No. 02-55825

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 OF APPELLEES

David C. Vladeck
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
Attorneys for Plaintiffs-Appellees

Marvin L. Krakow
1801 Century Park East, Suite 1520
Los Angeles, CA 90067-2302
Of Counsel

June 17, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitutional Provision:

Statutes:

Legislative Materials:

Miscellaneous:

STATEMENT OF JURISDICTION

Appellees concur in appellant's statement of jurisdiction.

STATEMENT OF ISSUES

Section 2954 of Title 5 provides that "[a]n Executive agency, on request of the [Committee on Government Reform] 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." Section 2954 was enacted as section 2 of the Act of May 29, 1928; section 1 repealed 128 statutes requiring agencies to submit reports to Congress. Appellant, Secretary of Commerce Donald L. Evans, refused a §2954 request for year 2000 adjusted census data from plaintiffs-appellees, Members of the House Committee on Government Reform. The issues are:

1. Does §2954 apply to the adjusted census data?

2.A. Having failed to timely argue below that plaintiffs' claims are unreviewable, may appellant raise that argument on appeal?

2.B. Assuming the question is before the Court, does §2954 preclude review or commit compliance to agency discretion by law?

3. Do plaintiffs have standing?

4. Does the "equitable discretion" doctrine foreclose review of this action?

5.A. Having failed to timely argue below that §2954 is unconstitutional,

may appellant raise that argument on appeal?

5.B. Is §2954 constitutional?

INTRODUCTION

Secretary Evans' brief to this Court marks his third effort in this case to find legal justification for withholding adjusted census data. Under settled Ninth Circuit precedent, adjusted census data is not privileged and must be made available to anyone under the Freedom of Information Act (FOIA), 5 U.S.C. §552. *Assembly of the State of California v. Department of Commerce*, 968 F.2d 916 (1992); *accord Carter v. Department of Commerce*, 186 F.Supp.2d 1147 (D.Or. 2001), *appeal pending*, No. 02-35151 (9th Cir.).[1]

Nonetheless, Secretary Evans did not respond to requests by Members of Congress for the year 2000 adjusted census data, precipitating this lawsuit. Before the district court, the Secretary contended that §2954 applies only to information contained in the reports discontinued by the 1928 Act and that the "equitable

---

[1] Before *California Assembly*, the Eleventh Circuit held adjusted census data exempt from disclosure under FOIA. *Florida House of Representatives v. Department of Commerce,* 961 F.2d 941 (1992). *California Assembly* expressly rejected the Eleventh Circuit's rationale. 968 F.2d at 922 n.3. The Supreme Court stayed *California Assembly*, 501 U.S. 1272 (1991), and granted certiorari in *Florida House*. But the government never sought review in *California Assembly*, moved to have the writ dismissed in *Florida House*, 506 U.S. 969 (1992), and then released the 1990 data.

discretion" doctrine precludes judicial review. After the district court rejected these arguments, the Secretary moved for reconsideration raising three new arguments: that plaintiffs lacked standing, that §2954 creates no judicially enforceable rights, and that, if it does, it is unconstitutional. The district court rejected the Secretary's motion as untimely.

On appeal, the Secretary relies mainly on arguments raised only on reconsideration, ignoring the district court's ruling on timeliness. Except for the Secretary's standing argument, these arguments are not properly before the Court. In any event, they are without merit.

Although we recognize that this Court must initially determine that the case satisfies Article III's requirements, we begin with the Act and its history to put our justiciability arguments in context. We next show that the Secretary's initial judgment not to raise his reviewability and standing arguments was correct — neither has merit. Taken together, the Secretary's arguments distill down to the implausible contention that when Congress enacted §2954 it knew, or should have known, that it was meaningless, unenforceable, and unconstitutional: meaningless because it provided Members of Congress with the right to request only the "useless" and "obsolete" information in the discontinued reports; unenforceable because Members could not compel agencies to provide information; and

unconstitutional because it empowered Members not in the majority to gather information.

Underlying many of the Secretary's arguments is the contention that the ruling below will engulf courts in a flood of executive privilege litigation. The concern is contrived. This case does not involve any claim of executive privilege. As the district court observed, "the Secretary has not premised his refusal to release the requested census information on executive privilege grounds nor does it appear that such a position would be viable" given this Court's ruling in *California Assembly*. Thus, the hypothetical issue the Secretary wants to force on this Court — the possibility of judicial entanglement in executive privilege litigation — is not presented here.

Nor are such issues likely to arise under §2954. The statute applies only to agency records, and does not reach records of the President, his personal advisors, or White House staff. Section 2954 requests may be made only by a significant number of Members of only two congressional Committees, a further safeguard against misuse. And at least since FOIA was enacted, Members of Congress have been free to seek any agency record they want. Yet none of the strife forecast by the Secretary has come to pass. There is no reason why enforcing §2954 here will encourage Members to throw caution to the wind, and the Secretary points to

none.

STATEMENT OF THE CASE

1. *Factual Background.*

The plaintiffs-appellees are Members of the House Committee on Government Reform, the successor Committee to the House Committee on Government Operations. *See* Pub. L. 104-14, § 1(6), 109 Stat. 186 (1995). Henry A. Waxman is the ranking minority Member, William Lacy Clay, Tom Lantos, Major R. Owens, Edolphus Towns, Patsy T. Mink, Bernard Sanders, Carolyn B. Maloney, Eleanor Holmes Norton, Elijah E. Cummings, Dennis J. Kucinich, Rod R. Blagojevich, Danny K. Davis, John F. Tierney, Thomas H. Allen, and Janice D. Schakowsky are Committee Members.

On April 16, 2001, the plaintiffs sent the Secretary a formal request for adjusted census data produced as part of the 2000 Census. Record Excerpts (RE) at 15. When no reply was forthcoming, Congressman Waxman followed up with staff requests and a letter dated May 16, 2001 (RE 21), but still received no response. On May 21, 2001, the plaintiffs filed this action.

2. *Importance of the Adjusted Census Data*

The Constitution requires an "actual enumeration"— a census — of the population every ten years, and it grants Congress the authority to conduct the

census in "such a manner as they shall by Law direct." U.S. Const., Art. I, §2, cl.3. The Constitution provides that the decennial census shall be used to apportion the members of the House of Representatives. *Id.* Census data is also used for other purposes. For example, the federal government considers census data in dispensing funds and other federal program benefits. In 1998, the government allocated $185 billion to states and localities based on census data. *See* General Accounting Office, *Formula Grants: Effects of Adjusted Population Counts on Federal Funding to States* 1-2, 6 (Feb. 1999) (GAO/HEHS-99-69). States also use the results in drawing intrastate political districts.

Through the Census Act, 13 U.S.C. § 1 *et seq.*, Congress delegated to the Secretary of Commerce the responsibility to conduct the census "in such a form and content as he may determine." *Id.* §141(a). The Secretary, in turn, has delegated certain responsibilities to the Census Bureau. As part of its work on the 2000 Census, the Bureau compiled two sets of data. One set of data is a population count based on census forms returned by mail and interviews at addresses for which no census form was returned ("Raw Data"). The Raw Data has been released.

Substantial questions have been raised about the accuracy of the Raw Data. According to Census Bureau experts, the Raw Data missed at least 6.4 million

people and counted 3.1 million people twice. *See, e.g.*, Eric Schmitt, *Count of 2000 Census Said to Err by Millions*, N.Y. Times, March 16, 2001, at A12. The Bureau itself officially acknowledges that statistical adjustment would correct for 4.3 million people undercounted and one million overcounted. *Statement by William G. Barron Jr. on the Current Status of Results of Census 2000 Accuracy and Coverage Evaluation Survey* (July 13, 2001). Recognizing that the Raw Data is inaccurate, the Bureau prepared a second set of data using well known statistical techniques designed to correct for errors ("Adjusted Data").

The Census Act requires the Secretary to release census data to the public and transmit it to the states for redistricting purposes within "one year of the decennial census date"—April 1, 2001. 13 U.S.C. §141(c).[2] A month before the deadline, the Census Bureau's Executive Steering Committee for Accuracy and Coverage Evaluation Policy reported that the evidence indicates that the Adjusted Data "are more accurate overall" than the Raw Data. 66 Fed. Reg. 14005-06 (2001). Although the Steering Committee concluded that the adjusted numbers

---

[2] For the sole purpose of apportioning seats in the U.S. House of Representatives, Congress has directed the Secretary to report *only* unadjusted numbers. *See* 13 U.S.C. §195; *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 340 (1999). Adjusted Data could be used for other purposes, including allocating federal grant money and congressional redistricting, if reported.

should not be released at that time for redistricting purposes, it did so only because the impending April 1, 2001 statutory deadline prevented a full analysis of the Adjusted Data. *Id.* On March 6, 2001, the Department announced that it would not use or release the Adjusted Data.

