ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5305

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELIJAH E. CUMMINGS, *et al.*,

Plaintiffs-Appellants,

v.

EMILY W. MURPHY, Administrator
General Services Administration,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-02308-APM
(Hon. Amit P. Mehta)

BRIEF OF APPELLANTS ELIJAH E. CUMMINGS, *et al.*,

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28, Appellants certify as follows:

A. Parties and Amici

The parties to this proceeding and in the proceedings before the district court are plaintiffs-appellants Elijah E. Cummings, Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Stacey Plaskett, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, and Mark DeSaulnier. Val Demings, Bonnie Watson Coleman, and Mark Cartwright were also plaintiffs below but are not appellants. The defendant-appellee is Emily W. Murphy, who was automatically substituted as defendant in the district court for original defendant Timothy O. Horne when she was confirmed as Administrator, General Services Administration. *See* FRCP 25(d).

B. Rulings Under Review

Appellants appeal the August 14, 2018 judgment entered by the Honorable Amit P. Mehta of the United States District Court for the District of Columbia granting defendant-appellee's motion to dismiss this action. JA __; 321 F. Supp. 3d 92 (D.D.C. 2018).

C. Related Cases

This case has not previously been before this or any other court. Counsel for appellants are not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY OF ABBREVIATIONS

APA:	Administrative Procedure Act
GSA:	General Services Administration
OLC:	Office of Legal Counsel

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On August 14, 2018, it entered judgment against plaintiffs disposing of all claims. JA __. On October 11, 2018, plaintiffs timely filed their notice of appeal. JA __; *see also* Fed. R. App. P. 4(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

Whether seven or more members of the House Oversight and Government Reform Committee who make a request for information from an Executive agency under 5 U.S.C. § 2954, and are thus entitled to the requested information by law, suffer concrete, particularized, and personal injury sufficient to satisfy the injury-in-fact requirement of Article III when their request is denied?

PRELIMINARY STATEMENT

This case presents the question whether Members of Congress, who have a statutory right to obtain information from Executive Branch agencies, have standing to enforce that right in court. The statute that confers this right provides that "[a]n Executive agency, on request of the Committee on Government Operations of the House of Representatives

[now the Committee on Oversight and Government Reform], or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954.[1]

This carefully crafted delegation of authority, known as the Seven Member Rule, reflects Congress's judgment, endorsed by the Executive Branch through the President's signature, that substantial groupings of members of either of its two standing oversight committees must be able to obtain information from executive agencies, even if the committee does not join the request. As the district court observed, "[t]he Seven Member Rule thus provides a statutory mechanism for members of the minority party to obtain records from the Executive Branch to support the Committee's oversight function." JA __. For most of the statute's history, agencies have complied with Section 2954 requests.

[1] As to the House Oversight Committee, a 1995 statute, Pub. L. 104-14, § 1(a)(6), (c)(2), set out as a note preceding 2 U.S.C. § 21, provides that references in law to that committee shall be treated as referring to the Committee on Government Reform and Oversight, the name of which was changed in 2007 to the Committee on Oversight and Government Reform by a House resolution.

This case involves a rare rejection of a Section 2954 request. Plaintiffs-appellants are fourteen members of the House Committee on Oversight and Government Reform ("Oversight Committee"), a minority of the forty-two committee members. They filed a Section 2954 request with the General Services Administration ("GSA") for information pertaining to the lease entered into between one of President Trump's companies and GSA to develop and operate the Trump International Hotel. GSA denied plaintiffs' request, and plaintiffs filed this action. The district court granted GSA's motion to dismiss on standing grounds.

The Supreme Court has routinely held that individuals deprived of information they are entitled to by law suffer concrete, particularized, and personal injury that satisfies Article III's injury-in-fact requirement. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549-50 (2016). Relying on *Raines v. Byrd*, 521 U.S. 811 (1997), however, the district court held that plaintiffs' injury is not "personal" to them but is instead a generalized "institutional injury" that may be remedied, if at all, only by congressional action.

The district court's ruling should be reversed. Section 2954's text establishes that the right of access to government information conferred

on Oversight Committee members is a "personal" right. For that reason, the district court's application of *Raines* misses the mark. Regardless of whether the plaintiffs' injury is labeled "personal" or "institutional," the invasion of a legally protected right to information conferred on a select group of committee members is "personal" to them and not shared with their committee colleagues, or anyone else. To be sure, the deprivation also causes broader "institutional" harm to the Committee and the House by depriving members of information and rendering Congress's delegation of information-gathering authority to committee members a nullity. But plaintiffs are not only the persons most directly affected by the denial of information, they also have been delegated by Congress the right to represent the broader "institutional" interests at stake.

Because the district court's standing ruling is in error, the judgment below dismissing this action should be reversed and the case remanded for further proceedings.

STATEMENT OF THE CASE

A. Factual Background.

1. Plaintiffs: Plaintiffs-appellants are fourteen members of the House of Representatives who were selected by their peers to serve on

the Oversight Committee. At the time of the events that gave rise to this action, all were members of the minority party on the Committee.[2]

The rules of the House of Representatives delegate responsibility to oversee government management to the House Oversight Committee. House Rule X(1)(n) confers on the Oversight Committee jurisdiction over "[g]overnment management and accounting measures generally," as well as "[o]verall economy, efficiency, and management of government operations and activities." House Rules task the Committee with the responsibility to "review and study on a continuing basis the operation of Government activities at all levels with a view to determining their economy and efficiency." House Rule X(3)(i). More broadly, the Committee has the authority to "at any time conduct investigations" of "any matter." House Rule X(4)(c)(2). Before this action was filed, GSA

[2] Plaintiffs-appellants are Ranking Member Elijah E. Cummings, and Members Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Stacey Plaskett, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, and Mark DeSaulnier. Three of the plaintiffs, Val Demings, Bonnie Watson Coleman, and Mark Cartwright, are no longer committee members and thus are not appellants in this appeal. This brief refers to the titles the Members of Congress held when the facts recited herein took place. Representative Cummings is now Chair of the House Oversight Committee.

acknowledged that the requested information falls within the Oversight Committee's jurisdiction. JA __.

2. The Trump Hotel Lease: On August 5, 2013, GSA entered into a sixty-year lease agreement with the Trump Old Post Office LLC, permitting the company to develop the Old Post Office on Pennsylvania Avenue into the Trump International Hotel. At the time the lease was signed, the Trump Old Post Office LLC was (and still is) owned by Donald Trump, his daughter Ivanka, and his sons Eric and Donald Trump, Jr. To avoid conflicts of interest, Article 37.19 of the lease provides:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom.

JA __.

3. The First Requests: On November 30, 2016, Oversight Committee Ranking Member Elijah E. Cummings and Transportation and Infrastructure Committee Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, sent a letter to GSA requesting "unredacted" copies of lease documents, annual and monthly statements from the Trump Old Post Office LLC, and a briefing. GSA did not produce any unredacted documents in response to that

letter. JA __. Two weeks later, the same four Members of Congress sent GSA another letter requesting unredacted lease documents, monthly expense reports, and other documents. JA __. They received no response.

4. The Section 2954 Requests—Round One: Given GSA's silence, on December 22, 2016, Representative Cummings and ten other members of the Oversight Committee sent another letter to GSA, again requesting unredacted lease documents and expense reports relating to the Old Post Office lease, and this time invoking Section 2954. JA __.

In keeping with its Section 2954 obligations, on January 3, 2017, GSA produced unredacted documents, including amendments to the lease, the 2017 budget estimate, and monthly income statements. GSA's transmittal letter acknowledged that the production was "[c]onsistent with the Seven Member Rule and judicial and Department of Justice, Office of Legal Counsel opinions (see e.g. 6 Op. O.L.C. 632 (1982) and 28 Op. O.L.C. 79 (2004))." JA __.

