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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HENRY A. WAXMAN, et al., Members of Congress, Plaintiffs, v. DONALD L. EVANS, Secretary of Commerce, Defendant.	No. 01-04530 (LGB) (AJWx) **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION** Date: March 25, 2002 Time: 10:00 a.m. Courtroom: No. 780 Location: Los Angeles: Roybal

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INTRODUCTION

Defendant has filed a motion for reconsideration, asking the Court to set aside its January 22 ruling — made after argument and two rounds of extensive briefing. The justiciability arguments defendant makes here are ones defendant considered, but deliberately chose not to raise, when the case was being briefed on summary judgment. As we show below, defendant's initial judgment was correct — none of these arguments has merit. Taken together, they distill down to the contention that when Congress enacted the Seven Member Rule, 5 U.S.C. § 2954, it knew, or should have known, that the statute was meaningless, unenforceable, and unconstitutional: meaningless because it provided Members of Congress with the right only to request information that it no longer wanted; unenforceable because courts could not compel agencies to comply with requests; and unconstitutional because it empowered Members of Congress not in the majority to engage in information-gathering. This Court's January 22 opinion rejects the argument that Congress engaged in a singularly futile gesture in enacting the Rule, and it should not be disturbed.

Defendant claims that reconsideration is required because the Court's ruling is based on an "unexamined premise," "namely, that plaintiffs were entitled to invoke the powers of the Court under the statutes on which they rely." Def's Mem. at 1. But that premise did not go "unexamined." The plaintiffs addressed these justiciability issues in their opening brief (at 17-21). Rather than respond, defendant effectively conceded the arguments it now wants to raise and contended instead that the equitable discretion doctrine precluded review. This Court properly rejected that argument and defendant does not try to resurrect it. What defendant now seeks is an opportunity to present arguments it chose not to advance before.

Defendant's motion should be denied for two reasons. First, no provision of the Federal Rules of Civil Procedure or of this Court's Local Rules gives any litigant — even a federal officer — two bites at the apple. Parties are bound by the strategic choices they make about which arguments to present and which to forgo. Ninth Circuit law makes clear that reconsideration is an "extraordinary remedy" that may not be used to "raise arguments . . . for the first time when they could reasonably have been raised earlier in the litigation." Kona Enterprises v. Estate of Bishop,

229 F.3d 877, 890 (9th Cir. 2000). Defendant's motion disregards that settled rule, and should be rejected.

Second, not one of the arguments defendant belatedly raises has merit. To begin with, plaintiffs have standing. Plaintiffs have been denied access to information to which they are entitled under statute and thus have suffered injury-in-fact that gives rise to standing under Article III. Raines v. Byrd, 521 U.S. 811 (1997), is not to the contrary. The injury found insufficient in Raines was the right shared by all members of Congress not to have votes on appropriation matters diluted by the President's exercise of the line item veto. Rather than alleging "personal injury," the Raines plaintiffs had alleged injury "based on a loss of political power." Id. at 821. Plaintiffs' standing here is not based on the infringement of such an abstract, diffused and undifferentiated right. Rather, the right that has been abridged is one conferred by statute on a discrete and identifiable group of legislators to engage in certain information-gathering functions. Nothing in Raines disturbs settled law that the deprivation of a statutory right gives rise to a justiciable claim.

Next, plaintiffs' claims are reviewable by this Court. Under the Administrative Procedure Act ("APA"), final agency action is presumptively subject to judicial review. Plaintiffs' claims are reviewable under the APA for precisely the reason that challenges to agency refusals to disclose information under the Federal Election Campaign Act, the Federal Advisory Committee Act, and myriad other disclosure laws are reviewable: The agency's decision finally determines the plaintiffs' statutory rights, and, absent a clear indication by Congress to preclude judicial review, Congress expects the courts to grant relief when an agency violates a statutory command.

Finally, the Seven Member Rule passes constitutional muster. Nothing in the Constitution forbids Congress from delegating fact-gathering power to specific legislators. Nor does the Constitution require that Congress establish its investigatory procedures by rule, rather than by statute. And INS v. Chadha, 462 U.S. 919 (1983), forecloses the argument that the Seven Member Rule has been "superseded" by more recent House rules.

I. Defendant Has Failed To Show That Reconsideration Is Warranted.

Although defendant has styled his motion as one for reconsideration, "[t]he Federal Rules of Civil Procedure recognize no 'motion for reconsideration.'" Hatfield v. Bd. of Cty Com'rs for Converse Cty, 52 F.3d 858, 861 (10th Cir. 1995); accord, Sch. Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). For that reason, defendant's motion must arise under either Rule 59(e) or Rule 60(b), Fed.R.Civ.P., although the timing of the filing (apparently more than 10 days after the Court's ruling), suggests that the motion was filed under Rule 60(b). See id. The Local Rules of this Court contemplate motions for reconsideration, but sharply circumscribe their availability. See Local Rule 7-18. Regardless of how it is viewed, defendant's motion is improper, and should be denied.

