**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
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| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>Plaintiff,<br><br>v.<br><br>SYLVIA MATHEWS BURWELL,<br>in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,<br><br>Defendants. | ) | Case No. 14-cv-01967-RMC |

**UNITED STATES HOUSE OF REPRESENTATIVES' SUPPLEMENTAL MEMORANDUM CONCERNING DEFENDANTS' MOTION TO DISMISS**

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July 1, 2015

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## INTRODUCTION

The only motion pending is Defendants' Motion to Dismiss the Complaint (Jan. 26, 2015) (ECF No. 20) (moving "pursuant to Rule 12(b)(1) . . . and Rule 12(b)(6)"). The principal issue raised by that motion is whether the House has Article III standing, in particular, whether the House has been injured by defendants' expenditure of public funds on an ACA program – the Section 1402 Offset Program – for which no funds ever have been appropriated.[1] In resolving this issue, the Court must assume that the facts pled are true and that the House has asserted viable legal theories. *See* Opp'n of the . . . House . . . to Defs.' Mot. to Dismiss the Compl. at 20-21 (Feb. 27, 2015) (ECF No. 22) ("House Opposition") (citing cases).[2]

On June 1, 2015, the Court directed the parties to "submit a stipulated record of the request(s), consideration, and funding decisions for Section 1401 and 1402 of the [ACA] in the FY 2014 Appropriations Bills, including any action by Defendant(s) to withdraw the funding request for Section 1402." Minute Order (June 1, 2015). The parties responded on June 15, 2015. *See* Joint Submission in Response to This Court's June 1, 2015 Minute Order (June 15, 2015) (ECF. No. 30) ("Joint Submission") (confirming, among other things, that defendants did *not* "withdraw the funding request for Section 1402").

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[1] Defendants nowhere have argued, because they cannot, that the causation and redressability elements of the Article III standing analysis are not satisfied here. *See* Defs.' Mem. in Supp. of Their Mot. to Dismiss the Compl. (Jan. 26, 2015) (ECF No. 20-1) ("Defendants' Memorandum"); Defs.' Reply Mem. in Support of Their Mot. to Dismiss the Compl. (March 31, 2015) (ECF No. 26) ("Defendants' Reply"); Tr. of Oral Arg. (May 28, 2015) (ECF No. 31) ("Transcript") (Ex. N to Joint Submission).

[2] *See also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. __, slip op. at 10-11 (June 29, 2015), attached to Plaintiff's Notice of New Authority (June 30, 2015) (ECF No. 32); *Z Street v. Koskinen*, No. 15-5010, 2015 WL 3797974, at *2, *3 (D.C. Cir. June 19, 2015) (affirming denial of motion to dismiss, and rejecting defendant IRS Commissioner's jurisdictional contentions which turned, in part, on his contesting of factual allegations in complaint: "[B]ecause the Commissioner moved to dismiss under Rules 12(b)(1) and (6), the district court was required to assume that the [facts as plead in the complaint were true]. . . . [L]ike the district court, [we] assume the truth of [plaintiff's] allegations. ").

Plaintiff U.S. House of Representatives ("House") now submits this Supplemental Memorandum pursuant to the Court's June 16, 2015 Minute Order. We first describe the facts that concern the FY 2014 budget and appropriations cycle, as reflected in the Joint Submission, and we then explain how those facts match exactly the allegations in the House's Complaint and, therefore, confirm that the House has Article III standing.

## ARGUMENT

### I. Congress Never Appropriated Funds for the Section 1402 Offset Program.

#### A. The ACA Did Not Appropriate Funds.

ACA sections 1401 and 1402 are separate and distinct: they are structured differently, serve different purposes, and, critically, funded differently.

Section 1401 Refundable Tax Credit Program: Section 1401(a) is structured as a refundable tax credit available to qualified individuals for the purpose of reducing the cost of their health insurance premiums. The ACA accomplishes this by adding to the Internal Revenue Code ("IRC") a new section 36B entitled "Refundable Credit for Coverage Under a Qualified Health Plan." *See* ACA 1401(a) ("Subpart C of part IV of subchapter A of chapter 1 of the [IRC] (relating to refundable credits) is amended by inserting after section 36A the following new section [36B]."). Section 1412(c)(2) (codified at 42 U.S.C. § 18082(c)(2)) authorizes the Secretary of the Treasury to make advance payment of the new tax credits allowed under new IRC section 36B to issuers of qualified health plans. In the ACA itself, Congress provided funding for the Section 1401 Refundable Tax Credit Program by amending 31 U.S.C. § 1324. *See* ACA § 1401(d)(1) ("Paragraph (2) of section 1324(b) of title 31, United States Code, is amended by inserting '36B,' after '36A'."). As the Court is aware, section 1324 permanently appropriates "[n]ecessary amounts . . . for refunding internal revenue collections as provided by

law . . . ." 31 U.S.C. § 1324(a). Section 1324(b) *expressly* restricts the use of this permanent appropriation:

> Disbursements may be made from the appropriation made by this section *only* for – (1) refunds to the limit of liability of an individual tax account; and (2) refunds due from [specified] credit provisions of the Internal Revenue Code . . . [including] section . . . 36B . . . of such Code.

