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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HENRY A. WAXMAN, et al., Members of Congress,
Plaintiffs,

v.

DONALD L. EVANS, Secretary of Commerce,
Defendant.

Civil Action No. 01-04530 (LGB) (AJWx)

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dated: August _, 2001

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INTRODUCTION

This case presents the question of whether 5 U.S.C. § 2954, the "Seven Member Rule," permits Plaintiffs, sixteen members of the Committee on Government Reform of the United States House of Representatives ("Sixteen Members"), to compel Defendant, the Secretary of the Department of Commerce ("Secretary"), to disclose data from the 2000 Census that the Department has adjusted to corre an admitted undercount of the population. The Seven Member Rule provides as follows:

An Executive agency, on request of the Committee on Government Operations [now the Committee on Government Reform] of the House Representatives, 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; *see also* Pub.L. 104-14, §§ 1(a)(6), (c)(2), set out as a note preceding 2 U.S.C. § 21 (explaining name change of committee). Because there are no facts in dispute and the question before the Court is solely one of law, this case is ideally suited for resolution by summary judgment.

The Seven Member Rule plainly compels disclosure of the information sought. There is no exemption claimed or applicable. The statute uses mandatory language (the agency "shall" submit) to require executive agencies to submit information to the requesting members of the Committee on Government Reform ("Committee"). The Secretary has no discretion not to disclose the information requested. The range of information that the Committee can request under the statute is broad ("any" information). And information regarding the census is certainly within the Committee's jurisdiction. Under the Rules of the House of Representatives, the Committee has both legislative and oversight jurisdiction over matters relating to population and demography, including the census.[(1)]

The legislative history of the Seven Member Rule confirms the statute's plain language, further indicating that the adjusted census data mu be disclosed. The Senate and House Reports on the original legislation both evince a preference for legislators making particularized, individual requests for information rather than enacting legislation that compels the production of regular reports to Congress, which the Senate and House Reports conclude are often of little value. Although the Seven Member Rule has never been adjudicated, agencies have routinely disclosed information pursuant to it. While the Department of Justice Office of Legal Counsel has taken the position that the executive's obligation to respond to Seven Member Rule requests is limited, this position is entirely self-serving. It is nothing more than the necessarily narrow litigating position of a coordinate branch of government responding to a request that applies to it; it ignores the actual text of the Seven Member Rule and it rests entirely on a misreading of the legislative history.

Finally, this suit involves a clear violation of a statutory right that runs directly to the Sixteen Members. As members of Congress aggrieved in their capacities as members of the Committee on Government Reform, the Sixteen Members clearly have standing to bring this suit both under the Administrative Procedure Act, 5 U.S.C. §§ 551(13), 706(1), and under 28 U.S.C. § 1361, as an action in the nature of mandamus to enforce their rights under the Seven Member Rule.

Accordingly, Plaintiffs' motion for summary judgment should be granted.

STATEMENT OF THE CASE

Facts Giving Rise To This Action.

The plaintiffs in this case--the Sixteen Members--consist of the following members of Congress: Plaintiff Henry A. Waxman is a duly elected member of the House of Representatives from California and is the ranking minority member of the House Committee on Government Reform, the successor Committee to the House Committee on Government Operations. *See* References in Law to Committees and Officers of the House of Representatives, Pub. L. 104-14, § 1(6), 109 Stat. 186 (1995). Plaintiff William Lacy Clay is a duly elected member of the House of Representatives and is the ranking minority member of the Subcommittee on the Census, House Committee on Government Reform. Plaintiffs Tom Lantos, Major R. Owens, Edolphus Towns, Patsy T. Mink, Bernard Sanders, Carolyn B. Maloney, Eleanor Holmes Norton, Elijah E. Cummings, Dennis J. Kucinich, Rod R. Blagojevich, Danny K. Davis, John F. Tierney, Thomas H. Allen, and Janice D. Schakowsky are duly elected members of the House of Representatives and are members of the House Committee on Government Reform.

On April 16, 2001, the plaintiffs transmitted to Donald L. Evans, the Secretary of Commerce, a formal request pursuant to 5 U.S.C. § 2954 for immediate access to the adjusted census data produced as part of the 2000 Decennial Census. (Attached as Exhibit A to the Declaration of Michael Yeager) (hereinafter exhibits are referred to as "Yeager Decl., Ex. _"). Although this letter asked for a prompt reply, over a month elapsed with no response. Congressman Waxman followed up with a letter dated May 16, 2001, but again received no response. (Yeager Decl., Ex. B). Accordingly, on May 21, 2001, the plaintiffs filed this action against Secretary Evans, in his official capacity. Two weeks later, Secretary Evans finally responded to the plaintiffs' request in a brief denial letter. (Yeager Decl., Ex. C).

