

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SHAWN MUSGRAVE,

Plaintiff,

v.

J. THOMAS MANGER, *et al.*,

Defendants.

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Civil Action No. 1:21-cv-02199 (BAH)

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**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER  
SUPPORT OF PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND IN OPPOSITION TO SENATE AND HOUSE DEFENDANTS’ JOINT  
MOTION TO DISMISS PLAINTIFF’S CLAIMS AGAINST THEM AS MOOT**

Plaintiff Shawn Musgrave (“Musgrave”) commenced this litigation pursuant to the common law right of access to public records and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to obtain various records from several sets of Defendants.

On 22 October 2021, each of the three sets of defendants filed a motion to dismiss. (*See generally* Senate Defs.’ Mot. Dismiss, Dkt. #11 (filed Oct. 22, 2021); Mot. Dismiss House Defs., Hon. William Walker & Off. House Sergeant at Arms, Dkt. #12 (filed Oct. 22, 2021); Defs.’ J. Thomas Manger & U.S. Capitol Police’s Mot. Dismiss or, Altern., Mot. Summ. J., Dkt. #13 (filed Oct. 22, 2021).) Musgrave filed an amended complaint and a consolidated opposition and cross-motion for partial summary judgment, in which he advised the Court that the only counts remaining in active controversy after Defendants’ motions were Counts 3 and 4 for the *House Security Policy Manual* (“House Manual”) and *Senate Security Manual* (“Senate Manual”) (collectively “the Manuals”), respectively. (*See* Pl.’s Mem. P. & A. Opp’n Defs.’ Mots. Dismiss & Supp. Pl.’s Cross-Mot. Part. Summ. J., Dkt. #21-1, at 3 (filed Apr. 1, 2022) [hereinafter Pl.’s

Mem.].) In addition to demonstrating the incorrectness of Defendants' legal arguments, Musgrave also included the declaration of Daniel Schuman, who had reviewed and taken notes on the House Manual and the 2018 version of the Senate Manual as part of his research for a report (Schuman Decl., Dkt. #21-4, ¶¶ 5-7 (filed Apr. 1, 2022)), as well as excerpts from the Manuals that he received from Mr. Schuman (*id.* ¶¶ 10-11; *see also* Dkt. #s 21-5 and 21-6 *passim* (filed Apr. 1, 2022)).

After Musgrave demonstrated that he could disprove Defendants' inaccurate and misleading claims about the contents of the Manuals, the Senate and House Defendants released full copies to Musgrave and filed a *fourth* motion to dismiss, this time arguing mootness. (*See generally* Mem. P. & A. Supp. Senate & House Defs.' J. Mot. Dismiss Pl.'s Claims Against Them as Moot, Dkt. #26-1 (filed June 16, 2022) [hereinafter Defs.' Mem.].) They then filed two separate consolidated briefs, which served as reply briefs supporting their initial motions to dismiss and oppositions to Musgrave's Cross-Motion. (*See generally* Sen. Defs.' Reply Mem. P. & A. Supp. Senate Defs.' Mot. Dismiss & Opp'n Pl.'s Cross-Mot. Part. Summ. J., Dkt. #30 (filed July 5, 2022) [hereinafter Senate Opp'n]; House Defs.' Reply Supp. Their Mot. Dismiss & Opp'n Pl.'s Cross-Mot. Part. Summ. J., Dkt. #32 (filed July 5, 2022) [hereinafter House Opp'n].) Musgrave now files this brief as a Reply in support of his Cross-Motion and an Opposition to Defendants' fourth motion to dismiss.

For the reasons stated herein, the Court should deny the Fourth Motion to Dismiss and grant Musgrave's Cross-Motion for Partial Summary Judgment, which seeks declaratory judgment that the common law right of access applies to the Senate and House Defendants.

### **ARGUMENT**

After all of the procedural developments discussed above, there are only three big questions that this Court must resolve: (1) Does sovereign immunity bar a lawsuit under the common law right of access against these Congressional offices and officials; (2) Does the common law right of access apply to these offices' records in general; and (3) Can Defendants escape judicial review at this late stage by releasing the specific records originally requested, leaving them free to continue to withhold other records in the future citing the same legal rationale.

