UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIJAH E. CUMMINGS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action 17-cv-012308-APM
	)	Hon. Amit P. Mehta
EMILY W. MURPHY,	)	
	)	
Defendant.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Date: March 9, 2018

INTRODUCTION

The General Services Administration ("GSA") makes two merits arguments in opposition to plaintiffs' motion for summary judgment, neither of which is on target. First, GSA contends that the Court should refrain from deciding this case under the "equitable discretion" doctrine. The doctrine, however, applies only when a case presents serious separation of powers issues that can be resolved by legislative action. But there is no separation of powers argument in this case. For all of GSA's speculation that requests under 5 U.S.C. § 2954 may raise privilege claims, it has not asserted any privilege claims here. Nor is plaintiffs' dispute with Members of Congress. Plaintiffs seek no enactment or repeal of legislation. Their dispute is with GSA, which refuses to comply with a statute that requires it to provide information plaintiffs requested. For these reasons, the equitable discretion doctrine has no bearing here.[1]

Second, GSA argues that the Court should disregard Section 2954's plain meaning and rewrite it to apply only to information that would have been provided to Congress in one of the 128 reports discontinued when the statute was enacted. The Court should do so, GSA contends, to be faithful to Section 2954's legislative history, and to avoid constitutional issues that might arise from giving Section 2954 its natural reading. GSA's argument fails at the threshold. "Legislative 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), and GSA makes no claim that Section 2954 is ambiguous. In any event, the legislative history, when examined in its entirety, supports the plain meaning of Section 2954.

[1] This Reply Memorandum responds only to GSA's merits arguments opposing plaintiffs' motion for summary judgment. Plaintiffs have responded to GSA's arguments supporting its motion to dismiss in their opposition/cross-motion, and do not seek leave to file a surreply.

GSA's constitutional avoidance argument for a non-textual construction of Section 2954 also fails because GSA cannot show there is "a serious doubt" about the statute's constitutionality. *Jennings v. Rodriquez*, 2018 WL 1054878 *9, __ S. Ct. __ (U.S. No. 15-1204, Feb. 27, 2018) (citations omitted). Congress has the power under the Constitution's Necessary and Proper Clause, Art. I, § 8, cl. 17, to delegate investigative authority as it sees fit. *McGrain v. Daugherty*, 273 U.S. 135, 160-61 (1927). Nor does judicial enforcement of Section 2954 raise a serious constitutional issue. Section 2954 is one of many government information statutes. GSA's speculation about the possibility of privilege disputes applies with equal force to every such statute, but that possibility hardly raises doubts about their constitutionality. In any event, the canon of constitutional avoidance applies only when a statute is susceptible of more than one construction. *Jennings, supra* at *9. And again, GSA has not argued that the text of Section 2954 is ambiguous or supports GSA's alternative interpretation. There is no warrant in the text or history of Section 2954 to perform the radical statutory surgery GSA seeks here.[2]

I. The "Equitable Discretion Doctrine" does not apply.

GSA argues that this Court "should decline to hear this case under the doctrine of equitable discretion." GSA Opp. Mem. at 21. But each of the conditions necessary to trigger the application of the doctrine is absent here. This case raises no significant separation of powers issue. *See Waxman v. Evans*, 2002 WL 32377615 *6 (C.D. Cal. 2002) (rejecting the government's equitable

[2] GSA points out in its opposition memorandum that plaintiffs did not submit a statement of material facts as to which the moving party contends there is no genuine issue. GSA's Opposition Memorandum, at 2 n.1 (hereinafter ("GSA Opp. Mem.")). Plaintiffs did not do so because, as GSA acknowledges, plaintiffs brought this case under the Administrative Procedure Act, and therefore this Court's review is based on the administrative record, not statements submitted by the parties. *See* LCvR 7(h)(1) & (2). Plaintiffs agree with GSA that there is no reason for GSA to prepare and file a certified list of the contents of an administrative record. Both parties have submitted as exhibits the key documents that would constitute the administrative record, namely the plaintiffs' requests pursuant to Section 2954 and GSA's letter denying their requests.

