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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)

Date: November 26, 2001
Time: 10:00 a.m.
Courtroom: No. 780
Location: Los Angeles: Roybal

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INTRODUCTION

In their opening brief, plaintiffs showed that they had standing to bring this action, and that there was no plausible legal basis for denying them access to the documents at issue in this case -- the adjusted 2000 Decennial Census data. Defendant does not take issue with plaintiffs' standing. Nor does defendant make any showing that the documents at issue are subject to any privilege claim (Executive or otherwise) that would raise the constitutional confrontation defendant hints at, but never establishes.

Nonetheless, defendant labors to convince this Court not to undertake the straightforward task of construing the one statute at issue -- 5 U.S.C. § 2954, the "Seven Member Rule" -- doubtless because the defendant does not want the Court to give meaning to the Rule, but wants to render it a nullity. To persuade this Court not to reach the merits, defendant invokes the long-discredited "equitable discretion doctrine" -- a doctrine never accepted by the Supreme Court or the Ninth Circuit, and now abandoned by the D.C. Circuit. And defendant suggests that an adjudication here would "raise[] serious constitutional doubts," (Def. Br. at i & 17), even though there is no claim that the adjusted census data are subject to Executive Privilege, and even though defendant's argument -- that any request for Executive Branch documents by a member of Congress raises "serious constitutional doubts" -- is overstated. Indeed, it would apply with equal force to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, a statute that has been enforced by the courts against the Executive Branch for thirty five years, often at the request of members of Congress, with no suggestion that it is unconstitutional.

Plaintiffs show in Point I below that there is no reason for this Court to withhold judgment in this case. Even assuming that the doctrine of equitable discretion is still viable (which it is not) and would be applied in this Circuit, the doctrine was invoked by the D.C. Circuit only to avoid an adjudication of claims of constitutional dimension. No constitutional claim plausibly can be raised here. The Ninth Circuit has ruled definitively that adjusted census records are not only not subject to Executive Privilege, they are in fact not subject to any privilege and are thus available to any requester under FOIA.

In Point II, we show that the rules of construction defendant seeks to apply here do not help his cause. They are rules applied to give meaning to ambiguous statutory language or to determine which of two competing, but plausible, constructions of a statute govern. Here, defendant has no interest in construing the Seven Member Rule. Instead, he asks the Court to rewrite the statute to drain it of any meaning. No rule of construction permits, let alone dictates, that outcome.

I. This Case Is Justiciable.

Defendant nowhere takes issue with plaintiffs' standing. Nor could he. The law is clear that the deprivation of a statutory right is sufficient to trigger Article III's injury-in-fact requirement. Plaintiffs have been injured by defendant's refusal to provide them with information that they are entitled to by statute -- a claim of injury that the Supreme Court has repeatedly found sufficient for standing purposes. E.g., Federal Election Comm'n v. Akins, 524 U.S. 11, 19-21 (1998); see also Plaintiffs' Summary Judgment Memorandum at 18 n.4, and authorities cited therein. Defendant nonetheless suggests that this Court should invoke the doctrine of equitable discretion and decline to adjudicate this case. The doctrine of equitable discretion has no application here for several reasons.

First, the equitable discretion doctrine has been discarded by the only court ever to apply it -- the D.C. Circuit -- and there is no reason for this Court to resurrect it. A few words of history help place defendant's argument in context. In a handful of decisions in the mid-1970s and early 1980s, the D.C. Circuit had ruled that members of Congress had standing to bring challenges to Executive Branch measures that unconstitutionally deprived them of their rights as legislators. See generally Chenoweth v. Clinton, 181 F.3d 112, 113-14 (D.C. Cir. 1999) (charting the history of the equitable discretion doctrine); see also, e.g., Kennedy v. Sampson, 511 F.2d 430, 433-36 (D.C. Cir. 1974); Carter v. Goldwater, 617 F.2d 697, 702 (D.C. Cir.) (en banc), vacated on other grounds, 444 U.S. 996 (1979) (per curiam); Barnes v. Kline, 759 F.2d 21, 25-26 (D.C. Cir. 1984), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987). To avoid rendering judgment in several cases between Congress and the Executive Branch involving constitutional claims, the D.C. Circuit ruled that, even though the plaintiff had standing, the court could withhold judgment on "equitable" or "remedial" discretion grounds to avoid judicial intrusion into a dispute better left to the coordinate branches of government to settle on their own. See generally Riegle v. Federal Open Market Comm., 656 F.2d 873, 880-81 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