*Id.* § 1324(b) (emphasis added).

Section 1402 Offset Program: Entirely separately, the ACA obligates health insurance companies that offer qualified plans through the ACA to reduce, for certain beneficiaries, specified non-premium out-of-pocket health insurance costs, i.e., deductibles, co-pays, and co-insurance (reductions referred to in the ACA as "cost-sharing reductions."). *See* ACA § 1402 (codified at 42 U.S.C. § 18071). ACA section 1412(c)(3) (codified at 42 U.S.C. § 18082(c)(3)) *authorizes* the Executive to make payments directly to such insurers to offset costs they incur in providing these cost-sharing reductions.

However, Treasury payments require both an authorization *and* an appropriation. And, in stark contrast to the Section 1401 Refundable Tax Credit Program, Congress in the ACA, (i) did not amend the IRC to make the Section 1402 Offset Program part of the IRC; (ii) did not structure the payments authorized by the Section 1402 Offset Program as tax credits; (iii) did not amend 31 U.S.C. § 1324 to permit that permanent appropriation to be used for Section 1402 Offset Program payments; and (iv) did not otherwise appropriate any funds for the Section 1402 Offset Program. Put another way, while defendants now say "the permanent appropriation of 31 USC 1324 is available for" Section 1402 Offset Program payments, Tr. at 48, that contention is not grounded on anything in the ACA or elsewhere in the real world.[3]

[3] *See* Mem. from Cong. Research Serv. to Sen. Tom Coburn, at 9-10 (July 29, 2013) (Section 1402 Offset Program not funded through 31 U.S.C. § 1324; annual appropriation necessary) (Ex. A to House Opp'n).

While defendants referred vaguely at oral argument to undefined "principles of appropriations law," *see, e.g.*, Tr. at 8, 23, the one paramount principle of appropriations law is that for there to be an appropriation, Congress must have enacted a law making an appropriation. That is, there must be an "Appropriation[] made by Law." U.S. Const. art. I, § 9, cl. 7; *see also* 31 U.S.C. § 1301(a) ("Appropriations shall be applied *only* to the objects for which the appropriations were made except as otherwise provided by law.") (emphasis added); *id.* § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . *only* if the law specifically states that an appropriation is made or that such a contract may be made.") (emphasis added). Congress did not do that in the ACA with respect to the Section 1402 Offset Program, nor did it do so in FY 2014 (or FY 2015), as detailed in the Complaint, the House's Opposition, the Joint Submission, and below.

**B. Congress Subsequently Declined to Appropriate Funds, and the Administration Never Withdrew Its FY 2014 Request for Such Funds.**

In its FY 2014 Budget, the Administration requested an *annual* appropriation for the Section 1402 Offset Program. *See* Office of Mgmt. & Budget, Fiscal Year 2014 Budget of the U.S. Government, App. p. 448 (Apr. 10, 2013) (Ex. A to Joint Submission) (requesting, "[f]or carrying out . . . sections 1402 and 1412 of the [ACA], such sums as necessary," and, "[f]or carrying out . . . such sections in the first quarter of fiscal year 2015[,] . . . 1,420,000,000." .). The Administration never withdrew this request, as defendants now concede. *See* Joint Submission at 3 n.1.

In justifying to Congress the funds it was requesting, HHS expressly recognized that it required an *annual* appropriation for the Section 1402 Offset Program: "CMS requests funding for its five annually-appropriated accounts including . . . beginning in FY 2014 [the Section 1402 Offset Program]." HHS Fiscal Year 2014, CMS, Justification of Estimates for Appropriations

Committees at 2 (Ex. B to Joint Submission); *see also id*. at 183-84 ("CMS requests an appropriation . . . to ensure adequate funding to make [the Section 1402 Offset Program] payments to issuers . . . in FY 2014."); *id.* at 7 (CMS needs a "4.0 billion [appropriation] in the first year of . . . operations. . . [and] a $1.4 billion advance appropriation for the first quarter of FY 2015" for the Section 1402 Offset Program).[4]

The compiling of the annual budget of the U.S. Government is not an accidental or slapdash process. Had the Administration believed 31 U.S.C. § 1324 was available for Section 1402 Offset Program payments, it would not have requested an annual appropriation for FY 2014. The fact that OMB (then headed by defendant Burwell), HHS, and CMS *all* supported the request for an *annual* appropriation for FY 2014 speaks volumes about the Administration's real understanding of the ACA – and the Constitution.

Congress *rejected* the Administration's request for a FY 2014 annual appropriation for the Section 1402 Offset Program. Instead, it enacted appropriations laws that excluded the

[4] In May 2013, OMB again took the position that 31 U.S.C. § 1324 was *not* available for Section 1402 Offset Program payments. At that time, it reported that (i) the CMS account established to make those payments was expected to be funded with a $3.978 billion annual appropriation the Administration had requested, and (ii) that anticipated annual appropriation was subject to sequestration in the amount of $286 million. *See* OMB Report to the Congress on the Joint Committee Reductions for Fiscal Year 2014, Corrected Version, App. p. 23 (May 20, 2013) (Ex. D to Joint Submission).