Plaintiffs' request for the Adjusted Data seeks information squarely within the jurisdiction of the House Committee on Government Reform. As their request letter explains (RE 11), the Committee has both legislative and oversight jurisdiction over matters relating to population and demography, including the census. As to legislative matters, "[c]oncerns have been raised that the existing provisions of the Census Act effectively prevent the most accurate data from being used for redistricting and other purposes. Review of the adjusted census data will enable us to evaluate the need for legislation in this area." *Id.*

Regarding the Committee's oversight jurisdiction, the letter explains that "this information could have an enormous impact on the allocation by Congress of more than $185 billion in population-based federal grant funds." *Id.* The letter pointed out that undercounted communities are denied their fair share of federal funds. In 1999, the GAO found that, as a direct consequence of the 1990 undercount, states and localities with the greatest undercount failed to receive approximately $449 million from fifteen federal programs. *Formula Grants:*

Effects of Adjusted Population Counts on Federal Funding to States, supra, at 4. If the 1990 undercount had been corrected, California alone would have received an additional $222 million. *Id.* at 7. The letter also notes that "[t]he reports that the Census Bureau missed 6.4 million people in its most recent count raise serious questions about whether all of our citizens will have an equal voice in government . . . [W]e need to investigate these important questions, and if need be, develop legislation that assures fairness in the redistricting process." *Id.*

3. *Proceedings Below.*

This action was filed on May 21, 2001, with jurisdiction based on 28 U.S.C. §§1331 and 1361. Secretary Evans filed a timely answer, which challenged neither standing nor reviewability. Plaintiffs moved for summary judgment arguing that the statute should be given its plain meaning, that the Adjusted Data is not privileged, and that plaintiffs have standing. In his cross-motion, the Secretary did not contest plaintiffs' standing or argue that the records are privileged. Rather, he contended that the "equitable discretion" doctrine barred review and that, in any event, the statute should be construed to cover only information contained in one of the 128 reports discontinued in 1928.

After extensive briefing and argument, the court ruled for plaintiffs. RE 120. The court rejected the Secretary's "equitable discretion" argument, noting

that there is no *inter*-branch dispute here because "the Secretary has not premised his refusal to release the requested census data on executive privilege grounds" and that such a claim would not be "viable given the Ninth's Circuit's finding that adjusted census records are . . . available for disclosure under the Freedom of Information Act." RE 127-28. The court also rejected the Secretary's claim that there is an *intra*-branch dispute within Congress, observing that "it is clear that plaintiffs' dispute is solely with the Secretary" and that withholding an adjudication would "nullify[] congressional intent to empower plaintiffs here to obtain the census data sought without having to invoke the authority of the full committee through a subpoena or convincing a chamber majority of the need for the information." RE 132-33.

The court also rejected the Secretary's statutory construction argument, finding the "plain language" of §2954 "mandates that the Secretary release the requested data to the plaintiffs." RE 134. The court reviewed the legislative history "out of an abundance of caution," but found it "only muddies the waters." RE 137. Because the "statute speaks clearly and its plain language does not contravene the legislative history," the court concluded that it "must hold Congress to its words." RE 138.

The court accordingly ordered the Secretary to release the Adjusted Data.

RE 140. Two weeks later, the Secretary filed a motion for reconsideration, raising three arguments his lawyers chose not to raise earlier: that plaintiffs lack standing, that their claims are not reviewable, and that §2954 is unconstitutional. Plaintiffs opposed the motion because it violated the rule forbidding parties from raising new issues on reconsideration, *see Kona Enterprises v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000), and explained why the Secretary's new arguments are unfounded. On March 21, 2002, the court denied the Secretary's motion and lifted a temporary stay it had entered. RE 152-54. This appeal followed. Plaintiffs agreed not to enforce the judgment if the Secretary moved to expedite his appeal.

SUMMARY OF ARGUMENT

The issue in this case is whether courts should enforce §2954 by compelling Secretary Evans to submit, on the request of sixteen Members of the House Committee on Government Reform, information within the Committee's jurisdiction that is not subject to any privilege claim, constitutional or otherwise. The answer to that question is plainly yes, and none of the defenses the Secretary raises to escape from his clear-cut duty under §2954 has merit.

I. Read literally, §2954 requires the production of the requested records. The Secretary makes no text-based argument to the contrary. Rather, he contends that §2954's legislative history evinces a congressional determination that §2954

reach no further than the information covered by the 128 reports discontinued in 1928. This argument is at odds with the text of §2954, which contains no such limit. It is at odds with the rule forbidding resort to legislative history where the statutory language is clear. And it is at odds with the very history on which it relies. Congress abolished the reporting requirements because the information in the reports was "obsolete" and "useless." It would have been pointless for Congress to limit the reach of §2954 to the very information it no longer wanted, and nothing more. The Secretary's invitation to this Court to rewrite §2954 should be rejected.

II. The Secretary's reviewability defense fares no better. In the first place, this defense was not preserved below and is not before this Court. The Secretary contends that whether a cause of action exists under the Administrative Procedure Act goes to subject matter jurisdiction, and thus the defense is non-waivable. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), the Court held that arguments about whether the plaintiff has a viable cause of action involve the merits, not subject matter jurisdiction, thus foreclosing the Secretary's non-waiver theory.

In any event, plaintiffs' claims are reviewable. Under the APA, final agency action is presumptively subject to judicial review. Plaintiffs' claims are

reviewable for precisely the reason that challenges to agency refusals to disclose information under the Federal Election Campaign Act (FECA), the Federal Advisory Committee Act (FACA), and myriad other disclosure laws are reviewable: The agency's decision finally determines the plaintiff's statutory rights, and absent a clear indication of intent to preclude judicial review, Congress expects the courts to grant relief when an agency violates a statutory command. The Secretary's claim that Congress precluded review here founders for a simple reason: The Secretary points to no evidence that supports his theory that when Congress enacted §2954 it intended to render the provision unenforceable.

III. Plaintiffs have standing. Plaintiffs have been denied access to information to which they are entitled under a statute and thus have suffered injury-in-fact that gives rise to Article III standing. *Raines v. Byrd*, 521 U.S. 811 (1997), is not to the contrary. The injury found insufficient in *Raines* was the denial of a claimed right shared by all members of Congress not to have votes on appropriations matters diluted by the President's exercise of the line item veto. Rather than alleging "personal injury," the *Raines* plaintiffs had alleged only an abstract loss of political power. 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 a concrete one conferred by statute on a discrete

and identifiable group of legislators to receive particular information. Nothing in *Raines* disturbs settled law that the deprivation of a statutory right gives rise to a justiciable claim.

IV. The "equitable discretion" doctrine has no bearing on this case. The doctrine was applied only to avoid constitutional claims raised in litigation between coordinate branches of government or disputes within Congress. Here, there is no constitutional issue to be avoided. The Secretary has made no privilege claim in this case, and following this Court's ruling in *California Assembly*, no such claim could plausibly be asserted. Because the Secretary's objections do not cross a constitutional threshold, the equitable discretion doctrine does not apply. Nor is the doctrine still viable. The equitable discretion doctrine was a vestige of the D.C. Circuit's generous congressional standing rulings, rulings swept away by *Raines v. Byrd*. Post-*Raines*, the D.C. Circuit focuses solely on standing; equitable discretion is no longer even discussed. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000). There is no reason to resurrect this doctrine here.

V. Section 2954 passes constitutional muster. The Secretary does not dispute that Congress may constitutionally empower anyone to demand agency records under FOIA, FACA, FECA, and other disclosure statutes, and to bring suit

to compel disclosure if the agency balks. But the Secretary contends that Congress is constitutionally forbidden to accord its Members comparable power. Nowhere does the Secretary explain this gaping anomaly. In fact, nothing in the Constitution forbids Congress from delegating fact-gathering power to specific legislators. Nor does the Constitution require Congress to establish its investigative procedures by rule, rather than statute. On the contrary, the Supreme Court's decisions recognize that the Constitution gives Congress flexibility in determining its procedures for oversight and fact-gathering.

