The Politics of Executive Privilege

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The "Seven Member Rule"

In 2001, seventeen Democrats and one Independent in the House invoked a seldom used statute, first enacted in 1928, that requires executive agencies to furnish information if requested by seven members of the House Committee on Government Reform or five members of the Senate Committee on Governmental Affairs. They sought census data from the Commerce Department. After the administration challenged the constitutionality of this statutory provision, a federal district court ruled in favor of the lawmakers.

This case, eventually mooted by the Ninth Circuit, raised the central question of what Congress needs to do to gain access to executive branch documents. Must congressional requests come only from the majority party, or may the minority operate effectively under the 1928 statute? May Congress act by committee, by a subgroup within a committee, or even by an individual member? Or does congressional access require action at least by a full chamber and perhaps even action by both chambers and presentation of a bill or resolution to the President?

Origin of the Statute

In 1928, as part of a statute that discontinued certain reports required to be made to the legislative branch, Congress added a section requiring every executive department and independent establishment of the federal government, upon request of "any seven members" of the House Committee on Expenditures in the Executive Departments, or "any five members" of the Senate Committee on Expenditures in the Executive Departments, to furnish "any information requested of it relating to any matter within the jurisdiction of said committee."[1] As presently codified, the statutory language requires an

1. 45 Stat. 996, §2 (1928).

"Executive agency," on request of seven members of the House committee or five members of the Senate committee, to submit "any information requested of it relating to any matter within the jurisdiction of the committee."[2]

The statutory language clearly gives seven members in the House and five members in the Senate, from the designated committees, the right to ask for certain executive information within the jurisdiction of their committee. One issue is the *type* of information that must be given to Congress. Part of the House legislative history suggests that the authority to request information is limited to what had been previously sent to Congress in agency reports, but was now being discontinued: "To save any question as to the right of the House of Representatives to have furnished any of the information contained in the reports proposed to be abolished, a provision has been added to the bill requiring such information."[3] Yet language on the same page of this House report suggests a much larger universe of information:

> The reports come in; they are not valuable enough to be printed, they are referred to committees, and that is the end of the matter. The departmental labor in preparation is a waste of time and the files of Congress are cluttered up with a mass of useless reports. If *any information* is desired by any Member or committee upon a particular subject that information can be better secured by a request made by an individual Member of committee, so framed as to bring out the special information desired.[4]

The House bill authorized access to executive branch information only by seven members of the designated House committee. In reporting the bill, the Senate decided to grant access to five members of its expenditure committee.[5] The Senate report included the language of the House report, but added language that seems to limit the request for agency information to what had been reported in the past in obsolete or useless reports: "This section makes it possible to require any report discontinued by the language of this bill to be resubmitted to either House upon its necessity becoming evident to the mem-

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2. 5 U.S.C. §2954 (2000). The codified language refers to the House Committee on Government Operations (now the Committee on Government Reform) and the Senate Committee on Governmental Affairs.

3. H.Rept. No. 1757, 70th Cong., 1st Sess. 6 (1928).

4. Id. (emphasis added). Floor debate in the House merely quotes the language of the section giving seven members of the House committee the right to request information from the executive branch. 69 Cong. Rec. 9417 (1928).

5. S. Rept. No. 1320, 70th Cong., 1st Sess. 1 (1928).

bership of either body."[6] Debate on the Senate floor reinforced that impression. The provision would enable either committee to "reinstate any report that was found to be needed."[7] The statutory language is broad, yet parts of the legislative history suggest a narrower field of information

In addition to disagreement about the type of information the two committees are entitled to receive, what legal remedies are available to Congress if an agency decides to ignore a request from seven members of the House committee or five members of the Senate committee? Would those legislators have to go to the full committee for support, or to the full chamber? Is their request enforceable in court?

