

“THE VOICE OF ADJURATION”: THE SIXTH  
AMENDMENT RIGHT TO COMPULSORY PROCESS  
FIFTY YEARS AFTER *UNITED STATES EX REL.  
TOUHY V. RAGEN*

MILTON HIRSCH\*

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And if a person sin, and hear the voice of adjuration, and is a witness, whether he has seen or known of it; if he do not utter it, then he shall bear his iniquity.<sup>1</sup>

I. INTRODUCTION

Jack Defendant is being prosecuted in state court. The case against him was made by Detectives Smith and Jones. The prosecutor calls Smith to the stand, elicits his testimony, then rests without calling Jones. This tactic nourishes a suspicion that has been growing in the mind of Jack’s defense counsel that there is something

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\* B.A., University of California, 1974; J.D., Georgetown University, 1982. The author gratefully acknowledges the contributions made in the preparation of this article by Roy Kahn, Robert Kuntz, and Joshua Zelman.

1. *Leviticus* 5:1. This passage is understood to mean that anyone who is summoned as a witness, and who, having knowledge of the case, refuses to testify, shall be accused.

In this verse, the principle was established in Jewish law that every person who has knowledge of relevant facts has a duty to testify, and if he withholds his testimony he is guilty of a transgression. According to the plain meaning of the verse, this obligation applies to all factual information acquired in any manner, whether as an eyewitness or by any other means. . . .

MENACHEM ELON, *JEWISH LAW* 283 (English ed. 1994).

The “voice of adjuration” (in Hebrew, *kol alah*) remonstrates not with the sinner, but with the witness, urging him to testify. The word “subpoena”—a command, under penalty of law, to bear witness or produce evidence—conveys a similar meaning.

fishy about the case against Jack. Perhaps, if offered just the right questions, Jones might contradict or at least undercut Smith's testimony.

Deciding whether to call Detective Jones as a defense witness will be difficult. Giving effect to that decision will be easy. Defense counsel need do no more than subpoena Jones; or, if Jones is waiting for Smith in the courthouse hallway, simply announce, "The defense calls Detective Jones."

Across the street, Jill Defendant is being prosecuted in federal court. The case against her was made by Agents Smith and Jones. The Assistant United States Attorney calls Smith to the stand, elicits his testimony, then rests without calling Jones. This tactic nourishes a suspicion that has been growing in the mind of Jill's defense counsel that there is something fishy about the case against Jill. Perhaps, if offered just the right questions, Jones might contradict or at least undercut Smith's testimony.

Deciding whether to call Agent Jones as a defense witness will be difficult. Giving effect to that decision will be next to impossible. In attempting to subpoena Agent Jones, Jill's lawyer will subject himself and his client to the Kafkaesque legal provisions of 28 C.F.R. §§ 16.22-16.29.<sup>2</sup> When the federal judge impatiently demands to know if the defense plans to call any witnesses, Jill's attorney will explain that his subpoena to Agent Jones came back with a letter from the U.S. Attorney's Office. The U.S. Attorney's Office insists that, pursuant to the cited regulations, the subpoena cannot be considered until defense counsel states in writing what testimony he expects to elicit from Agent Jones. Once that information is provided, the subpoena will be routed to the appropriate authorities in the Department of Justice for further consideration. All this may take some time. Perhaps, suggests defense counsel very meekly, His Honor would intervene? After all, Jill has a Sixth Amendment right to compulsory process and Jill's lawyer ought not to have to divulge his theory of the case to his adversary in order to effectuate that right—should he?

But His Honor is unhelpful. His Honor explains that these regulations are routinely relied upon by agencies within the Department of Justice, and kindred regulations by other federal agencies. In the meantime, notes His Honor pointedly, the jury is being kept waiting. Does defense counsel have a witness available or does he not? And if no witness is available, should the trial not proceed to closing argument?

If Jill is bewildered, she has every right to be. The notion that "regulations"—dreary, fustian prose drafted in the chiaroscuro re-

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2. 28 C.F.R §§ 16.22-16.29 (2001).

cesses of some federal bureaucracy, never submitted to the light of legislative debate, collected in a “Code” as succinct and readable as the Detroit telephone directory—have the power to paralyze Jill’s constitutionally-guaranteed right to compulsory process is indeed bewildering. Such a notion cannot be the law. Such a notion is not the law. Such a notion, however, is widely believed to be the law—believed even by some federal judges.

It was not always so. The first part of this Article considers the early history in this country of the right to compulsory process. American courts, state and federal, energetically enforced the compulsory process rights of criminal defendants, discountenancing claims by executive-branch officers of any privilege or immunity from process. The Aaron Burr litigation<sup>3</sup> is both entertaining and instructive on this point.

In modern American jurisprudence, the opinion of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*<sup>4</sup> is the case most cited both by executive-branch agencies in support of their regulations and by courts confronted by a demand for evidence withheld in reliance upon such regulations. *Touhy* involved a state court defendant seeking habeas relief in U.S. district court who caused a subpoena *duces tecum* to be served on the agent in charge of the Chicago FBI office.<sup>5</sup>

Any respectable short list of famous sayings that were never actually said would have to include:

Horace Greeley in the *New York Tribune*: “Go West, young man!”<sup>6</sup>

Humphrey Bogart as Richard Blaine in the movie *Casablanca*: “Play it again, Sam.”<sup>7</sup>

3. See discussion *infra* Section II.A.

4. 340 U.S. 462 (1951).

5. *Id.* at 463-64.

6. He never actually said it. John Soule, an Indiana newspaperman, coined that phrase in 1851, more than ten years after Greeley wrote in the *New York Tribune* that, “If you have no family or friends to aid you . . . turn your face to the Great West and there build up your home and fortune.” See David H. Fenimore, *Horace Greeley (1811-1872), Editor of the New York Tribune*, at <http://www.honors.unr.edu/~fenimore/greeley.html> (last visited July 1, 2002) (on file with author). It was the first of many such pronouncements, and Soule—in Indiana, a denizen of what then constituted “the West”—kept up with Greeley’s papers.

7. He never actually said it. *E.g.*, PAUL F. BOLLER, JR. & JOHN GEORGE, *THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES AND MISLEADING AUTHORITIES* 8-9 (1989). See also James Cousineau, *Maltese Falcon-Casablanca*, at [http://maltesefalcon.bogart.com/bogart\\_casablanca.html](http://maltesefalcon.bogart.com/bogart_casablanca.html) (last visited July 1, 2002) (on file with author); Gihan Perera, *Say it Again, Sam: The Best Quotations from Casablanca*, at <http://www.gihanperera.com/home/casablanca.html> (last visited July 1, 2002) (on file with author) (“The best-known quotation from the world’s greatest film is ‘Play it again, Sam.’ Ironically, this quotation *never* appears in the story—it’s one of the silver screen’s most widespread myths.”).

William Shatner as Captain Kirk in the TV show *Star Trek*: “Beam me up, Scotty.”<sup>8</sup>

The United States Supreme Court in *United States ex rel. Touhy v. Ragen*: “The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates by . . . regulation.”<sup>9</sup>

Greeley, Bogart, and Shatner said things very like the famous misquotations attributed to them. But the Supreme Court in *Touhy* never said anything akin to the misinterpretation commonly given to *Touhy*. Fifty years after *Touhy* was propounded, the “*Touhy* doctrine” bears little resemblance to, and cannot be derived from, the *Touhy* opinion. As discussed in the second section of this Article, *Touhy* did no more than recognize a power vested by statute in the heads of executive agencies scarcely broader than that necessary to enable those agency heads to designate the custodians of records for their departments.

The last section of this Article considers the cases applying *Touhy*. In civil cases, of course, no Sixth Amendment compulsory process right is implicated. The power of a civil litigant to enforce a subpoena directed to a federal agent or employee is discussed briefly, largely as a proem to the more important (from a standpoint of constitutional law) question of the right of a criminal defendant to enforce such a subpoena. To the latter question extended consideration is given. The inescapable conclusion is that federal courts commonly read *Touhy* out of all proportion, and the Sixth Amendment compulsory process power out of all existence. In state courts the issue of sovereign immunity is thrown into the mix, resulting in even more confusion.

The case of Jill Defendant is anything but hypothetical. The reported opinions confirm what experienced criminal trial practitioners know: criminal defendants routinely seek, and are routinely denied, evidence and testimony cloistered behind the all-but-impregnable barrier of executive agency ukase. A seemingly inconsequential rule intended to enable agency heads to manage their departments has become an elaborate body of regulations acting in derogation of the

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8. He never actually said it in the TV series. “Trekkies” are quick to point out, however, that he did get around to saying it in the fourth *Star Trek* movie. See Jim Matthews, *Jim’s Message Boards*, at <http://www.jimmatthews.startreksites.net/custom.html> (last visited May 28, 2002) (on file with author).

9. *Tholen Supply Co. v. Cont’l Cas.*, 859 F. Supp. 467, 469 (D. Kan. 1994); see also *Ferrell v. Yarberry*, 848 F. Supp. 121, 123 (E.D. Ark. 1994) (“[In *Touhy*, t]he U.S. Supreme Court has explicitly recognized the authority of agency heads to restrict testimony of their subordinates by regulations . . . .”); *Dent v. Packerland Packing Co.*, 144 F.R.D. 675, 678 (D. Neb. 1992) (“The United States Supreme Court has specifically recognized the authority of administrators of federal agencies to restrict subordinates from participating in judicial proceedings . . . .”). The Supreme Court has never said anything remotely resembling what appears in the foregoing cases—not in *Touhy*, and not elsewhere.

Anglo-American principle that the court is entitled to every man's evidence. That federal judges, particularly in criminal cases, have acquiesced in and even embraced the executive agency position is most troubling of all. On the occasion of *Touhy's* golden anniversary, courts would do well to remember the words of President Theodore Roosevelt in a 1904 message to Congress: "No man is above the law, and no man is below it; nor need we ask any man's permission when we require him to obey it."<sup>10</sup>

## II. THE ROAD TO *TOUHY V. RAGEN*

### A. *Compulsory Process at Common Law and at the Outset of American Constitutional History*

Although a relative latecomer to the common law,<sup>11</sup> the compulsory process power was well-recognized in early America, earning a place in the national Constitution as well as the constitutions of most states.<sup>12</sup> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."<sup>13</sup>—a guarantee made applicable as against the states by operation of the Fourteenth Amendment.<sup>14</sup>

From the earliest days of the Republic it was generally understood that no one, however lofty his station, was exempt from the reach of the compulsory process rights of even the lowliest defendant. Deriving the same principle from English cases in 1827, Jeremy Bentham—in much-quoted language that could have come from no pen but his—writes:

What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves,—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary,—they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the

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10. President Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), in JUSTIN KAPLAN, *BARTLETT'S FAMILIAR QUOTATIONS* 576 (1992).

11. The development of the compulsory process power is traced in JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2190 (1904). See also *United States v. Reid*, 53 U.S. (12 How.) 361, 364-66 (1851); *West v. State*, 1 Wis. 209, 230-33 (Wis. 1853); THOMAS STARKIE, *A PRACTICAL TREATISE ON THE LAW OF EVIDENCE* 84 (Theron Metcalf et al. eds., 6th Am. ed. 1837).

12. WIGMORE, *supra* note 11, § 2191 & n.1.

13. U.S. CONST. amend VI.

14. *Washington v. Texas*, 388 U.S. 14, 15 & n.2 (1967).

same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.<sup>15</sup>

The defendant in *United States v. Cooper*<sup>16</sup> was “indicted for a libel on the President.”<sup>17</sup> He sought, at a time when Congress was in session, to compel the testimony of several congressmen at his trial. Justice Chase’s terse opinion includes the following dictum: “The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases.”<sup>18</sup> Similarly, in *Respublica v. Duane*<sup>19</sup> the issue was whether the immunity from arrest granted to U.S. congressmen when Congress is in session<sup>20</sup> included immunity from the compulsory process of a trial subpoena. The Pennsylvania Supreme Court had no difficulty concluding that it did not; the constitutional privilege from arrest is not a general immunity from all judicial visitorial powers. The court went further: If a congressman were to ignore a subpoena, the constitutional immunity from arrest might not protect him from bodily “attachment . . . [for] neglecting or refusing to attend in consequence of a subpoena properly served.”<sup>21</sup>

The principle that no man is above the compulsory process of the law was burned into our early jurisprudence in figures of fire. In 1807, Aaron Burr, former Vice President of the United States, was tried for treason.<sup>22</sup> The trial was presided over by John Marshall, then Chief Justice of the United States.<sup>23</sup> Burr was lead counsel in his own defense, but was assisted by (among others) Luther Martin, a legendary legal figure in his time. On June 9, Burr made an application to the court: President Jefferson, in a proclamation to Congress the previous November 27, had referred to a letter and other

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15. WIGMORE, *supra* note 11, § 2192 (quoting THE WORKS OF JEREMY BENTHAM 320-21 (John Bowring ed., 1843)). Both R.P. CROOM-JOHNSON & G.F.L. BRIDGMAN, TAYLOR ON EVIDENCE § 1381 n.m (1931), and ANTHONY HAWKE, ROSCOE’S CRIMINAL EVIDENCE 132 (1928) [hereinafter ROSCOE], refer to newspaper reports of the 1911 case of *R. v. Mylius*, that stated, “[T]he A.G. had the King’s authority in writing for saying that he would have been a witness had not his law officers advised him that it would be ‘unconstitutional.’”

16. 4 U.S. (4 Dall.) 341 (C.C.D. Pa. 1800).

17. *Id.* at 341.

18. *Id.*

19. 4 Yeates 347 (Pa. 1807).

20. U.S. CONST. art I, § 6, cl. 1. (“They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . .”).

21. *Respublica*, 4 Yeates at 348.

22. See generally *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) [*Burr I*]; *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) [*Burr II*].

23. *Burr I*, 25 F. Cas. 30; *Burr II*, 25 F. Cas. 187.

papers received by him from General Wilkinson, the principal witness against Burr.<sup>24</sup> Burr had reason to believe that these papers would exculpate him in part, and would demonstrate that the case against him was a political plot to discredit and destroy him.<sup>25</sup> He had applied to the Secretary of the Navy for permission for his counsel to inspect these papers, and had been denied.<sup>26</sup> “Hence,” claimed Burr, “I feel it necessary . . . to call upon [the court] to issue a subpoena to the President of the United States, with a clause, requiring him to produce certain papers; or in other words, to issue the subpoena *duces tecum*.”<sup>27</sup>

Debate on the amenability of the President to the court’s subpoena power was spirited. Luther Martin and Thomas Jefferson had little in common, but one attribute they surely shared: each loathed the other to the marrow of his bones. Martin’s biographers recall his response to the prosecution’s claim of executive privilege:

The president has undertaken to prejudge my client by declaring that “of his guilt there can be no doubt.” He has assumed . . . the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country, which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this president of the United States, who has raised all this absurd clamour, pretend to keep back the papers which are wanted for this trial, where life itself is at stake? It is a sacred principle, that in all such cases, the accused has a right to all the evidence which is necessary for his defence. And whoever withholds, wilfully, information that would save the life of a person, charged with a capital offence, is substantially a murderer, and so recorded in the register of heaven.<sup>28</sup>

The amenability of the President to subpoena *ad testificandum* was largely conceded;<sup>29</sup> the question over which Chief Justice Marshall labored was the viability of the *duces tecum* portion of the subpoena. In the end, however, his course was clear. The constitutional guarantee of the right to compulsory process made no exception for presidents:

It cannot be denied that to issue a subpoena to a person filling the exalted station of the Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if

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24. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 433 (1929).

25. *Id.*

26. *Id.*

27. *Id.*

28. PAUL S. CLARKSON & R. SAMUEL JETT, *LUTHER MARTIN OF MARYLAND* 248 (1970) (quoting DAVID ROBERTSON, *REPORTS OF THE TRIALS OF COLONEL AARON BURR* 127 (Philadelphia, Hopkins & Earle 1808)).

29. See, e.g., BEVERIDGE, *supra* note 24, at 445; *Burr I*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).

it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it.<sup>30</sup>

### B. *The Revenue Cases*

As late as 1898, Underhill, in his treatise on criminal evidence, could state categorically that “[d]isobedience to a subpoena *duces tecum* by a post office or internal revenue official is not excused by the fact that the rules of his department forbid him to disclose any information contained in its records.”<sup>31</sup> The assertion is seemingly unremarkable. If, as was established at the outset of the 19th century, the highest federal official was not exempt from the obligations of subpoenas *ad testificandum* and *duces tecum*, surely it was safe to

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30. WIGMORE, *supra* note 11, § 2371. Both Marshall in his opinion and Wigmore in his treatise leave open the possibility that the administrative responsibilities of the President or some other executive officer might oblige the court to modify, or to put limitations upon, the time, place, and manner in which the recipient of the subpoena would be obliged to comply with it. Jefferson, in response to the Burr subpoena, offered to be examined by deposition in Washington rather than in person in far-off (in those days) Richmond, so that he could continue to discharge his presidential duties. *Id.* But there is no suggestion whatever that this constitutes a general immunity from, or an exception to, the compulsory process rights of litigants. Wigmore cites with approval the following language from a state case in which a subpoena was issued to the governor:

The argument *ab inconvenientie*, that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on his way to California, at the time of these riots, is an opposite example.

