4-2020

Terrible Touhy: Navigating Judicial Review of an Agency's Response to Third-Party Subpoenas

Zoe Niesel
St. Mary's University School of Law, zniesel@stmarytx.edu

TERRIBLE *TOUHY*: NAVIGATING JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO THIRD-PARTY SUBPOENAS

Zoe Niesel†

The question of judicial review of a federal agency's response to a third-party subpoena is highly litigated, and yet barely addressed in academic literature. For seventy years, this issue has been governed by the Supreme Court's holding in United States ex rel. Touhy v. Ragen, *a case that spawned its own vocabulary, its own legal doctrine, and its own circuit split. The confusion has left four circuit courts entrenched, the remainder waffling, and the district courts largely on their own to sort out a workable standard.*

This Article establishes that the circuit courts' approaches to judicial review of an agency's noncompliance with a subpoena are largely divided over the academic question of sovereign immunity. For the Fourth and Eleventh Circuits, only the Administrative Procedure Act (APA) provides the necessary waiver of sovereign immunity that allows a court to review agency action; accordingly, review of an agency's failure to comply with a subpoena is analyzed under the APA's "arbitrary and capricious" standard. For the Ninth and D.C. Circuits, the federal courts have broad, implicit power over discovery, and Federal Rule of Civil Procedure 45 is applied as it would be in all other cases. This Article seeks to reconcile these competing lines of authority by proposing that the APA's waiver of sovereign immunity still applies when an agency runs afoul of discovery standards contained in Federal Rule 45.

This Article attempts to reunite the circuits because district court case law shows that confusion over the appropriate standard is a "distinction without a difference." For lower courts and litigants attempting to navigate the circuit split, it is worth knowing that the question largely comes down to the impact third-party subpoenas have on agency time, money, and statutory mission. By framing judicial review accordingly, consistent results can be achieved despite the geographic location of the court.

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† Zoe Niesel is an Assistant Professor at St. Mary's University School of Law. She previously served as a Visiting Assistant Professor at Wake Forest University School of Law.

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INTRODUCTION

The term Touhy[1] is one of many meanings. Birthed by a Supreme Court case of the same name, *United States ex rel. Touhy v. Ragen*,[2] "Touhy" can refer to the case itself, a certain type of federal administrative regulation,[3]

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1 The litigant who started it all, Roger Touhy, was an infamous Chicago crime boss who went by the nickname "Touhy the Terrible." He was best known for two things—his rivalry with Al Capone, and a faked kidnapping of fellow gangster "Jake the Barber" Factor. *See Roger "The Terrible" Touhy*, FBI.GOV, https://www.fbi.gov/history/famous-cases/roger-the-terrible-touhy [https://perma.cc/39LJ-LMEY]; David Wallechinsky & Irving Wallace, *Biography of Gangsters Roger the Terrible Touhy*, TRIVIA-LIBRARY.COM, https://www.trivia-library.com/c/biography-of-gangsters-roger-the-terrible-touhy.htm [https://perma.cc/6Y9C-H26D].

2 United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951).

3 United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., 474 F. Supp. 2d 75, 79 (D.D.C. 2007) ("[A] federal agency may adopt procedures—dubbed *Touhy* regulations after the Supreme Court decision *United States ex rel. Touhy v. Ragen*—for responding to subpoenas and other requests for testimony or documents.").

a legal doctrine,[4] or a circuit split[5] that continues to confound litigants and district courts.

Ultimately, trouble with *Touhy* comes down to seven decades of confusion surrounding how courts should review a federal agency's refusal to allow the production of documents or employee testimony under a third-party subpoena. In these situations, private litigants, in cases to which the United States is not a party, seek to subpoena documents or employee testimony from a federal agency—sometimes to acquire facts held in agency records,[6] and sometimes to bootstrap a taxpayer-funded expert witness.[7] When this happens, federal agencies turn their attention to the Federal Housekeeping Statute (Housekeeping Statute) at 5 U.S.C. § 301, which allows agencies to promulgate internal regulations that govern the "custody, use, and preservation" of documents, or the "conduct of its employees."[8] Under § 301, many agencies have promulgated what are now called "*Touhy* regulations," which disallow federal employees from answering third-party subpoenas without the permission of certain agency officials.[9] Those designated officials then use balancing tests that examine the agency's resources, mission, and government neutrality in light of the requested information in acquiescing to, or demurring from, the subpoena.[10]

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4 Quezada v. Mink, No. 10-cv-00879-REB-KLM, 2010 WL 4537086, at *3 (D. Colo. Nov. 3, 2010) ("[T]here is little room to doubt that the [*Touhy*] doctrine is alive and well here.").

5 *See, e.g.*, Solomon v. Nassau Cty., 274 F.R.D. 455, 458 (E.D.N.Y. 2011) (collecting cases); *In re* Packaged Ice Antitrust Litig., No. 08-md-01952, 2011 WL 1790189, at *2 (E.D. Mich. May 10, 2011) (collecting cases).

6 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) ("[T]he National Weather Service alone receives hundreds of requests a year from private litigants seeking to introduce evidence about weather patterns in cases as routine as minor car accidents.").

7 Benhoff v. U.S. Dep't of Justice, No. 16CV1095-GPC(JLB), 2017 WL 840879, at *5 (S.D. Cal. Mar. 3, 2017) (showing documents that the litigant was requesting were more suitable for an investigator or expert witness than using federal taxpayer dollars to support agency employee involvement in private litigation).

8 5 U.S.C. § 301 (2018).

9 The Department of Health and Human Services' (HHS) *Touhy* regulations state that "[n]o employee or former employee" of HHS "may provide testimony or produce documents in any proceedings . . . concerning information acquired in the course of performing official duties . . . unless authorized by the Agency head . . . ." 45 C.F.R. § 2.3 (2020); *see also* United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., 474 F. Supp. 2d 75, 79 (D.D.C. 2007) (discussing HHS's *Touhy* scheme).

10 *See, e.g.*, 43 C.F.R. § 2.288(a), (c) (2020) (representing factors considered by the Bureau of Land Management).

After an agency reaches a decision under its *Touhy* regulations, the question of judicial review becomes one of an entrenched circuit split.[11] The Fourth and Eleventh Circuits currently assess an agency's decision under its *Touhy* regulations using the arbitrary and capricious standard set forth in § 706 of the APA—a standard that is largely deferential to the agency.[12] Under this standard, a "court is not . . . to substitute its judgment for that of the agency" but rather "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[13]

In contrast, the Ninth and D.C. Circuits utilize the "requester-friendly" standard found in Federal Rules of Civil Procedure 45 and 26, also referred to as the "undue burden" standard.[14] Pursuant to the two Federal Rules, courts "determine whether it would be an undue burden for the government to produce the requested employees, and to weigh that burden against the [p]laintiff's need for the testimony."[15] The decision on whether to compel the agency's compliance remains in the discretion of the district court.[16] Although not obvious, the ultimate confusion over the use of one of these standards, versus the other, is rooted in how a federal agency waives sovereign immunity before submitting to a federal court's subpoena.[17]

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11 Agility Pub. Warehousing Co. K.S.C.P. v. U.S. Dep't of Def., 246 F. Supp. 3d 34, 41 n.7 (D.D.C. 2017) (discussing the existence of a circuit split).

12 *See, e.g.*, Meisel v. FBI, 204 F. Supp. 2d 684, 689–90 (S.D.N.Y. 2002) (analyzing an agency's refusal to comply with a non-party subpoena only pursuant to the APA).

13 Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (internal quotation mark and citation omitted).

14 *See* Anwar v. Fairfield Greenwich Ltd., 297 F.R.D. 223, 226 (S.D.N.Y. 2013) (applying the "requester-friendly standard set forth in Rule 45"); *In re* PE Corp. Sec. Litig., No. 3:00 CV 705 CFD TPS, 2005 WL 806719, at *7 (D. Conn. Apr. 8, 2005) (applying the standard set forth in the Federal Rules).

15 Solomon v. Nassau Cty., 274 F.R.D. 455, 458 (E.D.N.Y. 2011); *see also* FED. R. CIV. P. 26(c)(1) (permitting a court to issue an order protecting a "party or person" from "undue burden or expense" in connection with a discovery request); FED. R. CIV. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty . . . ."); *Anwar*, 297 F.R.D. at 226 ("[T]he Court must 'balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it.'" (quoting Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams., 262 F.R.D 293, 300 (S.D.N.Y. 2009))).

16 *See In re* Fitch, Inc., 330 F.3d 104, 108 (2d Cir. 2003) ("Motions to compel and motions to quash a subpoena are both 'entrusted to the sound discretion of the district court.'" (quoting United States v. Sanders, 211 F.3d 711, 720 (2d Cir. 2000))).

17 *See* Joseph v. Fluor Corp., No. 10-379, 2010 WL 797840, at *2 (E.D. La. Mar. 2, 2010) ("Although *Touhy* does not specifically discuss sovereign immunity, it is easy to see how the concept ties in . . . .").

In three Parts, this Article breaks down and reconstructs the complicated framework that surrounds third-party subpoenas served on federal administrative agencies. Part I assesses the Supreme Court's holding in the *Touhy* case and the various iterations that "*Touhy* regulations" have taken in federal agencies. Part II explores the existing circuit split that governs how courts assess an agency's refusal to comply with a third-party subpoena. What becomes clear from this analysis is that the various approaches are ultimately rooted in considerations of sovereign immunity. The Fourth and Eleventh Circuits apply a deferential standard from the statutory language of the APA to the question of third-party subpoenas on the basis that only the APA contains a valid waiver of sovereign immunity in this context. In contrast, the Ninth Circuit and D.C. Circuit eschew sovereign immunity when a federal court is summoning a federal employee, and instead ask their lower courts to apply the "undue burden" standard from Federal Rule 45.

Part III examines the decisions made by district courts on the question of third-party subpoenas served on administrative agencies. From an analysis of the district court case law, at least one thing becomes clear: All district courts are essentially weighing the same considerations—a subpoena's impact on agency time and money, and any impact on the agency's statutory mission. Accordingly, Part III of this Article proposes a manner of reconciling the two approaches and reading them together by applying the APA's waiver of sovereign immunity while still using the analytical framework of Federal Rule 45.

The analysis proposed by this Article seeks to do two things. First, establish that the district courts are essentially looking to the same considerations, despite the standard of judicial review approach. Second, reconcile the question of sovereign immunity in the current circuit split. Under either theory, the question of sovereign immunity can be easily answered by the APA. As such, the proper standard to be applied should be Federal Rule 45, placing agencies on the same procedural ground as all non-parties summoned to outside litigation while still protecting the government's interest in preserving resources and fulfilling a public mission.

I. THE *TOUHY* NOMENCLATURE—DOCTRINE AND REGULATIONS

"*United States ex rel. Touhy v. Ragen* is part of an unbroken line of authority which . . . [holds] that a federal employee may not be compelled to

testify contrary to his federal employer's instructions under valid agency regulations."[18] The *Touhy* case not only birthed this line of legal doctrine, but also its own terminology (and, ultimately, its own circuit split on application).

The circumstances that gave rise to the *Touhy* doctrine are relatively straightforward. Roger Touhy was an inmate in an Illinois state penitentiary, and he brought a habeas corpus proceeding alleging his imprisonment violated the Fifth Amendment Due Process Clause.[19] In the course of the habeas proceedings, a subpoena duces tecum was served on a Federal Bureau of Investigation (FBI) agent that required the FBI to produce records that Mr. Touhy claimed showed that his conviction was fraudulent.[20] After being placed on the witness stand and ordered by the court to comply with the subpoena, the FBI agent refused to produce the records stating, "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229."[21]

The department rule to which the FBI agent was referring was Department of Justice (DOJ) Order No. 3229, which was originally issued by the DOJ in 1946. Pursuant to that rule:

> All official files, documents, records and information in the offices of the Department of Justice, including the . . . Federal Bureau of Investigation, . . . are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General . . . .
>
> Whenever a subpoena duces tecum is served to produce any of such files, . . . the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified there in, on the ground

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18 Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998) (citation omitted).

19 United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 463–64 (1951).

20 *Id.* at 464–65.

21 *Id.* at 465.

that the disclosure of such records is prohibited by this regulation.[22]

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22 *Id.* at 463 n.1. DOJ regulations concerning employees' responses to subpoenas duces tecum were found at 11 Fed. Reg. 4920 at the time of the *Touhy* case. Today, similar regulations for DOJ officials, including FBI agents, are located in the Code of Federal Regulations, Part 16, Subpart B, Section 16.22, which gives the general prohibition on employees producing documents in either federal or state proceedings to which the United States is not a party. *See id.*; *see also* 28 C.F.R. § 16.22 (2020). The relevant parts of that regulation are as follows:

> In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official.

Id. When an employee does receive a subpoena for documents or oral testimony, the employee must notify the U.S. Attorney for the district of the issuing authority. *Id.* If a party to a legal proceeding is demanding the oral testimony of a DOJ employee:

> [A]n affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

Id. In determining whether to produce the documents, the U.S. Attorney should employ a balancing test of factors. *See id.* § 16.26. The U.S. Attorney should consider: (1) whether disclosure is appropriate under the relevant case's rules of procedure; and (2) whether disclosure is appropriate after considering the substantive law of privilege. *Id.* Additionally, the U.S. Attorney will not allow production or disclosure if any of the following factors are found:

> (1) Disclosure would violate a statute, such as the income tax laws . . . ;
>
> (2) Disclosure would violate a specific regulation;
>
> (3) Disclosure would reveal classified information . . . ;
>
> (4) Disclosure would reveal a confidential source or informant . . . ;
>
> (5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired; [and]
>
> (6) Disclosure would improperly reveal trade secrets without the owner's consent.

Id.