Accordingly, the judgment below should be affirmed.

ARGUMENT

I. SECTION 2954 COMPELS THE SECRETARY TO SUBMIT THE REQUESTED CENSUS DATA.

Statutory language is the starting point in any case of statutory construction. *Barnhart v. Sigmon Coal Co.*, 122 S.Ct. 941, 950 (2002). The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (citation omitted). "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Id.* (quotation omitted).

Even a cursory reading of §2954 confirms the district court's conclusion

that its "plain language" is unambiguous. RE 134. Section 2954 states that on request an executive agency "shall" submit "any" information relating to "any matter within the jurisdiction of the committee." The statute uses language of command — "shall" — not discretion. The agency is not free to decide whether to respond. It must. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001); *Escoe v. Zerbst,* 295 U.S. 490, 493 (1935). Nor is there doubt that the statute confers broad access to agency records. Its repeated use of the word "any"— agencies must submit "any" information relating to "any" matter within the Committee's jurisdiction — underscores the breadth of authority it gives Committee Members. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997); *United States v. James,* 478 U.S. 597, 604 (1986). There is no ambiguity in §2954, and even the Secretary's lawyers make no effort to invent one.

Instead, the Secretary argues that §2954's legislative history shows that Congress intended it to cover only information that would have been provided in one of the 128 discontinued reports and that Congress' drafting process went terribly awry. But this argument collides with the settled rule that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989). *Accord Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v.*

Daas, 198 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 999 (2000); *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 750 (9th Cir.), *cert. dismissed*, 528 U.S. 924 (1999). As the Supreme Court recently warned, "parties should not seek to amend [a] statute by appeal to the Judicial Branch." *Barnhart,* 122 S.Ct. at 956. But amendment is just what the Secretary urges.

Comparing the Secretary's proposed revisions with the text of §2954 shows just how invasive the Secretary's surgery would be. As written by Congress, §2954 requires that an executive agency "shall submit information requested of it relating to any matter within the jurisdiction of the committee." As rewritten by the Secretary's lawyers, §2954's operative language is replaced by the following: on request, an agency "shall submit any information that would have been contained in one of the reports required by legislation repealed by this Act in 1928."[3]

The Secretary's suggestion that §2954 is limited to the subjects of the discontinued reports also ignores a crucial feature of the statute: §2954 defines its own limits. Section 2954 says that agencies must submit information where, but

---

[3] This formulation puts aside the Secretary's other proposed statutory revision, which is to substitute the permissive "may" for the mandatory "shall" on the theory that Congress understood when it enacted §2954 that it was unenforceable.

only where, such information falls "within the jurisdiction of the committee." The Secretary's rewriting of §2954 to cover only information in the discontinued reports renders this language surplusage, violating the rule that courts are "obliged to give effect, if possible, to every word Congress used." *See, e.g., Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979); *accord Stone v. INS*, 514 U.S. 386, 397 (1995). The Secretary's brief makes no effort to justify these substantial alterations to §2954.

The Secretary also distorts §2954's legislative history. As the Secretary observes, one purpose of §2954 was to preserve Congress' access to information in the discontinued reports. S. Rep. No. 70-1320, 4 (1928); H.R. Rep. No. 70-1757, 6 (1928). But the Secretary's attempt to translate that purpose into a limitation on §2954 confuses Congress' objectives and motivations with the *means* it used to achieve them. In this case, the means chosen was a clear statutory requirement that agency submit any requested information. The particular concerns that "catalyzed the enactment" of the statute do "not define the outer limits of the statute's coverage" — its language does. *New York v. FERC*, 122 S.Ct. 1012, 1025 (2002).

In any event, preserving access to information in the discontinued reports was not the only, or even main, purpose of §2954. As the legislative history

emphasizes, the information in those reports generally "serve[d] no useful purpose," was "of no value," "useless," "unnecessary," "valueless," "superseded," "out of date" and "obsolete." S. Rep. No. 70-1320; H.R. No. 70-1757. It would have been pointless for Congress to enable its Members to obtain information formerly contained in the discontinued reports and nothing more.

Rather, the Act's purpose — reflected in its text *and* legislative history — was to overhaul the process by which the two oversight committees obtained information from agencies. The Reports make clear that the bill's drafters knew the broad language of section 2 would extend well beyond the "useless" information contained in the discontinued reports. The Senate Report states that section 2 "requires every department of the Government, upon request of the Committee on Expenditures in the Executive Department [now the Committee on Government Reform], or any seven members thereof, to furnish any information requested of it relating to any matter within the jurisdiction of the committee." S. Rep. No. 70-1320, at 4.

This sentiment is amplified in identical language in both Reports, which note that the practice of enacting reporting requirements was burdensome and wasteful, and should be replaced with a more flexible system:

> The reports come in; they are not valuable enough to be

> printed, they are referred to committees, and that is the end of the matter. The departmental labor in preparation is a waste of time and the files of Congress are cluttered up with a mass of useless reports. *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 as to bring out the special information desired.*

Id. at. 4; H.R. Rep. No. 1757, at 6 (emphasis added). Thus, the Reports evidence a clear preference for having legislators make specific requests for information rather than compelling the standardized production of "useless reports."

Nor can the Secretary's argument be squared with the way §2954 has been interpreted by the courts, or even the Executive Branch outside the litigation context. Section 2954 has not been directly construed in court, but it has twice been mentioned in FOIA litigation. In *Leach v. Resolution Trust Corp.*, 860 F.Supp. 868 (D.D.C. 1994), the court declined to review the request of a lone congressman, Representative James Leach, who challenged the withholding of certain privileged Whitewater-related records, contending that even privileged records could not be withheld from Congress under FOIA. The court stated that other avenues for obtaining the information, including §2954, remained open to Members of Congress: "[T]he House has in fact provided alternative procedures through which small groups of individual congressmembers can request

information without awaiting formal Committee action." *Id.* at 876 n.7 (citing §2954). It also noted that both the Resolution Trust Corporation and the Office of Thrift Supervision had acknowledged that disclosure could be compelled under §2954. *Id.* In *Soucie v. David*, 448 F.2d 1067, 1072 n.9 (1971), the D.C. Circuit observed that "Congress has frequently exercised the . . . power [to compel disclosure of agency records] in statutes requiring executive officers to transmit information to Congress," and cited §2954 as an example. Although neither case relied on §2954, both support a plain understanding of its terms.

Outside the judicial arena, §2954 has been used to compel agencies to submit information well beyond the scope of the 128 discontinued reports. For example, in September 1994 twelve Republican (then minority) members of the House Government Operations Committee requested information regarding the failure of Madison Guaranty Savings and Loan from the Office of Thrift Supervision. The agency complied, even though it questioned whether the matter fell within the Committee's jurisdiction and whether disclosure would impair an Independent Counsel's ongoing investigation of Madison. RE 24-29. Similarly, in April 1994, Republican Committee Members requested documents regarding a Texas savings and loan from the FDIC. The FDIC responded that "[a]s eleven members of the Committee on Government Operations have requested the

documents pursuant to 5 U.S.C. §2954 . . . we are making the documents available for review." RE 30-34. Additionally, in August 1993, Committee members requested documents on the equal employment opportunity complaint resolution process from the Merit Systems Protection Board. The agency responded that "[y]our statutory authority under 5 U.S.C. §2954 compels [the agency] to disclose the information and material requested by the seven members of the Committee." RE 35-40.

Only the Department of Justice has taken a narrower view. In 1970, seven members of the Government Operations Committee asked the White House Office of Science and Technology for a report on the development of a supersonic transport aircraft. Then-Assistant Attorney General William Rehnquist counseled that §2954's legislative history shows that "its purpose was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress" and "not to compel the Executive branch to make confidential reports available to a small number of Congressmen." RE 42-44. The Department of Justice has reaffirmed this narrow interpretation of §2954. *See, e.g., Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, The Congressional Right to Information Act* (Oct. 23, 1975) (RE 46-51).