A week later, in a nationally televised news conference, then President-elect Trump announced that he would not divest his interest in his companies, including the Trump Old Post Office LLC. JA __. President-elect Trump had earlier told the *New York Times* that

"occupancy at that hotel will be probably a more valuable asset now than it was before, O.K.? The brand is certainly a hotter brand than it was before."[3]

Donald Trump was sworn in as President of the United States on January 20, 2017, without having divested his interest in Trump Old Post Office LLC. Nor did he divest his interest after he took office. JA __. For that reason, by letter dated January 23, 2017, Ranking Member Cummings, together with Representatives DeFazio, Connolly, and Carson, asked GSA (1) to explain the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement; (2) to state whether GSA intended to notify President Trump's company that it is in breach; (3) to provide the monthly reports President Trump's company submits to the GSA on the Trump International Hotel's revenues and expenses; (4) to explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and (5) to provide copies of

[3] *See Donald Trump's New York Times Interview: Full Transcript*, N.Y. Times (Nov. 23, 2016) (available at https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html).

all correspondence with representatives of President Trump's company or the Trump transition team. JA __.

GSA declined to comply with the request, but by letter dated February 6, 2017, promised that "[s]hould the U.S. House of Representatives Committee on Oversight and Government Reform or any seven members thereof submit a request pursuant to 5 U.S.C. § 2954, GSA will review any such request." JA __.

5. The Section 2954 Requests—Round Two: Responding to GSA's offer, Ranking Member Cummings, joined by seven other members of the Oversight Committee, made a Section 2954 request on February 8, 2017, for the information sought in the January 23rd letter. The February request pointed out that GSA had complied with Section 2954 requests for information on the same topic before President Trump was sworn in. JA __. Notwithstanding GSA's promise that it would review a Section 2954 request, GSA did not respond. JA __.

On March 23, 2017, GSA publicly released a letter that it had sent to Donald Trump, Jr., asserting that the Trump Old Post Office LLC had brought itself into full compliance with Section 37.19 of the lease. JA __. GSA's letter took the position that, because President Trump had placed

the income he receives from the Trump International Hotel into revocable trusts and other corporate entities, he would not directly receive any income from the hotel during the term of his presidency, and thus would not "benefit" from the lease. JA __.

In testimony on May 24, 2017 before the House Committee on Appropriations, Acting GSA Administrator Timothy Horne cited what he represented to be a new Administration policy of rejecting all oversight requests from Democrats unless they also were joined by a Republican Chairman. Mr. Horne testified that "for matters of oversight, the request needs to come from the Committee chair." His testimony did not address Section 2954.[4]

6. The Section 2954 Requests—Rounds Three and Four: On June 5, 2017, Ranking Member Cummings, now joined by sixteen other members of the Oversight Committee (including all appellants in this action), sent GSA another letter renewing the request initially made on February 8, 2017. The letter invoked Section 2954, renewed the demand for records, and requested additional documents in response to GSA's

[4] *See Hearing on the General Services Administration,* before the H. Comm. on Appropriations, Subcomm. on Financial Servs. and General Government, 115th Cong., 1st Sess. (May 24, 2017).

actions taken after the February request, including (1) all documents containing legal interpretations of Section 37.19 of the Old Post Office lease, (2) all documents relating to funds the Trump International Hotel had received from any foreign country, foreign entity, or foreign source, (3) any legal opinion relied upon by GSA in making a determination regarding the President's compliance with Section 37.19, and (4) all drafts and edits of the contracting officer's March 23rd letter. The June letter explained that GSA's failure to respond violated Section 2954, was inconsistent with GSA's policy, and was at odds with the practice of Republican and Democratic administrations to honor Section 2954 requests. JA __. GSA did not respond.

Undeterred, Ranking Member Cummings, joined by the same sixteen Oversight Committee members, sent one more letter to GSA on July 6, 2017, demanding a response to their prior requests and reminding GSA that in the past it had adhered to its policy of complying with Section 2954 requests. JA __.

7. GSA's Denial: GSA denied plaintiffs' requests by letter dated July 17, 2017. JA __. To justify its denial, GSA purported to rely on a May 1, 2017, Office of Legal Counsel ("OLC") memorandum asserting that

"[i]ndividual members of Congress, including ranking minority members, do not have authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." JA __. GSA's letter added that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." JA __ (citing OLC, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, at 1 (May 1, 2017)).

Neither GSA's letter nor the OLC memorandum coherently explained the basis for GSA's denial. Although the OLC memorandum did not address Section 2954, the memorandum's reasoning suggested that GSA should have complied with plaintiffs' requests. Requests under Section 2954 are made pursuant to "a specific delegation" of oversight authority. They are not made by just one "full house, committee, or subcommittee," but pursuant to a statute enacted through bicameral action by both Houses of Congress and presentment to and signature by the President. Undermining GSA's position further, the White House sent a letter to Senator Charles Grassley on July 20, 2017, three days

after GSA's denial, confirming that the OLC memorandum "does not set forth Administration policy" and that "[t]he Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive Branch policies and programs." JA __.

8. GSA's Inspector General Report: On March 8, 2018, GSA's Inspector General released a report confirming that GSA's decision to deny plaintiffs' requests was a departure from GSA's 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, 2017, Seven Member Rule Request." Office of the Inspector General, GSA, *Evaluation of GSA Nondisclosure Policy*, at 7 (March 8, 2018) (Report JE18-002); *see also id.* at 4-8, 13-18.

B. The History of Section 2954.

Congress enacted Section 2954 to restructure the way its standing oversight committees obtain information from executive agencies. *See* Act of May 29, 1928, ch. 901, 45 Stat. 996 ("the 1928 Act"). The 1928 Act was the final step in a movement to reform Congress's oversight of public

expenditures. First came the enactment of the Budget and Accounting Act of 1921. *See* Louis Fisher, *Presidential Spending Power* 29-35 (1975); Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* 89-94 (2001). Next was the merger of the appropriation committees in each House into a single committee. *Id.* Then came the consolidation of committees engaged in oversight of Executive Branch expenditures. The Senate went first in 1920, with the merging of its committees into the Senate Committee on Expenditure in the Executive Departments. *See* Schickler, *supra*, at 95-96. The House followed on December 5, 1927, establishing the House Committee on Expenditures in the Executive Departments in place of its various predecessors. *Id.* at 96; VII Clarence Cannon, *Precedents of the House of Representatives*, § 2041, at 830-31 (1935).

Earlier in 1927, the Supreme Court decided *McGrain v. Daugherty*, 273 U.S. 135 (1927), which confirmed that Congress's oversight authority necessarily includes the power to compel the provision of information. *McGrain*'s starting point was that "[a] legislative body cannot legislate wisely or effectively in the absence of information … and where the legislative body does not itself possess the requisite information—which

not infrequently is true—recourse must be had to others who do possess it." *Id.* at 175. "Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *Id.* These concerns were apparent "before and when the Constitution was framed and adopted … [and] [i]n that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it." *Id.* *McGrain* concluded that "there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised." *Id.*[5]

Following *McGrain*, Congress took the final step in its reform project by passing the 1928 Act to ensure that its newly-formed oversight

[5] Subsequent cases also stress that the "scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 & n.15 (1975); James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926) (overview of Congress's oversight powers).

committees had the information-gathering tools needed to oversee Executive Branch expenditures. The 1928 Act first repealed 128 statutes that required agencies to submit annual reports on a wide range of governmental functions to various congressional committees. Over time, the utility of those reports had waned, but the statutory reporting requirements remained on the books. *See* S. Rep. No. 70-1320, at 2 (1928); H.R. Rep. No. 70-1757, at 3-4 (1928) (observing that the discontinued reports "serve[d] no useful purpose," were "unnecessary," "valueless," "out of date" and "obsolete").