discretion argument and collecting cases), *vacated as moot*, No. 02-55825 (9th Cir. Jan. 9, 2003). Nor does this case involve an intra-Branch dispute "'[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute.'" *Id.* (quoting *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981). GSA can make no credible claim that plaintiffs' injury can be redressed by legislative action, let alone that plaintiffs' dispute is with their colleagues rather than with GSA.[3]

Contrary to GSA's submission, there is no significant separations of powers question in this case. It is useful to take a step back and consider the implications of GSA's argument. Unquestionably, Congress may constitutionally empower any person to request any agency record under FOIA (5 U.S.C. § 552), as well as records from federal advisory committees (5 U.S.C. App. II), and the Federal Election Commission (52 U.S.C. § 30110). Congress also may authorize the judiciary to give any party in civil litigation the right to subpoena agency records. *See* 28 U.S.C. § 2072 and Fed. R. Civ. P. 45. These exercises of congressional authority raise no plausible separation of powers objections. GSA nonetheless makes the unsupported claim that Section 2954, which provides a right of access roughly comparable to that created by FOIA, raises serious separation of powers concerns.

The only justification GSA musters is that privilege issues might arise in litigation to enforce Section 2954 requests. There is no need for the Court to indulge GSA's speculation in this case. GSA asserts no privilege here, and it is hard to imagine how it could. Of course, privilege issues could arise in other cases. But that possibility exists in all cases under government

[3] It is far from clear that the equitable discretion doctrine remains viable; the doctrine has not been applied since the D.C. Circuit questioned whether the doctrine survived *Raines v. Byrd*, 521 U.S. 811 (1991), nearly twenty years ago. *See Chenoweth v. Clinton*, 181 F.3d 112, 114-15 (D.C. Cir. 1999); *see also Walker v. Cheney*, 230 F. Supp. 2d 51, 62 n.8 (D.D.C. 2002) (explaining that "the scope of the doctrine remains unsettled").

information statutes, and the courts routinely have adjudicated those claims when they are presented. Section 2954 cases are even less likely to engender privilege disputes, especially over executive privilege, than subpoena enforcement cases. Unlike congressional subpoenas, Section 2954's reach is limited to "Executive agenc[ies]," and does not extend to the President, the Vice President, and the advisors and offices that assist the President. *See* 5 U.S.C. 551(1); *see also Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (President is not an agency); *Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (Presidential Task Force is not an agency).

This case does not involve an intra-Branch dispute. Plaintiffs' dispute is not with their colleagues; they seek no legislative action. *See Riegle*, 656 F.2d at 881 (the equitable discretion doctrine applies only in "cases concerning legislative action or inaction . . . [that] circumvent the processes of democratic decisionmaking."). Here, Congress has already acted legislatively by granting plaintiffs the right to obtain the information at issue, and plaintiffs' objection therefore is not to anything Congress has done or not done, but to GSA's failure to comply with the statute. Plaintiffs seek to enforce an existing statutory command against a federal officer who has refused to perform a mandatory duty. Nothing in the equitable discretion cases suggests that, under these circumstances, courts must retreat to the sidelines. The Court in *Waxman I* rejected the government's equitable discretion argument because failing to decide the merits would itself "constitute 'meddling with the internal decisionmaking processes of one of the political branches' by nullifying congressional intent to empower Plaintiffs here to obtain the . . . 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." *Waxman I,* *6 (quoting *Riegle,* 656 F.2d at 881).

