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A CONVENIENT BLANKET OF SECRECY: THE OFT-CITED BUT NONEXISTENT HOUSEKEEPING PRIVILEGE

William Bradley Russell, Jr.*

[The] “housekeeping” statute, destitute as it is of all vestige of definitions and standards, is susceptible of being tortured, and has been tortured, with judicial sanction, it must be admitted, into a claim of privilege against disclosure and inspection so all-encompassing that it may fairly be said that there is no hope of obtaining inspection of a public record not specifically opened by Congress except through the courtesy of the Government.¹

INTRODUCTION

Federal agencies today often claim a privilege of confidentiality that is really no privilege at all. These claims are based on a relatively unimportant “housekeeping” statute that grants the heads of federal agencies the power to make regulations for “the custody, use, and preservation” of agency records.² The law on this matter is widely misunderstood. Federal agencies often interpret this housekeeping statute as granting a substantive privilege to withhold information. Indeed, there are many valid reasons for a federal agency to claim a privilege. And the housekeeping statute facilitates agency decisions about claims of privilege by allowing agencies to make regulations requiring subordinates to report to decision-makers subpoenas for agency documents.³ The statute thus assures that only those approved by an agency will make decisions about whether to comply with a subpoena or to assert a claim of privilege. The housekeeping statute can do nothing more than this. If an

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¹ *Availability of Information from Fed. Dep'ts and Agencies: Hearings Before a Subcomm. of the Comm. on Gov't Operations (pt. 1)*, H. R., 84th Cong. 12 (1955) (statement of Harold L. Cross, Freedom of Information Counsel, American Society of Newspaper Editors).

² 5 U.S.C. § 301 (2000).

³ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (“When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.”).

agency is to withhold documents from the courts, it must do so in compliance with the law of privilege.⁴

In 1789, the first U.S. Congress gave cabinet secretaries authority over the records of their departments.⁵ The statutes granting this authority were not grants of a confidentiality privilege.⁶ Rather, the authority was merely a housekeeping matter, “enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents.”⁷ Over the years, this authority has been invoked by executive agencies to conceal information from the public and from the courts.⁸ It has been used as “a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws.”⁹ It has come to be known as the “housekeeping privilege.”¹⁰

In fact, though, the housekeeping statute confers no privilege at all.¹¹ Currently codified at 5 U.S.C. § 301, the housekeeping statute actually grants executive agencies the power only to centralize control over agency records in the head of the agency.¹²

⁴ See, e.g., 5 U.S.C. § 552 (2002). There are other ways that the government can avoid divulging information, of course, but these are the same methods that are available to private parties. See FED. R. CIV. P. 26. Under this rule, a court may protect a person from discovery that is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,” or whose burden or expense “outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues,” *Id.* See also *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (noting that the background rules of discovery are adequate to protect the government’s interests in conserving resources).

⁵ See, e.g., Act of July 27, 1789, ch. 4, 1 Stat. 29 (Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, 1 Stat. 50 (Department of War). The relevant language of both statutes is the same: “[T]he Secretary for the department . . . shall . . . be entitled to have the custody and charge of all records, books and papers in the office of the Secretary . . .”

⁶ H.R. Rep. No. 85-1461, as reprinted in 1958 U.S.C.C.A.N. 3352.

⁷ *Id.* at 3352.

⁸ *Id.* at 3352–53.

⁹ *Id.* at 3353.

¹⁰ Gregory S. Coleman, Note, *Touhy and the Housekeeping Privilege: Dead but not Buried?*, 70 TEX. L. REV. 685, 685 (1992).

¹¹ *Id.*

¹² *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951); see also *Recent Cases*, 108 HARV. L. REV. 965, 967–68 (1995) (discussing *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774 (9th Cir. 1994)).

It grants agency heads the power to promulgate regulations for the handling of agency records.¹³ Such regulations are binding on agency employees, but they are no more binding on the courts than the internal regulations of any employer.¹⁴

In 1951, the U.S. Supreme Court decided that a federal agency employee cannot be held in contempt of court for failure to comply with a subpoena duces tecum for agency records when the employee's failure to comply was required by agency regulations.¹⁵ The case was called *United States ex rel. Touhy v. Ragen*,¹⁶ and it addressed the problem of agency employees stuck between court orders for information and agency regulations requiring that such information be withheld.¹⁷ The Court held that an agency head may validly withdraw from employees the power to decide whether or not to comply with a subpoena.¹⁸ The Court did not hold that an agency head could promulgate regulations that would themselves create a privilege to withhold agency records from the courts.¹⁹ Federal agencies may indeed have numerous bases for asserting a privilege to withhold information, but such a privilege is not founded on the housekeeping statute.