These self-interested interpretations of §2954 are neither surprising nor

relevant — the Justice Department naturally construes the executive's obligations under the statute as narrowly as possible — and are certainly not entitled to deference. *See Crandon v. United States,* 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring). More fundamentally, the legislative history argument on which these opinions were based is refuted above. Nor is the argument more persuasive for having been stated by then-Assistant Attorneys General Rehnquist and Scalia — particularly since it is completely contrary to the approach to statutory construction that they have since successfully championed on the Supreme Court. Because the Secretary's argument depends on legislative history, "the last hope of lost interpretative causes," *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J. concurring) — and an incomplete reading of the history at that — this Court should decline the Secretary's plea to rewrite §2954.[4]

---

[4] *Chief Justice* Rehnquist has recently admonished that "reference to legislative history is inappropriate when the text of the statute is unambiguous." *Department of HUD v. Rucker,* 122 S.Ct. 1230, 1234 (2002). And *Justice* Scalia has emphasized that even if Congress did not envision a particular statutory application, "in the context of an unambiguous statutory text that is irrelevant." *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212 (1998). Rather, "[t]he best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. When that . . . is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the . . . enactment process." *West Va. University Hospitals v. Casey*, 499 U.S. 83, 98 (1991) (Scalia, J.). *See also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The*

(continued...)

II. PLAINTIFFS' CLAIMS ARE REVIEWABLE UNDER BOTH THE APA AND THE MANDAMUS STATUTE.

A. The Secretary Waived His Reviewability Arguments

The Secretary's principal argument is that plaintiffs' claim is nonjusticiable because §2954 does not create judicially enforceable rights. The Secretary did not raise this argument until after the district court ruled for plaintiffs. Even then, the Secretary *explicitly conceded* that the court had subject matter jurisdiction: "In this action, 28 U.S.C. §§1331 and 1361 provide the basis for the Court's exercise of subject matter jurisdiction." Reconsideration Mem. at 8 n.5. He argued only that plaintiffs could point to no "federal statute that creates an express or implied cause of action in their favor." *Id.* Under settled law, the failure to timely raise a defense in the district court constitutes a waiver and precludes assertion of that defense on appeal. *Underwood Cotton Co. v. Hyundai Merchant Marine Inc.*, 288 F.3d 405, 410 n.8 (9th Cir. 2002) (collecting cases); *Novato Fire Prot. Dist. v. United States,* 181 F.3d 1135, 1142 n.6 (9th Cir. 1999).[5]

---

[4](...continued)
Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION 3-25, 29-37 (Amy Gutmann ed., 1997) (arguing that legislative history is best ignored).

[5] The Secretary's disregard of Ninth Circuit Rule 28.25, which requires the appellant to "state where in the record on appeal the issue was raised and ruled (continued...)

The Secretary does not argue that the district court abused its discretion by denying his motion. Rather, exploiting the "many, too many meanings" of the word "jurisdiction," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998), the Secretary does an about-face and maintains that the reviewability argument goes to subject matter jurisdiction and may not be waived. This argument is incorrect.

To begin with, the Secretary is wrong in contending that labeling an argument "jurisdictional" insulates that argument from waiver. Jurisdictional arguments, except those relating to subject matter jurisdiction, are waivable. As the Supreme Court recently explained, even though personal jurisdiction is an "essential element of the jurisdiction" without which a court "is powerless to proceed," "restrictions on a court's jurisdiction over the person are waivable." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583-84 (1999). The question here is not whether the reviewability arguments are "jurisdictional" in some sense, but whether they go to subject matter jurisdiction.

Steel Company answers that question with a definitively no: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause

---

[5](...continued)
on," buttresses our point that many of the arguments he presses on appeal were not properly raised below.

of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." 523 U.S. at 89 (emphasis in original). Arguments about whether the plaintiff has a viable cause of action go to the merits, not to jurisdiction. *Id.* The Court held that subject matter jurisdiction exists if "the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* (quotation omitted). Applying that holding here, it is clear, as the Secretary conceded below, that his arguments go to the merits of a defense that the plaintiffs have no cause of action under the APA, not to the power of the court (*i.e.*, subject matter jurisdiction) to decide if plaintiffs have stated a claim. Thus, this defense has been waived.

The Secretary's failure to identify a single case holding that APA reviewability arguments are not waivable fortifies that conclusion. The Secretary cites four cases involving whether agency action was "committed to agency discretion by law" and therefore non-reviewable. None addresses waiver. *International Longshoremen's & Warehousemen's Union v. Meese,* 891 F.2d 1374, 1377 (9th Cir. 1989), simply examines subject matter jurisdiction *sua sponte* and finds the plaintiff's claim reviewable. *Newman v. Apfel,* 223 F.3d 937, 942-43 (9th Cir. 2000), is even less helpful to the Secretary because, in rejecting the

agency's non-reviewability argument, the court treats the question as one of statutory construction, not jurisdiction. All that remain are two D.C. Circuit decisions, *Oil, Chemical and Atomic Workers Int'l Union v. Richardson,* 214 F.3d 1379, 1381 (2000) and *Baltimore Gas & Elec. Co. v. FERC,* 252 F.3d 456, 458 (2001), both of which simply used the term "jurisdiction" in dismissing challenges to agency enforcement discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985). Neither case addresses waiver, and neither cites, let alone addresses, *Steel Company.* These cases provide no support for the Secretary's non-waiver theory, and this Court should not countenance the Secretary's thinly veiled effort to evade the restriction that forbids all litigants — even governmental parties — from raising matters not implicating subject matter jurisdiction for the first time on appeal.

B. Plaintiffs' Claims Are Reviewable.

The Secretary's argument that §2954 creates no judicially enforceable rights is based on a misreading of the law of reviewability and an inexplicable distortion of plaintiffs' position. The Secretary claims, without citation, that "Plaintiffs do not contend that Congress created a judicially enforceable right to compel information when it enacted Section 2954." Not so. Plaintiffs have consistently argued that when Congress enacted §2954 in 1928 it was enforceable in court

through mandamus. In fact, plaintiffs' claims are reviewable for two reasons: first, the Secretary's withholding of the Adjusted Data is final agency action reviewable under the APA; second, mandamus review is available, because the Secretary has failed to perform a non-discretionary duty and plaintiffs have a clear right to relief.

1. Plaintiffs' Claim Is Reviewable Under the APA.

The Secretary's APA argument proceeds as if the principle that agency action is presumptively reviewable was not established by the Supreme Court thirty-five years 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 Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995); *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). Thus, 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 APA, 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 a statute prohibits review, *id.* §701(a)(1), or where "agency action is committed to agency discretion by law." *Id.* §701(a)(2). Section 10(a) 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." *Id.* §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, and in section 10(e), which states that a "reviewing court shall — (1) compel agency action unlawfully withheld or unreasonably delayed . . .." *Id.* §706. The Secretary's denial of plaintiffs' §2954 request is reviewable under the APA because it is "agency action," it is "final," and it is not within the APA's exceptions to judicial review.

First, the Secretary's refusal to produce the requested information constitutes "agency action" as 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). This sweeping definition "ensure[s] 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 Chrysler Corp. v. Brown,* 441 U.S. 281, 317-19 (1979) (disclosure of records is agency action); *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). Just as an agency's refusal to honor an information request under FOIA, FACA, FECA, and the Government in the Sunshine Act constitutes reviewable agency action, so too does the Secretary's denial here. *See Public Citizen v. DOJ*, 491 U.S. 440, 449-50 (1989); *FEC v. Akins*, 524 U.S. 11, 21 (1998).[6]

Second, the agency's action is final. *Bennett v. Spears*, 520 U.S. 154, 177-78 (1997), explains 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.)

---

[6] The Secretary argues that his denial of plaintiffs' request is not "agency action" because cases like *Guerrero v. Clinton,* 157 F.3d 1190, 1195-96 (9th Cir. 1998), reject challenges to an agency's failure to file required reports with Congress. *But see Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037-39 (D.C. Cir. 2002) (agency report to Congress is reviewable final agency action). But these cases are irrelevant. Section 2954 was enacted to repeal reporting requirements, not enshrine them, and it operates the same way as many statutes requiring agencies to provide information on demand.

Third, the plaintiffs are "adversely affected" and "aggrieved" by the Secretary's refusal to carry out his duties. *See FEC v. Akins*, 524 U.S. at 19-20 (the word "aggrieved" in §702 is associated "with a congressional intent to cast the standing net broadly").

Thus, unless a "statute[] precludes judicial review" or compliance with §2954 is "committed to agency discretion by law," the Secretary's refusal to provide the Adjusted Data is subject to judicial review under the APA. 5 U.S.C. §§701(a)(1) & (2). As we show below, neither exception to the APA's strong presumption of judicial review applies in this case.