GSA also contends that plaintiffs' decision to invoke Section 2954, instead of seeking a committee subpoena, shows that their dispute is with their colleagues. GSA Opp. Mem. at 22. Not

so. Any Member of Congress may petition a Committee Chair to issue a subpoena. Section 2954 was designed to enable minority members of the Committee of Oversight and Government Reform, and its counterpart Senate Committee, to obtain information from agencies without having to navigate the subpoena process that exists for all Members. GSA's claim that plaintiffs' use of Section 2954 evidences an intra-Branch dispute is belied by the fact that plaintiffs based their request on a *statute*. Plaintiffs' use of an investigatory tool provided to them by their colleagues through legislation hardly signals a dispute with their colleagues; to the contrary, it demonstrates that plaintiffs are performing their delegated duties using a procedure designed by Congress for just this purpose.[4]

Equally unsound is GSA's claim that "it is undisputed" that plaintiffs could "obtain substantially the same relief as they seek from this Court through the subpoena process." GSA Opp. Mem. at 22. Executive agencies do not always comply with congressional subpoenas and enforcement only comes, if at all, through criminal contempt proceedings. *See, e.g.*, *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013). In *Holder*, the court relied on Executive Branch intransigence in rejecting the defendant's plea for dismissal on equitable discretion grounds because, as is true here, there was little or no prospect that the parties could resolve the impasse without the court's intervention. *Id.* at 24-25. The Executive Branch also uniformly contests standing in congressional subpoena cases. As plaintiffs demonstrated in their initial memorandum (at 22-29), plaintiffs have informational standing because of the access rights conferred on them by Section 2954. But in congressional subpoena cases, the standing inquiry is

[4] A recently released report of the Inspector General for GSA appears to confirm plaintiffs' submission that GSA's decision to deny their requests was a departure from GSA policy. The report states that "GSA officials told us that the Department of Justice Office of Legal Counsel (OLC) instructed GSA not to provide any documents in response to the [plaintiffs'] February 8, Seven Member Rule request." Office of the Inspector General, *GSA, Evaluation of GSA Nondisclosure Policy*, at 7; *see also id.* at 4-8. 13-18 (March 8, 2018) (Report JE18-002).

made more difficult by the absence of a statutory basis for the committee's informational standing claims. *See Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 66 (D.D.C. 2008), *appeal dismissed*, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009) (pointing out that the Committee's standing would be easier to establish if it could invoke a statutory right to information).

As is evident, the equitable discretion doctrine, if still viable, has no application here. This case presents no constitutional question that could be answered through the enactment, amendment or repeal of legislation. Plaintiffs' dispute is with GSA, which refuses to provide plaintiffs with the information they seek, and not their congressional colleagues, who have authorized their request by enacting Section 2954.

II. This Court should not rewrite Section 2954.

Although GSA urges this Court to rewrite Section 2954, GSA does not contest that plaintiffs' reading of Section 2954 is faithful to its plain meaning. That should end the matter. The Supreme Court often has instructed courts to "proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (quoting *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)); *accord Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). GSA makes no effort to parse the language of Section 2954 or to identify a textual ambiguity. Instead, GSA's approach rests on the theory that Section 2954 does nothing more than confer a narrow right of access to information Congress said in 1928 was "useless," "valueless," and "obsolete," and that Congress's effort to put that concept into statutory language must have gone awry. GSA thus urges the Court to rewrite Section 2954, claiming that the statute's text is at odds with its legislative history, that it raises "serious constitutional concerns," and that giving Section 2954 its natural

reading would be inconsistent with interpretations by the Executive Branch and a Congressional Research Service report. GSA Opp. Mem. at 2. None of GSA's arguments is sound.

First, GSA claims that plaintiffs' textual reading of Section 2954 "depends entirely on formalism," a term GSA does not define, but which appears to refer to reading and applying the statutory text. GSA Opp. Mem. at 23. The text GSA attacks is Section 2954's command that an executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the committee." GSA contends that it is "formalism" to give this command its natural reading and that this Court should depart from the statute's plain language to ensure that Section 2954 is given "a sensible interpretation" consistent with its history. *Id.*

No rewriting of Section 2954 is necessary. Plaintiffs' textual reading is the only "sensible" one. Section 2954's scope is twice limited: Requests may be made *only* to executive agencies and members may request *only* information that "falls within the jurisdiction of the committee." Section 2954 thus is significantly more focused than FOIA, which authorizes any person to obtain records from any "agency," defined to include not only those agencies covered by the Administrative Procedure Act, 5 U.S.C. § 551(1), but also "Government corporation[s], Government controlled corporation[s], or other establishment[s] in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f). Giving effect to Section 2954's comparatively modest and entirely unambiguous terms is eminently sensible.