Importance of the Adjusted Census Data

The United States Constitution requires that an "actual enumeration"--a census--of the population be conducted every ten years, and it vests Congress with the authority to conduct the census in "such a manner as they shall by Law direct." U.S. Const., Art. I, § 2, cl. 3. The Constitution provides that the results of the decennial census shall be used to apportion the members of the House of Representatives among the States. *Id.* Census data also are used for various purposes not set forth in the Constitution. For example, the federal government considers census data in dispensing funds and other benefits through federal programs. In 1998, for example, the federal government allocated $185 billion of grants to states and localities based on data derived from the census. *See* U.S. General Accounting Office, *Formula Grants: Effects of Adjusted Population Counts on Federal Funding to States* 1-2, 6 (Feb. 1999) (GAO/HEHS-99-69). Also, the states use the results in drawing intrastate political districts.

Through the Census Act, 13 U.S.C. § 1 *et seq.*, Congress has delegated to the Secretary of Commerce the responsibility to take "a decennial census of [the] population . . . in such form and content as he may determine." *Id.* § 141(a). The Census Act specifies that the census shall count population "as of the first day of April of such year, which date shall be known as the 'decennial census date.'" *Id.*

The Secretary, in turn, has delegated certain responsibilities under the Census Act to the Bureau of the Census and its head, the Director of the Census. As part of its work on the 2000 Decennial Census, the Bureau of the Census compiled two sets of data. One set of data is a population count determined through the use of census forms returned by mail and interviews conducted at addresses for which no census form was returned ("Raw Data"). Recognizing that the raw population count is not entirely accurate, the Bureau of the Census prepared a second set of data adjusting the population count by using well known statistical techniques designed to correct for errors in the census count ("Adjusted Data"). The Department of Commerce has released the Raw Data. *See* 13 U.S.C. § 141(a) and (b). On or about March 6, 2001, the Department of Commerce announced that it would not use or release the Adjusted Data.

The Census Act requires that the Secretary of Commerce release census data to the public and transmit it to the states for the purpose of redistricting within "one year of the decennial census date,"--April 1, 2001. 13 U.S.C. § 141(c).[(2)] Substantial questions have been raised about the accuracy of the raw 2000 census data that the Secretary has released. According to experts at the Bureau of the Census, the Raw Data missed at least 6.4 million people and counted 3.1 million people twice. *See, e.g.*, Eric Schmitt, *Count of 2000 Census Said to Err by Millions*, N.Y. Times March 16, 2001, at A12. The Census Bureau itself acknowledges that statistical adjustment would correct for 4.3 million people undercounted and one million people overcounted. *Statement by William G. Barron Jr. on the Current Status of Results of Census 2000 Accuracy and Coverage Evaluation Survey* (July 13, 2001).

Those communities that are undercounted do not receive their fair share of federal programs. In 1999, the General Accounting Office found that, as a direct consequence of the 1990 undercount, states and localities with the greatest undercount failed to receive approximately $449 million from fifteen federal programs. *Formula Grants: Effects of Adjusted Population Counts on Federal Funding to States, supra,* at 4. If the 1990 undercount had been corrected, according to the GAO, California would have received an additional $222 million. *Id.* at 7.

The Census Bureau's Executive Steering Committee for Accuracy and Coverage Evaluation Policy reported on March 1, 2001 that the majority of evidence indicates that the Adjusted Data are more accurate than the Raw Data. 66 Fed. Reg. 14005-06 (2001). Although the Steering Committee concluded that the adjusted numbers should not be released at that time for redistricting purposes, it reached this

decision only because the impending April 1, 2001 statutory deadline imposed by 13 U.S.C. § 141(c) prevented a full analysis of the Adjusted Data. The Steering Committee observed that "quality measures indicate that the adjusted data are more accurate overall" and tha "the majority of the evidence indicates . . . the superior accuracy of the adjusted number." 66 Fed. Reg. 14005-06. The Sixteen Members seek the adjusted 2000 census data to ensure that the states receive their fair share of federal funding and to assist the states in determining how to allocate state funds and resources.

As noted above, on April 6, 2001, the Sixteen Members requested "expeditious[]" access to "the adjusted data that the Census Bureau has already compiled" but that the Secretary has "decided not to release." (Exhibit A). The letter specifically invokes the Seven Member Rule se forth in 5 U.S.C. § 2954. The letter explains that the House Committee on Government Reform has both legislative and oversight jurisdictio over matters relating to population and demography, including the census. *Id.*

As to legislative matters within the Committee's jurisdiction relating to the census, the letter explains that the Sixteen Members "are actively considering whether to amend the [Census Act] regarding the timing and release of adjusted and unadjusted census data. Concerns have been raised that the existing provisions of the Census Act effectively prevent the most accurate data from being used for redistricting and other purposes. Review of the adjusted census data will enable us to evaluate the need for legislation in this area." *Id.*

Regarding the Committee's oversight function, the letter explains that "this information could have an enormous impact on the allocation by Congress of more than $185 billion in population-based federal grant funds." *Id.* The letter also explains that the information has a direct bearing on the Committee's legislative and oversight responsibility with regard to redistricting. The letter notes that "this information could have a significant bearing on the appropriateness of congressional redistricting efforts currently being undertaken by state governments. The reports that the Census Bureau missed 6.4 million people in its most recent count raise serious questions about whether all of our citizens will have an equal voice in government. . . . [W]e need to investigate these important questions, and if need be, develop legislation that assures fairness in the redistricting process." *Id.*

To date, the Secretary has failed to provide the Sixteen Members with the adjusted census data requested. Plaintiffs therefore had no alternative but to seek redress from this Court.