This is significant because the Budget Control Act of 2011, Pub. L. No. 112-25, § 302, 125 Stat. 240, 256 (2011), amended the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) ("Gramm-Rudman-Hollings"), by adding to Gramm-Rudman-Hollings a new § 251A. New § 251A created a process of automatic, largely across-the-board spending reductions commonly known as "sequestration rules," but exempts from those rules certain Treasury payments, in particular, those listed in § 255 of Gramm-Rudman-Hollings. *See* Gramm-Rudman-Hollings § 251A(8). Section 255(d) of Gramm-Rudman-Hollings – as amended by the Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, § 11(b), 124 Stat. 8, 23 (2010) – specifically exempts "payments to individuals made pursuant to the provisions of the [IRC] establishing refundable tax credits," the permanent appropriation for which is provided by 31 U.S.C. § 1324(b). In other words, payments properly made under 31 U.S.C. § 1324(b) are exempt from sequestration, and thus OMB's statement that Section 1402 Offset Program payments to insurers are subject to sequestration is an acknowledgement that 31 U.S.C. § 1324 *cannot* be the funding source for such payments.

appropriation specifically requested by the Administration for the Section 1402 Offset Program, *see* Joint Submission at 7-8, as defendants have conceded, Tr. at 27 ("There was no 2014 statute appropriating new money [for the Section 1402 Offset Program].").[5]

At oral argument, defendants claimed the Administration *withdrew* its FY 2014 request for an annual appropriation for the Section 1402 Offset Program:

> THE COURT: [M]y question . . . is, at the time that the House was looking at the appropriation for 2014, [the Administration] at least thought that it needed [the appropriation], because of course the administration had asked specifically for money for 1402, right?
>
> MR. McELVAIN: There was initially a request and that request was later withdrawn . . . .

Tr. at 23. Although the House immediately questioned the accuracy of that statement, *id.* at 38 ("MR. TURLEY: I don't believe it [defendant's 'withdrawal' statement] is accurate."), defendants left their erroneous "withdrawal" statement uncorrected until forced by the Court's June 1 Minute Order to admit that it was false, *see* Joint Submission at 3 n.1.[6]

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[5] The Joint Submission describes the following pertinent events:

July 17, 2013: Senate Appropriations Committee adopts S. 1284, a bill to make appropriations for HHS (among other departments) for FY 2014, and states in accompanying report that "[t]he Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA." S. Rep. No. 113-71, 113th Cong., at 123 (2013) (Ex. E to Joint Submission).

October 17, 2013: President signs into law the Continuing Appropriations Act, 2014, enacted by the House and Senate, which continues appropriations through January 15, 2014, and which does not contain an appropriation to fund the Section 1402 Offset Program for FY 2014, or any part thereof.

January 15, 2014: President signs into law H. Res. 106, enacted by the House and Senate, which continues appropriations through January 18, 2014, and which also does not contain an appropriation to fund the Section 1402 Offset Program for FY 2014, or any part thereof.

January 17, 2014: President signs into law the Consolidated Appropriations Act, 2014, enacted by the House and Senate, which provides appropriations for the remainder of FY 2014, and which also does not contain an appropriation to fund the Section 1402 Offset Program for FY 2014, or any part thereof.

[6] Defendants' statement that the "reference [to] a withdrawal [wa]s to OMB's submission of the [FY] 2015 Budget, which did not request a similar line item," Joint Submission at 3 n.1, is not remotely credible. *First*, the FY 2015 budget concerned an entirely different fiscal year and, accordingly, the

(*Continued. . .*)

There is no dispute that Congress did not appropriate funds for the Section 1402 Offset Program for FY 2015, nor is there any dispute that defendants began making Section 1402 Offset Program payments to insurers in January 2014 (presumably for reasons of political expediency since no other explanation fits the facts), and are continuing to make such payments.

## II. The House Plainly Has Article III Standing Here.

The foregoing facts, as reflected in the Joint Submission, match exactly with the House's factual allegations. *See* Compl. ¶¶ 25-26 (ACA authorizes the 1402 Offset Program); *id.* ¶ 28 (ACA did not appropriate any funds from which Section 1402 Offset Program payments could

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absence of a request in the FY 2015 budget cannot possibly be construed as a withdrawal of a request made in a prior budget. *Second*, at the time the Administration submitted its FY 2015 budget to Congress (March 4, 2014), (i) the FY 2014 budget cycle effectively was over because the Consolidated Appropriations Act, 2014, had been signed into law nearly two months earlier (January 17, 2014), and (ii) defendants already were making Section 1402 Offset Program payments to insurers (as of January 2014).

DOJ's misrepresentation is all the more troubling because it is the second time in recent months DOJ has misrepresented important facts to a federal court in the context of a case challenging the Administration's use of Executive action as a substitute for congressional action. *See* Order at 6, *Texas v. United States*, No. 1:14-cv-254 (S.D. Tex. April 7, 2015) (ECF No. 226) ("Whether by ignorance, omission, purposeful misdirection, or because they were misled by their clients, the attorneys for the Government misrepresented the facts."). In the *Texas* case, as here, DOJ misrepresented facts to the court in the context of contending that plaintiffs lacked standing to sue.