But the D.C. Circuit began to dismantle the equitable discretion doctrine almost at the same time it was being created. One of the earliest and most scathing critiques of the doctrine was leveled by Judge, now Justice Scalia, who questioned both the D.C. Circuit's generous congressional standing rulings and the propriety of a court's withholding judgment in a case where the plaintiff in fact could show standing.I know of no precedent for the assertion, which has been made in this Riegle line of cases, of a discretion to grant or withhold the only available relief on the basis of a factor that is not accidental or extrinsic but pertains to the identity of the parties and the very nature of the claim. When the impropriety of granting relief derives from such a jurisdictional characteristic, the courts have not hidden behind a massive "remedial discretion," but have admitted to their lack of power to rule in favor of the plaintiff because of standing, see [United States v.] Richardson, supra, or sovereign immunity, see Edelman v. Jordan, 415 U.S. 651 (1974).

Moore v. House of Representatives, 733 F.2d 946, 962-63 (D.C. Cir. 1984) (Scalia, J., concurring) (footnote omitted).

Virtually every case that followed contained similar attacks on the doctrine. See, e.g., Humphrey v. Baker, 848 F.2d 211, 214 (1988) (noting that the doctrine was "recently minted," had not been endorsed by the Supreme Court, and raised concerns that "troubled" the panel and other members of the court); Melcher v. Federal Open Market Comm., 836 F.2d 561, 565 n.4 (1987) (questioning continued viability of the doctrine); id. at 565-66 (Edwards, J., concurring) (disavowing the doctrine). And, lest there be any doubt about it, Chenoweth v. Clinton, supra, makes it clear that, in light of the Supreme Court's decision in Raines v. Byrd, 521 U.S. 811 (1997), the equitable discretion doctrine is a dead letter in the D.C. Circuit. 181 F.3d at 116 ("Raines, therefore, may not overrule Moore so much as require us to merge our separation of powers and standing analyses"). Chenoweth makes clear that in the D.C. Circuit the key inquiry is now standing, not equitabl discretion. Id. If a congressional plaintiff has standing post-Raines, then the case is justiciable; if the plaintiff lacks standing in light of Raine then the case must be dismissed. Id. There is no more middle ground, and defendant has not pointed to any D.C. Circuit decision post-Raines invoking equitable discretion. Because here there is no question that the plaintiffs have standing, the now-interred equitable discretion doctrine is no barrier to reaching the merits.

Second, every one of the D.C. Circuit's equitable discretion cases involved an effort by one branch of government (or members of that branch) to adjudicate an inter-branch dispute of clear constitutional import.(1) The equitable discretion doctrine was simply a branch of separation of powers jurisprudence, which recognized that "where a case involves 'difficult questions concerning the relationship between the legislative and executive branches,'" judicial intervention may be inappropriate. Moore, supra, 733 F.2d at 955 (citation omitted). In this case, there is no constitutional issue to be avoided. This case does not involve the kind of thorny constitutional issues that were at the core of cases like United States v. AT&T Co., 551 F.2d 384 (D.C. Cir. 1976), appeal after remand, 567 F.2d 121 (D.C. Cir. 1977), which involved the Department of Justice's effort to block a congressional investigation into warrantless national security wiretaps, or United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983), where the Justice Department sought to block the House from proceeding with criminal contempt charges against EPA Administrator Anne Gorsuch for withholding records, alleged to be subject to Executive Privilege, from Congress.

