesting instead that the parties seek a negotiated solution. In so doing, the court noted that a judicial resolution would not necessarily protect the interests of both branches and could alter the constitutional separation of powers:

> This dispute between the legislative and executive branches has at least some elements of the political question doctrine. A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance.

551 F.2d at 394.

In a subsequent opinion, which again sought to guide a negotiated solution rather than impose a judicial determination of one branch's right to prevail, the court further explained that judicial abstention in cases of this nature actually fosters the type of inter-branch dynamics contemplated by the constitutional separation of powers:

> The framers, rather than attempting to define and allocate all government power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches of government do not exist in an exclusively adversarial relationship to one another when a conflict arises. Rather, each branch should take of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.

567 F.2d 121, 127.

Applying this same doctrine, the court in United States v. House of Representatives, 556

F. Supp. 150 (D.D.C. 1983), declined to entertain a declaratory judgment action concerning the rights of a House committee to subpoena documents over which the President asserted executive privilege:

> When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted.... Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution.

556 F. Supp. at 152 (citation omitted).

Similar concerns for the proper functioning of coordinate branches of the federal government have led the D.C. Circuit to refrain from exercising jurisdiction over litigation brought by individual members of Congress when such disputes merely reflected extensions of legislative controversies. The D.C. Circuit developed the doctrine of remedial or equitable discretion to give due regard for separation of powers concerns in cases brought by legislators where other doctrines, such as standing and political question, were not a sufficient means of articulating the prudential separation of powers concerns which such cases presented. See Riegle v. Federal Open Market Committee, 656 F.2d 873, 880-81 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). The Riegle court stated that "[t]he most satisfactory means of translating our separation of powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion" to be applied in cases "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators[.]" 656 F.2d at 881.

Where other remedies are available, "the doctrine of remedial discretion properly permits" the courts to consider separation of powers concerns and to avoid adjudicating intra- and inter-branch disputes. See Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984) ("Congressional actions pose a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators."), cert. denied, 469 U.S. 1106 (1985). See also Melcher v. Federal Open Market Committee, 836 F. 2d 561 (D.C. Cir. 1987) (equitable discretion proper where potential relief existed in the form of new or repealed

legislation); Leach v. Resolution Trust Corp., 860 F. Supp. 868 (D.D.C. 1994) (declining to give an expansive reading to a statutory provision to allow access by a ranking minority committee member to agency records otherwise exempt from disclosure under the FOIA).[5] Similarly, where individual members have sought judicial review of executive action in advance of any action by Congress itself, courts have applied their remedial discretion to withhold relief. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987).[6] Application of the doctrine of remedial discretion does not turn on whether the court could fashion a remedy, but rather on "respect for a co-equal branch of government" to order its own affairs. Vander Jagt v. O'Neill, 699 F.2d 1166, 1176 (D. C. Cir. 1982), cert. denied, 464 U.S. 823 (1983).

The same separation of powers concerns should lead this Court to dismiss plaintiffs' action. The request for the census information in the Secretary's possession was made by a group of minority members of the House Committee on Government Reform. Rather than invoke the authority of the full committee through a subpoena, or convince a chamber majority of their need for the information, these members ask the Court to decide that Section 2954 grants any seven members of the committee carte blanche with respect to any and all information within its jurisdiction. The Court should not select a victor in such intra- and inter-branch disputes "until

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[5] The court in Leach was not presented with a claim under Section 2954, and thus had no occasion to consider the statute's history, purpose, or scope. The dicta in Leach does not stand for the proposition that all requests for information under Section 2954 would fall outside the remedial discretion doctrine. Where, as here, there are other avenues of relief available, the doctrine counsels against judicial involvement.

[6] In Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000), the court dismissed for lack of standing a suit by several members of Congress challenging an executive order. The court noted that the remedial discretion doctrine had developed as an alternative application of separation of powers concerns following the development of special rules for standing in cases brought by Congressmen. The court held that the Supreme Court's dismissal of an action by several members of Congress for lack of standing in Raines v. Byrd, 521 U.S. 811 (1997) governed the claims in Chenoweth. 181 F.3d 114-116. It noted, however, that the same result would apply under the doctrine of remedial discretion, as plaintiffs could seek a political solution through legislation. 181 F.3d at 116.

circumstances indicate that judicial intervention is necessary." That showing has not been made here. Separation of powers concerns dictate that plaintiffs first seek to convince their majority colleagues of their need for the adjusted Census figures they seek before requesting a ruling of first impression from the Court.

