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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-LGB (AJWx)

SECRETARY'S REPLY TO PLAINTIFFS' OPPOSITION TO 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

Plaintiffs' Opposition to the Secretary's Motion to Dismiss Or, in the Alternative, Cross-Motion for Summary Judgment ("Pl. Opp.") is noticeably long on rhetoric and accusation, but short on persuasive argument. Plaintiffs' report of the demise of the doctrine of remedial discretion is decidedly premature. Indeed, far from "dismantling" the doctrine shortly after adopting it, the D.C. Circuit has hewed to the doctrine of remedial discretion for nearly twenty years as a means of avoiding just the sort of political branch confrontation Plaintiffs seek to foist on this Court. The doctrine remains a viable, and in this case wholly appropriate, means for the Court to sidestep an inter- and intra-branch political dispute concerning access to information.

Even if the Court should decide to wade into the parties' political dispute and declare a victor, it should not do so by ignoring, as Plaintiffs continue to do, the plain intent of Congress in enacting Section 2954. "Plain meaning" is not the talismanic rule Plaintiffs claim it to be. For good and sound reasons, courts seek to render common sense interpretations of statutes. They do so, of course, by discerning Congress' purpose in enacting the statute at issue. It does not require an "interpretive voyage," Pl. Opp. at 10, or any other judicial stretch, to discern Congress' plain intent with respect to Section 2954. The brief legislative history accompanying Section 2954, which the Secretary has provided to the Court in full, supports the Secretary's interpretation that Congress' intent was to ensure that committee members who might be interested in information formerly contained in what came to be seen as useless reports would continue to have access to that information after the reporting requirements were repealed. Particularly where, as here, the issue is one of first impression, there is ample authority, in the Ninth Circuit and elsewhere, to permit the Court to consider Congress' plain, and readily discernible, intent. Given Congress' plainly discernible purpose, and the inherent constitutional difficulties engendered by Plaintiffs' expansive interpretation of Section 2954's scope, the Court should enter judgment in favor of the Secretary.

ARGUMENT

I. THE COURT SHOULD EXERCISE ITS REMEDIAL DISCRETION

Plaintiffs misread the scope of the remedial discretion doctrine. The doctrine is not aimed solely at avoiding constitutional crises, or narrowly concerned with "thorny constitutional

issues," Pl. Opp. at 4, although given the nature of the parties to these disputes it should come as no surprise that such weighty issues do arise. The essence of the doctrine of remedial discretion, which was first articulated in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), is that courts should encourage political compromise rather than intercede in inter- and intra-branch disputes. The doctrine is intended to ensure that "the court not interfere in matters which properly could, and should, be decided by appeal to one's fellow legislators." Gregg v. Barrett, 771 F.2d 539, 545 (D.C. Cir. 1985). It is intended to shield the courts from political skirmishes where "individual members of Congress seek to vent their frustration with their colleagues, or with the executive branch, or both, by appeals to the courts." Id. at 543.[1]

That, of course, is the precise concern raised by the instant lawsuit. Sixteen members of the House Committee on Government Reform appeal to this Court to adjudicate the nature of their right to information held by an Executive agency. The Secretary has argued, and Plaintiffs do not dispute, that these minority committee members have at their disposal remedies that would not entail judicial meddling in their dispute. For example, Plaintiffs could seek to convince their majority colleagues to join them in subpoenaing the information sought.[2] They

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[1] Contrary to Plaintiffs' argument, invocation of the remedial discretion doctrine does not depend upon the merits of any claim of privilege the Secretary may make with respect to the information at issue. Indeed, that is the whole point of the doctrine – for courts to avoid resolving such claims. Thus, Plaintiffs improperly seek to interject the Ninth Circuit's decision in Assembly of the State of California v. United States Dep't of Commerce, 968 F.2d 916 (9th Cir. 1992) into this case. In any event, it suffices to state that the Secretary disagrees with Plaintiffs' interpretation of Assembly. In fact, the scope and effect of that decision, which is not at issue here, is currently being litigated in another forum. Carter et al. v. Dep't of Commerce, No. 01-868-RE (D. Ore.).