Regulations like DOJ Order No. 3229 are products of the Housekeeping Statute,[23] 5 U.S.C. § 301. Pursuant to the Housekeeping Statute, an agency like the DOJ can pass regulations relating to "the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."[24]

In *Touhy*, the FBI agent in question, by following DOJ Order No. 3229, found himself in contempt of court and sentenced to the custody of the Attorney General of the United States after using the DOJ housekeeping regulations as a defense for failing to obey the subpoena duces tecum.[25] The circuit court reversed, and the issue reached the Supreme Court to determine "whether it is permissible for the Attorney General to make a conclusive determination not to produce records and whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena duces tecum."[26]

The Court began its analysis by noting that the question of the Attorney General's power to refuse to turn over papers in his possession was an unnecessary one—the man before the court in this instance was the Attorney General's subordinate, not the Attorney General himself.[27] As such, the Court considered only whether a refusal by the Attorney General's subordinate to comply with the subpoena duces tecum was appropriate in light of DOJ Order No. 3229, which prohibited the subordinate from answering the subpoena without the permission of the Attorney General. As such, the question was whether DOJ Order No. 3229 could in fact validly withdraw the subordinate's power to comply with the court's subpoena.[28]

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23 *See* Puerto Rico v. United States, 490 F.3d 50, 61 (1st Cir. 2007) ("Under the Housekeeping Act, 5 U.S.C. § 301, federal agencies may promulgate regulations establishing conditions for the disclosure of information."); Chrysler Corp. v. Brown, 441 U.S. 281, 283 (1979) ("Section 301 is a 'housekeeping statute,' authorizing rules of agency organization, procedure, or practice as opposed to 'substantive rules.'"). The original housekeeping statute was passed in 1789 as a means "to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents." Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 777 (9th Cir. 1994) (quoting H.R. REP. NO. 85-1461 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3352, 3352).

24 5 U.S.C. § 301 (2018).

25 *Touhy*, 340 U.S. at 465.

26 *Id.* at 465–67.

27 *Id.* at 467. The Court left for another time the question of whether the Attorney General himself could refuse, after a court request, to produce the papers. *Id.*

28 *Id.*

The Court also noted that the Housekeeping Statute, which allowed the promulgation of DOJ Order No. 3229, was rooted in valid concerns about government efficiency and management—particularly "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious."[29] As such, the Attorney General had statutory authority to prescribe regulations that would govern the preservation and use of agency documents.[30] Subordinate executive officers could thus not be held in contempt when they refused to comply with a subpoena in reliance on valid internal agency housekeeping regulations. The DOJ's regulations took on the name "*Touhy* regulations" in honor of the watershed case.[31]

The *Touhy* regulations for the DOJ continue to be litigated, but ultimately the same result continues to be reached. For example, in *Smith v. Cromer*, the Fourth Circuit addressed a case in which the defendant (who was facing drug charges in Maryland) subpoenaed two Assistant U.S. Attorneys and an agent of the Drug Enforcement Administration (DEA).[32] The defendant was attempting to compel the testimony of these individuals, as well as the production of documents from when he served as a DEA

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29 *Id.*

30 The Court looked to additional precedent for its holding—*Boske v. Comingore*, 177 U.S. 459 (1900). In that case, Department of the Treasury regulations prohibited an internal revenue collector from producing records in his possession for a state court proceeding. *Id.* at 460–61. The Court held that there was appropriate authority in the Secretary of the Treasury under the Housekeeping Statute to allow regulations that centralized the production of documents with the head of the agency:

> Can it be said that to invest the Secretary of the Treasury with authority to prescribe regulations . . . for the conduct of the business of his department, and to provide for the custody, use, and preservation of the records, papers . . . appertaining to it, was not a means appropriate and plainly adapted to the successful administration of the affairs of that department? Manifestly not.

Id. at 469.

31 *In re* Packaged Ice Antitrust Litig. No. 08-md-01952, 2011 WL 1790189, at *3 n.2 (E.D. Mich. May 10, 2011) ("These DOJ regulations, similar to those of other federal agencies, internally control the manner in which the DOJ responds to subpoena requests for documents and information. The regulations derive their name from *United States ex rel. Touhy v. Ragen* . . . .").

32 Smith v. Cromer, 159 F.3d 875, 877 (4th Cir. 1998).

informant, to defend against state narcotics charges.[33] The DOJ resisted the production of the file and the testimony of its employees, and was granted a protective order after the action was removed to the federal court.[34]

On review in the Fourth Circuit, the court noted that based on principles of sovereign immunity, the state court could not enforce the subpoenas.[35] The relevant DOJ *Touhy* regulations, including 28 C.F.R. § 16.22, prohibited employees from disclosing information in proceedings in which the United States is not a party without prior approval from the proper official and in the manner specified by the regulations.[36]

The *Touhy* case birthed an entire nomenclature. "*Touhy* regulations" exist for nearly all federal agencies, and usually have a few main features: (1) a general prohibition against subordinate employees producing documents or appearing for oral testimony without permission from a superior officer or executive agency head;[37] (2) a process for formally requesting, in writing, agency documents or testimony sought by a litigant;[38] and (3) a procedure

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33 *Id.* (explaining the defendant had served as a DEA confidential informant for just over a year before being indicted for delivering heroin to a state informant).

34 *Id.*

35 *Id.* at 881.

36 *Id.*; *see also* 28 C.F.R. § 16.22 (2020).

37 *See, e.g.*, 45 C.F.R. § 2.3 (2020). This section comes from the Department of Health and Human Services' *Touhy* regulations and states:

> No employee or former employee of the DHHS may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the person's official relationship with the Department unless authorized by the Agency head pursuant to this part based on a determination by the Agency head, after consultation with the Office of the General Counsel, that compliance with the request would promote the objectives of the Department.

Id. The Department of Energy's *Touhy* regulations are similar:

> No employee or former employee of the DOE shall, in response to a demand of a court or other authority, produce any material contained in the file of the DOE or disclose any information relating to material contained in the files of the DOE, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the General Counsel of DOE.

10 C.F.R. § 202.22 (2020).

38 For example, HHS requires:

> All requests for testimony by an employee or former employee of the DHHS in his or her official capacity . . . must be addressed to the Agency head in writing and must state the nature of the requested testimony, why the information sought is unavailable by any other

for the agency's review of the request.[39] The procedure for review often involves a combination of factors, or a balancing test, that the agency is to consider in accepting or denying the request; unsurprisingly, this balancing test usually centers on the interests of the agency and the public.[40] Parties seeking information from federal agencies must follow these steps, and exhaust the process, before challenging the agency in court.[41]

A typical *Touhy* scheme comes from the U.S. Department of Agriculture (USDA). *Touhy* regulations for the USDA are contained at Title 7 of the Code of Federal Regulations. Within 7 C.F.R. § 1.212, the agency states that "[n]o USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with this subpart."[42] Such is an example of the general prohibition against agency employees testifying or producing documents without following standard agency procedure.

Section 1.214 then spells out the exact procedure that is to be followed when an employee of USDA is served with a summons or subpoena demanding her appearance in a judicial proceeding to which the United States is not a party.[43] Pursuant to this section, employees who receive such summons or subpoenas are required to notify the agency head of the

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> means, and the reasons why the testimony would be in the interest of the DHHS or the federal government.

45 C.F.R. § 2.4 (2020). For a discussion of a requesting party's failure to follow the proper steps under a *Touhy* scheme, see *Manzo v. Stanley Black & Decker, Inc.*, No. 13-CV-3963 (JFB) (SIL), 2017 WL 1194651, at *8 (E.D.N.Y. Mar. 30, 2017).

39 *See* 6 C.F.R. § 5.48 (2020) (listing Department of Homeland Security procedures).

40 *See, e.g.*, 38 C.F.R. § 14.804. This section lists the factors that will be considered when the Department of Veteran's Affairs considers a request under its *Touhy* regulations. Those factors include:

> (a) The need to avoid spending the time and money of the United States for private purposes and to conserve the time of VA personnel for conducting their official duties concerning servicing the Nation's veteran population; (b) How the testimony or production of records would assist VA in performing its statutory duties; (c) Whether the disclosure of the records or presentation of testimony is necessary to prevent the perpetration of fraud or other injustice in the matter in question; [and] (d) Whether the demand or request is unduly burdensome or otherwise inappropriate under the applicable court or administrative rules.

Id.

41 United States *ex rel.* Pogue v. Diabetes Treatment Ctrs. of Am., 474 F. Supp. 2d 75, 79–80 (D.D.C. 2007).

42 7 C.F.R. § 1.212 (2020).

43 *Id.* § 1.214.

existence and nature of the order, and must await permission from the agency head before obeying the order.[44] If the appearance is not authorized by the agency head, the employee should appear at the stated time and place of the hearing, produce a copy of the relevant *Touhy* regulations, and respectfully decline to testify (much like was done by the FBI agent in *Touhy* itself).[45] To determine whether the employee should decline to comply with the order, the agency head, in consultation with the USDA General Counsel, will consider whether the appearance would be in the "interests of the employee and USDA."[46] The agency head will consider, among any other items: (1) "what interest of USDA would be promoted by the employee's testimony;" (2) "whether an appearance would result in an unnecessary interference with the duties of the USDA employee;" and (3) "whether an employee's testimony would result in the appearance of improperly favoring one litigant over another."[47]

Sierra Pacific Industries v. United States Department of Agriculture[48] represents a fairly typical third-party subpoena case handled under USDA's *Touhy* regulations. The underlying litigants sued each other in a state court case relating to forest fires that occurred in 2007. One of the litigants attempted to subpoena documents and witnesses from USDA relating to the state court action, and the USDA refused to comply on the basis of its *Touhy* regulations.[49] In refusing to allow the state court litigants access to its employees, the USDA argued (using the factors found at 7 C.F.R. § 1.214), that: (1) depositions and testimony of employees would take time away from their official duties; (2) testimony would create the appearance of favoring one litigant over the other; and (3) testimony in the state court action would be cumulative to testimony occurring in a related federal court action.[50] Interestingly, it is difficult to imagine a situation in which agency employees were requested as witnesses where such a request did not implicate their time

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44 *Id.*

45 *Id.* § 1.214(c). Under USDA's *Touhy* regulations, the request is then handled as a Freedom of Information Act request. *Id.* § 1.215(a).

46 *Id.* § 1.214(c).

47 *Id.* § 1.214(e).

48 No. CIV S-11-1250 KJM EFB, 2011 WL 6749837, at *1 (E.D. Cal. Dec. 22, 2011).

49 *Id.*

50 *Id.* The court ended up denying the state court litigants' request for documents with respect to some items but allowing the request for three letters exchanged between the U.S. Attorney's Office and the plaintiffs on which USDA was copied. *Id.* at *6.

on the job, suggesting that the first factor will always lean in favor of the agency.

The doctrine articulated first in *Touhy* has been expanded in a litany of case law outside the regulations of the DOJ. For example, the Department of Housing and Urban Development's *Touhy* regulations were discussed in *Caljeff, LLC v. A.M.E. Services, Inc.*[51] while USDA's *Touhy* regulations were discussed in *In re Elko County Grand Jury.*[52] To date, *Touhy* and its named regulations present one of the most frustrating challenges to litigators attempting to finesse information from the federal government.

II. THE CIRCUIT SPLIT—A QUESTION OF SOVEREIGN IMMUNITY

Judicial review of third-party discovery from federal administrative agencies is the subject of a circuit split that causes outcomes to vary by geography.[53] The Fourth[54] and Eleventh[55] Circuits adopt a deferential standard that analyzes an agency's decision to withhold information or testimony under its *Touhy* regulations by assessing whether the decision was "arbitrary or capricious" under the APA. This standard is more likely to result in the agency withholding information requested in a third-party subpoena. In contrast, the Ninth[56] and D.C.[57] Circuits have held that, for a federal court requesting testimony or documents from a federal agency, the standards of Federal Rule of Civil Procedure 45 govern.

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51 No. 08-4789, 2008 WL 5427637, at *1 (E.D. La. Dec. 30, 2008).

52 *In re* Elko Cty. Grand Jury, 109 F.3d 554, 556 (9th Cir. 1997); *see also* Davis Enterprises v. EPA, 877 F.2d 1181, 1184 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (Environmental Protection Agency); Swett v. Schenk, 792 F.2d 1447, 1452 (9th Cir. 1986) (National Transportation Safety Board); Giza v. Sec'y of Health, Ed. & Welfare, 628 F.2d 748, 751 (1st Cir. 1980) (Health Education and Welfare).

53 *See* Quiles v. Union Pac. R.R. Co., No. 8:16CV330, 2018 WL 734172, at *1 (D. Neb. Feb. 6, 2018), *aff'd*, No. 8:16CV330, 2018 WL 2148979 (D. Neb. May 10, 2018) ("Circuit courts are split regarding the appropriate standard to use when determining whether a federal agency has properly refused to comply with a third-party subpoena."); Agility Pub. Warehousing Co. K.S.C.P. v. U.S. Dep't of Def., 246 F. Supp. 3d 34, 41 n.7 (D.D.C. 2017) ("There appears to be a circuit split—or at least confusion—about whether Rule 45 or the APA should govern a court's review in the case of a federal court litigant.").

54 *See* COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999).

55 *See* Moore v. Armour Pharm. Co., 927 F.2d 1194, 1198 (11th Cir. 1991).

56 *See* Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994).

57 *See* Watts v. SEC, 482 F.3d 501, 508 (D.C. Cir. 2007).