As an initial matter, however, there are two procedural issues which must be addressed. First, Defendants have indicated a desire to file an additional reply brief in further support of their Fourth Motion (Senate Defs.' Resp. Court's Min. Order of 8/9/22, Dkt. #34, at 5 n.3 (filed Aug. 10, 2022) ("Senate and House defendants intend to submit a reply on their joint motion to dismiss for mootness addressing only the arguments in plaintiff's consolidated brief relevant to the mootness motion.")), but the Court should not allow this filing. Defendants filed their Fourth Motion on 16 June, in which they argued that the previous arguments were no longer relevant in light of their production of the Manuals, yet made only a passing mention of mootness in their 5 July replies, despite their claim that it was in effect the only question remaining. They should not be afforded yet another opportunity to flesh out this line of argument when they made the deliberate tactical choice to avoid making the argument in the last substantive briefs they filed. Their filing of the Fourth Motion—in effect a Cross-Cross-Motion—in the middle of the briefing on the previous motions was irregular enough, but they should not be allowed to compound that irregularity by choosing not to make the same arguments in their very next filings.

Second, it should be noted that while the Senate Defendants complied with Local Rule 7(h)(1) in their opposition to Musgrave’s Cross-Motion, the House Defendants did not. Therefore, pursuant to the Court’s Standing Order, the Court must “assume that facts identified by the moving party in its statement of material facts are admitted.” (Standing Order for Civil Cases, Dkt. #4, ¶ 6(f) (filed Aug. 18, 2021).) Accordingly, the House Defendants are assumed to admit that “[t]he *House Security Manual* is binding on all House of Representatives offices.” (Pl.’s Statement Mat. Facts as to Which There Is No Genuine Dispute, Dkt. #21-2 (filed Apr. 2, 2022) [hereinafter Pl.’s SOMF].) Even though the House Manual has been released, this admission remains relevant to Musgrave’s Cross-Motion.

#### **I. DEFENDANTS DO NOT MEANINGFULLY REFUTE MUSGRAVE’S INITIAL ARGUMENTS**

In the interest of judicial economy, Musgrave will not repeat herein most of the arguments that he previously made in his Cross-Motion, because Defendants’ opposition briefs were for the most part rehashes of their initial motions, including very little new material. Instead, he will briefly respond to the occasional noteworthy allegations peppered throughout the opposition briefs, in roughly the order in which they appear.

First, with respect to Defendants’ reliance on this Circuit’s opinion in *Consumers Union of U.S., Inc. v. Periodical Correspondents’ Association* (Senate Opp’n at 9-10 (citing 515 F.2d 1341, 1350 (D.C. Cir. 1975))), Defendants neglect to inform the Court that their characterization of that opinion is markedly different than the Circuit’s later characterization, in which the Circuit described the rules in question as involving “regulation of the very atmosphere in which lawmaking deliberations occur.” *See Barker v. Conroy*, 921 F.3d 1118, 1128 (D.C. Cir. 2019) (comparing rules governing the opening prayer with rules governing press access) (quoting *Walker v. Jones*, 733 F.2d 923, 930 (D.C. Cir. 1984)). Admittedly, the Circuit *did* hold that *some*

rules warrant Speech or Debate Clause protection, but it also held that some—namely, those which “could not be similarly said to regulate ‘the very atmosphere in which lawmaking deliberations occur,’” *Barker*, 921 F.3d at 1128—do *not*. Rules governing the handling of classified information by Congressional staff cannot be similarly said to do so, even if the Court *does* accept the characterization that they are “an integral part of the legislative machinery” (Senate Opp’n at 9), which it should not. In fact, Senate Defendants *themselves* argue later that “the Manual documenting guidance for Senate Members and staff about handling classified information is not ‘integral to [the Senate’s] resolution of the merits’ of any matter voted on or otherwise decided by the Senate.” (*Id.* at 23 (quoting *Comm’r, Ala. Dep’t of Corrections v. Advance Local Media, LLC*, 918 F.3d 1161, 1167-68 (11<sup>th</sup> Cir. 2019)).) Defendants cannot have it both ways. Much like whether a particular *document* is protected by the Speech or Debate Clause is a fact-dependent inquiry, so is whether a particular *rule* is justiciable. In fact, this is the very core of Musgrave’s Cross-Motion. Defendants maintain that *all* records in *all* offices in the Legislative Branch are off-limits to the common law right of access, and Musgrave simply asks the Court to issue a declaratory judgment stating that they are not, and that the applicability of Speech or Debate Clause protection must be adjudicated on a case-by-case basis.