Unfortunately, the *Touhy* doctrine that developed in the years following this decision bore little resemblance to the *Touhy* decision.²⁰ Rather, the doctrine has

¹³ The housekeeping statute, 5 U.S.C. § 301 (2000), states:

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.

¹⁴ A private employer may write regulations requiring employees to consult with someone in authority before taking legal action on behalf of the employer, such as complying with a subpoena. But those regulations do not create law that is binding on the courts. *See Blessing v. United States*, 447 F. Supp. 1160, 1191 n.44 (E.D. Pa. 1978) ("A nondiscretionary instruction from a private employer to a private employee does not ordinarily create an enforceable legal duty running to third parties."). Similarly, the internal housekeeping regulations of a federal agency govern the official actions of agency employees, but they do not bind the courts. Indeed, Congress did not, in the housekeeping statute, delegate to federal agencies the authority to create their own privileges. 5 U.S.C. § 301 (2000).

¹⁵ *Touhy*, 340 U.S. at 467–68.

¹⁶ 340 U.S. 462 (1951).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 467; *id.* at 472–73 (Frankfurter, J., concurring). Justice Frankfurter clarified that the Court did not decide whether the head of the agency himself could refuse to comply with a subpoena to produce agency records. *Id.* An agency head in such a situation would have to claim a valid privilege in order to avoid such a subpoena. *Id.*

²⁰ Milton Hirsch, "The Voice of Adjuration": *The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen*, 30 FLA. ST. U. L. REV. 81 (2002).

become the basis for federal agency assertions of a general privilege to withhold information when no specific privilege is available.²¹

The housekeeping statute grants no evidentiary privilege to federal agencies; it confers power that may only be exercised internally within executive agencies.²² In practice, however, the housekeeping statute is regularly used as an unqualified privilege, allowing federal agencies to decide whether or not to comply with subpoenas. This presents dangerous problems for our system of separation of powers because, under our system, the judiciary is supposed to decide matters of privilege.²³ Moreover, this situation presents a problem for the rule of law because powerful executive agencies can flout the law with impunity. This Note presents the true law and discusses the problems with disregarding it.

Executive privilege is essential to the operation of government. There are many matters that the government must keep in confidence. However, the housekeeping "privilege" purports to allow the executive to circumvent the standard method of adjudicating claims of executive privilege. This Note suggests that a withholding under the housekeeping "privilege" should automatically grant the court the power to decide the claim as if it were a claim of executive privilege (as at least one circuit has held).²⁴ Perhaps, in keeping with the standard method of adjudicating such claims, the executive privilege claim will fail unless the head of the executive department joins the litigation and makes a formal claim of privilege.

This Note argues that the federal agency practice of standing on the housekeeping statute as a justification for refusing to comply with a subpoena is not in accord with the law. This Note is divided into four parts. Part I discusses the history of the housekeeping statute. This part argues that the statute was never meant to authorize executive agencies to determine for themselves whether or not to comply with a subpoena. The section argues that agencies have used the housekeeping statute as a privilege to withhold, despite even an amendment to the statute clarifying that the statute does not confer such a privilege. Finally, Part I discusses the current state of the housekeeping privilege, including the fact that the continued existence of the housekeeping privilege relies to some extent on the cost of challenging agency decisions.

²¹ Coleman, *supra* note 10, at 687.

²² See 5 U.S.C. § 301 (2000). The statute confers authority only over the affairs of the agency.

²³ See *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("[I]t is the province and duty of this Court to 'say what the law is' with respect to the claim of privilege presented in this case." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

²⁴ See *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).

[W]hen a party has filed a request for evidence or testimony and the request can be properly denied only if the evidence or testimony is privileged, the question of privilege is as squarely raised by an unexplained refusal to comply as by an express claim of privilege, and the court must decide the question.

Part II discusses the real privilege to withhold: executive privilege. This part discusses proper claims of executive privilege and the rationale behind the privilege. The part also explains the proper procedure for claims of executive privilege. Finally, Part II explains that the standard for upholding an agency decision to withhold is much lower under the misunderstood housekeeping privilege than under a proper claim of executive privilege; this system undermines the law of executive privilege.

Part III explores the problems with misuse of the housekeeping statute. This part discusses the problem this misuse poses for the constitutional principle of the separation of powers. It also explores the tension with the common law principle of everyman's evidence. Further, it discusses the problem for the rule of law if executive agencies are able to create their own evidentiary privileges and flout the courts.