Here, there can be no plausible claim that adjusted census data records involve matters of national security, defense, criminal investigations, advice to the President from subordinates, or any other possible subject of an Executive Privilege claim. The Ninth Circuit has ruled that records indistinguishable from the ones at issue here -- namely, the adjusted 1990 Decennial Census records -- are not privileged in any respect, and thus are subject to mandatory disclosure under FOIA. Assembly of the State of California v. United States Department of Commerce, 968 F.2d 916 (9th Cir. 1992). The defendant's effort to bury the Ninth Circuit's decision in its brief (at 19 n.7) rather than address it forthrightly only reinforces our point: Under controlling Ninth Circuit precedent, the defendant' objection to the release of these records is neither rooted in the Constitution nor based on a statute. Because the defendant's objections fail to cross a constitutiona threshold, even the discredited equitable discretion document cannot apply. There simply is no separation of powers issue in this case.

The long-standing existence of FOIA further demonstrates the futility of defendant's efforts to portray this case as implicating separation of powers concerns. Under FOIA, any record in the possession or control of an Executive Branch agency must be disclosed to any person on request, subject to the nine specific exemptions in the Act. 5 U.S.C. § 552(a)(3) and (b)(1)-(9). There is no question that members of Congress, just like ordinary citizens, may invoke FOIA to obtain access to information in the hands of executive agencies and that the existence of FOIA may not be used to deny Members of Congress records to which they are otherwise entitled. 5 U.S.C. § 552(d) ("This section is not authority to withhold information from Congress"); Murphy v. Department of the Army, 613 F.2d 1151, 1156 & n.12 (D.C. Cir. 1979).(2) There is no question that, had they chosen to do so, the plaintiffs could have sought the same records under FOIA. They chose n to do so because FOIA's procedural requirements are burdensome and delay access. 5 U.S.C. § 552(a)(3). Nonetheless, had the plaintiffs elected to proceed via FOIA, there would be no separation of powers concerns for the reason defendant seeks to obscure in this case -- there is nothing at all sensitive about the records at issue and disclosing them would not conceivably harm executive prerogatives.

As we said at the outset, defendant has presented no reason for this Court to avoid resolving this dispute. The case presents a single question of law: Does the Seven Member Rule compel the defendant to provide plaintiffs with documents that are not subject to any plausible constitutionally based privilege claim(3) If not, there is no reason for the Court to avoid reaching this question. As then-Judge Scalia drove home in his concurrence in Moore, once a court is satisfied that the plaintiff surmounts the standing hurdle and the case is otherwise justiciable, then Justice Marshall's admonition in Marbury v. Madison controls: "'It is, emphatically, the province and duty of the judicial department, to say what the law is * * * [T]his is the very essence of judicial duty.'" Moore, 733 F.2d at 962 (Scalia, concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

II. Defendant's Reading Of The Seven Member Rule Renders It A Nullity.

The defendant's brief on the question of statutory construction reads like an exercise of wishful thinking. Virtually every settled rule of statutory construction is ignored. Thus, although the defendant acknowledges that "the task of statutory construction . . . begins with the specific words or phrases used by the drafters," (Def. Br. at 10), he makes no effort at all to parse the actual language of § 2954, which, astonishingly, is not even set forth in defendant's brief. And while defendant invokes the rule that resort to extrinsic sources to aid construction is warranted where there is a textual ambiguity (Def. Br. at 9), defendant glosses over the absence of textual ambiguity here. Defendant does not argue that this Court should choose one of several competing, but equally plausible, interpretations of 2954. Even abl defense counsel cannot contrive an ambiguity in this statute. Under these circumstances, there is simply no warrant for the Court to depart from the plain meaning of the Seven Member Rule. The law is clear: "Legislative history is irrelevant to the interpretation of an unambiguou statute." Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808-09 n.3 (1989); accord United States v. Gonzales, 520 U.S. 1, 6 (1997) (where statutory command is straightforward, "there is no reason to resort to legislative history"); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); United States v. Daas, 198 F.3d 1167, 1175 (9th Cir. 1999), cert. denied, 531 U.S. 999 (2000); In re Catapult Entertainment, Inc., 165 F.3d 747, 750 (9th Cir.), cert. dismissed, 528 U.S. 924 (1999).