Next, after an extensive recapitulation of previous arguments, Senate Defendants contend that the key distinction between this case and *Judicial Watch v. Schiff*, 474 F. Supp. 2d 305 (D.D.C. 2020), and *Washington Legal Foundation v. U.S. Sentencing Commission*, 89 F.3d 897 (D.C. Cir. 1996) (*WLF II*), is that, “unlike in those cases, Senate defendants cited case law demonstrating that the statutory ground relied on in *WLF II* and *Judicial Watch* for applying *Larson-Dugan*—the Mandamus Statute, 28 U.S.C. § 1361—applies only to Executive branch officials and not to officers of Congress.” (Senate Opp’n at 14.) Even if one accepts this

contention as true, it is a remarkable argument for Defendants to make. They are basically asking the Court to disregard controlling precedent *because this time they made a better argument*. This line of reasoning may ultimately result in Defendants convincing the Circuit to review this case *en banc* and reverse *WLF II*, but “we failed to make a good argument last time” is not grounds for a District Court to disregard controlling authority, and it is remarkable that the United States Congress is asking it to do so.

For their part, House Defendants accurately describe Musgrave’s position, yet style it as the incorrect conclusion: “Musgrave’s theory, taken to its logical conclusion, requires holding that the Judiciary has the authority to order records of the House of Representatives and the Senate be made available to the public, even over Congress’s reasoned judgment and other objections.” (House Opp’n at 3.) This is essentially correct, but the implication is not. Musgrave does contend that the Judiciary has the authority to hold that that *some* records of Congress must be made publicly available, but he does not argue that it has the authority with respect to *all* records of Congress. However, while Musgrave is willing to admit that this is not an all-or-nothing situation, House Defendants, like their Senate counterparts, are not, and they ask the Court to hold that the Judiciary *never* has the authority to compel the release of *any* records of Congress. To quote House Defendants, “This contention is wrong as a matter of constitutional law.” (*Id.*)

Much of the remainder of House Defendants’ argument is predicated on the assumption that “the Constitution already assigns [authority to ignore the common law right of access] to each of its chambers independently.” (*Id.* at 4-5.) If the Court accepts that contention, then the rest of Defendants’ arguments logically follow, and Musgrave loses this argument. However, as Musgrave has previously explained, the Framers never intended for these clauses to be read as

broadly as Defendants do now, since doing so would effectively neuter a significant part of the common law which was already in existence at the time of the Constitution's drafting.

Next, much like Senate Defendants' treatment of *Consumers Union*, House Defendants rely misleadingly on *In re Shepard* for the quotation, "The judiciary has never asserted the institutional competence to make such decisions [regarding public access to Congressional records], and there is no principled basis for doing so here. The Senate and House rules plainly do not permit access to the requested records at this time." (House Opp'n at 6 (quoting *In re Shepard*, 800 F. Supp. 2d 37, 41 (D.D.C. 2011)).) While that is admittedly a direct quote from Judge Lamberth's opinion, it omits the critical context that that case involved a request for Congressional investigative records held by the National Archives which would become publicly available over time, which is a completely different species of records than the ones held by Senate Defendants. Therefore, even if this Court were to accept Judge Lamberth's reasoning, it should limit that acceptance to a comparable context which is not applicable in this case.

Next, House Defendants attempt to refute the Schuman Declaration, first by attempting to diminish Mr. Schuman's credibility by stating that he "has never worked *directly* for either the House or Senate" (House Opp'n at 7 (emphasis added)), which draws an untenable distinction between employment as a legislative attorney for the Congressional Research Service and "real" Congressional work. (See Schuman Decl. ¶ 4 (describing Schuman's career).) Secondly, and more relevantly, House Defendants attempt to characterize the House Manual as "guidance," "guidelines," and "recommendations" which "does not reflect any official government action or decision." (House Opp'n at 8.) However, as noted above, House Defendants did not file a "statement of genuine issues filed in opposition to" Musgrave's Cross-Motion pursuant to the Court's Standing Order, and therefore they must be deemed to have admitted that "[t]he *House Security Manual* is binding on all House of Representatives offices." (Pl.'s SOMF at 1.) As a result, the entirety of House

Defendants’ argument about the allegedly advisory nature of the House Manual is rendered null and void, up to and including the conclusion that “final decisions regarding the security procedures discussed in the House Security Policy Manual are not made by the House Sergeant at Arms, but rather by the individual employing Members and Committees of the House, who may opt to follow the House Security Policy Manual as drafted, or who may supplement it and establish their own best practices and procedures.” (House Opp’n at 9.)