Finally, Part IV of this Note suggests that courts confronted with claims of the "housekeeping privilege" evaluate such claims as claims of executive privilege. This accords with the purpose of the housekeeping statute as a means of centralizing authority in the head of the department. Moreover, this eliminates an extralegal method of enforcing the de facto housekeeping privilege: the high cost of bringing and winning a claim against the head of an executive department or the department itself.

I. HISTORY OF THE HOUSEKEEPING PRIVILEGE

A. 1789 to the Modern Era

Congress originally granted federal agencies the power to control their records as part of the statutes that created those agencies.²⁵ This was just a housekeeping matter; having established an agency, Congress gave the head of that agency the authority over its records. The statute was not intended to grant a privilege of confidentiality. As explained by an expert witness before the Special Subcommittee on Government Information:

There was no historymaking debate over [the housekeeping statute] because it was not a historymaking statute, it was not a historymaking bill, it was not a historymaking proposal. If it had proposed secrecy it would have been historymaking. But it didn't. It was just a housekeeping statute, and as such raised none of the great issues that would have aroused Madison, Jefferson, Mason, and the rest of the statesmen who put so much trust in popular rights to information.²⁶

²⁵ See, e.g., Act of July 27, 1789, ch. 4, § 4, 1 Stat. 29; Act of Aug. 7, 1789, ch. 7, § 4, 1 Stat. 50.

²⁶ H.R. Rep. No. 85-1461, as reprinted in 1958 U.S.C.C.A.N. 3352, 3353 (citation

The statute was first codified in 1875.²⁷ The grants of authority to the heads of federal agencies to control the records of these agencies were consolidated into one statutory section granting all federal agency heads authority over the records of their respective agencies.²⁸ Just two years later, this code section was used for the first time to justify withholding federal agency records.²⁹

At the turn of the twentieth century, the Supreme Court decided that a court could not punish a federal employee for failing to turn over subpoenaed agency records. In *Boske v. Comingore*,³⁰ a state tax collector wanted to use federal tax records as evidence against a distiller of alcohol.³¹ Treasury Department regulations prohibited the release of such records.³² Federal law also made it a crime for any federal treasury agent to divulge tax information.³³ The state court ordered the federal agent to turn over the tax records, and the agent refused pursuant to the regulations of the Treasury Department.³⁴ The state court held the agent in contempt.³⁵

The Supreme Court determined that the agent could not be held in contempt for complying with the valid regulations of the Treasury Department.³⁶ The Secretary of the Treasury was held to have the authority to withdraw from his subordinates the power to determine how Treasury records would be used.³⁷ It is notable that, had the Secretary of the Treasury himself been ordered to produce the records, the Secretary would have been entirely within his rights to refuse to produce them. Although the Court never explicitly said this, the records would have been protected by executive privilege.

omitted).

²⁷ *Id.* at 3352.

²⁸ See HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 311 n.3 (1953) (noting that the housekeeping statute, as originally codified, was derived from the statutes that created the various cabinet departments in 1789).

²⁹ H.R. Rep. No. 85-1461, as reprinted in 1958 U.S.C.C.A.N. 3352, 3352; see also 15 Op. Att'y Gen. 342 (1877) (advising that the housekeeping statute grants agency heads the power to withhold documents from the press unless some other statute makes the documents public records). The opinion of the Attorney General, Charles Devens, is not noteworthy. He merely states that an agency head who is the legal owner of documents possesses the same right to withhold the documents as any owner of documents. *Id.* at 342-43. Unlike the courts, the press has no special power to force the production of documents. *Id.* at 345. Though this opinion advised that the housekeeping statute authorized withholding, it did not advise that the statute created a privilege to withhold documents under subpoena. *Id.* at 343-45.

³⁰ 177 U.S. 459 (1900).

³¹ *Id.* at 462.

³² *Id.* at 467.

³³ *Id.* at 462.

³⁴ *Id.* at 462-63.

³⁵ *Id.* at 463.

³⁶ *Id.* at 470.

³⁷ *Id.*

The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded.³⁸

The Court thus noted the existence of a privilege to withhold information in the public interest. If the information were liable to disclosure, taxpayers might be reluctant to report the details of their private businesses, and the government's ability to effectively collect revenue would be impaired.

In 1951, the Supreme Court decided a similar case, *United States ex rel. Touhy v. Ragen*.³⁹ In that case, a prison inmate alleged in a habeas corpus action that an FBI agent had documents that would be helpful to the inmate's defense.⁴⁰ The trial court ordered the production of the documents, but the agent, in compliance with Justice Department regulations, refused to produce the documents.⁴¹ The Seventh Circuit released the agent, holding that the Justice Department regulation, authorized by the housekeeping statute, "'confers upon the Department of Justice the privilege of refusing to produce."⁴² This demonstrated a misapprehension of the law. Unless the housekeeping statute was interpreted as granting a general privilege of confidentiality, there is no way that a regulation promulgated by a department head could have the effect of creating an evidentiary privilege. If the statute did in fact grant such a general privilege, the department head could make a conclusive determination not to produce records.

