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CENTRAL DIST. OF CALIF.
LOS ANGELES

FILED

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

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

15 v.

16 DONALD L. EVANS, Secretary of Commerce,
17 Defendant.
18

) No. 01-04530 (LGB) (AJWx)
) PLAINTIFFS' REPLY TO DEFENDANT'S
) OPPOSITION TO PLAINTIFFS' MOTION
) FOR SUMMARY JUDGMENT AND
) OPPOSITION TO DEFENDANT'S
) MOTION TO DISMISS, OR, IN THE
) ALTERNATIVE, CROSS-MOTION FOR
) SUMMARY JUDGMENT
) Date: November 26, 2001
) Time: 10:00 a.m.
) Courtroom: No. 780
) Location: Los Angeles: Roybal

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1 INTRODUCTION

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

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

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

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

6 **I. This Case Is Justiciable.**

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

16 First, the equitable discretion doctrine has been discarded by the only court ever to apply
17 it — the D.C. Circuit — and there is no reason for this Court to resurrect it. A few words of history
18 help place defendant's argument in context. In a handful of decisions in the mid-1970s and early
19 1980s, the D.C. Circuit had ruled that members of Congress had standing to bring challenges to
20 Executive Branch measures that unconstitutionally deprived them of their rights as legislators. See
21 generally Chenoweth v. Clinton, 181 F.3d 112, 113-14 (D.C. Cir. 1999) (charting the history of the
22 equitable discretion doctrine); see also, e.g., Kennedy v. Sampson, 511 F.2d 430, 433-36 (D.C. Cir.
23 1974); Carter v. Goldwater, 617 F.2d 697, 702 (D.C. Cir.) (en banc), vacated on other grounds, 444
24 U.S. 996 (1979) (per curiam); Barnes v. Kline, 759 F.2d 21, 25-26 (D.C. Cir. 1984), vacated as moot
25 sub nom. Burke v. Barnes, 479 U.S. 361 (1987). To avoid rendering judgment in several cases
26 between Congress and the Executive Branch involving constitutional claims, the D.C. Circuit ruled
27 that, even though the plaintiff had standing, the court could withhold judgment on "equitable" or
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1 “remedial” discretion grounds to avoid judicial intrusion into a dispute better left to the coordinate
2 branches of government to settle on their own. See generally Riegle v. Federal Open Market
3 Comm., 656 F.2d 873, 880-81 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

4 But the D.C. Circuit began to dismantle the equitable discretion doctrine almost at the same
5 time it was being created. One of the earliest and most scathing critiques of the doctrine was leveled
6 by Judge, now Justice Scalia, who questioned both the D.C. Circuit’s generous congressional
7 standing rulings and the propriety of a court’s withholding judgment in a case where the plaintiff in
8 fact could show standing.

9 I know of no precedent for the assertion, which has been made in this Riegle line of
10 cases, of a discretion to grant or withhold the only available relief on the basis of a
11 factor that is not accidental or extrinsic but pertains to the identity of the parties and
12 the very nature of the claim. When the impropriety of granting relief derives from
13 such a jurisdictional characteristic, the courts have not hidden behind a massive
14 “remedial discretion,” but have admitted to their lack of power to rule in favor of the
15 plaintiff because of standing, see [United States v.] Richardson, supra, or sovereign
16 immunity, see Edelman v. Jordan, 415 U.S. 651 (1974).

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

19 Virtually every case that followed contained similar attacks on the doctrine. See, e.g.,
20 Humphrey v. Baker, 848 F.2d 211, 214 (1988) (noting that the doctrine was “recently minted,” had
21 not been endorsed by the Supreme Court, and raised concerns that “troubled” the panel and other
22 members of the court); Melcher v. Federal Open Market Comm., 836 F.2d 561, 565 n.4 (1987)
23 (questioning continued viability of the doctrine); id. at 565-66 (Edwards, J., concurring) (disavowing
24 the doctrine). And, lest there be any doubt about it, Chenoweth v. Clinton, supra, makes it clear that,
25 in light of the Supreme Court’s decision in Raines v. Byrd, 521 U.S. 811 (1997), the equitable
26 discretion doctrine is a dead letter in the D.C. Circuit. 181 F.3d at 116 (“Raines, therefore, may not
27 overrule Moore so much as require us to merge our separation of powers and standing analyses”).

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1 Chenoweth makes clear that in the D.C. Circuit the key inquiry is now standing, not equitable
2 discretion. Id. If a congressional plaintiff has standing post-Raines, then the case is justiciable; if
3 the plaintiff lacks standing in light of Raines, then the case must be dismissed. Id. There is no more
4 middle ground, and defendant has not pointed to any D.C. Circuit decision post-Raines invoking
5 equitable discretion. Because here there is no question that the plaintiffs have standing, the now-
6 interred equitable discretion doctrine is no barrier to reaching the merits.

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

20 Here, there can be no plausible claim that adjusted census data records involve matters of
21 national security, defense, criminal investigations, advice to the President from subordinates, or any
22

23 ¹ For example, the Presentment Clause, see, e.g., Barnes v. Kline, 759 F.2d 21, 23 (D.C. Cir.
24 1985); Kennedy v. Sampson, 511 F.2d 430, 432 (D.C. Cir. 1974), the Appointments Clause, see, e.g.,
25 Melcher v. Federal Open Mkt. Comm., 836 F.2d 561, 562 (D.C. Cir. 1987); Riegle v. Federal Open
26 Mkt. Comm., 656 F.2d 873, 875 (D.C. Cir. 1981), the Ascertainment Clause, see, e.g., Humphrey v.
27 Baker, 848 F.2d 211, 213 (D.C. Cir. 1988), the Origination Clause, see, e.g., Moore v. United States
28 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).

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

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

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

1 As we said at the outset, defendant has presented no reason for this Court to avoid resolving
2 this dispute. The case presents a single question of law: Does the Seven Member Rule compel the
3 defendant to provide plaintiffs with documents that are not subject to any plausible constitutionally
4 based privilege claim?³ If not, there is no reason for the Court to avoid reaching this question. As
5 then-Judge Scalia drove home in his concurrence in Moore, once a court is satisfied that the plaintiff
6 surmounts the standing hurdle and the case is otherwise justiciable, then Justice Marshall's
7 admonition in Marbury v. Madison controls: "It is, emphatically, the province and duty of the
8 judicial department, to say what the law is * * * [T]his is the very essence of judicial duty." Moore,
9 733 F.2d at 962 (Scalia, concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170
10 (1803)).

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

12 The defendant's brief on the question of statutory construction reads like an exercise of
13 wishful thinking. Virtually every settled rule of statutory construction is ignored. Thus, although the
14 defendant acknowledges that "the task of statutory construction . . . begins with the specific words
15 or phrases used by the drafters," (Def. Br. at 10), he makes no effort at all to parse the actual language
16 of § 2954, which, astonishingly, is not even set forth in defendant's brief. And while defendant
17 invokes the rule that resort to extrinsic sources to aid construction is warranted where there is a
18 textual ambiguity (Def. Br. at 9), defendant glosses over the absence of textual ambiguity here.
19 Defendant does not argue that this Court should choose one of several competing, but equally
20 plausible, interpretations of § 2954. Even able defense counsel cannot contrive an ambiguity in this
21 statute. Under these circumstances, there is simply no warrant for the Court to depart from the plain
22 meaning of the Seven Member Rule. The law is clear: "Legislative history is irrelevant to the
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24 ^{3/} As we explain in more detail below, we acknowledge that the Seven Member Rule does not in
25 any way address or purport to limit the President's authority to make claims of Executive Privilege,
26 and that, like all statutes, the Seven Member Rule is limited by the Constitution. The Seven Member
27 Rule could no more abrogate the President's right to withhold Executive Privileged material than
28 could a Congressional 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.

1 interpretation of an unambiguous statute.” Davis v. Michigan Dep’t of Treasury, 489 U.S. 803, 808-
2 09 n.3 (1989); accord United States v. Gonzales, 520 U.S. 1, 6 (1997) (where statutory command
3 is straightforward, “there is no reason to resort to legislative history”); Connecticut Nat’l Bank v.
4 Germain, 503 U.S. 249, 253-54 (1992) (“When the words of a statute are unambiguous, then, this
5 first canon is also the last: ‘judicial inquiry is complete’”) (quoting Rubin v. United States, 449 U.S.
6 424, 430 (1981)); United States v. Daas, 198 F.3d 1167, 1175 (9th Cir. 1999), cert. denied, 531 U.S.
7 999 (2000); In re Catapult Entertainment, Inc., 165 F.3d 747, 750 (9th Cir.), cert. dismissed, 528
8 U.S. 924 (1999).

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

21 First, defendant’s argument is wrong. The purpose of § 2954 was not simply to enable
22 members of Congress to gather information formerly contained in the discontinued reports. That
23 would have been pointless. As the legislative history makes abundantly clear, the information in
24 those reports was “of no value,” “serve[d] no useful purpose,” was “useless,” “unnecessary,”
25 “valueless,” “superseded,” “out of date” and “obsolete.” S. Rep. No. 1320, 70th Cong., 1st Sess.

1 (1928); H.R. Rep. No. 1757, 70th Cong., 1st Sess., (1928).⁴ The purpose of the Seven Member Rule
2 was not, as defendant suggests, to give Congress the power to compel the submission of precisely the
3 information it no longer wanted and nothing more; rather, it was broader, as reflected in both the
4 language of § 2954 (“any information” “relating to any matter within the jurisdiction of the
5 committee”) and its legislative history. See, e.g., S. Rep. No 1320, 70th Cong., 1st Sess., p. 4 (1928)
6 (emphasizing that the Act “requires every department of Government, upon request of the Committee
7 on Expenditures in the Executive Department [now the Committee on Government Reform], or any
8 seven members thereof, to furnish any information requested of it relating to any matter within the
9 jurisdiction of the committee.”). Defendant’s highly selective discussion of the legislative history
10 simply ignores statements in both the House and Senate reports that confirm that Congress intended
11 the reach of the Seven Member Rule to go well beyond the discontinued reports, and saw the Rule
12 as a way to further the ability of members to gather particularized information relating to the
13 Committee’s jurisdiction upon request. S. Rep. No. 1320, 70th Cong., 1st Sess., p. 4 (1928); H.R. Rep.
14 No. 1757, 70th Cong., 1st Sess., p. 6 (1928). There is simply nothing in the Reports or the statute itself
15 to suggest that the drafters intended to limit the information the Committee and its members could
16 request to information formerly contained in the discontinued reports. Id.

17 Second, defendant’s suggestion that the scope of § 2954 is limited to the subjects of the
18 discontinued reports ignores a crucial feature of the Act: namely, that § 2954 itself defines its limits.
19 Section 2954 says that it may be used to compel the submission of any information in the hands of
20 the executive branch where, but only where, such information falls “within the jurisdiction of the
21 committee.” Defendant’s rewriting of § 2954 not only ignores its text, but would render this
22 provision surplusage in violation of the rule that, in construing statutes, courts are “obliged to give
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25 ^{4/} According to the House and Senate Reports, most of the discontinued reports concerned matters
26 that were no longer of any interest to Congress, including, for example, the “consolidation of the
27 offices of surveyors general with the cadastral engineering service,” the affairs of “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.

1 effect, if possible, to every word Congress used.” See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330,
2 339 (1979); accord Stone v. INS, 514 U.S. 386, 397 (1995).

3 Equally problematic, defendant’s reading would effectively substitute the word “report,”
4 which appears nowhere in the text of § 2965, for the word Congress actually selected, “information.”
5 Defendant seeks to justify this rewriting of the Act by pointing out that the Subchapter of which the
6 Act is part is entitled “Reports. ” That fact, defendant claims, is “persuasive demonstration of the
7 limited nature of Section 2954’s reach.” Def. Br. at 10. This argument is baseless. For one thing,
8 the Supreme Court has repeatedly cautioned against using words in titles as an interpretative tool.
9 Even the key case defendant cites makes clear that courts should observe “the wise rule that the title
10 of a statute and the heading of a section cannot limit the plain meaning of the text. * * * For
11 interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase.
12 They are but tools available for the resolution of a doubt. But they cannot undo or limit that which
13 the text makes plain.” Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519,
14 528-29 (1947) (citations omitted). Here, as noted above, there is no ambiguity in the language of
15 § 2954. Moreover, defendant’s argument proves too much. If titles are to be used by the Court as
16 an interpretative guide, then surely more directly relevant is the title of § 2954 itself, which is: “§
17 2954. Information to committees of Congress on request.” Defendant cannot have it both ways.
18 If titles are relevant to the Court’s inquiry, then the title of § 2954, which uses the word “information”
19 and not “report,” further undermines defendant’s argument.

20 Third, although the extrinsic sources defendant invokes do not support his reading of the Act,
21 defendant misses the mark in contending that resort to legislative history is appropriate where, as
22 here, the statutory text is clear. Defendant claims that the Ninth Circuit has “expressly held that
23 departure from the literal language of the statute is appropriate ‘where the legislative history clearly
24 indicates that Congress meant something other than what it said.’” (Def. Br. at 11, quoting In re
25 Catapult Entertainment, Inc., supra, 165 F.3d at 753). Not so. The quoted language is
26 unquestionably dicta, not holding, and the decision contradicts, not supports, defendant’s
27 freewheeling approach to statutory construction, as a brief review of the decision makes clear. The

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1 court begins its statutory construction analysis by stating: “First off, because we discern no ambiguity
2 in the plain statutory language, we need not resort to legislative history.” 165 F.3d at 753. The court
3 then says that “[w]e will depart from this rule, if at all, only where the legislative history clearly
4 indicates that Congress meant something other than it said.” Id. (emphasis added). The court
5 concludes that “the legislative history unearthed by Catapult falls far short of this mark.” Id. at 754.
6 This brief discussion hardly supports defendant’s contention that this Court should embark on an
7 interpretative voyage which disregards the text of § 2954, and it is surely not the “holding” claimed
8 by the defendant. Indeed, as far as we can tell, none of the Ninth Circuit rulings cited by the
9 defendant, and none of the recently decided Ninth Circuit cases we could identify, supports the
10 sweeping proposition he urges on this court. See, e.g., United States v. Daas, 198 F.3d 1167, 1175
11 (9th Cir. 1999) (only if a statute is ambiguous may a court “look to its legislative history for evidence
12 of congressional intent”), cert. denied, 531 U.S. 999 (2000); City of Auburn v. United States, 154
13 F.3d 1025, 1029-30 (9th Cir. 1998) (where statutory command is clear, “there is no reason to resort
14 to legislative history”), cert. denied, 527 U.S. 1022 (1999); Central Mont. Elec. Power Coop. v.
15 Administrator of Bonneville Power Admin., 840 F.2d 1472, 1477 (9th Cir. 1988) (“Absent a clearly
16 expressed legislative intent to the contrary, the plain language must ordinarily be regarded as
17 conclusive”); Foxgord v. Hischmoeller, 820 F.2d 1030, 1034 (9th Cir.) (recognizing that a statute’s
18 plain language controls absent exceptional circumstances not present in case), cert. denied, 484 U.S.
19 986 (1987).

20 Nor does defendant’s reliance on cases like Public Citizen v. Department of Justice, 491 U.S.
21 440 (1989), aid his case. To be sure, such cases as Public Citizen and Church of the Holy Trinity v.
22 United States, 143 U.S. 457 (1892) hold that, where the application of a statute to a particular
23 individual or entity would lead to an absurd or extreme result, the statute should be read to include
24 an exception that excuses that individual or entity from compliance. In Public Citizen, the question
25 was whether the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. II, applied to the
26 American Bar Association’s Standing Committee on Judicial Selection in its dealings with the Justice
27 Department on judicial nominations — a question that turned on whether the Justice Department

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1 “utilize[d]” the ABA committee in its work. Recognizing that “utilize” “is a woolly verb, its
2 contours left undefined by the statute itself,” 491 U.S. at 454, the Court found that Congress did not
3 intend FACA to sweep so broadly as to encompass the ABA committee. Id. at 467. In other words,
4 the Court found that the ABA committee should be excluded from an ambiguous statute, not that
5 FACA should be rewritten in its entirety. The same is true with Holy Trinity. There, the Court found
6 that the literal terms of a then-current immigration law prohibited a contract between a church and
7 an Englishman the church had hired to come to New York to be its pastor. 143 U.S. at 458. The
8 Court concluded that the law was aimed at unskilled workers, not members of the clergy, and that
9 it would offend the religious principles on which the nation was founded to restrict the entry of
10 clergymen to the United States. Id. at 464-470. Once again, faced with the perceived overbreadth
11 of a statute, the Court responded, not by performing major surgery on the statute as defendant here
12 urges, but by carving out a narrow exception. These cases provide no support to defendant, and
13 certainly no reason to rewrite § 2954.

14 III. Defendant’s Separation of Power Concerns are Contrived.

15 Defendant’s final contention — that a rewriting of the Act is required by “serious
16 constitutional doubts” (Def. Br. at pp. 17-20) — is as hollow as his prior contentions. Defendant’s
17 main argument is that a plain reading of the Seven Member Rule “vest[s] a sweeping authority in any
18 seven members of the Committee to demand disclosure of executive information . . . [including]
19 material deemed sensitive for national security or other reasons, or which is otherwise protected by
20 Executive Privilege.” Id. at 18. This power, defendant suggests, “is one not enjoyed even by the full
21 Congress.” Id. (citation omitted). If there was ever a case of a party setting up a strawman argument,
22 this is it; nowhere have the plaintiffs or anyone else ever suggested that a statute trumps the
23 Constitution. We recognize the settled rule that a valid constitutional claim of Executive Privilege
24 can defeat a congressional demand for information, regardless of whether the demand is made by
25 subpoena or under a statute. Moreover, a request made under § 2954 for materials subject to an
26 Executive Privilege claim is hardly self-enforcing, as defendant seems to suggest. Rather, an effort
27 to enforce a request under § 2954 would fare no better or worse than a demand for such materials

1 made by subpoena, except that the failure of an Executive Branch official to comply with a valid
2 congressional subpoena is punishable by civil or criminal contempt, see, e.g., United States v. House
3 of Representatives, 556 F. Supp. 150, 152 (D.D.C. 1983) (discussing possible indictment of then-
4 EPA Administrator Anne Gorsuch for failing to comply with congressional subpoena), whereas the
5 failure to comply with a demand under § 2954 can at most result in an action for injunctive relief, like
6 the one before the Court.⁵

7 Particularly ill-founded is defendant's effort to take shelter in the case law dealing with
8 congressional efforts to obtain Presidential materials, including defendant's citation to Senate Select
9 Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974) (en
10 banc). The simple answer here to defendant's professed fear that § 2954 empowers members of
11 Congress to run roughshod over the President is that § 2954 does not authorize committee members
12 to seek Presidential records; the provision explicitly limits information demands to an "Executive
13 agency," and the President and his personal advisors are assuredly not an "agency" under any
14 accepted definition of the term. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Armstrong
15 v. Executive Office of the President, 90 F.3d 553, 558-63 (D.C. Cir. 1996); Meyer v. Bush, 981 F.2d
16 1288, 1291-94 (D.C. Cir. 1993).

17 Finally, defendant protests that it is "unusual, and constitutionally suspect," for the power set
18 forth in § 2954 "to be lodged not in any committee, or subcommittee, but in a mere fraction of the
19 membership of only two of Congress' more than 40 full committees." (Def. Br. at 19). Apart from
20 the incongruity of the Executive Branch challenging a decision by Congress on how to order its
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22 ^{5/} As we discussed earlier, although the defendant raises the specter of Executive Privilege, he does
23 not assert such a claim in this proceeding. Defendant has not done so for two reasons. First, such a
24 contention would be foreclosed in this Court by the Ninth Circuit's ruling in Assembly of the State
25 of California v. United States Department of Commerce, 968 F.2d 916 (1992), that the 1990 adjusted
26 census data was not privileged. Second, as defendant's own papers demonstrate, there are procedures
27 the Executive Branch has put in place to regulate claims of privilege, and those procedures have not
28 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).

1 affairs,⁶ there is nothing strange or constitutionally suspect about this relationship. Congress, as
2 defendant points out, has reposed sweeping powers in its subcommittees, and standing
3 subcommittees in both Houses have been delegated subpoena power. CRS Report for Congress, 95-
4 464A (Defendant's Exhibit C, at 19). There is no difference in the enforceability of a duly authorized
5 subpoena issued by full Committee or by a subcommittee or select committee. So long as the
6 subpoena seeks material that is relevant to Congress' legislative or oversight purpose, and does not
7 intrude into matters subject to Executive Privilege, the subpoena will be enforced by the courts. See,
8 e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503-07 (1975); Wilkinson v.
9 United States, 365 U.S. 399, 408-09 (1961); Rosenblatt v. United States, 360 U.S. 109, 117 (1959).
10 Moreover, many committees and subcommittees have given a single member of Congress — the
11 committee chair — unilateral power to determine when to issue a subpoena. CRS Report for
12 Congress, 95-464A (Defendant's Exhibit C, at 19). Thus, contrary to defendant's argument, there
13 is nothing odd at all — let alone “constitutionally suspect” — in concentrating the power to request
14 Executive Branch records in the hands of seven committee members, rather than, for instance, one.

15 Indeed, the framework of § 2954 makes eminent sense. Members of the majority have no
16 need for provisions like § 2954, because they can always resort, if need be, to the subpoena process
17 to gather information. Section 2954 was plainly envisioned as the tool of minority members of the
18 two main oversight committees in Congress. The selection of these committees was not made at
19 random: At the time § 2954 was enacted, these were the two committees in Congress charged with
20 oversight of the Executive Branch, and the same remains true today. Nor was the selection of seven
21 members for the House Committee and five members for the Senate Committee made at random.
22 Rather, the number of members selected makes it clear that the provision was intended to empower
23

24 ^{6/} Indeed, the D.C. Circuit has suggested that it is not proper for the judiciary to second-guess
25 Congress on institutional arrangements like that contained in § 2954. As the court put it in Murphy
26 v. Department of the Army, 613 F.2d 1151, 1157 (D.C. Cir. 1979), in language especially apt here,
27 “It would be an inappropriate intrusion into the legislative sphere for the courts to decide without
28 congressional direction 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.”

1 significant groups of minority members to gain access to information within the Committee's
2 jurisdiction without being dependent on the good graces of the majority. And until now, the Seven
3 Member Rule has served its purpose well. Exhibits D-I to the declaration of Michael Yeager,
4 Minority Deputy Chief Counsel to the House Government Reform Committee, submitted in support
5 of Plaintiffs' Motion for Summary Judgment, demonstrate that § 2954 has repeatedly been invoked
6 by Democrats and Republicans alike to gain access to Executive Branch records. In each case, the
7 members making the request were members of the minority, and they used § 2954 to secure
8 information relevant to their legislative responsibilities that they could not otherwise obtain. And
9 in each case, the Executive agency made the records available, although at times the agency asked
10 the members of Congress to respect certain confidentiality concerns. But the overarching point is
11 that, in every case, § 2954 served its purpose with no untoward consequences to the Executive
12 Branch.

13 Nor would be there be any untoward consequences to granting plaintiffs the relief they seek.
14 To be sure, they could have sought the same records under FOIA, but chose not to do so because §
15 2954 provided a more direct and expeditious route to the same records. The courts have already
16 compelled defendant's predecessor to turn over the adjusted 1990 census records to the Assembly
17 of the State of California. Assembly of the State of California, supra. In light of that compelled
18 disclosure, there can be no claim of constitutional dimension in requiring defendant to turn over the
19 adjusted 2000 census records to sixteen members of Congress who serve on the House Committee
20 on Government Reform.

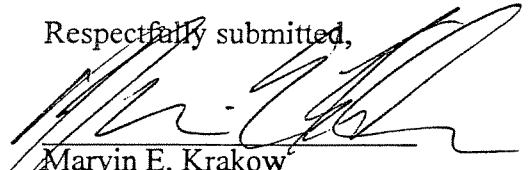
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CONCLUSION

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 17, 2001

Respectfully submitted,

Marvin E. Krakow
Law Offices of Marvin E. Krakow

David C. Vladeck
Of Counsel

1 x (FIRST CLASS MAIL) and caused such envelope with postage thereon prepaid to be placed
2 in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's
3 practice of collection and processing correspondence for mailing. It is deposited in the U.S.
4 Postal Service on that same day in the ordinary course of business. I am aware that on motion of
party served, service is presumed invalid if postal cancellation date or postage meter date is more
than one day after the date of deposit for mailing in affidavit.

5 ___ (FEDERAL EXPRESS) and caused such envelope(s) to be sent via FedEx at Los Angeles,
6 California with tracking airbill number _____. The envelope(s) was fully
7 prepaid. I am "readily familiar" with firm's practice of collection and processing correspondence
8 for delivery by Federal Express. Such correspondence will be delivered to an authorized courier
9 or driver authorized by Federal Express to receive documents or deposited with a faculty
regularly maintained by Federal Express for receipt of documents on the same day in the ordinary
course of business.

10 ___ (BY CERTIFIED MAIL) and caused such envelope with postage thereon prepaid to be
11 placed in the United States Mail at Los Angeles, California, return receipt requested, bearing
12 certified mail number(s) _____. I am "readily familiar" with the firm's practice of
13 collection and processing correspondence for mailing. It is deposited in the U.S. Postal Service
14 on that same day in the ordinary course of business. I am aware that on motion of party served,
service is presumed invalid if postal cancellation date or postage meter date is more than one day
after the date of deposit for mailing in affidavit.

15 ___ (BY FACSIMILE) I sent via facsimile a true and correct copy of said document to the
16 interested parties in the within action using the facsimile numbers listed above, in accordance with
17 the provisions of Rule 2008 of the California Rules of Court. Service was effected at
18 approximately _____ [a.m. / p.m.] from facsimile machine telephone number (310)
229-0912. The transmission was reported as complete and without error. The attached
transmission report was properly issued by the transmitting facsimile machine.

19 ___ (BY HAND DELIVERY) I caused such envelope to be delivered by hand to the interested
20 parties in the within action at the court appearance of this matter.

21 x (STATE) I declare under penalty of perjury under the laws of the State of California that the
22 above is true and correct.

23 x (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court
24 at whose direction the service was made.

25 Executed on this 18th day of October, 2001 at Los Angeles, California.

26 
27 LJ Schmitt

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA)
3) ss.
4 COUNTY OF LOS ANGELES)

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18
6 and not a party to the within action. My business address is 1801 Century Park East, Suite 1520,
7 Los Angeles, California 90067.

8 On October 18, 2001, I served the foregoing document(s) described as: **PLAINTIFFS'**
9 **REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR**
10 **SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION**
11 **TO DISMISS, OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY**
12 **JUDGMENT** on all interested parties in this action by placing ____ the original X a true copy
thereof enclosed in a sealed envelope addressed as follows:

12 Stuart E. Schiffer
13 Acting Assistant Attorney General

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