The law in this Circuit is crystal clear: Reconsideration motions may not be used to litigate arguments that could have been raised during summary judgment briefing. As the Ninth Circuit recently stressed:

> Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 James Wm. Moore et al., [Moore's Federal Practice (3d ed. 2000)]; supra § 59.30[4]. Indeed, "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange Street Partners [v. Arnold], 179 F.3d [656] at 665 [9th Cir. 1999]. A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.

Kona Enterprises v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000); accord, Novato Fire Prot. Dist. v. United States, 181 F.3d 1135, 1142 n. 6 (9th Cir. 1999); Sch. Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). This Court's local rule is, if anything, more stringent.

Defendant's motion defies these settled principles. It does not meet the standard laid out in Kona Enterprises because it does not present "newly discovered evidence," there has been no "intervening change in the controlling law," and there has been no showing that the Court "committed clear error." Rather, the motion has been filed for the one purpose that is plainly impermissible — to argue matters that could and should have been raised during the summary judgment briefing. Kona Enterprises, 229 F.3d at 890; accord 389 Orange Street Partners, 179 F.3d at 655; see also Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000) ("it is well settled . . . that new legal arguments or evidence may not be presented via Rule 59(e)"); Wright, et al., Federal Practice and Procedure § 2810.1, at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used to . . . raise arguments . . . that could have been raised prior to the entry of judgment"); Pacific Ins. Co. v. American Nat. Fire Ins. Co., 148 F.3d 396 (4th Cir. 1998) (same) (collecting cases).

As this Court well knows, and as candor would force defendant to concede, there is no reason why defendant failed to raise these arguments during the briefing in this case, other than defense counsel's serious reservations about their soundness. These arguments were obvious, they were addressed by the plaintiffs in their submissions, and they are standard fare for Justice Department lawyers. Having deliberately withheld making these arguments before, defendant's sole justification for asking that they be considered now is that this case is important. But that argument is bewildering — this case is no more important today than when it was being briefed. What defendant is really asking for is special treatment — a second bite at the apple — accorded to no other litigants in the Ninth Circuit. The purpose of Rule 59(e), Rule 60(b), and Local Rule 7-18, is not to enable litigants to have multiple chances to present their arguments, but to avoid miscarriages of justice. This Court should not depart from the rules in this case simply because the defendant now wishes to repudiate strategic decisions that did not turn out the way he expected. The motion for reconsideration should be denied.

II. Defendant's New Arguments Lack Merit.

We now turn to the arguments that defendant presses on reconsideration. We do so, not because we believe that they are properly before the Court, but instead to show that they are without merit.

A. Plaintiffs Have Standing.

1. Plaintiffs Have Sustained Injury-In-Fact.

In order to have standing in federal court, "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). There is no question in this case that plaintiffs' injury is traceable to defendant's conduct and would be redressed by the relief that plaintiffs have sought from this Court. Thus, the only issue relating to plaintiffs' standing is whether they have satisfied the injury-in-fact requirement of Article III.

As plaintiffs have explained in their prior submissions, the answer to that question is plainly yes. The Supreme Court has repeatedly held that the "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)); see also Lujan v. Defenders of Wildlife, 504 U.S. at 578. In keeping with this rule, the Court has on numerous occasion held that the deprivation of a statutory right to access to information constitutes injury-in-fact sufficient to give rise to standing.

The leading case is FEC v. Akins, 524 U.S. 11 (1998), which involved a claim by a "group of voters" (id. at 13) that the FEC had improperly failed to require the American Israel Public Affairs Committee (AIPAC) to make disclosures regarding its membership, contributions and expenditures. The FEC challenged plaintiffs' standing, arguing, among other things, that they had not suffered injury-in-fact within the meaning of Article III. The Court flatly rejected that argument. As the Court put it, "[t]he 'injury in fact' that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-

related contributions and expenditures—that, on respondents' view of the law, the statute requires AIPAC to make public." 524 U.S. at 21. This injury, said the Court, "seems concrete and particular." Id. And the Court noted that it had "previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." Id. (citations omitted).

Public Citizen v. Department of Justice, 491 U.S. 440, 449 (1989), further supports plaintiffs' standing. In Public Citizen, two advocacy organizations contended that the American Bar Association's Standing Committee on Federal Judiciary was subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II, when it provided advice to the Department of Justice regarding potential nominees for federal judgeships. FACA requires, inter alia, that advisory committee meetings, reports and records be open to the public, subject to limited exceptions. The ABA objected to the groups' standing, arguing that "neither appellant has alleged injury sufficiently concrete and specific to confer standing; rather, appellee [ABA] maintains, they have advanced a general grievance shared in substantially equal measure by all or a large class of citizens, and thus lack standing under our precedents." 491 U.S. at 448-49. The Court rejected this argument, noting that the ABA "does not, and cannot, dispute that appellants ***seek access to the ABA Committee's meetings and records in order to monitor its workings and participate more effectively in the judicial selection process." Id. at 449. The Court emphasized that:

> As when an agency denies requests for information under the Freedom of Information Act, refusals to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records. See, e.g., Department of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989); Department of Justice v. Julian, 486 U.S. 1 (1988); United States v.