On the other hand, GSA's proposed reading of Section 2954 is anything but sensible. As plaintiffs explained their initial memorandum (at 17-18), adopting GSA's view would require this Court to rewrite Section 2954 as follows: "An Executive agency, on request … shall submit ~~any information requested of it relating to any matter within the jurisdiction of the committee~~ *any information that would have been included in a report that was subject to a mandatory reporting*

requirement discontinued by Congress in 1928." GSA says not a word in defense of this wholesale revision; nor does GSA cite any case upholding such radical surgery on a statute. This Court should decline GSA's invitation to rewrite Section 2954 in a way that would render it a nullity. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (a statute should be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (citation omitted).

Equally unconvincing is GSA's claim that Section 2954's legislative history undermines a straightforward reading of its text. GSA nowhere heeds the Supreme Court's warning 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). Instead, GSA cherry-picks from the House and Senate Reports to focus solely on section 1 of the legislation, which repealed the statutory reporting requirements. GSA ignores section 2, which substituted a mandatory disclosure regime—Section 2954—for the discontinued, mandatory reports. GSA does not even acknowledge the "Conclusion" sections in both reports, which drive home the centrality of section 2 to the Act. S. Rep. No. 70-1320 at 4 (1928); H.R. Rep. No. 70-1757 at 6 (1928). Read in its entirety, the legislative history of Section 2954 confirms that a plain reading of Section 2954 fulfills, not undermines, Congress's intent.

As a last ditch argument, GSA contends that the statute's title—"An Act to Discontinue Certain Reports Now Required by Law to be Made to Congress"—supports its contention that the statute's overriding purpose was to abolish mandatory reporting. *See* GSA Opp. Mem. at 24. The Supreme Court, however, has ruled time and again that a title does not limit a statute's broad scope: A title "cannot undo or limit that which the [statute's] text makes plain." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (brackets in original) (quoting *Trainmen v.*

Baltimore & Ohio R. Co., 331 U.S. 519, 529 (1947)); *see also Whitman v. American Trucking Assns., Inc*., 531 U.S. 457, 482-83 (2001) (rejecting narrow reading of 42 U.S.C. § 7511(a) based on caption in light of "specifically" broader coverage of provision's text). The irony here is that if titles are to be used by the Court as an interpretative guide, then surely more directly relevant is the title of Section 2954, which is **"§ 2954. Information to committees of Congress on request."** Pub. L. 89-554, 80 Stat. 378, 413 (Sept. 6, 1966) (revising, codifying and enacting Title 5 U.S.C., "Government Organization and Employees") (Emphasis in original).[5] GSA cannot have it both ways. If titles inform the Court's inquiry, then the title of Section 2954, which uses the statutory term "information" and not "reports," further undermines GSA's argument.

Second, GSA argues that the canon of constitutional avoidance requires the Court to pare back Section 2954's reach to avoid difficult constitutional questions. The Court should reject this argument because GSA cannot make either of the showings required by the canon. GSA cannot demonstrate that there is a "serious doubt" about Section 2954's constitutionality or that "after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings*, 2018 WL 1054878 *9 (citations and quotations omitted).