## **II. DEFENDANTS’ INITIAL ATTEMPTS TO MISCHARACTERIZE THE NATURE OF THE MANUALS WARRANT REMEDIAL ACTION**

As of the time that Musgrave filed his Cross-Motion, he was required to draw inferences from parts of previous versions of the Manuals to show that they were not as Defendants described them, and yet he managed to do so. In response to his evidence, Defendants released the entire Manuals, which have been attached here as Exhibits F and G. The Court is now able to view the Manuals in their entirety and grasp the magnitude of Defendants’ misrepresentations, and in light of that fact, it should definitely grant declaratory relief against the parties which will undoubtedly continue to deny such requests for the same reasons, when the reasons given bear such little resemblance to the materials requested.

## **III. DEFENDANTS CANNOT ESCAPE JUDICIAL REVIEW THROUGH VOLUNTARY CESSATION**

In their attempt to avoid being held accountable for their decisions, Defendants selectively characterize the nature of this case to make it appear that the case is moot because “Plaintiff has therefore now been provided with the only two documents that his amended complaint seeks from the Senate and House defendants.” (Defs.’ Mem. At 2.) As above, Defendants make a technically accurate observation—Musgrave has been provided with the only two documents that he requested—and imply that the receipt of *those documents* ends the case.



Musgrave has indeed been provided with the only two documents he requested—after amending his Complaint—but his First Amended Complaint sought more relief than the receipt of those two documents. The Prayer for Relief reads:

WHEREFORE, Plaintiff Shawn Musgrave prays that this Court:

(1) Order Defendants Walker and Berry, their respectively led entities the House SAA and Office of the Secretary of the Senate, and the House to produce all requested records to him; [*and*]

(2) Declare that the common law right of access applies to the House SAA, Office of the Secretary of the Senate, and House, and direct those entities to develop standardized processes for the handling of such requests.

(1<sup>st</sup> Am. Compl., Dkt. #22, at 14 (filed Apr. 4, 2022) (emphasis added).) Therefore, his request for a declaratory judgment remains in controversy.<sup>1</sup>

Moreover, under the doctrine of voluntary cessation, Defendants’ belated decision to release the Manuals to Musgrave does not render the case moot, given that they openly stated their intention to treat future requests identically, advising Musgrave that “[b]oth the House and Senate defendants, for the reasons set forth in their respective motions to dismiss, adhere to the view that they are neither obliged to provide the security manuals under the common law right of access, nor can they be sued to compel disclosure of the manuals.” (Defs.’ Mem. at 5.) Therefore, given that “the reasons set forth in their respective motions to dismiss” revolve around a total legislative immunity to the common law right of access, there is no question that a future request from Musgrave or any other requester will be met with the exact same response

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<sup>1</sup> Musgrave concedes that his Cross-Motion sought partial summary judgment “regarding the general applicability of the common law right of access *to the House and Senate security manuals*” (Pl.’s Mot. Part. Summ. J., Dkt. #21, at 1 (filed Apr. 1, 2022) (emphasis added), and that that fact may be cited as grounds to deny his Cross-Motion, but the fact that his Cross-Motion was limited to two documents does not change the scope of the entire *case*, especially since he expressly requested *partial* summary judgment. The scope of the case is determined by the Complaint, not by any motion.

citing the exact same reasons. As has been established in this case and its companion case, Musgrave continues to have an abiding interest in such records as those he initially requested, and he is certain to continue to make such requests, especially in light of the fact that he dismissed several of the counts in this case simply because the records *had not been created yet*, not because he lost interest. So, while Defendants may be able to legitimately claim that there is no reasonable expectation that Musgrave will request *these Manuals* and be denied that request, they definitely cannot show that Musgrave's future requests for *comparable records* will be honored, and to suggest otherwise is disingenuous. The Court should accordingly deny Defendants' Fourth Motion to Dismiss and grant Musgrave's Cross-Motion for Partial Summary Judgment by entering a declaratory judgment in his favor.

Date: August 10, 2022

Respectfully submitted,

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