Appeal of Hartranft, 85 Pa. 433, 457 (Pa. 1877).

The notion that the President enjoys no general immunity from compulsory process has been affirmed in our own time. See *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974).

31. H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 252 (1898). This is not to say that Underhill and his contemporaries were unaware of executive privilege. Elsewhere in his treatise, and in seeming contradiction of the statement quoted in the text, Underhill observes:

The common law has always regarded as privileged all information in the possession of executive officials as such; and has uniformly declined to compel them to divulge facts of which they have obtained knowledge in any official capacity. . . . In this country the various executive departments of the government, both federal and state, acting under the power conferred by the legislative branch to formulate rules for the proper conduct of departmental affairs, have forbidden their subordinate officials to disclose official information, unless permitted or required to do so by their official superiors.

*Id.* at § 170. As discussed *infra* Part V.B.1., the existence of executive privilege (and all other evidentiary privileges) is entirely compatible with the notion that no one is above the law’s compulsory process power.

say at the close of the 19th century that such lowly federal officials as post office clerks and internal revenue officers were not exempt.

In support of this seemingly unremarkable assertion, Underhill cites *In re Hirsch*.<sup>32</sup> *Hirsch* was one of several cases—among them *In re Weeks*<sup>33</sup> and *In re Comingore*<sup>34</sup>—in which federal revenue officers were served with subpoenas issuing from state courts. In *Hirsch*, a criminal prosecution had been brought against Stephen H. Cole “for keeping intoxicating liquors . . . with intent to sell the same unlawfully.”<sup>35</sup> *Hirsch* was subpoenaed in the state case in his capacity as deputy United States internal revenue collector

to testify [as to] his knowledge in said [state] criminal cause, and to bring with him any and all papers, applications, or books in his possession showing that said Cole had paid a tax to the United States, or received a license from the United States for the sale . . . of spirituous or intoxicating liquor.<sup>36</sup>

*Hirsch* did appear and gave some testimony, but refused to produce the sought-after papers on the grounds of Internal Revenue regulations.<sup>37</sup> He was then imprisoned for contempt, and sought relief by way of habeas corpus in federal court. That court considered and rejected four objections made to the imposition of contempt sanctions upon a federal officer who failed to comply with a state court subpoena.<sup>38</sup>

The federal court began its analysis by recognizing that then-existing § 251 of the Revised Statutes of the United States authorized the Secretary of the Treasury “to prescribe rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the revenue laws.”<sup>39</sup> That such regulations would have the force of law “over those to be affected thereby” the court did not dispute, citing “the navy and army regulations [as illustrative] of this class of rules.”<sup>40</sup> The regulation or policy upon which *Hirsch* purported to rely, however, was in the court’s view a different matter. The federal court took the curious position that shielding *Hirsch* from the reach of the state court’s subpoena power would shield the state court defendant from prosecution under state law for violation of state liquor statutes. “The government of the United States does not undertake to interfere with the

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32. 74 F. 928 (C.C.D. Conn. 1896). Underhill also cites to a state case, *Rice v. Rice*, 47 N.J. Eq. 559 (N.J. 1891).

33. 82 F. 729 (D. Vt. 1897).

34. 96 F. 552 (D. Ky. 1899).

35. *In re Hirsch*, 74 F. at 928.

36. *Id.* at 931.

37. *Id.* at 929.

38. *Id.*

39. *Id.* at 931 (quoting R.S. § 251 (1820) (current version at 19 U.S.C. § 66 (2000)).

40. *Id.*

statutory system of a state for the protection of its citizens against the unlicensed sale of intoxicating liquor.”<sup>41</sup> The Internal Revenue regulations or policies were inconsistent with law, or at least with the *Hirsch* court’s notion of federalism, and thus of no effect.

The court then considered a position taken in writing by the Commissioner of Internal Revenue: that the sought-after records had been submitted by taxpayers to a federal agency under compulsion of federal law, which compulsion was justified because the records were to be used for no other purpose than the collection of revenue.<sup>42</sup> Thus the records “were privileged, and were for revenue purposes alone, and should not be admitted into evidence [in the state criminal prosecution].”<sup>43</sup> The court rejected this argument after some consideration of the history and nature of the compulsory process power.<sup>44</sup>

The court made short shrift of the argument that compliance with subpoenas such as those at bar would impose an insupportable inconvenience on federal officers such as *Hirsch*, taking them away from their public duties. Such inconvenience, said the court, comes

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41. *Id.*

42. *Id.* at 932.

43. *Id.*

44. *Id.* at 932-33. Perhaps without realizing it, the court was correct in one sense. Whether the records in question would have been admissible in the state court proceeding against Cole is a question that could have properly been raised by Cole in the state court, not by *Hirsch* (or his boss, the Commissioner of Internal Revenue) in the federal court. At the time the *Hirsch* opinion was written, courts had scarcely begun to develop what is today a byzantine body of jurisprudence regarding the compelled production of business records. “It used to be thought that if a person was required by the government to yield up an incriminating document, this was the equivalent of his being forced . . . to testify against himself” in violation of the Fifth Amendment protection against self-incrimination. *Smith v. Richert*, 35 F.3d 300, 301 (7th Cir. 1994) (Posner, C.J.) (citing *Boyd v. United States*, 116 U.S. 616 (1886)). This conception of the Fifth Amendment gave rise to the “required records” doctrine, *see, e.g.*, *Shapiro v. United States*, 335 U.S. 1 (1948), which has now been largely abandoned. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391 (1976); *Commodity Futures Trading Comm’n v. Collins*, 997 F.2d 1230 (7th Cir. 1993). It has been the law since at least the time of the *Fisher* opinion that “the government [can] compel the production of nonrequired records, because their creation, and the setting forth of potentially self-incriminating facts entailed by that creation, were the author’s voluntary choice; the government had not made him give utterance to or record these facts, as it would have done had it forced him to testify or beaten a confession out of him.” *Smith*, 35 F.3d at 302 (emphasis omitted).

*Fisher*, however, left open a possibility that was confirmed in *United States v. Doe*, 465 U.S. 605, 612 (1984): that “[a]lthough the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect.” This “act of production” doctrine is nowadays limited by something known as the “collective entity” doctrine. *See Braswell v. United States*, 487 U.S. 99 (1988). The collective entity rule provides that individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather, they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. *See, e.g.*, *In re Grand Jury Proceedings*, 838 F.2d 624, 625 (1st Cir. 1988).

with the territory.<sup>45</sup> The court analogized to custodians of records of large corporations, whose duties often obliged them to appear in court to authenticate documents.<sup>46</sup> If private businessmen could bear such inconvenience, public servants certainly could.

Almost as an afterthought, the court disposed of the point that would later prove to be central to this body of jurisprudence. Hirsch claimed that he had physical but not legal custody of the demised records; legal custody reposed in the hands of someone higher up the Internal Revenue ladder. The court found, however, that:

It is not necessary to serve a subpoena upon the person who is merely technically in control, but who is not in the town, and not in charge of the office where the papers are actually kept. The person in actual possession, as the head of the office where the papers are kept, should produce them.<sup>47</sup>

The facts of *In re Weeks* were substantially similar to those of *Hirsch*. The opinion in *Weeks* was pithy, but in reaching a contrary conclusion to that of *Hirsch* demonstrated a better understanding of federalism, sovereign immunity, and the supremacy of national law:

When the state lays hold of a federal officer, and his doings as such, for proof contrary to his duty in respect to the tax . . . it interferes with the lawful operations of the federal government in laying and collecting its taxes. The federal government cannot dictate as to evidence in state courts, but it cannot be required to provide evidence for them; and the state has no right to federal instruments of purely federal character for proof . . . . This is somewhat as if a federal district attorney or grand juror should be imprisoned to compel disclosure of proceedings before the grand jury, which might be very material in a trial elsewhere. This disclosure would be contrary to legal duty, as that would be, and . . . quite clearly contrary to the laws of the United States.<sup>48</sup>

In a cryptic attempt to distinguish *Hirsch*, the court stated only that the *Weeks* facts differed “in respect to the proof required, and the regulations, instructions, and directions shown.”<sup>49</sup> Whatever this was supposed to mean, *Hirsch* and *Weeks* clearly pointed in opposite directions.

For the district judge in *In re Comingore*,<sup>50</sup> the decisive factor was the nature of the Internal Revenue forms themselves.

These reports [which were] made to the collector in the course of administering the laws of the United States, and for this executive

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45. *Hirsch*, 74 F. at 934.

46. *Id.*

47. *Id.* at 935.

48. *In re Weeks*, 82 F. 729, 732 (D. Vt. 1897).

49. *Id.*

50. 96 F. 552 (D. Ky. 1899).

purpose alone, are now demanded of him by the state officials in the manner before shown. . . . So far as the information contained in the reports is obtained from the distiller, it is extorted for the sole purpose of enabling the United States to ascertain and collect from him its revenues. This purpose is all that relieves . . . this act . . . from being mere tyranny. The information derived from these reports is not obtained for publication in any manner. It is entirely official. Under this state of fact, it does not seem to the court that these reports are in any sense records open to the use of the public.<sup>51</sup>

The *Comingore* court recognized that the facts before it differed in an important way from those of *Hirsch* and *Weeks*: *Comingore* involved, not a subpoena issued on behalf of a criminal defendant seeking to exercise his Sixth Amendment rights in his own defense, but a subpoena issued by the Commonwealth of Kentucky seeking to prosecute local liquor law violations.<sup>52</sup> And the court did note deferentially that the regulations had been duly and lawfully propounded by the Internal Revenue Commissioner.<sup>53</sup> But the cynosure of the court's decision is reflected in the language excerpted above: the records were somehow privileged for any purpose but that of providing compliance with federal tax laws.

It was the *Comingore* case—the case *not* involving an assertion by a criminal defendant of his right to compulsory process under the Sixth Amendment or a state congener—that found its way to the United States Supreme Court.<sup>54</sup> Justice Harlan, writing for a unanimous Court, saw the lawsuit as posing two questions: whether the federal statute authorizing the Secretary of the Treasury to promulgate regulations such as those at bar was constitutional; and, if so, whether the regulations themselves were within the scope of the legislative delegation of power.<sup>55</sup> Neither question invited extended discourse. That such a statute, designed to aid the Department of the Treasury in its most important functions, fell well within Congress's "necessary and proper" power was established jurisprudence before *Boske*.<sup>56</sup>

The regulations in question provided that:

[A]ll records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control "for purposes relating to the collection of the revenues of the United States only,"

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51. *Id.* at 556-57.

52. *Id.* at 553.

53. *Id.* at 556-57.

54. *See Boske v. Comingore*, 177 U.S. 459 (1900).

55. *See id.*

56. *Id.* at 468 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Logan v. United States*, 144 U.S. 263 (1892)).

and that collectors “have no control of them, and no discretion with regard to permitting the use of them for any other purpose.”<sup>57</sup>

The Court found that such regulations were within the contemplation of the enabling statute.<sup>58</sup> If the demised Internal Revenue reports could routinely be subpoenaed in state civil litigation, taxpayers obliged to file the reports would be caught between the Scylla of submitting false or incomplete forms (thus inviting federal criminal prosecution) and the Charybdis of exposing their private financial affairs to the world at large (perhaps inviting civil litigation or personal embarrassment). It is in the interest of Congress, and of the Department of the Treasury, to provide taxpayers with every incentive and no disincentive to file accurate returns.

Apart from that, however, the Court was concerned with preserving the power of the Secretary of the Treasury to control and administer his department. “[G]reat confusion might arise in the business of the Department if the Secretary allowed the use of records and papers in the custody of collectors to depend upon the discretion or judgment of subordinates.”<sup>59</sup> The issue was not an alleged property interest or privilege that the Federal Government had in its tax returns, but the power of a large federal department to keep its house in order by centralizing control over the administration of requests for those returns.<sup>60</sup> Thus, the Court’s holding was as narrow as possible: the Secretary of the Treasury could lawfully “take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.”<sup>61</sup>

The power recognized in *Boske* made eminent good sense. In the late 19th century, at a time when photostatic copying was yet unimagined and unimaginable, compliance with a subpoena *duces tecum* was necessarily onerous, difficult, and a serious impediment to the day-to-day work of the subpoenaed party. A federal officer or employee might be obliged to travel for days by horseback, barge, or stagecoach to a distant courthouse, clutching the original of a document which, if dropped or damaged, was all but irreplaceable; and knowing all the while that his colleagues back home were helpless to proceed with their business until he returned with that document intact. Small wonder, then, that 19th-century legislators vested the heads of federal departments with the power affirmed by 19th-century jurists in *Boske* and elsewhere.

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57. *Id.* at 469.

58. *Id.* at 470.

59. *Id.*

60. *Id.*

61. *Id.*

Consider what *Boske* does *not* say. The opinion says nothing about the Sixth Amendment in particular or the compulsory process power in general. It could not, because no accused person was seeking to invoke that power. It says next to nothing, other than by implication, about the sovereign immunity of the United States, its agencies, or its agents; nor about the supremacy of its laws over those of the states. It says nothing about the law of immunities, or about the law of privilege. *Boske* simply acknowledges the power of the head of an executive department to designate the departmental records custodian, i.e. to make (because authorized by statute to do so) a legally binding determination that the constructive custodian of records is someone other than the actual physical custodian.<sup>62</sup> What that custodian is to do in response to a subpoena *duces tecum* issuing from a state court (or, for that matter, a federal court) on behalf of a criminal defendant (or, for that matter, the state itself, or a private civil litigant) is a question neither squarely posed by the *Boske* facts nor squarely answered by the *Boske* holding.

In other words, there was no reason to believe that the constitutional compulsory process power—recognized at the outset of the 19th century as formidable enough to command congressmen, governors, even the President—was any less plenipotent at the outset of the 20th century. If the strength had gone out of the Sixth Amendment, *Boske* was not to blame.

### III. *TOUHY V. RAGEN*

Roger Touhy had been convicted in state court and was serving time in the state penitentiary.<sup>63</sup> He initiated a habeas corpus proceeding in U.S. district court, in the course of which a subpoena *duces tecum* was served upon the agent in charge of the Chicago office of the FBI. The agent appeared in court, but when directed by the district judge to produce the documents called for in the subpoena, declined to do so, in reliance on “Department Rule No. 3229.”<sup>64</sup>

At all times material, 5 U.S.C. § 22, the so-called “housekeeping” statute, provided that, “The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.”<sup>65</sup> Acting upon that statute, the Attorney General, as head of the De-

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62. *Id.* at 469-70.

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

64. *Id.*

65. *Id.* at 463 n.2 (quoting 5 U.S.C. § 22 (1950) (current version at 5 U.S.C. § 301 (2000))).

partment of Justice, had propounded Department Order 3229. That order provided, *inter alia*, that:

Whenever a subpoena *duces tecum* is served to produce any of [the department's] files, documents, records or information, 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 that the disclosure of such records is prohibited by this regulation.<sup>66</sup>

A supplement to the regulation, describing more particularly the procedures that Department employees should follow, provided:

It is not necessary to bring the required documents into the court room . . . . If questioned [by the court about non-compliance], the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.<sup>67</sup>

The district court found Department Order 3229 not to excuse compliance with the subpoena and held the FBI agent in contempt.<sup>68</sup> The court of appeals reversed, finding that the “housekeeping” statute and Department Order 3229, taken together, rendered the subpoenaed documents privileged.<sup>69</sup>

The Supreme Court, however, found the case to be entirely controlled by *Boske*.<sup>70</sup> It saw “no material distinction between that case and this”<sup>71</sup> and particularly noted that the regulation at issue in *Boske* was “of the same general character as Order No. 3229.”<sup>72</sup> That being the case, the Court expressly declined any invitation to consider whether the Attorney General could, pursuant to the “housekeeping” statute or otherwise, “make a conclusive determination not to produce records”<sup>73</sup> in this case. Such a question was not before the Court. As it had half a century earlier in *Boske*, the Court construed the question before it narrowly. Department Order 3229 was a valid exercise of the power properly delegated to the attorney general by the “housekeeping” statute.<sup>74</sup> The effect of the order was to centralize control of, and decision-making power as to, departmental docu-

66. *Id.* (emphasis added) (quoting Department Order No. 3229, 11 Fed. Reg. 4920 (May 2, 1946)).