The Administration could have withdrawn its FY 2014 request for an annual appropriation for the Section 1402 Offset Program by submitting to Congress a formal "budget amendment," a process imposed by Title X of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681-88), and implemented by OMB Circular No. A-11, *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2013.pdf. Circular A-11 requires the Administration to submit to Congress a "special message," known as a "budget amendment," whenever the Administration, after transmitting its original fiscal year budget to Congress, wishes to make certain kinds of changes (including withdrawing an appropriations request). *See* OMB Circular A-11, Part I: General Information § 22; Part III: Selected Actions Following Transmittal of the Budget, §§ 110, 112. OMB even has created a sample budget amendment document for withdrawing an entire appropriations request. *See id.* § 110 at p. 6, Ex. 110B.

On May 17, 2013, the Administration submitted just such a budget amendment. *See* Ltr. from President Barack Obama to the Hon. John Boehner, Speaker of the U.S. House of Representatives (May 17, 2013), enclosing Ltr. from Sylvia M. Burwell, Dir., OMB, to the President (May 16, 2013), enclosing amendments to FY 2014 Budget for various departments, including HHS, H. Doc. No. 113-31 (Ex. C to Joint Submission). That budget amendment did not withdraw or otherwise alter in any respect the Administration's FY 2014 request for an annual appropriation for the Section 1402 Offset Program.

be made); *id.* ¶¶ 31-33 (in its FY 2014 Budget Request, the Administration explicitly requested an *annual* appropriation from Congress to make Section 1402 Offset Program payments); *id.* ¶ 34 (Congress did not appropriate any funds for the Section 1402 Offset Program for FY 2014, or for any subsequent fiscal year); *id.* ¶ 35 (notwithstanding the lack of *any* appropriation, defendants began making Section 1402 Offset Program payments to insurers in January 2014, and they are continuing to make such payments).

Given these alleged facts, and given the Court's obligation to assume their truth, *see supra* at 1 – an assumption made easier by the fact that the allegations are true and uncontested – it follows ineluctably that defendants' actions injure the House in at least four concrete and particularized ways. *First*, the Constitution bestows on the Congress, of which the House is one essential component, an exclusive appropriations power, that is, the power to vote affirmatively as an institution to appropriate public funds *before* defendants may expend *any* such public funds. Defendants' Section 1402 Offset Program payments to insurers in the *absence* of any such affirmative vote by the House thus injures the House in the most direct and concrete way imaginable: by usurping and negating its most fundamental and defining constitutional function, the power of the purse. *See* House Opp'n at 4-6, 25-26.

*Second*, a necessary and fundamental corollary of Congress' exclusive appropriations responsibility is its power to use the appropriations process to check the Executive. However, when defendants expend public funds in the *absence* of any congressional appropriations enactment, as they have here, that checking power necessarily is eviscerated (particularly if, as defendants maintain, the House has no recourse to the federal courts to challenge their expenditure of non-appropriated public funds). Negating the House's checking power also is an Article III injury-in-fact. *See id.* at 7-8, 27-29.

*Third*, one particularly important manifestation of the House's power to use the appropriations process to check the Executive is the House's power to use the appropriations process as a tool to force the Executive to disclose information that is critical to Congress' legislative responsibilities. The case law establishes that directly denying the House relevant information is an Article III injury. *See id.* at 30-31 (citing cases). It follows that eliminating the most important tool the House possesses to obtain such information from the Executive – the power of the purse – also constitutes a direct and concrete Article III injury. *See id.* at 29-31.

*Fourth*, defendants' Section 1402 Offset Program payments to insurers injure the House by nullifying not one, but five (to date) prior congressional legislative decisions to not appropriate funds for the Section 1402 Offset Program: the legislative decisions (i) to not appropriate funds in the ACA itself; (ii) to thrice not appropriate funds for FY 2014, in the face of defendants' specific request for an annual appropriation; and (iii) to not appropriate funds for FY 2015. *See id.* at 11-14, 26; *supra* at 2-7. Defendants' Section 1402 Offset Program payments to insurers – totaling more than $3 billion as of January 2015, *see* Joint HHS OIG/TIGTA Report: Review of the Accounting Structure Used for the Administration of Premium Tax Credits, at 18-19 (Mar. 31, 2015) (Ex. I to Joint Submission) – injure the House for purposes of Article III by directly nullifying those House votes, *see* House Opp'n at 26-27.