2. *The Secretary's Non-Reviewability Arguments Under the APA Are Without Merit.*

Without addressing these established principles, the Secretary says that plaintiffs' claims are unreviewable for two reasons: First, they were not reviewable when Congress enacted §2954, and the subsequent enactment of the APA "cannot transform[] previously unenforceable information requests into judicially enforceable subpoenas" (Sec. Br. at 14); and second, the tradition of negotiation rather than litigation to resolve information disputes between Congress and the Executive Branch "make[s] 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" (Sec. Br. at 19). Neither argument is on target.

A. To begin with, the Secretary's argument that agency action unreviewable before the passage of the APA could not have become reviewable with the APA's enactment is completely unsupported and, indeed, nonsensical. In fact, by broadly waiving sovereign immunity and granting any aggrieved person the right to sue to set aside unlawful agency action, the APA undoubtedly made reviewable many agency actions that were not previously subject to judicial review. But in any event, the central premise of the Secretary's argument — that §2954 claims were not reviewable before the enactment of the APA — is dead wrong.

Prior to the APA, plaintiffs routinely sought to compel agency compliance with nondiscretionary duties by seeking writs of mandamus. *Virginian Railway Co. v. System Federation No. 40,* 300 U.S. 515, 545 (1937); *Work v. U.S. ex rel. Rives,* 267 U.S. 175, 177 (1925); *U.S. ex. rel. Kansas City Southern Railway Co. v. ICC*, 252 U.S. 178, 187 (1920). Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), courts have recognized the availability of mandamus to compel federal officers to perform nondiscretionary duties. *See also Kendall v. U.S. ex rel. Stokes,* 12 Pet. 524, 37 U.S. 524 (1838). Mandamus litigation was commonplace

when §2954 was enacted — a fact well known to Congress. *See, e.g., Traynor v. Turnage,* 485 U.S. 535, 546 (1988) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.") (citation omitted). Indeed, mandamus cases were so common that the Supreme Court decided more than one hundred of them during the 1920s.[7]

The enactment of the APA essentially re-codified this practice. The Attorney General's Manual on the APA (1947) notes that the provision of the APA "authorizing a reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed,' appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc. v. Brown*, 138 F.2d 278 (E.C.A. 1943), certiorari denied, 320 U.S. 797." The Manual's references are to mandamus: Section 262 was the forerunner of 28 U.S.C. §1361, and *Safeway Stores* was a mandamus case.

Following the APA's enactment, a request for an injunction based on the APA and the general federal question statute, as plaintiffs sought here, is

---

[7] Mandamus cases were so prevalent that, just in calendar year 1928, the Supreme Court decided seven mandamus cases: *Delaware, Lackawanna & Western R.R. Co. v. Rellstab,* 276 U.S. 1 (1928); *Ex parte Collins*, 277 U.S. 565 (1928); *Ex parte Williams*, 277 U.S. 267 (1928); *Ex parte Public National Bank,* 278 U.S. 101 (1928); *Jordan v. Tashiro*, 278 U.S. 123 (1928); *Ex parte Williams,* 276 U.S. 597 (1928); *Ex parte Steidle,* 277 U.S. 577 (1928).

analogous to a request for a writ of mandamus 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). Contrary to the Secretary's argument, therefore, the relief being sought in this case is exactly parallel to the relief that could have been sought under mandamus in 1928.

B. As a final line of attack against reviewability, the Secretary contends that "Congress intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch." Secretary's Br. at 19. This argument defies logic. Most fundamentally, it depends on the submission that, when Congress enacted §2954, it intended to render the provision a toothless tiger that agencies were free to ignore with impunity. It is simply not credible to suggest, as does the Secretary, that Congress in §2954 deliberately vested in agencies complete and unreviewable discretion to decide whether to honor requests made under the statute. That submission is war with the plain text of §2954.

Nor is there is a syllable in the text of §2954 or its legislative history that supports the Secretary's theory that §2954 precludes judicial review. The Secretary does not contend otherwise. The Secretary's preclusion argument does

not even mention the text of §2954 or the reports accompanying it. Rather, his argument is grounded on sources wholly extrinsic to the Act. That alone dooms the Secretary's preclusion argument. *See Bowen*, 476 U.S. at 673 (preclusion requires convincing evidence of "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'") (citations omitted).[8]

The Secretary's principal preclusion argument is that reading §2954 to

---

[8] To find support for his position, the Secretary strays so far afield that he relies on the "Congressional Right To Know Act," an unenacted 1973 proposal. Apart from the impropriety of using an unenacted proposal to interpret a statute enacted by a different Congress forty-five years earlier, *see Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring), the Secretary misstates the proposal. The Secretary (at 21) claims that the bill "would have permitted judicial enforcement of requests made by a minority of any congressional committee or subcommittee" but "only with the approval of a majority of the entire House or Senate." It is true that proposed §341(b) was modeled on §2954 and would have given two-fifths of the members of any committee or subcommittee the power to request any information within the committee's jurisdiction. S. Rep. No. 93-612, 16 (1973). But the judicial review provision the Secretary refers to related only to materials withheld on privilege grounds under different sections of the Act. Where privilege claims were asserted, litigation by the House and Senate was authorized. But there was no comparable provision to enforce §341(b) because Congress thought it would *already* be enforceable and that new authority was needed only to permit Congress to wrest control of litigation over privilege claims from the Justice Department. The Senate Report states emphatically that "members acting together [under §341(b)] *are empowered to compel* the production of specific items of information they judge necessary to the effective execution of their duties." *Id.* at 11 (emphasis added).

create enforceable rights would mark a sharp and destabilizing departure from existing practice. Even if this argument were relevant to the preclusion inquiry (it is not), the Secretary's contention falls wide of the mark. In fact, the framework of §2954 makes eminent sense. A variety of House rules and federal statutes confer rights on minority Members of the House.[9] Section 2954 was similarly envisioned as a tool of the minority Members of the two main congressional oversight committees. *See Leach,* 860 F.Supp. at 876 n.7; *see also* RE 139 (§2954 "might have been contemplated by Congress as an antidote to the possible domination of the legislative body by members of an opposing political party"). Members of the majority do not need §2954 because they can always resort to the subpoena process to gather information, and can plausibly use the subpoena threat as leverage with the Executive Branch over information demands. But for minority Members of the oversight committees, §2954 provides an essential means of obtaining information necessary to fulfill their duties.

Section 2954 was carefully crafted to accomplish its purpose. The selection

---

[9] For instance, minority Members have the right to call a day of committee hearings with minority witnesses. House Rule XI, cl.2(c)(2). Minority Members also have the right to appoint members to commissions and boards. *See, e.g.,* Census Monitoring Board, Pub. L. 105-119, 111 Stat. 2843; Amtrak Reform Council, Pub. L. 105-134, 111 State. 2579. Moreover, it takes only a 1/3 vote on any committee to block the committee from awarding immunity from prosecution. 18 U.S.C. §§6002, 6005.

of the committees was not random: When §2954 was enacted, these were the two committees in Congress charged with oversight of executive agencies. Nor was the choice of seven Members for the House Committee and five for the Senate Committee arbitrary. The number selected makes it clear that the provision was intended to empower groups of Committee Members to gather information within the Committee's jurisdiction independently of the majority's good graces. And until now, §2954 has served its purpose well. To the extent that there has been an abrupt and destabilizing departure from practice here, it is by the Secretary, who did not even acknowledge the request until he was sued and now contends he is free to ignore §2954.

Moreover, if history is relevant to the Court's inquiry, the Secretary's presentation on the information-gathering power of Congress is tellingly incomplete.[10] One key omission is FOIA. The long-standing existence of FOIA demonstrates the futility of the Secretary's effort to portray this case as implicating separation of powers concerns. Under FOIA, any agency record must be disclosed

---

[10] The same flaw runs through the brief submitted by the misnamed "Bipartisan Legal Advisory Group of the U.S. House of Representatives," misnamed because only Republicans support the brief, a fact buried in its first footnote. Although that brief mentions FOIA, it does not address its significance. But FOIA is crucially important, because all the arguments the brief makes about why the House Republican Leadership would prefer §2954 to be unenforceable could be made about FOIA as well.

to any person on request, subject to nine specific exemptions. 5 U.S.C. §§552(a)(3) and (b)(1)-(9). Members of Congress, just like ordinary citizens, may invoke FOIA to obtain records. 5 U.S.C. §552(d); *Murphy v. Department of the Army,* 613 F.2d 1151, 1156 & n.12 (D.C. Cir. 1979). Plaintiffs could have sought the Adjusted Data under FOIA. They elected not to because §2954 remains the preferred information-gathering tool for Committee Members and because FOIA's procedural requirements delay access. 5 U.S.C. §552(a)(3). But had plaintiffs proceeded via FOIA, there would be no separation of powers concerns for the reason the Secretary obscures — there is nothing sensitive about these records and releasing them would not harm executive prerogatives.