Whether this controversy is viewed as a one between the sixteen plaintiffs and their majority colleagues, or one between plaintiffs and the Secretary, this Court should abstain from deciding the dispute. This is precisely the type of controversy for which the remedial discretion doctrine was devised. Indeed, even if the requests had the full support of the House, the same separation of powers concerns underlying the decisions in AT&T and House of Representatives, discussed above, would still strongly favor judicial restraint. Without that support, the case for the exercise of equitable discretion is even more compelling.

II. SECTION 2954 IS NOT A SWEEPING GRANT OF AUTHORITY

If the Court is inclined to referee this inter-Branch dispute, it should grant summary judgment in favor of the Secretary. Section 2954 must be construed with its narrow purpose firmly in mind. Congress' intent in enacting Section 2954 was not to grant broad access to all information in the possession of agencies, but rather to preserve access to information formerly contained in a series of reports required to be submitted to Congress. That purpose is readily apparent from the context of the entire statute, and from the accompanying House and Senate Reports, which are quoted above. It cannot be ignored merely because Section 2954 uses "language of command" (shall) and a "broad adjective" (any). Pl. Mem. at 6, 9.

A. Section 2954 Preserves Access Only To "Reports"

Although this is the first time any court has been asked to interpret Section 2954, plaintiffs ask the Court to ignore the statute's context and its legislative history. As the Supreme Court and the Ninth Circuit have made clear on numerous occasions, while courts begin with the statutory language, they are not shackled to it, particularly where, as here, the statutory text is at loggerheads with Congress' plain intent. Statutory interpretation is not, as plaintiffs argue, merely a black letter exercise. The Supreme Court has repeatedly emphasized that "'the meaning of statutory language, plain or not, depends on context.'" Holloway v. United States, 526 U.S. 1,

7 (1999) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)) (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991)). Thus, the task of statutory construction begins, but does not end, with the specific words or phrases used by the drafters. See Holloway, 526 U.S. at 6. See also Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

"The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." Watt v. Alaska, 451 U.S. 259, 266 (1981). The circumstances of Section 2954's enactment demonstrate that Congress did not intend the sweeping, literal meaning plaintiffs advocate. The Act under consideration must be construed as a whole. Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). Section 1 of the Act required the repeal of statutes mandating the submission of 128 specific reports to the House and Senate Committees. Section 2 of the Act, later codified as Section 2954, was enacted contemporaneously with Section 1. Section 2, as the legislative history makes abundantly clear, was merely intended to preserve access to the reports abolished by Section 1 of the Act. See S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4; H. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (Zick Decl., Ex. A, at 6, 12).

Further persuasive demonstration of the limited nature of Section 2954's reach can be found in the congressional design. As noted, Section 2954 is part of a subchapter entitled "Reports" (5 U.S.C. Chapter 29, Subchapter II). It is one of four sections in the subchapter; the other sections concern reports to the Office of Personnel Management, when to submit annual reports to Congress, and a requirement that certain reports to Congress contain information on additional employee requirements. Of course, "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt" concerning the reach of a provision. Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947). See also Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (resorting to title, and concluding title was "reinforced" by legislative history).

Placing Section 2954 within its proper context, including its position in the United States

Code, plainly indicates that the provision was intended to preserve a right to specific "reports," not to grant a minority of committee members access to any and all information located in the files of any agency within the committee's jurisdiction. Further evidence of Congress' narrow design is readily discernible from the statute's brief, but clear, history.