Despite all of this, defendant contends that this Court should rewrite the plain text of § 2954. To show how far afield the defendant urges this Court to stray, it is worth reviewing the actual text of § 2954 and comparing it with defendant's proposed revisions. The operative language of § 2954 is that, on request, an executive agency "shall submit information requested of it relating to any matter within the jurisdiction of the committee." According to defendant, however, that language should be deleted and the following language should be substituted: on request, an agency "shall submit any information that would have been contained in one of the reports required by legislatic repealed by this Act in 1928." Defendant's approach rests on the theory that § 2954 does nothing more than confer a narrow right of acces to information Congress said in 1928 was obsolete and useless, and that Congress' efforts to put that concept into statutory language went terribly awry. Defendant's reading is riddled with problems, the most glaring of which is that it is flatly at odds with the plain language of the Seven Member Rule.

First, defendant's argument is wrong. The purpose of § 2954 was not simply to enable members of Congress to gather information formerly contained in the discontinued reports. That would have been pointless. As the legislative history makes abundantly clear, the information in those reports was "of no value," "serve[d] no useful purpose," was "useless," "unnecessary," "valueless," "superseded," "out of date" and "obsolete." S. Rep. No. 1320, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 1757, 70th Cong., 1st Sess., (1928).(4) The purpose of the Seven Member Rule was not, as defendant suggests, to give Congress the power to compel the submission of precisely the information it no longer wanted and nothing more; rather, it was broader, as reflected in both the language of § 2954 ("any information" "relating to any matt within the jurisdiction of the committee") and its legislative history. See, e.g., S. Rep. No 1320, 70th Cong., 1st Sess., p. 4 (1928) (emphasizing that the Act "requires every department of 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."). Defendant's highly selective discussion of the legislative history simply ignores statements in both the House and Senate reports that confirm that Congress intended the reach of the Seven Member Rule to go well beyond the discontinued reports, and saw the Rule as a way to further the ability of members to gather particularized information relating to the Committee's jurisdiction upon request. S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (1928); H.R. Rep. No. 1757, 70th Cong., 1st Sess., p. 6 (1928). There is simply nothing in the Reports or the statute itself to suggest that the drafters intended to limit the information the Committee and its members could request to information formerly contained in the discontinued reports. Id.

Second, defendant's suggestion that the scope of § 2954 is limited to the subjects of the discontinued reports ignores a crucial feature of th Act: namely, that § 2954 itself defines its limits. Section 2954 says that it may be used to compel the submission of any information in the hands of the executive branch where, but only where, such information falls "within the jurisdiction of the committee." Defendant's rewriting of § 2954 not only ignores its text, but would render this provision surplusage in violation of the rule that, in construing statutes, courts are "obliged to give effect, if possible, to every word Congress used." See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); accord Stone v. INS, 514 U.S. 386, 397 (1995).

Equally problematic, defendant's reading would effectively substitute the word "report," which appears nowhere in the text of § 2965, for the word Congress actually selected, "information." Defendant seeks to justify this rewriting of the Act by pointing out that the Subchapter of which the Act is part is entitled "Reports. " That fact, defendant claims, is "persuasive demonstration of the limited nature of Section 2954's reach." Def. Br. at 10. This argument is baseless. For one thing, the Supreme Court has repeatedly cautioned against using words in titles as an interpretative tool. Even the key case defendant cites makes clear that courts should observe "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. * * * For interpretative purposes, they are of use only when they she light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947) (citations omitted). Here, as noted above, there is no ambiguity in the language of § 2954. Moreover, defendant's argument proves too much. If titles are to be used by

the Court as an interpretative guide, then surely more directly relevant is the title of § 2954 itself, which is: "§ **2954. Information to committees of Congress on request.**" Defendant cannot have it both ways. If titles are relevant to the Court's inquiry, then the title of § 2954, which uses the word "information" and not "report," further undermines defendant's argument.