Weber Aircraft Corp., 465 U.S. 792 (1984); FBI v. Abramson, 456 U.S. 615 (1982); Department of Air Force v. Rose, 425 U.S. 352 (1976). There is no reason for a different rule here.

Id. at 449-50. Accord Havens Realty v. Coleman, 455 U.S. 363, 373-74 (1982) (deprivation of truthful information about housing availability constitutes injury-in-fact).

Applying the rulings in Akins and Public Citizen, it is clear that the sixteen members of Congress who are plaintiffs here have suffered injury-in-fact and have standing. They have invoked a statute that entitles them access to executive agency records, and to borrow from the language of Public Citizen, they have shown "that they sought and were denied specific agency records." 491 U.S. at 449. No more is required.

2. Raines v. Byrd Does Not Undermine Plaintiffs' Standing.

Ignoring this line of cases, defendant argues that under Raines v. Byrd plaintiffs do not have standing. In Raines, the Court held that six members of Congress who challenged the Line Item Veto Act as unconstitutional prior to its application to any bill enacted by Congress lacked standing. The Act had authorized the President to cancel any spending item or tax benefit measure from a bill after signing it into law, a decision that could be overridden only by a "disapproval bill" passed by Congress with a two-thirds majority in each House. The six members of Congress alleged that they had suffered cognizable injury because, regardless of whether the line item veto was ever actually exercised, their votes would be less "effective" than before, and that the "meaning" and "integrity" of their votes had changed because the statute created a new legislative possibility by allowing the President to excise the appropriation for a particular project already approved by Congress and the President. 521 U.S. at 825.

The Supreme Court rejected the plaintiffs' standing arguments, concluding that they had failed to assert an injury that is "personal, particularized, concrete, and otherwise judicially cognizable." Id. at 820. The Court explained that the members of Congress "have alleged no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed" among Congress generally. Id. at 829. Rather than alleging "personal injury,"

the plaintiffs simply alleged injury "based on a loss of political power." Id. at 821. Moreover, their loss of political power was incomplete, since they were not being deprived of a vote, but merely alleged that the force of their vote was being diluted. In this regard, the Court distinguished Coleman v. Miller, 307 U.S. 433 (1939), which upheld legislator standing in a case alleging that the actions of the lieutenant governor of Kansas had completely nullified the legislators' votes to block the ratification of the proposed Child Labor Amendment to the Federal Constitution. The Raines Court noted that "there is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here." 521 U.S. at 826. Following Raines, legislators may not sue to challenge the dilution of their votes unless their votes have been nullified by allegedly illegal action in the sense that, but for that action, their "votes would have been sufficient to defeat (or enact) a specific legislative act." Id. at 823.

Raines does not undermine the plaintiffs' standing to sue in this case. The defendant tries to shoehorn this case into Raines' mold, claiming that the injuries complained of here "are quintessential 'institutional injuries' that 'damage[] all members of Congress and both Houses of Congress equally,' and are claimed only on the basis of plaintiffs' official capacities as legislators." Def. Mem. at 6 (quoting Raines, 521 U.S. at 821). But that description of plaintiffs' injuries is off target. In contrast to the plaintiffs in Raines, the plaintiffs here do not allege an abstract loss of political power through the dilution of the legislative process, and the injury here is personal, not a generalized interest shared with Congress as a whole. The injury here is the violation of a statutory entitlement to information that runs to members of a single Committee in each House of Congress designated by statute who join, along with the requisite number of other Committee members, to request specific documents from an executive agency. That interest is not shared by Congress as a whole; it is not even shared by members of the Committee who do not join in the request. Indeed, the plaintiffs do not sue in their lawmaking capacity at all; they do not claim that the injury here is the dilution or deprivation of their votes. Rather, they sue to enforce a statutory right granted to them. The injury claimed here is not "wholly abstract and widely dispersed" as in Raines, but is instead "personal, particularized, [and] concrete." Id. at 829. And the right they seek to enforce —

the right to gather information — relates as much to the oversight role that their Committee performs as it does to the legislative process itself.