Many of those issues were addressed during Senate hearings in 1975. Antonin Scalia, head of the OLC, testified on S. 2170, the Congressional Right to Information Act. Section 341(b) directed the head of a federal agency, "on request of a committee of the Congress or a subcommittee thereof or on request of two-fifths of the members thereof," to submit any information requested relating to matter within the jurisdiction of the committee or subcommittee. It was Scalia's position that committee action "normally presupposes majority support—and where this can not be achieved with respect to a proposed request for information from the Executive Branch, one suspects there would be good reason, based upon the unreasonableness of the request."[8]

Scalia compared S. 2170 to the "minority request" in the 1928 statute. He said the legislative history showed that "it did not represent a Congressional judgment that such a minority should have the power to demand all information, but rather only the information which was formerly contained in annual reports which the Congress abolished."[9] Congressional access, he said, applied only to "the information previously required." Any other interpretation, requiring presidential disclosure with respect to all material with a committee's jurisdiction, was of "questionable constitutionality."[10] Scalia regarded any provision that allowed a minority of a committee or subcommittee to obtain information from an executive agency as "surely extraordinary."[11]

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6. Id. at 4.
7. 69 Cong. Rec. 10613 (1928) (statement by Senator Sackett).
8. "Executive Privilege—Secrecy in Government," hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 105 (1975).
9. Id. at 107.
10. Id.
11. Id. at 106.

Subcommittee chairman Edmund S. Muskie moved Scalia from these general points to a specific: "Do you find it even more extraordinary for one Senator to ask for information? If it is extraordinary for two-fifths of the committee to ask for it, it is even more extraordinary for a single Senator to ask for information."[12] Scalia conceded that single Senators "are usually accommodated," but expressed concern that Section 341(b), if enacted, would "make it unlawful" for an executive official not to comply with a request that lacks support from a majority of the subcommittee.

Muskie took it to the next step: "That logic suggests that a single Senator ought not to ask for information, except as a matter of grace on the part of the executive, without getting the support of the majority of some committee."[13] Scalia said he had no objection to requests from individual members of Congress: "in the Justice Department and elsewhere we receive numerous requests from individual Senators and Congressmen which are complied with promptly." That response didn't satisfy Muskie, who charged that the "whole thrust" of Scalia's argument "is that we get information from the executive branch…only as a matter of grace," not as a matter "of constitutional right."[14]

Scalia held to his position that it was "extraordinary" to delegate to a minority of a subcommittee the authority to demand information that the majority of the subcommittee opposed.[15] As a matter of logic, he found it more reasonable "if the power were delegated to individual Senators."[16] However, Scalia assumed that a majority of a subcommittee might disagree with the minority's request. It might not. Also, the bill as a whole did not vest final authority in a minority. Under Section 342(a), an administration could decline to provide the information requested by two-fifths of a committee or subcommittee if the President, in writing, instructed an executive official to withhold the information and transmitted the instruction to the committee or subcommittee. At that point, the committee chairman, with the approval of the committee, was authorized under Section 343 to issue a subpoena requiring the executive officer to provide the information. Failure to comply with the subpoena would require the committee chairman to bring a civil action in the district court of the District of Columbia to enforce the subpoena.[17] Thus, the two-fifths minority marked only the first stage of a multi-step process that depended, in the end, on majority action.

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12. Id. at 71.
13. Id.
14. Id. at 72.
15. Id.
16. Id. at 73.
17. Id. at 166.

Applying the Statute

Prior to the request in 2001, the 1928 statute had seen little action. Herman Wolkinson, an attorney in the Justice Department, discussed the statute in an article published in 1949. The statutory language might lead one to believe that "every executive department is obliged to furnish *any information*, when requested to do so, by the Committees on Expenditures of the House and Senate."[18] The legislative history convinced Wolkinson that the law "was not intended to enable the Committee on Expenditures to make blanket calls for information and papers upon the Executive Departments."[19] The purpose, he said, was to give the committees access only to "such information as they had theretofore been able to receive through the filing of the reports."[20] Notwithstanding the 1928 statute, the heads of departments could continue "to keep from public view matters which, in their judgment, should remain confidential."[21]

When Attorney General William Rogers appeared before the Senate Judiciary Committee in 1958, he identified a number of principles that guide the release of information to Congress. One principle indicated that there were limits on statutory efforts to obtain documents: "the legislative branch can make inquiry of the executive for its documents, but in response to congressional requests for documents, the executive should exercise a discretion as to whether their production would serve a public good or would be contrary to the public interest."[22] Rogers' testimony was guided by the Wolkinson study.[23]

Also in 1958, a subcommittee of the House Government Operations Committee held hearings on the withholding of information by the Agriculture Department. The subcommittee had twice asked for a copy of the original version of a pamphlet, "Farm Population Estimates for 1957," which was withheld from distribution. Each time the request was denied, with the explanation that the original version was a "working draft" that is "not available for

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18. Herman Wolkinson, "Demands of Congressional Committees for Executive Papers" (Part III), 10 Fed'l Bar J. 319, 321 (1949) (emphasis in original).

19. Id. at 322.

20. Id.

21. Id. at 323.

22. "Freedom of Information and Secrecy in Government," hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 11 (1958).

23. Id. at 32–33. Wolkinson's analysis of the 1928 statute was included in the hearing record. Id. at 131–32.

release."[24] The second subcommittee request relied on the 1928 statute.[25] When the department again refused to comply, the subcommittee directed the assistant secretary to appear and to bring the original version of the document.[26] The department did so, and the original version was printed in the published hearings.[27] In withholding the document from the subcommittee, the department considered relying on executive privilege but soon dropped that as an argument.[28]

In 1970, seven members of the House Government Operations Committee asked the White House Office of Science and Technology for a report on a supersonic transport aircraft. William Rehnquist, as head of OLC, advised against releasing the report to the lawmakers. It was Rehnquist's position that the purpose of the 1928 statute "was to serve as a vehicle for obtaining information theretofore embodied in the annual routine reports to Congress submitted by the several agencies." To read the statute more broadly, he concluded, would bring it "into conflict with the constitutional prerogative of the President to withhold from Congress Executive branch documents the disclosure of which in his judgment does not comport with the national interest."[29] A broader reading, however, did not necessarily conflict with the constitutional authority of the President. If the report on the supersonic transport aircraft contained information that, if released, would be prejudicial to the national interest, the President could so state.

On September 20, 1994, twelve Republican members of the House Committee on Government Operations wrote to the Acting Director of the Office of Thrift Supervision, relying on the 1928 statute to request information regarding the failure of the Madison Guaranty Savings and Loan. The Acting Director complied with the request, while raising questions about whether the subject matter fell within the jurisdiction of the committee and whether release of the information might impair ongoing investigation of the company

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24. "Withholding of Information by Department of Agriculture," hearing before a subcommittee of the House Government Operations Committee, 85th Cong., 2d Sess. 3 (1958) (letter from Assistant Secretary Don Paarlberg to Subcommittee Chairman L. H. Fountain, March 3, 1958).

25. Id. at 5.

26. Id. at 6.

27. Id. at 9, 63–74.

28. Id. at 32–33, 51–55

29. Letter from Rehnquist to Dr. Lee A. DuBridge, Director of the Office of Science and Technology, June 3, 1970, cited in "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment," Waxman v. Evans, Civil Action No. 01-04530 (LGB) (AJWx), August 3, 2001, at 15.

by an independent counsel.[30] Earlier that year, Republican members of the same committee invoked the 1928 statute to request documents from the Federal Deposit Insurance Corporation relating to a Texas savings and loan. Acting under the provisions of the 1928 statute, the corporation made the documents available to the lawmakers.[31] The previous year, on August 3, 1993, Chairman John Conyers and other members of the Government Operations Committee cited the 1928 statute as authority for requesting documents related to an equal employment opportunity complaint. The Merit Systems Protection Board released the documents with the understanding that the statute "compels [the agency] to disclose the information and material requested by the seven members of the Committee."[32]

The 1928 statute had not been adjudicated before the Waxman suit, although in two decisions federal courts made mention of it. A decision in 1971 footnotes a number of statutes, including the 1928 law, that require agencies to disclose information to Congress upon request.[33] A 1994 decision involved the effort of Rep. James Leach to obtain documents from the Resolution Trust Corporation and the Office of Thrift Supervision. He brought the action under the Freedom of Information Act (FOIA). A district court held that the lawsuit involved a dispute primarily between Leach and his fellow lawmakers, and for that reason it was inappropriate for the court to review the issues. The court noted that Leach had available to him a number of remedies, including an attempt to persuade the entire Congress, the House leadership, the chairman of the Banking Committee, or the committee as a whole to authorize his request for the documents. A footnote explained that if Leach was unable to gain the support of the majority party on the committee, he could avail himself of the 1928 statute, "through which small groups of individual congressmembers can request information without awaiting formal Committee action."[34]

The Waxman Request

Acting under the 1928 legislation, Rep. Henry A. Waxman, ranking member of the House Committee on Government Reform, wrote to Secretary of Commerce Donald L. Evans on April 6, 2001, requesting the adjusted census

30. Id. at 14.
31. Id.
32. Id. at 14–15.
33. Soucie v. David, 448 F.2d 106, 107, n. 9 (D.C. Cir. 1971).
34. Leach v. Resolution Trust Corp., 860 F.Supp. 868, 875 n. 7 (D.D.C. 1994).

data produced as part of the 2000 census.[35] Sixteen Democrats and one Independent from the committee signed the letter. The Census Bureau had compiled two sets of data. The population count determined by census forms returned by mail, supplemented by interviews conducted at addresses where no census form was returned, had been made public. A second set of data, using statistical techniques to correct for errors in the population count, was not released to the public. Relying on news reports, Waxman said that the unadjusted numbers released to the public "missed at least 6.4 million people and counted at least 3.1 million people twice."[36]

Waxman offered several reasons why his committee needed the information. The committee wanted the second set of data because it was "actively considering whether to amend the law regarding the timing and release of adjusted and unadjusted census data."[37] Second, the information "could have an enormous impact on the allocation by Congress of more than $185 billion in population-based federal grant funds."[38] Third, the information "could have a significant bearing on the appropriateness of congressional redistricting efforts currently being undertaken by state governments."[39] Waxman requested the adjusted data on or before April 20, 2001.

After receiving no response from the Commerce Department, Waxman wrote another letter to Evans, dated May 16, 2001.[40] Through phone calls from committee staff members, Waxman learned that the matter was under "active consideration" by the department's Office of General Counsel. He told Evans that if he did not receive a written response by the end of the week, he would conclude that the department had made a decision not to respond.[41]

District Court Decision

On May 18, Waxman and fifteen other members of the committee filed suit in federal district court, requesting declaratory and injunctive relief.[42] Three

35. Letter of April 6, 2001, from Rep. Waxman to Secretary Evans.
36. Id. at 1.
37. Id. at 2.
38. Id. at 2–3.
39. Id. at 3.
40. Letter of May 16, 2001, from Waxman to Evans.
41. Id.
42. Waxman v. Evans, Civil Action No. 01-04530, "Complaint for Declaratory and Injunctive Relief," May 18, 2001. Representatives Paul E. Kanjorski and Jim Turner, who had signed the April 6, 2001, letter to Evans, did not sign the Complaint.

months later, Waxman and the other plaintiffs filed a memorandum of law in support of a motion for summary judgment.[43] The brief argued that the Seven Member Rule compelled disclosure of the information, no exemption was claimed or applicable, and the use of "shall" in the statute mandated executive agencies to submit information requested by members of the committee.[44] Instead of identifying parts of the legislative history that suggested a limited reach to agency information, the brief cited the statutory adjective "any" (modifying "information") as evidence that the committee could request a broad range of information.[45] As to legislative history, the brief looked to language that encouraged lawmakers to make particularized, individual requests for information needed by the committee.[46]

Did Waxman and his colleagues have standing to sue in court? They referred to the Administrative Procedure Act as granting a cause of action, and empowering the district court to "compel agency action unlawfully withheld or unreasonably delayed."[47] It was a matter, they said, of enforcing a statutory right. Notwithstanding *Raines* v. *Byrd* (1997),[48] which denied standing to lawmakers who sued in their lawmaking capacity, the sixteen members said they were not suing in their lawmaking capacity, but rather to enforce a statutory right granted to them.[49]

The Justice Department filed its opposition to the plaintiff's motion on November 26.[50] The brief narrowed the issue to two disputes: the first between the executive and legislative branches over access to information possessed by executive officials, and the second between the minority and majority members of the House Committee on Government Reform. Justice advised the court to "decline to wade into this political thicket" and allow the controversy to be "sorted out in the political realm."[51] Moreover, even if the court decided the case, the plaintiffs's interpretation of the statute—singling out the words

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43. Waxman v. Evans, Civil Action No. 01-04530 (LGB)(AJWx), "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment," August 8, 2001.

44. Id. at 1.

45. Id.

46. Id. at 1–2.

47. Id. at 18, citing 5 U.S.C. §§551(13), 706(1).

48. 521 U.S. 811 (1997).

49. "Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment," at 20.

50. Waxman v. Evans, No. 01-04530-LGB (AJWx)," Secretary's Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment," November 26, 2001.

51. Id. at 1.

"shall" and "any"—ignored "entirely Congress's readily ascertainable purpose."[52] The government interpreted the statute as preserving access "to a limited universe of agency reports for members of two of Congress' numerous committees."[53] The legislative history "makes abundantly clear" that the statute "was merely intended to preserve access to the reports abolished by Section 1 of the Act."[54]

The Justice brief argued that the broader interpretation pressed by plaintiffs "would raise serious doubts about the constitutionality of the statute."[55] Justice warned that "[g]ranting unlimited access to agency files may cause unwarranted interference with the Executive branch function to 'take care that the laws be faithfully executed.'"[56] The "sweeping authority" advanced by the plaintiffs implied that an agency in possession of sensitive, national security material, or documents protected by executive privilege, "would have no choice . . . but to make the requested disclosure."[57] That was not a strong point. If Justice argued, as it did, that executive privilege is constitutionally based, no statute may dilute it. Justice also charged that the plaintiffs' interpretation was "constitutionally suspect, because this absolute power is proposed to be lodged not in any committee, or subcommittee, but in a mere fraction of the membership of only two of Congress' more than 40 full committees."[58]

On January 18, 2002, the district court ruled in favor of the plaintiffs. District Judge Lourdes G. Baird rejected the government's recommendation that the dispute should be "sorted out in the political realm" because "there is no room for compromise and cooperation."[59] In effect, the government's conduct made it clear that an accommodation was out of the question. Two letters from Waxman had been "to no avail."[60] As a result, the circumstances of the case "indicate that judicial intervention has become necessary to solve this inter-branch dispute."[61] Unlike some of the other cases cited by the government, where courts advised members of Congress that they could get relief by persuading their colleagues to repeal an objectionable statute, Judge

52. Id.
53. Id.
54. Id. at 10.
55. Id. at 2.
56. Id. at 18.
57. Id.
58. Id. at 19.
59. Waxman v. Evans, CV 01-4530 LGB (AJWx) (D. Cal. 2002), at 9.
60. Id. at 10.
61. Id.

Baird concluded that "Plaintiffs' rights cannot be vindicated by congressional repeal of a statute; rather, their rights may actually be vindicated by the effectuation of a statute."[62] She therefore denied the government's motion to dismiss.

Moving to the merits, Judge Baird ruled that the plain language of the Seven Member Rule "mandates that the Secretary release the requested data to Plaintiffs."[63] She cited Supreme Court decisions that "if no ambiguity in the plain statutory language is discerned, as in the instant situation, legislative history need not be consulted."[64] Nevertheless, "out of an abundance of caution,"[65] she examined what lawmakers had said in committee reports and floor statements. While it was clear that Congress intended either House to obtain information contained in discontinued reports, "such a recognition does not necessarily mean that the provision was designed to merely accomplish that narrow aim."[66] Because of ambiguity in the legislative history, she chose to follow "the text rather than the legislative history."[67]

Regarding the constitutional doubts raised by the government, Judge Baird recognized "the settled rule that a valid constitutional claim of Executive Privilege can defeat a congressional demand for information."[68] However, only after the government made an express claim of executive privilege would it be necessary for a court to consider "whether the disclosure provisions of the act exceeded the constitutional power of Congress to control the actions of the executive branch."[69] Earlier in her decision she indicated that a claim of executive privilege over adjusted census records would probably not be "viable."[70] She examined the government's claim that a constitutional issue exists because the congressional power to request information is not lodged in a committee or subcommittee but rather in a fraction of one committee. Baird noted that many committees and subcommittees give a single member of Congress (the chairman) the power to issue a subpoena.[71] Based on the available facts, she ordered Secretary Evans to release the requested census data to the plaintiffs.[72]

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62. Id. at 12.
63. Id. at 15.
64. Id. at 16.
65. Id.
66. Id. at 18.
67. Id.
68. Id. at 19.
69. Id. at 20.
70. Id. at 8–9.
71. Id. at 20–21.
72. Id. at 21.

Request for Reconsideration

Following Judge Baird's decision, the government filed a memorandum in support of a motion for reconsideration.[73] Such motions are rare and usually unsuccessful. The motion implied that the government had prepared an inadequate brief the first time around and wanted to strengthen its case with arguments it had neglected to make. What new points could be offered to override the judge's skepticism? What had happened to elevate the importance of this case in the eyes of the Justice Department?

Quite likely the Waxman dispute became entangled with another case: *Walker* v. *Cheney*, in which Comptroller General David Walker relied on another statutory provision to demand documents from Vice President Dick Cheney. The Justice Department wanted to dismiss in each instance the capacity of Congress, either through its members or a legislative agency like the General Accounting Office, to use a compulsory process in court to obtain documents from the executive branch. The GAO case is discussed in the next chapter.

In the reconsideration motion, the government for the first time charged that the plaintiffs lacked Article III standing to sue and had no right of action in court either under the Seven Member Rule or the Administrative Procedure Act.[74] Moreover, the government now contended that the Seven Member Rule is a "rule of proceeding" within the meaning of Article I, §5, cl. 2, of the Constitution, and "has been superceded by House rules and is therefore no longer judicially enforceable."[75] It reiterated its position that Congress may not constitutionally delegate its investigatory powers to a few lawmakers and allow them to sue the executive branch to compel compliance with a request for information.[76]

In a separate brief on the reconsideration motion, the Justice Department argued that the court lacked authority to resolve "the quintessentially political dispute before it."[77] The court was unlikely to accept that position, given what appeared to be no chance of a political accommodation between the House members and the Commerce Department. This brief makes specific mention of *Walker* v. *Cheney*.[78]

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73. Waxman v. Evans, No. 01-04530-LGB (AJWx), "Secretary's Memorandum in Support of Motion for Reconsideration," March 4, 2002.

74. Id. at 1.

75. Id. at 2.

76. Id. at 19.

77. Waxman v. Evans, No. 01-04-530-LGB (AJWx), "Secretary's Reply in Support of Motion for Reconsideration," March 25, 2002, at 2.

78. Id. at 18, n.13.

The plaintiffs opposed the motion for reconsideration, pointing out that Ninth Circuit law "makes clear that reconsideration is an 'extraordinary remedy' that may not be used to 'raise arguments…for the first time when they could reasonably have been raised earlier in the litigation.'"[79] The plaintiffs also found the government at error when it argued that Congress could not delegate to sub-parties the authority to acquire information, pointing to powers delegated to the GAO to gather information from the executive branch and the subpoena powers available to committees, subcommittees, and even individual committee chairmen.[80] Similarly, the plaintiffs found no merit in the argument that the Seven Member Rule had been superseded by subsequent House rules. Section 2954 is not an internal rule; it is a statute.[81]

In a brief opinion on March 21, 2002, Judge Baird denied the motion for reconsideration. She pointed out that although the plaintiffs discussed the standing issue in their opening brief, the government had not addressed that issue.[82] The government, in its initial brief, had also failed to raise arguments as to whether the plaintiffs possessed a judicially enforceable right of action, and whether the Seven Member Rule had been superseded by House rules.[83] She cited Ninth Circuit case law that a motion for reconsideration should not be granted, absent highly unusual circumstances, the presentation of newly discovered evidence, commitment of clear error, or an intervening change in controlling law.[84]

Briefs for the Ninth Circuit

In its appeal to the Ninth Circuit, the Justice Department repeated some of the arguments that had failed in district court: (1) the Seven Member Rule "marks a sharp departure from the settled means by which Congress seeks information from the executive branch," (2) those precedents preclude "small minorities from compelling disclosure of information when the majority believes that disclosure would be inappropriate or even harmful," and (3) there

79. Waxman v. Evans, No. 01-04530 (LGB) (AJWx), "Plaintiffs' Response to Defendant's Motion for a Stay," March 25, 2002, at 1 (citing Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000).