Plaintiffs have already addressed why GSA's separation of powers arguments are off target. *See supra* at 3-4. Two additional points bear emphasis. The first is that there is no doubt, let alone a "serious doubt," that Section 2954 is constitutional as written. The Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 17, gave Congress the power to enact Section 2954. As the Court emphasized in *McGrain v. Daugherty*, 273 U.S. 135, 160-61 (1927), Congress has "the power to make investigations and exact testimony, to the end that it may exercise its legislative

[5] The title heading in Statutes at Large, codifying the 1928 enactment, Act of May 29, 1928, Ch. 901, 45 Stat. 966, is consistent with, but worded differently from, the title in the recodification. The title accompanying Section 2 states: "Committees on Expenditures of the House and Senate. Departments, etc., to furnish information requested by."

function advisedly and effectively." *McGrain* upheld the validity of a subpoena issued by a single Senate Committee, *id.* at 158, and the rationale of *McGrain* rules out any principled constitutional objection to Section 2954. The second point is that Section 2954 is not self-executing. Plaintiffs recognize that constitutionally-based privilege claims can, at times, defeat congressional requests for information, whether made by subpoena or under a statute like Section 2954. *See Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Where justified, executive and other privilege claims may be asserted, and an action to compel compliance with Section 2954 would fare no better (or worse) in the face of such an assertion than a demand made by a subpoena. Courts routinely resolve such disputes. *See, e.g., In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

Even if GSA presented a more compelling argument that there is a "substantial doubt" about Section 2954's constitutionality, it has failed to make any showing that Section 2954's text plausibly supports GSA's wholesale revision of the statute. Neither of GSA's submissions engages in any systematic analysis of Section 2954's text, let alone demonstrates a statutory ambiguity or plausible alternative construction. It is, however, "a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings, supra* at *9 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Because GSA offers no argument that Section 2954's text can support "more than one plausible construction," "the canon simply 'has no application,'" and the Court thus is bound to read the statute as written. *Jennings*, *supra* at *9 (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014)).

Third, GSA argues that this Court should rewrite Section 2954 to accord with Executive Branch and Congressional Research Service interpretations of the statute. GSA Opp. Mem. at 23-25. This argument is meritless.

As plaintiffs demonstrated in their initial submission (at 17-18), the Court should disregard the two Department of Justice opinions on which GSA relies. The interpretations do not engage with the statute's text but are instead based on selective readings of Section 2954's legislative history. Nor should deference be accorded to the Executive Branch's interpretation. To the contrary, because the obligation imposed by Section 2954 runs against the Executive's self-interest, its interpretation should be taken with a grain of salt.

GSA also makes a passing reference to a 50-page, 1995 Congressional Research Service report on Congressional investigations that contains a brief, four paragraph discussion of Section 2954. Morton Rosenberg, CRS Report for Congress, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, at 43-44 (April 7, 1995). The report's cursory discussion (a) predates *Waxman I*; (b) does not address the text of Section 2954 or its legislative history stressing the importance of mandatory disclosures; and (c) fails to acknowledge that, at the time the report was written, Oversight Committee members were successfully receiving information pursuant to Section 2954 that would not have been provided in one of the discontinued reports. *See* plaintiffs' exhibits 12 through 18.

For all of these reasons, this Court should reject GSA's insistence that Section 2954 be rewritten to limit the statute's reach to information Congress thought in 1928 was useless, obsolete, or of no value. GSA's wholesale revision would render Section 2954 a nullity and should be rejected.[6]

[6] GSA asks the Court to enter a stay in the event that the Court grants summary judgment to plaintiffs. Plaintiffs recognize the general practice of staying orders requiring the production of documents, but here, in contrast the cases GSA cites, GSA has asserted no privilege. Plaintiffs assume that the Court's decision on the GSA's stay request would be governed by the principles laid down in *Winter v. NRDC*, 555 U.S. 7, 20 (2008), requiring a showing of likelihood of success on appeal and irreparable injury as well as balancing of relevant interests.

CONCLUSION

For the reasons stated above, and in plaintiffs' initial memorandum, this Court should grant plaintiffs' motion for summary judgment.

Respectfully submitted,

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Date: March 9, 2018

* Counsel wish to acknowledge the assistance of Georgetown University Law Center students M. Annie Houghton-Larsen and Megan Pieper the in the preparation of this memorandum.