ARGUMENT

I. The Seven Member Rule employs nondiscretionary language of command--"shall submit"--to compel the Secretary to submit requested information to the Committee on Government Reform.

The Seven Member Rule states that upon receiving a request by seven members of the House Committee on Government Reform, an executive agency "shall" submit any information requested of it relating to any matter within the jurisdiction of the committee. 5 U.S.C. § 2954. Thus, the plain language of the statute compels the agency to submit the information requested of it. The statute uses language of command--"shall"--not language of discretion or permission. It does not confer any discretion on the agency regarding whether to submit th information. The agency is not at liberty to decide whether or not to respond to the request. It must.

The principal definition of "shall" in Black's Law Dictionary is: "Has a duty to; more broadly, is required to." Black's Law Dictionary (7th ed. 1999); *see Buckhannon v. West Virginia Dep't of Health and Human Servs*., 121 S.Ct. 1835, 1839 (2001) (relying on Black's definition). Thi definition is the only definition "acceptable under strict standards of drafting." Black's Law Dictionary, *supra*. More importantly, there are numerous cases, from the Supreme Court and the Ninth Circuit, holding that "shall" imposes a mandatory duty and does not allow for a discretionary decision.

Just this past Term, the Supreme Court reaffirmed, in *Alabama v. Bozeman*, 121 S. Ct. 2079 (2001), that "[t]he word 'shall' is ordinarily 'the language of command.'" *Id.* at 2085 (*quoting Anderson v. Yungkau,* 329 U.S. 482, 485 (1947) (*quoting Escoe v. Zerbst,* 295 U.S. 490, 493 (1935)). In *Bozeman*, the Court interpreted a provision of the Interstate Agreement on Detainers, 18 U.S.C.App. § 2, a compact that creates uniform procedures for transferring a prisoner to another jurisdiction for trial on a different crime. The compact states that once a prisoner is transferred, a trial must be held prior to the prisoner's being returned to the original place of imprisonment; otherwise, the charges "shall" be dismissed with prejudice. In considering the case of a federal prisoner who had been transferred to the custody of Alabama authorities for a single day to be arraigned on state firearms charges, and who was brought back to Alabama for trial a month later, the Supreme Court determined that no de minimis exception to the statute exists. Rather, the language of the statute "is absolute." 121 S. Ct. at 2085. It says that, when a prisoner is 'returned' before trial, the indictment, information, or complaint '*shall not* be of any further force or effect, and the court *shall* enter an order dismissing the same with prejudice.'" *Id.* (emphasis added by Supreme Court's opinion). As a consequence, because of the transfer, the charges had to be dismissed.

In the 2000 Term, the Supreme Court emphasized that "shall" indicates a nondiscretionary requirement. In interpreting 18 U.S.C. § 3626(e)

(2)--which states that a motion filed under that section "shall" operate as a stay--the Court held that "[t]he stay is 'automatic' once a state defendant has filed a § 3626(b) motion, and the statutory command that such a motion 'shall operate as a stay during the [specified time] period' indicates that the stay is *mandatory* throughout that period of time." *Miller v. French*, 530 U.S. 327, 337 (2000). The Court went on t note that because "the statute employ[s] the mandatory term 'shall,'" to allow "discretion to prevent the stay from 'operating' . . . would be tc contradict § 3626(e)(2)'s plain terms [and] would mean that the motion to terminate merely *may* operate as a stay, despite the statute's command that it 'shall' have such effect." *Id.* at 337-38.

As support for its conclusion, the *Miller* Court quoted *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), for the general proposition that "[t]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Miller*, 530 U.S. at 337 (*quoting Lexecon*, 523 U.S. at 35 (internal citation omitted)). In *Lexecon*, the Court determined that 28 U.S.C. § 1407 requires the Judicial Panel on Multidistrict Litigation to remand cases that have been consolidated for pretrial proceedings back to their original courts for trial. The statute states that "each action so transferred [for pretrial purposes] shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.* The Court found the us of the term shall to be a "plain command" to the panel. 523 U.S. at 35. After considering arguments based on past practice, rules issued under the statute, and legislative history, the Court concluded that "none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand." *Id.* at 40.