80. Id. at 17, 18.

81. Id. at 19–20.

82. Waxman v. Evans, No. CV 01-4530 LGB (AJWx) (D. Cal. 2002), at 3.

83. Id.

84. Id.

is a "general presumption that disputes between the branches will be resolved by political rather than judicial means."[85] The brief states that Congress "intended to preclude review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch."[86] How could there be a political resolution if the decision to release information to Congress is left solely to the discretion of the executive branch? The government also argued that the lawmakers lacked standing to bring the suit, but that if the Ninth Circuit were to grant standing, the lawmakers should have access only to what would be permitted under a restrictive reading of the 1928 statute: information from discontinued reports.[87]

The government brief acknowledged that Congress has authorized committees, subcommittees, and even committee chairmen to issue subpoenas,[88] but that enforcement of a subpoena requires a vote by the full chamber and dependence on a U.S. Attorney to file an action in federal court.[89] Allowing Waxman and the other lawmakers to file an enforcement action in their own name would be contrary to "[t]hat longstanding approach."[90] The government wavered on what Congress needed to do to obtain information from the executive branch. At times the test seemed to be "a majority of the House."[91] Elsewhere it insisted that even action by a full House would fail. Relying on *INS* v. *Chadha* (1983), the government stated that requests by Congress for information from the executive branch, since they affect the legal rights and duties of executive officials outside the legislative branch, would require bicameral action and presentment of a bill to the President for his signature or veto.[92] Under this analysis, the administration could ignore requests made under a House resolution of inquiry, but the political costs of pursuing this legal strategy would destroy the credibility and reputation of any administration.

The brief for Waxman and the other lawmakers argued that "[u]nder settled Ninth Circuit precedent, adjusted census data is not privileged and must be made available to anyone under the Freedom of Information Act…."[93] The brief repeated the district court's position that the case did not involve a claim

85. Waxman v. Evans, "Brief for the Appellant" (9th Cir.), May 10, 2002, at 5–6.
86. Id. at 6.
87. Id. at 8.
88. Id. at 21.
89. Id. at 22–23.
90. Id. at 23.
91. Id. at 12.
92. Id. at 8, 38.
93. Waxman v. Evans, "Brief for the Appellees" (9th Cir.), June 17, 2002, at 2.

of executive privilege, and that it was unlikely for the President to assert such a claim because the Seven Member Rule "applies only to agency records, and does not reach records of the President, his personal advisors, or White House staff."[94] As to the government's position that the Seven Member Rule merely allows lawmakers to ask for information, but not receive it, the Waxman brief stated that the government "points to no evidence" to support the theory that when Congress enacted §2954 "it intended to render the provision unenforceable."[95]

Whereas the government asserted that §2954 allows members of the two committees to request only documents from discontinued reports, the Waxman memo relied on statutory language and legislative history to argue for a broader universe of information: "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."[96]

With regard to the government's argument that Congress "intended to preclude [judicial] review of requests made under Section 2954 and to commit such decisions to the discretion of the executive branch," the Waxman brief held that this argument "defies logic" and "depends on the submission that, when Congress enacted §2954, it intended to render the provision a toothless tiger that agencies were free to ignore with impunity.... That submission is [at] war with the plain text of §2954."[97] The government urged the court to dismiss lawsuits brought by members of Congress when the issue is essentially an intra-branch conflict, but the Waxman brief stated that the dispute raised by Waxman "is not with congressional colleagues.... [P]laintiffs do not seek to enact, amend or repeal legislation. They seek to enforce an existing statutory command against a federal officer...."[98]

Finally, the Waxman brief addressed the government's claim that under *INS* v. *Chadha*, legislative demands for information from the executive branch must comply with bicameralism and presentment. The distinction here is that "[a]lthough the Supreme Court has held that Congress may not *legislate* without action by both Houses,... it has never suggested that the Constitution places comparable limits on Congress' oversight and investigatory powers."[99]

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94. Id. at 4.
95. Id. at 13.
96. Id. at 20 (citing H. Rept. No. 1757, 70th Cong., 1st Sess. 6 (1928)).
97. Id. at 34.
98. Id. at 50.
99. Id. at 54–55 (emphasis in original).

The Supreme Court has recognized the power of individual congressional committees to investigate and issue subpoenas.[100]

The House of Representatives submitted two amici briefs: one by the Office of General Counsel, and the other by the House Democratic Leadership. The first argued that executive-legislative struggles over access to information should be left to the political process, not to the courts. The second supports the district court ruling that §2954 mandates disclosure of the census data to Waxman and the other plaintiffs. The Office of General Counsel submitted its brief to the leadership of both parties, but the two Democratic leaders decided not to join. Thus, the brief represents only the views of the three Republican members of the bipartisan group: Speaker Dennis Hastert, Majority Leader Dick Armey, and Majority Whip Tom DeLay.