There is no coherent argument that the House has not suffered, and is continuing to suffer, these direct and concrete Article III injuries as a result of defendants' Section 1402 Offset Program payments to insurers. Indeed, defendants' effort to defeat the House's standing has become increasingly incoherent and conflicted. On the one hand, they say – correctly – that the Court must "assume that [the House] is right." Tr. at 11; *see also id.* at 27 ("Our views of the merits are irrelevant to the question of standing. Standing is logically prior. You can assume

that [the House is] right under [its] legal theory."); *id.* at 48 ("Standing comes before the merits and you can assume that [the House is] right on the merits. *You can assume that there is no appropriation*.") (emphasis added). On the other hand, defendants say the House lacks standing because it is asserting only a "generalized interest in enforcement of the laws," Defs.' Reply at 2, or that the dispute concerns "differences of opinion between the Legislative and Executive Branches as to the interpretation of federal law," *id.* at 10. This argument necessarily asks the Court to assume that the House's factual allegations are *not* true, and/or that the House has *not* stated viable legal theories, and/or that the House is wrong on the merits.[7]

This mischaracterization form of argument not only is contrary to the black-letter law of this Circuit, *see* House Opp'n at 20-21 and *supra* at 1 & n.2, and contrary to defendants' own statements to the Court, *see* Tr. at 11, 27, 48, it is wholly tautological in the Appropriations Clause context. If defendants' argument – i.e., defendants say a statute appropriates money, therefore the dispute concerns an interpretation of that statute, therefore the House has no standing – prevails here, then the Executive always wins because it always can claim (even if wholly fancifully, as here) that it contends that some statute appropriates money. While we responded to this ploy earlier, *see* House Opp'n at 33-34, it bears repeating that defendants may not defeat the House's standing by such a simplistic and transparent gambit that, in essence, asks the Court to assume away the merits of the House's claims. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, slip op. at 10-11; *see also id.* at 13-14 (reaffirming viability of *Coleman v. Miller*, 307 U.S. 433 (1939), and vote nullification rationale for conferring

[7] Defendants' mischaracterizations of the nature of the House's allegations and claims are rampant. *See, e.g.*, Defs.' Mem. at 2 (case is "generalized institutional dispute between the Executive Branch and one chamber of the Legislative Branch concerning the proper interpretation of federal law"); *id.* at 1, 12-13, 16-17; Tr. at 5 ("House lacks any legally cognizable interest of its own in the administration of law that has already been enacted"); *id.* at 11, 18, 21.

standing; holding that state legislature had standing where it asserted that its legislative power and votes were effectively nullified).[8]

**CONCLUSION**

At bottom, this Administration, like past Administrations, craves a bright-line no-standing rule that would free it of any scrutiny by the Judicial Branch whenever the Legislative Branch is the plaintiff. In 2008, in the context of contending that a House committee lacked standing to sue to enforce its subpoenas to two Executive Branch officials, DOJ said exactly that:

> [DOJ Lawyer]: [T]here are only two ways for Article III courts to adjudicate disputes before them. One is through lawsuits brought on behalf of individuals aggrieved by the conduct of the defendant, whether it be another individual or the government. The other way is for the executive branch to enforce federal statutes, under its express power under Article II, to take care that the law be faithfully executed. *There is no third way.*

Tr. of Oral Arg. at 70, *Comm. on the Judiciary, U.S. House of Representatives v. Miers*, No. 08-cv-00409 (D.D.C. June 23, 2008) (emphasis added), pertinent pages attached as Ex. 1; *see also* Br. for the United States as Amicus Curiae . . ., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314, 2015 WL 309078, at *9 (S. Ct. Jan. 2015) ("separation-of-powers doctrine . . . bar[s] . . . suit by Congress against the Executive Branch").

At oral argument, this Court pressed this very question: "THE COURT: So is it the Executive's position that, that Congress cannot sue the Executive in any circumstances at all?" Tr. at 53. Defendants conspicuously dodged the question:

> MR. McELVAIN: . . . . So one case I would refer you to is the Census case [i.e., *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76

[8] Defendants' only other response to the House's standing arguments has been to suggest that the Court establish new standing rules designed solely to ensure that the House not have standing here. *See, e.g.*, Defs.' Mem. at 15, 15 n.5, 19-20. We already have responded to this "change-the-rules-while-the-game-is-underway" ploy. *See* House Opp'n at 34-38. With respect to defendants' other Motion to Dismiss arguments (e.g., its argument that the House lacks a cause of action), the House rests on its papers and its oral argument contentions.

> (D.D.C 1998)] . . . . There the holding was this is the unique, narrow circumstance where the House [wa]s not suing just about the general administration of the law not asserting an interest shared by everybody . . . the House was asserting a particularized interest unique to the House itself as to its own composition.

Tr. at 53-54.

The problem for the defendants with this answer – aside from the fact that it did not answer the Court's question – is that, in the Census case, DOJ (true to form) moved in the district court to dismiss the House's suit on standing grounds, advancing arguments very similar to those it advances here, and then repeated those arguments to the Supreme Court.[9] Moreover, there is no constitutionally coherent distinction between the unique interest asserted by the House in the Census case – an interest deemed sufficient by the District Court to confer standing on the House – and the unique Appropriations Clause interests the House asserts here, interests that are not even remotely "shared by everybody," *see* House Opp'n at 25-31; *supra* at 8-9.

Nothing about our separated powers form of government that mandates the House's exclusion from the courthouse in this case, and everything about the checks and balances system that is the practical predicate for that form of government affirmatively supports the House's standing here. Defendants' arguments, if accepted, would result in an enormous concentration of power in the Executive at the expense of Congress and the Judiciary. We urge the Court to reject defendants' invitation to radically alter the balance of powers between the branches; to deny the motion to dismiss; and to schedule this matter for briefing on the merits.

[9] *See* Defs.' Mem. in Support of Mot. to Dismiss at 32-38, *U.S. House of Representatives v. U.S. Dep't of Commerce*, No. 98-456 (D.D.C. April 6, 1998), pertinent pages attached as Ex. 2; Br. for the Appellants, *U.S. Dep't of Commerce v. U.S. House of Representatives*, No. 98-404, 1998 WL 69127, at *17-25 (S. Ct. Oct. 5, 1998).

Respectfully submitted,

*/s/ Jonathan Turley*
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July 1, 2015

**CERTIFICATE OF SERVICE**

I certify that on July 1, 2015, I filed the foregoing United States House of Representatives' Supplemental Memorandum Concerning Defendants' Motion to Dismiss via the CM/ECF system for the United States District Court for the District of Columbia which, I understand, caused service on all registered parties.

*/s/ Sarah Clouse*
Sarah Clouse

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>Plaintiff,<br><br>v.<br><br>SYLVIA MATHEWS BURWELL,<br>in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,<br><br>Defendants. | ) | Case No. 14-cv-01967-RMC |

# EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, | |
| Plaintiff, | CA No. 08-0409 (JDB) |
| v. | Washington, D.C. |
| HARRIET MIERS, JOSHUA BOLTEN, | Monday, June 23, 2008 10:00 a.m. |
| Defendants. | |

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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| For the Plaintiff: | IRVIN B. NATHAN, ESQ.<br>Office of General Counsel<br>219 Cannon House Office Building<br>Washington, D.C. 20515<br>202-225-9700 |
| For the Defendants: | CARL NICHOLS, ESQ.<br>U.S. Department of Justice<br>20 Massachusetts Avenue, NW<br>Washington, D.C. 20530<br>202-514-2356 |
| Court Reporter: | Bryan A. Wayne, RPR, CRR<br>Official Court Reporter<br>U.S. Courthouse, Room 6714<br>333 Constitution Avenue, NW<br>Washington, D.C. 20001<br>202-354-3186 |

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

MR. NICHOLS: How about up? At a level of generality, Your Honor, I think there are only two ways for Article III courts to adjudicate disputes before them. One is through lawsuits brought on behalf of individuals aggrieved by the conduct of the defendant, whether it be another individual or the government.

The other way is for the executive branch to enforce federal statutes, under its express power under Article II, to take care that the laws be faithfully executed. There is no third way. And so I don't even know whether the courts necessarily apply a standing analysis when the executive branch sues in federal court. I think it's the tradition that the executive branch can prosecute or otherwise enforce federal statutes and federal laws in the Article III courts.

THE COURT: So the answer in part is that in this dispute, as in prior disputes between the two political branches, over a congressional subpoena, the executive branch can take it to court and get a resolution because the executive branch has standing, but Congress cannot take it to court because Congress doesn't have standing. That's part of the answer?

MR. NICHOLS: I think there's a significant difference between a lawsuit filed --

THE COURT: But the proposition that I just expressed, is that a proposition that you agree with?

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>Plaintiff,<br><br>v.<br><br>SYLVIA MATHEWS BURWELL,<br>in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,<br><br>Defendants. | ) | Case No. 14-cv-01967-RMC |

# EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>Plaintiff,<br><br>v.<br><br>THE UNITED STATES DEPARTMENT OF COMMERCE, WILLIAM M. DALEY, Secretary of the United States Department of Commerce, BUREAU OF THE CENSUS, and JAMES F. HOLMES, Acting Director of the Bureau of the Census,<br><br>Defendants. | Civil Action No. 98-456<br><br>(Three-Judge Court)<br>(RCL, MBG, RMU) |

**DEFENDANTS' MOTION TO DISMISS**

The defendants hereby move, pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, for the dismissal of plaintiff's complaint because the Court lacks subject-matter jurisdiction and plaintiff has failed to state a claim upon which relief can be granted. The defendants respectfully refer the Court to the attached memorandum of law for a full statement of the grounds for this motion.

Dated: April 6, 1998

Respectfully submitted,

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Assistant Attorney General

WILMA A. LEWIS
United States Attorney

DENNIS G. LINDER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES HOUSE OF REPRESENTATIVES,<br><br>Plaintiff,<br><br>v.<br><br>THE UNITED STATES DEPARTMENT OF COMMERCE, WILLIAM M. DALEY, Secretary of the United States Department of Commerce, BUREAU OF THE CENSUS, and JAMES F. HOLMES, Acting Director of the Bureau of the Census,<br><br>Defendants. | Civil Action No. 98-456<br><br>(Three-Judge Court)<br>(RCL, MBG, RMU) |

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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sampling in such a fashion is the subject of ongoing discussion and debate between the political branches.[17]

## II. THE HOUSE LACKS ARTICLE III STANDING TO BRING THIS ACTION BECAUSE IT HAS NOT ESTABLISHED THAT IT WILL SUFFER A LEGALLY COGNIZABLE INJURY

Another "element of the case-or-controversy requirement is that [the House], based on [its] complaint, must establish that [it] ha[s] standing to sue." Raines v. Byrd, 117 S. Ct. 2312, 2317 (1997). The Supreme Court "ha[s] always insisted on strict compliance" with Article III standing requirements, and the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the courts] to decide whether an

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[17] In Goldwater, the Court dismissed as nonjusticiable a complaint by Members of Congress challenging President Carter's unilateral termination of the United States's treaty with Taiwan. Justice Powell, in a concurring opinion, explained that the complaint was not ripe for judicial review. 444 U.S. at 997. At the same time of the suit, the Senate was considering a potentially retroactive resolution declaring Senate approval necessary for the termination of any mutual defense treaty. Justice Powell reasoned that, because the House and Senate might still decide to accept the President's claimed authority to terminate the Taiwan treaty, the Court should not interfere in the absence of an actual confrontation. Id. at 998.

Justice Powell's reasoning applies with equal force to this case. Here, the Secretary of Commerce, in the exercise of his delegated power to conduct the census, has reported to Congress his intention to conduct Census 2000 using sampling. See generally Report to Congress. Congress, after years of hearings and debate on the matter, as well as the Presidential veto of H.R. 1469, which would have prohibited such a use of sampling, has agreed to postpone debate on whether to alter the status quo to forbid sampling in the decennial census, while demanding that the Secretary "become prepared to implement 2000 decennial census, without using statistical methods[.]" Pub. L. 105-119, § 209 (j), 111 Stat. 2440, 2483. Therefore, as in Goldwater, there is no actual controversy for the Court to resolve and judicial intervention would be premature.

action taken by one of the other two branches of the Federal Government was unconstitutional." Id. at 2317-18, see also, National Law Center on Homelessness and Poverty, 91 F.3d at 180 (the court is "obligated" to consider plaintiffs' standing before reaching the merits and to "take no action beyond dismissal for lack of jurisdiction" if plaintiffs lack standing).

In order to satisfy the "irreducible constitutional minimum" of Article III standing, a plaintiff must first establish that he "ha[s] suffered an 'injury in fact'" to a "legally protected interest." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted); City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). When a plaintiff seeks to predicate his standing on a future injury, rather than an existing one, he must show that the injury is "imminent." Lujan, 504 U.S. at 564 & n.2; Bennett v. Spear, 117 S. Ct. 1154, 1163 (1997); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). The imminence requirement is not satisfied unless the plaintiff is "'immediately in danger of sustaining some direct injury'. . ." O'Shea v. Littleton, 414 U.S. 488, 494 (1974) (citation omitted); Laird v. Tatum, 408 U.S. 1, 15 (1972) (Article III requires "actual present or immediately threatened injury"). If the prospect of future injury is merely "conjectural or hypothetical," it does not suffice to establish standing. Bennett, 117 S. Ct. at 1163; Lujan, 504 U.S. at 560. The imminence requirement serves "to ensure that the alleged injury is not too speculative for Article III purposes -- that the

injury is certainly impending." Lujan, 504 U.S. at 564 n.2 (emphasis in original) (internal quotation marks omitted). Finally, "'the "injury in fact" test requires more than a cognizable interest. It requires that the party himself be among the injured.'" Id. at 563 (quoting Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (emphasis added)); see also Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564, 569-72 (D.D.C.) (three-judge court) ("FAIR"), appeal dismissed, 447 U.S. 916 (1980) (plaintiffs in census case could not establish that, even if there were some future injury to someone, they were among the injured)); Ridge v. Verity, 715 F. Supp. 1308, 1312-18 (W.D. Pa. 1989).

When measured against these standards, the House has not carried its burden of demonstrating that it has standing to challenge defendants' plans to use sampling in Census 2000. The House has not suffered any concrete injury as a result of the defendants' actions thus far, and it is not in imminent danger of suffering any such injury in the future. As the census results cannot be known yet, or considered for their use in Congressional apportionment, in advance of the many census operations that remain, from data collection to the President's certification, Franklin, 505 U.S. 799-800, no injury could be imminent until the entire process is completed. Indeed, it is purely hypothetical whether the House will ever suffer any injury -- and for Article III purposes, "[a] hypothetical threat is not enough." United Public Workers v. Mitchell, 330 U.S. 75, 89-90 (1947).

The House has alleged that there is a "substantial risk or likelihood" that the following harms will occur without intervention by this Court:

> (1) that the composition of the House will not conform to the requirements of the Constitution and laws in the next decade; (2) that there will be a successful legal challenge to apportionment that could disrupt the House's operations as a body; (3) that the public will not have confidence in census numbers derived from estimates, which will undermine public respect for the House; and (4) that the census numbers could be politically manipulated to alter the composition of the House.

Complaint at ¶ 32. Further, the House states that it will be harmed by defendants' actions because it will be prevented from "fulfilling the constitutional and statutory duty imposed upon Congress to conduct the census and ensure that the House can be timely apportioned in accordance with law." Id. at ¶ 33. Finally, the House states that defendants' actions "may cause a conflict" between the Clerk of the House who is required to transmit the result of the census received from the President and the "constitutional duty of the House to ensure that the census and ensuing reapportionment is conducted in accordance with the Constitution and the laws of the United States," thereby potentially placing the House in a position such that it is forced to violate one of its legal duties. Id. at ¶ 34.

None of these alleged injuries is sufficiently concrete or particularized to support Article III standing for the House in this lawsuit. Each alleged injury depends upon the ultimate accuracy of the census for each jurisdiction, an outcome which inherently unknown and unknowable until the census is conducted

Rather, the alleged injuries are based on speculation as to the ultimate results.

Further, as discussed in Section III, infra, the House's allegations of injury are nothing more than a threat to a "generalized interest" shared by all citizens, that the enumeration of the nation's population be as accurate as possible. The House has no special interest in the accuracy of the count for the simple reason that, as a body of 435 members, the actual number will not affect its overall composition. In other words, after the 2000 decennial census, there will still be a House of Representatives comprised of 435 members. While the accuracy of the count may certainly affect the distribution of those House seats, that is not an "injury" to the House qua House.

Allegations that the potential for future litigation that could be "disruptive" to the operation of the House as a body is hardly sufficient to establish injury given the panoply of litigation that has surrounded all recent decennial censuses, see e.g., Wisconsin, 517 U.S. at 19 (noting the "plethora of lawsuits that inevitably accompany each decennial census"); Franklin, 505 U.S. at 790 ("As one season follows another, the decennial census has again generated a number of reapportionment controversies."), including the Supreme Court's decision in Wisconsin that was not issued until six years after the completion of the decennial census at issue. Certainly, had the plaintiffs prevailed in the Wisconsin litigation, there could have been ramifications vis-a-

vis the apportionment of the seats in the House of Representatives.[18]

The House's allegation that the use of sampling may "undermine public respect for the House," is sheer speculation." As to the potential that the census numbers "could be politically manipulated to alter the composition of the House," again this is sheer speculation and, more to the point, insufficient to confer standing. The House has every opportunity to exercise oversight."[19]

A determination of the legality and constitutionality of sampling in a decennial census for apportionment purposes, therefore, must await a challenge by a plaintiff who, unlike the House, can establish that he or she suffers a judicially

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[18] In addition, the House's claim that post-Census 2000 modifications to the count is "likely" to be "disruptive," ignores the fact that such modifications have occurred in the past. For example, when Congress enacted the present statutory scheme in 1941, fixing the apportionment formula to the method of "equal proportions," it not only made the change prospectively (for the 1950 census apportionment and beyond), but also enacted "retroactive" legislation providing for a second certificate (stating the number of seats to be awarded to each state) to be sent -- which benefitted Arkansas at the expense of Michigan. Act of Nov. 15, 1941, ch. 470, §§ 1 & 2(a), 55 Stat. 762, codified at 2 U.S.C. §§ 2a & 2b.

[19] In fact, in the 1998 Appropriations Act, Congress established an 8-person bipartisan census monitoring board "to oversee the whole process [planning for Census 2000 and the dress rehearsal] from the inside, so that everyone can be assured that it is being done in the proper way." 143 Cong. Rec. H10,919 (daily ed. Nov. 13, 1997) (statement of Rep. Rogers). Also, the Census Bureau has committed to making its decisions on sampling formulas in an open process, well in advance of the census. The Bureau will finalize its sampling algorithms well before data collection begins and will not change these algorithms afterward Report to Congress at 49-51.

cognizable injury as a result of a sampling Census. See Raines, 117 S. Ct. at 2322.

## III. PERMITTING THE HOUSE TO BRING THIS ACTION VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

In its Complaint, the House states that it is bringing this action pursuant to the "specific authorization" granted it in § 209 of the 1998 Appropriations Act. Complaint at ¶¶ 1, 35. Pursuant to that authorization, the House seeks a declaration from this Court that the defendants are not acting in accordance with the Constitution and section 195 of the Census Act. Complaint at ¶¶ 20, 29, and Count I. However, because Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law.[20]

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[20] Certainly, the House cannot claim that it is unified behind this litigation. As is evidenced by the debate over the provisions providing the Speaker with the authority to bring this litigation, many individual members objected to this grant of authorization to sue an Executive Branch agency. See, e.g., 143 Cong. Rec. H10,938 (daily ed. Nov. 13, 1997) (In opposing the FY 1998 Appropriations bill for, inter alia, the Commerce Department, Rep. Gephardt stated: "Third, this language gives unprecedented power to the Speaker of the House to sue on behalf of the House to block sampling and to use the resources of the House Counsel or outside counsel to pursue such litigation. While the Speaker is entitled to express his views on sampling wherever and whenever he chooses — as he has done frequently in voicing his strong opposition to sampling — I cannot support giving him my proxy or that of other Members of the House who share my belief that he is dead wrong on this issue."); id. at H10,909 (statement of Rep. Hall ("Unfortunately, this compromise also includes objectionable language calling on the House genera

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