67. *Id.*

68. *Id.* at 465.

69. *Id.*

70. *Id.* at 469 (“This case is ruled by *Boske* . . . .”), 471 (“‘This case,’ the Court holds, ‘is ruled’ by *Boske* . . . . I agree.”) (Frankfurter, J., concurring).

71. *Id.* at 470.

72. *Id.* at 469.

73. *Id.* at 467.

74. *Id.* at 468.

ments.<sup>75</sup> The Attorney General, as department head, could conclusively determine who the constructive custodian of records was as to any document within the Department of Justice; and he could do so without regard to the physical whereabouts of the document.<sup>76</sup> Department Order 3229, as read by the Court in *Touhy*, meant that the FBI agent in Chicago was not subject to punishment for non-compliance with the subpoena for the simple reason that the subpoena should have been directed to someone else.<sup>77</sup>

The Court went no further. No more than it had in *Boske* did it consider the Sixth Amendment in particular or the compulsory process power in general. It could not, because no accused person was seeking to invoke that power.<sup>78</sup> *Boske* left untouched the issues of the sovereign immunity of the United States, its agencies, and its agents, and the supremacy of its laws over those of the states. *Touhy* had no occasion to reach those issues because there was no state court proceeding and no state court subpoena. The subpoena in question emanated from a U.S. district court. Although the court of appeals had resolved *Touhy* by reference to the doctrine of privilege, the Supreme Court expressly declined to consider the jurisprudence of privilege or immunity.<sup>79</sup>

Like *Boske*, *Touhy* recognized the authority of the head of an executive department to make a legally binding determination that the records custodian, as to any document within the control of that department, is someone other than the person in actual physical possession of the document.<sup>80</sup> Had Roger Touhy offered to prove that the

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75. *Id.* at 470.

76. *Id.* at 469-70.

77. *Id.* at 468.

78. Touhy had been convicted in a state criminal trial. In his habeas petition, he was—nominally at least—a plaintiff in a civil action. The *Touhy* Court recognized that matters might be different if the case “concerned . . . the effect of a refusal to produce *in a prosecution by the United States*,” i.e. in a case in which the Sixth Amendment compulsory process right was directly implicated. *Id.* at 467 (emphasis added) (citing *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944)). *Andolschek* involved I.R.S. regulations akin to those considered in *Boske v. Comingore*. The Second Circuit recognized the precedential effect of *Boske*, but held:

While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

*Andolschek*, 142 F.2d at 506.

79. See *Touhy*, 340 U.S. at 468 (citing WIGMORE, *supra* note 11, §§ 2374, 2378).

80. See *id.* at 468-69.

documents he sought were in the hip pocket of the FBI agent to whom his subpoena was directed, his proof would have been immaterial. Congress is constitutionally empowered to authorize the heads of executive departments to maintain good order by centralizing control of, and decision-making power as to, documents within their departments. Such good order will, presumably, contribute to efficient government, minimize costs and duplication of labor, and assure uniform policies and practices within each department. It will also serve to provide well-deserved protection to the subpoenaed FBI agent or any similarly-situated “subordinate official who otherwise would be caught in the unpleasant dilemma of refusing to obey either an order of his superior or one issued by a court.”<sup>81</sup> Department Order 3229 was within the scope of the delegation of power to the Attorney General. Its wording identified “the Attorney General, [t]he Assistant to the Attorney General, or an Assistant Attorney General acting for him”<sup>82</sup> as the custodian of records for the Department of Justice. Service of a subpoena *duces tecum* upon anyone else—in *Touhy*, service upon an FBI agent—was simply of no legal effect.

Deliberately left unconsidered in *Touhy*, as in *Boske*, was the legal effect of service upon the designated custodian of records, in this case the Attorney General. “[T]he case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court.”<sup>83</sup> Justice Frankfurter premised his concurrence on this very point:

I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests. . . . In joining the Court’s opinion I assume . . . that the Attorney General can be reached by legal process.<sup>84</sup>

In the half-century since *Touhy*, the Supreme Court has had nothing to add to the *Boske/Touhy* jurisprudence. If in the interim the mighty Sixth Amendment compulsory process power had lost its punch—if it could no longer bring even the most august executive officers under its sway—the Supreme Court was not to blame.

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81. *Davis Enters. v. EPA*, 877 F.2d 1181, 1189 (3d Cir. 1989) (Weis, J., dissenting). Judge Weis was adamant that *Touhy* go no further. *Touhy* “is sometimes cited for the proposition that an agency head is free to withhold evidence from a court. But the Supreme Court in *Touhy* specifically refused to reach that question.” *Id.* at 1189.

82. *Touhy*, 340 U.S. at 463 (quoting Department Order No. 3229, 11 Fed. Reg. 4920 (May 2, 1946)).

83. *Id.* at 467.

84. *Id.* at 472 (Frankfurter, J., concurring).

## IV. CATCH 16.22

The “housekeeping” statute has been relocated to 5 U.S.C. § 301. Unchanged in substance since the days of *Touhy*, it now provides:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.<sup>85</sup>

Department Order 3229, however, has been replaced by a series of federal regulations extending from 28 C.F.R. § 16.22 through § 16.29. Captioned “General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party,” § 16.22 forbids any present or former employee of the Department of Justice to comply with a subpoena in a case in which the United States is *not* a party unless prior approval has been obtained from the Department.<sup>86</sup> The procedure for obtaining such prior approval obliges the party issuing the subpoena to append “an affidavit, or . . . a statement by the party . . . setting forth a summary of the testimony sought and its relevance to the proceeding.”<sup>87</sup> Sections 16.24 and 16.25 set out in detail the internal procedures by which the Department of Justice evaluates and passes upon a subpoena described in § 16.22.<sup>88</sup>

In litigation to which the United States is a party, § 16.23 governs.<sup>89</sup> Like § 16.22, it provides that a subpoena *ad testificandum* to a present or former employee of the Department must be accompanied by an affidavit or statement setting forth a summary of the testimony sought.<sup>90</sup> Because the United States is a party to the litigation, the summary is to be submitted, not through Department of Justice channels, but directly “to the Department attorney handling the case or matter.”<sup>91</sup> If, for example, Jill Defendant’s lawyer seeks to obtain the testimony of Agent Jones at the trial of *United States v. Jill Defendant*, he must submit a summary of the testimony he proposes to elicit from Jones to the very United States Attorney’s Office that is prosecuting Jill. Unlike § 16.22, § 16.23 does not require that the summary of the testimony also include a proffer as to its relevance.

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85. 5 U.S.C. § 301 (2000).

86. 28 C.F.R. § 16.22 (2001).

87. 28 C.F.R. § 16.22(c). The rule is the same for subpoenas *duces tecum*. 28 C.F.R. § 16.22(d).

88. 28 C.F.R. §§ 16.24-16.25 (2001).

89. 28 C.F.R. § 16.23 (2001).

90. 28 C.F.R. § 16.23(c).

91. *Id.*

Because the lawsuit is one to which the United States is a party, the Department assumes that the assistant U.S. attorney handling the prosecution is already equipped to evaluate the relevance of the testimony in the defense case.

Once the Department determines that an employee or former employee upon whom a subpoena has been served should not provide testimony or material in compliance with the subpoena, the procedure is the same whether or not the United States is a party to the litigation. Section 16.28 provides that “the employee or former employee upon whom the demand has been made shall . . . respectfully decline to comply.”<sup>92</sup> Section 16.28 then concludes: “*See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).”<sup>93</sup>

Whatever may be said in defense of 28 C.F.R. §§ 16.22-16.29, these regulations cannot be justified by reference to *Boske* and *Touhy*. The reach of the regulations extends far beyond the contemplation of those two Supreme Court cases. The Court took pains to cast *Boske* and *Touhy* as narrowly as possible, holding only that the delegation of power to an executive department head made by the “housekeeping” statute was sufficient to enable that department head to centralize control over records in his department for purposes of compliance with subpoenas *duces tecum*. The regulations seek to create an evidentiary privilege that cannot be derived from *Boske* or *Touhy*. The regulations extend to subpoenas *ad testificandum* as fully as to subpoenas *duces tecum*, which cannot be derived from *Boske* or *Touhy*. The regulations oblige a criminal defendant, as a condition precedent to the exercise of his Sixth Amendment rights, to retail to adverse counsel his (or his attorney’s) mental work product in the form of an “affidavit or statement” appended to the subpoena.<sup>94</sup> This limitation on the exercise of a constitutional right cannot by any hermeneutics be derived from *Boske* and *Touhy*. In these and other particulars, the regulations range far beyond territory mapped by *Boske* and *Touhy*. Properly construed, *Boske* and *Touhy*, and regulations looking to those cases for support, do no more than “give Justice Department [or other federal agency] employees the authority, when so ordered by superiors, to refuse to comply with a subpoena ordering disclosure of confidential files when the United

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92. 28 C.F.R. § 16.28 (2001). If the Department has not completed its evaluation of the subpoena and accompanying proffer, § 16.27 provides that a Department attorney “shall appear and furnish the court . . . with a copy of the regulations contained in this subpart and inform the court” that compliance with the subpoena is under consideration. 28 C.F.R. § 16.27 (2001). The Department attorney should then “request the court . . . to stay the demand [i.e. the subpoena] pending” its consideration by departmental higher-ups. *Id.* In effect, the Department attorney is to ask the district judge to put a trial on hold *in medias res* while the departmental chain of command determines if an accused citizen is to be afforded the benefit of his Sixth Amendment rights.

93. 28 C.F.R. § 16.28.

94. 28 C.F.R. § 16.22(c) (2001).

States is not a party to a legal action.”<sup>95</sup> A decade and a half after *Touhy*, the same federal appellate court that gave the world *Touhy* affirmed contempt citations imposed by the trial court upon the special agent in charge of the Chicago FBI office (i.e. the holder of the same office as the person to whom the subpoena in *Touhy* was directed) for his refusal to answer questions (but not for his refusal to produce documents) in a case in which he had been subpoenaed by the alleged boss of the Chicago mafia.<sup>96</sup> “We cannot justify the assertion of a general and unlimited authority of a departmental head to instruct a subordinate not to give any testimony in a certain case pending in a district court.”<sup>97</sup>

To say that the regulations cannot be justified in terms of *Boske* and *Touhy* alone is not to say that the regulations cannot be justified. As the cases considered *infra* make clear, the variety of demands made by subpoena upon the Federal Government nowadays, and the variety of contexts in which those demands are made, has necessarily moved the jurisprudence in this area far beyond what could have been imagined at the time and on the facts of the revenue cases. Depending on the demand, and on the context, application of the regulations may raise issues under the Sixth Amendment, the Supremacy Clause, the doctrine of sovereign immunity, and so on. For purposes of analysis, it is simplest to begin with those cases in which the Sixth Amendment is of no, or only limited, concern; then to proceed to federal criminal cases; and finally to consider state criminal cases.

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95. *Louisiana v. Sparks*, 978 F.2d 226, 234 (5th Cir. 1992). In other words, “*Touhy* held that the Attorney General could validly withdraw from his subordinates the power to release department papers and that the subordinate could properly refuse to produce those papers pursuant to a subpoena duces tecum.” *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12, 14 (D. Colo. 1983). Nor does the “housekeeping” statute itself contemplate a power as capacious as that which the Department of Justice purports to exercise:

[The “housekeeping” statute] was intended only to allow agencies to regulate their internal procedures for receiving and processing demands . . . for access to information in their files. It was not intended to confer on an agency or any of its officials the substantive authority either to withhold information as a matter of absolute discretion or to promulgate and assert any form of executive privilege against disclosure. While the regulations . . . may therefore validly prescribe enforceable procedures for presenting and internally processing such demands, they may not go further and lay down substantive grounds for their denial, either as a matter of unreviewable discretion or as a matter of qualified privilege. To the extent they purport to do the latter, they are invalid.

*Smith v. Cromer*, 159 F.3d 875, 889 (4th Cir. 1998) (Phillips, Sr. J., dissenting).

96. *Giancana v. Johnson*, 335 F.2d 372 (7th Cir. 1964).

97. *Id.* at 376. See also *Golden Pac. Bancorp v. FDIC*, No. 99-3799, 1999 U.S. Dist. LEXIS 20303, at \*6-7 (D.N.J. Nov. 9, 1999) (“*Touhy* regulations do not create a privilege against judicial discovery. Rather, in order to support a *Touhy*-based claim of insulation from subpoena, the agency information must be protected by an independent discovery privilege.”); *Landry v. FBI*, No. 97-197, 1997 U.S. Dist. LEXIS 9850, at \*9 (E.D. La. July 3, 1997) (“[N]either 5 U.S.C. § 301[ the ‘housekeeping’ statute,] nor the Department of Justice’s *Touhy* regulations create a privilege or authorize the withholding of information from the public.”).

## V. THE CASES APPLYING THE REGULATIONS

## A. Cases in Which No Sixth Amendment Issue Arises

## 1. Civil Cases Originating in State Court

*Swett v. Schenk*<sup>98</sup> began life as a civil case in the Superior Court of California. Plaintiff's parents had died in a plane crash.<sup>99</sup> He brought suit for wrongful death against various defendants including the pilot's estate and the manufacturer of the aircraft.<sup>100</sup>

The National Transportation Safety Board ("NTSB"), a federal agency, conducted an investigation into the cause of the crash.<sup>101</sup> In the course of preparing his civil lawsuit, Swett sought the deposition testimony of an NTSB investigator. Although the investigator appeared for deposition and responded to some questions, he refused to answer others.<sup>102</sup> His refusal was in reliance upon orders from the NTSB chairman, which orders in turn were premised on an agency regulation akin to those appearing at 28 C.F.R. §§ 16.22-16.29.<sup>103</sup> Swett sought relief before the state trial court, which ordered the witness to answer.<sup>104</sup> The matter was then removed to federal court pursuant to 28 U.S.C. § 1442.<sup>105</sup>

The district court properly held that, in the exercise of its state court derivative jurisdiction, it was without power to compel the federal inspector's answers. In affirming, the Ninth Circuit cited *Touhy* for the proposition "that subordinate federal officers could not be held in contempt for failing to comply with a court order in reliance on a validly promulgated regulation to the contrary."<sup>106</sup> Because the regulation at issue here was validly promulgated, the reliance was protected.

98. 792 F.2d 1447 (9th Cir. 1986).

99. *Id.* at 1449.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* The regulation in question differed from §§ 16.22-16.29 in one important respect, discussed *infra*: It expressly permitted testimony as to matters of fact, prohibiting testimony only as to matters of opinion.

104. *Swett*, 792 F.2d at 1449.

105. 28 U.S.C. § 1442(a) provides that:

A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1)[A]ny officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for any act under color of such office . . .

Removal in such cases does not extend to the entire underlying cause of action. All that is before the federal district court is the plaintiff's application for an order directing the federal witness to answer the demised questions. In addressing this issue, the federal court, in effect, sits as a state court, i.e., its jurisdiction is not that of a United States district court but that of the state court from which the matter was removed. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232 (1981); *Minnesota v. United States*, 305 U.S. 382 (1939).

106. *Swett*, 792 F.2d at 1451.

The Ninth Circuit opinion provides no discussion of the doctrine of sovereign immunity as such. In his dissent, however, Judge Norris cast the issue in terms of that doctrine.<sup>107</sup> Because the regulation in question permitted the giving of fact testimony but not opinion testimony, it constituted, in Judge Norris's view, a waiver of the inspector's "immunity from testimonial compulsion with respect to matters of fact."<sup>108</sup> That being the case, Judge Norris "disagree[d] that sovereign immunity deprived the state court of jurisdiction to compel fact testimony."<sup>109</sup>

Sovereign immunity is an attribute that inheres in the government of the United States. When a state court seeks to compel an agent of the government of the United States in his capacity as agent, that attribute is implicated. In *Swett*, the California court sought to order an NTSB inspector to testify to information acquired in his official capacity.<sup>110</sup> Were there no "housekeeping" statute, no regulation, and no *Touhy*, the United States would still have the power to protect its agent from the visitorial power of the state court. Of course the United States may, in a given context, decline to exercise that protection. Perhaps Judge Norris had the better of the argument when he noted that the regulation in question is, in one respect, permissive: It provides that an NTSB inspector may give testimony as to matters of fact, and in so providing may constitute a partial waiver of sovereign immunity.<sup>111</sup> But whether this is so or not, *Swett* is no case in which to test the propriety of departmental regulations, nor to reconcile such regulations with the Sixth Amendment. *Swett* simply stands for the unremarkable proposition that in civil cases, state courts cannot command federal officers unless federal law says they can.<sup>112</sup> This is sovereign immunity at its most basic, and—as noted *supra*—the analysis would be the same if *Touhy* had never been written. Apart from being unnecessary to a resolution of the sole issue raised in *Swett* (i.e. immunity of the federal sovereign and its officers to state compulsion), consideration of *Touhy* only confuses matters. As noted *supra*, *Swett* cites *Touhy* as exempting "subordinate federal officers" from any obligation "to comply with a court order."<sup>113</sup> This reads *Touhy* far too broadly. *Touhy* exempts subordinate federal officers from contempt citations for failure to comply

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107. *Id.* at 1452-53 (Norris, J., dissenting).