Third, although the extrinsic sources defendant invokes do not support his reading of the Act, defendant misses the mark in contending tha resort to legislative history is appropriate where, as here, the statutory text is clear. Defendant claims that the Ninth Circuit has "expressly held that departure from the literal language of the statute is appropriate 'where the legislative history clearly indicates that Congress mean something other than what it said.'" (Def. Br. at 11, quoting In re Catapult Entertainment, Inc., supra, 165 F.3d at 753). Not so. The quoted language is unquestionably dicta, not holding, and the decision contradicts, not supports, defendant's freewheeling approach to statutory construction, as a brief review of the decision makes clear. The court begins its statutory construction analysis by stating: "First off, becaus we discern no ambiguity in the plain statutory language, we need not resort to legislative history." 165 F.3d at 753. The court then says that "[w]e will depart from this rule, if at all, only where the legislative history clearly indicates that Congress meant something other than it said. Id. (emphasis added). The court concludes that "the legislative history unearthed by Catapult falls far short of this mark." Id. at 754. This brief discussion hardly supports defendant's contention that this Court should embark on an interpretative voyage which disregards the text of § 2954, and it is surely not the "holding" claimed by the defendant. Indeed, as far as we can tell, none of the Ninth Circuit rulings cited by the defendant, and none of the recently decided Ninth Circuit cases we could identify, supports the sweeping proposition he urges on this court. See, e.g., United States v. Daas, 198 F.3d 1167, 1175 (9th Cir. 1999) (only if a statute is ambiguous may a court "look to its legislative history for evidence of congressional intent"), cert. denied, 531 U.S. 999 (2000); City of Auburn v. United States, 154 F.3d 1025, 1029-30 (9th Cir. 1998) (where statutory command is clear, "there is no reason to resort to legislative history"), cert. denied, 527 U.S. 1022 (1999); Central Mont. Elec. Power Coop. v. Administrator of Bonneville Power Admin., 840 F.2d 1472, 1477 (9th Cir. 1988) ("Absent a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive"); Foxgord v. Hischemoeller, 820 F.2d 1030, 1034 (9th Cir.) (recognizing that a statute's plain language controls absent exceptional circumstances not present in case), cert. denied, 484 U.S. 986 (1987).

Nor does defendant's reliance on cases like Public Citizen v. Department of Justice, 491 U.S. 440 (1989), aid his case. To be sure, such cases as Public Citizen and Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) hold that, where the application of a statute to particular individual or entity would lead to an absurd or extreme result, the statute should be read to include an exception that excuses tha individual or entity from compliance. In Public Citizen, the question was whether the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, applied to the American Bar Association's Standing Committee on Judicial Selection in its dealings with the Justice Department on judicial nominations -- a question that turned on whether the Justice Department "utilize[d]" the ABA committee in its work. Recognizing tha "utilize" "is a woolly verb, its contours left undefined by the statute itself," 491 U.S. at 454, the Court found that Congress did not intend FACA to sweep so broadly as to encompass the ABA committee. Id. at 467. In other words, the Court found that the ABA committee should be excluded from an ambiguous statute, not that FACA should be rewritten in its entirety. The same is true with Holy Trinity. There, the Cou found that the literal terms of a then-current immigration law prohibited a contract between a church and an Englishman the church had hired to come to New York to be its pastor. 143 U.S. at 458. The Court concluded that the law was aimed at unskilled workers, not member of the clergy, and that it would offend the religious principles on which the nation was founded to restrict the entry of clergymen to the Unite States. Id. at 464-470. Once again, faced with the perceived overbreadth of a statute, the Court responded, not by performing major surgen on the statute as defendant here urges, but by carving out a narrow exception. These cases provide no support to defendant, and certainly no reason to rewrite § 2954.

III. Defendant's Separation of Power Concerns are Contrived.

Defendant's final contention -- that a rewriting of the Act is required by "serious constitutional doubts" (Def. Br. at pp. 17-20) -- is as hollow as his prior contentions. Defendant's main argument is that a plain reading of the Seven Member Rule "vest[s] a sweeping authority in any seven members of the Committee to demand disclosure of executive information . . . [including] material deemed sensitive for national security or other reasons, or which is otherwise protected by Executive Privilege." Id. at 18. This power, defendant suggests, "is one not enjoyed even by the full Congress." Id. (citation omitted). If there was ever a case of a party setting up a strawman argument, this is it; nowhere have the plaintiffs or anyone else ever suggested that a statute trumps the Constitution. We recognize the settled rule that a valid constitutional claim of Executive Privilege can defeat a congressional demand for information, regardless of whether the demand is made b subpoena or under a statute. Moreover, a request made under § 2954 for materials subject to an Executive Privilege claim is hardly self-enforcing, as defendant seems to suggest. Rather, an effort to enforce a request under § 2954 would fare no better or worse than a deman for such materials made by subpoena, except that the failure of an Executive Branch official to comply with a valid congressional subpoena is punishable by civil or criminal contempt, see, e.g., United States v. House of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (discussing possible indictment of then-EPA Administrator Anne Gorsuch for failing to comply with congressional subpoena), whereas the failure to comply with a demand under § 2954 can at most result in an action for injunctive relief, like the one before the Court.[(5)]