The proposition that the term "shall" imposes a mandatory duty, as the Court reaffirmed most recently in *Bozeman*, *Miller*, and *Lexecon*, is entirely consistent with the Court's precedent. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 231 (2001) (discussing "Congress' use of a mandatory 'shall' . . . to impose discretionless obligations"); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("[T]he terms of [16 U.S.C.] § 1533(b)(2) are plainly those of obligation rather than discretion: 'The Secretary *shall* designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.' (Emphasis added.)"); *id.* at 175 ("[A]ny contention that the relevant provision of 16 U.S.C. § 1536(a)(2) is discretionary would fly in the face of its text, which uses the imperative 'shall.'"); *United States v. Monsanto*, 491 U.S. 600, 607 (1989); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see also* Black's Law Dictionary (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory."). The Ninth Circuit precedents are in accord. *See, e.g., Leslie Salt Co. v. United States,* 55 F.3d 1388, 1397 (9th Cir. 1995) ("[A]s a matter of statutory interpretation, a longstanding canon holds that the word 'shall' standing by itself is a word of command rather than guidance . . ..").

In short, the plain language of the Seven Member Rule, exemplified by its use of the mandatory directive "shall," compels the Secretary to submit the information requested of him to the Sixteen Members. There is no hint of wobbling in the statutory directive, and the normal meaning of "shall," affirmed by Supreme Court decisions too numerous to cite in full, confirms that Congress's clear intention was to order executive agencies, including the Department of Commerce, to submit information requested of them to the Sixteen Members.

II. The Seven Member Rule employs broad language to compel the Secretary to submit "any" information requested by the Committee on Government Reform on "any" matter within the Committee's jurisdiction.

Other language contained in the Seven Member Rule confirms the broad authority granted to Committee. The Rule explicitly states that executive agencies must submit "any" information requested of them relating to "any" matter within the committee's jurisdiction. The use of the broad adjective "any" confirms the expansive scope of the information that the Committee is entitled to request under the statute.

The Supreme Court has affirmed that, as used in statutes, "any" should be understood in its normal, broad sense. In *United States v. Gonzales*, 520 U.S. 1 (1997), the Supreme Court explained that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 5 (*quoting* Webster's Third New International Dictionary (1976)). *Accord United States v. James,* 478 U.S. 597, 604 (1986) (observing that it is "difficult to imagine broader language" than "any"). In *Gonzalez*, the Court interpreted 18 U.S.C. § 924(c), which requires that a federal sentence under that section not "run concurrently with any other term of imprisonment." *Id.* The Court concluded that "any" other term of imprisonment meant what it said and was not limited to "some subset of prison sentences." 520 U.S. at 5.

The Court noted that "Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to *all* 'term[s] of imprisonment,' including those imposed by state courts." *Id.* (emphasis added). In other words, the adjective "any" naturally implies the totality of the subject it modifies. *See also United States v. Alvarez-Sanchez,* 511 U.S. 350, 358 (1994) (noting that statute referring to "any" law enforcement officer includes "federal, state, or local" officers); *Collector v. Hubbard,* 12 Wall. 1, 15, 20 L.Ed. 272 (187 (stating "it is quite clear" that statute prohibiting filing of suit in "any" court includes state courts as well as federal courts because "there is not a word in the [statute] tending to show that the words 'in any court' are not used in their ordinary sense").

Just as the Court found no basis in *Gonzalez* for limiting "any" term of imprisonment to a subset of types of imprisonment, there is no basis here for limiting "any" information relating to "any" matter to a subset of types of information or types of matters that are within the Committee's jurisdiction. Congress plainly intended the scope of information that the Committee could request to be expansive.

Moreover, as the *Gonzalez* Court recognized, when the statutory text is plain, the legislative history is irrelevant. "Given the straightforward statutory command, there is no reason to resort to legislative history." 520 U.S. at 6. *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992); *United States v. Wiltberger*, 5 Wheat. 76, 95-96, 5 L.Ed. 37 (1820) (Marshall, C.J.) ("Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."). In this case, the words of the statute themselves could hardly be more straightforward. The Secretary must submit any information under the Committee's jurisdiction.

III. The adjusted census data are within the scope of the Committee's jurisdiction.

The Seven Member Rule compels the Secretary to submit any information requested of him relating to any matter "within the jurisdiction of the committee" on Government Reform. The Rules of the House of Representatives define the scope of the Committee's jurisdiction. *See* House of Representatives Rules 107th Congress; H.Res.5, 107th Cong., 1st Session, January 3, 2001 (adopting House Rules). Under House of Representatives Rule X, cl. 1(h)(8), the Committee on Government Reform has jurisdiction over "[p]opulation and demography generally, including the Census." *Id.* Moreover, under House of Representatives Rule X, cl. 4(c)(2), the Committee on Government Reform "may at any time conduct investigations of any matter without regard to clause 1, 2, 3, or this clause conferring jurisdiction over the matter t another standing committee." *Id.* These clauses establish both that the adjusted census data requested by the Committee are well within th scope of the Committee's jurisdiction, and that the Committee has jurisdiction to investigate the operation of government activities. They also establish that the House of Representatives contemplated that the Committee would be empowered to investigate the activities of government.