More pertinent here, Congress enacted the Act's second section, codified as Section 2954, to ensure that the oversight committees, and committee members, would have unfettered access to executive agency information. *See* H.R. Rep. No. 70-1757, at 6; S. Rep. No. 70-1320, at 4. Section 2954 states that, on request by seven or more members of the House Oversight Committee, an executive agency "shall" submit "any information" relating to "any matter within the jurisdiction of the committee." By using the imperative "shall," not the discretionary "may," Congress signaled that compliance is mandatory. *See* Antonin Scalia & Bryan Gardner, *Reading the Law: The Interpretation of Legal Texts* 114

(2012). And Congress's repeated use of the word "any"—agencies shall, on request, submit "*any* information" relating to "*any* matter" within the Committees' jurisdiction—underscores the breadth of the authority conferred in Section 2954.[6]

Section 2954 also reflects Congress's concern that, if left unchecked, partisanship might undermine its core oversight function. The delegation to Committee members of authority to request information was intended to ensure that minority members of the House oversight committee are able to conduct oversight, even if their majority colleagues do not participate. To implement that goal, Congress invested the authority to invoke Section 2954 in groupings of members meeting numerical thresholds: seven in the House and five in the Senate. The House number is particularly significant. At the time of the Act's passage the House Committee on Expenditures in the Executive Department had twenty-

[6] The Act's antecedents go back to the Treasury Act of 1789, which said it is "the duty of the Secretary of the Treasury … to make report, and give information to either branch of the legislature in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65 (1789). *See also* Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 71-74 & 72 n.53 (1983) (tracing the history of Congress's oversight of Executive Branch expenditures).

one members; thirteen from the majority party and eight from the minority. *See* 1 David Canon, *et al.*, *Committees in the U.S. Congress (House Committees)*, 1789-1946, at 497 (2002). The counterpart Senate Committee had only seven members, four from the majority party. *See* 2 David Canon, *et al.*, *Committees in the U.S. Congress (Senate Committees)*, 1789-1946, at 501 (2002). Thus, at the time of its enactment, the legislation permitted minority members of the House Committee, but not its Senate counterpart, to make requests without the concurrence of majority members.[7]

For this reason, Section 2954 has long been viewed as an oversight tool for minority House members. For instance, in *Leach v. Resolution*

[7] By 1947, the Senate Committee had thirteen members. Committee on Government Operations, U.S. Senate, *50th Anniversary: History 1921-1971*, 92nd Cong., 1st Sess. at 85 (1971) (Senate Doc. 31). Section 2 of Section 2954 was drafted by the House. JA __. The Act's legislative history does not explain the choice of seven members for the House and five members for the Senate. As to the Senate, one possibility is that the decision to require five Senators was based on the Senate's Resolution appointing five members of the Senate to constitute a Select Committee to investigate then-Attorney General Harry M. Daugherty, who had been accused of abusing his office. The Senate's Charge is set forth in *McGrain*, 273 U.S. at 151-53, and empowers the Committee to, among other things, "send for books and papers, to subpoena witnesses, to administer oaths, and to sit at such times and places as it might deem advisable." *Id.* at 152.

Trust Corp., 860 F. Supp. 868 (D.D.C. 1994), Representative Leach challenged the withholding of records relating to the failed Madison Savings and Loan under the Freedom of Information Act ("FOIA"). Leach argued that even privileged records could not be withheld from a Member of Congress under FOIA. Rejecting Leach's argument as to FOIA, the court noted that to "the extent that Representative Leach seeks to suggest that the alleged domination of the Committee by members of an opposing political party makes such a collegial remedy an impossibility, the Defendants note that the House has in fact provided alternative procedures through which small groups of individual congressmembers can request information without awaiting formal Committee action. *See* 5 U.S.C. § 2954." 860 F. Supp. at 876 n.7.[8]

After the court's ruling in *Leach*, twelve Republican (then minority) members of the House Oversight Committee invoked Section 2954 to request the same information. Even though the agency questioned whether the matter fell within the Committee's jurisdiction and whether

[8] *See also Soucie v. David*, 448 F.2d 1067, 1071 n.9 (D.C. Cir. 1971) (observing that "Congress has frequently exercised" the "power [to compel disclosure of agency records] in statutes requiring executive officers to transmit information to Congress," and citing Section 2954 as one of two examples).

compliance would impair an Independent Counsel's ongoing investigation of Madison, the agency complied. JA __.

Similarly, in April 1994, minority members of the Committee requested documents regarding a Texas savings and loan from the Federal Deposit Insurance Corporation. 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." JA __.

And in August 1993, Committee members in the majority requested documents on the equal employment opportunity complaint resolution process from the Merit Systems Protection Board. JA __. 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." JA __. There is no compendium of all of the Section 2954 requests that have been made over the years, but several other examples are set out in the Joint Appendix. JA __.[9]

[9] Members brought two prior lawsuits under Section 2954. The first, *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. Jan. 18, 2002), involved access to the 2000 adjusted census data. The congressional plaintiffs prevailed in the district court, but the decision was vacated as moot after the Ninth Circuit ruled in *Carter v. Dep't of Commerce*, 307 F.3d 1084

C. Proceedings Below.

Plaintiffs filed this action on November 2, 2017, seeking declaratory and injunctive relief to compel GSA to provide the requested information. JA __.[10] GSA moved to dismiss, arguing that plaintiffs lacked standing, that judicial review under the Administrative Procedure Act ("APA") and other, non-statutory grounds was unavailable, that the "equitable discretion" doctrine required dismissal, and that the information requested fell outside the scope of Section 2954. Plaintiffs cross-moved for summary judgment and opposed GSA's motion to dismiss. After hearing argument, the district court issued a memorandum opinion holding that plaintiffs lack standing and a final order dismissing the case under Rule 12(b)(1), FRCP. JA __; 321 F. Supp. 3d 92 (D.D.C. 2018).

(9th Cir. 2002), that the same census data was subject to disclosure under FOIA. JA __. The second case, *Waxman v. Thompson*, 2006 WL 8432224 (C.D. Cal. July 24, 2006), involved access to an actuarial report relating to the costs of a proposed expansion of prescription drug coverage by Medicare. The district court decided the case in defendant's favor on standing grounds. Soon thereafter, and after the 2006 election, which resulted in Democratic control of the House, the case was mooted by the disclosure of the report.

[10] The complaint named Timothy O. Horne, then-Acting GSA Administrator, as defendant. Defendant-appellee Emily W. Murphy was automatically substituted as defendant when she was confirmed as GSA Administrator. *See* FRCP 25(d).

At the outset, the court recognized that Section 2954 "provides a statutory mechanism for members of the minority party to obtain records from the Executive Branch to support the Committee's oversight function." JA __. The court then analyzed plaintiffs' standing under *Raines v. Byrd*, 521 U.S. 811, which held that Members of Congress who sued to invalidate the Line Item Veto Act lacked standing because the injury they alleged—vote dilution—was not "personal" to them, but was instead an "institutional" injury shared equally by all Members. JA __ (citing *Raines*, 521 U.S. at 821). The district court quoted *Raines*'s analysis of *Powell v. McCormack*, 395 U.S. 486 (1969), which distinguished Representative Powell's claims from those in *Raines*, where the plaintiffs did "not claim that they have been deprived of something to which they *personally* are entitled," but rather their "claim of standing is based on a loss of political power, not loss of any private right." JA __ (quoting *Raines*, 521 U.S. at 821 (emphasis in original)). The court also addressed *Raines*'s discussion of *Coleman v. Miller*, 307 U.S. 433 (1939). It noted that *Raines* found "'a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power' alleged in *Raines*," and stated that vote

dilution claims—as opposed to nullification claims—are insufficient to confer standing. JA __ (quoting *Raines*, 521 U.S. at 826).