The Supreme Court refused to consider the issue of whether the housekeeping statute conferred a privilege:

Among the questions duly presented by the petition for certiorari was whether it is permissible for the Attorney General to make a conclusive determination not to produce records and whether

³⁸ *Id.* at 469–70.

³⁹ 340 U.S. 462 (1951).

⁴⁰ *Id.* at 464–65.

⁴¹ *Id.* at 465.

⁴² *Id.* at 465 (quoting *United States ex rel. Touhy v. Ragen*, 180 F.2d 321, 327 (7th Cir. 1950)).

his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena duces tecum.

We find it unnecessary, however to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal.⁴³

Instead, the Supreme Court determined that the Attorney General could "validly withdraw from his subordinates the power to release department papers."⁴⁴ This was a correct statement of the law. It did not recognize any housekeeping privilege; it only determined that the courts would have to order the head, rather than an employee, of an executive department to produce department records. This accords completely with the housekeeping statute, which says that the department head is the person who has custody of department records.⁴⁵

This case gave birth to the *Touhy* doctrine, which bears little resemblance to the holding of the case. "The decision in *Touhy* is often cited for the proposition that an agency head is free to withhold evidence from a court without a specific claim of privilege."⁴⁶

Despite Justice Frankfurter's best efforts, the holding in *Touhy* has not been so narrowly construed or applied. Because the Supreme Court did little or no analysis of the problem before it, most lower courts that have been faced with a similar set of facts have interpreted the *Touhy* opinion as authority to deny the contested discovery without looking at the circumstances of the particular situation before it. Unfortunately, this has allowed agency heads to promulgate blanket non-disclosure regulations which forbid subordinates from complying with discovery requests while avoiding review of their own actions. This practice has persisted, with relatively little change or development, for nearly forty-five years.⁴⁷

⁴³ *Id.* at 467.

⁴⁴ *Id.*

⁴⁵ 5 U.S.C. § 301 (2000).

⁴⁶ Coleman, *supra* note 10, at 687. See also Hirsch, *supra* note 20, at 83 ("[*Touhy*] is the case most cited by both executive-branch agencies in support of their regulations and by courts confronted by a demand for evidence withheld in reliance upon such regulations.").

⁴⁷ John T. Richmond, Jr., Note, *Forty-Five Years Since United States ex rel. Touhy v. Ragen: The Time is Ripe for a Change to a More Functional Approach*, 40 ST. LOUIS U. L.J. 173, 181 (1996) (footnotes omitted).

In 1958, Congress attempted to address the misunderstanding of the housekeeping statute by amending it to make clear that the statute does not authorize withholding information.⁴⁸ By this, the Congress attempted to return the housekeeping statute to its original intent.⁴⁹ But the new amendment had little effect on federal agency refusals to produce information.⁵⁰

Although some commentators believed that this amendment was intended to reverse, or indeed, that it did reverse the *Touhy* doctrine, others were skeptical of such conclusions Irrespective of whether Congress intended to overrule *Touhy* . . . , courts have continued to apply and expand the immunity from testimony beyond what was allowed in *Touhy*.⁵¹

The 1958 amendment may have been passed to overrule the housekeeping privilege, but it seems not to have had that effect.

It has been written that the 1958 amendment eliminated the housekeeping privilege, and that the only vestige of the doctrine left is an agency's procedural discretion to determine when to assert a privilege. While those positions follow logically the 1958 amendment, most courts that have addressed the issue have not recognized the demise of the *Touhy* doctrine. Indeed, time has shown that although the 1958 amendment "knocked the judicially sanctioned prop out from under the bureaucratic privilege claims," it has done little to stem the tide of claims of *Touhy* privilege flowing from government agencies. Most, if not all, commentators agree that the amendment was intended to abrogate the de facto privilege that had arisen under various housekeeping regulations. The proposition for which *Touhy* is often cited — that a government agency may withhold docu-

⁴⁸ H.R. Rep. No. 85-1461, as reprinted in 1958 U.S.C.C.A.N. 3352. The amendment added one sentence to the statute: "This section does not authorize withholding information from the public or limiting the availability of records to the public." *Id.* at 3553.

⁴⁹ *Id.* at 3352.