Nor does Raines hold that legislators can never have standing, as the defendant suggests. Indeed, Raines reaffirms, not overrules, Coleman, which upheld legislator standing, and this case is much closer to Coleman. As noted above, Raines distinguishes Coleman by pointing out that the Coleman plaintiffs had standing because, taken together, their votes "would have been sufficient" to bring about the result they sought, assuming that they were right on the merits. 521 U.S. at 823. But that is exactly the case here. Assuming that plaintiffs are right on the merits (as the Court must do in assessing standing, and has already ruled), plaintiffs' request "would have been sufficient" to require the production of the information that has been denied to them. Raines and Coleman thus support, not undercut, plaintiffs' standing here.[1]

Equally hollow is defendant's suggestion that legislators have less standing to sue than any other individuals suing to enforce rights granted to them. Just like the plaintiffs in Akins and Public Citizen, the plaintiffs here sue to redress a direct and particularized rejection of the entitlement granted specifically to them under law, namely the Seven Member Rule — an injury not suffered by other members of Congress, most of whom are not authorized to make such a request and none of whom has had a Seven Member Rule request denied. By contrast, the Raines Court explained

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[1/] Raines' treatment of Coleman also shows that defendant goes too far in arguing that a grievance shared by all members of Congress would be fatal for standing purposes. After all, suppose that every member of the Kansas legislature had voted against the ratification of the Child Labor Amendment, only to have the lieutenant Governor nullify their votes. Raines does not hold that simply because an interest may be shared with 535 people it cannot confer standing. See Public Citizen, supra, 491 U.S. at 449-50 (rejecting argument that because many may file Freedom of Information Act request for same records, claim is a non-justiciable generalized grievance). The Raines Court was not troubled simply by the "dispers[ion]" of the injury, but that it was "wholly abstract" and not "sufficiently concrete." 521 U.S. at 829. Indeed, "[s]o long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury." Pye v. United States, 269 F.3d 459, 469 (4th Cir. 2001).

that the plaintiffs there were no different from their colleagues, noting that "appellees have not been singled for specially unfavorable treatment as opposed to other members." Id. at 821.[2]

Finally, the Raines Court noted the availability of alternate remedies in the form of either further congressional action or a lawsuit by private plaintiffs suffering injury as a result of the Act. Id. According to Professor Tribe, "where potential legislative alternatives to individual suit are available—such as direct suit by Congress or political action by any of a number of people to rectify the alleged harm—the individual legislator is really only complaining of a failure to persuade fellow colleagues." Laurence H. Tribe, American Constitutional Law (Third ed. Vol. 1) § 3-20 at 462. In such cases, the individual legislator is not alleging particularized injury. In this case, in contrast, the plaintiffs are not complaining of an inability to persuade fellow legislators to pass or reject a particular piece of legislation. They are complaining of the Secretary's refusal to obey the law and provide them with information, the submission of which is legally required. Nor are there alternative means of relief available to the plaintiffs to vindicate this specific statutory right. In this case, the particularized harm is directed to the plaintiffs, and the plaintiffs alone, and the power to redress that harm lies with this Court in this suit.

B. Plaintiffs' Claim Is Reviewable.

In arguing that plaintiffs' claim is not reviewable by this Court, defendant devotes most of his memorandum to issues that are not raised in this case (e.g., whether there is an implied right of action, an argument plaintiffs have never made) and mischaracterizes the law on the issues that are implicated in this case. Plaintiffs' claims are reviewable by this Court for two reasons: first, the defendant's denial of plaintiffs' demand for information constitutes final agency action that is

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[2/] Indeed, if defendant's theory were correct, and that any injury asserted by a member of Congress was an institutional one that was not "personal" to the member, then members of Congress would have no standing to use the Freedom of Information Act to obtain agency records, they would be forbidden from invoking the Federal Advisory Committee Act to obtain records from advisory committees, and they would otherwise be rendered second-class citizens, so long as they sought these records in the course of their duties as members of Congress. That, of course, is not the law. E.g., Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979).

reviewable under the APA, and second, mandamus review is available, since defendant has failed to perform a non-discretionary duty and plaintiffs have a clear right to relief.

1. Plaintiffs' Claim Is Reviewable Under The APA.

Defendant's APA argument proceeds as if the basic principle that agency action is presumptively reviewable was not established by the Supreme Court more than three decades ago. At least since Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), it has been settled that the APA "embodies a basic presumption of judicial review" — a presumption that "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Accord Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) . "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Dunlop, 421 U.S. at 567 (quoting Abbott Labs, 387 U.S. at 141); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). The message of this line of cases is clear enough: courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." Bowen, 476 U.S. at 681.

This conclusion flows directly from the language and structure of the APA. Section 10 of the Administrative Procedure Act, 5 U. S. C. § 701, provides that the action of "each authority of the Government of the United States" is subject to judicial review except where there is a statutory prohibition on review, id. § 701(a)(1), or where "agency action is committed to agency discretion by law." Id. § 701(a)(2); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (citations omitted). Section 10(a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. This right of action is refined in section 10(c), which provides that "[a]gency action made reviewable by statute and final

agency action for which there is no other adequate remedy in court are subject to judicial review." Id. § 704.[3]

Defendant's refusal to comply with the clear command of the Seven Member Rule triggers the judicial review provisions of the APA because it is "agency action," it is "final," and it falls within none of the limited exceptions to reviewability of agency action set forth in the APA. First, the defendant is the head of an Executive agency that is unquestionably an "authority" of the United States whose actions are covered by § 701. Second, defendant's refusal to produce the requested information constitutes "agency action" as sweepingly defined in the APA: "the whole or part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . .." 5 U.S.C. § 551(13). The Supreme Court has instructed that this definition must be read "to ensure the complete coverage of every form of agency power, proceeding, action, or inaction." FTC v. Standard Oil of California, 449 U.S. 232, 238 n.7 (1980); see also Her Majesty the Queen ex rel. Ontario v. EPA, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990) (finding letter subject to APA review). Third, the agency's action is final. In Bennett v. Spears, 520 U.S. 154, 177-78 (1997), the Supreme Court explained that final agency action "mark[s] the consummation of the agency's decisionmaking process" and determines "rights or obligations" from which "legal consequences will flow." (citations and quotations omitted). Fourth, the plaintiffs are "adversely affected" and "aggrieved" by defendant's refusal to carry out his duties within the meaning of § 702. See FEC v. Akins, 524 U.S. at 19-20 (the use of the word "aggrieved" in the APA is associated "with a congressional intent to cast the standing net broadly"). Fifth, no statute precludes review of defendant's compliance with the Seven Member Rule, nor is its administration "committed to agency discretion by law." § 701(a)(2). Accordingly, the agency's action is subject to judicial review under § 702 and § 706(1)

[3/] Although plaintiffs' claims are based on the APA, that statute does not independently confer subject matter jurisdiction on the district court; plaintiffs therefore invoked 28 U.S.C. § 1331 as the jurisdictional basis for their complaint. The Supreme Court expressly endorsed this approach in Califano v. Sanders, 430 U.S. 99, 105-107 (1977) (explaining that 28 U.S.C. § 1331, as amended in 1976 to eliminate the amount in controversy requirements for federal question claims, was intended to serve as the jurisdictional basis for APA claims where Congress has not otherwise provided a jurisdictional provision). See generally Chamber of Commerce v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996). The defendant concedes that § 1331 confers subject matter jurisdiction here.

&(2)(A), which makes reviewable "agency action unlawfully withheld" and "not in accordance with law." See Bowen, 476 U.S. at 670-71, 680; see also NCUA v. First National Bank & Trust Co., 522 U.S. 479 (1998) (upholding review under § 702).

Without addressing these established principles, defendant makes the far-fetched argument that defendant's denial of plaintiffs' Seven Member Rule request "does not constitute 'agency action' within the meaning of the APA." Def's Mem. at 16. To be sure, Guerro v. Clinton, 157 F.3d 1190, 1195-96 (9th Cir. 1998) and NRDC v. Hodel, 865 F.2d 288, 318-19 (D.C. Cir. 1988), reject third parties' challenges to an agency's failure to file required reports with Congress. But these cases are irrelevant here. The Seven Member Rule was enacted to repeal reporting requirements, not enshrine them. The Rule operates in the same manner as many federal statutes that entitle individuals to demand information from the government, and make the provision of that information mandatory. Just as an agency's refusal to honor an information request under the Freedom of Information Act, Federal Advisory Committee Act, and Federal Election Campaign Act constitutes final agency action, so too did defendant's denial here. The defendant's refusal to carry out his responsibility under the Act plainly "mark[ed] the consummation of the agency's decisionmaking process" and determined the "rights" of plaintiffs and the "obligations" of defendant. Bennett, 520 U.S. at 177-78. Accordingly, review of plaintiffs' claims is authorized by the APA.[4]

2. Plaintiffs' Claim Is Reviewable Under Mandamus.

Review in this Court is also appropriate under the Mandamus statute, 28 U.S.C. § 1361. As the D.C. Circuit recently explained, "the necessary prerequisites for this court to exercise its mandamus jurisdiction are that '(1) the plaintiff has a clear right to relief; (2) the defendant has a

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[4/] Because review is available under the APA, we do not respond to many of the defendant's arguments on reviewability, several of which have nothing to do with this case. To illustrate, defendant argues that the Court should not imply a private right of action under the Seven Member Rule, Def's Mem. at 8-11, an argument plaintiffs have not made and an argument that makes no sense in the context of this case. The question whether to imply private rights of action arises only when third parties seek to enforce federal mandates against private entities, which is the point of Sandoval v. Alexander, 532 U.S. 275 (2001), a case defendant cites extensively, but has no bearing here where plaintiffs are the beneficiaries of a federal statute and are suing a federal official to enforce their statutory rights.

clear duty to act; and (3) there is no other adequate remedy available to the plaintiff.'" Swan v. Clinton, 100 F.3d 973, 977 (1996) (citations omitted) (Wald, J.). Accord American Cetacean Soc'y v. Baldridge, 768 F.2d 426, 433 (D.C. Cir. 1985), rev'd on other grounds sub nom. Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); Heckler v. Ringer, 466 U.S. 602, 616-17 (1984); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986). These requirements go to the court's jurisdiction under the mandamus statute, and they also determine whether the plaintiff is entitled on the merits to issuance of the writ. Swan, 100 F.3d at 973; see also Willis v. Sullivan, 931 F.2d 390, 395-96 (6th Cir. 1991); Carpet, Linoleum & Resilient Tile Layers v. Brown, 656 F.2d 564, 567-69 (10th Cir. 1981); Cook v. Arentzen, 582 F.2d 870, 876-77 (4th Cir. 1978).[5]

We recognize that a request for an injunction based on the APA and the general federal question statute, as we have sought here, is analogous to a request for a writ of mandamus in this context, where the injunction is sought to compel federal officials to perform a statutorily required ministerial duty. National Wildlife Fed'n v. United States, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980). But since we anticipated that the defendant would challenge the reviewability of defendant's actions under the APA, the mandamus statute was invoked to ensure that review would occur. See Swan, 100 F.3d at 980-81 (holding mandamus review available even where APA review is not).[6]

[5/] Defendant speculates that because the Seven Member Rule was enacted in 1928, two decades before the APA, the only means by which Congress could have enforced the Rule at the time of its enactment was through 2 U.S.C. § 194, a statute that dates back to the mid-1800s to give Congress an avenue to obtain judicial compulsion for its subpoenas, or 5 U.S.C. § 1345, which gave courts jurisdiction over actions brought by the United States or by an officer authorized to sue by Congress. Def's Mem. at 11-12. Not so. Defendant overlooks the clearest and most direct source of authority for the plaintiffs to have sued at that time — mandamus, which has been used to resolve intra-Branch disputes since the earliest day of our Nation. E.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838). Indeed, Wilbur v. United States, 281 U.S. 206 (1930), was pending in the courts at the time the Seven Member Rule was enacted, and it makes clear that, at that time, mandamus cases were common.

[6/] The mandamus statute does not independently waive sovereign immunity; but the Supreme Court has made it clear that where a mandamus claim is properly stated, sovereign immunity does not come into play because, by acting outside the sphere of his or her delegated authority, the official is not acting as the sovereign. Swan, 100 F.3d at 981 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949) and Dugan v. Rank, 372 U.S. 609, 621-23 (1963)).

The only real question therefore is whether the Seven Member Rule imposes a duty on the defendant that is ministerial and not discretionary — if it does, then that duty may be enforced by way of mandamus. Swan, 100 F.3d at 977; see also Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838); Chamber of Commerce v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996). As the Supreme Court said over seventy years ago, "[m]andamus is employed to compel performance, when refused, of a ministerial duty, this is its chief use." Wilbur v. United States, 281 U.S. 206, 218 (1930). In light of the text of the Rule, which uses "shall" — the language of command — as its operative directive, there can be no question that mandamus review is available here, in the event that APA review is not.[7]

Accordingly, because plaintiffs' claim is reviewable under the APA and the mandamus statute, defendant's justiciability arguments should be rejected.

C. The Seven Member Rule Is Constitutional.

Defendant's final arguments are that the Seven Member Rule, as construed by this Court, violates the Constitution for two reasons: first, because it empowers members of Congress to bring suit without the consent of their respective chambers; and second, because it has been superseded by House rules. Before responding to these arguments, two preliminary points are in order. First, we emphasize that there is a serious question about the right of the Executive Branch to challenge in Court how Congress chooses to order its affairs, and especially to challenge the constitutionality of a federal statute the Executive is constitutionally bound to faithfully execute. The D.C. Circuit warned against precisely this form of intrusion in Murphy v. Department of the Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979), a caution that the defendant has ignored.

Second, we doubt that the defendant has taken a step back and fully considered the implication of these arguments. In a nutshell, they boil down to the proposition that, while Congress

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[7] We do not respond to many of the defendant's arguments on this point because they address issues not raised in this case. For example, defendant places significant weight on Barron v. Reich, 13 F.3d 1370 (9th Cir. 1994), which reserves the question whether mandamus is available to a plaintiff seeking to use mandamus as a substitute for a non-existent implied private right of action against a non-governmental party. That issue is not raised in this case.

may constitutionally empower "any person" to request any agency record under the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A), as well as records from the Federal Election Commission, 2 U.S.C. § 434, and from federal advisory committees, 5 U.S.C. App. II, and may give any party engaged in civil litigation the right to subpoena virtually any relevant record from individuals, companies and governmental bodies, Rule 45, Fed.R.Civ.P., Congress is constitutionally disabled from according its own members similar authority to demand records of its own government. Viewed from this perspective, defendant's arguments cannot be sustained. Nonetheless, because defendant has pressed these arguments, we respond to each in turn.

1. The Seven Member Rule Is Constitutional.

Defendant's first argument is that if the Seven Member Rule is read to create rights that are enforceable in court it is unconstitutional. Def's Mem. at 19-20. According to defendant, if the Seven Member Rule "encompass[es] a right of individual members of Congress to sue the Executive Branch for failure to comply with an investigatory request, without the express consent of their respective Chamber, that statute would be unconstitutional. Congress simply may not constitutionally delegate its investigatory powers to a few individuals members in a manner that has coercive effects outside of Congress." Id. at 19. Not surprisingly, defendant cites no case that supports this proposition, because none exists. Although the Supreme Court has held that Congress may not legislate without action by both Houses, see INS v. Chadha, 462 U.S. 919 (1983), no comparable limit has been placed on congressional oversight and investigatory powers.

In fact, Congress has by statute authorized fact-gathering, and litigation against the government and private parties in aid of fact-gathering, not just by members of Congress, but by an agent of Congress, without requiring the express concurrence of one or both Houses, and these statutes have been upheld against constitutional attack. Most significant is the Supreme Court's ruling in Bowsher v. Merck & Co., 460 U.S. 824 (1983), which upheld the right of the Comptroller General of the United States, an agent of Congress who operates without direct Congressional oversight (cf. Bowsher v. Synar, 478 U.S. 714 (1986)), to bring suit against third parties pursuant to a statute giving him broad litigation authority, without the necessity of obtaining consent or

clearance from either or both Houses of Congress. At issue in Merck was the Comptroller General's right to enforce subpoenas directed at major drug companies for records relating to the costs of the drugs that were being sold to federal agencies. A number of federal statutes give the Comptroller General the right to review cost data relating to government contracts, 460 U.S. at 827-28, and the Court upheld the Comptroller General right to compel submission of "direct" cost data. Id. at 839-40. The Court thought it "irrelevant" that the Comptroller General's information demand, and the ensuring litigation, had been triggered by just two Senators. Id. at 844.

To be sure, Merck takes it as a given that the Comptroller General's litigation authority is constitutional. But that issue has been vented fully in the courts of appeals, and the courts have rejected the argument that Congress could not, consistent with the Constitution, delegate authority to the Comptroller General to bring litigation. See, e.g., Bowsher v. McDonnell Douglas Corp., 751 F.2d 220 (8th Cir. 1984); McDonnell Douglas Corp. v. United States, 754 F.2d 365 (Fed. Cir. 1985) (adopting 8th Circuit's ruling in McDonnell Douglas). Thus, because it is constitutionally permissible for Congress to give an agent the power to gather information on its behalf — often at the behest of a handful, or, as in Merck & Co., only two Members of Congress — it is plainly constitutional for Congress to designate a specified number of members of two oversight committees to engage in fact-gathering functions.

It bears noting as well that the Comptroller General has been given broad power to gather information from the Executive Branch as well, and, if need be, to sue to compel disclosure. Thus, for example, 31 U.S.C. § 716(a), requires, in language quite similar to that set forth in the Seven Member Rule, each agency to give the Comptroller General any information he "requires about the duties, powers, activities, organization, and financial transactions of the agency." If the agency fails to produce the requested information, the Comptroller General may bring a civil action to compel release of the information, without first obtaining the clearance of either House of Congress. Id. § 717(b)(2). This provision is the one on which the Comptroller General relied in his recently filed action to obtain the records of the National Energy Policy Development Group headed by Vice President Cheney. Walker v. Cheney, No. 1:02CV00340 (JDB) (D.D.C., filed on February 22,

2002). In a similar vein, 2 U.S.C. § 687, a provision of the Impoundment Control Act, authorizes the Comptroller General to sue the United States to force the expenditure of unlawfully impounded funds, again without first obtaining clearance from either House. And, as the government contract cases exemplify, the Comptroller General has broad authority to obtain cost data relating to work performed by third parties under a government contract, through litigation, if necessary.

Finally, there can be little question that the "necessary and proper" clause of the Constitution, Art. I, § 8, cl. 17, gives Congress the right to enact and enforce the Seven Member Rule. As the Court emphasized in McGrain v. Dougherty, 273 U.S. 135, 160-61 (1927), it is the "necessary and proper clause" that gives Congress "the power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively." For that reason, the McGrain Court upheld the validity of a subpoena issued by a single Senate Committee. Id. at 158. While the defendant acknowledges this aspect of McGrain, it says that the subpoena power is different because "The committee was acting for the Senate and under its authorization and therefore the subpoenas which the committee issued . . . are to be treated as if issued by the Senate." Def's Mem. at 20 (quoting McGrain at 158). This is a distinction without a difference. Congress, as defendant's own exhibits show, has reposed sweeping subpoena power, not just in its committees, but in subcommittees and select committees as well, many of which have only a few members. CRS Report for Congress, 94-464A (Defendant's Exhibit C, at 19). The subpoena power is conferred by Rule, not by statute. There is no difference in the enforceability of a duly authorized subpoena issued by a full committee, a subcommittee, or a select committee. Moreover, many committees and subcommittees have given a single member of Congress — the committee chair — unilateral power to determine when to issue a subpoena. Id. So long as the subpoena seeks material that is relevant to Congress' legislative and oversight purpose, and does not intrude into matters of Executive