The House General Counsel brief pointed out that congressional efforts to obtain executive documents take place "almost entirely outside the judicial arena,"[101] through political negotiation, accommodation, compromise, and resort to subpoenas and contempt citations.[102] The district court's decision "would radically change the manner in which executive/legislative information access disputes are resolved," and would conflict with House rules "designed to maintain institutional control over the House's investigatory authority."[103] The point here is that the House, not the judiciary, should "decide what information is needed for legislative purposes, and when executive agencies may withhold information on matters such as national security or law enforcement."[104]

After reaching those judgments, the House General Counsel brief stated that Congress should be able to obtain executive documents needed for legislative and oversight functions, that the Commerce Department construed §2954 too narrowly, and that executive agencies have an obligation to respond "in good faith" to legislative requests under the 1928 statute.[105] When disputes arise under the 1928 statute, regarding congressional access to executive branch documents, resolution should be "through negotiation and accommodation, not through the judicial system."[106]

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100. Id. at 55, citing McGrain v. Daugherty, 273 U.S. 135, 158, 160–61 (1927).

101. Waxman v. Evans, "Brief of Amicus Curiae Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Reversal" (9th Cir.), May 21, 2002, at 1.

102. Id. at 2.

103. Id. at 3.

104. Id.

105. Id.

106. Id. at 4.

The two Democratic members, Minority Leader Dick Gephardt and Minority Whip Nancy Pelosi, filed a separate amicus brief, prepared by Charles Tiefer. It argued that the procedure for holding someone in contempt of Congress (requiring action by the full House or Senate) is distinct from statutes that mandate release of executive branch information to Congress.[107] The brief placed § 2954 in the "tradition of statutes mandating the public release of unprivileged Executive information, without resort to contempt powers or processes."[108] During the period from 1920 to 1927, each House consolidated oversight of executive branch expenditures in a single committee devoted to expenditure oversight, "capable of fully looking over the Executive Branch's documents."[109] Dismissing claims in the House General Counsel brief that the district court's ruling would "radically," "profoundly," and "drastically" change executive-legislative relations over information access disputes,[110] the Democratic brief described § 2954, like the Freedom of Information Act, "as a sensible mandatory disclosure statute for documents not subject to executive privilege."[111]

The Ninth Circuit held oral argument on the Waxman case along with a FOIA case brought by two Oregon lawmakers, who also sought access to the census documents. After argument, the two cases were submitted to the court for decision. On September 16, 2002, the court withdrew the submission of the Waxman case,[112] and on October 8 it decided the FOIA case in favor of the two lawmakers.[113] It rejected the government's argument that the adjusted data could be covered by the "deliberative process" privilege under Exemption 5 to FOIA. To the court, the data "were neither predecisional nor deliberative."[114] The Bush administration decided not to appeal.[115]

Although there was no final ruling on the Waxman case, the lawsuit revealed the extent to which the Justice Department would erect barriers to block legislative access to documents through compulsory process in court. In

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107. Waxman v. Evans, "Brief of Amicus Curiae" (9th Cir.), June 21, 2002 , at 3.
108. Id. at 4.
109. Id. at 7.
110. Id. at 13.
111. Id. at 15–16.
112. Waxman v. Evans, No. 02-55825 (9th Cir. 2002).
113. Carter v. U.S. Dept. of Commerce, 307 F.3d 1084 (9th Cir. 2002).
114. Id. at 1088.
115. Steven A. Holmes, "U.S. Won't Appeal Ruling on Release of Census Estimates," New York Times, November 23, 2002, at A15.

the end, the Justice Department argued that only by satisfying the standards of *Chadha*—bicameralism and presentment—could Congress enforce its demand for executive documents. Of course this greatly exaggerates the executive position, for agencies regularly surrender information in response to much lesser congressional actions, such as requests from individual members or through the House resolution of inquiry. Ironically, although 16 members of Congress were denied the census documents, they were turned over to two state lawmakers in a FOIA case. Evidently there were no legitimate grounds for the Commerce Department to initially withhold the documents. Finally, the 1928 law benefits the minority party when the majority in the House decides not to investigate the administration.