[2] As Plaintiffs themselves note, one or more of them could also have sought the requested information under the Freedom of Information Act. Pl. Opp. at 5. They chose not to do so, even though they claim Ninth Circuit precedent mandates disclosure under FOIA, on the purported grounds that FOIA procedures are "burdensome and delay access." Id. at 5. If there is a "strawman" in this lawsuit, Pl. Opp. at 11, it is Plaintiffs' argument that the mere existence of FOIA demonstrates that there are no separation of powers concerns in asking the Court to adjudicate the scope of Section 2954. The fact that these Plaintiffs did not, acting as "ordinary

have chosen instead to "vent their frustration" with the Secretary in this judicial forum, asking the Court to declare a victor under Section 2954. The purpose of the doctrine of remedial discretion is to avoid just such a tilting of the scales in favor of one branch. The doctrine enforces the notion, rooted in the separation of powers, that the legislative and executive branches are best situated to achieve a compromise solution. United States v. AT&T Co., 551 F.2d 384, 394 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977). Under the doctrine of equitable discretion, the Court should stay its hand and insist that these Plaintiffs invoke the alternative, collegial remedies available to them.

Plaintiffs also mischaracterize the vitality of the remedial discretion doctrine. The doctrine has not been "abandoned," "discarded," or "interred," Pl. Opp. at 1, 4, and the Secretary is not asking that the Court "resurrect" the doctrine of remedial discretion. Id. at 2. Plaintiffs seek to bury the doctrine alive through a highly selective rendering of its history and pedigree. It is nothing more than Plaintiffs' own "wishful thinking," Pl. Opp. at 6, that the D.C. Circuit began to "dismantle the equitable discretion doctrine almost at the same time it was being created." Id. at 3. In fact, as the D.C. Circuit itself pointed out in Gregg, supra, the court "openly embraced" the doctrine in Riegle, and then proceeded to "firmly establish[]" the doctrine by upholding the dismissal of numerous claims brought by members of Congress in a long line of cases. Gregg, 771 F.2d at 544. See Vander Jagt v. O'Neill, 699 F.2d 1166, 1176 (D. C. Cir. 1982), cert. denied, 464 U.S. 823 (1983); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (per curiam); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Gregg, 771 F.2d at 545-46; Melcher v. Federal Open Market Committee, 836 F. 2d 561 (D.C. Cir. 1987).

To be sure, as Plaintiffs note, then-Judge Scalia expressed his own concerns about the

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citizens," Pl. Opp. at 5, invoke FOIA proves nothing with regard to the applicability of the remedial discretion doctrine in this case. As a matter of constitutional separation of powers, the difference between a request made by an individual Member under a public information statute available to all citizens, and one made by a group of legislators pursuant to a statute that purportedly provides a sweeping right to Executive information to minority Members *by virtue of their membership on a specific House committee*, should be obvious.

doctrine in his concurrence in Moore, and other judges from time to time have cautioned against over-extending the doctrine. See Gregg, 771 F.2d at 545. It is, however, an unwarranted, and unsupportable, leap from criticisms that the doctrine is imperfect to Plaintiffs' conclusion that the doctrine has been "discarded" by the court. Pl. Opp. at 2. None of the cases cited above has been overruled. Nor, despite their efforts, can Plaintiffs rewrite the D.C. Circuit's opinion in Chenoweth v. Clinton, 181 F.3d 112 (D.C. Cir. 1999), to accomplish this purpose. Chenoweth was concerned principally with whether, after the Supreme Court's decision in Raines v. Byrd, 521 U.S. 811 (1997), the D.C. Circuit's prior legislative standing doctrine remained good law. Although holding that its standing doctrine in this area was "untenable" in light of Raines, 181 F.3d at 115, and that the legislators' claims must therefore be dismissed, the court expressly left open what effect, if any, Raines had on the doctrine of remedial discretion. See id. at 116 ("Whatever Moore gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion.").[3] The doctrine remains viable, and the Court should apply it in this case.