108. *Id.* at 1452 (Norris, J., dissenting).

109. *Id.* Some confusion may be engendered by describing the doctrine of sovereign immunity as "jurisdictional." Sovereign immunity can be waived by the sovereign. Matters that are truly jurisdictional can never be waived; parties cannot, by waiver, vest a court with jurisdiction where otherwise it would have none.

110. *Id.* at 1449.

111. 49 C.F.R. § 835.3(b) (2001).

112. See *Swett*, 792 F.2d at 1452.

113. *Id.* at 1451.

with a very specific kind of court order—a subpoena *duces tecum*—in a very specific context: when the department head has arrogated to himself or his designee the custody of the sought-after evidence.<sup>114</sup>

All but identical to *Swett* is *Boron Oil Co. v. Downie*.<sup>115</sup> Downie was an employee of the Environmental Protection Agency (“EPA”) who served as “On-Scene Coordinator” of an investigation into an alleged gasoline leak at a Boron Oil Company service station.<sup>116</sup> When a tort suit was brought against Boron in state court, both sides attempted to subpoena Downie as a trial witness.<sup>117</sup> In reliance upon agency regulations<sup>118</sup> and instructions from his superiors, Downie declined to testify.<sup>119</sup> The EPA sought to quash the trial subpoenas in state court; when that application was unsuccessful, the EPA removed the subpoena proceedings to U.S. district court.<sup>120</sup> Although the district court declined to quash the subpoenas, the court of appeals reversed.<sup>121</sup>

The Fourth Circuit apparently considered the EPA entitled to quashal on either of two bases: failure of the private litigants to comply with the procedures set forth in valid agency regulations, and sovereign immunity. The district court had rejected the sovereign immunity argument on the ground that sovereign immunity was inapplicable to a case in which the United States was not a party.<sup>122</sup> The court of appeals reversed, citing *Dugan v. Rank*<sup>123</sup> and *Portsmouth Redevelopment & Housing Authority v. Pierce*<sup>124</sup> for the proposition that sovereign immunity is implicated where, as here, a state court subpoena is issued to a federal agent in that agent’s official capacity.<sup>125</sup> Because the federal sovereign had not waived its immunity, the subpoena must be quashed. The analysis could and should have ended there.

Prior to its sovereign immunity analysis, however, the *Boron* court had discussed, as an independent basis for quashal, the failure of the plaintiffs to comply with the EPA regulation regarding testimony of agency employees.<sup>126</sup> As did the court in *Swett*,<sup>127</sup> the court in

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

115. 873 F.2d 67 (4th Cir. 1989).

116. *Id.* at 68.

117. *Id.* Although both sides subpoenaed Downie, it was the plaintiffs who brought the motion to compel.

118. 40 C.F.R. § 2.401 (1986).

119. *Boron Oil Co.*, 873 F.2d at 68.

120. *Id.*

121. *Id.* at 72.

122. *Id.* at 68-69. Although the district court was mistaken, there is a difference for these purposes between cases in which the United States is a party and cases in which it is not. See discussion *infra* Part V.A.2.

123. 372 U.S. 609 (1963).

124. 706 F.2d 471 (4th Cir. 1983).

125. *Boron Oil Co.*, 873 F.2d at 71.

126. *Id.* at 69.

*Boron* began its analysis by over-reading *Touhy*: “The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates by this type of regulation.”<sup>128</sup> The Supreme Court has done nothing of the kind—not in *Touhy* and not elsewhere. Discussion of *Touhy* adds nothing to the resolution of *Boron*. The observation made in connection with *Swett* is equally applicable here: Were there no “housekeeping” statute, no regulation, no *Touhy*, the result would have been the same. “The EPA issued a written determination that Downie not be permitted to testify.”<sup>129</sup> Sovereign immunity having been thus asserted and nowhere waived, nothing more was needed to resolve the matter.<sup>130</sup>

## 2. Civil Cases Originating in Federal Court

a. *Cases in Which the United States is Not a Party.*—When a state, acting through its court, attempts to exercise its visitatorial powers upon an agent or agency of the United States, the issue of sovereign immunity appears in bold relief. When the United States government, acting through its court, attempts to exercise its visitatorial powers upon its own agent or agency, the issue of sovereign immunity is more difficult to discern. There is an isonomy between the judicial branch that issues the subpoena and the executive branch that receives it. The power that vivifies one is the power that vivifies the other. It is gibberish to say that the federal sovereign is “immune” from itself.

If that is so,<sup>131</sup> the proper disposition of subpoenas issued in federal cases to federal officers cannot be determined by use of the simple sovereign immunity model employed in the state court cases discussed *supra*. Consideration of *Touhy* and regulations alleged to have been propounded upon its authority was irrelevant to the state court cases; but such consideration has been found to be relevant and necessary in recent federal cases.<sup>132</sup> After receiving partial approbation

127. *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986).

128. *Boron Oil Co.*, 873 F.2d at 69 (citing *Touhy*).

129. *Id.* at 68.

130. See *Davis Enters. v. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989) (“In *Boron* . . . the EPA relied on a sovereign immunity theory . . .”).

131. At least one prominent court takes a conceptually different view. For the Second Circuit, sovereign immunity is as much a sticking point in federal court as it is in state court: The subpoena that issues out of the federal court is not the court’s subpoena, but the litigant’s subpoena. The litigant, a private party, seeks by that subpoena to command an agent or agency of the sovereign. Thus, the sovereign immunity problem remains. A federal “subpoena duces tecum issued by General Electric to the EPA would compel the EPA to act and therefore is barred by sovereign immunity in the absence of a waiver.” *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999). The court, however, found the requisite waiver in the Administrative Procedure Act. *Id.* at 598. See also *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208 (D.C. Cir. 1996).

132. See, e.g., *In re Boeh*, 25 F.3d 761 (9th Cir. 1994).

from the Ninth Circuit in 1994, *Touhy*-spawned regulations came in for condign criticism, both in the Ninth Circuit and elsewhere.<sup>133</sup>

*In re Recalcitrant Witness Richard Boeh*<sup>134</sup> began as a federal civil rights suit. The plaintiffs in the underlying action sought damages against the Los Angeles Police Department in connection with the shooting deaths of three individuals and the critical wounding of another.<sup>135</sup> Boeh was the FBI agent who headed the Bureau's investigation of the shootings.<sup>136</sup> Plaintiffs subpoenaed Boeh as a trial witness in the civil rights suit. "Plaintiffs' purpose in serving the subpoena was to secure Boeh's testimony regarding evidence he had collected in his investigation and his conclusions as to what had actually occurred at the scene."<sup>137</sup> The subpoena was referred up the Department of Justice ladder; the Department, citing 28 C.F.R. § 16.22(a), directed Boeh to decline to testify.<sup>138</sup>

Although the district court cited Boeh for contempt, the Ninth Circuit reversed the order.<sup>139</sup> "Boeh may not be held in contempt for failing to comply with a court order if a valid regulation required him not to comply."<sup>140</sup> As to the propriety of the demised regulations, "[a]ny doubt as to the validity of the regulation's requirement of prior approval is foreclosed, in our view, by the Supreme Court's decision in [*Touhy*], which upheld the validity of a predecessor to 28 C.F.R. § 16.22(a)."<sup>141</sup>

As he had in *Swett*,<sup>142</sup> Judge Norris dissented in *Boeh*.<sup>143</sup> The focus of his dissent was the majority's over-reading of *Touhy*.<sup>144</sup> *Touhy*, in Judge Norris's view, "does not control this case."<sup>145</sup> The inapplicability of *Touhy* arises from "the difference between a subpoena *duces tecum* and a subpoena *ad testificandum*—the difference . . . between documentary evidence and live testimony."<sup>146</sup> *Touhy* and the "house-keeping" statute deal with the former but not the latter.

The ability to produce documents in response to a subpoena *duces tecum* is impersonal. . . . Which agency employees may produce documents is a matter suitable for treatment in agency regu-

133. *Id.*

134. *Id.*

135. *Id.* at 763.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (citing *Ex parte Sackett*, 74 F.2d 922, 923 (9th Cir. 1935) and *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989)).

141. *Id.* at 763-64 (citation omitted). See also *Herr v. McCormick Grain*, No. 92-1321-PFK, 1994 U.S. Dist. LEXIS 9088, at \*3 (D. Kan. June 28, 1994).

142. *Swett v. Schenk*, 792 F.2d 1447, 1452 (9th Cir. 1986).

143. See *Boeh*, 25 F.3d at 767 (Norris, J., dissenting).

144. *Id.* (Norris, J., dissenting).

145. *Id.* at 768 (Norris, J., dissenting).

146. *Id.* at 769 (Norris, J., dissenting).

lations promulgated pursuant to the “housekeeping” statute. Because the head of an agency cannot divest herself of the authority to control internal documents, she always has the ability to herself comply with a subpoena *duces tecum* served upon *her*. Her personal knowledge of the contents of the documents is irrelevant; all that matters is that they are within her control.

In contrast, the ability to produce testimony is personal. Because the testimony must be based upon the witness’ personal knowledge, it can only be produced by the witness himself. Only Agent Boeh can comply with the subpoena *ad testificandum* at issue here. Moreover, nobody other than Agent Boeh himself may be subpoenaed to produce Agent Boeh’s testimony. Not even the Attorney General herself can be subpoenaed for that purpose.<sup>147</sup>

Judge Norris contended that neither the “housekeeping” statute nor *Touhy* go any further than to empower an agency head “to regulate employees, manage agency business, and control agency papers and property.”<sup>148</sup> Agency regulations purporting to assert an evidentiary privilege can draw no support from the “housekeeping” statute or *Touhy*:

The statute cannot be read as authorizing agency heads to adopt regulations creating an executive privilege not to testify. It cannot be read as supporting the government’s argument that an agency head can, by not authorizing a subordinate to testify, strip the district court of Article III power to enforce its subpoena.<sup>149</sup>

As a solatium for the loss of effective subpoena power, the majority suggested that the plaintiffs might have a remedy under the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, or perhaps by way of mandamus against the Attorney General pursuant to 28 U.S.C. § 1361.<sup>150</sup> Judge Norris was as critical of these suggestions as he was of the majority position in general:

Neither route is an acceptable substitute to the time-honored means of obtaining a witness’s testimony by serving him with a subpoena *ad testificandum*, backed up by the court’s power of contempt. If [Plaintiff] Gomez had a right to Boeh’s testimony, he had a right to obtain it when he needed it, which in this case was immediately, while the trial was still going on. Forcing Gomez to file a separate mandamus action or a cumbersome APA suit in the middle of his civil rights trial is so burdensome that it effectively eviscerates his right to obtain Boeh’s testimony.<sup>151</sup>

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147. *Id.* (Norris, J., dissenting).

148. *Id.* at 771. (Norris, J., dissenting).

149. *Id.* (Norris, J., dissenting).

150. *Id.* at 764 n.3.

151. *Id.* at 770 n.4 (Norris, J., dissenting).

A scant three months later, a different panel of the Ninth Circuit had occasion to reconsider the issues over which Judge Norris had clashed so sharply with the majority in *Boeh*. The panel that decided *Exxon Shipping Co. v. United States Department of Interior*,<sup>152</sup> however, went beyond the position taken by Judge Norris in his *Boeh* dissent.

Various individuals, businesses, and local governments sued Exxon Corporation and Exxon Shipping Corporation for injuries alleged to have resulted from the Exxon Valdez oil spill.<sup>153</sup> In the course of the litigation, Exxon issued a notice of deposition and subpoena to ten federal employees, claiming that these individuals, in their capacity as federal officials, possessed information vital to the lawsuit.<sup>154</sup> The agencies involved instructed eight of the ten employees not to appear for deposition. The other two employees were permitted to appear and to provide some testimony, but not to answer questions as to certain matters. Exxon sought to enforce compliance with its subpoenas, arguing that the agencies' actions were not authorized by the "housekeeping" statute and the various regulations propounded on the supposed authority of that statute.<sup>155</sup>

Anticipating the *Touhy* issue, Exxon brought its enforcement action, not against the recalcitrant witnesses, but against the departments or agencies by which those witnesses were employed.<sup>156</sup> This enabled Exxon to argue, and the Ninth Circuit to conclude, that *Touhy* was not controlling. "Here, unlike in *Touhy*, the agencies themselves are named defendants. Thus, the ultimate question of federal agencies' authority to withhold discovery . . . is squarely at issue."<sup>157</sup> That "ultimate question," of course, had been reserved in *Touhy*, where the sole issue was the authority of an agency head, not to withhold evidence, but to designate a records custodian for purposes of compelled production of evidence.<sup>158</sup> Having identified the issue before it, the Ninth Circuit went further even than Judge Norris had been prepared to go in *Boeh*: Without distinguishing between subpoenas *ad testificandum* and subpoenas *duces tecum*, it held that

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152. 34 F.3d 774 (9th Cir. 1994).

153. The two underlying actions were *SeaHawk Seafoods, Inc. v. Exxon Corp.*, No. A89-0095-CV (D. Alaska 1989) and *Exxon Valdez Litig.*, 3AN-89-2533CI (Alaska Super. Ct. 1989)—one federal case and one state case.

154. *Exxon Shipping Co.*, 34 F.3d at 775-76. The federal agencies were the Department of Interior (and the United States Fish and Wildlife Service, an agency within the Department of Interior), the Department of Health and Human Services, the Environmental Protection Agency, the Department of Agriculture, and the Department of Commerce. *See id.* at 775 n.1.

155. *Id.*

156. Wisely, Exxon brought the action to compel discovery in the federal case, thus avoiding the sovereign immunity issue that would have arisen had enforcement been sought in state court.

157. *Id.* at 777.

158. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-68 (1951).

“neither the [‘housekeeping’] statute’s text, its legislative history, nor Supreme Court case law supports the government’s argument that [5 U.S.C.] § 301 authorizes agency heads to withhold *documents or testimony* from federal courts.”<sup>159</sup>

*Exxon* came before the court, not as a motion filed in the pending lawsuit on the merits, but as a free-standing civil cause of action to compel discovery.<sup>160</sup> Had the subpoenas in the underlying litigation been *duces tecum*, Exxon’s failure to seek relief through such a free-standing complaint would have been outcome-determinative. A motion to compel directed to the individuals subpoenaed would have been unenforceable by operation of *Touhy*; and no motion could have been directed to the executive departments or their department heads because neither was before the court. Because the subpoenas were *ad testificandum*, however, Exxon might have proceeded by moving to enforce the subpoenas against the individuals in the underlying litigation. Of course, at the time the issue arose, Exxon could not have known that the Ninth Circuit would boldly—and properly—find that *Touhy* has nothing at all to say about subpoenas *ad testificandum*.

Nor did the *Exxon* court have any use for the suggestion made by its colleagues in *Boeh* that relief was available by means of the Administrative Procedure Act. Citing Judge Norris’s dissent in *Boeh*, the *Exxon* court “acknowledge[d] that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may ‘effectively eviscerate[]’ any right to the requested testimony.”<sup>161</sup>

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159. *Exxon Shipping Co.*, 34 F.3d at 778 (emphasis added).

160. *See id.* at 775.

161. *Id.* at 780 n.11 (quoting *In re Boeh*, 25 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J., dissenting)). The Second Circuit in *EPA v. General Electric Co.*, 197 F.3d 592 (2d Cir. 1999), found that the APA was the only available remedy for a litigant in this situation. The court held, however, that the APA did not require the filing of a new complaint, independent of the ongoing litigation on the merits, to compel enforcement of the subpoena. Rather, the district judge before whom the litigation was proceeding could simply apply the APA standards and determine the enforceability of the subpoena.

[T]he EPA’s refusal to comply with the subpoena *duces tecum* issued by General Electric may be reviewed in the civil proceeding [below] by [a] motion to enforce. In allowing the district court to proceed under the provisions of the APA to determine the propriety of the subpoena, without a separate and independent lawsuit, we recognize the scheme for waiver of sovereign immunity for review of agency actions provided by the APA, permit the use of subpoenas for discovery to be served upon the United States . . . in accordance with the pertinent rules of procedure, and promote judicial economy by allowing the underlying litigation to advance without delay.

On remand, the district court will, of course, review the EPA’s refusal to respond to the subpoena under the standards for review established by the APA. . . . Applying these standards, the district court will decide whether the EPA’s action in withholding documents is, among other things, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §

*Exxon* has afforded the federal courts an opportunity to restore their intended and proper meanings to the “housekeeping” statute and *Touhy*. Courts other than the Ninth Circuit have now “likewise conclude[d] that Congress did not empower [federal agencies] to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information.”<sup>162</sup> If compliance with a particular subpoena in a particular case would be oppressive or burdensome, there are federal rules of procedure and of evidence that provide courts with means of remedying such abuses, and those means may be invoked by the government as well as by private litigants.<sup>163</sup> The mere prospect of compliance with process, burdensome or otherwise, is no justification for ignoring rules of procedure and of evidence simply because it is the government that is obliged to comply. “The Federal Rules of Civil Procedure do not bow to executive pontification, and absent some specific grant of authority from Congress, executive agencies . . . may not impose restrictions upon the power of this court to call witnesses before it and compel them to testify.”<sup>164</sup> Of course, a federal agent or employee who appears in response to a subpoena and testifies is free—as is any other witness—to assert such privileges as may apply to his testimony. But the assertion of privilege by a testifying witness in response to a particular question is very different from the general assertion by government of the immunity of its agents and employees from compulsory process.

*b. Cases in Which the United States is a Party.*—As a function of sovereign immunity, the United States need never be a litigant. If the sovereign is a litigant, it is because the sovereign has chosen to be a litigant. If the sovereign chooses to be a litigant, the sovereign cannot be heard to assert its immunity. In cases to which the United States is a party, the United States must play by the rules—procedural and evidentiary—regarding the conduct of parties. Those

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706(2)(A). In this regard the district court may consider EPA claims of privilege and undue burden.

*Id.* at 599 (citations omitted).

162. *In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995).

163. *See, e.g.*, *United States v. Pereda-Aleman*, No. 94-2197, 1995 U.S. App. LEXIS 15162 (10th Cir. June 20, 1995). In *Pereda-Aleman*, a criminal case, the defendant sought to subpoena a DEA agent “who had testified in a previous, unrelated case and who would have testified in this case that ‘it is not at all unusual for the driver of a vehicle containing contraband to have no knowledge of such contraband.’” *Id.* at \*3. The district court, on application from the prosecution, excluded the proffered “expert” testimony as irrelevant. Citing Federal Rules of Evidence 702 and 704, the court of appeals affirmed. *Id.* at \*4-6. Non-compliance with 28 C.F.R. §§ 16.22-16.29 was raised at the trial level, but not considered by the appellate court because the matter was so readily resolved on the relevance issue.

164. *Carter v. Miss. Dep’t Corr.*, No. 4:88CV213-D-B, 1996 U.S. Dist. LEXIS 21118, at \*9 (N.D. Miss. May 22, 1996). *See also Exxon Shipping Co.*, 34 F.3d at 779-80; *United States ex rel. Roby v. Boeing*, 189 F.R.D. 512 (S.D. Ohio 1999).

rules govern issuance of and compliance with subpoenas. “When the government is named as a party to an action, it is placed in the same position as a private litigant, and the rules of discovery in the Federal Rules of Civil Procedure apply.”<sup>165</sup>

Petitioners in *Streett v. United States*<sup>166</sup> were the subject of an IRS investigation. They issued subpoenas to two IRS agents and an IRS group manager, all of whom were involved in the investigation.<sup>167</sup> Citing *Touhy*-type agency regulations, the IRS sought quashal.<sup>168</sup> The district court rejected the argument that the agency regulation and *Touhy* “may be used as a tool by the executive” in a case to which the United States is a party.<sup>169</sup> “Our legal system would not endure long . . . [if] a party to a dispute [could] double[] as the referee.”<sup>170</sup>

### B. Cases in Which the Sixth Amendment is at Issue

To summarize: (1) federal agents and agencies are immune from subpoenas issuing out of state courts, unless the Federal Government chooses to waive that immunity; (2) federal agents and agencies are not immune from, and must obey, subpoenas issuing out of federal courts; but, (3) with respect to subpoenas *duces tecum*, agency or departmental regulations identifying a custodian of records are binding, and subpoenas *duces tecum* directed to someone other than the custodian are unenforceable. Courts may disagree about the details of subpoena enforcement,<sup>171</sup> but there seems to be general agreement that federal courts have, and must exercise, power to decide what evidence shall be produced before them. Application of a contrary rule—abandoning to the executive branch the power to decide what evidence shall or shall not be produced—would “raise serious separation of powers questions.”<sup>172</sup> Of course a federal agent to whom, or an agency to which, a subpoena is directed may assert applicable privileges and defenses; in this respect the agent or agency is in no different shoes than a private actor would be.

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165. *Exxon Shipping Co.*, 34 F.3d at 776 n.4 (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) and *Mosseller v. United States*, 158 F.2d 380 (2d Cir. 1946)).

166. No. 96-M-6-H, 1996 U.S. Dist. LEXIS 19898 (W.D. Va. Dec. 18, 1996).

167. *Id.* at \*2.

168. *Id.*

169. *Id.* at \*12.

170. *Id.*

171. Compare *Exxon Shipping Co. v. United States Dep’t of Interior*, 34 F.3d 774 (9th Cir. 1994) (enforcement pursuant to federal rules of procedure and evidence), with *EPA v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999) (enforcement pursuant to standards and procedures of APA).

172. *In re Boeh*, 25 F.3d 761, 772 (9th Cir. 1994) (Norris, J., dissenting). See also *id.* at 768 (Norris, J., dissenting) (citing *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”) and *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

Given the foregoing jurisprudence, the civil litigant in federal court who issues a subpoena in good faith to a federal agent or agency, calling for testimony or documents not privileged and which the subpoena recipient is capable (in fact and in law) of providing, should have every expectation that his subpoena will be honored or, if necessary, enforced. If the subpoena is *ad testificandum*, resistance based on *Touhy* regulations is unjustifiable. If the subpoena is *duces tecum* and directed to the officer identified in *Touhy* regulations, resistance is unjustifiable. If resistance purports to be based on the unwritten constitutional doctrine of sovereign immunity, the private litigant will properly urge the inapplicability of that doctrine, and may counter with the assertion of an unwritten constitutional doctrine of his own: separation of powers. Federal courts, not federal agencies, must decide what evidence shall be produced before those courts.

### 1. Federal Cases

How much greater, then, should be the confidence of a defendant in a federal criminal case that the subpoena he propounds to a federal agent will be honored. He is armed with all the rights and arguments with which his civil congener is able to carry the day—plus that sockdolager, the Sixth Amendment. Curiously, however, the cases considering the exercise by a federal criminal defendant seem to point in every direction but the true one: that his compulsory process right is paramount to all objections and arguments urged against it, and cannot be burdened in its exercise by unauthorized and unreasonable conditions precedent.

Some of the confusion may result from the seeming irreconcilability of, on the one hand, the existence of executive privilege,<sup>173</sup> and on the other, the existence of a compulsory process power in the hands of every federal criminal defendant to which no one—not even those at the highest levels of government—may plead an immunity. This irreconcilability, however, is a chimera. No one disputes the existence of executive privilege. The question is not whether executive privilege exists, but who shall decide whether the privilege applies in a given case—the judiciary or the executive? Ironically, the regulations actually considered by the Supreme Court in *Touhy* conceded that, in the final analysis, the decision rested with the courts. “Supplement No. 2” to Department of Justice Order 3229, dated June 6, 1947, provided:

It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee [not to produce the evidence pursuant to depart-

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173. See *United States v. Nixon*, 418 U.S. at 703-16.

mental regulation]. If questioned, the officer or employee should state that the material is at hand *and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.*<sup>174</sup>

Such a procedure was calculated to secure to a defendant his compulsory process rights. The subpoenaed evidence would be submitted to the court *in camera*. If the court determined that the evidence was irrelevant, or that a valid assertion of executive privilege was made, it would exclude the evidence. But that determination was to be made by the judge, based upon his evaluation of the relevance of, and need for confidentiality as to, a particular item of evidence in the context of a trial over which he was presiding. It was not to be made by an executive-branch mandarin, removed (in every sense) from the litigation in which the demised evidence was sought.

Compare the regulation presently appearing at 28 C.F.R. § 16.26.<sup>175</sup> The factors that “Department officials and attorneys” are to consider in determining whether or not to comply with a duly-issued subpoena are no doubt among the factors that the district judge would consider in determining whether to enforce compliance with a duly-issued subpoena. But the regulations proceed from the premise that the enforcement decision is taken away from the district court, and that the decision of the executive bureaucracy is final.<sup>176</sup>

174. United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 464 (1951) (emphasis added).

175. Section 16.26, captioned “Considerations in determining whether production or disclosure should be made pursuant to a demand [i.e. a subpoena]” provides, in pertinent part:

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(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, [or]

(6) Disclosure would improperly reveal trade secrets without the owner’s consent.

176. See 28 C.F.R. §§ 16.25, 16.27-16.28 (2001).

Inexplicably, federal courts have bought into this notion hook, line and sinker. The defendant in *United States v. Gentry*<sup>177</sup> was charged with the possession of a kilo of cocaine with intent to distribute. He caused to be issued a “trial subpoena which seeks the testimony of FBI Special Agent Ray Spoon who now is stationed in another state.”<sup>178</sup> Although the subpoena was *ad testificandum*, not *duces tecum*, the prosecution cited *Touhy* in support of its motion to quash.<sup>179</sup> The district court, in granting quashal, construed *Touhy* to mean that the “information possessed by Agent Spoon is actually the property of the Attorney General and may be subject to various claims of privilege.”<sup>180</sup> This is a remarkable statement; actually, two remarkable statements. The Attorney General of the United States has no cognizable property interest in Agent Spoon (the Thirteenth Amendment settled that question definitively), nor in observations Agent Spoon made as a percipient witness to crime, nor in testimony that Agent Spoon is capable of giving. Neither *Touhy* nor any other authority sets forth a theory of vested property rights pursuant to which executive departments own the truth and rent it out for use in trial. In the parlance of the courthouse, lawyers often speak of “my witness” or “my exhibit,” but such locutions are simply a form of oral shorthand, not a theory of evidence law. Whatever *Touhy* has been stretched to mean, it has never been stretched to mean what the *Gentry* court said.

Of course it is true that Agent Spoon’s testimony “may be subject to various claims of privilege”—the second of the remarkable assertions reflected in the quoted language from *Gentry*.<sup>181</sup> Every piece of evidence to be offered in every trial to be conducted in America *may* be subject to various claims of privilege. But if the Department of Justice had a good-faith basis to believe that portions of Agent Spoon’s testimony *actually were* subject to specific claims of privilege, the assistant U.S. attorney prosecuting *Gentry* was free to raise those claims by way of an appropriate objection.<sup>182</sup> Federal judges

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177. No. 92 CR 588, 1995 U.S. Dist. LEXIS 5517 (N.D. Ill. Apr. 27, 1995).

178. *Id.* at \*1.

179. *Id.*

180. *Id.* at \*2. In fairness to the district court, this observation was merely dictum. The court actually resolved the matter on grounds of relevance: The defendant sought Agent Spoon’s testimony in support of a defense of duress or coercion, which defense the court determined to be inadmissible. “Because *Gentry*’s proffer is insufficient as a matter of law, the Court grants the Government’s motion in limine to preclude the assertion of a duress defense before the jury. This conclusion moots the issue of Agent Spoon’s potential testimony and the Court will quash that subpoena.” *Id.* at \*14.

181. *Id.* at \*2.

182. Assume, for example, that in the course of his involvement in the *Gentry* investigation, Spoon overheard confidential conversations between the President of the United States and the Prime Minister of Israel (an absurd example; but there is nothing in the *Gentry* opinion to suggest that the assertion of privilege the prosecution would actually have made—if it had ever been called upon to make one—would have been less absurd).

bristle with indignation at the sort of executive-branch steamrolling visited upon Gentry when it arises in a civil case.<sup>183</sup> In a criminal case, in which the private litigant's right to compulsory process is of constitutional dimension, the same courts seem strangely apathetic.

One expression of this apathy is a theory federal courts have developed to avoid the constitutional issue that arises when the executive branch seeks to burden, by the imposition of conditions precedent, the exercise of a defendant's Sixth Amendment right to compulsory process. The defendant in *United States v. Allen*<sup>184</sup> issued a subpoena to the United States attorney for the jurisdiction in which he was convicted. The subpoena was not accompanied by the statement prescribed in the regulations, viz. a statement or affidavit setting forth the witness's expected testimony.<sup>185</sup> The subpoenaed "prosecutor advised the court that he declined to testify since he did not have permission to testify under regulations governing testimony by Department of Justice personnel."<sup>186</sup> Confronted with this outright refusal on the part of the subpoenaed witness to comply with the exercise of the defendant's constitutional compulsory process right, the appellate court saw no constitutional issue:

We do not have the problem . . . of whether the [trial] court should have rejected a refusal by the Department due to the constitutional guarantees of the Fifth and Sixth Amendments. Since the defendant did not follow the procedure and submit the required summary of testimony desired, the Department made no decision whether the prosecutor could testify and we do not reach the constitutional claim.<sup>187</sup>

This is Alice-through-the-looking-glass jurisprudence. The Department of Justice witness had been subpoenaed. The Department of Justice replied, in effect, "Because you have not told us what you want to ask and why you think it matters, we will instruct the witness to ignore your subpoena." So instructed, the witness refused to testify. Squarely before the court was the issue whether the condition precedent imposed by the Department of Justice on the otherwise-unconditioned exercise of a constitutional right was lawful. Suppose,

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Had the prosecution filed a motion in limine as to the confidential material (which motion the court would no doubt have received *ex parte*, and granted), privilege would have been preserved without shredding Gentry's constitutional right to compulsory process.

183. See *Streett v. United States*, No. 96-M-6-H, 1996 U.S. Dist. LEXIS 19898, at \*11-13 (W.D. Va. Dec. 18, 1996); *Carter v. Miss. Dep't Corr.*, No. 4:8CV213-D-B, 1996 U.S. Dist. LEXIS 21118, at \*9 (N.D. Miss. May 22, 1996); and discussion *supra* Part V.A.2.

184. 554 F.2d 398 (10th Cir. 1977).

185. *Id.* at 406.

186. *Id.* Although the opinion states that the subpoena was *duces tecum*, there is no reference to production of documents. As the quoted language reflects, the witness refused to testify, citing 28 C.F.R. §§ 16.22, 16.23 (1974). *Id.*

187. *Id.* at 407.

by way of example, that the regulations read as follows: Before any Department of Justice employee will be permitted to comply with a subpoena issued by a criminal defendant in a pending case, the defendant issuing the subpoena must quack like a duck. Conceptually, this regulation is indistinguishable from those actually propounded by the Department of Justice. If a defendant refuses to quack and stands upon his constitutional right, he is entitled to a determination from the court whether the quacking requirement is a lawful, or an unlawful, burden upon his compulsory process power. Such a determination would include consideration of the nature of the constitutional right at issue, the nature of the condition placed upon it, the justification of the condition, the legislative grant of power supporting the condition, and so on. At the end of the day, the court might conclude that the condition was a constitutionally-permissible burden upon the exercise of the defendant's right, or it might conclude the opposite. But the issue would be squarely before the court, and could not be avoided.

Standing legal analysis on its head, courts have taken the position that it is only by *complying* with the conditions—only by quacking—that the defendant can preserve his entitlement to a judicial determination of the constitutionality of the regulations. Citing *Allen*, the court in *United States v. Marino*<sup>188</sup> had this to say:

Because the defendants never complied with the procedures [set out in the regulations] to demand testimony, the government denied their request [i.e. ignored their subpoenas]. . . . The question of whether these procedures deny the defendants their Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied. Because Marino and Castello failed to make a demand in accordance with 28 C.F.R. § 16.23(c), they have no constitutional claim.<sup>189</sup>

But the law is to the contrary: Had the defendants complied with the procedures described in the regulations, they would have waived, rather than perfected, their constitutional objections to those procedures. Had the Department of Justice then refused to honor the subpoenas, the defendants would have sought enforcement, not on the grounds of the Sixth Amendment, but on the grounds of the regulations themselves. By refusing to comply with the regulations, the defendants preserved intact their claim that the regulations constituted an unlawful burden upon their Sixth Amendment right to compulsory process—a claim that the court, by operation of the peculiar logic reflected in the excerpted paragraph *supra*, never reached. Although neither the Supreme Court nor Congress has ever put its im-

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188. 658 F.2d 1120 (6th Cir. 1981).

189. *Id.* at 1125 (citing *Allen*, 554 F.2d. at 406).

primatur on the Attorney General's claim to control, even to the point of barring, eyewitness testimony by all present and former Department of Justice employees, federal courts continue, inexplicably, to treat as closed the constitutional question raised by that claim.<sup>190</sup>

As noted *supra* page 114, the regulations require that a defendant seeking to subpoena a Department of Justice employee must append to the subpoena a statement of what testimony the defense expects to adduce from the witness.<sup>191</sup> Courts have required exacting compliance with this requirement. The defendants in *United States v. Cleveland*<sup>192</sup> subpoenaed several of the FBI agents who participated in the investigation that led to the defendants' prosecution. All the subpoenaed agents had already testified for the prosecution during the government's case-in-chief.<sup>193</sup> Nevertheless, the defendants complied with the requirements of the regulations by submitting

a statement notifying [the U.S. attorney's office] that each subpoenaed witness would be called to testify regarding (1) the [tape-recorded telephone] conversation monitored by [such agent] that would be introduced into evidence; (2) other conversations [that the agents] monitored on the wiretap; (3) the authenticity of those conversations; and (4) other steps taken by them in this investigation.<sup>194</sup>

Certainly the foregoing summary of proposed testimony was adequate to adumbrate any issues of executive privilege, and to enable both the prosecution and the court to consider how best to respond. Certainly the proposed testimony would be directly relevant to the case. But the prosecution argued, and the court agreed, that this summary of proposed testimony was insufficiently complete and particular to satisfy the regulations:

The Court finds that a sufficient summary must designate the specific tapes about which each witness may be expected to give testimony by date and participants, or some other identifying refer-

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190. See, e.g., *United States v. Wallace*, 32 F.3d 921, 929 (5th Cir. 1994) ("The Department of Justice regulations for subpoenaing witnesses [*ad testificandum* in a criminal case] have been held to be valid and mandatory. . . . Because the defendants failed to [submit a summary of the testimony sought] . . . we do not reach their constitutional claims."); *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982) ("Defendant's argument that these regulations are unconstitutional under the Fifth and Sixth Amendments overlooks the case of *United States v. Ragen* [sic]."); *State v. Reyes*, 816 F. Supp. 619, 623 n.2 (E.D. Cal. 1992). *But cf.* *McClure v. United States*, No. 93-35835, 1995 U.S. App. LEXIS 11809, at \*3 n.1 (9th Cir. May 17, 1995) (treating the constitutional issue as unresolved and a matter of concern).

191. 28 C.F.R. § 16.23 (2001). In a case in which the United States is not a party, 28 C.F.R. § 16.22 requires a statement both of the testimony sought and of its relevance to the proceedings.

192. No. 96-207, 1997 U.S. Dist. LEXIS 7359 (E.D. La. May 22, 1997).

193. *Id.*

194. *Id.* at \*4 (internal quotation marks omitted).

ence understandable to both parties. In addition, a sufficient summary must also specify whether the witness is expected solely to authenticate the tape or whether she or he is also expected to give substantive testimony about the tapes, but the specific nature of the substantive testimony need not be described. Finally, the Court finds that the defendants' general statement that these witnesses will all be asked to testify as to "other steps taken by them in this investigation" is too broad to satisfy the regulation. A sufficient summary must generally identify the steps in the investigation about which the witness might be asked (e.g., execution of search warrant; interview of witness).<sup>195</sup>

In the pressure-cooker of the trial courtroom, it is difficult enough for a trial lawyer to know where his own carefully-prepared witness's testimony will lead. To ask defense counsel to state with the level of specificity demanded by the court what he will ask a witness with whom he has never been permitted to discuss the facts of the case<sup>196</sup> is wholly unworkable.<sup>197</sup>

But the principal objection to the demand in the Department of Justice regulations of a summary of proposed testimony as a condition precedent to compliance with a subpoena to a Department of Justice employee is not that such a precondition is unworkable or impractical. The principal objection is that the regulations in their present form burden, in a manner not authorized by the legislature nor approved by the Supreme Court, the proper exercise of a criminal defendant's Sixth Amendment privilege. By requiring defense counsel to state the specific testimony he hopes to elicit from a Department of Justice witness, the regulations oblige the defendant to sacrifice work-product privilege for the possibility (but not the certainty) that his exercise of a right secured to him by the Constitution will be honored.<sup>198</sup>

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195. *Id.* at \*6. See also the statement actually submitted, and appended to the opinion of the appellate court, in *United States v. Winner*, 641 F.2d 825, 834-35 (10th Cir. 1981).

196. In a federal civil case, where all that is at issue is money, litigants can utilize all the principal discovery devices: depositions, interrogatories, requests for admission, requests for production, and so on. In a federal criminal case, where liberty itself hangs in the balance, the defendant can utilize *none* of these discovery devices. Defense counsel has no power, for example, to compel a federal agent to submit to an interview or deposition prior to trial.

197. Would defense counsel be bound by the proffer he makes? If the summary of testimony indicates that Agent Jones will be asked about the execution of a search warrant, and during the course of his testimony Jones makes reference to corruption within FBI ranks in connection with the present case, would defense counsel be precluded from following up, on the grounds that the issue is beyond the scope of the statement supporting Jones's subpoena?

198. One federal judge, marveling at regulations that purport to entitle a federal prosecutor to be told before the fact what testimony his adversary hoped to adduce as a condition precedent to his adversary's adducing that testimony, observed that, "it would be Valhalla for a private lawyer to be able to get a preview of an adverse witness's cross-examination." *United States v. Feeney*, 501 F. Supp. 1324, 1325 (D. Colo. 1980).

The hypothetical at the outset of this article—the case of *United States v. Jill Defendant*—is a stripped-down version of (among many other cases) *United States v. Wallace*.<sup>199</sup> In *Wallace*,

the government rested its case without having called two of the witnesses that had been listed on its prospective witness list, DEA Agent John Houston and U.S. Border Patrol Agent William Rasbury. This action surprised the defendants, because Houston and Rasbury were on a list read to the jury as “witnesses that the government may use,” and the government had already produced Jencks Act material in anticipation of their possible testimony. Houston and Rasbury were present in the hallway on the last day of the government’s case, and counsel for Wallace had spoken to them about their anticipated testimony. After the government rested without calling Houston or Rasbury, defendants attempted that evening to subpoena the two agents to testify for the defense.<sup>200</sup>

Prior to the time the government rested its case, defense counsel had no reason to believe that the agents would not testify in the prosecution case-in-chief, and every reason to believe that they would. Not only had the agents been identified to the jury as likely prosecution witnesses, but the assistant U.S. attorney handling the case had also turned over Jencks statements—an all-but-certain sign that a witness will be called.<sup>201</sup> The government’s failure to call the witnesses naturally raised the prospect in the minds of defense counsel that the agents knew something that could benefit the defense or undermine the prosecution. Defense counsel could only speculate what that “something” was, and whether (and how) it could safely be elicited by the defense on direct examination of the agents. But such speculation is work-product in the case, and privileged as such.

The work-product privilege received the imprimatur of the United States Supreme Court in *Hickman v. Taylor*.<sup>202</sup> The doctrine, as described in *Hickman*, extends not only to documentary work-product, but also to mental work-product.<sup>203</sup> In civil practice, the privilege is codified in Federal Rule of Civil Procedure 26(b)(3), which expressly

199. 32 F.3d 921 (5th Cir. 1994).

200. *Id.* at 928.

201. Although a federal criminal defendant has no discovery rights (as discovery is understood in federal civil cases; *see supra* note 196), he is entitled to inspect certain witness statements in certain circumstances. *See* 18 U.S.C. § 3500 (2000). These statements are referred to in courthouse argot as “Jencks statements.” But the prosecution is not obliged to produce Jencks statements until *after* the witness in question has testified. Thus, for a prosecutor to provide Jencks statements for a witness who has yet to testify is a virtually certain indication that the witness is about to testify.

202. 329 U.S. 495 (1947).

203. *Id.* at 511 (explaining that if work product privilege did not extend to mental impressions, case theorizing, and the like, “[a]n attorney’s thoughts, heretofore inviolate, would not be his own”).

extends its protection to “the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation.”<sup>204</sup> But “[a]lthough the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.”<sup>205</sup>

In criminal as in civil cases, the “opinions, judgments, and thought processes of counsel’ are generally protected.”<sup>206</sup> Courts refer to the privilege as extending, in criminal cases, to “mental impressions, opinions, conclusions, and legal strategies formed in anticipation of specific litigation”<sup>207</sup> or to an “attorney’s mental impressions, conclusions, strategies, or theories.”<sup>208</sup> Such mental impression work-product is entitled to the very highest level of protection from invasion.

Fact work-product may be obtained upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. . . . Opinion work-product, however, . . . is more scrupulously protected as it represents the actual thoughts and impressions of the attorney.<sup>209</sup>

This two-tier approach to work-product privilege has prompted one court to refer to “the super-protective envelope reserved by Rule 26(b)(3) for ‘mental impressions.’”<sup>210</sup>

The statement or affidavit required by the Department of Justice regulations must summarize the testimony sought from a witness in the adversary’s camp; and, in a state court case, must demonstrate the relevance of that testimony. Such a statement or affidavit completely dismantles the privilege for mental impressions, strategies, and theories. This forfeiture of a valuable privilege is the price federal

204. FED. R. CIV. P. 26(b)(3). *See also* *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (stating “Rule 26 accords special protection to work product revealing the attorney’s mental processes”).

205. *United States v. Nobles*, 422 U.S. 225, 238 (1975). *See also, e.g.*, *United States v. Jacques Dessange, Inc.*, No. S2 99-CR1182, 2000 U.S. Dist. LEXIS 3734 (S.D.N.Y. Mar. 27, 2000); *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988).

206. *In re Sealed Case*, 124 F.3d 230, 235 (D.C. Cir. 1997) (quoting *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982)).

207. *United States v. One Tract Real Prop.*, 95 F.3d 422, 428 (6th Cir. 1996).

208. *Jacques Dessange*, 2000 U.S. Dist. LEXIS 3734, at \*2 (citing *United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998)).

209. *In re Grand Jury Proceedings*, 102 F.3d 748, 750 (4th Cir. 1996) (internal quotations and citations omitted). *See also In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993) (stating that “[a]n attorney’s protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information”); *Jacques Dessange*, 2000 U.S. Dist. LEXIS 3734, at \*5 (stating that “[a] heightened standard of protection must be accorded ‘opinion’ work product that reveals an attorney’s mental impressions and legal theories”).

210. *In re Sealed Case*, 124 F.3d at 236.

courts oblige criminal defendants to pay, not to assure that an executive-branch officer will honor a subpoena he is constitutionally bound to honor, but merely to assure that the Department of Justice will consider permitting the executive-branch officer to honor a subpoena he is constitutionally bound to honor. To the extent that agency regulations require subpoenas *duces tecum* to be served on the agency head or his designee, such regulations are a valid exercise of the housekeeping power. To the extent that agency regulations purport to condition compliance with a subpoena *ad testificandum* upon surrender by a federal criminal defendant of his work-product privilege, such regulations are an invalid burden upon the Sixth Amendment right to compulsory process; and are in no sense justified by the “housekeeping” statute. The complicity of federal courts in this executive-branch overreaching and abuse is inexplicable. The whole business of requiring a summary or affidavit in support of a defendant’s compulsory process right was debunked by Chief Justice Marshall in the Aaron Burr treason litigation.<sup>211</sup> In support of Burr’s application for a subpoena *duces tecum* to President Jefferson, Burr and his co-counsel did submit an affidavit;<sup>212</sup> although the affidavit is not quoted or summarized in the reported opinions, it appears that the affidavit was simply one of good faith.<sup>213</sup>

It is only because the subpoena is to those who administer the government of this country, that such an affidavit was required as would furnish probable cause to believe that the testimony was desired for the real purposes of defence, and not for such [other purposes] as this court will forever discountenance [e.g. harassment, delay, or the like].<sup>214</sup>

The prosecution argued that the defendant’s bare assertion of his belief that the demised evidence was relevant was inadequate. Burr, according to the prosecution, should have made the sort of detailed proffer required by the present-day Code of Federal Regulations. This argument Chief Justice Marshall easily rejected:

[Burr] has made his affidavit [that the demised evidence is material]. But that is said [by the prosecution] to be insufficient; and why? Because the averment is, that the [evidence sought] “may be material” in the defence. Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the [evidence] to the defence, may depend on the testimony adduced by the prosecutor . . . . It is objected that the particular passages of the [evidence] which are required are not pointed out. But how can this be

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211. *Burr I*, 25 F. Cas. 30, 35-38 (C.C.D. Va. 1807).

212. *Id.* at 38.

213. *See id.*

214. *Id.* (citations omitted).

done while the [evidence] itself is withheld? Or how can their applicability be shown without requiring the accused prematurely to disclose his defence?<sup>215</sup>

Consider again the hypothetical appearing at the outset of this Article. The case against Jill Defendant was made by Agents Smith and Jones. The prosecution called Smith in its case-in-chief, then rested without calling Jones. Jill's lawyer cannot know why Jones did not testify for the prosecution; he can do no more than speculate. His speculation will be informed by his knowledge of the facts of the case; his "taking the temperature of the courtroom" (placing particular emphasis on his assessment of the jury's reaction to his cross-examination of Smith); his own prior experience, if any, with the prosecutor and with Jones; courthouse scuttlebutt about the prosecutor and about Jones and about the progress of the case; and a variety of other factors as well. Perhaps the prosecutor believes, based on his own prior experience, that Jones does poorly on cross-examination. Perhaps Jones has been ill lately. Perhaps, too, Jones will fail to corroborate Smith's testimony in important particulars; or that Jones is not as certain about something as Smith was; or that Jones harbors poorly concealed suspicions about the truthfulness of the warrant affidavit Smith swore to, or the testimony he gave. What summary of expected testimony can Jill's lawyer give in support of his subpoena to Jones? A truthful summary might recite:

I, Jill Defendant's lawyer, am not entirely sure what I need to ask Jones. I'll start out with some questions about the history of his involvement with Smith on this case and see where that takes me, but of course I'll have to be careful not to give Jones a chance to vouch for Smith or bolster Smith's credibility. I may try to point out that during the surveillance Jones wasn't positioned where Smith was and that the two may have seen things differently, but of course I won't know how far to pursue that line of examination until I get Jones to commit to where he was standing, what the lighting conditions were, and what he saw. I have a gut feeling that Jones believes that the woman's voice on the last taped telephone conversation was Jill's sister Jane, not Jill herself (as Smith said it was), but I won't know if I dare to ask him that until I see how the cross is going. Depending on his demeanor and tone of voice when he describes Smith's role in the case and his own working relationship with Smith, I may go so far as to pose a series of questions calling Smith's accuracy as an observer (and, by implication, his integrity) into question, but of course I can't know now whether I'll go that far.

Other than its candor and truthfulness, the foregoing has nothing to commend it. It surely constitutes a waiver of every vestige of work-

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215. *Burr II*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807).

product privilege. The attorney has divulged the entirety of his mental impressions, tactics, and conclusion. And it has probably purchased him nothing, because the statement is insufficiently specific to satisfy the Department of Justice chain of command or the federal courts.<sup>216</sup>

If Jill's lawyer wants to preserve work-product privilege intact, he may revise his statement or affidavit to read as follows:

I, Jill Defendant's lawyer, seek to question Agent Jones about his involvement in the surveillance conducted in the investigation of this case.

It is unlikely that a Department of Justice functionary or a district court will deem the foregoing sufficiently specific to comply with the regulations. But what happens if Jones is permitted to testify and, in the middle of a line of questions about surveillance, blurts out a suggestion that Smith may have coerced Jill into confessing? Jill's lawyer, of course, pounces on the answer and seeks to pose follow-up questions. The prosecutor objects; the statement in support of the subpoena that brings Jones here makes reference only to surveillance, not at all to interrogation. Was the purpose of the statement merely to demonstrate the existence of a bona-fide line of questioning sufficient to justify bringing Agent Jones to court? If so, the purpose of the statement (and of the regulations) was satisfied, and the defense should be permitted to follow up with questions about any relevant matter—as, for example, circumstances anent Jill's confession that render it unreliable. Or was the purpose of the statement to afford the government an opportunity to determine if it had before-the-fact objections, on grounds of privilege or anything else, to the subject matter of the examination? If so, Jill's lawyer is bound by his statement; if he wants to examine Agent Jones about Agent Smith's interrogation excesses, he must re-subpoena Jones, appending a new summary of expected testimony.