B. Congress' Narrow Purpose Is Readily Apparent

The language of the statute "ordinarily" controls, but only "'[a]bsent a clearly expressed legislative intent to the contrary.'" Central Mont. Elec. Power Coop. v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1477 (9th Cir. 1988) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Indeed, the Ninth Circuit has expressly held that departure from the literal language of the statute is appropriate "where the legislative history clearly indicates that Congress meant something other than what it said." In re Catapult Entertainment, Inc., 165 F.3d 747, 753 (9th Cir.), cert. dismissed, 528 U.S. 924 (1999). See also Foxgord v. Hischemoeller, 820 F.2d 1030, 1034 (9th Cir.) ("This court may give effect to a clearly expressed legislative intent which is contrary to the language of the statute itself."), cert. denied, 484 U.S. 986 (1987). That is precisely the case here.

Moreover, courts are not confined to the "naked text" where guidance as to the meaning of statutory terms is readily available. Public Citizen v. United States Department of Justice, 491 U.S. 440, 454 (1989). Nor are courts required to discard common sense when interpreting statutes, or to ignore the plain purpose of a statute, particularly where, as here, it can easily be ascertained. The plain meaning rule "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). See also United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'") (citations omitted). Particularly where matters of first impression are concerned, courts should not ignore readily discernible indicia of congressional intent. See Foxgord, 820 F.2d at 1034 (concluding that case of first impression presented "exceptional circumstances" calling for an explanation of the

"historical basis" for Congress' enactment).

As plaintiffs point out, although Section 2954 has been codified for more than seventy years, it has never been interpreted by any court. Despite the novelty of the issue presented, however, plaintiffs ask this Court to wear interpretive blinders and ignore both the context in which Section 2954 was enacted, and clear, identical expressions of legislative purpose in both the House and Senate Reports. Notwithstanding plaintiffs' efforts to cloud the statements in those reports, they make unmistakably clear that Congress did not intend to vest in any seven members of the Committee on Government Reform the broadest possible right of access to agency information, but rather to preserve the right to obtain, in the words of the House Report, "any of the information contained in the reports proposed to be abolished," or, as the Senate Report stated, "any report discontinued by the language of this bill." S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4; H. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (Zick Decl., Ex. A, at 6, 12).

The Supreme Court has repeatedly resorted to the legislative history in the face of similar contentions that "plain meaning" controls. The Court has rejected literal readings of statutory provisions where the "natural sense" of the statute, in light of its intended purpose, leads it toward a "common sense view" of the matter. Heckler v. Edwards, 465 U.S. 870, 879 (1984). See id. at 880-882 & n. 14 (examining "history of the enactment" and floor debates to discern congressional purpose). See also Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 530 (1983) ("[B]efore we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning."). In Associated General Contractors, the Court rejected the contention that a union could recover under the Clayton Act, which made remedies available to "any person." Although it acknowledged the literal breadth of the statute, the Court examined the legislative history of the Act, including the "larger context in which the entire statute was debated." 459 U.S. at 530. Relying on statements in the legislative debate regarding the purpose of the Act, the Court held that the phrase "any person," although literally broad in scope, did not encompass the union's alleged injuries. Id.

More recently, in Lewis v. United States, 523 U.S. 155 (1998), the Court considered

whether the federal Assimilative Crimes Act (ACA), which applies state law to a defendant's acts or omissions on federal enclaves that are "not made punishable by any enactment of Congress," precluded application of state law under the circumstances because several federal laws appeared to "punish" the acts in question. See id. at 159 (emphasis added). Again, although the language of the statute was broadly worded to encompass "any" congressional enactment, the Court consulted the legislative history to determine the "basic purpose" of the ACA, which it concluded was to fill gaps in federal criminal enclave law. In light of this history, the Court expressly rejected a "literal" interpretation of the statutory provision because it "would dramatically separate the statute from its intended purpose." Id. at 160. A literal interpretation of "any" enactment, the Court reasoned, would have created the very gaps the ACA was designed to fill. Id. at 161. Accordingly, the Court concluded "that Congress did not intend the relevant words – '*any* enactment' – to carry an absolutely literal meaning." Id. at 162 (emphasis in original).