At the very heart of the circuit split surrounding judicial review of agency action under *Touhy* regulations is the question of sovereign immunity. Sovereign immunity is an ancient doctrine, one that prohibits a court from compelling the action of the United States, or entertaining an action against the United States, without the "sovereign's" consent.[58] As such, the government must clearly waive sovereign immunity if it is to be the subject of suit or compelled to act by court order.[59] The doctrine is particularly powerful where a court attempts to restrain the government from acting, or attempts to compel it to act (like when a court issues a third-party subpoena).[60] In such cases, the court is essentially interfering with the performance of executive duties, violating separation of powers, and halting the executive from controlling its own resources.[61]

It is easy to see why questions of third-party subpoenas call up the question of sovereign immunity—the doctrine is implicated when a court's judgment or order would interfere with "'the public treasury or domain, or interfere with the public administration' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"[62] In the third-party subpoena case, the court's coopting of government personnel to answer the subpoena or assemble requested documents would both interfere with the public domain, and compel the government to act. As such, a number of cases discuss the *Touhy* question in light of sovereign immunity, and two competing interpretations have emerged in the circuit courts.[63]

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58 Library of Cong. v. Shaw, 478 U.S. 310, 315 (1986). "The Federal Government cannot be sued without its consent." United States v. Navajo Nation, 556 U.S. 287, 289 (2009) (citation omitted). Such consent to suit "must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969).

59 "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." Cartwright Int'l Van Lines, Inc. v. Doan, 525 F. Supp. 2d 187, 194 (D.D.C. 2007) (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)).

60 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) ("It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.").

61 *Id.*

62 Dugan v. Rank, 372 U.S. 609, 620 (1963) (internal citations omitted).

63 *See, e.g.*, Davis Enters. v. EPA, 877 F.2d 1181 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (noting the issue of sovereign immunity in a case involving *Touhy* regulations); Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989) ("We have previously instructed that suits against federal

A. Touhy *and the Administrative Procedure Act's Waiver of Sovereign Immunity*

Currently, the Fourth[64] and Eleventh[65] Circuits apply the APA to conclude that an agency's refusal to comply with a subpoena is subject to the standards articulated in the APA. Specifically, the APA requires a court to uphold the decision of an administrative agency unless the decision is "arbitrary and capricious."[66]

The application of the APA in the context of third-party subpoenas is premised on a concept that might be sovereign immunity by outcome—the idea that such subpoenas, although not technically against the sovereign and actually against government employees, still implicate the protection of sovereign immunity.[67] This conclusion is based on the idea that obtaining information from a federal employee in her official capacity is still an action against the United States as a sovereign.[68] Suit, or legal proceedings, are considered to be against the sovereign if the judgment would "interfere with

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employees may be barred by the doctrine of sovereign immunity where the effect of the suit falls upon the government . . . ."); Envtl. Enters., Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987).

64 COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 277 (4th Cir. 1999) ("We apply the APA's deferential standard of review in full recognition of the fact that one of our sister circuits has decided otherwise.").

65 Moore v. Armour Pharm. Co., 927 F.2d 1194, 1195 (11th Cir. 1991) (analyzing third-party subpoena issue by assessing whether there was an abuse of discretion by HHS).

66 *See* 5 U.S.C. § 706 (2018) (stating that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

67 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949); *Boron*, 873 F.2d at 71 ("[S]ubpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign."). *Boron* held that a state court, or a federal court on removal, could not compel a federal employee to testify in a state court civil action to which the United States was not a party. *Id.* at 70–71; *see also Envtl. Enters.*, 664 F. Supp. at 586 ("As to sovereign immunity, there is obvious merit to the argument that federal officers should not be subpoenaed to testify in state courts proceedings of which they are not parties without their approval."); Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290–91 (D. Mass. 1982) (showing federal official's refusal to testify in response to state court subpoena protected by sovereign immunity).

68 *Boron*, 873 F.2d at 71. In *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 112 (4th Cir. 1993), the Fourth Circuit noted that agency heads may restrict the testimony of subordinates through the promulgation of housekeeping regulations. "The policy behind such prohibitions on the testimony of agency employees is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business." *Boron*, 873 F.2d at 70 (quoting *Reynolds Metals*, 572 F. Supp. at 290).

the public administration."[69] In the case of third-party subpoenas, it is easy to see that the marshalling of resources to produce documents or engage in testimony would interfere with the normal public administration of an agency's work; the agency is using time and resources differently than it would under its normal public function.[70]

When a subpoena is issued against an agency for information that the agency possesses relating to a lawsuit between other parties, the government, i.e., the agency, is not a party to the underlying dispute. In these situations, the Fourth and Eleventh Circuits find that the APA provides the only avenue for review of the agency's decision to prohibit its employees from producing the information requested in the subpoena.[71] The legal conclusion here flows from a direct reading of the APA. If there is final agency action,[72] the APA in § 702 explicitly waives the government's sovereign immunity[73] and permits a federal court to review the agency's action, so long as the relief is not money damages and the plaintiff claims that "an agency or an officer or employee thereof acted or failed to act in an official capacity or under color

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69 Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting Land v. Dollar, 330 U.S. 731 (1947)); Portsmouth Redevelopment & Hous. Auth. v. Pierce, 706 F.2d 471, 473 (4th Cir. 1983).

70 *See Boron*, 873 F.2d at 70–71. Indeed, the number of subpoenas received by the government's agencies seems staggering, estimated by the Department of Labor in 1986 to be "more than 1,500 subpoenas . . . each year on Department employees." Alex v. Jasper Wyman & Son, 115 F.R.D. 156, 157 n.3 (D. Me. 1986). One can imagine a situation in which "officials might find themselves spending all of their time doing nothing but complying . . . and thus they would have little opportunity to pursue their important governmental responsibilities." *Envtl. Enters.*, 664 F. Supp. at 586.

71 COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 274 (4th Cir. 1999).

72 The Supreme Court has defined final agency action in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (collecting cases for the propositions that final agency action is the consummation of the agency's decision-making process and is an action from which legal consequences will flow). In *COMSAT Corp.*, 190 F.3d 269, the Fourth Circuit found that an agency's decision not to allow its employees to answer a third-party subpoena was a final agency decision for purposes of the APA.

73 The APA provides a waiver of sovereign immunity by authorizing judicial review of agency action that is arbitrary or capricious. 5 U.S.C. § 706(2)(A) (2018); *see* Davis Enters v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (an agency employee's failure to comply with a subpoena reviewable as agency action under the APA). As noted above, the government can only be sued, or compelled to act under court order, with its consent. FDIC v. Meyer, 510 U.S. 471, 475 (1994). The APA sets forth a general waiver of sovereign immunity: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2018); *see also* City of Alexandria v. FEMA, 781 F. Supp. 2d 340, 347 (W.D. La. 2011) (discussing the limited waiver of sovereign immunity present in the APA).

of legal authority."[74] It seems clear that a claim that agency employees failed to answer a valid subpoena is in fact a claim for relief that is not money damages. Additionally, in refusing to answer the subpoena, the agency has interpreted and acted under its own internal authority—i.e., its *Touhy* regulations.[75] As such, the court is reviewing the agency's final decision[76] pursuant to its own regulations, which implicates the language of § 702.[77] Section 706 then directs a reviewing court to set aside final agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[78]

An example is helpful. In *COMSTAT Corp. v. National Science Foundation*, the National Science Foundation (NSF) appealed an order that required it to comply with subpoenas issued by an arbitrator during prehearing discovery.[79] The subpoenas arose out of questions of liability for certain cost overruns for a construction project undertaken by an NSF grant awardee.[80] Specifically, the NSF awardee had sub-contracted for the building of a state-of-the-art radio telescope in West Virginia—when the project went over budget, the plaintiff sub-contractor COMSTAT Corporation sued the grant awardee to recover an additional twenty-nine million dollars in costs.[81] The suit went to mandatory arbitration pursuant to the construction contract, and the arbitrator issued a subpoena to the NSF asking the agency to turn over all documents relating to the telescope project.[82]

NSF refused to comply with the subpoena, citing its internal *Touhy* regulations at 45 C.F.R. § 615.5, which block employees from producing official records or providing any testimony without the General Counsel's explicit permission.[83] Additionally, the NSF's General Counsel can only grant an employee permission to testify or produce records when, among

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74 5 U.S.C. § 702.

75 *COMSAT Corp.*, 190 F.3d at 271.

76 *See* Top Choice Distribs., Inc. v. U.S. Postal Serv., 138 F.3d 463, 466 (2d Cir. 1998) ("Finality is an explicit requirement of the APA . . . ."); Air Espana v. Brien, 165 F.3d 148, 152 (2d Cir. 1999) ("The APA explicitly requires that an agency action be final before a claim is ripe for review.").

77 United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999).

78 5 U.S.C. § 706.

79 *COMSAT Corp.*, 190 F.3d at 271.

80 *Id.* at 272–73.

81 *Id.*

82 *Id.*

83 *Id.*; 45 C.F.R. § 615.5 (2020).

other things, fulfilling the request would: (1) be in keeping with the regulation's purposes (i.e., to promote efficient operations, avoid controversial issues, and maintain NSF impartiality); (2) be necessary to prevent a miscarriage of justice; (3) promote NSF's interest in the decision that may be rendered in the legal proceeding; and (4) be in the best interest of NSF.[84]

Following NSF's refusal to comply with the subpoena, the arbitrator issued three additional subpoenas that required the NSF Document Custodian to produce all documents relating to the telescope project, and two NSF employees familiar with the grant awardee to appear and produce all documents in their possession relating to the telescope project.[85]

NSF again refused to produce the documents, explaining its analysis under its *Touhy* regulations at 45 C.F.R. § 615.5(b).[86] In so analyzing, the General Counsel articulated that:

> (1) Fulfilling the demand would be needlessly uneconomical, as it was duplicative of an earlier Freedom of Information Act request filed by the plaintiff;
>
> (2) Production would be needlessly burdensome because the documents could be discovered from the grant awardee;
>
> (3) Production would not further the goal of maintaining NSF's neutrality because NSF had no joint agreement with its grant awardee; and
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> (4) The balance of interests were such that compliance was not needed to prevent a miscarriage of justice and would not be in the public interest.[87]

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[84] *COMSAT Corp.*, 190 F.3d at 272–73. NSF also noted its refusal to comply because it believed that much of the information being sought in the subpoenas was contained in a previous Freedom of Information Act request field by the plaintiff. *Id.* at 272. Pursuant to that request, NSF had apparently "identified over 40 linear feet of files that might contain [responsive] documents." *Id.* at 272 n.4; NSF warned the plaintiff that copying such files would cost upwards of $20,000. *Id.* The plaintiff then narrowed its request and NSF began photocopying documents, but ultimately stopped when plaintiff failed to pay the photocopying costs. *Id.* at 272 & n.4. The cost of copying is a likely reason that the NSF continued to object to production.

[85] *Id.* at 272.

[86] *Id.* at 273.

[87] *Id.*

After an additional exchange of letters,[88] to no avail, the plaintiff brought a motion to compel in the federal district court.[89] A veritable procedural mess ensued. Plaintiff argued that NSF was actually a party to the proceeding because it had named NSF in the caption of its motion.[90] Pursuant to this reasoning, Federal Rule of Civil Procedure 45 would govern NSF's responses to the subpoena.[91] Ruling from the bench, the magistrate agreed with the plaintiff and held that NSF could not use sovereign immunity as a defense to answering the subpoenas.[92] Further, the magistrate found that NSF had waived its right to object to the subpoenas by ignoring certain internal regulations requiring the NSF's General Counsel to inform the court that the demand was being reviewed and to seek a stay of the demand pending a final determination.[93] An order was entered directing the NSF to comply with the subpoenas.[94]

In the Fourth Circuit, the court led its analysis by noting that "although [the] review of the district court's legal conclusions is de novo . . . review of NSF's refusal to comply with the subpoenas is governed by the [APA]."[95] As such, the court chose to apply a "deferential standard" that examined whether NSF's refusal to comply with the third-party subpoenas was an action that could be considered "arbitrary and capricious."[96]

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88 Specifically:

> NSF requested further clarification of COMSAT's justification for seeking to depose [the two NSF employees]. COMSAT responded with the explanation that these NSF employees had discussed the [project with the grant awardee]. NSF responded in turn with a request for additional clarification from [plaintiff], and in a September 28, 1998, letter the agency indicated that it had not reached a final decision with respect to the deposition subpoenas.

Id.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 273–74; *see also* 45 C.F.R. § 615.6(c) (2020) ("If a response to a demand is required before the General Counsel has made the determination referred to in § 615.6(b), the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.").

94 *COMSAT Corp.*, 190 F.3d at 274.

95 *Id.* (citation omitted).

96 *Id.* at 277.

The arbitrary and capricious standard is well-settled—it is narrow, and the court should not substitute its judgment for that of the agency.[97] However, the agency must still have a satisfactory explanation for its chosen action, including a "rational connection between the facts found and the choice made."[98] Courts "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[99]

In so reviewing, the Fourth Circuit agreed with the plaintiff that NSF's *Touhy* regulations could not immunize the agency from the duty to answer the subpoena; rather, it was the concept of sovereign immunity that allowed the agency to refuse to comply.[100] When the agency, NSF, read and applied its *Touhy* regulations, it implicated the judicial review provisions of the APA, which waive sovereign immunity and allow a federal court to compel production if the agency's refusal to comply with the subpoena was arbitrary or capricious.[101]

As such, the Fourth Circuit turned its analysis to the decision made by NSF regarding the third-party subpoenas and the reasons provided by the agency.[102] The court explored the agency's reasons for failing to comply—namely, that the NSF General Counsel had provided a detailed breakdown of the costs of compliance in light of the fact that most of the documents requested were available in an earlier Freedom of Information Act request (one for which the requesting party, the plaintiff, had failed to keep up on its copying bills).[103] The General Counsel had explained that to comply with the subpoena now was to essentially charge the taxpayers for work that the plaintiff failed to pay for on its own—something that did not keep with the agency's mission or its responsibility as a "taxpayer-funded" organization.[104]

The Fourth Circuit found that it simply could not second-guess the agency's decision-making; essentially, the agency had reached a policy decision that was well-grounded in its mission and financial reality, which

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97 Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

98 Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

99 *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citations omitted).