These questions have not been addressed, much less resolved, in the case law. But these questions should never arise. The course of a criminal trial—or of any single witness examination within that trial—is no more predictable than the course of life itself. Jill's lawyer does not know, cannot know, much of what he will ask Agent Jones until Jones takes the stand. To oblige Jones to take the stand, Jill's constitutionally-guaranteed compulsory process power should be all that is needed. The power consigned to executive department heads by the "housekeeping" statute is ample to enable those department heads to control departmental responses to subpoenas

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216. See, e.g., *United States v. Winner*, 641 F.2d 825, 834-35 (10th Cir. 1981); *United States v. Cleveland*, No. 96-207, 1997 U.S. Dist. LEXIS 7359, at \*5-6 (E.D. La. May 21, 1997).

*duces tecum*. That grant of power was not intended to, and should not enable executive-branch employees and officers to place obstacles before the good-faith exercise of a defendant's Sixth Amendment rights—particularly when one of the obstacles is the forfeiture of the precious work-product privilege.

Assume Jill's lawyer is a member in good standing of the bar. As such, his issuance of a subpoena on Jill's behalf is presumed to be in good faith and not for the purposes of harassing witnesses or delaying proceedings. If it appears to the court that Jill's lawyer has acted in bad faith, the court (and the state bar) have powerful remedies at their disposal. If the Department of Justice has privileges or objections to assert, it can do so pretrial, at trial, or both.<sup>217</sup> But the Department of Justice cannot arrogate to itself the power to flout the Sixth Amendment, to stretch the "housekeeping" statute out of all proportion, and to determine dispositively what testimony shall and shall not be called for before Article III courts.

## 2. State Cases

Pity the criminal defendant in state court. He suffers from all the disabilities that afflict other litigants considered hereinabove, as well as another that is unique to him. Like the state court civil litigant, he bumps up against the immovable object that is sovereign immunity. Like the federal court criminal defendant, he is hobbled by the requirement that he provide the Department of Justice a summary of the testimony he hopes to elicit. There is, of course, nothing confidential about this summary, and no reason to believe that Department of Justice prosecutors will not immediately share it with their state court colleagues charged with the prosecution of the case in which the testimony is sought. And, in addition to summarizing the proposed testimony, he—unlike his federal court congener—must expressly proffer its relevance.

Perhaps for these reasons there is a relatively small corpus of jurisprudence dealing with state criminal cases. What jurisprudence there is is not always well thought out. One federal court to which a motion to quash subpoena was removed pursuant to 28 U.S.C. § 1442 inexplicably concluded that it lacked removal jurisdiction.<sup>218</sup> One state court appeared to claim an authority to order the Attorney General of the United States to comply with a state court subpoena,

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217. See *Burr I*, 25 F. Cas. at 37:

"If [the demised evidence] does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed . . . Everything of this kind, however, will have its due consideration on the return of the subpoena."

218. *Alabama v. Stephens*, 876 F. Supp. 263 (M.D. Ala. 1995).

General of the United States to comply with a state court subpoena, the doctrine of sovereign immunity notwithstanding.<sup>219</sup>

Typically, the issue of subpoena compliance by a federal actor arises when a state court criminal defendant claims that he was acting as an informer, or otherwise at the behest of federal law enforcement, in connection with the conduct for which he is being prosecuted. The state defendant then seeks to subpoena a federal agent to corroborate this theory of defense. That was the case in *Buford*.<sup>220</sup> In *Louisiana v. Parker*,<sup>221</sup>

[t]he defendant testified at his trial. He stated that he was a long-time informant for the FBI. The defendant admitted that he was in northeast Louisiana the weekend of the murder, but said that he was attempting to gather evidence for the FBI on some drug dealers. He also claimed that his FBI agent-contact, Ralph DiFonso, could corroborate his testimony. However, the Department of Justice invoked a special FBI privilege preventing the agent from testifying.<sup>222</sup>

The “special FBI privilege,” of course, was simply the applicable provisions of the C.F.R.<sup>223</sup>

On such facts, state courts, and federal courts exercising state court removal jurisdiction, almost invariably uphold the power of the Federal Government to resist state court visitorial process.<sup>224</sup> Sometimes the ruling is based, properly, on sovereign immunity.<sup>225</sup> Too often, courts conjure up some notion of “a special FBI [or DEA, etc.] privilege.”<sup>226</sup>

Samuel Johnson was a defendant in state court in California. He faced two counts of “homicide with special circumstances” for which the state prosecution was seeking the death penalty.<sup>227</sup>

Through information obtained during discovery, Johnson’s attorneys became aware of the possibility that several of the prosecu-

219. *Buford v. State*, 282 S.E.2d 134, 138 (Ga. Ct. App. 1981) (“[I]f the Attorney General [of the United States] refuses [to comply with the state trial court’s subpoena], the trial court must make a determination on the Attorney General’s claim of privilege, and if the material is necessary to due process, the court should order its disclosure.”).

220. *Id.*

221. 661 So. 2d 603 (La. Ct. App. 1995).

222. *Id.* at 608.

223. *See also State v. Andrews*, 250 So. 2d 359 (La. 1971).

224. *But see Buford*, 282 S.E.2d at 134.

225. *See, e.g., Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998) (“[T]he doctrine of sovereign immunity divests the district court [sitting on removal as a state court] of jurisdiction to enforce the subpoenas.”); *Louisiana v. Sparks*, 978 F.2d 226 (5th Cir. 1992).

226. *Parker*, 661 So. 2d at 608. *See also Kansas v. Call*, Nos. 91-3114-16, 1992 U.S. App. LEXIS 7774, at \*6-7 (10th Cir. Apr. 22, 1992); *State v. Reyes*, 816 F. Supp. 619, 623 (E.D. Cal. 1992).

227. *DeMore v. Superior Court of Cal.*, No. C-99-3730 SC, 1999 U.S. Dist. LEXIS 18997, at \*2 (N.D. Cal. Dec. 8, 1999).

tion's proposed witnesses were in the United States illegally. Johnson's attorneys came to believe that these witnesses' immigration files might contain information that would undermine their credibility as well as provide other exculpatory evidence . . . . Johnson's attorneys subpoenaed these witnesses' immigration files from [Charles H. DeMore, who at that time was] the Custodian of Records of the [Immigration and Naturalization Service].<sup>228</sup>

The local U.S. attorney's office intervened, moving to quash the subpoenas on the grounds of sovereign immunity and of the failure of Johnson's attorneys to comply with the procedures embodied in the CFR. When the state court judge sought to enforce the subpoenas, the U.S. attorney's office had the matter removed to U.S. district court.<sup>229</sup> The federal court cited *Touhy* as supporting the regulations, and non-compliance with the regulations as supporting quashal of the subpoenas.<sup>230</sup>

Undeterred, Johnson's lawyers continued to investigate and prepare the case. They learned that one Gabriela Gomez was "a key prosecution witness whose testimony . . . connected Johnson with the victims in th[e] case."<sup>231</sup>

Johnson's attorneys believed Gomez to be in the Federal Witness Protection Program and that her participation in that program induced a change in her testimony. It was also believed that [Agent Paul] Massock [of the Bureau of Alcohol, Tobacco and Firearms] was integral in securing Gomez in the Witness Protection Program . . . . Johnson's attorneys also learned that Massock was involved in the investigation leading to Johnson's arrest. In an effort to gain further information about the investigation and Gomez, Johnson[s attorneys] subpoenaed Massock to testify and produce records concerning his participation in the investigation as well as his knowledge of Gomez.<sup>232</sup>

The *Massock* litigation then followed in the footsteps of the *DeMore* case. Again the state judge sought to enforce the subpoenas. Again federal prosecutors removed the matter to U.S. district court. In again granting quashal, the federal judge cribbed from his prior opinion in *DeMore*.<sup>233</sup>

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228. *Id.* (citations omitted).

229. *Id.* at \*4.

230. *Id.* at \*8-13.

231. *Massock v. Superior Court of Cal.*, No. C-99-3713 SC, 2000 U.S. Dist. LEXIS 53, at \*2 (N.D. Cal. Jan. 3, 2000).

232. *Id.* at \*2-3 (citations omitted).

233. *Compare DeMore*, 1999 U.S. Dist. LEXIS 18997, at \*4-13, *with Massock*, 2000 U.S. Dist. LEXIS 53, at \*4-13. Because the Bureau of Alcohol, Tobacco and Firearms is within the Department of the Treasury, rather than the Department of Justice, the applicable federal regulation was 27 C.F.R. §§ 70.801-70.803 rather than 28 C.F.R. §§ 16.22-16.29. Apart from this difference in citation, however, the analysis and, for the most part, the

Whether in proper reliance upon the doctrine of sovereign immunity, or on an overreading of *Touhy* and the regulations alleged to be premised upon *Touhy*, courts are apparently unwilling to enforce the subpoenas of state court criminal defendants issued to federal actors when those subpoenas are not accompanied by the affidavits or statements called for by the various provisions of the Code of Federal Regulations. But what of the state-court defendant who complies, or at least attempts to comply, with these regulations? Assume that the defendant in a state court criminal case has a bona fide need to call a federal agent or employee as a trial witness. Assume further that he has scrupulously complied with the Code of Federal Regulations, barring his soul (and his theory of defense) to the Department of Justice by setting forth a summary of the testimony he hopes to elicit from the federal actor and the relevance of that testimony to the state court trial. Finally, assume that the Department of Justice has determined, for reasons known only to it, to resist the defendant's subpoena. Does the defendant have any remedy at all?

On the present state of the law, many courts have concluded that the answer is an unvarnished "no." Courts holding out the hope of remedy generally look to one or both of two possible sources of remedy: the state court itself or the Administrative Procedure Act.

*State v. Tascarella*<sup>234</sup> is the easy case. Florida, unlike most states, affords criminal defendants the qualified right to take depositions of material witnesses before trial.<sup>235</sup> The prosecution listed no fewer than eleven DEA agents as material witnesses to the case against Mr. and Mrs. Tascarella.<sup>236</sup> The Tascarellas' attorney duly noticed these witnesses for deposition. The agents, relying on instructions from the Department of Justice chain of command, declined to appear.<sup>237</sup> The trial court, recognizing that contempt was not a possible remedy,<sup>238</sup> simply refused to allow the witnesses to testify at trial for the prosecution. The state supreme court approved this exercise of the trial court's power to control the proceedings before it; in effect taking the position that if federal agents wanted their cases prosecuted in state court, they had better be prepared to play by state court rules.<sup>239</sup>

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language employed by the court in *Massock* was identical to that employed by the court in its earlier opinion in *DeMore*.

234. 580 So. 2d 154 (Fla. 1991).

235. FLA. R. CRIM. P. 3.220.

236. *Tascarella*, 580 So. 2d at 155.

237. *Id.*

238. *Id.* at 156.

239. The Florida Supreme Court even rejected the prosecution's suggestion that the Tascarellas should be obliged to attempt to obtain the agents' testimony via compliance with the Code of Federal Regulations, i.e. by providing a summary of testimony and rele-

The facts of *Tascarella* are unique, or nearly so. Because it was the prosecution, and not the defense, that wanted to elicit the testimony of the federal agents at trial, the state trial court could afford the defendants a complete remedy by simply excluding those witnesses for their non-compliance with state procedural law. In virtually every case other than *Tascarella*, however, it is the defense that seeks the testimony of uncooperative federal agents. Although state trial courts may have discretionary power to dismiss charges outright in cases in which federal agents refuse to honor a defense trial subpoena, *Tascarella* provides no precedent for the exercise of such a power.

*In re Gray*<sup>240</sup> began in the criminal courts of the State of Oklahoma. Defendant Dewayne E. Hopkins caused a subpoena having both *ad testificandum* and *duces tecum* provisions to be served on FBI Agent Ed Gray.<sup>241</sup> There is no suggestion in the opinion that Hopkins's need for Gray's testimony, and for the documents associated with that testimony, was other than bona fide. Citing 28 C.F.R. §§ 16.22-16.29, the Department of Justice instructed Gray to dishonor the subpoena, and removed the matter to federal court.<sup>242</sup> There, Hopkins squarely presented the constitutional issue: "that 5 U.S.C. § 301, under which the regulations were promulgated, does not permit the government to withhold information and the regulations must yield to [Hopkins's] constitutional rights to due process, to confront his accusers and to compulsory process."<sup>243</sup> The court of appeals, however, viewed the matter as not yet ripe for adjudication because Hopkins "has other remedies available. Those remedies may include dismissal of the charges or other ameliorative action by the state court . . . ."<sup>244</sup>

The federal appellate court's deference to the Oklahoma courts, although no doubt commendable as a matter of comity, raises more questions than it answers. Apparently the federal court felt itself insufficiently familiar with state procedural law to assert flatly that Hopkins *would* obtain relief in the state courts; it would go only so far as to suggest that Hopkins "*may*" obtain relief there. It is, of course, apodictic that any litigant *may* (or may not) obtain relief from any court upon any issue. Nor was the federal court at all certain

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vance, before the trial court could exclude the agent/witnesses. *Id.* at 157. *But see* State v. Miranda, 793 So. 2d 1042 (Fla. 3d DCA 2001).

240. No. 97-6385, 1998 U.S. App. LEXIS 25779 (10th Cir. Oct. 13, 1998).

241. *Id.* at \*2.

242. *Id.*

243. *Id.* at \*3.

244. *Id.* at \*4 (citation omitted).

what form this imagined relief might take. Perhaps outright dismissal, perhaps some unidentified "other ameliorative action."<sup>245</sup>

As a practical matter, state trial judges have few remedies at their command in a Hopkins-type situation. Outright dismissal deprives the state of its power to vindicate its interest in what may be an important criminal prosecution, and is at odds with the preference reflected in the Anglo-American legal tradition for resolution on the merits.<sup>246</sup> At the other extreme is the approach taken by the courts in *Andrews*, *Parker*, and some of the other cases considered *supra* page 124: the defendant is simply without a remedy. Between those two extremes, a state trial judge has little to work with. He cannot visit sanctions upon a federal agent as he would upon any other recalcitrant witness.

As an alternative to a remedy in the state court system, *In re Gray*, and other cases to consider the issue, look to the Administrative Procedure Act (APA).<sup>247</sup> Conceptually, the APA provides a complete remedy. As a practical matter, it provides a very incomplete remedy. A state court criminal defendant determines, before or perhaps during trial, that he needs the testimony of a federal agent. Pursuant to the Code of Federal Regulations he prepares and submits a summary of the desired testimony and of its relevance to the pending or impending prosecution. Time passes. The Department of Justice, which no doubt considers itself to have more pressing things to do than to decide whether to make its agent and his testimony available to some unimportant state court defendant in some far-flung corner of the Republic, will decide when it decides. The state court defendant can do nothing to expedite the decision process. The state court judge can do nothing to expedite the decision process. Perhaps in the fullness of time the Department decides that it will not comply. Now the state court defendant must become a federal court plaintiff, bringing a claim under the APA. A federal judge, no doubt with a very full docket, will consider the matter when he can. The state court defendant turned federal court plaintiff can do nothing to expedite the federal judge's decision process. The state court

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245. *Id.* Research has unearthed no subsequent reported cases in the state courts of Oklahoma arising out of the prosecution of Hopkins. If the state courts did indeed fashion an "ameliorative action," there is no record of it.

246. The counter-argument, of course, is the interest the state has in vindicating the authority of its judiciary to control its judicial proceedings. When federal agents participate in investigative activities that result in state court prosecutions, it is not too much to ask those federal agents to be prepared to play by state court rules, on pain of seeing the state prosecutions dismissed. Even after such a dismissal, the Federal Government is free to bring charges in its own courts, where it can play by its own rules.

247. *In re Gray*, 1998 U.S. App. LEXIS 25779, at \*4. See also *United States v. Williams*, 170 F.3d 431, 434 (4th Cir. 1999); *Illinois v. Mayfield*, No. 99-C2702, 1999 U.S. Dist. LEXIS 9069, at \*12 (N.D. Ill. May 26, 1999).

judge can do nothing to expedite the federal court judge's decision process. Meantime, has the criminal trial in state court not already begun? If it has begun, will the state court trial judge simply suspend the trial proceedings before him until the day that may or may not come in which the Federal Government will make, or will be ordered by a federal judge to make, its witness available? The APA may have great utility in many contexts, but in this context it has little. The criticisms made by Judge Norris in *Boeh*,<sup>248</sup> are fully applicable here.