IV. The legislative history of the Seven Member Rule is consistent with the Rule's plain language and contemplates full disclosure of the information requested.

The Seven Member Rule is derived from section 2 of the Act of May 29, 1928, 45 Stat. 996 § 2. The first section of that act repealed 128 statutes that required the submission of obsolete or useless reports. H.R. Rep. No. 1757, 70th Cong., 1st Sess., pp. 2-3 (1928). In discussing the second section of the act of 1928--the Seven Member Rule--the Senate Report explains that "[t]his section makes it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the membership of either body." S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (1928). The House Report, for its part, states:

To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information to be furnished to the Committee on Expenditures in the Executive Departments [now the Committee on Government Reform] or upon the request of any seven members thereof.

H.R. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (1928). Thus, the legislative history reveals that Congress understood that the Seven Member Rule could be used to gather the information formerly contained in the 128 discontinued reports

This language has served as the Justice Department's basis for interpreting the Seven Member Rule--in contravention of the plain text of th statute--to compel submission only of the information formerly contained in the 128 reports, *see infra.* Part V, even though the original Act o May 29, 1928 discontinued the mandatory submission of these reports because Congress deemed them useless and obsolete. It has given rise to the question of whether the Seven Member Rule is best understood by its plain language--to grant a broad right of access to information--or through the implication of part of its legislative history--as a useless statute conferring a narrow right of access to obsolete information.

A more complete evaluation of the legislative history reveals an intention to allow a broad right of access, as the statute itself states. The House and Senate Reports also indicate that the bill drafters knew that the broad language of section 2 would not be limited to the purpose of gathering the obsolete and useless information contained in the discontinued reports. The Senate Report specifically states that section "requires every department of the Government, upon request of the Committee on Expenditures in the Executive Department [now the Committee on Government Reform], or any seven members thereof, to furnish any information requested of it relating to any matter within the jurisdiction of the committee." S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (1928). This language tracks the plain and broad language of the statute itself.

Moreover, both the Senate and the House Reports provide further evidence that the drafters understood that they were granting broad authority and that they intended to do so. In their respective "conclusions," both Reports note that the common practice of enacting reportir requirements was burdensome, wasteful, and needed to be stopped. Both Reports state:

The committee desires to make the observation that it is easy in the enactment of general legislation on some subject for some one to suggest that a special report be made to Congress. Little attention is given to the character of report that should be submitted, and the legislation goes in the statute books. The department makes the character of report that it thinks will fit the legal requirement, and often it is entirely valueless for the purpose intended. The reports come in; they are not valuable enough to be printed, they are referred to committees, and that is the end of the matter. The departmental labor in preparation is a waste of time and the files of Congress are cluttered up with a mass of useless reports. *If any information is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member or committee, so framed as to bring out the special information desired.*

S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (1928); H.R. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (1928) (emphasis added).

Thus, the House and Senate Reports evidence a clear preference for having legislators and committees make specific individual requests for information rather than compelling the standardized production of "useless reports." *Id.* In keeping with this preference, the drafters included the Seven Member Rule as a way to further the ability of members to gather particularized information upon request. There is nothing in the Reports or the statute itself to suggest that the drafters intended to limit the information that the Committee could request to information formerly contained in the 128 reports, rather than to allow access to such information as part of a broader right to information from executive branch agencies--a process they clearly favored.

By explicitly allowing any seven members of the Committee to compel the submission of information, the drafters granted a right not to Congress as a body, which would have been superfluous because Congress as a body (or any authorized Committee of Congress) can compel information independently of the Seven Member Rule, but to any seven interested Committee members, even members of the minority party. The legislative history reveals that the Seven Member Rule was not merely a means of demanding useless information formerly contained in the 128 reports abolished by the Act. Nor was it a redundant process allowing Congress as a whole, or congressiona Committees, to obtain information held by the executive. Rather, it was (and is) a special mechanism that enabled a small group of legislators--not simply Congress as a whole or the majority party--to obtain specific necessary information without littering the statute books with annual reporting requirements.

V. In practice, executive agencies have tended to comply with the Seven Member Rule, and the Department of Justice's legal opinions narrowly interpreting its disclosure requirements simply represent the executive's litigating position and are based on an incorrect reading c the statute and an incorrect interpretation of the legislative history.