Nor is it accurate to suggest, as does the Secretary (at 21-22), that Congress envisions the subpoena process as its exclusive means of obtaining Executive Branch records. In fact, congressional subpoenas are a crude tool to compel production of agency records. Historically, congressional subpoenas were enforced only by the Executive Branch through criminal contempt proceedings, raising the unlikely specter of Executive Branch lawyers prosecuting Executive Branch officials. 2 U.S.C. §§192, 194. Not surprisingly, no such proceeding has ever been brought. *See Soucie v. David,* 448 F.2d at 1072 n.9. True, the threat of a subpoena enforcement battle remains a powerful tool to force Executive Branch

disclosures. But that threat exists so that privilege claims can be tested when they affront the majority party, not for obtaining the kind of records involved in this case. Thus, it made perfect sense for §2954 to move away from the Executive Branch- and majority-dependent subpoena model, just as a later Congress expected FOIA to provide another ready avenue to obtain agency records.

The Secretary's final argument — that Congress "committed to agency discretion by law" the power to decide whether to honor §2954 requests — warrants only a brief response. It is refuted by the plain language of §2954 which, using the command "shall," confers no such discretion. Undeterred, the Secretary relies heavily on *Heckler v. Chaney*, 470 U.S. 821 (1985), which held unreviewable the FDA's decision not to bring an enforcement action. *Heckler* belies the Secretary's position here. *Heckler* reaffirmed the Court's holding in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), which emphasized that the "committed to agency discretion" exception to judicial review is "very narrow," "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Heckler,* 470 U.S. at 830. Enforcement decisions, *Heckler* noted, are "generally committed to an agency's absolute discretion" because they involve assessment of agency resources and policy preferences that are rarely etched in stone, making them

unsuitable for judicial review. *Id.* at 831. Section 2954, by contrast, clearly establishes "law to apply." It identifies those Members of Congress authorized to make requests, defines what information they may request, and obligates agencies to comply. These are standards any court can apply, and they negate any suggestion that Congress entrusted to agencies the unilateral power to decide whether to comply with §2954 requests. *See Volpe*, 401 U.S. 410-413.

3. *Plaintiffs' Claim Is Reviewable Under Mandamus.*

Mandamus relief also remains available to plaintiffs. 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 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). *Accord 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).[11]

---

[11] The Secretary argues that mandamus is unavailable to a plaintiff seeking to use mandamus as a substitute for a non-existent implied private right of action. (continued...)

Assuming that "there is no other adequate remedy available to plaintiffs," *Swan*, 100 F.3d at 977, the test for mandamus relief is plainly met here. The only real question is whether §2954 imposes a nondiscretionary duty on the Secretary — if it does, that duty may be enforced by way of mandamus. *Id.*; *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996). In light of §2954's use of "shall" — the language of command — mandamus review is plainly available here, in the event that APA review is not. *See Swan*, 100 F.3d at 980-81. Thus, the plaintiffs have stated a valid claim for relief in this case.

III. PLAINTIFFS HAVE STANDING

The Secretary initially conceded plaintiffs' standing and reversed field only after the district court ruled in plaintiffs' favor. Nonetheless, because the Court has an independent duty to inquire into standing, we show that plaintiffs have sustained injury-in-fact and that *Raines v. Byrd* does not undermine their standing.

---

[11](...continued)
(Br. at 24 n.9). But the Ninth Circuit has declined to follow the cases the Secretary relies on and has suggested that, even in the absence of an implied right of action, mandamus might lie where the duty to act on the plaintiff's behalf is clear. *Barron v. Reich*, 13 F.3d 1370, 1374-76 (1994). *See also Campos v. INS*, 62 F.3d 311 (9th Cir. 1995); *Hernandez-Avalos v. INS*, 50 F.3d 842, 845-46 (10th Cir. 1995). Moreover, as explained above, plaintiffs are not seeking to have a private action implied in this case.

A. Plaintiffs Have Sustained Injury-In-Fact.

To have Article III standing, "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). Plaintiffs' injury is unquestionably traceable to the Secretary's conduct and would be redressed by the relief the district court granted. Thus, the only standing issue is whether plaintiffs satisfy the injury-in-fact requirement.

The answer 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) (quotation omitted). Accordingly, the Court has often held that deprivation of a statutory right to access to information constitutes injury-in-fact. *E.g., FEC v. Akins*, 524 U.S. at 21 ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"); *Public Citizen v. Department of Justice,* 491 U.S. at 449-50 ("those requesting information under [disclosure statutes] need [not] show more than they sought and were denied specific agency records"); *Havens Realty v. Coleman*, 455 U.S. 363, 373-74 (1982) (deprivation of truthful information about housing availability constitutes injury-in-fact).

Under *Akins, Public Citizen* and *Havens Realty*, plaintiffs have suffered injury-in-fact and have standing. They have invoked a statute that entitles them to agency records, and they have shown "that they sought and were denied specific agency records." *Public Citizen,* 491 U.S. at 449. No more is required.

B. *Raines v. Byrd* Does Not Undermine Plaintiffs' Standing.

Ignoring this line of cases, the Secretary argues that plaintiffs lack standing under *Raines v. Byrd*, 521 U.S. 811 (1997). Nowhere does the Secretary acknowledge the fundamental distinction between this case and *Raines* and the other congressional standing cases he cites: This case alone involves the enforcement of a statutory right that runs directly to the plaintiffs, and not to Members of Congress generally. The plaintiffs are not seeking to enforce abstract principles, protect their votes against dilution, or ensnare the court in an intramural dispute with their colleagues. Plaintiffs seek only what litigants often seek from courts: an order compelling an agency official to comply with a statute passed by Congress and signed into law by the President.

Raines is not to the contrary. In *Raines*, the Court held that six members of Congress lacked standing to challenge the Line Item Veto Act before its application. The Act authorized the President to cancel any spending item or tax benefit from a bill after signing it, a decision that could be overridden only by a

"disapproval bill" passed with a two-thirds majority of each House of Congress. The six Members alleged they had suffered cognizable injury because, regardless of whether the line item veto was ever exercised, their votes would be less "effective" than before. They claimed 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 concluded that the plaintiffs had not asserted injury that was "personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820. The Members of Congress had "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 deprived of a vote, but merely alleged that the force of their vote was diluted. The Court distinguished *Coleman v. Miller,* 307 U.S. 433 (1939), which upheld legislator standing where the actions of Kansas' lieutenant governor had completely nullified the legislators' votes to block the ratification of the proposed Child Labor Amendment to the Constitution. The *Raines* Court

concluded 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 in the sense that, but for the challenged action, their "votes would have been sufficient to defeat (or enact) a specific legislative act." *Id.* at 823.

The Secretary tries to shoehorn this case into *Raines*' mold, claiming that the injuries complained of here are "institutional injuries" and that plaintiffs "have no 'personal stake' in obtaining the requested information." Secretary's Br. at 29. That description of plaintiffs' injuries is off-target. In contrast to the *Raines* plaintiffs, the plaintiffs here do not allege an abstract loss of political power through dilution of the legislative process. The injury here is personal, not to a generalized interest shared with Congress as a whole. The injury is the violation of a statutory entitlement to information that runs to Members of a single Committee in each House of Congress 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 claim that the injury here is the dilution or deprivation of their

votes. Rather, they sue to enforce a statutory right. Their injury is not "wholly abstract and widely dispersed" as in *Raines*, but is instead "personal, particularized, [and] concrete." *Id.* at 829.

Nor does *Raines* hold that legislators can never have standing, as the Secretary suggests. *Raines* reaffirms *Powell v. McCormack*, 395 U.S. 486 (1969), which holds that a justiciable question is presented where a Member of Congress states a claim that he has a distinct legal entitlement, even where that entitlement is dependent on his congressional status. *Raines* also reaffirms, not overrules, *Coleman*, which *upheld* legislator standing. This case is much closer to *Coleman*. The *Coleman* plaintiffs had standing because, taken together, their votes "would have been sufficient" to bring about the result they sought, assuming they were right on the merits. 521 U.S. at 823. That is exactly the case here. Assuming plaintiffs are right on the merits (as the Court must do in assessing standing, *see Steel Co.,* 523 U.S. at 89), plaintiffs' request "would have been sufficient" to require the production of the Adjusted Data. *Raines, Powell* and *Coleman* thus support, not undercut, plaintiffs' standing.[12]

---

[12] *Raines*'s treatment of *Coleman* also shows that the Secretary goes too far in arguing that a grievance shared by all members of Congress would be fatal for standing purposes. Suppose that every member of the Kansas legislature had voted against the Child Labor Amendment, only to have the lieutenant governor

(continued...)