100 *COMSAT Corp.*, 190 F.3d at 277.

101 *Id.*; United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999).

102 *See generally COMSAT Corp.*, 190 F.3d 269.

103 *Id.* at 277.

104 *Id.* at 277–78.

could not be arbitrary nor capricious. Further, the court noted that there were over twenty-thousand additional NSF grantees, and that allowing a private litigant embroiled in conflict with a grantee to always seek such costly information from the agency would place a "potential cumulative burden upon the agency [that] becomes alarmingly large."[105] What the court did not say, but which seems clear from the face of the analysis, is that the NSF had made an appropriate decision to avoid taking on the cost of a project for which the plaintiff should have funded on its own. Had the plaintiff continued to pay its bills for photocopying and completed the Freedom of Information Act request, it would have gathered the documents that it desired. Seeking a third-party subpoena appeared to be a way to push the cost of the documents on the NSF and the taxpayers, while saving the plaintiff some money.

The Fourth Circuit's reasoning basically encapsulates a longstanding tradition of deference to an agency's policymaking authority.[106] Indeed, the Fourth Circuit itself recognized the importance of such deference by citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[107] which noted that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[108] This concept of deference to agency policymakers has been recognized in every federal circuit and serves as a cornerstone for judicial deference. The premise exists on the foundation of separation of powers and the idea that agency decision makers, who are accountable to elected officials and thus share their political accountability, are the sole purveyors of policy.[109] Particularly in administrative law cases, courts comment on the subject-matter expertise of the agency as compared to the generalist knowledge of Article III judges.[110]

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105 *Id.* at 278.

106 *See, e.g.*, Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962); *COMSAT Corp.*, 190 F.3d at 278.

107 *Id.*

108 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

109 *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").

110 Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967, 972 (7th Cir. 2001) ("Judges are not experts in any field except law."); *id.* (specifically noting that "[m]uch escapes [judges]" in "highly technical field[s]").

Like the Fourth Circuit, the approach taken by the Eleventh Circuit looks to the APA, but with a wandering eye towards the Federal Rules of Civil Procedure. In *Moore v. Armour Pharmaceutical Co.*, parents of children who had been allegedly infected with HIV during blood transfusions sued the companies that supplied the blood in federal district court in Florida.[111] During this underlying litigation, the parents subpoenaed two Center for Disease Control (CDC) physicians who researched methods for detecting HIV in donated blood.[112] Interestingly, the two physicians had actually made their research public and shared recommendations with the defendant companies.[113] The Department of Health and Human Services (HHS), the parent agency of the CDC, denied permission for the parents to depose the doctors, stating that it received so many requests that to honor them all would force the CDC to cease its other functions.[114] Further, HHS expressed concern that it should remain neutral in private litigation or risk "frank, free, and full exchanges within the scientific community."[115]

At the heart of the Eleventh Circuit's discussion was, of course, HHS's *Touhy* regulations and the Housekeeping Statute at § 301.[116] HHS's *Touhy* regulations provided that:

> No employee or former employee of the [HHS] may provide testimony or produce documents in any proceedings to which this part applies concerning information acquired in the course of performing official duties or because of the person's official relationship with the [HHS] unless authorized by the Agency head pursuant to this part based on a determination . . . that compliance with the request would promote the objectives of the [HHS].[117]

Although recognizing *Touhy* and its "unbroken line of authority" contending that "a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency

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111 Moore v. Armour Pharm. Co., 927 F.2d 1194, 1195–96 (11th Cir. 1991).

112 *Id.*

113 *Id.* at 1196.

114 *Id.*

115 *Id.*

116 *Id.*

117 45 C.F.R. § 2.3 (2020).

regulations," the court also noted that the Federal Rules of Civil Procedure "favor full discovery whenever possible."[118] The court noted that it would overturn HHS's action only if it found that such action was "arbitrary, capricious, an abuse of discretion, or otherwise not contrary to law"—the standard used under the APA for review of agency action.[119]

In applying the "arbitrary and capricious" standard of review, the court noted that there was no abuse of discretion by the agency because HHS, on behalf of the CDC, had expressed its interest in conserving the time and attention of CDC employees for the public mission of the fight against AIDS and HIV.[120] The parents were essentially competing for the doctors' time with the public, and the CDC believed that the time was better used researching methods that would mitigate a national health crisis.[121] Essentially, the parents lost a policy battle—no competing policy interest could outweigh letting two of the nation's leading health researchers continue their lifesaving work. Further, the burden on the agency was simply too great in loss of time, manpower, and valuable employees distracted from their primary tasks.[122]

This reasoning parallels that of additional Supreme Court case law that agencies should be the ones to set their resources and prioritize their tasks, and that these decisions are "committed to agency discretion" by law per the APA.[123] The Supreme Court has consistently noted that agency decisions that involve the balancing of resources are best left in the hands of the agency. For example, when an agency decides not to pursue an enforcement action, this is considered the product of a balancing of resources and priorities and therefore is not even subject to judicial review.[124] Similarly, an

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118 *Moore*, 927 F.2d at 1197 (citing FED. R. CIV. P. 26(b)(1)).

119 *Id.*

120 *Id.*

121 *Id.* at 1198 ("Each day that Dr. Evatt and other doctors employed by the CDC spend giving deposition testimony is a day they are kept from doing research that might save numerous lives.").

122 *See* Moore v. Armour Pharm. Co., 129 F.R.D. 551, 554 (N.D. Ga. 1990) (noting that requests for CDC deposition testimony are "overwhelming").

123 Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (holding that the decision to reassign agency staff was not subject to judicial review because it involved questions of balancing resources and determining how the agency should meet its statutory mandate).

124 Heckler v. Chaney, 470 U.S. 821, 832 (1985). *Heckler* listed the following factors that must be considered when an agency declines an enforcement proceeding:

agency's decision not to grant reconsideration of an action is beyond judicial review because it involves a balancing of factors and policies that require the agency's expertise.[125] The *Touhy* schema are similar in their balancing tests that require agency expertise. For example, the *Touhy* regulations adopted by the Department of Veteran's Affairs (VA), codified at 38 C.F.R. §§ 14.800–14.810, require that the VA determine the nature of the testimony requested, and evaluate factors like the need to avoid spending time and money of the United States for private purposes, how the testimony or production would assist the department in performing its duties, and whether the demand is overly burdensome or inappropriate.[126]

In the third-party subpoena review theory articulated by the Fourth and Eleventh Circuits, the agency's decision not to comply with the subpoena is a political policy choice based on resource allocation and public benefits.[127] Further, private litigants would still maintain a way to challenge the agency's response to a third-party subpoena—such litigants can seek the review of the federal court pursuant to the APA.[128] For example, in *United States v. Williams*, a criminal defendant indicted for murder attempted to subpoena files from the FBI while claiming that they contained exculpatory

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> [W]hether a violation has occurred, [] whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id. Not unsimilar factors must be balanced under an agency's *Touhy* regulations—the agency must look to whether it is a good use of agency resources to participate, whether the agency can succeed in its public and statutory mission by participating, whether participating risks government neutrality in third-party matters and exposes the agency to needless controversy, and whether the agency can bear the expense and lost manpower in complying.

125 ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 282 (1987).

126 38 C.F.R. § 14.804 (2020).

127 It is worth noting here that no circuit has found agency decisions on third-party subpoenas to be wholly beyond the scope of judicial review. Even if this type of agency balancing could be considered presumptively unreviewable, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832–33. Further, the *Touhy* regulations provide a mechanism by which to review the agency's balancing of policy factors.

128 COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999) ("Private litigants who are dissatisfied with an agency's response to a third-party subpoena or to a FOIA request may still obtain federal court review under the APA.").

evidence.[129] The FBI refused to obey the subpoena on the basis of the DOJ's *Touhy* regulations.[130] When the Fourth Circuit considered the matter, it noted that the defendant had recourse if he was unsatisfied with the agency's response to the subpoena; specifically, he could seek judicial review of the agency's final decision through the APA, §§ 701–706.[131] Should the subpoena-seeker attempt to exercise this option, the federal court would review to determine if the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[132] Further, the federal court could "compel agency action unlawfully withheld or unreasonably delayed."[133]

In sum, the position articulated by the Fourth and Eleventh Circuits prizes the expertise of agencies in running their own affairs, as well as the prominence of the APA in reviewing agency decisions. The decision to ultimately allow or not allow the production of documents or the testimony of agency employees is committed to the agency's discretion and will be reviewed under the APA's "arbitrary and capricious" standard for final agency actions. In applying that "arbitrary and capricious" standard of review, it does not particularly matter if the agency could theoretically, or even practically, achieve the request of the subpoena. For example, in *Boron Oil Co. v. Downie*, the Fourth Circuit recognized that the agency that received the third-party subpoena, the Environmental Protection Agency (EPA), could have complied with the subpoena "without undermining the

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129 United States v. Williams, 170 F.3d 431, 432 (4th Cir. 1999). The defendant had been convicted of murder previously, and the FBI had assisted with the investigation at the request of state officials. *Id.* The first conviction was overturned on appeal and the defendant attempted to subpoena the FBI files during his second trial on the murder charges. *Id.*

130 *Id.* at 432–34.

131 *Id.* at 434. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2018); *see* Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998) (explaining that the remedy for an agency's refusal to answer a third-party subpoena "may be found in the [APA] which expressly limits such review authority to the federal courts").

132 5 U.S.C. § 706(2)(A).

133 *Id.* § 706(1); *see also Williams*, 170 F.3d at 434 (noting that "a state criminal defendant, aggrieved by the response of a federal law enforcement agency made under its regulations, may assert his constitutional claim to the investigative information before the district court, which possesses authority under the APA to compel the law enforcement agency to produce the requested information in appropriate cases"); *COMSAT Corp.*, 190 F.3d 269, 277–78 (4th Cir. 1999) ("Private litigants who are dissatisfied with an agency's response to a third-party subpoena or to a FOIA request may still obtain federal court review under the APA.").

immediate purposes for the EPA regulations."[134] The court noted, however, that the agency could have a valid interest in preventing its expert employees from being distracted by requests for testimony in private actions.[135] This reasoning would protect the priorities of the EPA and leave its employees free to pursue their official business as required by their taxpayer-funded mission.[136]

B. Touhy *and Federal Rule of Civil Procedure 45—The Power of the Federal Court*

The Fourth Circuit's approach is clear—the Housekeeping Statute at § 301, the existence of an agency's *Touhy* regulations, and the collection of case law on the matter establish that a federal agency can restrict documents and employee testimony by the exercise of valid agency authority.[137] This exercise of valid agency authority is an indication that the agency did not waive its sovereign immunity in the proceeding.[138] The Fifth Circuit has gone so far as to state that *Touhy* regulations "evince an intent *not* to waive the [agency]'s sovereign immunity."[139] As such, the only way to review the agency's refusal to comply with a summons or subpoena is to assess whether it was "arbitrary and capricious" under the APA, which does contain a waiver of sovereign immunity at § 702.[140]

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134 Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989).

135 *Id.*

136 The desire for agencies to protect their internal priorities and resources is well-established in case law. *Id.* at 70 (purpose of EPA's *Touhy* regulations is to conserve resources); Envtl. Enters., Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987) (*Touhy* regulations balance the need for private litigants to achieve information with the need for the government to conserve its limited resources); Se. Pennsylvania Transp. Auth. v. Gen. Motors Corp., 103 F.R.D. 12, 14 (E.D. Pa. 1984) (finding legitimacy for the Department of Transportation to avoid funding private litigation).

137 Edwards v. U.S. Dep't of Justice, 43 F.3d 312, 317 (7th Cir. 1994).

138 Omni Pinnacle, LLC v. All S. Consulting Eng'rs, LLC, No. 12-1617, 2012 WL 12296176, at *2 (E.D. La. Sept. 7, 2012) (finding that there was no waiver of sovereign immunity when the USDA refused to authorize an employee to appear at a deposition in a case where the United States was not a party because an assertion of the *Touhy* regulations indicated that the agency was preserving sovereign immunity).

139 Louisiana v. Sparks, 978 F.2d 226, 235 (5th Cir. 1992).

140 "The APA contains a limited waiver of sovereign immunity." Teton Historic Aviation Found. v. U.S. Dep't of Def., 686 F. Supp. 2d 75, 78 (D.D.C. 2010); *see also* 5 U.S.C. § 702 (2018) (stating that under the APA "action[s] in a court of the United States seeking relief other than money damages and stating

The Ninth Circuit and the D.C. Circuit view this landscape differently. These circuits hold instead that agencies do not have a valid basis in sovereign immunity to use *Touhy* regulations to refuse to comply with a summons or subpoena because such a position would "violate the fundamental principle that 'the public . . . has a right to every man's evidence.'"[141] As such, an agency's refusal to comply with a summons or subpoena is analyzed under Federal Rule of Civil Procedure 45 (as it would be in all other cases).

Federal Rule of Civil Procedure 45 establishes that a court "must quash or modify a subpoena that . . . subjects a person to undue burden."[142] Whether or not there is an undue burden is determined by looking to: (1) the relevance of the requested information; (2) the need for the party for the information; (3) the breath of the request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested information; and (6) the burden imposed.[143] "Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party."[144]

The most prominent case on the use of Federal Rule 45 in the context of third-party subpoenas to federal agencies is *Exxon Shipping Co. v. U.S. Department of Interior*,[145] decided by the Ninth Circuit. Exxon Shipping Corporation and Exxon Corporation (collectively, Exxon) faced an underlying civil damages action arising out of the Exxon Valdez oil spill.[146] In defending against that action for damages, Exxon sought the depositions

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a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . [can]not be dismissed nor relief therein be denied on the ground that it is against the United States").