The Seven Member Rule has yet to be adjudicated in court, although it has been mentioned twice. In *Leach v. Resolution Trust Corp.*, 860 Supp. 868 (D.D.C. 1994), the court declined to review the request of a lone congressman, Representative James Leach, made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The congressman had challenged the withholding of certain privileged Whitewater-related records on the basis that under section 552(d) of the FOIA such records could not be withheld from "Congress." In declining to decide whether an individual congressman could qualify as "Congress" under the terms of the FOIA, the court noted that various methods obtaining the information, including the Seven Member Rule, remained open to the congressman. The court noted that "the House has in fact provided alternative procedures through which small groups of individual congressmembers can request information without awaiting formal Committee action." 860 F. Supp. at 876 n.7 (*citing* Seven Member Rule). It also noted that the defendants in the case, the Resolutio Trust Corporation and the Office of Thrift Supervision, had themselves cited the statute as a means of compelling disclosure. *Id.*

In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), a Freedom of Information Act case, the D.C. Circuit discussed in a footnote the doctrine of executive privilege. In the footnote, the court noted that "[s]ince 1789, Congress has frequently exercised the latter power [to compel disclosure of agency records to Congress] in statutes requiring executive officers to transmit information to Congress," and the court cited the Seven Member Rule as an example. *Id.* at 1072 n.9. Although neither case relied on the Seven Member Rule, both support a plain understanding of its terms, and both underscore that at no point has the Executive Branch categorically claimed that Congress, or a duly constituted unit of Congress, may not properly require executive agencies to furnish information relevant to Congress' legislative or oversight function.

Outside of the judicial arena, the Seven Member Rule has been used to compel the submission of records to members of the Committee. For example, on September 20, 1994, twelve Republican (then minority) members of the House Committee on Government Operations, le by Ranking Minority Member William F. Clinger, Jr., wrote to the Acting Director of the Office of Thrift Supervision invoking the Seven

Member Rule to request information regarding the failure of the Madison Guaranty Savings and Loan. In a letter dated October 21, 1994, the Acting Director acceded to the request, even though there were significant questions about whether the matter fell within the jurisdictior of the Committee and whether the disclosure would impair the ongoing investigation of matters relating to Madison by an Independent Counsel. (Yeager Decl., Exs. D & E). Similarly, on April 22, 1994, Representative Clinger and other minority members of the Government Operations Committee requested documents relating to a Texas savings and loan from the Federal Deposit Insurance Corporation ("FDIC" In a letter dated May 3, 1994, the FDIC responded that "[a]s eleven members of the Committee on Government Operations have requestec the documents pursuant to 5 U.S.C. § 2954 . . . we are making the documents available for review." (Yeager Decl., Exs. F & G). Additionall on August 3, 1993, Chairman John Conyers and other members of the Government Operations Committee requested documents relating t the equal employment opportunity complaint resolution process from the Merit Systems Protection Board. In a letter dated August 5, 1993, 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." (Yeager Decl., Exs. H & I).

Only the Department of Justice, as counsel to the executive branch, has taken a narrower view of the Seven Member Rule. In 1970, seven members of the Government Operations Committee asked the White House Office of Science and Technology for a report evaluating the development of a supersonic transport aircraft. In response to a request for legal advice, Assistant Attorney General for the Office of Legal Counsel William Rehnquist, acting as lawyer for the executive, counseled against disclosure, concluding:

The legislative history of the legislation from which 5 U.S.C. § 2954 is derived thus indicates that its purpose was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress submitted by the several agencies. Its purpose was not to compel the Executive branch to make confidential reports available to a small number of Congressmen who happen to be members of a particular Congressional committee. We do not believe it should be so read, particularly since to do so would bring the statute into conflict with the constitutional prerogative of the President to withhold from Congress Executive branch documents the disclosure of which his judgment does not comport with the national interest.

Letter from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Dr. Lee A. DuBridge, Director, Office of Science and Technology (June 3, 1970).[(3)] (Yeager Decl., Ex. J).

The Department of Justice has reaffirmed this narrow interpretation of the Seven Member Rule on several occasions. *See, e.g.*, Senate Committee on Government Operations, Subcommittee on Intergovernmental Relations, *Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, The Congressional Right to Information Act* (Oct. 23, 1975) ("In view of the legislative history and the questionable constitutionality of the provision if interpreted to require Presidential disclosure with respect to all material within the Committee's jurisdiction, the Department of Justice has taken the position that the statute applies only to the routine information formerly contained in the abolished reports.") (Yeager Decl., Ex. K); *cf.* Testimony of Elliot Richardson, Senate Committee on the Judiciary, *Nomination of Elliot L. Richardson to be Attorney General*, 93rd Cong., 164 (1973) (stating that Rule does not extend to material subject to claims of executive privilege) (Yeager Decl., Ex. L).