Equally hollow is the Secretary's suggestion that legislators have less standing to sue than other individuals. Just like the plaintiffs in *Akins*, *Public Citizen,* and *Havens Realty*, the plaintiffs here sue to redress a direct and particularized rejection of an entitlement specifically granted to them by law — 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 request denied. By contrast, the *Raines* plaintiffs were no different from their colleagues: They had "not been singled out for specially unfavorable treatment as opposed to other members." *Id.* at 821.[13]

Finally, *Raines* noted the availability of alternative remedies such as further

---

[12](...continued)
nullify their votes. *Raines* does not hold that an interest shared with 535 people cannot confer standing. *See Public Citizen, supra*, 491 U.S. at 449-50 (rejecting argument that because many may file FOIA requests for same records, claim is a non-justiciable generalized grievance). The *Raines* Court was not troubled just because the injury was "dispersed," but because it was "wholly abstract" and not "sufficiently concrete." 521 U.S. at 829. "So 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).

[13] Indeed, if the Secretary's theory — that any injury asserted by a member of Congress is an institutional one not "personal" to the member — were correct, members of Congress would have no standing to use FOIA to obtain agency records, to invoke FACA to obtain advisory committee records, or to use other disclosure laws. They would be rendered second-class citizens. That is not the law. *E.g., EPA v. Mink,* 410 U.S. 73 (1973).

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, by contrast, the plaintiffs are not complaining of an inability to persuade fellow legislators to pass or reject particular legislation. They seek to enforce an existing statutory right and challenge the Secretary's refusal to provide them with information as required by law. Nor are there alternative means available to the plaintiffs to vindicate this specific statutory right. The particularized harm is directed to the plaintiffs alone, and the power to redress it lies with this Court.[14]

---

[14] The Secretary (at 27) notes that the *Raines* Court attached "importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action and that both Houses actively oppose their suit." 521 U.S. at 829. This case is different because here Congress has specified the Members who are authorized to invoke §2954 in the provision itself, and because plaintiffs are not claiming an injury redressable by Congress.

IV. THE "EQUITABLE DISCRETION" DOCTRINE DOES NOT APPLY.

Among the litany of defenses raised by the Secretary is the one he actually made below: that the D.C. Circuit's doctrine of "equitable discretion" bars judicial review. The Secretary's reliance on the doctrine is misguided.

To begin with, every one of the D.C. Circuit's "equitable discretion" cases involved an effort by one branch of government (or its members) to adjudicate an inter- or intra-branch dispute of clear constitutional import. RE 131 (collecting cases). There is no constitutional issue to be avoided here. This case does not involve the kind of thorny constitutional inter-branch conflicts that were at the core of cases like *United States v. AT&T Co.*, 551 F.2d 384 (D.C. Cir. 1976), *appeal after remand*, 567 F.2d 121 (D.C. Cir. 1977), which involved the Justice Department's effort to block a congressional investigation into warrantless national security wiretaps, or *United States v. House of Representatives*, 556 F.Supp. 150 (D.D.C. 1983), where the Justice Department sought to block the House from proceeding with criminal contempt charges against EPA Administrator Anne Gorsuch. There has been no claim of privilege in this case, and this Court's ruling in *California Assembly* only underscores our point that the Secretary's objection to the release of these records is not rooted in constitutional

privilege. Because the Secretary's objections fail to cross a constitutional threshold, the equitable discretion doctrine cannot apply. There is no separation of powers issue here.

Nor does this case implicate an *intra*-branch conflict, as the Secretary contends. Plaintiffs' dispute is not with congressional colleagues. Central to the decision in *Raines* was the idea that the ruling would not "deprive[] Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach)." 521 U.S. at 829. But plaintiffs do not seek to enact, amend or repeal legislation. They seek to enforce an existing statutory command against a federal officer, and nothing in *Raines* or the equitable discretion cases suggests that, under these circumstances, courts must stay on the sidelines. As then-Judge Scalia stressed in his concurrence in *Moore v. House of Representatives,* 733 F.2d 946 (D.C. Cir. 1984), once a court is satisfied that the plaintiff has standing and the case is otherwise justiciable, Justice Marshall's admonition in *Marbury v. Madison* controls: "'It is, emphatically, the province and duty of the judicial department, to say what the law is * * * [T]his is the very essence of judicial duty.'" *Moore*, 733 F.2d at 962 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)). *Accord Campbell v. Clinton,* 203 F.3d at 41 (Tatel, J., dissenting).

Finally, the "equitable discretion" doctrine is a dead letter in the only court ever to apply it — the D.C. Circuit. In several decisions predating *Raines*, the D.C. Circuit ruled that Members of Congress had standing to bring challenges to measures alleged to unconstitutionally deprive them of their rights as legislators. *See generally Chenoweth v. Clinton*, 181 F.3d 112, 113-14 (D.C. Cir. 1999) (history of the equitable discretion doctrine). In such cases, judgment could be withheld on "equitable discretion" grounds to avoid intrusion into disputes better left to the coordinate branches to settle on their own. *See generally Riegle v. Federal Open Market Comm.*, 656 F.2d 873, 880-81 (D.C. Cir. 1981). But the D.C. Circuit began to dismantle the equitable discretion doctrine almost as soon as it was created. *See, e.g, Humphrey v. Baker*, 848 F.2d 211, 214 (1988); *Melcher v. Federal Open Market Comm.*, 836 F.2d 561, 565 n.4 (1987); *id.* at 565-66 (Edwards, J., concurring). Lest there be any doubt, *Chenoweth* makes it clear that, in light of *Raines*' more rigorous congressional standing inquiry, the doctrine is no longer viable in the D.C. Circuit. 181 F.3d at 116. Post-*Chenoweth*, the focal point is now standing, not equitable discretion, *id.*, a conclusion driven home in *Campbell v. Clinton*, *supra,* which dismisses on standing grounds and does not mention equitable discretion. There is no reason for this Court to revive this now-interred doctrine.

V. SECTION 2954 IS CONSTITUTIONAL.

In the district court, the Secretary contended that §2954 should be construed narrowly to avoid executive privilege challenges that would ensue if it were read literally. Only on reconsideration did the Secretary argue that §2954 is unconstitutional because it empowers Members of Congress to bring suit without the consent of their respective chambers and because it conflicts with House rules.

As explained above, *see supra* at 24, defenses the Secretary raised only on reconsideration are not properly before the Court. Not even the Secretary suggests that his constitutional arguments implicate the Court's subject matter jurisdiction; he raises them without justification. But even if these constitutional arguments were properly before the Court, they would provide no basis for invalidating §2954.

Before responding point-by-point to the Secretary's arguments, it is useful to take a step back and consider the implications of his position. Unquestionably, Congress may constitutionally empower "any person" to request *any* agency record under FOIA, as well as records from federal advisory committees, and may give any party engaged in civil litigation the right to subpoena agency records, *see* Rule 45, Fed.R.Civ.P. The Secretary nonetheless makes the remarkable argument that Congress is constitutionally disabled from giving selected Members of

Congress comparable authority to demand records of their own government. The Secretary cites no authority for his novel theory that the Constitution forbids Congress to accord its members powers commensurate with those given to every other person, and no such authority exists. The Secretary's more specific claims are similarly flawed.

1. In the district court, the Secretary urged that §2954 be read to apply only to information in the 128 discontinued reports. A broader reading, the Secretary warned, would empower Members of Congress to "demand disclosure of executive information . . . [including] material deemed sensitive for national security or other reasons, or which is otherwise protected by Executive Privilege." Def. Mem. at 18. This argument was properly rejected by the district court. RE 138-39. Plaintiffs recognize that *constitutional* executive privilege claims can defeat congressional demands for information, whether made informally, by subpoena, or under statute, *see generally Soucie v. David*, 448 F.2d at 1077, and that disclosure of classified information to Congress must conform to legitimate national security needs. But a request under §2954 is not self-enforcing. Where justified, executive privilege claims could be asserted. An action to compel compliance with §2954 would then fare no better (or worse) than a demand made by subpoena, except that the failure of an agency official to comply with a

congressional subpoena is potentially punishable by criminal contempt, *see United States v. House of Representatives,* 556 F.Supp. at 152, whereas the failure to comply with a demand under §2954 can, at most, result only in injunctive relief.