Similarly, in Public Citizen, supra, the Court expressly rejected a literal interpretation of the phrase "utilized" under the Federal Advisory Committee Act (FACA). Under the proposed interpretation, the Department of Justice would have been required to disclose information relating to its consultations with the American Bar Association concerning potential nominees for federal judgeships. The Court was "convinced" that Congress could not have intended a literal reading of the statute, which would have "extend[ed] FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive Agency seeks advice." Id. at 452. The Court explained: "A nodding acquaintance with FACA's purposes, *as manifested by its legislative history* and as recited in § 2 of the Act, reveals that it cannot have been Congress' intention" to extend FACA's requirements "to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice." Id. at 453 (emphasis added). "Close attention to FACA's history" convinced the Court that a literal interpretation was inconsistent with the statute's purpose. Id. at 455.

A "nodding acquaintance" with Section 2954's purpose, as manifested by its legislative history, compels a similar result. The statute's purpose and origin are plainly set forth in the

legislative history. Although Congress chose broad language, it plainly did not intend that Section 2954 create a sweeping tool for the gathering of any information that any seven members of the House Committee on Government Reform might desire. As the Supreme Court long ago stated:

> Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). Such is the case here. Congress merely intended to preserve legislators' right to require the production of the 128 reports eliminated by Section 1 of the Act, in the event members later determined that the information therein was critical to an issue within the committee's jurisdiction.

Indeed, even plaintiffs concede that the doctrine of "plain meaning," or literal interpretation, is not the hard-and-fast rule they claim it is. None of the cases plaintiffs rely upon raised any issue of incongruence between statutory language and congressional purpose. See Miller v. French, 530 U.S. 327, 336-37 (2000) (finding clear intent in language and "context" of statute as a whole); id. at 360 ("the legislative history is neutral") (Souter, J., concurring in part and dissenting in part). See also Lexecon, 523 U.S. at 39 (reviewing legislative history and concluding that, on balance, the history supported a literal reading of the statute); United States v. Gonzales, 520 U.S. 1, 6 (1997) ("Indeed, far from clarifying the statute, the legislative history only muddies the waters."). Thus, despite the apparent stridency of their position, the most plaintiffs can say with respect to the statutory directive "shall," for example, is that it is "ordinarily" language of command, or is a "general proposition" that guides courts with respect to interpretive issues. Pl. Mem. at 6, 7. Plaintiffs do not, and cannot, suggest that the literal language always controls, or that it must control even where the legislative history plainly contradicts their textual interpretation.

Courts should be particularly wary of endorsing literal interpretations that appear to

countenance odd or troubling results. "Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." Public Citizen, supra, 491 U.S. at 454 (quoting Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989)). The odd, and constitutionally troubling (see III., infra), result compelled by plaintiffs' proposed interpretation is that, without ever having uttered a word on the matter, Congress purportedly vested in a small fraction of the membership of only two committees, and no others, an absolute right of access with regard to any information contained in the files of any agency whose activities fall within the jurisdiction of those committees. The scope of that proposed power is out of all proportion to Congress's own right of access, which although not expressly delineated, is not absolute. See Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("Broad as it is, the power [to investigate] is not, however, without limitations."). See also McGrain v. Daugherty, 273 U.S. 135, 177 (1927) (congressional investigations must pertain to subjects "on which legislation could be had"). Thus, to accept plaintiffs' view is to accept that Congress vested in any seven members of the House Committee on Government Reform a right of access broader in scope than that enjoyed by the body as a whole.

C. Plaintiffs Misconstrue the Legislative History

Plaintiffs themselves quote the clear, concise portions of the House and Senate Reports that clarify the narrow scope of Section 2954. Ironically, however, they do not believe themselves bound by the "plain meaning" of the language contained therein. Rather, plaintiffs seek to maneuver around the legislative history by misinterpreting it.

Section 1 of the Act abolished reports that were, in their then form, considered either useless or obsolete, or were thought to contain information that could be assembled upon request in another, more useful form. See S. Rep. No. 1320, at 3; H.R. Rep. No. 1757, at 2 (Zick Decl., Ex. A at 5, 8). At the time of enactment, Section 2 did not simply confer "a narrow right of access to obsolete information." Pl. Mem. at 11. Rather, it preserved legislators' access to the information in these reports, insofar as that information could be assembled in a report more useful in form or substance to the requesting members. Even a passing acquaintance with the brief legislative history demonstrates that it was the form of the reports, more than anything else,

that caused Congress to conclude that their submission served no useful purpose.