II. CONGRESS' PLAIN PURPOSE CANNOT BE IGNORED

There should be no confusion concerning Congress' intent in enacting Section 2954. As the legislative history demonstrates, prior to 1928, numerous agencies had been required to submit to Congress reports and statements that members had come to view as being of little or no value. The legislative history demonstrates that it was principally the form, or "character," of the reports and statements themselves that troubled Congress and caused it in 1928 to decide that henceforth128 reports and other statements would not be submitted. See, e.g., S. Rep. No. 1320, at 4 ("Little attention is given to the character of report that should be submitted, and the

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[3] Plaintiffs again overstate their case in arguing that Chenoweth holds that in all subsequent cases, standing is the "key inquiry" and displaces the separation of powers concerns that gave rise to a separate doctrine of remedial discretion. The D.C. Circuit itself noted that Raines did not address either the applicability or validity of the remedial discretion doctrine. See 181 F.3d at 115. The Chenoweth panel speculated, in what is plainly dicta, that Raines "may not overrule Moore so much as require us to merge our separation of powers and standing analyses." Id. at 116. Such ruminations hardly sound the death knell for the doctrine of remedial discretion.

legislation goes in the statute books. The department makes the character of report that it thinks will fit the legal requirement, and often it is entirely valueless for the purpose intended.") (Zick Decl., Ex. A, at 6). See also H. Rep. No. 1757, at 6 (same) (Zick Decl., Ex. A, at 12). In many instances, the information required to be submitted in the reports was available elsewhere, thus rendering the submission of the mandated report, in Congress' judgment, a useless exercise. See S. Rep. No. 1320, at 2-3; H.R. Rep. No. 1757, at 3-5 (Zick Decl. Ex. A, at 4-5, 9-11). The history further indicates that, based on this experience, both the House and Senate urged members in the future generally to be more circumspect in requesting reports from agencies, and to seek to narrow and refine their requests for information such that reports would be of some use to the recipient committees. See S. Rep. No. 1320, at 4; H.R. Rep. No. 1757, at 6 (Zick Decl. Ex. A, at 6, 12).

Although Congress decided, for the reasons stated, to repeal a number of mandatory reporting requirements, it did not wish to deny members access to whatever useful information might have been contained in the reports, or even to the reports themselves, should members later find them to be of value. The plain statements of legislative purpose relating to Section 2954, which Plaintiffs continue to ignore, thus bear repeating once more. 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).[4] Similarly, the Senate Report states:

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[4] Thus, the House Report speaks in terms of preserving the "information contained in the reports." This may well explain why Congress chose to place Section 2954 in the subchapter entitled "Reports," but to label the specific section "Information to committees of Congress on request."

> 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). What is astonishing is that, in the face of these plain statements, Plaintiffs continue to insist that "[t]here is simply nothing in the Reports or the statute itself to suggest that the drafters intended to limit the information the Committee and its members could request to information formerly contained in the discontinued reports." Pl. Opp. at 8 (emphasis added).[5] That is precisely what the Reports say.[6]

Plaintiffs treat the notion that "plain meaning" can be trumped by clear, but contrary, legislative intent as a contrived canon of statutory construction. To the contrary, there is ample support in case law from this circuit for the rule of construction that purportedly plain or literal meaning does not control where there exists a "clearly expressed legislative intent" that is contrary to the text of the statute under consideration. Central Mont. Elec. Power Coop. v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1477 (9th Cir. 1988). See also In re Catapult Entertainment, Inc., 165 F.3d 747, 753 (9th Cir.) (court will depart from plain language "only where the legislative history clearly indicates that Congress meant something other than it said"), cert. dismissed, 528 U.S. 924 (1999); 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).

The legislative history, which Plaintiffs did not provide to the Court despite its brevity,

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[5] It is Plaintiffs, not the Secretary, who engage in a "highly selective discussion of the legislative history." Pl. Opp. at 8. The House and Senate Reports could not more plainly state that the right conferred in § 2954 was a narrow one. See Secretary's Opposition to Plaintiffs' Motion for Summary Judgment, at 15-17.

[6] There is nothing unusual about Congress limiting Section 2954's reach regarding the discontinued reports and the information therein to the Committee's jurisdiction. See Pl. Opp. at 8-9. Indeed, it is hard to imagine what authority the affected committees would have to compel information and reports outside their jurisdiction.

and which they repeatedly ignore or mischaracterize, meets the Ninth Circuit's standard. It is not the Secretary's "theory," Pl. Opp. at 7, that Section 2954 confers a narrow right of access to information formerly contained in reports Congress found to be useless and unnecessary; that is a matter of historical fact, as indicated in the statements quoted above and in the other legislative materials.[7] It is that plain history that distinguishes this case from In re Catapult Entertainment, supra, and other cases in which courts, although recognizing that they should not turn a blind eye to legislative intent, refused to depart from the text because the legislative history did not persuasively demonstrate that Congress' purpose was at odds with the text. Here, there is ample evidence that Congress' purpose is at variance with what Plaintiffs argue is the "plain language" of § 2954.