141 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

142 FED. R. CIV. P. 45.

143 Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004).

144 *Id.*; Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998) (noting that "concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs" in Rule 45 inquiry).

145 *Exxon Shipping Co.*, 34 F.3d 774.

146 "[C]ommercial fishermen, landowners, local governments, businesses, and others sued Exxon seeking compensatory and punitive damages for injuries they allegedly suffered as a result of the Exxon Valdez oil spill." *Id.* at 775.

of ten federal employees from five administrative agencies.[147] In response to these requests, the federal government refused to let eight of the requested employees testify, and seriously restricted the testimony of the remaining two requested employees.[148] These decisions were made under the agencies' *Touhy* regulations, which, as discussed above, generally prohibit a federal employee from testifying unless she receives permission from the proper agency authority.[149]

Exxon was particularly concerned about the failure to obtain deposition testimony from the government witnesses, as these witnesses had information relating to the extent of damage the oil spill had on Alaska's natural resources. As such, Exxon filed a complaint on the following grounds:

(1) The government could not refuse to comply with the discovery requests under the Federal Rules of Civil Procedure;

(2) The agencies' actions were not authorized by their *Touhy* regulations; and

(3) The agencies' actions violated the APA.

The agencies, in an argument adopted by the district court, asserted that the Housekeeping Statute at § 301 authorizes agency heads to prohibit their employees from testifying in litigation in which the United States is not a party. Additionally, the agencies cited the holding in *Touhy*—that subordinate federal officials could not be held in contempt for refusing to

147. The agencies involved were the Department of the Interior, the Department of Agriculture, the Department of Commerce, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Association.

148 Interestingly, the agencies did not formally answer the discovery requests—they merely instructed employees not to attend or to provide limited testimony. *Id.* at 776.

149 *See, e.g.*, 43 C.F.R. § 2.289(b) (2020) (Department of the Interior—"[a]fter consulting with the Solicitor's Office or, in the case of the Office of Inspector General, its General Counsel, the official in charge will decide whether to grant the *Touhy* Request"); 7 C.F.R. § 1.214(b)(1) (2020) (Department of Agriculture—"[a]n employee of USDA served with a valid summons, subpoena, or other compulsory process . . . may appear only if such appearance has been authorized by the head of his or her USDA agency"); 15 C.F.R. § 15.18(a) (2020) (Department of Commerce—an "employee may not testify as an expert or opinion witness for any other party other than the United States").

comply with a subpoena when the agency's internal housekeeping regulations prohibited them from disclosing the documents or testifying.[150]

The Ninth Circuit quickly pointed out a key difference between the situation at bar and the one in *Touhy*. In *Exxon*, the agencies themselves were the named parties, not subordinate agency officials. And, *Touhy* itself specifically declined to reach the question of whether the agency or agency head had power under a claim of privilege to withhold testimony or documents.[151] Indeed, other courts had held that *Touhy* and its progeny did not apply when the order at issue was directed to the agency head.[152]

In analyzing the situation in *Exxon*, the Ninth Circuit noted that the language of the Housekeeping Statute specifically noted that it did not "authorize withholding information from the public or limiting the availability of records to the public."[153] This specific sentence was added to the statute in 1958 after Congress became concerned that the agencies and executive officials operating under the statute had used the language of § 301 as a shield to prevent disclosure of information to the public, or to Congress.[154] The House Report accompanying the addition noted that the sentence was specifically added to ensure that the executive branch could not use § 301 as a substantive basis to withhold information or as an executive privilege.[155] Indeed, other cases have noted that doing so would create a

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150 *Exxon Shipping Co.*, 34 F.3d 774.

151 United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 467 (1951) ("We find it unnecessary . . . to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession . . . .").

152 NLRB v. Capitol Fish Co., 294 F.2d 868, 873–74 (5th Cir. 1961); Reynolds v. United States, 192 F.2d 987, 992–93 (3d Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1953). As such, it seems for the Ninth Circuit that the only thing to take from *Touhy* is that "a challenge to the Attorney General's decision cannot be initiated by contempt orders against an agent who has been denied permission to testify." Gomez v. Gates (*In re* Boeh), 25 F.3d 761, 766 (9th Cir. 1994).

153 *Exxon Shipping Co.*, 34 F.3d at 777.

154 H.R. REP. NO. 85-1461 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3352, 3364–65. Interestingly, the legislative history of the 1958 amendment to the Housekeeping Statute also contains indications of support for the executive's control over its limited resources. At least one representative stated that:

> [T]he legislative branch neither had, has, nor can it be given, authority to interfere with the basic principles under which the other two branches operate . . . . The executive departments derive their basic authority from the Constitution . . . and it is for the president or individuals selected by him to control the exercise of that power.

Id.

155 *Exxon Shipping Co.*, 34 F.3d at 777 (discussing the first instance of the Housekeeping Statute being used as a shield for executive agencies—"[t]he statute was apparently first used to deny

perverse result by exceeding the congressional delegation of authority contained in the Housekeeping Statute.[156] Essentially, the Housekeeping Statute only provided enabling authority to adopt rules of organization, but did not address whether papers or records were privileged.[157]

Additionally, the Ninth Circuit examined the Supreme Court's holding in *Chrysler Corp. v. Brown* for additional support for the proposition that § 301 did not supply an independent executive privilege. In *Chrysler*, the Court held that § 301 was merely a "housekeeping statute."[158] As such, it was properly characterized as a "'rule[] of agency organization procedure or practice' as opposed to [a] 'substantive rule[].'"[159] According to the Ninth Circuit, "neither the statute's text, its legislative history, nor Supreme Court case law supports the government's argument that § 301 authorizes agency heads to withhold documents or testimony from federal courts."[160]

After resolving the issues surrounding the Housekeeping Statute, the court turned its attention to the trickier question of sovereign immunity.[161]

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information to the public in 1877, when a California newspaperman sought politically sensitive files from the Hayes Administration"); *see also* Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without a Bureaucratic Privilege*, HARV. C.R.-C.L. L. REV. 495, 500 (1981) ("As the legislative history accompanying the 1958 amendment to the housekeeping statute shows, Congress intended that the statute itself should not double as a form of privilege."). The Senate Report also spoke to this issue: "Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public." S. REP. NO. 85-1621, at 2 (1958).

156 *In re* Packaged Ice Antitrust Litig., No. 08-md-01952, 2011 WL 1790189, at *13 (E.D. Mich. May 10, 2011).

157 *Id.*; *see also In re* Motion to Compel Compliance with Subpoena Direct to Dep't of Veterans Affairs, 257 F.R.D. 12, 15 (D.D.C. 2009) (explaining that *Touhy* regulations "do not . . . confer a separate privilege upon the government, nor create a legal basis to withhold information pursuant to a federal subpoena").

158 Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979).

159 *Id.*

160 *Exxon Shipping Co.*, 34 F.3d at 778. The court also rejected the government's argument that it could stop employees from testifying in judicial proceedings because the Housekeeping Statute allows the agency the authority to control "the conduct of its employees." *Id.* at 777. The court, however, noted that its precedent had already established that there was no distinction for purposes of *Touhy* between subpoenas seeking testimony or those seeking the production of documents. *Id.*; *see also* Gomez v. Gates (*In re* Boeh), 25 F.3d 761, 766 (9th Cir. 1994) (holding that "[t]here is no difference . . . between the power of the Attorney General to specify what records a subordinate may release and the power to specify what information a subordinate may release through testimony").

161 The government's brief specifically argued a line of reasoning from holdings of the Fourth Circuit—Exxon was seeking testimony from federal employees, and thus, was essentially compelling the government to act (which it is not compelled to do absent a waiver of sovereign immunity).

In doing so, it confronted headfirst the issue of the Fourth Circuit's existing line of authority on the matter. Specifically, the government had cited *Boron*[162] for the position that an action against a federal official through a subpoena was an action against the United States itself, therefore implicating questions of sovereign immunity. The Ninth Circuit quickly took the opportunity to distinguish it—specifically, it noted that the Fourth Circuit had decided to link its *Touhy* approach to sovereign immunity because the factual situation before the *Boron* court involved a situation in which a state, not federal, court was attempting to subpoena federal officials.[163] Due to considerations of sovereign immunity, a state court (or a federal court with only removal jurisdiction) could not compel the behavior of a federal official; however, "[s]uch limitations do not apply when a *federal* court exercises its subpoena power against federal officials."[164]

The *Exxon* court also considered the separation of powers implications of the government's arguments that the *Touhy* regulations protected their employees from testifying; namely, if such arguments were allowed, the executive branch would be making decisions that implicated judicial control over evidence in a federal case.[165] Further, the court looked to an ancient doctrine—the doctrine of "every man's evidence." Initially a principle of ancient British law, the "every man's evidence doctrine establish[es] that the public has a right to every man's evidence, and that there exists in the law a general duty to give testimony one is capable of giving."[166] Should evidence

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162 Boron Oil Co. v. Downie, 873 F.2d 67, 69 (4th Cir. 1989).

163 *Exxon Shipping Co.*, 34 F.3d at 778. The *Exxon* court had to do an additional sidestep around some of its own authority. In *Swett v. Schenk*, 792 F.2d 1447, 1451–52 (9th Cir. 1986), the Ninth Circuit had affirmed the dismissal of a state court's contempt proceeding against a National Transportation Safety Board's investigator who had, pursuant to the agency's *Touhy* regulations, limited his testimony on certain matters. The party who had requested the investigator's testimony was apparently attempting to use him as an expert witness. *Id.* In *Exxon*, the court noted that this holding was undistributed because sovereign immunity prohibited the state court from subpoenaing a federal employee (thus creating a jurisdictional issue). *Exxon Shipping Co.*, 34 F.3d at 778.

164 *In re Boeh*, 25 F.3d at 770 (Norris, J., dissenting) (noting that the Ninth Circuit had already held that a state court lacked jurisdiction to use contempt proceedings against a National Transportation Safety Board investigator). Such a limitation applies on removal because "removal jurisdiction is derivative [and] the district court acquired no jurisdiction on removal." *Id.* (citation omitted).

165 *Exxon Shipping Co.*, 34 F.3d at 778 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." (quoting United States v. Reynolds, 345 U.S. 1, 9–10 (1953))).

166 12 Parl. Hist. Eng. 693 (1812) (noting the speech of Lord Chancellor Hardwicke on May 25, 1742, in the House of the Lords); Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89 (1987); *see*

not be available by compulsory process, havoc is wreaked as to a judicial system which relies on the zealous advocacy of adversarial positions.[167]

Since neither the Housekeeping Statute nor the doctrine of sovereign immunity were at play, the Ninth Circuit determined that any third-party subpoenas received by the government would be analyzed under the normal rules of the game—Federal Rules of Civil Procedure 26(c) and 45, which provide discretion for the district court to quash subpoenas that would create an undue burden.[168] If the government was worried about third-party subpoenas creating excessive work for its employees, or distracting from its public mission,[169] the court articulated that such concerns would be mitigated by the operation of the Federal Rules. Specifically, the court pointed to the following protections:

- Federal Rule of Civil Procedure 45(c)(3)(A)(ii), which allows a district court to quash a subpoena that requires a person to travel beyond 100 miles where the person resides, is employed or regularly transacts business, or beyond the state where the person resides, is employed, or regularly transacts business if the person is a party or

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also United States v. Bryan, 339 U.S. 323, 331 (1950) ("Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted, its validity must be assessed."). Lord Chancellor Hardwicke set out the principle as such in 1742: "[T]he public has a right to every man's evidence, a maxim which in its proper sense cannot be denied." 12 Parl. Hist. Eng. 693. The maxim establishes that the integrity of the judicial system, and its truth-by-adversarial-argument approach, require a full disclosure of all facts. As such, there must be some process by which each side can attain the facts needed to advocate its case. Only common law, statutory, or constitutional privileges can overcome the principle that each side should be able to attain facts needed for its case. United States v. Nixon, 418 U.S. 683, 709 (1974).

167 *Nixon*, 418 U.S. at 709.

168 *Exxon Shipping Co.*, 34 F.3d at 779 (citing Rule 26(c) and Rule 45(c)(3)).

169 The government apparently had quite a bit to worry about here, accusing Exxon of articulating a position that would turn the government into a "speakers' bureau for private litigants." *Id.* at 779. At oral argument, the government noted the substantial number of third-party subpoena's received every year—the "National Weather Service alone receives hundreds of requests a year from private litigants seeking to introduce evidence about weather patterns in cases as routine as minor car accidents." *Id.* The theoretical possibility of having to answer all those subpoenas would result in a huge loss of manpower hours, increased burden on tax dollars, and distraction from agency assignments. The court in *Exxon* acknowledged the government's concern "that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations," but also articulated that the Federal Rules of Civil Procedure provided enough checks to guard against abuse or excessive burden. *Id.*

is commanded to attend trial and would not incur substantial expense.[170]

- Federal Rule of Civil Procedure 45(c)(3)(B)(ii), (iii), empowers the court to disallow the taking of a non-retained expert's testimony unless there is a showing of substantial need and the requesting party pays reasonable compensation. The court noted that this provision would prevent litigants from using government employees as tax-funded expert witnesses.
- Federal Rule of Civil Procedure 45(c)(3)(A)(iii) allows the court to quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies."[171]
- Federal Rule of Civil Procedure 26(b)(2), which requires the court (on its own motion) to limit discovery if: (i) unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope of discovery.[172]

In addition to the provisions of the Federal Rules, the *Exxon* court also noted that the federal agencies could still articulate any legitimate claims of privilege. For example, the "state secrets privilege," which allows the government a privilege against revealing military secrets.[173] Additionally, the government has the option to assert a qualified executive privilege that weighs the value of disclosure against the competing need for government secrecy. In making a determination of executive privilege, the court must weigh "the policy of free and open discovery juxtaposed to the need for

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170 FED. R. CIV. P. 45(c)(3)(A)(ii).