The district court extracted several principles from *Raines*. To start, the court stated that, for suits brought by individual Members of Congress, *Raines* "establishes a binary rubric of potential injuries for purposes of assessing standing," under which "the alleged injury in such cases is either personal or institutional." JA __. As to institutional injuries, "Members of Congress generally do not have standing to vindicate the institutional interests of the house in which they serve," but may assert institutional interests in at least some circumstances—most notably, where, as in *Coleman*, the vote of a legislative body has been completely nullified. JA __. As to personal injuries, members may "go to court to demand something to which they are *privately* entitled," but they "cannot claim harm suffered solely in their official capacities as legislators that 'damages all Members of Congress and both Houses of Congress equally.'" JA __ (emphasis added; quoting *Raines*, 521 U.S. at 821, 829).

Applying these principles, the court ruled that plaintiffs were not personally injured by GSA's denial of their Section 2954 request because

they "only allege harm stemming from their official status as legislators, as opposed to injury suffered in their private capacities." JA __. The court expressed ambivalence about whether plaintiffs could assert an "institutional" injury, ultimately concluding that they could not. The court was "not of the view that complete vote nullification is the *only* instance in which an individual legislator can assert institutional injury consistent with *Raines*." JA __ (emphasis in original). "Arguably, this is such a case," the court stated, where the plaintiffs could assert an institutional injury because "Section 2954 is unique in that it grants a statutory right to seven members of the House Oversight Committee—a true minority (seven Members) of a minority of the House of Representatives (those Members on the Oversight Committee)—to request and receive information from an Executive agency." JA __. Because of this "statutory right," the court continued, plaintiffs' "claimed institutional injury that is neither 'wholly abstract' nor 'widely dispersed' [may] suffice to confer standing on an individual Member of Congress." JA __. After all, "[n]ot every Member even possesses the right to make a Seven Member Rule request—only a small percentage do and, even then, it must be a collective demand." JA __.

The court also recognized that "[a]t least in terms of concreteness, it is hard to conceive of a material difference between this case—a suit to enforce a congressional records demand—and a subpoena enforcement case—a suit to enforce a congressional records demand." JA __. Thus, "to the extent that *Raines* demands that an individual Member of Congress have an injury that is both concrete and particularized to vindicate an institutional injury, this case bears those characteristics in a way that other cases post-*Raines* have not." JA __. The court added that "Plaintiffs have made a stronger case than the plaintiffs in *Raines* that they have suffered the type of institutional injury that could potentially establish Article III standing." JA __.

Nonetheless, the court held that plaintiffs lack standing, relying in part on two "additional considerations" discussed in *Raines*. JA __; *see Raines*, 521 U.S. at 829-30. First, the court cited *Raines*'s observation that the "historical experience" has been that "inter-branch disputes have typically been resolved through the political process" as a reason to deny standing here. JA __. But the court did not reconcile this observation with its prior statement that, in terms of the "concreteness" of the plaintiffs' injuries, there is no "material difference" between this case and "a suit to

enforce a congressional records demand." JA __. Second, the court noted that Congress had not expressly authorized litigation in *Raines* or in this case, but it did not address plaintiffs' counter-arguments, including plaintiffs' contention that because their action was not brought on behalf of Congress or the Committee, but on their own behalf, no authorization was required beyond that conferred by Section 2954. JA __.

STANDARD OF REVIEW

This Court reviews the district court's dismissal of a complaint for lack of standing *de novo*. *Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, 892 F.3d 332, 339 (D.C. Cir. 2018).

SUMMARY OF ARGUMENT

Congressional oversight is a core constitutional function, a cornerstone of the structural checks and balances on which our government is built. Congress cannot carry out its constitutional duties without the power to investigate whether the Executive Branch is faithfully executing the law and properly spending the money Congress appropriates. In Section 2954, Congress exercised its power to make its oversight effective by granting Oversight Committee members a statutory entitlement to obtain information from executive agencies.

The district court held that plaintiffs lack standing to enforce that entitlement because they have not suffered injury sufficient to meet the injury-in-fact requirement of Article III. That ruling is in error. The deprivation of a statutory right to information that plaintiffs alone possess has caused concrete and particularized harm that satisfies Article III's injury-in-fact requirement. The district court also erred in ruling that, because the right conferred by Section 2954 derives from their "official status" as members of the Oversight Committee, the right is not "personal" to each plaintiff. That view misreads *Raines* and renders Section 2954 a paper tiger.

A. This Court's inquiry should begin and end with Section 2954. Section 2954 grants a statutory right to information on "any seven members" of the House Oversight Committee who request information from an executive agency. That right may be exercised only by the right-holders; it is not shared with any Committee member who does not join the request and it is not shared generally with Members of Congress. The district court's ruling that members who request information under Section 2954 lack standing to sue when their request is denied effectively erases Congress's statutory grant of authority to Committee members

and renders Congress's goal of giving minority members a right to the information needed for oversight a nullity.

B. *Raines* supports plaintiffs' standing. *Raines* reaffirms that legislators may suffer injuries to rights they hold by virtue of their office, and that the invasion of those rights may cause personal, concrete, and particularized harm to the legislators sufficient to constitute injury in fact. *Raines* goes on to recognize that, in some cases, personal injuries to legislators may also, in turn, cause serious harm to the institution. Regardless of whether the injury to plaintiffs here is denominated "personal" or "institutional," each plaintiff suffered concrete and personalized injury in fact.

1. Plaintiffs have sustained personal injury. Properly understood, Section 2954 satisfies *Raines*'s admonition that to have standing Members of Congress must seek to enforce a "right" that is "personal" to them. By reaffirming *Powell v. McCormack*, 395 U.S. 486, and *Coleman v. Miller*, 307 U.S. 433, *Raines* confirms that legislators suffer "personal" injury when rights that run with their office, but are personal to them, are nullified (*Coleman*) or denied (*Powell*). So too here. Plaintiffs' injury here is not, as in *Raines*, the loss of political power—an injury shared

equally by every Member of Congress. It is an informational injury that the plaintiffs alone have sustained.

2. To the extent that plaintiffs' injury may be characterized as "institutional," they are entitled to assert that injury because it is particularized to them and they have been delegated by the institution authority to claim entitlement to the requested information. Oversight is a core congressional function. *See, e.g.*, *McGrain v. Daugherty*, 273 U.S. 135 (1927). Denials of information inflict personal and particularized harm on each of the plaintiffs, but the denials also undermine the House's ability to enact informed legislation and ensure that executive agencies faithfully execute the law. *McGrain* drives home that Congress's "power of inquiry" must have an "enforcing process," because "some means of compulsion are essential to obtain what is needed." *Id.* at 175. In section 2954, Congress created that means of compulsion by authorizing groups of members of the Committee to exercise the institution's authority to obtain information from executive agencies. The decision below erodes that authority by cancelling Section 2954's delegation of information-gathering power to minority members.

C. In finding that plaintiffs lack standing, the court relied on two considerations discussed in *Raines* that do not bear on whether plaintiffs sustained injury in fact. First, the court faulted plaintiffs for failing to secure authorization to file suit or to enlist their majority-party colleagues to aid in finding an alternative remedy. Second, the court noted that, historically, the judiciary generally seeks to avoid resolving inter-branch disputes. The court erred on both counts.