Plaintiffs again overreach in arguing that the Secretary wishes simply to ignore the statutory text of Section 2954.[8] Plaintiffs ask the Court to ignore the reality that legislative will sometimes is imperfectly, or even incorrectly, represented in statutory text. Fortunately, the canon of plain meaning is not a judicial straightjacket. It is well settled 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)). See also Watt v. Alaska, 451 U.S. 259, 266 (1981) ("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."). The canon does not present any obstacle to this Court taking the legislative materials into consideration when determining the breadth of "information" Congress intended to affect in Section 2954. See 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

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[7] Based in part on this history, the Department of Justice and the Congressional Research Service have consistently adhered to the same narrow interpretation of § 2954.

[8] Contrary to Plaintiffs' assertion, Pl. Opp. at 6, the Secretary quoted the language of Section 2954 at page 4 of his opening brief.

omitted). Section 2954's context, circumstances, and overall history compel the conclusion that Plaintiffs' broad interpretation of Section 2954 must be rejected by the Court.

III. CONSTITUTIONAL DOUBTS RESULT FROM PLAINTIFFS' PROPOSED INTERPRETATION OF SECTION 2954

Plaintiffs chastise the Secretary for raising the serious constitutional doubts that accompany their expansive interpretation of Section 2954. This is no "strawman," as Plaintiffs suggest. Pl. Opp. at 11. In determining the validity of a party's proposed statutory interpretation, courts must, of course, concern themselves with the consequences of the interpretations pressed upon them.

Plaintiffs cannot avoid the sheer oddness of their proposed interpretation, which would vest sweeping authority in a small number of minority members of the House Committee on Government Reform. Of course, as Plaintiffs note, Congress vests a number of powers in less than the full membership of its many committees. But it does not vest any power of the magnitude encouraged by Plaintiffs under Section 2954 in a small number of minority members of a committee. If the majority in Congress had intended that result in 1928, one would expect to find some mention of it in the legislative materials.

The matter of Section 2954's interpretation is one of constitutional proportion because Plaintiffs ask this Court to rule as a matter of law that these minority members have blanket access to any Executive information within the jurisdiction of the committee. In their opening brief, Plaintiffs nowhere hinted that Section 2954 had any limits other than the committee's jurisdictional bounds. Now they argue that, of course, a "valid" claim of Executive privilege is an exception to Section 2954's mandate. Pl. Opp. at 11. In other words, rather than accept an interpretation consistent with Congress' narrow purposes, Plaintiffs press an interpretation that vaults the judiciary into future contests over the validity of constitutional privilege claims. Plaintiffs seek to avoid this result by arguing that no Presidential materials are even implicated by their proposed interpretation, since Section 2954 applies only to "Executive agencies." But, of course, those materials, and other sensitive information, may well be found within the files of the "Executive agency" called upon to produce information upon request of the committee.

Nowhere do Plaintiffs provide any reason, other than their own interest in expediency, for this Court, or any other, to risk interference with Executive functions and prerogatives by reaching out to interpret Section 2954 in the manner proposed. Indeed, Plaintiffs themselves offer the best reason not to embark on this course: "Members of the majority have no need for provisions like § 2954, because they can always resort, if need be, to the subpoena process to gather information." Pl. Opp. at 13. Plaintiffs should be required to resort to this or other remedies here.

CONCLUSION

For the foregoing reasons, the Court should exercise grant the Secretary's Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment, and deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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Dated: November 6, 2001

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2001, I caused a true copy of the Secretary's Reply to Plaintiffs' Opposition to Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment to be served by first class mail, postage prepaid, upon:

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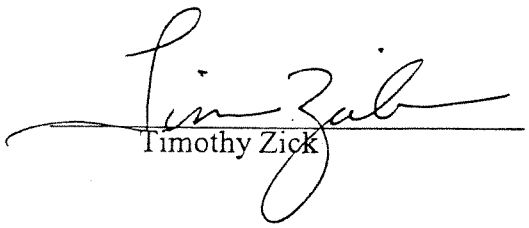

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