Particularly ill-founded is the Secretary's effort to take refuge in cases dealing with congressional efforts to obtain sensitive materials generated by the President and his close personal advisors. Congressional subpoenas can reach the White House. But nothing in §2954 empowers Members of Congress to run roughshod over the President and his staff. Section 2954 explicitly limits demands to "Executive agenc[ies]," and the President and his personal advisors are not "agencies." *See* 5 U.S.C. §551(a) (APA definition of "agency"); *see also, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *Armstrong v. Executive Office of the President,* 90 F.3d 553, 558-63 (D.C. Cir. 1996). Thus, the Secretary's concerns about the use of §2954 to intrude into presidential prerogatives are unfounded.

2. On reconsideration, the Secretary asserted that "Congress simply may not constitutionally delegate its investigatory powers to a few individual members in a manner that has coercive effects outside of Congress." Reconsideration Mem. at 19. The Secretary cites no case supporting 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), it has never suggested that the Constitution places comparable limits on Congress' oversight and investigatory powers. Indeed, decisions emphasizing the autonomy each Chamber exercises in establishing its own procedures suggest just the opposite. *See, e.g.*, *McGrain v. Daugherty*, 273 U.S. 135, 160-61 (1927); *United States v. Ballin*, 144 U.S. 1 (1892).

Contrary to the Secretary's argument, the Constitution plainly empowers Congress to delegate information-gathering authority to committees, subcommittees and selected groups of Members. The Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 17, gives Congress the power to enact §2954. As the Court emphasized in *McGrain*, 273 U.S. at 160-61, this provision gives Congress "the power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively." Thus, the *McGrain* Court upheld the validity of a subpoena issued by a single Senate Committee. *Id.* at 158.[15] The Secretary fails even to acknowledge this aspect of *McGrain*. In the district court, the Secretary tried to distinguish the subpoena

---

[15] The statute governing the enforcement of congressional subpoenas makes explicit that when either House is out of session, it "shall be the duty" of the President of the Senate or the Speaker of the House to refer contempt proceedings to the "appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury." 2 U.S.C. §194.

process, arguing that "[t]he committee [in *McGrain*] 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." Reconsideration Mem. at 20 (quoting *McGrain* at 158). This is a distinction without a difference. Congress has reposed sweeping subpoena power, not just in its standing committees, but in subcommittees and select committees as well, many of which have only a few Members. RE 78. Moreover, many committees and subcommittees entrust to a single Member — the committee chair — unilateral power to issue a subpoena. *Id.* That is the case with the House Committee on Government Reform. House Comm. on Government Reform Rule 18(d), 107th Cong., 1st Sess. (Feb. 2001).[16]

Section 2954 reflects just as much, if not more, authorization by Congress. Indeed, in every respect, more formality attaches to the issuance of a request under §2954. Such requests are made pursuant to a formal statutory delegation of power. That delegation is carefully circumscribed. It 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, no

---

[16] The Rule provides that "The chairman of the full committee shall . . . [a]uthorize and issue subpoenas as provided in House Rule XI, clause 2(m), in the conduct of any investigation or activity . . . within the jurisdiction of the Committee." Rule XI.2(m) authorizes committees and subcommittees to delegate control over subpoenas to the chairman.

matter how powerful or senior. Requests may be invoked only with the participation of a substantial number of Committee Members — a number designated by statute. For these reasons, the Secretary's suggestion that subpoenas are permissible because they have been authorized by one House of Congress, but that §2954 requests are not authorized, cannot be sustained. Requests made pursuant to §2954 reflect a far more formal, and far more limited, delegation of Congress' power than the House and Senate Rules authorizing subpoenas.

Moreover, Congress has by statute authorized information-gathering and litigation in aid thereof, not just by Members of Congress, but by an *agent* of Congress, without the concurrence of one or both Houses, and these statutes have been upheld against constitutional attack. Most significant is *Bowsher v. Merck & Co.*, 460 U.S. 824 (1983), which upheld the right of the Comptroller General, an agent of Congress who operates without direct Congressional oversight (*cf. Bowsher v. Synar*, 478 U.S. 714 (1986)), to bring suit without obtaining consent from either House. Federal statutes give the Comptroller General the right to review government contract cost data, 460 U.S. at 827-28, and the Court in *Merck* upheld the Comptroller's right to sue drug companies to compel submission of cost data for drugs sold to the government. *Id.* at 839-40. The Court thought it

"irrelevant" that the Comptroller's information demand, and the ensuing litigation, had been triggered by just two Senators. *Id.* at 844.

To be sure, *Merck* takes the constitutionality of the Comptroller General's litigation authority as a given. But that issue has been vented fully in the courts of appeals, which have rejected the argument that Congress may not constitutionally delegate general litigation authority to the Comptroller General. *See, e.g., United States v. McDonnell Douglas Corp.*, 751 F.2d 220 (8th Cir. 1984); *McDonnell Douglas Corp. v. United States*, 754 F.2d 365 (Fed. Cir. 1985).

The Comptroller General's power extends to gathering information from the Executive Branch, and, if need be, suing to compel disclosure. For example, 31 U.S.C. §716(a) requires agencies to give the Comptroller General any information he "requires about the duties, powers, activities, organization, and financial transactions of the agency." If the agency resists, the Comptroller General may bring a civil action to compel release of the information without obtaining clearance from either House of Congress. *Id.* §717(b)(2). *See Walker v. Cheney*, No. 1:02CV00340 (D.D.C., Feb. 22, 2002) (action to obtain records of Vice President Cheney's National Energy Policy Development Group). In a similar vein, 2 U.S.C. §687 authorizes the Comptroller General to sue the United States to force expenditure of unlawfully impounded funds, again without clearance from

either House. These powers dwarf those conferred by §2954.

Because it is constitutional for Congress to give an agent the power to gather information on its behalf — often at the behest of only a handful Members — it is also constitutional for Congress to designate a specified number of Members of oversight committees to engage in information-gathering functions. The Secretary's contrary arguments should be rejected.

3. The Secretary's final argument, raised below only on reconsideration, is that Congress' delegation of authority in §2954 is "in conflict with House Rules contemplating that committees will pursue information only by subpoenas approved by the whole House." Secretary's Br. at 21-22. Again, the Secretary cites no case that supports this sweeping proposition — which would render the statute a nullity — and the argument is deeply flawed.

First, the conflict the Secretary asserts is with House Rule XI.2(m). But that Rule speaks only to the limits on the issuance and enforcement of "subpoenas," and does not mention, let alone address, requests made under §2954 or FOIA. Thus, the Rule gives no support to the Secretary.

Second, the argument proves too much. Accepting the Secretary's logic would not just invalidate §2954, but would mean that all the statutes delegating power to the Comptroller General to demand records and sue to compel their

submission are unconstitutional because they implement the House and Senate's investigatory powers by statute rather than by rule.

Finally, the Secretary's argument rests on the false premise that §2954 is an internal "rule" of both the House and Senate that has been the subject of revision. It is not. It is a statute imposing obligations on the Executive Branch, it is not subject to the constraints governing internal rules of the House and Senate, and it has not been the subject of revision. The one case the Secretary cites as support for his argument, *United States v. Ballin*, 144 US 1 (1892), says only that each House has the power to determine its own rules. *Ballin* does not say, as the Secretary claims, that the investigatory powers of Congress *must* be exercised through rules and may never be embodied in statutes. *Ballin* addressed quorum rules, not rules regarding the exercise of investigative powers. And *Ballin* certainly does not exclude the possibility that Congress would enact laws like §2954 to enhance its fact-gathering capacity.

As is evident, the Secretary's constitutional attack on §2954 fails, and there is no reason why this Court should sanction the Secretary's failure to carry out his mandatory duty under §2954.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

David C. Vladeck
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiffs-Appellees
The Honorable Henry A. Waxman, *et al.*

Marvin E. Krakow
Law Offices of Marvin E. Krakow
1801 Century Park East
Suite 1520
Los Angeles, California 90067-2302
(310) 229-0900

Of Counsel