171 FED. R. CIV. P. 45(c)(3)(B)(ii)–(iii).

172 FED. R. CIV. P. 45(c)(3)(A)(iii).

173 United States v. Reynolds, 345 U.S. 1, 6 (1953). The government's privilege not to reveal military secrets dates back to the English common law and seems well-grounded. In asserting it, the court determines whether the circumstances are appropriate for the claim of privilege yet must do so "without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* at 8.

secrecy to insure candid expression of opinions by government employees in the formulation of government policy."[174]

In sum, the Ninth Circuit's decision in *Exxon* establishes a doctrine by which the Federal Housekeeping Statute does not allow federal agencies to withhold information from the public during third-party litigation; rather, the normal application of Federal Rule 45 is assumed to appropriately balance the interests of the government in efficiency or secrecy and the interests of the parties in achieving evidence needed to argue their position.[175] Such an approach requires the judge hearing the matter to protect the "unique interests" of the government in such situations.[176] This approach is vastly different from the deferential APA analysis conducted by the Fourth Circuit.

The D.C. Circuit largely adopted the Ninth Circuit approach,[177] rejecting the opportunity to review an agency's noncompliance with a subpoena through the lens of the APA, and instead utilizing the Federal Rules of Civil Procedure. In *Watts v. SEC*,[178] the D.C. Circuit considered a case in which a defendant to an underlying shareholder's suit served testimonial subpoenas on Securities and Exchange Commission (SEC) employees.[179] The SEC refused to allow the employees to testify under relevant *Touhy* regulations that required employees to decline subpoenas unless the SEC's General Counsel gave permission for "non-expert, non-privileged, factual . . . testimony."[180] The defendant sought review of the SEC's refusal directly in the circuit court under a statutory provision allowing for court of appeals review of SEC orders.[181]

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174 United States v. An Article of Drug, 43 F.R.D. 181, 190 (D. Del. 1967) ("Thus, when the privilege is claimed, it is necessary to balance interests to determine whether disclosure would be more injurious to the consultative functions of government than non-disclosure would be to the private litigant's defense.").

175 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 780 (9th Cir. 1994).

176 *Id.*

177 In the D.C. Circuit, a subpoena duces tecum will be reviewed under Rule 45, but a subpoena ad testificandum will be reviewed under the APA. Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

178 Watts v. SEC, 482 F.3d 501, 503 (D.C. Cir. 2007).

179 *Id.*

180 17 C.F.R. §§ 200.735-3(b)(2)(ii)–(iii) (2020).

181 *Id.* Specifically, the defendant sought direct appeal under 15 U.S.C. § 78y(a) (2018). That statute specifically states that "[a] person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which

The D.C. Circuit noted that the *Touhy* regulations utilized by the SEC to prohibit its employees from testifying were simply to "centralize[] agency control over agency employees."[182] In the context of a third-party subpoena issued to an agency, courts should apply Rule 45 standards, which does not articulate a separate standard for subpoenas issued to federal agencies or federal agency officials.[183] The court found that the *Touhy* regulations "do not relieve district courts of the responsibility to analyze privilege or undue burden assertions under Rule 45" because such regulations are only "relevant for internal housekeeping and determining who within the agency must decide how to respond to a federal court subpoena."[184]

III. THE *TOUHY* DOCTRINE IN ACTION

A. *The Split Gives Way to Agreement*

Despite the current circuit split, there appears to be two areas on which the circuits agree—the first being the question of a state court, or a federal court on removal, attempting to compel a federal employee to testify contrary to agency instructions.[185] For the Fourth Circuit, such a situation implicates the APA—a state court, or federal court with removal jurisdiction, cannot review federal agencies' interpretation of their own regulations, as such activity violates the APA.[186]

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he resides or has his principal place of business, or for the District of Columbia Circuit." *Id.* The court ultimately held that the SEC's decision in this case was not an order under the statute—the court looked to the definition of an order from the APA to determine that the agency's decision not to comply with a subpoena is an ordinary litigation decision and not an agency's "final disposition." *Watts*, 482 F.3d at 506.

182 *Id.* at 507.

183 *Id.*; *see also* Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

184 *Watts*, 482 F.3d at 508–09; *see also* Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 793 (D.C. Cir. 1971) (noting that the Federal Housekeeping Statute "does not confer a privilege").

185 *Houston Bus. Journal, Inc.*, 86 F.3d 1208; Edwards v. U.S. Dep't of Justice, 43 F.3d 312 (7th Cir. 1994); Gomez v. Gates (*In re* Boeh), 25 F.3d 761 (9th Cir. 1994); Louisiana v. Sparks, 978 F.2d 226 (5th Cir. 1992); Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290–91 (D. Mass. 1982).

186 Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989); *see* 5 U.S.C. § 702 (2020) (noting a provision of the APA which expressly limits such review authority to the federal courts). *Boron* found that such an approach protected federal supremacy in two ways:

However, even the Ninth Circuit would agree that a state court cannot access federal records due to considerations of sovereign immunity. An example comes from *In re Elko County Grand Jury*.[187] In *Elko*, a Nevada grand jury issued a subpoena to a Forest Service employee, who was ordered by his agency not to testify under its *Touhy* regulations.[188] The Nevada court ruled that the grand jury could validly subpoena the Forest Service employee, and the DOJ removed the case to federal court.[189] There was no question as to the language of the relevant *Touhy* regulations—they specifically prohibited an employee from providing testimony in judicial proceedings without permission of the relevant agency official.[190] The Ninth Circuit noted that because the case was removed based on federal removal jurisdiction under 28 U.S.C. § 1442,[191] any jurisdiction acquired by the federal court was derivative.[192]

The court noted that the relevant question was not whether the agency had followed its regulations or whether those regulations were valid; rather, the relevant question was one of sovereign immunity.[193] A line of circuit court precedent already held that in federal court removal proceedings state court subpoenas of unwilling federal officers are barred by sovereign immunity; indeed, the agency's decision not to allow the employee's testimony under its *Touhy* regulations was a clear refusal to waive sovereign immunity.[194] These courts have held that state courts, or federal courts on

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> (1) by applying the doctrine of sovereign immunity to preclude state courts, or a federal court on removal, from reviewing federal agency action, and (2) by giving recognition to the principle that valid federal regulations have the force and effect of federal law, which state courts are bound to follow.

Smith v. Cromer, 159 F.3d 875, 880 (4th Cir. 1998) (describing the holding in *Boron*).

187 *In re* Elko Cty. Grand Jury, 109 F.3d 554 (9th Cir. 1997).

188 *Id.* at 555.

189 *Id.* (noting that the district court quashed the subpoena and refused to remand the case to the Nevada court).

190 7 C.F.R. § 1.212 (2020).

191 *In re Elko Cty. Grand Jury*, 109 F.3d at 555. Specifically, § 1442(a), which states that a state court action directed to "any agency [of the United States] or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office" could be removed to the district court of the United States for the district and division of the place where the state court action was pending. 28 U.S.C. § 1442 (2018).

192 *In re Elko Cty. Grand Jury*, 109 F.3d at 555.

193 *Id.* at 556.

194 *Id.*

removal, simply lacked the jurisdiction to "enforce a subpoena against an unwilling sovereign"[195]—as such, the *Touhy* doctrine takes on a jurisdictional quality.[196] Further, this means that the circuit split is at a less harsh angle than might be imagined. Circuits favoring one approach or the other would still agree that there is no ability of a state court or federal court on removal to subpoena a federal official; as such, the only disagreement remains as to the power of the federal court to summon a federal official.[197]

The option for the requesting party is limited by its jurisdiction—in state court, the federal officials are protected by sovereign immunity and the state court (or a federal court on removal) cannot enforce a subpoena, while in federal court (with federal jurisdiction) the agency's decision not to produce officers or documents is assessed through either prong of the current circuit split.[198] However, it is worth noting that state court litigants seeking information from a federal agency are not totally out of luck, no matter the circuit court. Such a litigant would first request the needed documents from the federal agency by following the *Touhy* regulations; essentially, making a "*Touhy* request."[199] For example, the DOJ's *Touhy* regulations state that if a party is requesting the testimony of a DOJ employee, that requesting party must provide a summary of the testimony sought and its relevance to the appropriate U.S. attorney.[200] If, after reviewing the *Touhy* request, the agency refuses to produce, the requesting party can file a collateral action seeking review under the APA,[201] or possibly pursue a mandamus action against the head of the agency.[202]

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195 Edwards v. U.S. Dep't of Justice, 43 F.3d 312, 317 (7th Cir. 1994).

196 Swett v. Schenk, 792 F.2d 1447, 1452 (9th Cir. 1986) (stating that "the *Touhy* doctrine is jurisdictional and precludes a contempt action" when a state court attempts to subpoena a federal official).

197 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778 (9th Cir. 1994) (claiming that nothing "authorizes agency heads to withhold documents or testimony from federal courts").

198 Agility Pub. Warehousing Co. K.S.C.P. v. U.S. Dep't of Def., 246 F. Supp. 3d 34, 41 (D.D.C. 2017).

199 Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

200 28 C.F.R. § 16.22 (2020).

201 Gomez v. Gates (*In re* Boeh), 25 F.3d 761, 767 (9th Cir. 1994); *see also* McClure v. United States, 54 F.3d 785 (9th Cir. 1995) (unpublished table decision) ("Alternatively, [plaintiff] might have filed a separate action under the [APA] or sought a writ of mandamus to compel the Attorney General or her designee to grant permission to [the agency employee] to comply with the subpoena.").

202 *Id.* For those tempted to try a mandamus action, the First Circuit put a quick stop to such an attempt in *Giza v. Secretary of Health, Education and Welfare*, 628 F.2d 748, 752 (1st Cir. 1980).

The second item on which the split circuits agree is less surprising—that the existence of *Touhy* regulations does not create an independent privilege to be exercised by the executive branch.[203] Such agreement stems from a holding of the Supreme Court on the matter. In *Chrysler*, the Court considered a case involving a government contractor who sued in order to prevent it from having to disclose information it had supplied to the Defense Logistics Agency about its employment of women and minorities.[204] Such disclosure had been made as the result of executive orders that required the Secretary of Labor to ensure government contractors were providing equal employment opportunities.[205] Chrysler Corporation (Chrysler), the government contractor at issue in this suit, had been informed that third parties made a Freedom of Information Act request for reports Chrysler had filed to comply with the government's regulations, and Chrysler filed suit seeking to enjoin disclosure.[206] In the litigation, the respondents, who were seeking Chrysler's employment reports, argued that the Housekeeping Statute provided an explicit grant of legislative authority for the Department of Labor's regulations requiring diversity in employment reporting.[207]

Pursuant to *Giza*, a doctor who worked for the FDA received a subpoena from a state court litigant in a wrongful death suit. *Id.* The court determined that there was no mandamus jurisdiction because the doctor did not owe a duty to the state court litigants to submit to a deposition. *Id.* The Sixth Circuit has indicated that mandamus may not be appropriate because the ability to make a *Touhy* request belies a party's argument under the mandamus framework that there is no other adequate remedy available. Rimmer v. Holder, 700 F.3d 246, 264 (6th Cir. 2012); *see also* Norton v. Loether, No. CV 5:17-351-DCR, 2018 WL 1352152, at *5 (E.D. Ky. Mar. 15, 2018).

203 Lively, *supra* note 155 ("As the legislative history accompanying the 1958 amendment to the housekeeping statute shows, Congress intended that the statute itself should not double as a form of privilege."). Of course, one should never be surprised to find opinions outside the party line. United States v. Vander Luitgaren, No. 6:07-cr-211-Orl-22DAB, 2008 WL 2610465, at *3 (M.D. Fla. June 30, 2008) ("The Court also grants the United States' Motion to Quash on the basis of *Touhy*."); *see also* United States v. Mintz, No. 91-40045-01-DES, 1996 WL 666784, at *1 (D. Kan. Mar. 15, 1996).

204 Chrysler Corp. v. Brown, 441 U.S. 281, 285 (1979).

205 Justice Rehnquist, who wrote the opinion for the Court, noted in his opening sentence that "[t]he expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations." *Id.* at 285. Against this backdrop are Executive Orders 11246 and 11375, under which the Department of Labor's Office of Federal Contract Compliance Programs has promulgated regulations that require government contractors to report information about the racial and gender composition of their workforces and their actions in increasing diversity in their employee pools. *Id.*

206 *Id.*

207 *Id.* at 281.

In analyzing this issue, the Supreme Court was firm that the Housekeeping Statute did not provide "substantive rules" that would regulate the disclosure of government information. Instead, the Court held that the Housekeeping Statute was a rule of agency organization or practice—it did not grant any independent authority to an agency to withhold information from the public.[208] Simply put, the Housekeeping Statute was "a grant of authority to the agency to regulate its own affairs."[209]

As a result of *Chrysler*, courts recognized that the Housekeeping Statue could not provide independent authority for the government to withhold information, and therefore did not support an executive privilege to decline to answer a third-party subpoena.[210] Thus, there is no absolute immunity for an agency to refuse to answer a third-party subpoena.[211] However, what remains clear in all these cases is the basic premise of *Touhy*—"the long-established rule that a superior government official [can] withdraw from his subordinates the power to release government documents"—remains intact.[212] The split remains, of course, on how a federal judge should review that decision in a federal court.[213]

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208 *Id.* at 309. The case referenced the 1958 amendment to the statute, discussed above, as a reason for holding that the statute did not grant independent power nor allow for withholding of information from the public.

209 Important for the *Chrysler* case was the "logical corollary" to this position—that the Housekeeping Statute was not a substantive grant for the agency to promulgate rules authorizing the release of trade secrets (at issue in the suit). *Id.* at 309–10.