This point was driven home in the House and Senate Reports. The additional portions of these reports quoted by plaintiffs (Pl. Mem. at 12) have no specific bearing on the issue in this case – the precise scope of Section 2 of the Act. The Reports simply state each committee's summary conclusion that reports generally, including some "303 reports required to be made to Congress by the executive departments and the independent establishments," S. Rep. No. 1320, at 4, were all of such poor quality as to be virtually useless:

> The committee desires to make the observation that it is easy in the enactment of general legislation on some subject for some one to suggest that a special report be made to Congress. Little attention is given to the character of the report that should be submitted, and the legislation goes in the statute books. The department makes the character of the report that it thinks will fit the legal requirement, and often it is entirely valueless for the purpose intended. . . . If any information is desired by any Member or Committee upon a particular subject that information can be better secured by a request made by an individual Member or committee so framed to bring out the special information desired. It would be helpful if in the future committees would be more careful as to the character and extent of requiring that reports be made to Congress in connection with the administration of legislation.

See S. Rep. No. 1320, at 4; H. R. Rep. No. 1757, at 6 (Zick Decl., Ex. A, at 6, 12). Thus, in the view of each committee, members might be better served, in general, to make individual requests for desired information, and to frame their request for reports in a manner calculated to lead to the production of the most useful reports. This general observation says nothing about any right under Section 2954 itself to "particularized information." Pl. Mem. at 12.

Further, nothing in the Senate Report indicates any "intention to allow a broad right of access." Pl. Mem. at 11. To the contrary, immediately after the quotation plaintiffs take out of context (see Pl. Mem. at 12), the Senate Report plainly states that Section 2 of the Act "makes it possible to require *any report discontinued by the language of this bill* to be resubmitted to either

House upon its necessity becoming evident to the membership of either body." S. Rep. No. 1320, at 4 (Zick Decl., Ex. A, at 6) (emphasis added). In light of this clear statement, it is disingenuous to argue, as plaintiffs do, that the drafters "understood that they were granting broad authority and that they intended to do so." Pl. Mem. at 12.

III. PLAINTIFFS' SWEEPING INTERPRETATION RAISES SERIOUS CONSTITUTIONAL DOUBTS

In choosing between competing versions of statutory construction, it is axiomatic that a court must choose that which avoids constitutional question "if a serious doubt of constitutionality is raised" by the alternative interpretation. Crowell v. Benson, 285 U.S. 22, 62 (1932). The Supreme Court assumes that Congress "legislates in the light of constitutional limitations." Rust v. Sullivan, 500 U.S. 173, 191 (1991). This approach "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988).

The Supreme Court has indicated that the reluctance to confront or decide constitutional issues "is especially great where, as here, they concern the relative powers of coordinate branches of government." Public Citizen, 491 U.S. at 466. Absent some evidence that Congress at least considered the matter, the Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets[.]" Id. Thus, in Public Citizen, the Court declined to adopt a literal interpretation of FACA that would have brought the ABA and other consultive groups within the statutory orbit, fearing the separation of powers issues that would have been raised under such a broad interpretation of the statute. The legislative history, the Court determined, suggested a congressional intent contrary to the words it had chosen to include in the statute. Id. at 467. That history, the Court said, "counsels adherence to our rule of caution." Ibid.

Similar considerations counsel adherence to the rule of constitutional doubt in this case. Plaintiffs' interpretation of Section 2954 requires submission on demand by the Secretary of any information in the agency's files on the request of only seven members of the House Committee

on Government Reform. That interpretation raises two substantial questions that require rejection of plaintiffs' statutory interpretation.

First, plaintiffs' interpretation admits of not a single exception to disclosure, instead purporting to vest a sweeping authority in any seven members of the Committee to demand disclosure of executive information. Thus, an agency in possession of material deemed sensitive for national security or other reasons, or which is otherwise protected by Executive privilege, would have no choice, in plaintiffs' view, but to make the requested disclosure. This rather remarkable power, which on plaintiffs' view was apparently randomly vested only in members of these particular committees, is one not enjoyed even by the full Congress. See Barenblatt, 360 U.S. at 111 ("Broad as it is, the power [to investigate] is not, however, without limitations."). See also McGrain v. Daugherty, 273 U.S. 135, 177 (1927) (congressional investigations must pertain to subjects "on which legislation could be had").

