No. 02-

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY A. WAXMAN, et al.,

Plaintiffs-Appellees,

v.

DONALD L. EVANS, Secretary of Commerce,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1361. Excerpts of Record ("ER") 4, ¶ 2 (Compl.). On January 22, 2002, the district court entered an order granting plaintiffs' motion for summary judgment. ER 165 (Docket Entry 30). The government filed a timely motion for reconsideration ten business days later, on February 5, 2002. See Fed. R. Civ. P. 59(b); Fed. R. Civ. P. 6(a). The district court denied the motion in an order entered on March 25, 2002. ER 166 (Docket Entry 42). The United States timely filed a notice of appeal on May 10, 2002. ER 156-57. See Fed. R. App. P. 4(a)(1)(B); Fed. R. App. P. 4(a)(4)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Sixteen members of the House Committee on Government Reform brought this action against the Secretary of Commerce to obtain adjusted census data that they had sought under 5 U.S.C. § 2954. The questions presented are:

1. Whether 5 U.S.C. § 2954 creates rights judicially enforceable through the Administrative Procedure Act.

2. Whether 5 U.S.C. § 2954 could constitutionally authorize individual members of Congress to compel action by the executive branch.

3. Whether 5 U.S.C. § 2954 applies to the adjusted census data requested in this case.

STATEMENT OF THE CASE

Congressman Henry A. Waxman and 15 other members of the House Committee on Government Reform commenced this suit against the Secretary of Commerce to obtain adjusted census data under 5 U.S.C. § 2954. The district court ordered the Secretary to release the requested data to the plaintiffs and denied the government's motion for reconsideration. This appeal followed.

STATEMENT OF FACTS

1. In April 2001, Congressman Henry Waxman and 17 other members of the House Committee on Government Reform asked the Secretary of Commerce to disclose adjusted data from the 2000

census. See ER 15-19.[1] They made this request pursuant to 5 U.S.C. § 2954, which provides:

> 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]

The Secretary declined to release the requested data, which the Secretary, the Director of the Census Bureau, and a committee of Bureau experts determined to be too unreliable to be used for intrastate redistricting, for the distribution of federal funds, or for any other purpose. See 66 Fed. Reg. 14004 (Mar. 8, 2001); 66 Fed. Reg. 56006, 56007 (Nov. 5, 2001).

2. Congressman Waxman and 15 other members of the House Committee on Government Reform brought this action to compel the Secretary to comply with their request for information. See ER 3-8. Their lawsuit was not brought on behalf of the House of Representatives. Nor was it authorized by the full House or even the Committee.

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[1] According to the website of the Committee on Government Reform (the "Members" link at http://www.house.gov/reform/), the Committee has at least 43 members.

[2] The House Committee on Government Operations no longer exists. However, a 1995 statute provides that references to that Committee in earlier laws "shall be treated as referring to the Committee on Government Reform and Oversight of the House of Representatives." Pub L. No. 104-14, § 1(a)(6), 109 Stat. 186 (1995). Although the "Committee on Government Reform and Oversight" was later renamed the "Committee on Government Reform," that change did not appear to have any substantive impact on the scope of the Committee's jurisdiction.

The district court entered summary judgment for plaintiffs. The court found no reason why it should not intervene in a political dispute between minority and majority members of Congress, and between individual members of Congress and the executive branch. ER 125-33. The court then held that Section 2954 encompasses the data sought by plaintiffs. ER 133-38. The court concluded that construing the statute in this manner would present no serious constitutional questions. See ER 125 n.3; ER 138-40. In the court's view, Section 2954 was enacted as "an antidote to possible domination of the legislative body by members of an opposing political party," ER 139, and the provision thus interpreted raises no serious constitutional problems. ER 140.

The district court denied the Secretary's motion for reconsideration, ruling that the Secretary had not timely presented arguments that plaintiffs lacked standing to sue and that their request for information was not judicially enforceable. ER 154. The court declined to reconsider its prior constitutional rulings. See ER 154-55.[3]

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[3] The district court suggested, incorrectly, that the Secretary's motion was not filed within 10 days of the entry of its order and therefore should be treated as a motion filed under Fed. R. Civ. P. 60(b) rather than Fed. R. Civ. P. 59(e). Although the order was dated January 18, 2002, it was not entered on the docket until January 22. See ER 165 (Docket Entry 30). The motion was filed on February 5 (see ER 165 (Docket Entry 31)), the tenth business day after the court's order was entered, and thus was timely under Rule 59(e).

SUMMARY OF ARGUMENT

A minority of the House Committee on Government Reform seeks to compel disclosure of information by the executive branch, invoking 5 U.S.C. § 2954. This use of a statute enacted in 1928 marks a sharp departure from the settled means by which Congress seeks information from the executive branch. Today, as in 1928, congressional committees may, when they believe appropriate, issue subpoenas for documents or testimony. And today, as in 1928, the statute governing enforcement of such subpoenas requires the approval of a majority of the whole House. That practice ensures political accountability for actions taken in furtherance of legislative power and precludes small minorities from compelling disclosure of information when the majority believes that disclosure would be inappropriate or even harmful.

1. Plaintiffs do not contend that Congress created a judicially enforceable right to compel information when it enacted Section 2954. They argue, however, that the subsequent passage of the Administrative Procedure Act vested in individual members the right to effectively issue and enforce subpoenas to the executive branch.