Perhaps the only reported case of a state court criminal defendant obtaining timely relief under the APA in such circumstances is that of Samuel Johnson. Johnson's attempts to secure documents and testimony from federal agents were rebuffed in *Massock v. Superior Court of California*<sup>249</sup> and *DeMore v. Superior Court of California*.<sup>250</sup> His attorneys continued to believe—rightly, as it turned out—that evidence crucial to their client's defense was in the hands of federal authorities. In *Johnson v. Reno*<sup>251</sup> their persistence bore fruit.

It is implied, although not expressly stated, in the *Johnson v. Reno* opinion that Johnson's lawyers bowed to necessity and at last submitted, in support of their subpoenas, the statements called for by the CFR.<sup>252</sup> What is stated expressly is that the federal district judge came to conclude that Johnson's repeated requests were more than justified, and that the federal agencies' repeated ducking was less than justified.<sup>253</sup> "It appears to this Court that several federal agencies, including the ATF, DEA and FBI, were intimately involved in the investigation which led to [Johnson's] arrest. By virtue of their participation in this investigation, these agencies may have in their possession information helpful to [Johnson's] defense."<sup>254</sup> At issue was Johnson's entitlement to that information.

The court began its analysis by citing *United States v. Andolschek*<sup>255</sup> for the proposition "that although it is lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, this does not include the suppression of information in a criminal prosecution."<sup>256</sup> *Andolschek* was a federal prosecution for conspiracy to vio-

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248. *In re Boeh*, 25 F.3d 761, 767 (9th Cir. 1994) (Norris, J., dissenting).

249. No. C-99-3713 SC, 2000 U.S. Dist. LEXIS 53 (N.D. Cal. Jan. 3, 2000).

250. No. C-99-3730 SC, 1999 U.S. Dist. LEXIS 18997 (N.D. Cal. Dec. 8, 1999).

251. 92 F. Supp. 2d 993 (N.D. Cal. 2000). The court granted relief both under the APA and, in the alternative, by writ of mandamus.

252. *Id.* at 995.

253. *Id.*

254. *Id.* A few paragraphs later the court added, "In light of the dire nature of [Johnson's] circumstances, Defendants' refusal to produce the requested documents is unconscionable, unsupportable and in violation of [Johnson's] constitutional rights." *Id.*

255. 142 F.2d 503 (2d Cir. 1944); *see also supra* note 78.

256. *Johnson*, 92 F. Supp. 2d at 994 (citing *Andolschek*, 142 F.2d at 506).

late the income tax laws.<sup>257</sup> Codefendants Ward, Nagle, and Herskowitz were inspectors in the “Alcohol Tax Unit”<sup>258</sup> of the Internal Revenue Service who sought to obtain, for use in their defense, “certain official reports” which reflected upon their performance of their duties.<sup>259</sup> The trial judge ruled that Department of the Treasury regulations shielded the reports from disclosure to the defendants.<sup>260</sup>

In holding that the non-production of the documents was reversible error, Judge Hand seems almost to proceed on a theory of waiver. The Federal Government had brought charges against its former agents. The Federal Government possessed documents, putatively confidential, that were alleged to be relevant to those charges. “The government must choose; either it must leave the transactions [reflected in the sought-after documents] in the obscurity from which a trial will draw them, or it must expose them fully.”<sup>261</sup>

This quasi-waiver theory is hard to apply to the *Johnson* facts. It was the state, not the Federal Government, that initiated the criminal prosecution of Johnson.<sup>262</sup> But it was the Federal Government, not the state, from which Johnson sought evidence. When the Federal Government refused to honor Johnson’s subpoenas, it did so not on the basis of any state regulations but on the basis of its own regulations.<sup>263</sup> It cannot be argued that the State of California, by initiating a criminal case against Samuel Johnson, had “waived” the effect of regulations propounded by the United States Department of Justice. The State of California is without power to waive the effect of federal law.

Perhaps the *Johnson* court meant to suggest that merely by participating so actively and directly in the state’s prosecution of Johnson the federal authorities waived the benefit of their own regulations; a kind of waiver by proxy, or *Andolschek*-once-removed. If so, this is a novel interpretation of *Andolschek*—novel, but not unreasonable. True, the State of California cannot waive on behalf of the Federal Government the benefit that the Federal Government derives from its own lawfully enacted regulations. But by the same token, federal authorities ought not to work cheek-by-jowl with their state colleagues in accumulating evidence for a state criminal prosecution and then cache that evidence behind the Code of Federal Regulations to prevent the defendant from gaining access to it.

257. *Andolschek*, 142 F.2d at 504.

258. *Id.*

259. *Id.* at 505.

260. *Id.* It appears that the regulations in question, rather than conditioning production of the documents upon a defendant’s submission of a statement of his reasons for wanting the documents, simply barred production outright.

261. *Id.* at 506.

262. *Johnson v. Reno*, 92 F. Supp. 2d 993, 994 (N.D. Cal. 2000).

263. *Id.* at 995.

The jurisprudence of *Johnson* is novel in other ways. The opinion nowhere mentions the Sixth Amendment, nor the right to compulsory process. The opinion mentions more than once a criminal defendant's constitutional entitlement to exculpatory evidence.<sup>264</sup> *Johnson* quite properly cites *Brady v. Maryland*<sup>265</sup> as first setting forth that constitutional entitlement. In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>266</sup> Apparently, then, it was Samuel Johnson's Fifth Amendment right to due process of law,<sup>267</sup> and not his Sixth Amendment right to compulsory process, that the *Johnson* court purported to vindicate. The Sixth Amendment compulsory process right remains the red-headed stepchild of constitutional criminal procedure.

Johnson was fortunate, not just because he obtained relief, but because he obtained relief seasonably. The federal agencies were obliged to produce their evidence to him pretrial, when his lawyers could evaluate that evidence and determine what if any use to make of it. The next Samuel Johnson may learn only on the eve of trial, or perhaps after trial has already begun, of the existence of a crucial piece of evidence in the hands of a federal agency. For such a defendant there will probably be, on the present state of the law, no relief and no justice. The mere issuance of a subpoena will get him nothing. Appending to that subpoena the statement or affidavit required by federal regulations will assure him only that in the fullness of time someone will consider his subpoena. Beyond that, there is the prospect—citing *Johnson*—of an action under the APA. But time and trials wait for no man.

A criminal defendant in state court has a right, by operation of the Federal Constitution, to compulsory process. Yet federal agencies, by interposing the sovereignty of the Federal Government, can effectively frustrate that right. At the end of the day, the state court de-

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264. *Id.* (stating that Johnson was entitled "to obtain relevant materials that would, in a federal criminal trial, be discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963)," i.e., "information that is . . . exculpatory"; federal agencies were ordered to produce "[a]ll witness statements made that . . . contain exculpatory information"). It is not only defendants in *federal* criminal trials who are entitled to exculpatory information under *Brady*. As discussed in the text, *Brady* is an interpretation of the constitutional guarantee to due process of law, applicable to state as well as federal criminal defendants. *Id.*

265. 373 U.S. at 83.

266. *Id.* at 87. The *Brady* doctrine has since been refined in cases such as *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); and *Kyles v. Whitely*, 514 U.S. 419 (1995).

267. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. See also U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

defendant has no reliable, practical remedy—unless state trial judges are prepared to engage in the wholesale dismissal of cases in which defendants seek, but are denied, access to testimony and evidence from federal actors.<sup>268</sup>

## VI. CONCLUSION

On the occasion of *Touhy*'s fiftieth anniversary, the jurisprudence it has engendered is in a state of unexampled chaos. A statute intended to empower executive agency heads to maintain in good order the books, records, and evidentiary artifacts of their agencies has been interpreted by some federal courts as vesting in those agency heads an unreviewable power to defeat any exercise of the compulsory process right expressly guaranteed by the Sixth Amendment.<sup>269</sup> Other federal courts have given *Touhy* a much narrower reading, recognizing, for example, that it says nothing at all about testimonial, as opposed to documentary, evidence.<sup>270</sup> Still other federal courts continue to debate the scope and meaning of *Touhy*.<sup>271</sup> As Oliver Hardy is widely but incorrectly believed to have said to Stan Laurel, "Here's another fine mess you've gotten us into!"<sup>272</sup>

One hundred years ago Wigmore could write that, "[f]or three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence."<sup>273</sup> By operation of the Sixth Amend-

268. In *EPA v. General Electric Co.*, 197 F.3d 592 (2d Cir. 1999), the Second Circuit suggested that the inefficiency of the APA as a remedy could be ameliorated in a federal case by permitting the district judge before whom the underlying lawsuit is pending to review, as if in an independent APA action, the dishonoring of a subpoena by a federal actor pursuant to departmental regulations. That short-cut is unavailable when the trial is in a state court.

269. See, e.g., *United States v. Gentry*, No. 92-CR588, 1995 U.S. Dist. LEXIS 5517 (N.D. Ill. Apr. 27, 1995). See generally *Tholen Supply Co. v. Cont'l Cas.*, 859 F. Supp. 467, 469 (D. Kan. 1994); *Ferrell v. Yarberry*, 848 F. Supp. 121, 123 (E.D. Ark. 1994); *Dent v. Packerland Packing Co.*, 144 F.R.D. 675, 678 (D. Neb. 1992).

270. See, e.g., *Louisiana v. Sparks*, 978 F.2d 226 (5th Cir. 1992); *Giancana v. Johnson*, 335 F.2d 372 (7th Cir. 1964). See generally *Golden Pac. Bancorp v. FDIC*, No. 99-3799, 1999 U.S. Dist. LEXIS 20303 (D.N.J. 1999); *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12 (D. Colo. 1983).

271. Compare *Smith v. Cromer*, 159 F.3d 875 (4th Cir. 1998), with *id.* at 889 (Phillips, Sr. J., dissenting); compare *Davis Enters. v. EPA*, 877 F.2d 1181 (3d Cir. 1989), with *id.* at 1189 (Weis, J., dissenting). The Eastern District of Louisiana has met itself coming and going. Compare *United States v. Cleveland*, No. 96-207, 1997 U.S. Dist. LEXIS 7359 (E.D. La. May 21, 1997), with *Landry v. FBI*, No. 97-197, 1997 U.S. Dist. LEXIS 9850 (E.D. La. July 3, 1997).

272. He never actually said it. He did say, "Here's another nice mess you've gotten me into." *Another Fine Mess* was the title of a 1930 Laurel & Hardy short film. Hardy did use the expression "another fine mess" in a pilot recording for a radio series. See BBC, *A Brief Introduction to Laurel & Hardy*, at <http://www.bbc.co.uk/dna/h2g2/alabaster/A727355> (last visited Apr. 11, 2002) (on file with author).

273. WIGMORE, *supra* note 11, § 2192. This "fundamental maxim" is one that courts in our own time seem never to tire of repeating. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665,

ment, every member of the public who is prosecuted in federal court has a right to every man's evidence.

The simplest case for the proper application of *Touhy* is that of Jill Defendant, *supra* page 82. A federal agent—one whose involvement in the case as a percipient witness is not denied—is subpoenaed by the defense to give testimony at trial. *Touhy* has nothing to say about this case. The authorities cited by *Touhy* have nothing to say about this case. No statute that has been enacted, and no statute or regulation that could be enacted consistent with the Constitution, has anything to say about this case. Jill's right to compel the testimony of the witness cannot, on any rational interpretation of the Sixth Amendment or the *Touhy* jurisprudence, be defeated.

Only slightly more difficult is the case in which Jill issues a subpoena, not for testimony, but for physical or documentary evidence. The "housekeeping" statute lawfully empowers the head of an executive agency or department to make a definitive identification of the custodian of records of his agency or department—a determination that, by operation of the "housekeeping" statute, even the federal courts must respect. Undoubtedly the head of an executive agency or department can, as a function of his power to designate a custodian of records, affix merely ministerial conditions to the process of subpoena compliance, e.g. "time, place, and manner" restrictions, so long as they are not unreasonable or inconsistent with rules of federal procedure. But a condition of compliance that Jill state the reason for her subpoena is unreasonable, not supported by *Touhy*, and at odds with Jill's attorney's work-product privilege.

There is no basis for any suggestion that, absent stringent regulations such as those appearing at 28 C.F.R. § 16.22-16.29, federal agencies will be unable to protect themselves from a tidal wave of frivolous or unfairly burdensome subpoenas. The telephone company and other public utilities, bereft of any power to propound regulations, routinely respond to many and varied subpoenas directed to their custodians of records without being overwhelmed. Businesses large and small in heavily regulated industries are likewise subject to extensive visitorial process. If a subpoena directed to a federal agent or agency is overbroad, vexatious, or calls for privileged or confidential materials, the federal respondent has the same remedies available to him as does any other recipient of a subpoena. To suggest that federal agencies, stripped of the armor of their regulations, will be defenseless against the slings and arrows of outrageous sub-

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674 (1972); *United States v. Simmons*, 215 F.3d 737, 741 (7th Cir. 2000); *In re Grand Jury Subpoena*, 112 F.3d 910, 917 (8th Cir. 1997); *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 54 (9th Cir. 1980); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998); *In re Grand Jury Subpoena*, 406 F. Supp. 381, 385 (S.D.N.Y. 1975).

poenas is to suggest that such federal agencies are without recourse to the federal courts.

To restore the Sixth Amendment to its rightful place in federal criminal litigation, no more is needed than a consistently proper (and properly narrow) reading of *Touhy* by federal courts. Much more than a return to the original understanding of *Touhy*, however, will be necessary to resolve the Gordian problem of the state court criminal defendant who seeks to compel evidence or testimony from a federal source.

The subpoena propounded by the state court criminal defendant issues in the name of the state. Although the defendant's right to such a subpoena is assured by the Federal Constitution, such a subpoena is without power to compel the federal sovereign or its agents.

Sovereign immunity is waived to the extent, and within the terms, of the APA. The APA has proven adequate to the needs of civil litigants, such as those involved in the *Exxon* litigation.<sup>274</sup> But civil litigation, state or federal, is heavily weighted toward pretrial practice. Depositions, interrogatories, requests for production and other such discovery devices, by means of which a litigant may learn the identity and potential testimony of witnesses, and of the existence and location of physical or documentary evidence, are largely unknown to criminal practice. Additionally, the relatively slower pace of civil litigation, always undertaken with one eye on structuring a settlement in lieu of trial, affords time and opportunity to pursue an APA claim. Trial preparation in a criminal case is conducted at a forced-march pace, while constitutional and statutory "speedy trial" clocks tick and harried judges bark about docket congestion. Possessed of few discovery devices and little preparation time, the state court criminal defendant may learn only on the courthouse steps the name of a key federal witness, or the existence of a crucial piece of evidence in federal custody. A subpoena unaccompanied by a statement of the desired evidence and its relevance will not be honored. A subpoena accompanied by such a statement (which statement is undeniably a waiver of work-product privilege) may, or may not, be honored. It would be a rare trial judge indeed who would be willing to continue for months a trial that had already begun, or was about to begin, in order to afford the defendant an opportunity to litigate, pursuant to the APA, a separate claim that an agency's rejection of his subpoena was an abuse of discretion. Samuel Johnson's successful pursuit of federally-held evidence for use in his state criminal case appears to make him unique, or nearly so, among state court criminal defendants.

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274. *E.g.*, *SeaHawk Seafoods, Inc. v. Exxon Corp.*, No. A89-0095-CV (D. Alaska 1989); *Exxon Valdez Litig.*, 3AN-89-2533CI (Alaska Super. Ct. 1989).

As noted above, this is an injustice that cannot be remedied simply by a judicial re-reading of *Touhy*. Nor is it a problem that will just go away. The use of law enforcement “task forces” combining federal, state, and local agencies in response to interstate and international criminal activity will likely increase the number of instances in which federal hands will hold evidence needed by a state defendant. Whether Congress could ever vest state judges with concurrent jurisdiction over APA claims is a question of constitutional law the resolution of which is unnecessary for purposes of this article; in any event, Congress has not attempted to vest such jurisdiction in state courts and gives no sign of intending to do so.

As a practical matter, then, the only remedy presently available to the criminal defendant in state court is outright dismissal of the case against him. It is a remedy that courts are understandably reluctant to provide. A raft of orders dismissing charges against habitual offenders for reasons having nothing to do with the merits of those charges is not the sort of thing with which a state judge wants to be confronted come election time. But the inability of a state defendant to enforce his subpoena frustrates more than that defendant’s constitutional rights; it also frustrates the state court’s truth-seeking function. If, in the view of the trial judge, the absence of a federal witness or the lack of federally-held evidence undermines the truth-seeking function of the trial sufficiently, dismissal is not merely justice to the defendant but justice writ large. Like the witness in *Leviticus*, the federal agent or employee has heard the “voice of adjuration.” If he ignores it, then he—not the trial judge, not the defendant—must bear his iniquity.