Not only does the legislative history suggest a far narrower statutory scope, but there is not a shred of evidence that any member even considered the ramifications of a sweeping grant of access to executive information. This silence is particularly disturbing in light of the separation of powers issues such an interpretation raises. Granting unlimited access to agency files may cause unwarranted interference with the Executive function to "take care that the laws be faithfully executed." U.S. Const., art. II, § 3. See Yeager Decl. Ex. K, at 29 (then Assistant Attorney General Scalia noting the "questionable constitutionality" of Section 2954 should it be interpreted to provide unfettered access to executive materials). Indeed, save for the jurisdiction of the committee itself, plaintiffs would place no limits whatever on the committee's right of access. The Constitution requires that Congress, and its committees and members, respect and defer to a sphere of Executive autonomy. See Barenblatt, 360 U.S. at 112 (Congress "cannot inquire into matters which are within the exclusive province of one of the other branches of the Government"; it cannot "supplant the Executive in what exclusively belongs to the Executive").[7]

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[7] Moreover, granting an unfettered right of access to agency information will result in the very vices Executive privilege is designed to cure – it will inhibit frank discussion, prematurely foreclose useful lines of inquiry by agency officials, and generally negatively affect the quality of

An unfettered right of access by members of Congress to Executive materials would, as noted, be unprecedented, and would denigrate the constitutional doctrine of executive privilege. See Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc) (holding that House Judiciary Committee's need for information was "too attenuated and too tangential to its functions" to permit judicial enforcement of subpoena directed at President).

Second, plaintiffs' interpretation is all the more unusual, and constitutionally suspect, because this absolute power is proposed to be lodged not in any committee, or subcommittee, but in a mere fraction of the membership of only two of Congress' more than 40 full committees. Article I of the Constitution vests the lawmaking power and, by implication, the investigatory power, in "Congress." Plaintiffs do not even hint at what authority Congress presumably relied upon in writing a blank investigatory check to any seven members of the House Committee on Government Reform. Odder still, they do not explain why Congress would vest such powers in a small number of minority members of the committee. Moreover, plaintiffs' interpretation has no logical constitutional limitations. In plaintiffs' view, Congress presumably could vest in even a single member of a committee a breadth of investigatory powers not enjoyed by the full Congress. The Court should not simply assume that Congress intended to so empower a small fraction of the House Committee on Government Reform when it enacted Section 2954. There is no evidence that Congress considered, much less expressly intended, such a constitutionally doubtful, and politically bizarre, result.

This Court should not adopt plaintiffs' interpretation, particularly absent some

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agency decisions. See NLRB v. Sears Roebuck & Co., 421 U.S. 149, 151 (1975) ("Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions."). The Secretary has consistently taken the position in suits brought under the Freedom of Information Act that adjusted census information is protected by the deliberative process privilege. See Florida House of Representatives v. United States Department of Commerce, 961 F.2d 941 (11th Cir.), cert. dismissed, 506 U.S. 969 (1992) (holding that adjusted census figures are protected from disclosure under the FOIA). But see Assembly of the State of California v. United States Department of Commerce, 968 F.2d 916 (9th Cir. 1992) (holding that factual record did not support privilege claim for census figures).

demonstration that Congress intended to vest blanket access to Executive materials in any seven members of the House Committee on Government Reform and, indeed, in the face of plain evidence that it did not so intend. The Court should reject plaintiffs' constitutionally doubtful interpretation, accept the Secretary's interpretation, and grant summary judgment in favor of the Secretary.

CONCLUSION

For the foregoing reasons, the Court should exercise its remedial discretion and dismiss plaintiffs' Complaint. In the alternative, the Court should grant summary judgment in favor of the Secretary.

Respectfully submitted,

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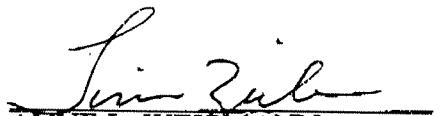

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