210 *See, e.g.*, Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 777 (9th Cir. 1994); Harvey Aluminum (Inc.) v. NLRB, 335 F.2d 749, 755 (9th Cir. 1964); NLRB v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961); Puerto Rico v. United States, 490 F.3d 50, 61 (1st Cir. 2007); Owings v. Hunt & Henriques, 673 F. Supp. 2d 1104, 1107 (E.D. Cal. 2009); Res. Invs., Inc. v. United States, 93 Fed. Cl. 373, 380–81 (2010); FTC v. Timeshare Mega Media & Mktg. Grp., Inc., No. 10-62000-CIV, 2011 WL 6102676, at *3 (S.D. Fla. Dec. 7, 2011) ("*Touhy* regulations create no privilege."). For the Fourth Circuit's take, see *Kasi v. Angelone*, 300 F.3d 487, 503 (4th Cir. 2002) (describing the issue as one of sovereign immunity rather than an independent privilege). Agencies themselves also seem to recognize this fact. *See generally* Beckett v. Serpas, No. 12-910, 2013 WL 796067, at *3 (E.D. La. Mar. 4, 2013) ("The Department concedes that its *Touhy* regulations do not create any substantive right, such as a privilege, to decline to comply with [the] subpoena.").

211 Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 792 (D.C. Cir. 1971) ("In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.").

212 Smith v. C.R.C. Builders Co., 626 F. Supp. 12, 14 (D. Colo. 1983).

213 *Serpas* describes the circuit split as such:

> The Fourth and Eleventh Circuits review the agency's decision under the APA's arbitrary and capricious standard because the APA contains the waiver of sovereign immunity that

B. *District Court Application—Not Nearly So Divided*

In the wake of the circuit split, or confusion,[214] regarding the proper judicial standard for when a private litigant causes a federal court to issue a subpoena to a non-party federal employee, the district courts have been left to sift through the tattered remains of sovereign immunity and *Touhy*.[215] "Some district courts, lacking guidance from their own circuit court of appeal, have adopted one or the other standard used in other circuits."[216] For example, in *Palmer v. Hawkins*, the Western District of Louisiana noted that it was not "persuaded that the Fifth Circuit has made any clear choice on the issue, but it is persuaded that the courts that have applied the APA standard have the better argument."[217] In *In re Packaged Ice Antitrust Litigation*, the Eastern District of Michigan noted that the Sixth Circuit's position on the split was unclear, but that it would apply Federal Rule 45.[218] The Eastern District of New York, in *Solomon v. Nassau County*, applied both the arbitrary and capricious standard and the standard contained in Federal Rule 45[219] after the Second Circuit initially adopted the arbitrary and capricious standard and then vacated its decision to reserve the question for the future.[220]

> allows review of the decision at all .... On the other hand, the D.C. and Ninth Circuits conduct an analysis under Federal Rule of Civil Procedure 45, balancing the interests favoring disclosure against the interests asserted against disclosure.

Serpas, 2013 WL 796067, at *7 (citations omitted).

214 *Id.* (showing "[r]ecent district court cases have examined the case law and acknowledged that there is a split of authority among the appeal courts that have considered the issue" of the proper standard of review when a private litigant causes the federal court to issue a subpoena to a nonparty federal employee).

215 *Id.*

216 *Id.* at *8.

217 Palmer v. Hawkins, No. 09-mc-0019, 2009 WL 3230750, at *3 (W.D. La. Oct. 2, 2009).

218 *In re* Packaged Ice Antitrust Litig., No. 08-MD-01952, 2011 WL 1790189, at *2 (E.D. Mich. May 10, 2011).

219 Solomon v. Nassau Cty., 274 F.R.D. 455, 460 (E.D.N.Y. 2011).

220 For the Second Circuit's *Touhy* flip-flop, see *EPA v. General Electric Co.*, 212 F.3d 689, 689–90 (2d Cir. 2000), *amending* 197 F.3d 592 (2d Cir. 1999). The Second Circuit had initially adopted the APA's arbitrary and capricious standard of review, asking the lower court to "[o]n remand ... review the EPA's refusal to respond to the subpoena under the standards for review established by the APA." *Gen. Elec. Co.*, 197 F.3d at 599. General Electric, the party seeking government documents, requested a rehearing. On rehearing, the Second Circuit stated that the sentence, asking the district court to consider the question under APA standards, "which would otherwise be a holding in this case, is not to

However, despite the confusion (and concord on certain matters),[221] the same factors are generally considered by district courts facing judicial review of an agency's decision not to comply with a third-party subpoena. Essentially, district courts are considering the same two things, whether they use the APA or Federal Rule 45: (1) agency money[222] and agency time,[223] collectively called agency resources; and (2) agency mission. As such, the circuit split may be a distinction without a difference, as the same factors appear to lead to the same outcomes under either approach.

1. Agency Resources

Regardless of whether they are applying the APA standard of review, or the standards under Federal Rule 45, courts reviewing an agency's refusal to answer a third-party subpoena from a federal court turn their attention to the question of money and manpower—or, more delicately phrased, agency resources.

A fantastic example comes from *Solomon*, which applied both the APA standard and Federal Rule 45 in wake of the confusion surrounding the Second Circuit's position. The court started by examining the issue under the standards of the APA—"[t]he reviewing court shall . . . hold unlawful

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be regarded as the opinion of the Court." *Gen. Elec. Co.*, 212 F.3d at 690. No response brief was requested from the government, drawing a vigorous dissent. *Id.* at 691–92 ("Finally, in fifteen years of service on this court, I never have served on a panel that granted rehearing and proceeded to a decision on a substantive matter without requiring a response to the rehearing petition."); *see also In re* SEC *ex rel.* Glotzer, 374 F.3d 184, 191–92 (2d Cir. 2004) ("[T]he question of whether APA § 706 governs courts' review of agency non-compliance with discovery requests—a question which is, in any event, far from settled."); Abdou v. Gurrieri, No. 05-CV-3946 (JG)(KAM), 2006 WL 2729247, at *4 (E.D.N.Y. Sept. 25, 2006) ("The Second Circuit has not decided which standard of review applies in determining whether a federal agency has properly refused to comply with a subpoena: the arbitrary and capricious standard of the APA . . . or the standard set forth in Rule 45 of the Federal Rules of Civil Procedure . . . .").

221 *See supra* Section III.A.

222 As American musician and professor Dan Wyman so eloquently put it, "It all comes down to money. The biggest problem is juggling the cash flow." *Dan Wyman Quotes*, PRIMO QUOTES, https://www.primoquotes.com/author/dan+wyman [https://perma.cc/5FED-YFTG]. Money may be a bald-faced way to state the problem—most courts phrase the problem as one of agency resources. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1998) (noting that the agency's "choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources").

223 Arguments in this space look much like the conventional wisdom—"Nobody is too busy, it's just a matter of priorities."

and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[224] The underlying case was an action for damages initiated by a pre-trial inmate at Nassau County Correctional Facility in New York—while in his jail cell, the plaintiff was bitten by a rat, exacerbating his pre-existing post-traumatic stress disorder.[225] Plaintiff attempted to subpoena two VA employees (a psychiatrist and a social worker) for testimony relating to his treatment for post-traumatic stress disorder.[226]

The VA *Touhy* regulations set forth a list of factors to be considered in determining whether a VA employee would respond, by testimony or documents, to a subpoena.[227] These factors include the need to spend the money and time of the United States for private purposes and to conserve VA employees for conducting official duties.[228] In response to the subpoena, the VA asserted the following reasons to withhold the doctor and social worker's testimony: (1) that the doctor and social worker had significant patient responsibilities; (2) that the doctor oversaw other VA staff, including medical students; and (3) that there was cumulative harm in spending the time and money of the VA to benefit private litigants instead of serving the nation's veteran population.[229]

In assessing these reasons, and the decision that flowed therefrom, the court noted that the VA was in a better position than anyone to understand the best use of its limited resources, including the time that the doctor and social worker would lose from their official duties.[230] The court specifically noted the "limited resources" of the VA in caring for all veterans in the nation—as such, allowing employees to be coopted for private litigation would risk them being unavailable to their normal patients.[231] Against these

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224 5 U.S.C. § 706(2)(A) (2018).

225 Solomon v. Nassau Cty., 274 F.R.D. 455, 456 (E.D.N.Y. 2011).

226 *Id.*

227 38 C.F.R. §§ 14.803–.804 (2020).

228 *Id.* § 14.804.

229 *Solomon*, 274 F.R.D. at 459.

230 *Id.*

231 *Id.* (quoting from the VA's reply brief—"[i]f VA doctors or employees were required to give testimony for every patient they treated in unrelated civil actions, e.g., car accidents, slip and falls, discrimination cases, or worker's compensation cases, then employees would be unable to perform their normal, official duties" (citation omitted)).

reasons, the court could not say that the VA's decision constituted an abuse of discretion under the "arbitrary and capricious" standard.[232]

The court then turned its attention to the standard under Federal Rule 45, which focused on whether or not the subpoena created an "undue burden."[233] The court noted that "many of the factors that the VA weighed in deciding whether to grant the *Touhy* request, such as the detrimental impact on the agency, the VA employees, and other patients, are also applicable to the Court's analysis under the Rules."[234] Such analysis could also include whether the government had a serious interest in protecting its employees from being commandeered into private service.[235] The same burdens on the social worker and doctor were equally compelling under these factors.[236] Further, in following the Federal Rule 26 command[237] that the undue burden be balanced against the necessity of obtaining the information, the court noted that the plaintiff had every opportunity to utilize an outside medical expert to testify.[238] As such, the same result was achieved under both standards.

The situation in *Solomon* is not unusual—cautious district courts have found that when it comes to the question of agency allocation of resources, the outcome as to a third-party subpoena is the same regardless of whether the "arbitrary and capricious" or "undue burden" standard is applied.[239]

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232 *Id.* For similar reasoning in another case, see *Bobreski v. EPA*, 284 F. Supp. 2d 67, 80 (D.D.C. 2003) ("The plaintiff may not agree with EPA's assessment and its denial of the plaintiff's request. But neither the plaintiff nor this court may substitute their judgment for that of the EPA.").

233 *Solomon*, 274 F.R.D. at 460.

234 *Id.*

235 *Id.*

236 *Id.*

237 A court must limit discovery when "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." FED. R. CIV. P. 26(b)(C)(i).

238 *Id.* 26(b)(1).

239 *See, e.g.*, Quiles v. Union Pac. R.R. Co., No. 8:16CV330, 2018 WL 734172, at *2 (D. Neb. Feb. 6, 2018), *aff'd*, No. 8:16CV330, 2018 WL 2148979 (D. Neb. May 10, 2018) ("In the case at hand, this Court would reach the same result using either standard."); Estate of Williams v. City of Milwaukee, No. 16-CV-869-JPS, 2017 WL 1251193, at *2 (E.D. Wis. Mar. 30, 2017) (noting that even "[t]hough it appears the [Ninth Circuit] standard is the more modern view... the Court need not stake a claim to either..."—the court goes on to note that the reason provided by the agency fails to satisfy "either standard of review"); Abdou v. Gurrieri, No. 05-CV-3946 (JG)(KAM), 2006 WL 2729247, at *4 (E.D.N.Y. Sept. 25, 2006) ("The Court finds that, under either standard, the subpoena for testimony should be quashed."); Johnson v. Bryco Arms, 226 F.R.D. 441, 445 (E.D.N.Y. 2005) ("In the instant case

Regardless, cases look to the burden on agency time and personnel hours—including (1) time spent by agency employees away from other tasks;[240] (2) the time agency personnel would take to prepare to meet the requirements of the subpoena;[241] (3) any cumulative impact of allowing private litigants to summon agency personnel;[242] and (4) cost.[243]

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there is no need to decide what burden applies. Whatever the standard, the Magistrate Judge's decision should be affirmed . . . .").

240 *In re* Vioxx Prod. Liab. Litig., 235 F.R.D. 334, 345 (E.D. La. 2006) ("This Court does not see how the deposition of one employee during non-working hours would cripple the FDA's ability to function."); Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989) (noting that the EPA "has a valid and compelling interest in keeping its On-Scene Coordinators, as a class, free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest"); Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1278 (D. Colo. 2011) ("The burden on USPS employees and the disruption to postal operations required for compliance with the subpoenas is minimal. The testimonial subpoenas call for two depositions, each limited to three hours."); *Quiles*, 2018 WL 734172, at *2 ("If agency employees were routinely permitted or compelled to testify in private civil actions, significant loss of manpower hours would predictably result and agency employees would be drawn from other important agency assignments." (internal quotations and citations omitted)).

241 Beckett v. Serpas, No. 12-910, 2013 WL 796067, at *11 (E.D. La. Mar. 4, 2013) (having agency personnel appear for a two-hour deposition will not excessively strain agency resources); City of Ashland v. Schaefer, No. 08-3048-CL, 2008 WL 2944681, at *6 (D. Or. July 31, 2008) ("[T]he USDA is in the best position to determine the time and effort involved in preparing the employees for their depositions and testimony and how that time commitment might hamper their ability to fulfill their duties. Thus, the Court cannot find that the USDA's decision regarding the testimony's undue interference with the employees' [duties] was unreasonable . . . .").

242 Davis Enters. v. EPA, 877 F.2d 1181, 1187 (3d Cir. 1989) ("Appellants' argument about the minimal burden in this case fails to take into account the EPA's legitimate concern with the potential cumulative effect of granting such requests. . . . Its concern about the effects of proliferation of testimony by its employees is within the penumbra of reasonable judgmental decisions it may make."); *id.* ("Appellants have not shown that the agency's judgment that the potential cumulative impact of granting such requests would constitute a drain on the agency's resources is arbitrary.").