Particularly ill-founded is defendant's effort to take shelter in the case law dealing with congressional efforts to obtain Presidential materials including defendant's citation to Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc). The simple answer here to defendant's professed fear that § 2954 empowers members of Congress to run roughshod over the President is that § 2954 does not authorize committee members to seek Presidential records; the provision explicitly limits information demands to an "Executive agency," and the President and his personal advisors are assuredly not an "agency" under any accepted definition of the term. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Armstrong v. Executive Office of the President, 90 F.3d 553, 558-63 (D.C. Cir. 1996); Meyer v. Bush, 981 F.2d 1288, 1291-94 (D.C. Cir. 1993).

Finally, defendant protests that it is "unusual, and constitutionally suspect," for the power set forth in § 2954 "to be lodged not in any committee, or subcommittee, but in a mere fraction of the membership of only two of Congress' more than 40 full committees." (Def. Br. at 19). Apart from the incongruity of the Executive Branch challenging a decision by Congress on how to order its affairs,[(6)] there is nothing strange or constitutionally suspect about this relationship. Congress, as defendant points out, has reposed sweeping powers in its subcommittees, and standing subcommittees in both Houses have been delegated subpoena power. CRS Report for Congress, 95-464A (Defendant's Exhibit C, at 19). There is no difference in the enforceability of a duly authorized subpoena issued by full Committee or by a subcommittee or select committee. So long as the subpoena seeks material that is relevant to Congress' legislative or oversight purpose, and does not intrude into matters subject to Executive Privilege, the subpoena will be enforced by the courts. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503-07 (1975); Wilkinson v. United States, 365 U.S. 399, 408-09 (1961); Rosenblatt v. United States, 360 U.S. 109, 117 (1959). Moreover, many committees and subcommittees have given a single member of Congress -- the committee chair -- unilateral power to determine when to issue a subpoena. CRS Report for Congress, 95-464A (Defendant's Exhibit C, at 19). Thus, contrary to defendant's argument, there is nothing odd at all -- let alone "constitutionally suspect" -- in concentrating the power to request Executive Branch records in the hands of seven committee members, rather than, for instance, one. Indeed, the framework of § 2954 makes eminent sense. Members of the majority have no need for provisions like § 2954, because they can always resort, if need be, to the subpoena process to gather information. Section § 2954 was plainly envisioned as the tool of minority members of the two main oversight committees in Congress. The selection of these committees was not made at random: At the time § 2954 was enacted, these were the two committees in Congress charged with oversight of the Executive Branch, and the same remains true today. Nor was the selection of seven members for the House Committee and five members for the Senate Committee made at random. Rather, the number o members selected makes it clear that the provision was intended to empower significant groups of minority members to gain access to information within the Committee's jurisdiction without being dependent on the good graces of the majority. And until now, the Seven Member Rule has served its purpose well. Exhibits D-I to the declaration of Michael Yeager, Minority Deputy Chief Counsel to the House Government Reform Committee, submitted in support of Plaintiffs' Motion for Summary Judgment, demonstrate that § 2954 has repeatedly been invoked by Democrats and Republicans alike to gain access to Executive Branch records. In each case, the members making the request were members of the minority, and they used § 2954 to secure information relevant to their legislative responsibilities that they cou not otherwise obtain. And in each case, the Executive agency made the records available, although at times the agency asked the membe of Congress to respect certain confidentiality concerns. But the overarching point is that, in every case, § 2954 served its purpose with no untoward consequences to the Executive Branch.