By imposing on plaintiffs the duty to obtain House authorization before filing suit, the district court created a requirement at odds with Section 2954 and the nature of plaintiffs' case. This case was not brought in the name of or on behalf of the Oversight Committee or the House. Instead, it was brought by seventeen members of the Oversight Committee in their own names to vindicate their personal right of access. Section 2954 supplies all necessary authorization. It empowers seven or more committee members to take action without securing Committee or House approval. Further authorization was unnecessary, just as it was unnecessary for plaintiffs to secure majority member assistance to find an alternative remedy. Requiring majority approval or participation as a precondition to enforcing Section 2954 would defeat the statute's goal of

empowering minority committee members to engage in oversight independent of their majority colleagues.

Also off-target is the district court's finding that the history of Section 2954's enforcement, and the hesitancy courts have in resolving inter-branch disputes, weigh against plaintiffs' standing. Section 2954's history shows that in the past agencies have cooperated with Committee members to fulfill requests, obviating any need for judicial intervention. That is no longer true. Plaintiffs' efforts to engage with GSA were unavailing, leaving plaintiffs with no recourse other than to seek relief from the courts.

In such circumstances, courts are not hesitant to decide cases involving Congress's right of access to government information. Courts in this Circuit routinely resolve cases challenging agency refusals to provide information to Congress, even in congressional subpoena cases where sensitive privilege issues may arise. *See*, *e.g.*, *AT&T v. Dep't of Justice*, 551 F.2d 384 (D.C. Cir. 1976); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2015). This case is no different.

ARGUMENT

The "irreducible constitutional minimum" of Article III standing "consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo,*136 S. Ct. at 1547 (citations omitted). "[T]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). The Supreme Court has consistently held that the deprivation of a statutory right to information inflicts personal, particularized and concrete injury in fact sufficient to confer standing on those entitled to the information. *Id.* at 1549-50; *accord FEC v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989); *see also Friends of Animals v. Jewell* (*Jewell II*), 828 F.3d 989, 992 (D.C. Cir. 2016).

Plaintiffs' injury—the deprivation of information to which they are entitled by law and that they need to perform their congressionally delegated oversight function—is traceable to GSA's unlawful denial of

their request. Plaintiffs' injury is particularized and concrete. And the relief plaintiffs seek—an order directing GSA to produce the requested information—would unquestionably redress their injury. Neither GSA nor the district court contested these points below. Accordingly, the only disputed issue is whether plaintiffs have alleged a deprivation of a legally protected interest to information sufficient to satisfy the injury-in-fact requirement. As demonstrated below, the answer to that question is yes.

A. Plaintiffs have suffered injury in fact.

Congress may by statute create enforceable rights to executive agency information, and the "judgment of Congress" is "important" in determining whether the invasion of "an intangible harm," including informational harm, "constitutes injury in fact." *Spokeo*, 136 S. Ct. at 1549. Congress has explicitly created a right to government information in Section 2954 that is personal to the members of the Oversight Committee who exercise that right, and the invasion of that right inflicts injury in fact.

The Supreme Court explained in *FEC v. Akins* that a plaintiff "suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." 524 U.S. at 21;

see also Public Citizen, 491 U.S. at 449 (holding that failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). Following *Akins*, this Circuit has recognized that "a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimants' reading) requires that the information 'be publicly disclosed' and there 'is no reason to doubt their claim that the information would help them.'" *Friends of Animals v. Jewell (Jewell I)*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016) (citations omitted).

The key defect in the ruling below is the court's failure to recognize that the rights Section 2954 confers are "personal" to the handful of Members of Congress authorized to make requests under the statute. There is every reason to conclude that Congress intended these rights to be personal and enforceable by Committee members. In fact, the district court's analysis of Section 2954 goes a long way to establish plaintiffs' claim that the right belongs to them and no one else. As the district court put it, "Section 2954 is unique in that it grants a statutory right to seven members of the House Oversight Committee—a true minority (seven members) of a minority of the House of Representatives (those Members

on the Oversight Committee)—to request and receive information from an Executive agency." JA __. The court also noted that the "Seven Member Rule thus provides a statutory mechanism for members of the minority party to obtain records from the Executive Branch to support the Committee's oversight function." JA __. And the court added that "[n]ot every Member even possesses the right to make a Seven Member Rule request—only a small percentage do and, even then, it must be a collective demand." JA __.

Under the Supreme Court's standing precedents, the right is personal. In *Spokeo*, for example, the Court addressed "personal" injury as part of the "particularization" requirement for standing. The Court said that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). In *Akins*, the Court held that the deprivation of information that impaired the plaintiffs' ability to "evaluate candidates for public office" constituted injury in fact, and that the plaintiffs' "injury consequently seems concrete and particular." 524 U.S. at 21. Here, the deprivation of information constitutes injury, but the deprivation also thwarts each plaintiff's ability to fulfill the oversight responsibility

delegated to them by their House colleagues. The district court agreed that, "[t]o the extent that *Raines* demands that an individual Member of Congress have an injury that is both concrete and particularized[,] … this case bears those characteristics in a way that other cases post-*Raines* have not." JA __.

The discord between the district court's description of the "statutory right" as belonging only to Oversight Committee members who exercise it, and the court's holding that the right is not "personal" to them because it is based on their "official status," is stark. The court paradoxically asserted that although plaintiffs themselves "possess[]" the right, it is nonetheless only an institutional right that runs to Congress generally and is shared equally by all its Members, not just the Members who made the request. The two rulings are irreconcilable. Only the first ruling—that Section 2954 "grants a statutory right" to members of the Oversight Committee who "possess[]" it—is correct, as the text and purpose of Section 2954 demonstrate. Courts, after all, "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) (citation omitted).

The inquiry into whether the right conferred by Section 2954 is personal to the plaintiffs should begin and end with the text of Section 2954. The rights-creating text provides that "[a]n Executive agency, "on request of … any seven members" of the House Oversight Committee, "*shall* submit any information requested of it relating to any matter within the jurisdiction of the Committee." The word "shall" is "the language of command," *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (citation omitted), and "courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands.'" *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted).

That presumption applies with full force here. This Court in *Jewell I* twice italicized the word "shall" in Section 10(c) of the Endangered Species Act, 16 U.S.C. § 1539(c), to emphasize that, in construing disclosure provisions, "shall" means that an agency "must disclose information" and "clearly creates a right to information upon which a claim of informational standing may be predicated." 824 F.3d at 1041. In Section 2954, the rights-creating language is far more targeted and narrower than the rights-creating language Congress has used in other statutes establishing a right of access to government information, which

often confer an enforceable, personal right to information on anyone who seeks access to it.[11] As in *Jewell I*, the statute at issue thus creates a *right* to information.

The only remaining question is whether the right conferred by the statute is "personal" to plaintiffs or is instead an "institutional" right. *Raines* defines an "institutional" right as one the invasion of "which necessarily damages all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. Section 2954 confers a right to information that belongs exclusively to those members who have joined with at least six other committee members to make the request. The members' rights are not transferable and are not shared with any Committee member who refrained from joining in a request. Nor are the requesting members' rights shared equally with all Members of Congress. To be sure, other Oversight Committee members and Members of the House may benefit from plaintiffs' access to the requested

[11] *See*, *e.g.*, 5 U.S.C. § 552(a)(3)(A) (Freedom of Information Act, authorizing "any person" to demand access to agency records); 5 U.S.C. § 552b(h) (Government in the Sunshine Act, authorizing "any person" to bring suit to compel agency to disclose specified information); 16 U.S.C. § 1539(c) (Endangered Species Act, requiring that certain information "shall be available to the public as a matter of public record at every stage of the proceeding").

information, but none of them may invoke that right, let alone has a personal or particularized stake in access.

There is, moreover, no reason to conclude that Congress cannot confer a "personal" right on its own members. This unexplained assumption, which lies at the core of the district court's ruling, is incorrect. *Raines* does not suggest, let alone hold, that Congress may not designate certain members who, unlike their peers, have special rights to demand access to government-held information.

Nor could it. One of *McGrain*'s lessons is that the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 17, gives Congress wide latitude to delegate its information-gathering authority as it sees fit. 273 U.S. at 158, 160-63, 175. Oversight is not intrinsically an activity that Congress must undertake as a whole; indeed, doing so would be intolerably unwieldy. For that reason, Congress has always delegated its information-gathering function to committees created by the rules of each House. Every House committee has subpoena power, *see* House Rule XI(m)(1), and subpoenas issued by committees are valid and enforceable, even though they have no statutory pedigree. *McGrain*, after all, enforced

a subpoena issued by a five member, *ad hoc*, Senate Committee organized to investigate the then-Attorney General. 273 U.S. at 151-53.

There is also no basis for restricting congressional delegations of oversight powers to committees, as opposed to other groupings of members constituted by either House or Congress. Indeed, the delegation of authority to Oversight Committee members in Section 2954 stands on even firmer ground than delegations to committees made by House and Senate rules. Section 2954 is, after all, a *statute* enacted through bicameral congressional action and signed into law by the President. And the statute's operation depends on the ability of Committee members to obtain requested information and, if necessary, to compel compliance.

Unquestionably, Congress may empower "any person" to obtain records from executive agencies under the Freedom of Information Act (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 Rule 45, FRCP. As the Supreme Court observed, "of course, there is abundant statutory precedent for the regulation and mandatory

disclosure of documents in the possession of the Executive Branch." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 445 (1977). Save for the few constitutionally organized departments of government, the administrative and executive agencies, including GSA, exist only by the will of Congress. For these reasons, the district court's theory that Congress lacks the power to enact a statute granting a critical mass of House Oversight Committee members an enforceable right to carry out oversight activities is without support.

Nonetheless, the district court concluded, without explanation, that Congress did not delegate a "personal" and enforceable right to its own members in Section 2954. The consequences that would follow from that ruling underscore its error. If, as the court held, the "rights" conferred on Committee members by Section 2954 cannot support a claim in federal court because they are not "personal" but are "institutional," those rights would be enforceable, if at all, only by congressional action. To state that alternative lays bare its defects. Accepting the district court's ruling would erase Congress's delegation of authority to Committee members, thereby making hash out of Section 2954's text, which separately delegates information-gathering authority to the Oversight Committees

and to their members. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("parties should not seek to amend [a] statute by appeal to the Judicial Branch"). Because Section 2954 creates a right that is personal to plaintiffs, and the invasion of that right constitutes injury in fact, the judgment below should be reversed.

B. *Raines v. Byrd* confirms plaintiffs' standing.

The district court's erroneous decision that the right plaintiffs assert in this case is not "personal" tainted the district court's application of *Raines*. To be sure, *Raines* is hardly a direct precedent here. In *Raines*, and virtually every other legislative standing case, the plaintiffs claimed to have suffered institutional injuries resulting from an asserted loss of political power that could be redressed by legislative action; they did not "claim that they have been deprived of something to which they *personally* are entitled." *Raines*, 521 U.S. at 821 (emphasis in original). Not so here. Unlike *Raines*, this case has nothing to do with abstract notions of vote dilution. It is an action to compel the production of information to which plaintiffs are entitled under law. As the district court acknowledged, the right to request and receive information under Section 2954 does not run to Congress. JA__. The right may be invoked

only by members of specified committees; they alone among the five hundred and thirty-five Members of Congress "possess[]" this right. JA __.

Properly understood and applied, *Raines* supports plaintiffs' standing. Regardless of whether the injury flowing from GSA's denial is labeled "personal" or "institutional," plaintiffs have a "personal stake" in receiving the information they requested from GSA and "the alleged injury suffered is particularized" as to them. *Raines*, 521 U.S. at 819 (citations omitted). And the court below compounded its error by suggesting that legislator-plaintiffs may not suffer injury that is both "personal" and "institutional." After all, the court acknowledged that there may be some instances, such as the circumstances of *Coleman*, in which some individual legislators but not others would have standing to press institutional injuries. JA __. As the Supreme Court explained in *Raines*, the successful standing claim in *Coleman* was by legislators whose votes in favor of ratifying a constitutional amendment had been nullified; legislators who opposed the amendment would obviously not have had the same claim to standing. *Raines* 521 U.S. at 823-24.

1. The deprivation plaintiffs suffered is "personal."

The district court erred in reading *Raines* to forbid legislator standing by defining "personal" injury to exclude any injury "stemming from their official status as legislators, as opposed to injury suffered in their private capacities." JA __. *Raines* draws no such line, and certainly not the bright line adopted by the district court. To the contrary, by reaffirming *Powell v. McCormack*, 395 U.S. 486 (1969), and *Coleman v. Miller*, 307 U.S. 433 (1939), *Raines* confirms that legislators may have standing to sue based on injuries sustained by virtue of their office, so long as the rights invaded are "personal" to them. 521 U.S. at 820-22; *see also id.* at 832 (Souter, J., concurring); *cf. id.* at 841 (Breyer, J., dissenting) (pointing out that "the Constitution does not draw an absolute line between disputes involving a 'personal' harm and those involving an 'official' harm").

Raines reaffirmed *Powell*, which held that Representative Powell had standing to assert his right to his seat in Congress and to pay denied to him by the House, even though those rights were based on his status as an elected official. *Raines* drives this point home when it distinguishes the injuries alleged by Powell from those alleged by the *Raines* plaintiffs.

To be sure, *Raines* characterizes Powell's rights as both "personal" and "private," and uses these words interchangeably. *Raines*, 521 U.S. at 821. But *Raines* nowhere suggests that a right that is premised on plaintiff's status as an elected official cannot be the basis for an injury sufficiently "personal" to support standing. To the contrary, the claims in *Powell* necessarily were based on Representative Powell's status as a duly elected Member of Congress. Instead, *Raines* distinguishes *Powell* on the ground that, in contrast to the concrete injuries alleged by Powell, the *Raines* plaintiffs did "not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Raines*, 521 U.S. at 821 (emphases in original). In this passage, the Court uses the word "personal" in its ordinary sense, that is, "belonging to or affecting a particular person rather than to anyone else."[12]

Raines also points out that, unlike *Powell*, the *Raines* plaintiffs asserted "institutional injury (the diminution of legislative power), which

[12] *See, e.g.*, *Personal*, Oxford English Dictionary https://en.oxforddictionaries.com/definition/personal (last visited Feb. 12, 2019); *Webster's Third New International Dictionary* 1686 (1976) (defining "personal" as "of or relating to a particular person: affecting one individual or each of many individuals").

necessarily damages all Members of Congress and both Houses of Congress equally." *Id.* And *Raines* stresses that the injury plaintiffs alleged was not personal, because if any of the plaintiffs were "to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead." *Id.*

Each of the hallmarks of "personal" injury on which the *Raines* Court relied to distinguish *Powell* from *Raines* is present here: 1) plaintiffs "have been deprived of something to which they *personally* are entitled"; 2) the injury plaintiffs sustained does not "necessarily damage[] all Members of Congress" equally; and 3) if a plaintiff "retire[d] tomorrow," the plaintiff's right would not be "possessed by" a "successor," because the successor would not have joined the request. *Id.* Indeed, statutory rights to information are by definition personal; they may only be exercised by the right-holder. *Cf. Sinito v. Dep't of Justice*, 176 F.3d 512, 516-18 (D.C. Cir. 1999) (strictly limiting the right of survivorship under FOIA).

Raines's reaffirmation of *Coleman v. Miller* further demonstrates that legislators have standing to bring suit where an injury is "personal" to them, even when the injury is inextricably tied to their official

positions. 521 U.S. at 820-22; *see also id.* at 832 (Souter, J., concurring). *Coleman* held that state legislators who claimed that their votes were unlawfully nullified suffered injury in fact sufficient to satisfy Article III because they had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 825 (quoting *Coleman*, 307 U.S. at 438). So too here. Voting rights are based on a legislator's official status, just as the right conferred on Oversight Committee Members by Section 2954 is status-based.

Under the district court's analysis, both *Powell* and *Coleman* would be wrongly decided, because in each case the plaintiffs "only allege[d] harm stemming from their official status as legislators." *Compare* JA ___, *with Powell*, 395 U.S. at 512-14, *and Coleman*, 307 U.S. at 441-46. And *Raines* did not hold, let alone suggest, that legislator-plaintiffs must assert "an injury suffered in their private capacities" for standing purposes—"private" in the sense that the right is unrelated to the plaintiffs' office. JA __. *Raines* clarified that for standing purposes, a Member of Congress may not rely on a claim of "injury" based on an intra-branch dispute where the injury is necessarily shared equally by all Members of Congress and the "injury" could be redressed by legislative

action. 521 U.S. at 821. But that is not *this* case. Plaintiffs' dispute is not with their colleagues. Legislation, such as a re-enactment of Section 2954, would do nothing to redress their injury.

Section 2954's unique grant of autonomy to Oversight Committee members and Congress's unmistakable intent that agencies comply with Section 2954 further distinguish this case from *Raines*. The right conferred by Section 2954 belongs to Committee members and no one else. The exercise of that right is not dependent on the Committee's will, or that of Congress, but resides only in Committee members who join in a Section 2954 request. They, and they alone, suffer personal injury in fact when an agency refuses to honor a Section 2954 request. For these reasons, plaintiffs have alleged personal injury sufficient to meet Article III's injury-in-fact requirement.[13]

2. Plaintiffs have standing to assert the "institutional" harm caused by noncompliance with their request.

The injury plaintiffs sustained as a result of GSA's denial of the Section 2954 request is "personal" to them, but also, in turn, caused

[13] If the Court agrees with plaintiffs' submissions regarding "personal" injury, the Court need not address whether plaintiffs can also assert standing based on "institutional injury."

serious institutional injury to the Committee and the House of Representatives. *See Raines*, 521 U.S. at 821 (characterizing the claim in *Coleman* as "institutional injury"). The district court recognized that the informational injury here could constitute "institutional" injury. The court said that it was "not of the view that complete vote nullification is the only instance in which an individual legislator can assert institutional injury consistent with *Raines*," and "[a]rguably, this is such a case." JA __. The court also recognized that "[t]o the extent that *Raines* demands that an individual Member of Congress have an injury that is both concrete and particularized[,] … this case bears those characteristics in a way that other cases post-*Raines* have not." JA __.

The institutional injury here is little different from that suffered by the plaintiffs in *Coleman*, where the alleged vote nullification negated not only each plaintiff's vote, but also the legislature's institutional decision on an important matter before it. Here, deprivation of information has a similar downstream institutional effect; it not only directly injures plaintiffs, but it also deprives plaintiffs' colleagues of information that might inform their decisions on legislative or oversight matters, and undermines the Committee's power of inquiry.

Even though the injury is comparable, sharp differences between the informational rights at issue here and the voting rights at issue in *Raines* and *Coleman* make this case a more compelling one for finding institutional injury justiciable. Voting, after all, is a non-delegable act, carried out collectively by each House, which is why the vote *dilution* injury alleged in *Raines* was "necessarily shared equally by all Members of Congress" and also could be redressed through congressional action.

Oversight is different. Information is the oxygen that Congress needs to carry out its constitutional role as a check on the Executive Branch. The Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 17, gives Congress the power to organize its oversight responsibilities as it sees fit, not as the Executive Branch might prefer. *See McGrain*, 273 U.S. at 158, 160-63,175. Congress carries out oversight in accordance with applicable statutes and the rules of each House, through the delegation of information-gathering authority to committees, and in Section 2954, to members of the Oversight Committees. *See generally* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. Chi. L. Rev. 440, 441 (1951) (describing the power of investigation as "perhaps … the most necessary of all the powers

underlying the legislative function"). And courts have routinely held that the deprivation of information lawfully sought by one House of Congress or a congressional committee constitutes institutional injury sufficient for standing purposes.[14]

McGrain explains why the denial of a lawful oversight request injures Congress in a concrete and particularized way. "A legislative body cannot legislate wisely or effectively in the absence of information … and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.* at 175. For that reason, Congress's "power of inquiry" must have an "enforcing process," because "some means of compulsion are essential to obtain what is needed." *Id.*; *see also Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 & n.15 (1975). The institutional injury here is not just the deprivation of information. The House is also

[14] *See, e.g.*, *AT&T v. Dep't of Justice*, 551 F.2d 384, 391-92 (D.C. Cir. 1976); *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 65-79 (D.D.C. 2008), *app. dism'd*, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009); *Comm. on Oversight and Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 9-17 (D.D.C. 2013); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d. 53, 65-77 (D.D.C. 2015).

harmed by the thwarting of one "means of compulsion" that is "essential to obtain what is needed." Section 2954 is one of the few statutory tools Congress has available to conduct oversight, and GSA's refusal to comply with a proper request under that statute drains Section 2954 of its "enforcing process."

It is no answer to say, as GSA did below, that the Committee can simply invoke its subpoena power. The power to issue a subpoena is exercised by the majority; Section 2954 was engineered to enable minority members to engage in oversight. Nor is it a foregone conclusion that GSA would comply with a subpoena. Enforcing congressional subpoenas against an executive agency is often fraught with difficulty, and the Executive Branch uniformly contests standing even when an enforcement case is brought by a congressional committee or a House of Congress. *See supra* n.14. Congress was no doubt aware of the difficulties of enforcing subpoenas against executive agencies when it enacted Section 2954 to provide the oversight committees a more direct avenue of access to agency information.

For these reasons, the injury here is both "personal" to plaintiffs and "institutional." The deprivation of the requested information harms

plaintiffs, the Oversight Committee, and other House members; it also harms the House's institutional interests by impairing the Oversight Committee's power of inquiry. Because the Members who made the request, under the terms of Section 2954, have been delegated authority to represent the institutional interests of Congress and have suffered the effects of the denial of their request in a concrete and particularized way, they have standing to assert the institution's injury, just as the individual legislators whose votes were negated were entitled to assert the legislature's institutional injury in *Coleman*.

C. *Raines*'s "additional considerations" support plaintiffs' standing.

In finding that plaintiffs lack standing, the district court gave considerable weight to two factors discussed in *Raines* that do not bear on whether plaintiffs sustained injury in fact. First, the court found that plaintiffs' failure to obtain majority support, by securing authorization to file suit or finding an "alternative" remedy to litigation, was "fatal" to standing. JA __. Second, the court said that relative lack of judicial enforcement of Section 2954, and the traditional reluctance of courts to resolve inter-branch disputes, also undermined plaintiffs' standing. JA __. The court did not explain why these factors relate to standing, and

none bear on any of the core elements of standing: injury in fact, traceability or redressability. *See Spokeo*, 136 S. Ct. at 1548. Even if these factors were relevant, however, they would support plaintiffs' standing.

1. Authorization beyond Section 2954 is unnecessary.

The district court ruled that plaintiffs' failure to "secure approval from the full House before bringing suit" had a "significant" bearing on their standing and that the absence of authorization was "fatal" to standing. JA __. In so ruling, the court invented a rule that did not exist. Neither Section 2954 nor any House rule requires authorization before Oversight Committee members bring an action to enforce their statutory right to information. The requirement of authorization applies when, but only when, a Committee or the full House is seeking to participate in litigation to represent the interests of the Committee or the House. All of the cases the court cites to support its authorization theory, including *AT&T v. Department of Justice*, 551 F.2d 384 (D.C. Cir. 1976), and the subpoena enforcement cases cited above, *see supra*, at n.14, fall into that category.

Plaintiffs had no obligation to seek such authorization because they did not sue in the name of, or purport to represent, the Oversight

Committee, the House, or Congress. This case was brought by individual Members of Congress to vindicate their statutory rights. Plaintiffs alleged federal question jurisdiction under 28 U.S.C. § 1331 and did not claim jurisdiction under 28 U.S.C. § 1345, which allows for jurisdiction to parties who have been "expressly authorized" to bring suit by Congress. No House or Committee lawyers represent plaintiffs, and neither the House nor the Committee has provided support—financial or otherwise—for this litigation. Structurally, this case is no different than a FOIA case brought by Members of Congress, who do not need authorization before bringing suit.

Put another way, Section 2954's delegation of authority to committee members supplies all the authorization required. This Court held in *AT&T* that "[i]t is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf." 551 F.2d at 391 (noting that "Congressman Moss was allowed to intervene as a defendant on his own behalf and on behalf of the Committee and the House," and that the House ratified his intervention after the fact). Here, through Section 2954, Congress designated members to act on its behalf by authorizing seven or more committee

members to act independently from the Committee to obtain information needed for oversight. The Congress that enacted Section 2954 no doubt understood that judicial remedies were available to committee members if an agency failed to comply with their request, without the need to seek permission from the Committee to vindicate their rights.[15]

In a variation on the authorization theme, the district court also faulted plaintiffs for not seeking to persuade majority members to join in plaintiffs' effort to obtain the requested information through "alternative remedies." JA __. The district court's theory has no precedent; the cases it cites involve legislative disputes, not cases seeking enforcement of a statutory right of access. JA __.

The theory is also incompatible with Section 2954. A court-imposed requirement that committee members obtain House authorization to sue to enforce Section 2954, or seek the assistance of majority members in

[15] Like many statutes of its era, Section 2954 does not contain a right of action. *See* Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 818-30 (2004). This action was brought mainly under the APA, which incorporates the rights of action on which congressional plaintiffs would have based their claims prior to the APA's enactment, including mandamus claims and claims of *ultra vires* agency action. *See* 5 U.S.C. § 706(1) and (2)(C); *Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934) (mandamus); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108-11 (1902) (*ultra vires*).

finding an alternative remedy, would turn the statutory purpose of granting minority members rights to information upside down. Although the court theorized that the plaintiffs might be able to enlist their majority colleagues to take action to force GSA to comply, the court acknowledged the reality that "had these paths been readily available, Plaintiffs would not have filed this action." JA __. Making a statute designed to confer rights on the minority dependent on the actions of the majority is to render those rights a dead letter. The Court should not interpret a statute in a way that nullifies it.

2. History supports plaintiffs' standing.

The district court also erred in concluding that "as a general matter, inter-branch disputes have typically been resolved through the political process," and finding that this factor weighed against standing. JA __. There are three flaws in the court's reasoning.

First, the district court thought it important that there have been only two prior cases seeking judicial enforcement of Section 2954 requests. JA __. From that fact, the court inferred "strong evidence that, historically, the proper solution has been a political and not a judicial one," and "that in the past, the political branches have worked out

document requests 'simply by sitting down and talking,' even in 'controversial disputes, like Whitewater or the savings [and] loan controversy.'" JA __. History is often an unreliable guide for the future. The history the court cited involved cases in which the parties reached a consensual resolution resulting in the disclosure of the information the Members sought. JA __. Fruitful negotiations often depend on the threat that, if negotiations fail, there is an enforcement mechanism waiting in the wings. *See*, *e.g.*, *AT&T*, 551 F.2d at 394-96.

The situation today is different. As laid out above, there was no "sitting down and talking" between the parties. *See supra* at pp. 4-13. Plaintiffs exhausted every avenue to seek a consensual resolution and were rebuffed because GSA was "instructed by OLC not to provide any documents" to plaintiffs. *See supra* at p. 13. Under the district court's ruling, no enforcement option is waiting in the wings, and, as a result, Section 2954 is rendered a nullity. Nowhere does the district court address the fundamental question in this case: Why would Congress have enacted Section 2954 if it thought that agencies would be free to ignore it?

A bygone history of cooperation with Section 2954 is no justification for the courts to refrain from hearing this case now. The default rule, after all, is that 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." *Reich*, 74 F.3d at 1328 (citation omitted).

Second, cases to enforce Section 2954 are unlikely to raise significant separation of powers issues. The merits questions that could surface under Section 2954 are no different than the questions courts confront every day in cases brought under open government statutes and subpoena enforcement cases. True, privilege issues might arise in litigation to enforce Section 2954. But that possibility exists in all cases involving subpoenas and government information statutes, yet courts routinely resolve them. *See*, *e.g.*, *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). Section 2954 cases are even less likely to engender privilege disputes, especially over executive privilege, than subpoena enforcement cases. Section 2954's reach is limited to executive agencies, and does not extend, as do subpoenas, to the President, the Vice President, and the advisors and officers who assist them. *See* 5 U.S.C. § 551(1) (defining

"agency" to exclude the President, Vice President, and close Presidential advisors). Tellingly, in this case, GSA asserted no privilege; it is hard to see how it could have.

Third, district courts routinely resolve congressional subpoena enforcement cases—the cases most analogous to this one. In *AT&T v. Department of Justice*, this Court drove home that "the mere fact that there is a conflict between the legislative and executive branches … does not preclude judicial resolution of the conflict." 551 F.2d at 390 (citing *United States v. Nixon*, 418 U.S. 683 (1974)). In *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d at 14, the court held that the Committee had standing to enforce a subpoena issued to the Attorney General for information on an enforcement operation by the Bureau of Alcohol, Tobacco and Firearms. The court rejected the agency's argument, similar to that made here, that the court should refrain from addressing the merits: "The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable; Supreme Court precedent establishes that the third branch has an equally fundamental role to play, and that judges not only may, but sometimes must, exercise their responsibility to interpret the

Constitution and determine whether another branch has exceeded its power." *Id.* at 3; *accord U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d at 65-79; *U.S. House of Representatives v. Miers*, 558 F. Supp. 2d at 69-72.

The district court had it right when it observed that "it is hard to conceive of a material difference between this case—a suit to enforce a congressional records demand—and a subpoena enforcement case—a suit to enforce a congressional records demand." JA __. A suit to enforce a Section 2954 request cannot meaningfully be distinguished from other cases involving rights of access to executive agency information that courts in this Circuit adjudicate every day. There is no reason why courts should refrain from resolving this case on the merits.

CONCLUSION

For the reasons stated above, the district court's judgment dismissing this action should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,446 words, excluding the parts of the brief exempted by F. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using word Century Schoolbook type-style with a 14 point type.

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CERTIFICATE OF SERVICE

I, David C. Vladeck, certify that on March 11, 2019, a copy of Appellant's brief was served via the Court's ECF system on all counsel of record.

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