The Department of Justice's narrow interpretation of the Seven Member Rule is neither surprising nor relevant. It represents nothing other than the litigating position of the executive when faced, in practice or even hypothetically, with a request made under the statute. Because lawyers for the executive represent the interests of the executive, they understandably will attempt to limit the scope of a statute that imposes burdens on the executive, particularly if those burdens implicate a partisan dispute. As a result, their interpretation is not an objective, dispassionate reading of the statute or the legislative history. The Department naturally construes the statute--and the executive's obligations under it--as narrowly as it possibly can.

In addition, the statements from the Office of Legal Counsel stating that the Seven Member Rule was enacted simply to allow members of the Committee to request information contained in the discontinued reports formerly presented to Congress represent a striking departure from the plain text of the statute. These statements inappropriately give priority to a self-serving reading of the legislative history over the statute itself. Although then-Assistant Attorney General Antonin Scalia and then-Assistant Attorney General William Rehnquist, as advocates for the executive branch, wrote that the legislative history trumped the text of the statute, this stance is hardly the approach to statutory interpretation they have taken as Justices. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A Matter of Interpretation 3-25, 29-37 (Amy Gutmann ed., 1997) (discussing textualism and arguing that attempting to discern legislative intent is illegitimate goal in statutory interpretation and that legislative history is best ignored); *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) ("I have in the past been critical of the Court's using the so-called legislative history of an enactment . . .to determine its meaning. Today, however, the Court's fascination with the files of Congress (we must consult them, because they are there) is carried to a new silly extreme.") (citations omitted); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J. concurring) (calling legislative history "the last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction"); *United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia

J., concurring in part) ("[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or eve a Committee Report, said it said. This text is eminently clear, and we should leave it at that."); *United Steelworkers v. Weber*, 443 U.S. 193 221 (1979) (Rehnquist, J., dissenting) ("Today, however, the Court behaves much like the Orwellian speaker earlier described . . . . Accordingly, without even a break in syntax, the Court rejects 'a literal construction of (the statute)' in favor of newly discovered 'legislative history' . . ..").

Moreover, as discussed *infra.* in Part IV, such statements are an incorrect interpretation of the legislative history, which reveals that the drafters had a clear preference for individual requests and contemplated broad disclosure. The fact that the Seven Member Rule also allowed members of the Committee to compel production of information formerly contained in the reports does not alter the broad language of the statute or the broad intention of the drafters.

VI. This case is justiciable, and the Sixteen Members have standing to sue, despite the Supreme Court's decision in *Raines v. Byrd* limiting legislator standing.

A. Justiciability.

This case presents a justiciable controversy for the Court's resolution, and the Sixteen Members have standing to sue. Although the executive branch routinely makes arguments attempting to deny standing to individual legislators and groups of legislators bringing suit, such arguments have little bearing here because the Seven Member Rule specifically grants a particular right to a small group of congresspeople--the plaintiffs in this case. Indeed, this case is nothing but a suit to enforce a statutory right, in which the cause of action to enforce the Seven Member Rule is both in the nature of mandamus and specifically granted under the Administrative Procedure Act.[(4)]

The Administrative Procedure Act grants a cause of action, 5 U.S.C. § 702, and empowers this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 551(13), 706(1). Moreover, under 28 U.S.C. § 1361, this Court has jurisdiction over actions-- such as this one--in the nature of mandamus "to compel an officer or employee of the United States or any agency thereof to perform a dut owed to the plaintiff." *Id.*; *see also Wilbur v. United States*, 281 U.S. 206, 218 (1930) ("Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgme and discretion, but not to direct exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action alread taken in the exercise of either."); *Kendall v. U. S. ex rel. Stokes*, 12 Pet. 524, 37 U.S. 524 (1838) (holding that issuance of mandamus to control action of postmaster general in respect to performance of act as to which he has no discretion does not infringe exclusive function c executive department). *Cf. NTEU v. Nixon,* 492 F.2d 587, 611-13 (D.C. Cir. 1974) (mandamus is available to compel executive officer to perform non-discretionary duty). Thus, this Court is empowered under the Administrative Procedure Act

and under its quasi-mandamus authority in 28 U.S.C. § 1361 both to hear the merits of this dispute and to compel the Secretary to comply with the Seven Member Rule.

This case presents none of the concerns discussed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) or *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464 (1982), of plaintiffs presenting "abstract questions" that amount to "generalized grievances" that are not concrete or particularized. *Valley Forge*, 454 U.S. at 475. Unlike the plaintiffs in *Lujan*, who were procedurally empowered by the citizen-suit provision of the Endangered Species Act, the Sixteen Members here have a particularized substantive right to obtain the information requested, not merely a procedural right to sue to vindicate a generalized grievance. In this case the Seven Member Rule specifically grants the right to receive the Adjusted Data requested by the Sixteen Members. Because at its core this is a case to enforce a statutory right, plaintiffs have standing and this Court may adjudicate plaintiffs' right under the Seven Member Rule.