Nor would be there be any untoward consequences to granting plaintiffs the relief they seek. To be sure, they could have sought the same records under FOIA, but chose not to do so because § 2954 provided a more direct and expeditious route to the same records. The courts have already compelled defendant's predecessor to turn over the adjusted 1990 census records to the Assembly of the State of California. Assembly of the State of California, supra. In light of that compelled disclosure, there can be no claim of constitutional dimension in requirir defendant to turn over the adjusted 2000 census records to sixteen members of Congress who serve on the House Committee on Government Reform.

CONCLUSION

For the reasons stated above and in the memorandum of law in support of plaintiffs' motion for summary judgment, plaintiffs' motion for summary judgment should be granted, defendant's motion to dismiss, or, in the alternative, cross-motion for summary judgment should be denied, and defendant should be directed to make available the adjusted 2000 Decennial Census data to plaintiffs without delay.

Dated: October __, 2001

Respectfully submitted,

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Of Counsel

1. For example, the Presentment Clause, see, e.g., Barnes v. Kline, 759 F.2d 21, 23 (D.C. Cir. 1985); Kennedy v. Sampson, 511 F.2d 430, 432 (D.C. Cir. 1974), the Appointments Clause, see, e.g., Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 562 (D.C. Cir. 1987); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 875 (D.C. Cir. 1981), the Ascertainment Clause, see, e.g., Humphrey v. Baker, 848 F.2d 211, 213 (D.C. Cir. 1988), the Origination Clause, see, e.g., Moore v. United States House of Representatives, 733 F.2d 946, 948 (D.C. Cir. 1984), the Appropriations Clause, see, e.g., Harrington v. Bush, 553 F.2d 190, 194-95 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455, 457 (4th Cir. 1975), and the Treaty Clause, see, e.g., Goldwater v. Carter, 617 F.2d 697, 703 (D.C. Cir. 1979) (en banc).

2. The Murphy court refers to 5 U.S.C. § 552(c), rather than 552(d), as the FOIA provision reserving Congress' rights. The discrepancy is attributable to amendments to the Act that post-dated Murphy that added a new subsection (c).

3. As we explain in more detail below, we acknowledge that the Seven Member Rule does not in any way address or purport to limit the President's authority to make claims of Executive Privilege, and that, like all statutes, the Seven Member Rule is limited by the Constitution The Seven Member Rule could no more abrogate the President's right to withhold Executive Privileged material than could a Congressiona subpoena. But the constitutional issue does not and cannot arise in this case, because there is no plausible claim that the disputed census information is subject to a constitutional privilege, and, for that reason, defendant has made no such claim.

4. According to the House and Senate Reports, most of the discontinued reports concerned matters that were no longer of any interest to Congress, including, for example, the "consolidation of the offices of surveyors general with the cadastral engineering service," the affairs c "the Freedman's Hospital," the conduct of the War Finance Corporation, and the legislative output of the legislatures of the Philippines and Puerto Rico. Id.

5. As we discussed earlier, although the defendant raises the specter of Executive Privilege, he does not assert such a claim in this proceeding. Defendant has not done so for two reasons. First, such a contention would be foreclosed in this Court by the Ninth Circuit's ruling in Assembly of the State of California v. United States Department of Commerce, 968 F.2d 916 (1992), that the 1990 adjusted censu data was not privileged. Second, as defendant's own papers demonstrate, there are procedures the Executive Branch has put in place to regulate claims of privilege, and those procedures have not been invoked by the defendant in this case. See CRS Report for Congress, 95-464A (Defendant's Exhibit C, at 25-26). The deliberative process privilege alluded to by defendant is a non-constitutional discovery privilege often asserted by the Executive Branch in litigation under FOIA; this privilege is not a basis for withholding records from members of Congress. See generally Murphy v. Department of the Army, 613 F.2d 1151 (D.C. Cir. 1979).

6. Indeed, the D.C. Circuit has suggested that it is not proper for the judiciary to second-guess Congress on institutional arrangements like that contained in § 2954. As the court put it in Murphy v. Department of the Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979), in language especially apt here, "It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional directio that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress."