UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIJAH E. CUMMINGS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 17-cv-02308-APM
	)	Hon. Amit P. Metha
EMILY W. MURPHY,	)	
	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

David C. Vladeck (D.C. Bar No. 945063)
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Scott L. Nelson (D.C. Bar No. 413548)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009-1001
(202) 588-1000
snelson@citizen.org

Attorneys for Plaintiffs

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INTRODUCTION

This action seeks declaratory and injunctive relief with respect to the Trump Administration's unlawful effort to deprive Members of Congress of information they need to carry out their oversight responsibilities under Article I of the Constitution, in violation of a statute specifically entitling them to obtain that information. The information at issue concerns the lease that the General Services Administration ("GSA") entered into with the Trump Old Post Office LLC, a company owned by Donald Trump and his children, to redevelop the Old Post Office on Pennsylvania Avenue as the Trump International Hotel. The lease prohibits any "elected official of the Government of the United States" from taking or sharing in any benefit that "may arise" from the lease. President Trump has refused to divest his interest in the Trump Old Post Office LLC, and GSA has failed to enforce the lease's prohibition against elected officials benefiting from the lease. These actions are unprecedented and warrant congressional oversight.

The House of Representatives has delegated responsibility for oversight of government operations, including the operations of GSA, to the House Committee on Oversight and Government Reform ("House Oversight Committee"). Congress has delegated the authority to obtain information relevant to the Committee's oversight function, not just to the Oversight Committee, but also to the *members* of the Oversight Committee.

Congress did so in 1928 by enacting a statute, 5 U.S.C. § 2954, providing that an "[a]n Executive agency, on request of the [Committee on Oversight and Government Reform] of the House of Representatives, or any seven members thereof ... shall submit any information requested of it relating to any matter within the jurisdiction of the committee."[1] This carefully crafted

[1] Section 2954 confers the same authority to request information on any five members of the Senate Homeland and Government Affairs Committee. As to the House Oversight Committee, the statute's text refers to "the Committee on Government Operations." A 1995 statute, Pub. L.

delegation of authority, known as the Seven Member Rule, reflects Congress's judgment, endorsed by the Executive Branch through the President's signature, that members of its two oversight committees must be able to obtain information from executive agencies, even if the committee does not request it.

This case is brought by seventeen members of the House Oversight Committee who submitted multiple Seven Member Rule requests to GSA seeking information relating to GSA's management of the lease for the Old Post Office. After several requests and many months of delay, GSA denied the requests.[2]

Plaintiffs now move for summary judgment. There is no dispute about any material fact, and plaintiffs are entitled to judgment as a matter of law. GSA's denial of plaintiffs' requests is a clear-cut violation of the Seven Member Rule that this Court has the power to redress. Section 2954 establishes a mandatory disclosure duty: "Shall" is the language of command, not discretion. GSA's claim that Section 2954 is a paper tiger that agencies may ignore is contradicted by the statute's unequivocal text and its history, which establish that Congress intended Section 2954 to be enforced as written. This Court should order GSA to comply with its statutory duty to produce the information that plaintiffs have requested.

Also before the Court is GSA's motion to dismiss. GSA argues that Section 2954's disclosure mandate is unenforceable because the plaintiffs lack standing, because judicial review under the Administrative Procedure Act ("APA") and other sources of authority is unavailable,

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

[2] For convenience, this memorandum refers to GSA, rather than defendant Emily W. Murphy, who was substituted for defendant Timothy O. Horne, pursuant to Federal Rule of Civil Procedure 25(d), when she was confirmed as GSA Administrator.

and because separation-of-powers concerns counsel use of this Court's "equitable discretion" to avoid resolving what GSA characterizes as a political dispute. GSA is wrong on all counts.

To begin with, plaintiffs' statutory right to the information at issue answers GSA's standing argument. Section 2954 is undeniably a rights-creating statute. It says that an executive agency *shall* provide records requested by seven or more members of the Oversight Committee. Because plaintiffs are enforcing their statutory right of access to executive agency information, GSA's effort to recast this case in the mold of *Raines v. Byrd*, 521 U.S. 811 (1997), and similar vote dilution cases, falls flat. In *Raines*, and every other congressional standing case on which GSA relies, plaintiffs claimed to have suffered institutional injuries resulting from an asserted loss of political power. *Id.* at 821. Not so here. This case has nothing to do with abstract and generalized notions of vote dilution. It is an action brought to compel the production of information to which plaintiffs are entitled under law. The right to information here does not run to Congress. It is personal to members of the specified committees; they alone among the 535 Members of Congress may exercise this right. The Supreme Court has long made clear that statutory rights to information involve sufficiently tangible interests that the deprivation of those rights confers standing. *See, e.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540, 1549-50 (2016). This case is no different.

Nor does the absence of a statutory cause of action in Section 2954 foreclose judicial review. GSA's denial of plaintiffs' request constitutes reviewable final agency action under the APA, just as cases brought under the Federal Advisory Committee Act and the Government in the Sunshine Act brought to compel disclosure of information are reviewable under the APA. *Public Citizen v. Dep't of Justice*, 491 U.S. 440 (1989); *Clark-Cowlitz Joint Operating Agency v. FERC*, 798 F.2d 499 (D.C. Cir. 1986) (*en banc*). GSA's claim that Congress intended to preclude judicial review is at war with Section 2954's text and history, which drives home Congress's intent to

exchange a mandatory reporting regime for a mandatory disclosure regime. As plaintiffs demonstrate below, even aside from the APA, there are other bases for this Court's review.

Finally, assuming that the equitable discretion doctrine is still viable, it has no place here. Every equitable discretion case involved difficult and unresolved constitutional questions. There is no comparable constitutional issue in this case. For these and the reasons that follow, this Court should deny GSA's motion to dismiss and grant plaintiffs' motion for summary judgment.

STATEMENT OF THE CASE

The plaintiffs in this case are seventeen duly elected members of the House of Representatives who were selected by their peers to serve on the House Oversight Committee.[3] This Court's intervention is necessary to resolve the ongoing controversy between the parties because of GSA's persistent refusal to comply with its obligations under the Seven Member Rule in the face of plaintiffs' sustained efforts to obtain information they need to perform their oversight responsibilities.

On August 5, 2013, GSA entered into a sixty-year lease agreement with the Trump Old Post Office LLC, permitting the company to develop and convert the famous Old Post Office on Pennsylvania Avenue, just two blocks from the White House, into the Trump International Hotel. At the time the lease was entered into, the Trump Old Post Office LLC was owned by Donald Trump, his daughter Ivanka and his sons Eric and Donald Trump, Jr.

To avoid conflicts of interest, Article 37.19 of the lease provides:

[3] Plaintiffs are Ranking Member Elijah E. Cummings, and Members Carolyn Maloney, Eleanor Holmes Norton, William Lacy Clay, Stephen Lynch, Jim Cooper, Gerald Connolly, Robin Kelly, Brenda Lawrence, Bonnie Watson Coleman, Stacey Plaskett, Val Demings, Raja Krishnamoorthi, Jamie Raskin, Peter Welch, Matt Cartwright, and Mark DeSaulnier. The other Democrat on the Committee, Jimmy Gomez, joined the Committee after the Seven Member Rule requests were submitted to GSA.

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

Declaration of Krista Boyd at ¶ 4 (hereinafter "Boyd Decl.").

The rules of the House of Representatives delegate responsibility to oversee government management—including the government's financial dealings—to the House Oversight Committee. House Rule X confers on the Oversight Committee jurisdiction over "[g]overnment management and accounting measures generally," as well as "[o]verall economy, efficiency, and management of government operations and activities." House Rules task the Committee with the responsibility to "review and study on a continuing basis … the operation of Government activities at all levels with a view to determining their economy and efficiency." More broadly, the Committee has the authority to "at any time conduct investigations" of "any matter." Boyd Decl. at ¶ 5 & Exhibit ("Ex.") 1. GSA has acknowledged that the information requested by the plaintiffs falls within the Oversight Committee's jurisdiction. *Id.* at ¶ 9.

On November 30, 2016, Oversight Committee Ranking Member Elijah E. Cummings and Transportation and Infrastructure Committee Ranking Member Peter DeFazio, along with Representatives Gerald Connolly and André Carson, sent a letter to then-GSA Administrator Denise Turner Roth requesting unredacted copies of lease documents, annual and monthly statements from the Trump Old Post Office LLC, and a briefing. GSA did not produce any unredacted documents in response to that letter. *Id.* at ¶ 6 & Ex. 2. Two weeks later, the same four Members of Congress sent another letter to then-Administrator Roth requesting unredacted lease documents, monthly expense reports, and other documents. *Id.* at ¶ 6 & Ex. 3. They received no response.

Representative Cummings and his colleagues therefore decided to invoke the Seven Member Rule. Accordingly, on December 22, 2016, eleven members of the Oversight Committee

sent a letter under Section 2954 to then-Administrator Roth, once again requesting unredacted lease documents and expense reports related to the Old Post Office lease. *Id.* at ¶ 8 & Ex. 4.

In keeping with its obligations under Section 2954, on January 3, 2017, GSA produced unredacted documents to Rep. Cummings and his colleagues, including amendments to the lease, the 2017 budget estimate, and monthly income statements. In a letter to Ranking Member Cummings, GSA Associate Administrator Lisa A. Austin acknowledged that the production was "[c]onsistent with the Seven Member Rule and judicial and Department of Justice, Office of Legal Counsel opinions (see e.g. 6 Op. O.L.C. 632 (1982) and 28 Op. O.L.C. 79 (2004))." Boyd Decl. at ¶ 5 & Ex. 5.

A week later, in a nationally televised news conference, then President-elect Trump announced that he would not divest his interest in his companies, including the Trump Old Post Office LLC. *Id.* at ¶ 10. In an earlier interview with the *New York Times*, President-elect Trump had boasted that "occupancy at that hotel will be probably a more valuable asset now than it was before, O.K.? The brand is certainly a hotter brand than it was before."[4]

Donald Trump was sworn in as President of the United States on January 20, 2017, without having divested his interest in Trump Old Post Office LLC. Nor did he divest his interest after he took office. *Id.* at ¶ 11. For that reason, by letter dated January 23, 2017, Ranking Member Cummings, together with Representatives DeFazio, Connolly, and Carson, asked GSA (1) to explain the steps that GSA had taken, or planned to take, to address President Trump's apparent breach of the lease agreement; (2) to state whether GSA intended to notify President Trump's company that it is in breach; (3) to provide the monthly reports President Trump's company

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

submits to the GSA on the Trump International Hotel's revenues and expenses; (4) to explain and provide documentation of the steps GSA had taken, or planned to take, to address liens against the Trump International Hotel; and (5) to provide copies of all correspondence with representatives of President Trump's company or the Trump transition team. *Id.* at ¶ 12 & Ex. 6.

GSA declined to comply with the request, but by letter dated February 6, 2017, GSA Acting Associate Administrator Saul Japson promised that "[s]hould the U.S. House of Representatives Committee on Oversight and Government Reform or any seven members thereof submit a request pursuant to 5 U.S.C. § 2954, GSA will review such a request." *Id.* at ¶ 13 & Ex. 7.

To follow up, Ranking Member Cummings, joined by seven other members of the Oversight Committee, made a request on February 8th, pursuant to Section 2954, to Acting Associate Administrator Japson for the information sought in Ranking Member Cummings' January 23, 2017, letter. The February 8th letter pointed out that GSA had complied with requests for information on the same topic under Section 2954 before President Trump was sworn in. *Id.* at ¶ 14 & Ex. 8. Notwithstanding Mr. Japson's promise that GSA would review a request made under the Seven Member Rule, neither Mr. Japson nor anyone else at GSA responded to the February 8th request. *Id.* at ¶ 15.

On March 23, 2017, GSA publicly released a letter to Donald Trump, Jr., asserting that the Trump Old Post Office LLC had brought itself into full compliance with Section 37.19 of the lease. *Id.* at ¶ 16. GSA's letter took the position that, because Mr. Trump had placed all the income he receives from the Trump International Hotel into revocable trusts and other corporate entities, he would not directly receive any income from the hotel during the term of his presidency, and thus would not "benefit" from the lease. *Id*.

Although GSA had not responded to plaintiffs' Seven Member Rule requests, Acting GSA Administrator Timothy Horne, in testimony on May 24, 2017, before the House Committee on Appropriations, cited what he represented to be a new Administration policy of rejecting *all* oversight requests from Democrats unless they also were joined by a Republican Chairman. Mr. Horne testified that "for matters of oversight, the request needs to come from the Committee chair." His testimony did not address Section 2954.[5]

Ranking Member Cummings, now joined by seventeen other members of the Oversight Committee (including all plaintiffs in this action), sent GSA another letter on June 5th, renewing the request initially made on February 8th. The letter invoked Section 2954 and requested additional documents in response to GSA's actions taken after the February 8th letter, including all documents containing legal interpretations of Section 37.19 of the Old Post Office lease, all correspondence and documents relating to funds the Trump International Hotel had received from any foreign country, foreign entity, or foreign source, any legal opinion relied upon by GSA in making a determination regarding the President's compliance with Section 37.19, and all drafts and edits of the contracting officer's March 23rd letter. The June 5th request letter explained that GSA's failure to respond violated Section 2954, was inconsistent with prior practices of both Republican and Democratic administrations and with GSA's own previous practice of honoring Seven Member Rule requests, and thwarted the ability of Committee members to carry out their duty to perform oversight. Boyd Decl. at ¶ 18 & Ex. 9. GSA did not respond to this letter.

Undeterred, Ranking Member Cummings, joined by the same seventeen members of the Oversight Committee, sent one more letter to Acting Administrator Horne on July 6, 2017,

[5] *See Hearing on the General Services Administration before House Committee on Appropriations, Subcommittee on Financial Services and General Government*, 115th Congress (available at https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879).

demanding that he respond to the prior requests and reminding him that GSA in the past had complied with Section 2954 requests. *Id*. at ¶ 19 & Ex. 10.

Finally, by letter dated July 17, 2017, GSA Associate Administrator P. Brennan Hart III denied plaintiffs' Seven Member Rule requests. *Id.* at ¶ 20 & Ex. 11. That letter sought to justify GSA's refusal by referring to a recent Office of Legal Counsel ("OLC") memorandum stating that "[i]ndividual members of Congress, including ranking minority members, do not have authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." *Id*. Quoting the OLC memorandum, GSA's letter stated that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." *Id.* (citing OLC, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch* at 1 (May 1, 2017).

Neither GSA's letter nor the OLC memorandum, however, explained GSA's denial of plaintiffs' request. The OLC memorandum did not address Section 2954 requests. In fact, the memorandum's reasoning, as cited in the GSA letter, suggested that GSA should have complied with plaintiffs' requests. Requests under Section 2954 are made pursuant to "a specific delegation" of oversight authority, not just by one "full house, committee, or subcommittee," but by a statute enacted through bicameral action by both Houses of Congress and presentment to and signature by the President. Undermining GSA's position further, the White House sent a letter to Senator Charles Grassley on July 20, 2017, three days after GSA sent its response to plaintiffs, confirming that the OLC opinion "does not set forth Administration policy" and that "[t]he Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive branch policies and programs." *Id*. at ¶ 21.

This suit is brought to enforce plaintiffs' rights under Section 2954.

STANDARD OF REVIEW

GSA has moved to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). To satisfy Rule 12(b)(1) and the case or controversy requirement of Article III, the party invoking the Court's jurisdiction must demonstrate that the court has subject matter jurisdiction to hear its claim. To do so, the plaintiff must establish that it has standing to raise the claims asserted in its complaint with the manner and degree of pleading or evidence required at the relevant stage of the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). To satisfy Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

Plaintiffs have cross-moved for summary judgment. Summary judgment is appropriate under Federal Rule of Civil Procedure 56(a) where the moving party "shows that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." The moving party "bears the initial responsibility" of "identifying those portions" of the record that "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries its initial burden, the burden shifts to the nonmoving party to show that sufficient evidence exists for a reasonable fact-finder to find in the nonmoving party's favor. *Id*. at 322. The nonmoving party's opposition must consist of competent evidence setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); C*elotex*, 477 U.S. at 324.

ARGUMENT

Ninety years ago, Congress foresaw that vital congressional oversight—a core congressional function under Article I of the Constitution—might fall victim to partisanship. To guard against that eventuality, Congress enacted a statute that has come to be known as the "Seven Member Rule," 5 U.S.C. § 2954, which was carefully crafted to ensure that Congress's primary oversight committees had broad and unfettered access to information held by executive agencies. But Congress did not stop with giving the committees themselves the authority to obtain information. It also provided, in unequivocal terms, that any seven members of the House Oversight Committee, and any five members of the Senate Oversight Committee, have a right to obtain any information within the Committee's jurisdiction from any executive agency on request, even if their committee colleagues do not join them.

Notwithstanding the statute's mandatory text, GSA contends that it may ignore Seven Member Rule requests. GSA does not even attempt to answer the central question its argument raises: If Congress understood that Section 2954 would be unenforceable, why did Congress bother to enact it? An unenforceable mandate has no value, and, under GSA's approach, a Seven Member Rule request has no more weight than any request by any Member of Congress. GSA's argument nullifies Section 2954.

This memorandum first demonstrates that Section 2954 imposes a mandatory duty that Congress expected the courts to enforce. The statutory language is clear: Congress used the word "shall" to drive home that executive agencies must honor Seven Member Rule requests. For that reason, the Executive Branch has routinely complied with Seven Member Rule requests, even when requests were made by members of the minority party. Under the undisputed facts here, the statute's plain terms entitle plaintiffs to the information they have requested.

The memorandum then turns to GSA's motion to dismiss and explains why GSA's justiciability and procedural arguments—standing, right of action, and equitable discretion—lack merit.

This case presents questions of law, not genuinely disputed issues of material fact. Because GSA's legal arguments for dismissal are meritless, and the undisputed facts demonstrate that GSA has failed to comply with its mandatory duty to disclose information properly requested under Section 2954, the case is appropriately disposed of by summary judgment in plaintiffs' favor.

I. Section 2954 requires GSA to provide plaintiffs with the requested information.

The key question presented by this case is whether the plaintiffs have an enforceable right to the information they requested from GSA under the Seven Member Rule. In any case of statutory construction, the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). A court's "inquiry into the meaning of the statute's text ceases when, as here, 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017) (quoting *Barnhart*, 534 U.S. at 450).

Section 2954's "statutory language is unambiguous and the statutory scheme is coherent and consistent." Section 2954 states that on request by seven or more members of the House Oversight Committee, an executive agency "shall" submit "any information" relating to "any matter within the jurisdiction of the committee." The statute uses the imperative "shall," not the discretionary "may" or "should." GSA thus is not free to decide whether to comply; compliance is mandatory. "Shall" is "the language of command." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001); *see also Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *Fed.*

Express Corp. v. Holowecki, 552 U.S. 389, 400 (2008) ("Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations'") (quotations omitted); *see also* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 114 (2012) ("[W]hen the word shall can reasonably read as mandatory, it ought to be so read.").

The statute also vests the committees and their members with broad authority to obtain access to information held by executive agencies. Section 2954's repeated use of the word "any"—agencies shall submit "any information" relating to "any matter" within the Committee's jurisdiction—underscores the breadth of authority Congress bestowed on its oversight committees. *See, e.g.*, *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214 (2008) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also United States v. James*, 478 U.S. 597, 604 (1986). There is no ambiguity in Section 2954, and there is no textual warrant to invent one. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (citation omitted).

The plain-language reading of Section 2954 is consistent with the statute's history. The Seven Member Rule was enacted to alter the way Congress's oversight committees obtain information from the Executive Branch. Before 1928, Congress would enact laws requiring agencies to submit annual reports on a wide range of governmental functions to the House and Senate Committees on Expenditures—forerunners of today's oversight committees. Over time, the utility of those reports waned, but the statutory reporting requirements remained on the books. In the legislation enacting Section 2954, entitled "An Act 'To discontinue certain reports now required by law to be made to Congress,'" Congress decided to repeal 128 mandatory reporting

statutes, and to move to a mandatory request-driven process for the oversight committees and their members to get needed information from executive agencies. Section one of the Act "discontinued" the 128 reporting requirements; section two has been codified as Section 2954. Act of May 29, 1928, Ch. 901, 45 Stat. 986-96.

The 1928 Act accomplished two related goals. First, the statute repealed the outdated reporting requirements. One of the then-existing statutory reports required executive agencies to submit "[a] statement given for each of the Government-owned buildings in the District of Columbia under the jurisdiction of each department and independent establishment, the location and valuation of each building, the purpose or purposes for which used, and the cost of care, maintenance, upkeep, and operations thereof." *Id*. at § 1(7), 45 Stat. at 986. Another statutory report required the Postmaster-General to provide Congress with detailed financial statements on property within the Postmaster-General's control. *Id.* at § 7(49), 45 Stat. at 990. Accordingly, much of the information requested by plaintiffs would have been reported to Congress under the pre-1928 scheme.

Second, the statute ensured that Congress's oversight committees, and the members of the committees, would have ready access to information about the activities of agencies without Congress having to bear the burden of enacting statutory reporting requirements. S. Rep. No. 70-1320, at 4 (1928); H.R. Rep. No. 70-1757, at 6 (1928). Preserving access to the exact information in the discontinued reports was not Congress's main goal in Section 2954. Indeed, the legislative history emphasizes that much of the information in the discontinued reports "serve[d] no useful purpose," was "unnecessary," "valueless," "out of date" and "obsolete." S. Rep. No. 70-1320 at 2 & 4; H.R. No. 70-1757, at 3. Rather, the Act's overriding purpose was to overhaul the process by which the two oversight committees and their members obtained information from agencies. To

this end, it eliminated the rigid regime of mandatory reports with predefined contents and replaced it with a mandatory but flexible system requiring provision of any information upon request. The House Report states that the Act "requires every department of the Government, upon request of the Committee on Expenditures in the Executive Department [now the Committee on Oversight and Government Reform], or any seven members thereof, to furnish any information requested of it relating to any matter within the jurisdiction of the committee." H.R. Rep. No. 70-1757, at 6; *see also* S. Rep. No. 70-1320, at 4.

The House and Senate Reports confirm Congress's clear preference for having legislators make specific requests for information directly to executive agencies, rather than enacting legislation to compel the production of reports that, over time, became "useless." Both the House and Senate Reports include the following "Conclusions" Section:

> 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 committee, 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. 70-1320 at 4; H.R. Rep. No. 70-1757 at 6 (emphasis added).

The statute's text also reflects Congress's intent to ensure that discrete groups of committee members had the power to obtain agency records on request. Congress invested the authority to invoke Section 2954 not only in the House and Senate oversight committees, but in groupings of members meeting numerical thresholds—seven in the House and five in the Senate—that did not constitute a majority of committee members. *See* Canon, *et al.*, *Committees in the U.S. Congress,*

1789-1946, Vol. I, House Standing Committees, at 497 (reporting that in 1928, the House Committee on Expenditures in the Executive Department had twenty-one members; thirteen from the majority and eight from the minority). For this reason, Section 2954 has always been conceived of as a tool for minority members. In *Leach v. Resolution Trust Corp*., 860 F. Supp. 868 (D.D.C. 1994), Representative James Leach challenged the withholding of records relating to the failed Madison Savings and Loan under the Freedom of Information Act ("FOIA"). Leach argued that even privileged records could not be withheld from a member of Congress under FOIA. Rejecting Leach's argument, the court pointed to Section 2954 in stating that "the House has in fact provided alternative procedures through which small groups of individual congressmembers can request information without awaiting formal Committee action." *Id.* at 876 n.7; *see also Soucie v. David*, 448 F.2d 1067, 1072 n.9 (D.C. Cir. 1971) (observing that "Congress has frequently exercised the power [to compel disclosure of agency records] in statutes requiring executive officers to transmit information to Congress," and citing Section 2954 as one of two examples); *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. 2002), *vacated as moot*, No. 02-55825 (9th Cir. Jan. 9, 2003) (noting that "Section 2954 might have been contemplated by Congress as an antidote to possible domination of the legislative body by members of an opposing political party.").

Executive agencies have routinely complied with Seven Member Rule requests. For example, in April 1994, Republican members of the Committee requested documents regarding a Texas savings and loan from the Federal Deposit Insurance Corporation. The FDIC responded that "[a]s eleven members of the Committee on Government Operations have requested the documents pursuant to 5 U.S.C. § 2954 … we are making the documents available for review." Boyd Decl. ¶ 22 & Exs. 12 & 13. Additionally, in August 1993, Committee members in the majority requested documents on the equal employment opportunity complaint resolution process from the Merit

Systems Protection Board. *Id.* at ¶ 24 & Ex. 14. 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." *Id.* at ¶ 25 & Ex. 15. *See also* Boyd Declaration, ¶¶ 26-28, Exs. 16-18 (other examples of agency compliance with Section 2954).

The Department of Justice has, at times, taken a narrower view of the Executive's obligations under Section 2954. In 1970, seven members of the Government Operations Committee asked the White House Office of Science and Technology for a report on the development of a supersonic transport aircraft. Then-Assistant Attorney General William Rehnquist opined that Section 2954's legislative history shows that "its purpose was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress" and "not to compel the Executive branch to make confidential reports available to a small number of Congressmen." The Department of Justice reaffirmed this narrow interpretation of Section 2954 in 1975. Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, The Congressional Right to Information Act (Oct. 23, 1975).

These interpretations of Section 2954 are unpersuasive. The Justice Department often construes the executive's obligations narrowly, and its views on these matters are not entitled to deference. *See Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring). Nor is the argument more persuasive for having been stated by future Chief Justice Rehnquist and future Associate Justice Scalia, given that their opinions rely on a cramped view of the statute's legislative history and ignore its text. Adopting their view of Section 2954 would require this Court to rewrite the statute as follows: "An Executive agency, on request … shall submit ~~any information requested of it relating to any matter within the jurisdiction of the committee~~ *any information that would have been included in a report that was subject to a mandatory reporting requirement*

discontinued by Congress in 1928." Needless to say, this sort of radical surgery on Section 2954's text is utterly contrary to the approach to statutory construction that those Justices championed on the Supreme Court and that the Court has embraced.[6] Even as a legislative history argument, their interpretation of Section 2954 rests on the theory that the same Congress that found the reports provided under the repealed statutes useless and outdated would have limited its members to requesting only the information contained in those reports. Because the Department of Justice's interpretation rests solely on the statute's legislative history, "the last hope of lost interpretative causes," *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J. concurring)—and a distorted reading at that—this Court should decline any plea to rewrite Section 2954 to limit its reach or its enforceability.

So far, only two courts have considered cases raising claims under Section 2954. In the first case, *Waxman v. Evans*, 2002 WL 32377615 (C.D. Cal. 2002), House Oversight Committee members invoked Section 2954 in an effort to obtain the adjusted 2000 Census data, which the Department of Commerce refused to provide. The government raised no standing argument at the outset of the case, but urged the court to dismiss it on equitable discretion grounds. The district court rejected that argument, which was based mainly on the government's claim that courts should refrain from entertaining challenges that the government characterized as both inter-branch (between Congress and the Executive), and intra-branch (arguing that the plaintiffs' disagreement was with their congressional colleagues). *Id.* at *2 -*7. Moving to the merits, the court found that

[6] *Chief Justice* Rehnquist admonished that "reference to legislative history is inappropriate when the text of the statute is unambiguous." *Dep't of HUD v. Rucker*, 535 U.S. 125, 132 (2002). *Justice* Scalia contended that legislative history is "best ignored." *See* 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).

the plain terms of Section 2954 compelled the conclusion that the Department was obligated to produce the withheld Census data to the plaintiffs. As the court put it, "[b]ecause the statute speaks clearly and its plain language does not contravene any clear legislative history, this Court 'must hold Congress to its words.'" *Id*. at *10 (citation omitted). Finally, the Court rejected the government's constitutional claims, which theorized that if plaintiffs prevailed, Section 2954 could be used to obtain information that might be subject to claims of Executive Privilege. The Court noted that the government had made no claim of Executive Privilege, and that should such an issue arise in a case seeking to enforce Section 2954, it would then "become necessary for a court to consider whether the disclosure provisions of the act exceed[] the constitutional power of Congress to control the actions of the executive branch." *Id.*

After the district court ruled, the government filed a motion for reconsideration, raising standing and right-of-action arguments that it had declined to make earlier. Denying the government's motion, the court made clear that the government's submissions had "done nothing to persuade the court that it committed clear error with this rejection." Order Denying Motion for Reconsideration, at 3, Boyd Decl. at ¶ 30 & Ex. 20. The court entered judgment for plaintiffs, and the government appealed. In the end, the Ninth Circuit vacated the ruling and dismissed the case as moot because, in a parallel FOIA action seeking the same adjusted census data, it held that the records were not exempt from disclosure and therefore had to be released. *See Carter v. Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002).[7] Despite its vacatur on appeal, the district court's

[7] GSA has commendably notified the Court that its memorandum (at p. 10) incorrectly stated that the Ninth Circuit "reversed" the district court's ruling. The error is understandable because Westlaw and Lexis incorrectly cite a December 6, 2002, order rather than the Ninth Circuit's order of January 9, 2003, which makes clear that the decision below was vacated on mootness grounds.

reading of the statute, and its rejection of the view that the statutory disclosure requirement is limited to the contents of the discontinued reports, remains highly persuasive.

The second case, *Waxman v. Thompson*, No. 04-3467 (C.D. Cal.), was an action under Section 2954 by House Oversight Committee members to compel disclosure of cost projections made by the Chief Actuary of the Center for Medicare and Medicaid Studies, part of the Department of Health and Human Services, who stated publicly that the Medicare Prescription and Modernization Act of 2003 would cost $400 billion more than the Administration had projected. In granting the defendant's motion to dismiss, the Court found that the plaintiffs lacked standing under *Raines v. Byrd*, 521 U.S. 811 (1997). The decision, entered on July 24, 2006, was never submitted for publication in any form. Because the decision was based solely on standing grounds, it offers no support for GSA's narrow, non-textual reading of Section 2954. GSA places substantial weight on this unpublished, non-precedential opinion, which is unwarranted for the reasons discussed in the next section of this memorandum. The appeal of the plaintiffs in the case was mooted as a result of the November 2006 elections, which changed the composition of the House, and put members affiliated with the Democratic Party in the majority on the House Committees, including the Oversight Committee. The requested records were disclosed as a result. A copy of the opinion in *Waxman v. Thompson* is Exhibit 1 to GSA's memorandum.[8]

* * *

Section 2954's plain meaning requires GSA to provide the requested information to plaintiffs. There is no credible text-based argument that suggests a contrary reading. The text and

[8] GSA also relies on an *amicus* brief filed in *Waxman v. Thompson* by the misleadingly named "Bipartisan Legal Advisory Group of the U.S. House of Representatives," which was supported only by Republicans, and fails to acknowledge the *amicus* brief filed by the House Democratic Leadership in Support of the Plaintiffs' Motion for Summary Judgment, a copy of which is attached to the Boyd Declaration at ¶ 29 & Ex. 19.

history of Section 2954 demonstrate a clear congressional intent to empower seven or more members of the Oversight Committee to obtain information regardless of the predilections of the committee majority. For these reasons, this Court should grant plaintiffs' motion for summary judgment and order GSA to produce forthwith the information plaintiffs have requested.

II. GSA's justiciability and procedural arguments are meritless.

The two prior Seven Member Rule cases show that the Executive Branch has little confidence in its merits arguments. For that reason, GSA has moved to dismiss and concentrated its fire on threshold arguments—that plaintiffs lack standing, that the absence of an explicit right of action in Section 2954 leaves this Court powerless to review plaintiffs' claims, and that the equitable discretion doctrine counsels against this Court resolving this case.

GSA's arguments miss the mark. First, plaintiffs have standing. The Supreme Court has made clear that statutory rights to information involve sufficiently tangible interests that the deprivation of those rights confers standing. *See, e.g.*, *Spokeo*, 136 S. Ct. at 1549-50. Second, this Court is authorized to review plaintiffs' claim. GSA's denial of plaintiffs' request is final agency action reviewable under the Administrative Procedure Act ("APA"). *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). And, apart from the APA, there are multiple other bases for review, including the longstanding common law rules that federal courts may grant injunctive relief against *ultra vires* agency action and may issue writs of mandamus to compel officials to carry out non-discretionary duties. The Court may also rely on the Declaratory Judgment Act to enforce rights conferred by Section 2954. Finally, the equitable discretion doctrine, assuming it is still viable, has no relevance here because there is no difficult constitutional question to avoid in this case.

A. Plaintiffs have standing.

Article III standing requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). As the Supreme Court has explained: "Our cases have established that the 'irreducible constitutional minimum' of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1548 (citations omitted). Statutory rights to information involve sufficiently personal, particularized and concrete interests that denials have long been held to confer standing on those entitled to the information. *See id*. at 1549-50; *see, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that a "plaintiff suffers 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Public Citizen*, 491 U.S. at 449 (holding that an agency's refusal to disclose information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue."); *see also Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)("A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.").

Plaintiffs' injury—the deprivation of information to which they are entitled by law and that they need in order to perform their congressionally-delegated oversight function—is unquestionably traceable to GSA's unlawful denial of their request. And the relief plaintiffs seek—an order commanding GSA to produce the requested information—would unquestionably redress

plaintiffs' injury. For these reasons, the only standing issue is whether plaintiffs satisfy the injury-in-fact requirement.

1. Plaintiffs have sustained injury in fact.

As noted, the Supreme Court has repeatedly held that Congress may by statute create rights to government-held information, the deprivation of which constitutes injury in fact. *Spokeo*, 137 S. Ct. at 1548-49. Congress enacted Section 2594 to ensure that members of Congress's oversight committee have ready access to information in the hands of executive agencies. Section 2954 is thus one important tool—and one of the few statutory tools—implementing Congress's Article I "power of inquiry." As the Supreme Court explained in *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927):

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

And the Court has emphasized that the "scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 & n.15 (1975).

Congress enacted the Seven Member Rule to provide Congress's oversight committees and their members with "the power of inquiry—with enforcing process" that *McGrain*, *Barenblatt* and

Eastland recognized is essential for Congress to carry out its constitutional mandate. Congress did not delegate the power to obtain agency records just to the oversight committees. Instead, Congress also delegated investigative authority to groups of individuals *within* the committees to empower a significant number of committee members, but less than a majority, to join together to obtain information within the committee's jurisdiction without regard to majority rule.

The Supreme Court has often held that deprivation of a statutory right to access to information constitutes injury. In *Spokeo*, the Court said that "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560). Each plaintiff here has a "legally protected interest" in the requested information. Each plaintiff joined in one or more Seven Member Rule requests, which GSA denied. Each plaintiff has thus suffered a *particularized* injury: The deprivation of the requested information is *personal* to each member, and it is distinct and differentiated injury because it is suffered only by those seventeen House Oversight Committee members who joined the Seven Member Rule requests. The harm is not shared by every member of the Committee, let alone every member of the House or Congress. *See, e.g.*, *Spokeo*, 137 S. Ct. at 1547. Each plaintiff has also suffered *concrete* injury; the deprivation of the requested information "actually exist[s]," is "tangible," "'real,' and not 'abstract.'" *Id.* at 1548.

In *Spokeo*, the Court confirmed that when violation of a right granted by statute is "sufficient ... to constitute injury in fact," the plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id*. at 1549 (emphasis in original). To illustrate, the Court pointed to *FEC v. Akins*, 524 U.S. at 21, in which the Court held that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a

statute," and *Public Citizen v. DOJ*, 491 U.S. at 449-50, in which the Court held that the refusal of a committee to provide information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue."[9]

This case is no different. Like the plaintiffs in *Akins* and *Public Citizen*, plaintiffs here have standing. They have invoked a statute that entitles them to agency records, and "they sought and were denied specific agency records." *Public Citizen*, 491 U.S. at 449. No more is required. Judge Bates echoed this point in *Committee on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 66 (D.D.C. 2008), *appeal dismissed*, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009), where he observed that the Judiciary Committee lacked an "information injury" that would give it standing to enforce a subpoena because, in contrast to *Akins* and *Public Citizen* (and this case), Congress had not "enacted statutes" creating "unqualified legal rights to information," the invasion of which "inflicted a concrete and particular injury supportive of the plaintiffs' standing." (Nonetheless, he found that the "House has standing to invoke the federal judicial power to aid its investigative function," even in the absence of a statutory right of action. 558 F. Supp. 2d at 69.)[10]

[9] GSA's memorandum (at 10) states that GSA is treating plaintiffs' requests as if they were requests under FOIA. GSA has not informed plaintiffs that it is doing so; the time for any response under FOIA has long passed; and FOIA itself makes clear that it is not a limitation on congressional access to agency information. *See* 5 U.S.C. § 552(d). GSA's invocation of FOIA, however, undermines its justiciability arguments. Under FOIA, individual congressional plaintiffs indisputably have a right to seek agency records and to sue if their requests are not honored. GSA offers no reason why a FOIA case brought by a congressional plaintiff is justiciable, but an action by seven or more members of the Oversight Committee under § 2954 is not.

[10] Two other judges of this Court have recently observed that a statutory basis for an information request is one of many factors that distinguishes congressional plaintiffs with standing from those who lack standing, like the plaintiffs in *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). In *Committee on Oversight and Government Reform v. Holder*, 979 F. Supp. 2d 1, 14 (D.D.C. 2013), Judge Jackson relied on a passage from *Raines* that made clear that the Supreme Court "attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action" in denying standing. By contrast, Judge Jackson concluded that a "duly authorized House Committee" had standing to sue to enforce a Committee

2. *Raines v. Byrd* does not undermine plaintiffs' standing.

GSA's argument that plaintiffs lack standing, and the unpublished ruling in *Waxman v. Thompson*, take *Raines v. Byrd*, 521 U.S. 811 (1997), as their point of departure. *Raines* is the paradigmatic vote dilution case. In *Raines*, six members of Congress challenged the Line Item Veto Act. The Act authorized the President to cancel any spending item or tax benefit from a bill after signing it—a decision that Congress could override only by a "disapproval bill" passed by a two-thirds majority of each House of Congress. The plaintiffs alleged they had suffered cognizable injury because, regardless of whether the President ever exercised the line item veto, their votes would be less "effective" than before. They claimed that the "meaning" and "integrity" of their votes had changed because the statute created a new legislative possibility by allowing the President to excise the appropriation for a particular project already enacted into law. *Id.* at 825.

The Supreme Court concluded that the plaintiffs lacked standing because they had not asserted an injury that was "personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820. The injury plaintiffs alleged was "based on a loss of political power," that was not personal to the plaintiffs, because if any of the plaintiffs were "to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead." *Id*. at 821. And the Court emphasized that the "plaintiffs have not been singled out for unfavorable treatment as opposed to other members of their respective bodies. Their claim is that the Act causes a type of institutional injury (the diminution of legislative power) which necessarily damages all Members of Congress and both houses of Congress equally." *Id*. The Court distinguished *Coleman v. Miller*, 307 U.S. 433 (1939), which held legislators had standing where the actions of Kansas's

subpoena. Most recently, in *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 67 (D.D.C. 2015), Judge Collyer also distinguished *Raines* on authorization grounds. Here, the plaintiffs have also been "duly authorized," not just by a committee, but by statute.

lieutenant governor had completely nullified their votes to block ratification of the proposed Child Labor Amendment to the Constitution. The *Raines* Court concluded 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 is alleged here." 521 U.S. at 826. Following *Raines*, legislators may not sue to challenge the dilution of their votes unless their votes have been nullified in the sense that, but for the challenged action, their "votes would have been sufficient to defeat (or enact) a specific legislative act." *Id.* at 823.

This case cannot be shoehorned into the *Raines* mold. GSA's argument conflates two very different congressional tasks—plaintiffs' exercise of power delegated to them by statute to gather information; and Congress's exercise of legislative power. *See McGrain*, 273 U.S. at 175. Here, plaintiffs' injuries are "personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820.

Plaintiffs' injuries are *personal* in that each plaintiff joined in the Seven Member Rule requests and each plaintiff is entitled to the requested information. If a plaintiff in this case retired tomorrow, the claim would not survive that plaintiff's retirement, and his or her successor would *not* possess the claim raised in this case; it is personal to that plaintiff and not to his or her office. In sharp contrast to *Raines*, there can be no claim here that all Members of Congress of both Houses share this injury "equally," which is how *Raines* defined "institutional injury." *Id.* at 821. GSA's effort to read *Raines* to forbid legislator standing by defining "personal" injury to exclude any injury suffered in the plaintiff's official capacity has not been accepted by the Supreme Court. To the contrary, *Raines* made clear that legislators have standing to bring suit where an injury is personal to them, even when their injury is inextricably tied to their positions as members of a legislature. 421 U.S. at 820-22; *see also id*. at 832 (Souter, J., concurring). *Raines* reaffirmed

Powell v. McCormick, 395 U.S. 486 (1969), which held that a justiciable question is presented where a member of Congress states a claim that he has a distinct legal entitlement to his seat, even where that entitlement is dependent on his congressional status. *Raines* also reaffirmed *Coleman*, which upheld legislator standing to sue over alleged vote nullification. To accept GSA's reasoning would render both *Powell* and *Coleman* wrongly decided, because in each case the injury to the legislator-plaintiffs arose only because they were legislators. But in *Powell* and *Coleman*, the Court clearly understood the "personal injury" element to require only that the injury be suffered by an identifiable party rather than the institution itself, and not that the right infringed must be "personal" in the sense of being private. *See Powell*, 395 U.S. at 512-14; *Coleman*, 307 U.S. at 441-46.

Plaintiffs also satisfy *Raines*' other standing requirements. Plaintiffs' injuries are *particularized*: They have been deprived access to information to which they are entitled that directly bears on their duties as House oversight committee members. Their injuries are *concrete*: The deprivation of the information they seek is tangible and ongoing. And their injuries are *judicially cognizable:* The relief plaintiffs seek—an order directing the production of information—is the kind of order courts routinely enter in cases under other statutes requiring executive agencies to provide records, including FOIA, the Federal Advisory Committee Act, the Privacy Act, the Government in the Sunshine Act, and others. *See generally Soucie*, 448 F.2d at 1072 n.9. Nothing in *Raines* casts doubt on plaintiffs' standing in this case.

The statutory mooring of plaintiffs' claim also distinguishes this case from *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002), which found that the Comptroller General lacked standing to pursue a case to compel Vice President Cheney to produce information. In *Walker*, the court suggested that "the Comptroller General's power under [31 U.S.C.] § 716(b)(2) to bring a

civil action against the 'head of an agency' should be read as insufficient to justify a lawsuit against the Vice President, consistent with *Franklin v. Massachusetts*, 505 U.S. 788 (1992)." *Walker*, 230 F. Supp. 2d at 60 (describing the Vice President's arguments); *id.* at 61 (finding that this argument has merit); & *id*. at 74 (pointing to the difficult constitutional issues raised by a suit against the President or Vice President). More important, the core of the district court's standing ruling was that the Comptroller General was merely an *agent* of Congress, and that he "does not claim that he has been deprived of something to which [he] **personally** [is] entitled." *Walker*, 230 F. Supp. 2d at 66 (bold and bracketed material in the original; quoting *Raines*, 521 U.S. at 821). That is not the case here.

In short, the injuries plaintiffs allege are personal, not institutional, and their quarrel is not with their fellow members of Congress, but with an executive agency. Judge Bates was right in *Committee on Judiciary* in observing that, had the Committee based its claim on a statute providing it "with unqualified legal rights to information," the "invasion" of those rights would "inflict a concrete and particular injury supportive of plaintiffs' standing." 558 F. Supp. 2d at 66. That is this case, and for that reason, plaintiffs have standing.

B. The rights Section 2954 confers are judicially enforceable.

Equally unavailing is GSA's argument that Section 2954 creates no judicially enforceable rights. The Supreme Court has held that "'federal judges traditionally proceed from the strong presumption that Congress intends judicial review,'" and has "stated time and again that judicial review of executive action 'will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (quoting *Bowen*, 476 U.S. at 670 and *Abbott Labs*, 387 U.S. at 140). To be sure, Section 2954, like many statutes, does not create a right of action. Plaintiffs' claims are nonetheless reviewable for at least three reasons: (1) GSA's denial of plaintiffs' Seven Member Rule constitutes final agency

action that is presumptively reviewable under the APA; (2) GSA's refusal to carry out a non-discretionary duty under the Seven Member Rule is reviewable both because GSA is acting beyond the discretion conferred on it by law and because GSA has failed to carry out a non-discretionary duty, *see, e.g.*, *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996); and (3) GSA's refusal to provide plaintiffs information to which they are entitled gives rise to a claim for relief under the Declaratory Judgment Act to redress GSA's violation of Section 2954.

1. The APA's presumption of review applies here.

a. Plaintiffs' claims are reviewable under the APA.

A bedrock principle of the APA is that final agency action is presumptively reviewable. That principle was articulated fifty years ago in *Abbott Laboratories*, when the Supreme Court said that the APA "embodies a basic presumption of judicial review"—a presumption that review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140. The Court has faithfully adhered to *Abbott Laboratories. See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 251 (2010); *Bowen*, 476 U.S. at 670; *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). Under *Abbott Labs*, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Dunlop*, 421 U.S. at 567 (quoting *Abbott Labs*, 387 U.S. at 141). Courts will "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen*, 476 U.S. at 681.

Plaintiffs satisfy each of the APA's reviewability requirements. To start, GSA's refusal to produce the requested information constitutes "final agency action." 5 U.S.C. § 704. "Agency action" is broadly defined by the APA. *See* 5 U.S.C. § 551(13). This sweeping definition was

intended to "ensure the complete coverage of every form of agency power, proceeding, action, or inaction." *FTC v. Standard Oil of Cal*., 449 U.S. 232, 238 n.7 (1980); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 6-7 (D.C. Cir. 2017) (*per curiam*) (agency stay of a rule's effective date is agency action); *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1531-32 (D.C. Cir. 1990) (agency letter subject to APA review). Final agency action, the Supreme Court has explained, is action that "mark[s] the consummation of the agency's decisionmaking process" and determines "rights or obligations" from which "legal consequences will flow." *Bennett v. Spears*, 520 U.S. 154, 177-78 (1997) (quotations omitted).[11] GSA's denial letter of July 17, 2017 marked the consummation of the agency's decisionmaking process by determining, albeit wrongly, that plaintiffs had no right to the information they requested. Just as an agency's refusal to honor information requests under the Federal Advisory Committee Act, the Federal Election Campaign Act, or the Government in the Sunshine Act, constitutes reviewable agency action under the APA, so too does GSA's denial here. *See Public Citizen*, 491 U.S. at 449-50; *Akins*, 524 U.S. at 21; *Clark-Cowlitz*, 798 F.2d at 501 (reviewing merits of agency's invocation of Sunshine Act exemptions); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 217-19 (1979) (disclosure of records is final agency action).[12]

[11] *See, e.g.*, *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435–37 (D.C. Cir. 1986) (holding letter expressing EPA's position on procedural question was final agency action because it was definitive and had direct and immediate effect upon petitioners); *Nat'l Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689, 702 (D.C. Cir. 1971) (holding letter from Administrator of Wage and Hour Division of Department of Labor interpreting provision of Fair Labor Standards Act was final agency action).

[12] Despite the legion of cases holding that a denial of information to which one is legally entitled constitutes final agency action reviewable under the APA, GSA relies on cases like *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998), and *American Trucking Ass'n v. United States,* 755 F.2d 1292 (7th 1985), which involved claims by third parties challenging an agency's failure to submit a report to Congress (*Guerrero*), or failure to provide access to reports to Congress (*ATA*). Unlike in those cases, where the courts held that the filing of the report or failure to do so

Plaintiffs are also "adversely affected" and "aggrieved" by GSA's refusal to comply with its non-discretionary duty to provide them the requested records. *See Akins*, 524 U.S. at 19-20 (the word "aggrieved" in § 702 is associated "with a congressional intent to cast the standing net broadly"). Plaintiffs have been denied information to which they are entitled under law, and that denial hinders their ability to perform their duties as members of the Oversight Committee. GSA's denial is subject to review under the APA.

b. GSA's preclusion arguments lack merit.

In arguing that APA review is precluded by statute, GSA is swimming against the tide. Preclusion claims are highly disfavored and depend entirely on the terms of the specific statute under review. *Bowen*, 476 U.S. at 673 & 681.[13] GSA nonetheless suggests that review is precluded, not because Section 2954 or its history says so, but because GSA claims that Section 2954 would not have been enforceable when it was enacted, and, in any event, because in 1938, a decade *after* Section 2954's enactment, Congress passed statutes to enable judicial enforcement of congressional subpoenas through criminal enforcement cases handled by the U.S. Attorney for the District of Columbia. *See* 2 U.S.C. §§ 192, 194. These arguments are riddled with flaws.

First, GSA claims that Section 2954 is "utterly silent" about enforcement. GSA Mem. at 26. Based on that "silence," GSA speculates that Congress did not intend Section 2954's mandate to be judicially enforceable. But GSA's fact-free speculation ignores the background law in 1928,

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was not an agency action because it had no legal consequences, here the GSA's refusal to comply with Section 2954 had the legal consequence of denying plaintiffs' statutory entitlement to the requested information.

[13] GSA claims that *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345-46 (1984), envisions a more free-ranging and uncabined inquiry. *See* GSA Mem. at 26. That suggestion is refuted by *Block* itself, which focused on the "statutory scheme" governing milk marketing orders to conclude that Congress intended to foreclose actions by consumers. *See Sackett v. EPA*, 566 U.S. 120, 129-30 (2012).

which establishes that Congress would have had every reason to believe that Section 2954 claims would have been enforceable in court.[14] Congress's omission of a right of action in 1928 was hardly unusual—many statutes of that era had no statutory right of action because the breadth of common law equity jurisdiction and the availability of mandamus as an equitable remedy permitted broad access to the courts. *See, e.g.*, Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 Iowa L. Rev. 777, 818-30 (2004) (explaining that statutes in which Congress did not specifically authorize judicial review were commonplace before the merger of law and equity in federal courts in 1938). For this reason, the APA's legislative history stresses that "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of an intent to withhold review." H.R. Rep. No. 79-1980, at 41 (1946); *see generally Abbott Labs*, 387 U.S. at 140-42; *Reich*, 74 F.3d at 1328.

Equally flawed is GSA's argument that agency action unreviewable prior to the APA's enactment could not become reviewable after the APA's enactment—a theory unsupported by any precedent. After all, the core purpose of the APA was broadly to waive sovereign immunity and to grant any aggrieved party the right to sue. Undoubtedly the passage of the APA made reviewable many agency actions that were not previously subject to judicial review. GSA cites no authority for the proposition that statutes enacted before the APA necessarily qualify as review-preclusion statutes if they do not affirmatively authorize review. But in any event, the central claim made by GSA—that Section 2954 claims would have been unreviewable before the enactment of the APA—is wrong.

[14] The Supreme Court has made clear that Congress "'legislate[s] against a background of [the] common law … principles' found in the field where it is working." *Artis v. District of Columbia*, __ S. Ct. __, 2018 WL 491524 at *19 (Jan. 22, 2018) (Gorsuch, J., dissenting) (quoting *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010)).

As discussed below, before the APA, aggrieved parties routinely sought to compel agency compliance with the law by seeking writs of mandamus or injunctive relief against *ultra vires* action. Mandamus litigation especially was commonplace when Section 2954 was enacted. *See, e.g.*, *Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934) (collecting cases); *Wilbur v. United States*, 281 U.S. 206 (1930); *Work v. United States*, 262 U.S. 200 (1923); *Lane v. Hoglund*, 244 U.S. 174 (1917); *Roberts v. United States*, 176 U.S. 221 (1900). The availability of injunctive relief to set aside *ultra vires* actions also was well established. *See, e.g.*, *Reich*, 74 F.3d at 1327 (collecting cases); *Stark v. Wickard*, 321 U.S. 288, 289 (1944) (explaining the availability of "general equity jurisdiction" over injunctive actions against the government). The APA was enacted in part to codify the availability of mandamus and injunctive relief as statutory, rather than common law, remedies. 5 U.S.C. § 706(1). The Attorney General's Manual on the APA (1947) notes that the provision of the APA "authorizing a reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed' appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 USC 377). Safeway Stores, Inc. v. Brown, 158 F.3d 278 (E.C.A. 1943), certiorari denied, 320 U.S. 797." The Manual's references are to mandamus: Section 262 was the forerunner to the modern mandamus statute, 28 U.S.C. § 1361, and *Safeway Stores* was a mandamus case.[15]

[15] GSA contends that the fact that litigation did not arise under Section 2954 until the first *Waxman* case is somehow probative of Congress's intent that Section 2954 would not be judicially enforceable. GSA Mem. at 27 n.11. That claim presupposes a fact that GSA has not asserted—that executive agencies denied requests under Section 2954 before then. History may be a "powerful indication" of enforceability, but only if there is evidence of violations that went unchallenged. Equally unavailing is GSA's reliance on *Reed v. Cty Comm'rs of Delaware Cty., Pa.*, 277 U.S. 376 (1928). *Reed* was not a mandamus case; it arose under the Elections Clause of Article I, § 5, and not the Necessary and Proper Clause of Article I, § 8, cl. 18; the defendants in *Reed* were state election officials and not a federal official or agency; and *Reed* has been understood to address

Second, GSA's argument defies common sense. It is simply not credible that Congress bothered to enact a statute that plainly mandates disclosure but nonetheless vested agencies with complete and unreviewable discretion to decide whether to comply.

Third, GSA does not, and cannot, explain why Congress's subsequent enactment of statutes authorizing the Justice Department to enforce congressional subpoenas, 2 U.S.C. §§ 192, 194, sheds any light on congressional intent regarding Section 2954, enacted a decade earlier. *See, e.g.*, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one") (citations omitted). Nor can the GSA point to anything in the 1938 subpoena statutes, or their legislative history, that demonstrates that Congress intended subpoenas to be the exclusive means by which Congress could force the Executive Branch to provide it with information. Congress may have had faith that the Justice Department would enforce subpoenas against third parties. But it is wishful thinking for GSA, part of the Executive Branch, to suggest that Congress believed that the Executive Branch would enforce subpoenas directed at executive agencies. Congressional subpoenas are enforced, if at all, only by the U.S. Attorney's Office through criminal contempt proceedings. The specter of Executive Branch lawyers prosecuting Executive Branch officials to compel disclosure of information the Executive Branch wants to withhold from Congress is a mirage. *See, e.g.*, *Miers*, 558 F. Supp. 2d at 63-64. And the dynamic that makes statutory enforcement of subpoenas against the Executive Branch an empty threat today was true in 1928 as well. For that reason, it made sense for Congress in Section 2954 to move away from the majority-

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only Congress's authority under its Elections Clause powers. *See Roudebush v. Hartke*, 405 U.S. 15 (1972).

dependent subpoena model and to a system that entitles the oversight committees and their members to swift, sure and mandatory access to agency information.

2. Non-statutory bases for review.

a. Plaintiffs' claim is subject to non-statutory review because GSA's refusal to provide plaintiffs the information they requested is *ultra vires.*

In addition to review under the APA, this Court has authority to engage in the non-statutory review of *ultra vires* official action described in the Supreme Court's decision in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108-11 (1902), and its progeny. Those cases recognize that, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority," even without specific statutory authorization. *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). For example, in *Reich*, 74 F.3d 1322, the D.C. Circuit held that the district court had authority to review President Clinton's Executive order related to qualifications for government contractors. The Court explained that "courts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" *Id*. at 1328 (collecting cases) (citation omitted); *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1168, 1172-73 (D.C. Cir. 2003) (concluding that Postal Service regulations could be reviewed on a non-statutory basis notwithstanding exemption from the APA because "the case law in this circuit is clear that judicial review is available when an agency acts *ultra vires*.").

The Supreme Court recently reiterated the availability of non-statutory review, noting that it has "long held that federal courts may in some circumstances grant injunctive relief against … violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. at 1384 (citing *McAnnulty*). Plaintiffs properly invoke that authority here.

GSA dismisses the *McAnnulty* line of cases by contending that the Court in *Armstrong* suggested that the doctrine applies only in actions to protect constitutional rights. GSA Mem. at 24 n.10. Not so. As discussed above, most of the cases following *McAnnulty* are statutory, not constitutional, cases, and the equitable authority referred to by the Court in *Armstrong* is the same authority that would have been available to enforce Section 2954 claims prior to the APA's enactment. *See Reich*, 74 F.3d at 1327 (collecting cases). *Reich* also makes clear that the APA's enactment did not disturb the availability of non-statutory review under *McAnnulty*. *Id.*; *see also Dart*, 848 F.2d at 224.

b. Plaintiffs are entitled to relief in the nature of mandamus.

The *McAnnulty* line of cases address instances in which an executive agency is alleged to have *exceeded* its legal authority and thus acted *ultra vires*. GSA did just that by denying plaintiffs the information to which they were entitled. In doing so, GSA also failed to carry out its non-discretionary duty to provide information requested by any seven members of the Oversight Committee. GSA's refusal to carry out a mandatory duty gives rise to a claim in the nature of mandamus. *See generally Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958).

As noted above, federal courts long understood that aggrieved parties were entitled to judicial review in cases brought to compel agency compliance with nondiscretionary duties. Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), courts have recognized the availability of mandamus to compel federal officers to perform mandatory duties. *See also Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524 (12 Pet. 524) (1838). The Congress that enacted Section 2954 would have been aware that mandamus was available to compel an official to perform a non-discretionary duty. Mandamus cases at that time were legion. *See supra* at 34.

Relief in the nature of mandamus remains available to plaintiffs, if no other ground for review is available. As the D.C. Circuit has explained, "the necessary prerequisites for this court

to exercise its mandamus jurisdiction are that '(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff.'" *Swan v. Clinton*, 100 F.3d 973, 976-77 n.1 (D.C. Cir. 1996) (citations omitted); *accord Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). These requirements go to the Court's jurisdiction under the mandamus statute, 28 U.S.C. § 1361, and also determine whether the plaintiff is entitled on the merits to issuance of the writ. *Swan*, 100 F.3d at 973; *see also Willis v. Sullivan*, 931 F.2d 390, 395 96 (6th Cir. 1991). Assuming that "there is no other adequate remedy available to plaintiffs," *Swan*, 100 F.3d at 977 n.1, the test for mandamus relief is plainly met here.[16] Plaintiffs have a clear right to relief. Section 2954 imposes a nondiscretionary duty on GSA, which it failed to perform, and there is no other remedy available to plaintiffs. Mandamus relief is therefore available if APA review is not. *Id.* at 980-81; *Reich*, 74 F.3d at 1332; *Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980).[17]

[16] The cases GSA cites for the proposition that mandamus jurisdiction is unavailable are inapposite. In contrast to the Seven Member Rule, the statutes at issue in the cases GSA cites expressly limit jurisdiction. *See, e.g., Columbia Power Trades Council v. Dep't of Energy*, 671 F.2d 325, 328-29 (9th Cir. 1982) (finding that Congress granted Federal Labor Relations Authority exclusive jurisdiction over federal labor relations); *Estate of Michael ex rel. Michael v. Lullo*, 173 F.3d 503, 506 (4th Cir. 1999) (finding Mandamus Act's grant of jurisdiction does not override Anti-Injunction Act's withdrawal of jurisdiction for purposes of restraining assessment or collection of any tax); *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 593 (4th Cir. 2006) (finding that mandamus could not be used to circumvent limitation on appeal of district court order remanding removed case to state court on basis of lack of federal subject matter jurisdiction under 18 U.S.C. § 1447(d)); *Ross v. United States*, 460 F. Supp. 2d 139, 150 (D.D.C. 2006) (finding Taxpayer Bill of Rights' exclusivity provision barred taxpayers' claims for damages under Mandamus Act).

[17] Reprising its standing argument, which asserts that the rights conferred by Section 2954 are not "personal" to plaintiffs, GSA argues that mandamus relief is not available because the duty of disclosure imposed by Section 2954 does not run to the requesting plaintiffs, but instead is owed to the House of Representatives as a whole. GSA Mem. at 34-35. Once again, that characterization cannot be squared with the text of Section 2954, which states categorically that the right of access is vested in the Oversight Committees or the members who make the request.

c. Review of plaintiffs' claim is authorized by the Declaratory Judgment Act.

In two actions brought by congressional committees to enforce subpoenas, and in one case involving the House of Representatives' challenge to the constitutionality of the Executive Branch's implementation of the Affordable Care Act ("ACA"), judges in this district have found that the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201 & 2202, provides a basis for review of the plaintiffs' claims, so long as the substantive right that the plaintiffs assert emanates from a source other than the DJA. The rationale of these rulings also confirms that the DJA provides a ground for review here, because the right plaintiffs seek to enforce in this case emanates from a statute enacted pursuant to Article I's Necessary and Proper Clause, U.S. Const., Article I, § 8, cl. 18, and not the DJA.[18]

The first case in this trilogy, *Miers*, 558 F. Supp. 2d 53, involved an action by the House Judiciary Committee to enforce a subpoena it issued to obtain records regarding the firing of seven Democratic United States Attorneys. After addressing standing (*see supra* p. 25), Judge Bates turned to the right-of-action issue and concluded that the DJA provides a right of action, so long as the DJA is not the basis for the asserted substantive right. *Id.* at 81-82. Judge Bates found that the requisite right in *Miers* emanated from Article I, which implies a substantive right of Congress to investigate in furtherance of its legislative function. *Id*. at 89-91.

[18] GSA has no answer to this argument, aside from saying that the DJA presupposes the existence of a judicially remediable right. GSA Mem. at 32 & n.13. Plaintiffs agree, but Section 2954 constitutes just such a judicially remediable right. GSA also points out that in *Miers*, *Holder* and *Burwell*, the House authorized the litigation, GSA Mem. at 21, but overlooks a key fact, highlighted by each ruling, that there was no statutory underpinning for enforcement in any of these cases. In contrast, this case is brought to enforce a statute, making it an easier case. As noted earlier, the judges in *Miers*, *Holder* and *Burwell* contrasted *Raines* and its progeny to cases like this one, where the suit is brought to enforce a statutory right.

The next case, *Holder*, 979 F. Supp. 2d. 1, applied similar reasoning. In *Holder*, the House Oversight Committee brought suit to enforce a subpoena relating to its investigation of "Fast and Furious" conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives. Following Judge Bates' lead, Judge Jackson relied on the DJA "as the source of the mechanism to achieve the vindication of a right derived elsewhere," and pointed to Article I as the basis for the plaintiff's substantive right. *Id.* at 22.

Most recently, in *Burwell*, 130 F. Supp. 3d 53, the court held that the House had standing on constitutional grounds to challenge the expenditure of unappropriated funds to implement the ACA. Judge Collyer concluded "that the House can seek relief under the Declaratory Judgment Act for those claims that it has standing to bring" notwithstanding the absence of a statutory right of action. *Id.* at 78.

This case shares key attributes that tie *Miers*, *Holder* and *Burwell* together: First, as in *Miers* and *Holder*, plaintiffs here seek records from an Executive Branch agency under authority Congress delegated to them, and the agency has refused to provide the information. Second, as in all three cases, the legal obligation here is independent from the DJA. And third, plaintiffs have no recourse other than a judicial order. Under the holdings of *Miers*, *Holder* and *Burwell*, the DJA gives this Court the authority to "declare the rights and other legal relations" of the parties, 28 U.S.C. § 2201, and enforce them through injunctive relief if necessary. *Id. §* 2202. Accordingly, this Court has authority to review plaintiffs' claim for relief under the DJA, if other avenues of review are unavailable.

C. The "equitable discretion" doctrine does not apply.

GSA argues that this Court should dismiss this action under the "equitable discretion" doctrine, which has fallen into disuse by the only circuit to apply it—the D.C. Circuit. *See, e.g.*, *Chenoweth v. Clinton*, 181 F.3d 112, 114-15 (D.C. Cir. 1999) (casting doubt on the doctrine's

continued salience). Even if the doctrine remains viable, it does not apply here, because this case raises no thorny constitutional issue that this court must avoid. Every one of the D.C. Circuit's "equitable discretion" cases involved an effort by one branch of government (or its members) to entangle the court in an inter- or intra-branch dispute of clear constitutional import. *See id; see also Waxman v Evans*, 2002 WL 32377615 at *6 (collecting cases). Here, there is no constitutional issue to be sidestepped, let alone the kind of difficult inter-branch conflicts that were at the core of cases like *United States v. AT&T Co*., 551 F.2d 384 (D.C. Cir. 1976), which involved an effort by the Department of Justice to block a congressional investigation into warrantless wiretaps, or *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983), where the Department of Justice sought to block the House from proceeding with criminal contempt charges against EPA Administrator Anne Gorsuch. Nor is it likely that Executive Privilege claims will arise in this case. That privilege may be invoked only by White House Staff working "in close proximity" to the President who are providing advice on "official government matters," *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1977)—a requirement that plainly forecloses an Executive Privilege claim arising here. Of course, if questions of privilege were to arise in a Section 2954 case, it would then be up to the reviewing court "to consider whether the disclosure provision of the act exceeds the constitutional power of Congress to control the actions of the executive branch." *Waxman v. Evans*, *supra*, at *9. But this Court should leave that question to another day.

At the end of its memorandum, GSA invokes the specter of Seven Member Rule requests raising serious separation of powers questions. GSA suggests that Section 2954 could be used to gain access to sensitive national security or law enforcement information, creating what GSA characterizes as a risk of an "unrestrained power of disclosure." GSA Mem. at 36. These hyperbolic claims are readily answered. GSA's use of the word "disclosure" appears to imply

public disclosure, but nothing in Section 2954 suggests that information provided in response to a request will ever become public. Section 2954 requires disclosure not to the public, and not to Congress writ large; it requires disclosure only to members of the Oversight Committee. Congressional subpoenas routinely seek highly sensitive information and Congress, with the help of the Executive Branch, has constructed procedures to safeguard that information. Sensitive materials have been provided to Committee members in the past pursuant to Section 2954. Members of Congress see highly sensitive material every day. Members who serve on oversight committees are the members most likely to have routine access to sensitive information, and they are acutely aware of the need to safeguard it. It is an affront to plaintiffs in this case, and to Members of Congress, to suggest that they are incapable of handling sensitive information in a responsible way, yet that is the thrust of the GSA's argument. This Court should not countenance that suggestion.

Finally, GSA's argument entirely overlooks the other half of the constitutional balance of powers: Congress's authority to engage in oversight, which Section 2954's requirements reasonably implement. There is no basis for concluding that the creation of a statutory tool to compel production of information needed for oversight oversteps congressional authority or interferes with the executive branch's performance of its functions, under the balancing approach that governs such separation of powers issues. *See, e.g.*, *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441-45 (1977).

* * *

Plaintiffs seek the straightforward application of an unambiguous statute to remedy GSA's denial of their Seven Member Rule requests. GSA can make no credible claim that the underlying information is subject to Executive Privilege. The information requested by plaintiffs relates to a

garden-variety commercial transaction involving the leasing of federal property. GSA oversees thousands of federal leases, including dozens in the District of Columbia.[19] Congress has every right to monitor GSA's implementation of these leases. To be sure, this transaction now involves a sitting President. But the fact that a President is now the government's lessee does not justify GSA's failure to obey the law. The possibility that the President is in violation of the lease agreement he signed before becoming President only underscores the need for congressional oversight.

Ninety years ago, a prescient Congress foresaw the possibility that partisanship might be an obstacle to Congress engaging in the oversight it is responsible for carrying out under Article I of the Constitution. Section 2954 was written to address that possibility. It authorizes members of the minority to peer behind the bureaucratic curtain, even when the majority chooses not to look. The case that Congress forecast in 1928 is now before this Court. This Court should enforce Section 2954 as written by Congress, and direct GSA to deliver the requested information to plaintiffs forthwith.

[19] *See* GSA Lease Inventory & Lease Documents for DC Regional Area (available at https://www.gsa.gov/real-estate/realestate-services/leasing-policy-procedures/lease-ocuments/lease-documents-region-11-national-capital-region#DistrictOfColumbia).

CONCLUSION

For the reasons set forth above, GSA's motion to dismiss should be denied, and plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

/s/ David C. Vladeck
David C. Vladeck (D.C. Bar No. 945063)
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, D.C. 20001
(202) 662-9540
vladeckd@law.georgetown.edu

Scott L. Nelson (D.C. Bar No. 413548)
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009-1001
(202) 588-1000
snelson@citizen.org

Attorneys for Plaintiffs*

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