B. *Byrd v. Raines* Does Not Apply.

The fact that the Sixteen Members are members of Congress is no bar to their suit either, notwithstanding the Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), which denied standing to legislators suing in their distinctively lawmaking capacity. In *Raines*, the Cou held that six members of Congress who challenged the Line Item Veto Act as unconstitutional did not possess standing. The Act had authorized the President to cancel any spending item or tax benefit measure from a bill after signing it into law, a decision which could be overridden only by a "disapproval bill" passed by Congress with a two-thirds majority in each House. The six members of Congress allegec that they had suffered a cognizable injury because, regardless of whether the line item veto were ever actually exercised, their votes would be less "effective" than before, and that the "meaning" and "integrity" of their vote had changed because the statute created a new

legislative possibility by allowing the President to excise the appropriation for a particular project. *Id.*

The Supreme Court rejected the plaintiffs' argument for standing, stating that they had not asserted an injury that is "personal, particularize concrete, and otherwise judicially cognizable." *Id.* at 820. The Court explained that the members of Congress "have alleged no injury to themselves as individuals . . . [and] the institutional injury they allege is wholly abstract and widely dispersed" among Congress generally. *I* at 829. Rather than alleging "personal injury," the plaintiffs had simply alleged injury "based on a loss of political power." *Id.* at 821. Moreover, their loss of political power was incomplete. The Court distinguished *Coleman v. Miller*, 307 U.S. 433 (1939) (upholding legislato standing in suit alleging unconstitutional action by lieutenant governor of Kansas that had effect of defeating measure), by noting that "there is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that alleged here." *Id.* at 826. Thus, as a result of *Raines*, members of Congress may not sue in their distinctly lawmaking capacity unless their votes have been completely nullified by allegedly illegal action in the sense that, but for that action, their "votes would have been sufficient defeat (or enact) a specific legislative act" which has gone into effect (or not gone into effect). *Id.* at 823.

Raines, however, does not affect the Sixteen Members' standing to sue in this case. Unlike the plaintiffs in *Raines*, the Sixteen Members do not allege an abstract loss of political power through dilution of their legislative power. The Sixteen Members do not sue in their lawmaking capacity at all. Rather, they sue to enforce a statutory right granted specifically to them. *Raines* certainly does not imply that legislators can never have standing, and there is no reason to think that legislators have less standing to sue than any other individuals suing to enforce rights granted to them. *See* cases cited in n.4, *supra*. Indeed, the Sixteen Members sue to redress a direct and particularized rejection of th authority granted specifically to them under the Seven Member Rule--an injury not suffered by other members of Congress, none of whom have had a Seven Member Rule request denied. By contrast, the *Raines* Court explained that in that case the plaintiffs were no different from their colleagues by noting that "appellees have not been singled out for specially unfavorable treatment as opposed to other Members *Id.* at 821.

Moreover, the *Raines* Court noted the availability of alternative remedial means in the form of either further congressional action or a lawsu by private plaintiffs suffering injury as a result of the act. *Id.* According to Professor Tribe, "where potential legislative alternatives to individual suit are available--such as direct suit by Congress or political action by any of a number of people to rectify the alleged harm--the individual legislator is really only complaining of a failure to persuade fellow colleagues." Laurence H. Tribe, *American Constitutional Law* (Third Ed. vol. 1) § 3-20 at 462. In such cases, the individual legislator is not alleging particularized injury.

In this case, by contrast, the Sixteen Members are not complaining of an inability to persuade fellow legislators to pass or not pass a particular piece of legislation. They are complaining of the Secretary's refusal to follow the law and to provide them with information, the submission of which is legally required. Nor are there alternative means of relief available to the Sixteen Members. In this case, the particularized harm is directed specifically to the Sixteen Members, and the power to redress that harm lies with this Court in this suit.

CONCLUSION

For the foregoing reasons, the Sixteen Members' motion for summary judgment should be granted. The Court should order the Secretary t release the requested information to the Sixteen Members within ten days of the date of the Court's order.

Dated: August __, 2001

Respectfully submitted,

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Of Counsel

1. Because the activities surrounding the 2000 Decennial Census are winding down, the Census Subcommittee is slated to be disbanded a the end of this year, with its responsibilities either reverting to the full Committee or shifting to a different subcommittee.

2. For the sole purpose of apportioning seats in the U.S. House of Representatives, Congress has directed the Secretary to report *only* unadjusted numbers. *See* 13 U.S.C. § 195; *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 340 (199

3. This report was later the subject of the *Soucie v. David* litigation, which concluded that the report was an agency record subject to FOIA, 448 F.2d at 1075-76, and remanded the case for consideration of the government's executive privilege claim.

4. The Supreme Court has often held that the "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (*quoting Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973)); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555. 578 (1992) (reaffirming *Warth*); *Public Citizen v. Department of Justice*, 491 U.S. 440, 448-49 (1989) (holding that the violation of procedural rights under the Federal Advisory Committee Act constituted injury-in-fact sufficient to confer standing).