But as the Supreme Court has emphasized, the APA was not intended to significantly alter the common law of judicial enforcement. The long-established means by which Congress has enforced congressional subpoenas, and the general presumption

that disputes between the branches will be resolved by political rather than judicial means, make clear that Congress intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch. In the years since 1928, Congress has adopted and invoked rules and procedures to enforce information requests through the subpoena process without ever referencing the possibility of a judicial enforcement proceeding under Section 2954. And when it has considered legislation that would permit enforcement of requests from less than a majority of members, that legislation has made enforcement conditional on a vote of the whole House. Nothing in the history of Section 2954 or in the following three quarters of a century remotely suggests that Congress believed it had vested in small groups of congressmen the ability to enforce in court against the executive branch their requests for information without regard to the views of the majority and with no limitation but their own judgment.

2. As this Court has made clear, whether a claim is reviewable under the APA is a threshold jurisdictional inquiry that may be resolved prior to other threshold jurisdictional questions. In undertaking that inquiry, the Court should seek to avoid the serious constitutional concerns that would be raised if plaintiffs' understanding of Section 2954 were to be adopted.

If the Court were to conclude, however, that plaintiffs' claims are reviewable under the APA, it should hold that Congress cannot properly confer standing on individual members to compel disclosure of information from the executive branch. Claims that the executive branch's failure to comply with a statute have diminished a legislator's power or effectiveness state institutional, not personal, injuries. As the Supreme Court has held, such injuries cannot be vindicated by individual legislators acting without approval of the institution as a whole. Raines v. Byrd, 521 U.S. 811 (1997). Plaintiffs' only claimed injury here concerns their effectiveness as legislators and, indeed, no other injury would be possible.

The doctrine set out in Raines reflects both the institutional nature of the injuries asserted by legislators and the power of Congress to achieve its ends without resort to the courts. Congress may make use of a variety of tools, including but not limited to its subpoena power, in obtaining information from the executive branch. But these tools are wielded by the House as a body, and the political process cannot properly be circumvented by small groups seeking to achieve political ends through the courts.

3. Even assuming that plaintiffs have standing to pursue a judicially reviewable claim, Section 2954 should be construed to encompass only information of the type actually considered by

Congress when it enacted the statute. The legislation abolished a number of reporting requirements and substituted a streamlined mechanism that allowed legislators to make requests to the executive branch in a way that would produce more useful information than the reports.

The district court's expansive interpretation of the statute is without basis. And the court's construction exacerbates the constitutional difficulties that the statute presents. Indeed, to the extent that Section 2954 is not limited to the narrow range of information that previously would have been contained in the reports that the 1928 statute abolished, there is even less reason to infer that Congress silently intended to authorize individual legislators to seek judicial enforcement of their information requests.

Moreover, Section 2954 impermissibly delegates to subgroups of individual Congressmen the power to create legal obligations on individuals and agencies outside the legislative branch. The Supreme Court has made clear that only Congress itself can impose such obligations and only after complying with the bicameralism and presentment requirements of the Constitution.

ARGUMENT

I. Section 2954 Is Not Judicially Enforceable Through The Administrative Procedure Act

Under 5 U.S.C. § 2954, any seven members of the House Committee on Government Reform may ask the executive branch for

information. Under established principles, however, the denial of such a request does not give rise to a judicially enforceable claim by individual members of Congress under the Administrative Procedure Act.

As this Court has made clear, the reviewability of agency action is an issue of subject matter jurisdiction that the courts are obligated to raise sua sponte. International Longshoremen's and Warehousemen's Union v. Meese, 891 F.2d 1374, 1377 (9th Cir. 1989); see also Newman v. Apfel, 223 F.3d 937, 942-43 (9th Cir. 2000) (treating as jurisdictional the inquiry into whether a matter is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2)); Chemical and Atomic Workers International Union, AFL-CIO v. Richardson, 214 F.3d 1379, 1381 (D.C. Cir. 2000) (whether a matter is "committed to agency discretion by law" is a jurisdictional inquiry that can be resolved without first resolving other jurisdictional defenses such as mootness); Baltimore Gas and Electric Co. v. FERC, 252 F.3d 456, 458 (D.C. Cir. 2001) ("The ban on judicial review of actions 'committed to agency discretion by law' is jurisdictional."). The reviewability argument therefore is properly addressed by this Court as a threshold inquiry, notwithstanding the district court's erroneous refusal to do so.

In considering whether Section 2954 creates judicially enforceable rights under the APA, this Court should construe

these statutes to avoid the significant constitutional concerns that would arise if plaintiffs' construction of the statute were accepted. See, e.g., Zadvydas v. Davis, 121 S. Ct. 2491, 2498 (2001); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).

A. Section 2954 Creates No Judicially Enforceable Rights.

1. Section 2954 is derived from a statute that was enacted in 1928, nearly two decades before the passage of the Administrative Procedure Act. See Act of May 29, 1928, § 2, 45 Stat. 996. At that time, the statutory procedure for compelling disclosure of information by the executive branch was already well established, and it did not include lawsuits by individual members of Congress. As far as we are aware, in the nearly 75 years since the enactment of Section 2954, and the more than 55 years since the enactment of the APA, no one has ever sought judicial enforcement of Section 2954. The decades-long understanding reflected in this history underscores the implausibility of plaintiffs' position.

In 1928, as now, resort to the courts in response to a failure of the executive branch to comply with a congressional subpoena required the assent of a majority of a house of Congress and referral to the U.S. Attorney for prosecution. See Act of January 24, 1857, 11 Stat. 155 (currently codified, as amended, at 2 U.S.C. §§ 192, 194). Although subpoenas could be issued by

legislative committees, and, in some instances, by committee chairpersons, they could not be enforced in court without the approval of the relevant subcommittee, the full committee, and the full House (or by the Speaker of the House if Congress were not in session). See Wilson v. United States, 369 F.2d 198, 203 (D.C. Cir. 1966); House Rule XI, cl. 2(m)(1)(C) ("[c]ompliance with a subpoena issued by a committee or subcommittee * * * may be enforced only as authorized or directed by the House."). When a House of Congress votes to authorize enforcement, it virtually never has brought suit but instead has certified its request to the United States Attorney. See 2 U.S.C. § 194; see also Buckley v. Valeo, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed.").[4]

When Section 2954 was signed into law, moreover, the Supreme Court had already confirmed that individual legislators cannot invoke the power of the courts to compel the production of

[4] Congress has by statute authorized the Senate Legal Counsel to institute a civil action to enforce a subpoena if the full Senate authorizes the suit, see 2 U.S.C. §§ 288b(b), 288d. The jurisdictional statute governing such actions, however, expressly excludes suits brought against executive branch officials where the refusal to comply with the subpoena "has been authorized by the executive branch of the Federal Government." Ibid.

requested documents absent a specific and express grant of that power by their respective Chamber. See Reed v. County Commissioners of Delaware County, Pa., 277 U.S. 376, 388-89 (1928) (upholding dismissal of suit brought by a number of Senators to compel the production of ballots and other evidence where suit was not expressly authorized by the full Senate).

These settled rules recognize that a request for information from the executive branch implicates the institutional interests of a House of Congress. And they ensure that the courts become involved in these disputes only when a majority of the House believes that disclosure of information is in the public interest and accepts political accountability for its determination.

2. Congress would be expected to speak clearly if it intended to abrogate these well-established rules and practices governing judicial enforcement of requests for information from the executive branch. The language of Section 2954, however, is absolutely silent on the subject of judicial review. There is no suggestion that Congress believed it was, for the first time, conferring on individual members of Congress an implied right of action to enlist the courts to compel disclosure of a virtually unlimited category of information from the executive branch.

The legislative history of Section 2954 confirms that the statute was enacted for a more limited purpose: to provide a more efficient means of addressing requests for information to

the executive branch. At the same time that Congress abolished a number of specific reporting requirements, it created a mechanism for submitting specific requests for information that Congress hoped would generate more useful information. See H.R. Rep. No. 70-1757, at 6 (1928); S. Rep. No. 70-1320, at 4 (1928).[5] In streamlining the means for seeking information from the executive branch, Congress nowhere suggested that it was shifting judicially enforceable rights to small minorities that would be capable of overriding the collective judgment of both houses and the executive branch. Indeed, the Congressional Research Service has recognized both that Section 2954 "lacks a compulsory component" of judicial enforcement and 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." ER 98-99 ("Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, CRS Report No. 95-464A (April 7, 1995), at 24-25); see also ER 72 (Memorandum

[5] The committee reports noted that when Congress requested production of special reports, the resulting reports were often of little value. "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." S. Rep. No. 70-1320, at 4; H.R. Rep. No. 70-1757, at 6.

from American Law Division to Senate Government Operations Committee, dated January 15, 1975, at 2).

B. The APA Did Not Transform Previously Unenforceable Requests For Information Into Judicially Enforceable Subpoenas.

1. It is thus clear that when Section 2954 was first enacted, it conferred no judicially enforceable rights. Plaintiffs contend, however, that the subsequent enactment of the Administrative Procedure Act transformed previously unenforceable information requests into judicially enforceable subpoenas.

The Administrative Procedure Act was not intended to significantly "alter the 'common law' of judicial review of agency action." Heckler v. Chaney, 470 U.S. 821, 832 (1985) (citing 5 K. Davis, Administrative Law § 28.5 (1984)); see also United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 96 (1947) (APA's judicial review provision "was a restatement of existing law," and "[t]his construction * * * was not questioned or contradicted in the legislative history."). The APA does not apply where review is either precluded by statute, see 5 U.S.C. § 701(a)(1), or committed to agency discretion by law, see 5 U.S.C. § 701(a)(2). And the statute permits review only of "final agency action," 5 U.S.C. § 704, at the behest of "person[s] suffering legal wrong * * * or adversely affected or aggrieved * * *." 5 U.S.C. § 702.

It would be particularly inappropriate to construe the APA to "alter the 'common law' of judicial review of agency action" when the plaintiffs are not private parties but members of Congress seeking information in their official capacity. As this Court has recognized, Congress (and its members, acting in pursuit of their official duties) has political means at its disposal that are unavailable to private persons. As the Court observed, "'[i]t scarcely bears more than passing mention that the most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives.'" Guerrero v. Clinton, 157 F.3d 1190, 1196 (9th Cir. 1998) (declining to resolve private party challenge to adequacy of reports submitted to Congress by the executive branch and explaining that it is for Congress, the recipient of the report, to "'take what it deems to be the appropriate action'") (quoting Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 318-19 (D.C. Cir. 1988)).

While the APA creates a presumption in favor of judicial review by private parties (who generally have no alternative remedies), the statute cannot be thought to have established the same presumption when a court is asked to resolve a dispute between the political branches. To the contrary, even absent any express preclusion of review, the courts have been consistently reluctant to involve themselves in interbranch disputes.

See, e.g., Raines, 521 U.S. at 819-30; Melcher v. Federal Open Market Committee, 836 F.2d 561, 562-65 (D.C. Cir. 1987), cert. denied, 486 U.S. 1042 (1988); Gregg v. Barrett, 771 F.2d 539, 543-46 (D.C. Cir. 1985); Moore v. U.S. House of Representatives, 733 F.2d 946, 954-56 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (per curiam), cert. denied, 467 U.S. 1251 (1984); Vander Jagt v. O'Neill, 699 F.2d 1166, 1174-77 (D.C. Cir. 1982), cert. denied, 464 U.S. 823 (1983); United States v. AT&T Co., 551 F.2d 384, 385, 394-95 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977).

Moreover, as the Supreme Court has explained, "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984). Thus, judicial review can be precluded not only by express statutory text, but by "specific legislative history that is a reliable indicator of congressional intent"; "by contemporaneous judicial construction barring review and the congressional acquiescence in it"; by "the collective import of legislative and judicial history behind a particular statute";

and by "inferences of intent drawn from the statutory scheme as a whole." Id. at 349.

Similarly, in determining whether action is committed to agency discretion, "[t]he overall statutory structure must be considered, as well as whether the subject matter is 'an area of executive action "in which the courts have long been hesitant to intrude."'" Helgeson v. Bureau of Indian Affairs, 153 F.3d 1000, 1003 (9th Cir. 1998) (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (in turn quoting Franklin v. Massachusetts, 505 U.S. 788, 819 (1992) (Stevens, J., concurring))). As the Supreme Court has explained, the APA precludes review of "categories of administrative decisions that courts traditionally regarded as 'committed to agency discretion.'" Lincoln v. Vigil, 508 U.S. at 191.

Thus, in Heckler v. Chaney, the Supreme Court held that a provision stating that any person who violates the prohibitions of the Federal Food, Drug, and Cosmetic Act "'shall be imprisoned * * * or fined'" could not be enforced under the APA, despite its mandatory language. Id. at 835. The Court observed that an agency's decision not to take enforcement action had traditionally been committed to the agency's discretion, and it believed that "the Congress enacting the APA did not intend to alter that tradition." Id. at 832; see also ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 282 (1987). The Court

declared that this type of decision would be "presumed immune from judicial review" under the APA. Heckler v. Chaney, 470 U.S. at 832.

In addition, because (as explained more fully below) the injuries claimed here are "institutional injur[ies]" that "damage[] all Members of Congress and both Houses of Congress equally," Raines v. Byrd, 521 U.S. 811, 821 (1997), members of Congress bringing a suit of this kind are not "person[s] * * * aggrieved" within the meaning of the statute. 5 U.S.C. § 702. That phrase is a term of art informed by traditional understandings about the proper judicial role; as the Supreme Court has explained, "'[t]he determination of who is "adversely affected or aggrieved . . . within the meaning of any relevant statute" has "been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme."'" Director, Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122, 127 (1995) (citations omitted). Here, the background rules and practices discussed above, which inform the text and "spirit of the statutory scheme," provide no basis for allowing lawsuits by subgroups of individual Congressmen.

Finally, it bears emphasizing that the APA is limited to "agency action." See 5 U.S.C. §§ 702, 704. And, as this Court has explained, the submission of a report to Congress "is not agency action of the sort that is typically subject to judicial review." Guerrero, 157 F.3d at 1195.[6]

2. The long-established means by which Congress has enforced congressional subpoenas, and the general presumption that disputes between the branches will be resolved by political rather than judicial means, make clear that Congress intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch. Accordingly, the APA does not authorize judicial review of claims arising under that provision. See 5 U.S.C. § 701(a)(1), (a)(2).

Just as the Supreme Court did not infer an intent to make agency enforcement decisions subject to judicial review, there can also be no basis for inferring that Congress, in enacting the APA, intended to render superfluous the longstanding procedures by which Congress may seek to compel production of information from the executive branch. That reading of Section 2954 would

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[6] See also Chemical Weapons Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1495 (10th Cir. 1997); Taylor Bay Protective Ass'n v. EPA, 884 F.2d 1073, 1080-81 (8th Cir. 1989); Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d at 316-10; Natural Resources Defense Council v. Lujan, 768 F. Supp. 870, 881-83 (D.D.C. 1991); Greenpeace U.S.A. v. Stone, 748 F. Supp. 749, 765-67 (D. Haw. 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

fundamentally alter the relationship between the political branches. And it would significantly change the relationship of small minorities to the House as a whole by permitting groups of congressmen to, in effect, issue and enforce subpoenas to the executive branch without regard to the view of the majority. Courts should not lightly presume that Congress, in enacting the APA, intended such sweeping structural changes in the interbranch and intrabranch allocation of power without saying so explicitly. Cf. Gregory v. Ashcroft, 501 U.S. 452, 434 (1991) (declining "[i]n the face of * * * ambiguity" to "attribute to Congress an intent to intrude on state governmental functions"); Jones v. United States, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so.").[7]

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[7] Even where interbranch relations are not at issue, the courts have been unwilling to permit individual congressmen to use the courts to obtain information without majority approval. See Wilson v. United States, 369 F.2d at 201-05 (interpreting the contempt-of-Congress statute (2 U.S.C. § 194), contrary to its literal terms, to require (when Congress is in session) a full vote of the House of Representatives before the Speaker of the House certifies to the U.S. Attorney a House committee's statement with respect to an alleged contempt); In re Beef Industry Antitrust Litigation, 589 F.2d 786, 789-91 (5th Cir. 1979) (not allowing Chairmen of two subcommittees of the House of Representatives to intervene in antitrust suit in order to gain access to documents where they had failed to obtain authorization from the House); see also Watkins v. United States, 354 U.S. 178, 205 (1957) (areas of inquiry for congressional committees should be clearly delineated by the authorizing House because "[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative

Plaintiffs' understanding also would place Section 2954 in conflict with House Rules contemplating that committees will pursue information only by subpoenas approved by the whole House. Congress has adopted and invoked elaborate procedures to enforce information requests through the subpoena process without even referencing the possibility of judicial enforcement under Section 2954. Current House Rules authorize the committees, including the Government Reform committee, to "conduct * * * investigations." See House Rule XI, cl. 1(b)(1). A "committee or subcommittee is authorized * * * to require, by subpoena or otherwise, * * * the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary." Id. cl. 2(m)(1). A subpoena "may be authorized and issued * * * in the conduct of an investigation * * * only when authorized by the committee or subcommittee, a majority being present" (id. cl. 2(m)(3)(A)) or by the chairman if authorized by the committee. Ibid. And a subpoena "may be enforced only as authorized or directed by the House." Id. cl. 2(m)(3)(C) (emphasis added). This elaborate enforcement scheme makes no provision for unilateral enforcement, through the courts or otherwise, by a small number of individual members.

There is no evidence whatsoever that when Congress adopted these rules it believed that existing law curtailed its

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need").

rulemaking authority or its power to ensure institutional accountability.[8] Indeed, when Congress, in 1973, considered legislation that would have permitted judicial enforcement of requests made by a minority of any congressional committee or subcommittee, that bill would have allowed judicial enforcement only with the approval of a majority of the entire House or Senate. See Congressional Right to Information Act, S. 2432, §§ 341(b), 343(b) (1973), reprinted in Deschler's Precedents, ch. 15, § 5.2, at 2347, 2348. A similar proposal was considered in 1975. See ER 46-51 (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, the Congressional Right to Information Act, before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations (Oct. 23, 1975)).

Moreover, even when a full House of Congress votes to enforce a subpoena against the executive branch, the governing

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[8] Indeed, it would be antithetical to the notions underlying a Rule of Procedure to conclude that Congress had divested itself of the authority to enact appropriate rules to govern its procedures. See United States v. Ballin, 144 U.S. 1, 5 (1892) ("The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house"); cf. In re Chapman, 166 U.S. 661, 671-72 (1897) ("Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended"). And because this power is granted to each House alone, see U.S. Const., Art. I, § 5, cl. 2, "Congress may not, by * * * statute, provide that the House is to be governed by certain procedural rules during a future Congress." Deschler's Precedents, ch. 1, § 10, at 59.

statute authorizes Congress only to certify its directive to the U.S. Attorney, not to file an enforcement action in its own name. 2 U.S.C. § 194. That longstanding approach -- an approach that is itself grounded in separation-of-powers concerns, see Buckley, 424 U.S. at 138 -- further militates against plaintiffs' proposed reading of Section 2954.

In sum, by permitting private parties to seek judicial review of final agency action, the APA did not transform Section 2954 into an instrument that would allow individual members of Congress to use the courts to resolve controversies with the executive branch without regard to the views of the majority of the relevant House. The established means for enforcing congressional subpoenas recognizes the institutional nature of the interest at stake when individual members seek information from the executive branch, and it ensures that such information requests are pursued in court only upon the considered judgment of the whole House in a suit brought by or on behalf of the whole House.

Thus, "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved," Block, 467 U.S. at 345, all evince a congressional intent to preclude judicial review. And like an agency's decision to undertake prosecutorial or enforcement action, an agency's response to information requests

submitted by individual members of Congress should be "presumed immune" from judicial review under the APA. Heckler v. Chaney, 470 U.S. at 832.[9]

II. Section 2954 Cannot Constitutionally Authorize Individual Members Of Congress To Compel Disclosure Of Information From The Executive Branch

As we have shown, Section 2954 does not create judicially enforceable rights under the APA. This conclusion is underscored by the significant constitutional concerns that would be raised if plaintiffs' understanding of the statute were adopted. As we show below, if Section 2954 were construed to give individual members of Congress standing to invoke the federal courts to compel disclosure of information from the executive branch, then the provision, as so construed, would be unconstitutional. Although the district court declined to consider the issue of standing, the government is plainly permitted to raise it on appeal. Indeed, as the Supreme Court has emphasized, the courts have an independent obligation to confirm that Article III

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[9] Plaintiffs' attempt to invoke the Mandamus and Venue Act (28 U.S.C. § 1361), is equally unavailing. As the weight of appellate precedent reflects, mandamus is not available where the statute sought to be enforced provides no private right of action. See Aguirre v. Meese, 930 F.2d 1292, 1293 (7th Cir. 1991) (per curiam); Gonzalez v. INS, 867 F.2d 1108, 1109-10 (8th Cir. 1989); District Lodge No. 166, International Association of Machinists and Aerospace Workers, AFL-CIO v. TWA Services, Inc., 731 F.2d 711, 717 (11th Cir. 1984), cert. denied, 469 U.S. 1209 (1985). But see Hernandez-Avalos v. INS, 50 F.3d 842, 845-46 (10th Cir.), cert. denied, 516 U.S. 826 (1995). And mandamus is certainly not available where, as here, the statute creates no judicially enforceable rights or duties.

standing requirements are satisfied even if (unlike here) no party raises the issue. See, e.g., Adarand Constructors, Inc. v. Mineta, 122 S. Ct. 511, 514 (2001).[10]

A. Individual Members Of Congress Lack Standing To Vindicate Institutional Interests Of Congress In Suits Against The Executive Branch

The Supreme Court has made clear that members of Congress lack standing to require the executive branch to comply with statutes when the injury asserted is a diminution in the plaintiffs' ability to perform their role as members. As the Court explained, "'the law of Art. III standing is built on a single basic idea -- the idea of separation of powers,'" reflecting an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." Raines, 521 U.S. at 820 (citation omitted). Accordingly, "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him," id. at 819.

This suit is far removed from an exercise of the "judicial Power" and the resolution of "Cases" and

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[10] This Court can properly address whether Section 2954 creates any judicially enforceable rights without first addressing plaintiffs' Article III standing, since both issues are jurisdictional. See, e.g., Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583-88 (1999); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 97 n.2 (1998); see also City of New York v. Clinton, 524 U.S. 417, 428 (1998) (holding that statutory jurisdictional issue could be raised for the first time on appeal).

"Controversies" as the Framers understood those terms. As the Supreme Court has explained, "Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000) (citation omitted). There certainly is no history or tradition that would support interbranch lawsuits, much less interbranch suits brought by individual members of Congress.

As the Supreme Court in Raines emphasized, a member of Congress who seeks to invoke the power of the federal courts must allege a "personal injury" in order to establish standing. 521 U.S. at 818. Alleging an institutional injury that "runs * * * with the Member's seat" is insufficient. Id. at 821.

In Raines, individual members of Congress challenged the constitutionality of the Line Item Veto Act under a statutory provision that purported to grant standing to any congressman adversely affected by the statute. The plaintiffs alleged that the Act injured them by altering the balance of powers between the branches and by changing the effectiveness of their votes on appropriations bills. The Supreme Court held that the plaintiffs only alleged "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and

both Houses of Congress equally." 521 U.S. at 821. The Court determined that such an "institutional injury," asserted by individual members of Congress, is insufficient to confer standing. See id. at 829.

The Court attached "importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." 521 U.S. at 829. The Court thus referenced (id. at 829 n.10) two of its earlier decisions recognizing that legislative bodies must generally act collectively. See Bender v. Williamsport Area School Dist., 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take"); United States v. Ballin, 144 U.S. 1, 7 (1892) ("The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole.").

The Court in Raines thus underscored the importance of obtaining the approval of the full House or Senate before allowing a suit to vindicate an institutional injury suffered by those bodies. Indeed, permitting suit without approval of the full House would invite routine judicial involvement in

interbranch disputes that have historically been resolved through the political process, and would subvert political accountability, allowing Congress to disassociate itself from the consequences of a suit brought in the name of sustaining legislative power or facilitating the legislative process.

As the D.C. Circuit has explained, the Court in Raines "focus[ed] on the political self-help available to congressmen" and denied standing because the plaintiffs "possessed political tools with which to remedy their purported injury." Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir.), cert. denied, 531 U.S. 815 (2000). The Court thus "explicitly rejected [the] argument that legislators should not be required to turn to politics instead of the courts for their remedy." Ibid. As the D.C. Circuit also recognized, serious separation-of-powers concerns are raised "when a legislator attempts to bring an essentially political dispute into a judicial forum." Chenoweth v. Clinton, 181 F.3d 112, 114 (D.C. Cir. 1999), cert. denied, 529 U.S. 1012 (2000); see also Gregg v. Barrett, 771 F.2d at 543 (attempts by individual members to enforce Congress's institutional interests by invoking the judicial power "present serious separation-of-powers issues, especially in cases where the plaintiff 'could have obtained from Congress the substantial equivalent of the judicial relief sought, because in such cases the court is asked to intrude into the internal functionings of the legislative

branch itself'" (citation omitted)). Indeed, "given the restrictions on congressional standing and the courts' reluctance to interfere in political battles, few executive-congressional disputes over access to information have ended up in the courts." In re Sealed Case, 121 F.3d 729, 739 (D.C. Cir. 1997).

B. Congress May Not Constitutionally Confer Standing On Individual Members Of Congress To Sue To Compel Information The Production Of Information Under Section 2954

In this case, as in Raines, plaintiffs allege only an institutional injury. See ER 7, ¶ 16a (information needed to "evaluate the need for legislation in this area"); ER 7, ¶ 16b (information needed to assist with "the allocation by Congress" of federal grant funds); ER 7, ¶ 16c (alleging that the requested census data is necessary to perform "the Committee's legislative and oversight responsibility"). Indeed, Section 2954 by its terms addresses only institutional interests of Congress: it applies only to information "relating to * * * matter[s] within the jurisdiction of the committee"; it may be invoked only by sitting "members" of Congress; and it cannot be invoked by any one individual, but only by "seven members" acting collectively to secure information from the executive branch. 5 U.S.C. § 2954 (emphasis added). Plaintiffs have no "personal stake" in obtaining the requested information; the information furthers the institutional interests of Congress. As in Raines, the "injury claimed * * * is not claimed in any private capacity but solely

because [plaintiffs] are Members of Congress." 521 U.S. at 821.

The Constitution provides that "[a]ll legislative Powers shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1 (emphasis added). Section 2954 is an exercise of Congress's implied authority to gather information in aid of its power to legislate. See Morrison v. Olson, 487 U.S. 654, 694 (1988); McGrain v. Daugherty, 273 U.S. 135, 160-61 (1927). As the Constitution specifies, however, the power to legislate is vested in the Houses of Congress, not in subgroups of individual members.

As in Raines, plaintiffs seek to short-circuit the political process by involving the courts in a suit approved by neither House of Congress. Congress has numerous political tools at its disposal to obtain information from the executive branch, including its control over appropriations and its powers of investigation and oversight. Those political tools, however, belong to Congress as an institution, not to subgroups of individual legislators, and can be wielded only by majority vote. Congress may make use of political means to secure information it believes necessary to its legislative function. Congress may even issue subpoenas for such information. But, as we have shown, and consistent with Raines, judicial enforcement of a subpoena under 2 U.S.C. § 194 cannot be pursued without "a

resolution of the full House or Senate, citing the witness for contempt." United States v. AT&T Co., 551 F.2d at 393 n.16. This process minimizes judicial involvement in interbranch political disputes and ensures institutional accountability; as the D.C. Circuit has explained, "[t]his plenary vote assures the witness some safeguard against aberrant subcommittee or committee demands." Ibid.; see also Wilson v. United States, 369 F.2d at 201-05 (interpreting the contempt-of-Congress statute to require vote of the House of Representatives before certification to U.S. Attorney of alleged contempt); In re Beef Industry Antitrust Litigation, 589 F.2d at 789-91 (House subcommittee chairmen could not intervene in ongoing suit to gain access to documents without authorization from the House).

Congress may not delegate to a small subgroup of its members the authority to pursue coercive action against the executive branch (much less do so through the Article III courts) that is not subject to the usual checks and balances reflected in the established mechanism for subpoena enforcement that requires a vote of a whole House. It is one thing for Congress to authorize committees to issue subpoenas which can be enforced only with the approval of a full House. It is another to delegate to small groups lacking even the formal character of a committee the power to effectively issue and enforce their own subpoenas. Indeed, if it is unconstitutional for Congress to delegate its

lawmaking powers to a few members of either House (see INS v. Chadha, 462 U.S. 919 (1983)), it is equally unconstitutional for Congress to delegate to such members its investigatory powers that have coercive effects outside the legislative branch.

In sum, Congress is free to use its power over appropriations and its various tools of oversight and investigation, including the power to issue subpoenas. If a subpoena is issued and the executive branch refuses to comply, a majority of the House of Representatives can approve a contempt citation and refer the matter to the U.S. Attorney for judicial enforcement. But Congress cannot constitutionally delegate to subgroups of individual Representatives its authority to enforce its information requests, and this Court should not construe either Section 2954 or the APA to have effected such an extraordinary delegation.

C. The Doctrine Of Equitable Discretion Requires Dismissal Of This Suit

Even if Congress could properly confer standing on individual members to bring suit to vindicate institutional interests, dismissal of this suit would be warranted under the doctrine of equitable discretion.

The equitable discretion doctrine prevents courts from "interfer[ing] in matters which properly could, and should, be decided by appeal to one's fellow legislators." Gregg v. Barrett, 771 F.2d at 545. As the D.C. Circuit has recognized, it

would be "unwise to permit the federal courts to become a higher legislature when a congressman who has failed to persuade his colleagues can always renew the battle." Riegle v. Federal Open Market Committee, 656 F.2d 873, 882 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); see also Leach v. Resolution Trust Corp., 860 F. Supp. 868 (D.D.C. 1994) (same). Similarly, where individual members have sought judicial review of executive action in advance of any action by a House of Congress, courts have invoked their remedial discretion to withhold relief. See Crockett v. Reagan, 720 F.2d at 1356-57; Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987). Application of the doctrine of equitable discretion does not turn on whether the court could fashion a remedy, but rather on respect for the ability of the coordinate political branches to order their own affairs. See Vander Jagt v. O'Neill, 699 F.2d at 1176.

These separation-of-powers considerations compel the dismissal of this suit. The request for census data from the Secretary of Commerce was made by a minority of the House Committee on Government Reform. Rather than invoke the authority of the full committee through a subpoena, or convince a majority of the House of their need for the information, the plaintiffs seek relief from the courts. Whether this case is viewed as a dispute between the 16 plaintiffs and their colleagues in the House, or as a dispute between the plaintiffs and the Secretary

of Commerce, the equitable discretion doctrine compels dismissal of this suit.

III. Section 2954 Does Not Apply To The Adjusted Census Data They Seek

Even if plaintiffs have stated a justiciable claim and have standing, Section 2954 should not be construed as authorization to seek information of any character, but as authority to seek the limited type of information actually considered by Congress when it enacted the legislation. As explained below, the district court's contrary interpretation reads the statute out of context and magnifies the constitutional concerns that the statute presents.

The "'"meaning of statutory language, plain or not, depends on context."'" Holloway v. United States, 526 U.S. 1, 7 (1999) (citations omitted); see also Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). Here, the relevant context demonstrates that Section 2954 has a far narrower reach than the district court determined.

Section 2954 provides that "[a]n 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." 5 U.S.C. § 2954. Although the text provides for the submission of "any" information requested that falls within the committee's

jurisdiction, the purpose of the statute is far more limited.

As explained above, Section 2954 is derived from a statute enacted in 1928. See Act of May 29, 1928, 45 Stat. 996. Section 1 of that statute repealed statutes mandating the submission of 128 specific reports to the relevant House and Senate Committees. Section 2 of the Act, from which Section 2954 is derived, was enacted contemporaneously with Section 1, and Section 2954 is codified in a subchapter that governs "Reports" to Congress. See 5 U.S.C. Chapter 29, Subchapter II.

As the Supreme Court has noted, "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." Jones v. United States, 526 U.S. at 234. And the legislative history makes clear that Section 2 of the 1928 statute was merely intended to preserve access to the sort of information included in the reports abolished by Section 1 of the Act. See S. Rep. No. 70-1320, at 4; H.R. Rep. No. 70-1757, at 6. Thus, the Senate Report, after addressing the numerous reporting requirements that were being repealed, explained that

> To save any question as to the right of the House of Representatives to have furnished 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 * * * upon the request of any seven members thereof.

S. Rep. No. 70-1320 at 4; see also H.R. Rep. No. 70-1757 at 6 (same). The Senate Report similarly explained that the statute

"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." Ibid.; see also 69 Cong. Rec. 10613 (May 29, 1928) (statement of Sen. Sackett) (reproduced at ER 143) (noting that 1928 statute included a provision "under which the committee could reinstate any report [previously required] that was found to be needed.").

In light of this history, the executive branch has long understood the provision to allow access only to the information that had previously been included in the reports that Congress had abolished. More than thirty years ago, then-Assistant Attorney General Rehnquist explained that Section 2954 "is rather narrow" and "its purpose was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress submitted by the several agencies." ER 43. Likewise, in 1975, 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.

ER 50.

As noted earlier, consistent with those views, the Congressional Research Service also has recognized that Section 2954 "lacks a compulsory component" and 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." ER 98-99 (Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, CRS Report No. 95-464A (April 7, 1995), at 24-25); see also ER 72 (Memorandum from American Law Division to Senate Government Operations Committee, dated January 15, 1975, at 2). As the Congressional Research Service has explained, "the scope of 5 U.S.C. 2954 appears closely tied to the 128 reports abolished by section 1 of the Act of May 29, 1928." ER 73; see also ER 99.

As noted above, interpreting Section 2954 to create any judicially enforceable rights presents serious constitutional concerns. By unduly expanding the statute's substantive reach, the district court's decision exacerbates those concerns. Indeed, if the district court's sweeping interpretation is correct, and Section 2954 is not limited to a narrow range of information that would have been contained in the required annual reports that the 1928 statute abolished, there is even less reason to conclude that Congress silently intended to authorize subgroups of individual Representatives to seek judicial enforcement of their information requests.

Moreover, Section 2954 poses additional constitutional difficulties that the district court's statutory interpretation magnifies. Section 2954 delegates to subgroups of individual members of Congress the power to request information from the

executive branch. Those information requests, however, are not matters internal to Congress. Rather, the requests have "the purpose and effect of altering the legal rights, duties and relations of * * * Executive Branch officials * * * outside the legislative branch." Chadha, 462 U.S. at 952. As the Supreme Court explained in Chadha, only Congress itself can create such legal obligations, and only after complying with the bicameralism and presentment requirements of Article I. The statute is an invalid attempt to circumvent those constitutional requirements.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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MAY 2002

STATEMENT OF RELATED CASES

Counsel for the appellant are not aware of any related cases pending before this Court. The adjusted census data requested in this case also are being sought by other individuals under the Freedom of Information Act in Carter v. United States Department of Commerce, No. 02-35161 (9th Cir.).

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2002, I filed and served the foregoing Brief for the Appellant by causing the original and fifteen copies to be sent to this Court by Federal Express and by causing two copies to be served upon the following counsel by Federal Express:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HENRY A. WAXMAN, et al. Plaintiffs-Appellees, v. DONALD L. EVANS, Secretary of Commerce, Defendant-Appellant.	)	No. 02-____ [Dist. Ct. No. 01-04530-LGB AJWx (C.D. Cal.)]

UNOPPOSED MOTION TO EXPEDITE BRIEFING AND ORAL ARGUMENT

Defendant-appellant Donald L. Evans respectfully moves the Court to set this appeal for expedited briefing and oral argument in accordance with the schedule proposed below. The government filed a notice of appeal earlier today, and copies of our opening brief accompany this motion. The district court in this case has ordered the Secretary of Commerce to disclose adjusted census data to the plaintiffs, Congressman Henry Waxman and 15 other members of the minority of the House Committee on Government Reform. Expedited review is warranted to avoid undue delay in resolving the important questions presented in this case. This motion is unopposed.

1. Congressman Henry A. Waxman and 15 other members of the minority of the House Committee on Government Reform commenced this suit against the Secretary of Commerce to obtain adjusted census data under 5 U.S.C. § 2954. Section 2954 provides that "[a]n 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." The

district court ordered the Secretary to release the requested data to the plaintiffs and denied the government's motion for reconsideration.

2. This appeal raises important issues of first impression that affect relations between the executive and legislative branches of the federal government. Given the important interests at stake, expedited review is warranted, and we are accordingly filing copies of our opening brief today. We respectfully ask the Court to adopt the following briefing schedule, with oral argument to be heard as soon as practicable following the close of briefing:

Brief for the Appellant -- filed on May 10, 2002

Brief for the Appellees -- due on June 10, 2002

Reply Brief for the Appellant -- due on June 24, 2002

3. We have contacted David C. Vladeck, counsel for the appellees, and informed him of our intention to seek expedition under the schedule outlined above. Mr. Vladeck informed us that he does not oppose this motion.

For the foregoing reasons, defendant-appellant respectfully requests the Court to set this case for expedited briefing in accordance with the above schedule and to hear oral argument as soon as practicable following the close of briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2002, I served the foregoing Motion to Expedite Briefing and Oral Argument by causing a copy to be sent to the following counsel by Federal Express:

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