243 *Id.* at 1188 ("[W]e cannot say that [the agency] abused its discretion in deciding that its interest in having the time of its employees (and therefore taxpayers' money) spent on agency business outweighed the interests of Appellants in having the EPA reports admitted into evidence in private litigation to which the EPA was not a party."); Benhoff v. U.S. Dep't of Justice, No. 16CV1095-GPC(JLB), 2017 WL 840879, at *4 (S.D. Cal. Mar. 3, 2017) ("[P]roducing the documents would not be an efficient use of taxpayer dollars . . . .").

2. Agency Mission

In addition to discussion surrounding agency resources, most courts that analyze a court's third-party subpoena to a federal agency discuss the impact of the subpoena on the agency's statutory mission.[244] Agencies are products of their statutory missions—the EPA must complete its mission to safeguard human health and the environment,[245] while the VA must care for veterans and their dependents.[246] Time spent answering third-party subpoenas, in taking time and resources away from the agency's work, compromises the statutory mission of the agency. Additionally, part of the agency's mission is to protect government neutrality, and guard against the appearance of impropriety.

Courts that analyze the question of agency mission in the third-party subpoena context are often doing so in conjunction with the APA's arbitrary and capricious standard. This seems obvious—the deferential standard of the APA holds the agency as the expert on its own mission and resources.[247] For example, in *CCA of Tennessee, LLC v. Department of Veterans Affairs*, the court noted that taking the deposition of an agency employee who was a specialized doctor with a heavy patient load would not contribute to the agency's mission, and thus the decision not to allow the doctor to testify was not arbitrary or capricious.[248] However, the question of public mission is also considered in an undue burden analysis, with courts both quashing and supporting subpoenas based on considerations of agency mission.[249]

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244 *See, e.g.*, Cleary, Gottlieb, Steen & Hamilton v. U.S. Dep't of Health & Human Servs., 844 F. Supp. 770, 785 (D.D.C. 1993) (holding that HHS was rational in disallowing two researchers to give deposition testimony as it would disrupt the advancement of public health).

245 Physicians for Soc. Responsibility v. Wheeler, 359 F. Supp. 3d 27 (D.D.C. 2019).

246 *See* Solomon v. Nassau Cty., 274 F.R.D. 455, 459 (E.D.N.Y. 2011) (noting that requested testimony would not "assist the VA in performing its statutory duty to serve the nation's veterans").

247 For an explanation of the arbitrary and capricious standard of review, see *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983); see also United States v. Mintz, No. 91-40045-01-DES, 1996 WL 666784, at *1 (D. Kan. Mar. 15, 1996).

248 CCA of Tennessee, LLC v. Dep't of Veterans Affairs, No. 09cv2442 WQH (CAB), 2010 WL 1734953, at *8 (S.D. Cal. Apr. 27, 2010).

249 *See In re* Vioxx Prod. Liab. Litig., 235 F.R.D. 334, 346 (E.D. La. 2006) ("[The] deposition would further the objectives of the FDA and the FDCA. The objective of the FDA and FDCA is the protection of the public. The FDA protects the public by enacting regulations governing the sale and marketing of pharmac[e]utical products and, based upon those regulations, approving and monitoring

Additionally, the question of agency neutrality in private disputes was addressed in *City of Ashland v. Schaefer*.[250] In that case, the USDA articulated that it wished to maintain neutrality in a dispute between two outside entities with which the USDA regularly interacted.[251] The court agreed that the USDA had no business inserting itself into an unnecessary political and legal dispute, and it was not in the interest of the USDA to become involved in the litigation.[252] Other cases reveal similar analyses.

3. A Distinction Without a Difference

Overall, a vast number of cases that examine the question of a federal court's third-party subpoena to an administrative agency show that the same result can be achieved under either approach, both while examining the use of the agency's resources and the impact on the agency's statutory mission.

That certainly begs the question—how split are the circuits? Certainly, they claim to espouse different approaches to the question of deference. The Fourth Circuit and Eleventh Circuit approach is described as slightly more deferential to the agency, with the Supreme Court articulating the scope of the "arbitrary and capricious" review as "narrow."[253] In contrast, the use of Federal Rule of Civil Procedure 45 is seen as the more "requester-friendly" standard.[254] Perhaps this is because the court must balance the interests served by demanding compliance with the statute against the government's interest in quashing it—the "arbitrary and capricious" standard contains no such explicit balancing test.[255] However, many *Touhy* regulations do take

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pharmaceutical products for sale and marketing. Any improvements deriving from such a reevaluation would promote the protection of the public—the FDA's ultimate goal.").

250 City of Ashland v. Schaefer, No. 08-3048-CL, 2008 WL 2944681 (D. Or. July 31, 2008).

251 *Id.* at *6.

252 *Id.* It is worth noting that this case involved a state court attempting to subpoena a federal official. *Id.* at *4.

253 *See* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also* Beckett v. Serpas, No. 12-910, 2013 WL 796067, at *8 (E.D. La. Mar. 4, 2013) ("I will apply the APA standard, which is more deferential to the Department.").

254 *See* Anwar v. Fairfield Greenwich Ltd., 297 F.R.D. 223, 226 (S.D.N.Y. 2013) (noting the "requester-friendly standard set forth in Rule 45").

255 *Id.* ("[T]he Court must balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it." (internal quotations and citations omitted)).

into account the interests of the private litigant in achieving the information, thus incorporating similar balancing.

Ultimately, the question of the circuit split seems to be one of sovereign immunity.[256] Pursuant to the Fourth Circuit's reasoning, only the APA, § 702, grants the waiver of sovereign immunity that would allow a federal court to subpoena a federal agency employee.[257] As such, any review must be conducted under the APA's arbitrary and capricious standard of review. For the Ninth Circuit, sovereign immunity considerations exist when a state court attempts to subpoena a federal official, but there is no such concern when a federal court attempts to subpoena a federal official.[258]

Despite this difference in approach to sovereign immunity, there may be a way to read the circuits' varying approaches in tandem. If the question is ultimately one of how to achieve a waiver of sovereign immunity, the answer may be obvious—the APA. Courts have articulated that a subpoena served on a federal official in her official capacity is an action against the United States and sovereign immunity is implicated.[259] As the Second Circuit noted,

> [t]he rules governing discovery and the issuance of subpoenas duces tecum for the production of documents by third parties include no express waivers of the type necessary to subject the government to compulsion in judicial proceedings to which it is not a party. The only express waiver to be found in this regard is in the APA.[260]

Courts differ on how the APA's waiver of sovereign immunity comes to exist—some articulate that § 702's waiver of sovereign immunity is limited by § 706's arbitrary and capricious standard of review, while other

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256 Houston Bus. Journal, Inc. v. Office of the Comptroller of the Currency, U.S. Dep't of Treasury, 86 F.3d 1208, 1211–12 (D.C. Cir. 1996).

257 *Serpas*, 2013 WL 796067, at *7 (describing the Fourth Circuit approach—"[only] the APA contains the waiver of sovereign immunity that allows review of the decision at all").

258 *See* EPA v. Gen. Elec. Co., 197 F.3d 592, 598 (2d Cir. 1999) (identifying only a broad authority on district courts to limit discovery and the need to preserve testimonial privilege).

259 *See, e.g.*, COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999); *In re* Bankers Tr. Co., 61 F.3d 465, 470 (6th Cir. 1995); Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778 (9th Cir.1994); Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197 (11th Cir. 1991); Davis Enters. v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989); *In re* PE Corp. Sec. Litig., No. 3:00 CV 705 CFD TPS, 2005 WL 806719, at *6–7 (D. Conn. Apr. 8, 2005).

260 *Gen. Elec. Co.*, 197 F.3d at 598.

courts note that § 702 is a blanket waiver of sovereign immunity and does not require that the arbitrary and capricious standard be used.[261]

Section 706 specifically notes that a reviewing court can "decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action."[262] In doing so, the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law."[263] This section is usually read in conjunction with APA § 702, which provides for a waiver of the agency's sovereign immunity when there has been "legal wrong because of agency action."[264] However, there is no mandate that the sections be read together.[265] There is a presumption that an agency action is subject to judicial review, and only when such review is precluded by Congress do federal courts lack jurisdiction.[266] Nearly all courts agree that the Housekeeping Statute does not preclude such review.[267]

The critical language in § 702 is "legal wrong because of agency action"—in the third-party subpoena context, the law creating the "wrong" could be Federal Rule 45.[268] This same theory is used successfully in other contexts. For example, in *Pueschel v. Chao*,[269] the D.C. Circuit examined a case in which plaintiff, a former federal employee, brought an action against the Secretary of Transportation when her disability benefits were reduced by

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261 Linder v. Calero-Portocarrero, 251 F.3d 178, 181 (D.C. Cir. 2001) ("Unlike the Fourth and Second Circuits, we have never read the waiver contained in APA § 702 to be limited by APA § 706. Nothing in the language of § 702 indicates that it applies only to actions brought under § 706, and our decisions have never so held.").

262 5 U.S.C. § 706 (2018).

263 *Id.*

264 *Id.* § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

265 *See, e.g.*, Flanigan v. W. Milling, LLC, No. 1:18-mc-00024-SAB, 2018 WL 4775619, at *2 (E.D. Cal. May 1, 2018), *report and recommendation adopted*, No. 1:18-mc-00024-DAD-SAB, 2018 WL 4775613 (E.D. Cal. July 18, 2018) (reading § 702 separately from § 706 and noting that in "federal court, a litigant can seek to obtain records from a third party under Rule 45 of the Federal Rules of Civil Procedure. The federal government has waived its sovereign immunity in federal court under the APA, 5 U.S.C. § 702," but not explaining what in § 702 allows such review).

266 Wallace v. Christensen, 802 F.2d 1539, 1542 (9th Cir. 1986) (en banc).

267 *See supra* Part I.

268 *Contra* EPA v. Gen. Elec. Co., 212 F.3d 689, 690 (2d Cir. 2000) (noting this approach, apparently argued by General Electric in a petition for rehearing, but not adopting or discussing it).

269 Pueschel v. Chao, 357 F. Supp. 3d 18 (D.D.C. 2018).

the Office of Worker Compensation.[270] The court was forced to discuss the issue of sovereign immunity when plaintiff articulated a constitutional challenge to the disability benefits determination.[271] The court noted that "[t]he [APA], however, waives the Federal Government's sovereign immunity . . . so long as the plaintiff does not seek monetary damages."[272] Further, this waiver applies whether the suit was brought "under the APA or not,"[273] i.e., even if the suit were brought under the Federal Rules of Civil Procedure.

Finally, under § 702, a plaintiff "claiming a right to review" an agency action must specify how that agency action has resulted in a "legal wrong."[274] The APA waiver of sovereign immunity requires an agency action and a legal wrong, defined as any invasion of a legally protected right.[275] In the third-party subpoena context, the legally protected right is the one to compel "every man's" evidence.[276]

The benefits of this approach are many. First, it provides a "hook" to achieve a waiver of sovereign immunity. It seems clear that for a federal agency to be compelled to action by a court, state or federal, it must waive sovereign immunity.[277] APA § 702 supplies that hook and accounts for an explanation that courts adopting the Ninth Circuit approach have had a hard time providing.[278] Further, it removes any argument of special treatment or misguided argument of privilege surrounding federal agencies. Most modern courts have articulated that agencies, like all other "mortals,"

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270 *Id.* (noting that her statutory claims were under Title VII, the Americans with Disabilities Act, and the Rehabilitation Act).

271 *Id.* at 27–28.

272 *Id.* at 28.

273 *Id.*

274 Smith v. U.S. Dep't of Agric., 888 F. Supp. 2d 945, 954 (S.D. Iowa 2012).

275 *Id.*; Pennsylvania R.R. Co. v. Dillon, 335 F.2d 292, 294 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 945 (1964).

276 United States v. Bryan, 339 U.S. 323, 331 (1950) (discussing the legal right to "every man's evidence").

277 Beckett v. Serpas, No. 12-910, 2013 WL 796067, at *4 (E.D. La. Mar. 4, 2013) ("A subpoena served on a federal official acting in his official capacity is an action against the United States subject to sovereign immunity.").

278 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778 (9th Cir. 1994) (noting sovereign immunity concerns but not explicitly stating how a waiver would apply).

should be subject to Federal Rule 45.[279] The difficulty in reconciling the case law thus seemed to be one of sovereign immunity, only.

Finally, it seems worth noting that the district courts actually analyzing these issues, particularly in circuits that have yet to commit to a particular approach, do so using the same considerations of resources and mission. In some sense, they are working backwards from factors to a standard. The factors to be assessed are universal, and thus the only remaining question is one of legal standard, or what words to use in articulating the rule. In the absence of further guidance from the Supreme Court, the best approach may be to recognize that waiver of sovereign immunity comes from the APA, but only Federal Rule 45 supplies the statutory standard to adjudge quashing a third-party subpoena.

CONCLUSION

From the 1950s to now, *Touhy* has continued to be a procedural anomaly that serves only to confuse an unsuspecting litigant with its complicated doctrine and needless circuit split. Such confusion arises out of a disagreement largely over how to achieve a waiver of sovereign immunity when a federal court subpoenas a federal officer.

This Article has attempted to reconcile that split simply—the waiver necessary to achieve sovereign immunity is in the APA, and the standards of § 702 and § 706 still allow Federal Rule 45 to be applied when a court determines whether or not to quash a third-party subpoena sent to a federal agency.

However, such reconciliation may be largely academic. As in all things, the circuit courts can speak, but results are achieved in the district courts (where the rubber hits the road). It appears district courts are looking largely to agency resources and mission when they make decisions about third-party subpoenas sent to federal agencies. As such, the wise litigant would frame their *Touhy* arguments in light of these considerations.

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279 "[Federal] officers should be subject to the same rule of law that governs other mortals." Quezada v. Mink, No. 10-cv-00879-REB-KLM, 2010 WL 4537086, at *3 (D. Colo. Nov. 3, 2010).