Privilege, the subpoena will be enforced by the Courts. E.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 50307 (1975); Wilkinson v. United States, 365 U.S. 399, 408-09 (1961).[8]

The Seven Member Rule reflects just as much, if not more, authorization by Congress as is the issuance of a subpoena. Indeed, in every respect, more formality attaches to the issuance of a request under the Rule. Seven Member Rule requests are made pursuant to a formal delegation of power by each House of Congress made by statute. That delegation is carefully circumscribed. The delegation extends to only one committee in each House — the Committee with government oversight responsibilities. And that delegation stipulates that requests may not be made by any single member of Congress, no matter how senior. Rather, requests may be invoked only with the participation of a substantial number of Committee members — a number designated by Congress. For these reasons, defendant's suggestion that subpoenas are permissible because they have been authorized by one House of Congress, but that Seven Member Rule requests are not authorized, cannot be sustained. Requests made pursuant to the Seven Member Rule reflect a far more formal, and far more limited, delegation of Congress' power than the House and Senate Rules authorizing the issuance of subpoenas. Accordingly, defendant's claim that the Seven Member Rule authorizes fact-gathering without sufficient congressional authorization cannot stand.

2. The Seven Member Rule Has Not Been Superseded.

Defendant's final argument is that Congress' delegation of authority in the Seven Member Rule has been "superseded by subsequent House rules and was therefore" ineffective at the time the request was made. Def's Mem. at 21. According to defendant, all "'method[s] relating' directly to the investigatory powers of the House and Senate must be 'open to the determination of [each] House,'" which, defendant claims, means that the Houses of Congress may not establish

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[8/] It makes perfect sense for the drafters of the Seven Member Rule to move away from the Executive Branch-dependent subpoena model, especially where, as here, only agency records are at issue. The subpoena power has distinct limitations when used to compel the production of Executive Branch records because subpoenas historically have been enforced through contempt cases filed on behalf of Congress by the Department of Justice. 2 U.S.C. §§ 192, 194. Recent legislation authorizes the Senate to bring litigation to enforce its own subpoenas, id. § 288d, but insofar as we are aware, that statute has yet to be tested in court.

investigatory procedures by statute, but only by rule. Id. (Citation omitted). Again, defendant cites no case that supports this sweeping proposition, and his argument is riddled with flaws.

First, defendant's argument proves too much. Accepting defendant's logic would mean that all of the statutes delegating power to the Comptroller General to demand records and to sue to compel their submission are unconstitutional because they implement the House and Senate's investigatory powers by statute rather than by rule. Second, defendant's argument rests on the demonstrably false premise that 5 U.S.C. § 2954 is an internal "rule" of both the House and Senate that must be subject to revision by subsequent rule. It is not. It is a statute imposing obligations on the Executive Branch, and is therefore not subject to the constraints governing internal rules of the House and Senate. The one case defendant cites, Ballin v. United States, 144 U.S. 1 (1892), says only that each House of Congress has the power to determine its own rules. Ballin certainly does not say, as defendant claims, that the investigatory powers of the House and Senate must be exercised through rules and may never be embodied in statutes. Indeed, Ballin addressed quorum rules, not rules regarding the exercise of investigative powers. And Ballin certainly does not rule out the possibility that Congress would enact laws like § 2954 to enhance its fact-gathering capacity. Finally, Congress' decision to delegate by statute certain fact-gathering powers to members of two committees may not be overturned by either House of Congress. INS v. Chadha, 462 U.S. 919 (1983), forecloses the argument that a statute may be repealed or overridden by the unilateral action of either House, or even by the bilateral action of both Houses without presentment to the President. As is evident, defendant's self-serving effort to cast doubt on the validity of § 2954 fails.[9]

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[9] Defendant has attached portions of the legislative debates on the Seven Member Rule to his reconsideration motion. We do not believe that it is appropriate to engage in reargument over the merits of the case. We simply note that any doubt about the correctness of the Court's statutory analysis in this case was erased by the Supreme Court's recent decision in Barnhart v. Sigmon Coal Co., 122 S. Ct. 941 (2002).

CONCLUSION

Plaintiffs submit that the arguments defendant seeks to raise on reconsideration are too little too late. They are too little because not one has merit. And they are too late because the defendant deliberately withheld them during summary judgment briefing and seeks to raise them now only in a vain attempt to snatch victory from the jaws of defeat. We urge this Court to deny defendant's plea for special treatment and reject the motion for reconsideration on the grounds that it is improper to use such a motion to raise issues that could and should have been raised during briefing. In the alternative, we urge the Court to reaffirm its decision of January 22 awarding plaintiffs summary judgment.

Respectfully submitted,

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