⁵⁰ Jason C. Grech, Note, *Exxon Shipping, the Power to Subpoena Federal Agency Employees, and the Housekeeping Statute: Cleaning Up the Housekeeping Privilege for the Chimney-Sweeper's Benefit*, 37 WM. & MARY L. REV. 1137, 1144 (1996) ("Although the language of the [1958 housekeeping statute] amendment was direct in its demand for openness, the addition had little, if any, effect on federal agency responses to discovery requests.").

⁵¹ Robert R. Kiesel, Note, *Every Man's Evidence and Ivory Tower Agencies: How May a Civil Litigant Obtain Testimony from an Employee of a Nonparty Federal Agency?*, 59 GEO. WASH. L. REV. 1647, 1655-56 (1991) (footnotes omitted).

ments or testimony at its discretion — simply is not good law and hasn't been since 1958.⁵²

The *Touhy* doctrine has been approved as a privilege to conserve the resources of federal agencies.⁵³ If agency employees were forced to spend a great deal of time in court, their agencies would be deprived of their services. This protection of agency resources is unnecessary, however. If the need is slight for the testimony of federal employees, and the cost to the federal agency of supplying the testimony is great, the Federal Rules of Civil Procedure already protect the federal agency from the burden of supplying the testimony.⁵⁴ These are the same rules that apply to private parties as well.⁵⁵ The court must balance the interests for and against the production of information in cases where the cost of complying with a subpoena becomes an issue.⁵⁶ Yet, the *Touhy* doctrine has allowed federal agencies to make their own determinations on this question.⁵⁷

⁵² Coleman, *supra* note 10, at 688–89 (quoting EEOC v. Los Alamos Constructors, Inc., 382 F. Supp. 1373, 1378 (D.N.M. 1974)) (footnotes omitted).

⁵³ See Moore v. Armour Pharm. Co., 129 F.R.D. 551, 556 (N.D. Ga. 1990), *aff'd*, 927 F.2d 1194 (11th Cir. 1991).

⁵⁴ FED. R. CIV. P. 26(b)(2)(iii) (explaining that a court may limit discovery if it determines that “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues”); see also Kiesel, *supra* note 51, at 1669–70.

Certain safeguards against overly burdensome discovery . . . already exist in federal practice. Under the discovery provisions of the Federal Rules of Civil Procedure, only relevant information may be sought through discovery and overly burdensome requests may be limited or denied by the trial court. These rules limit discovery in such a manner that any request that passes their tests should be allowed unless the information sought is privileged. When a court issues a subpoena to an agency employee, it already has determined that the requested information is relevant or may lead to the discovery of relevant information and that the request is not overly burdensome. Thus, a separate agency determination of the requested testimony’s burden on the public fisc seems superfluous. Nonparty federal agencies should stand as others under the rules governing discovery, with the limitation, of course, that privileges unique to the government are recognized. Furthermore, when the agency considers the costs of testimony, its analysis is one-sided; the agency has no means by which to assess the need of the litigant for the testimony sought.

Id. (footnotes omitted).

⁵⁵ See FED. R. CIV. P. 26(c).

⁵⁶ See FED. R. CIV. P. 26(b)(2).

⁵⁷ See Kiesel, *supra* note 51, at 1668.

For example, in *Moore v. Armour Pharmaceutical Co.*,⁵⁸ the U.S. District Court for the Northern District of Georgia held that the Secretary of Health and Human Services could decide not to allow employees of the Center for Disease Control to testify in private litigation if the Secretary determined that the testimony would be too burdensome.⁵⁹ The court itself did not balance the interests of the Center for Disease Control with the interests of the litigants. Instead, it held that, under the housekeeping statute, “the head of an executive department may prohibit an employee of his department from giving testimony in private litigation.”⁶⁰

Other courts have properly applied the *Touhy* doctrine, though, holding that the housekeeping privilege cannot justify withholding information from the courts.⁶¹ In *United States v. Reynolds*,⁶² the widows of civilians killed in the crash of a military airplane sued the government in tort.⁶³ The plaintiffs moved to require the Air Force to produce the official accident report.⁶⁴ The Air Force defended by asserting that regulations promulgated under the housekeeping statute made the reports privileged.⁶⁵ The trial court refused to accept that argument and ordered production.⁶⁶ Then the Secretary of the Air Force made a formal claim of the military secrets privilege.⁶⁷ The U.S. Supreme Court granted certiorari and held that the claim of the housekeeping privilege was unavailing:

[T]he trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.⁶⁸

⁵⁸ 129 F.R.D. 551 (N.D. Ga. 1990).

⁵⁹ *Id.*

⁶⁰ *Id.* at 553.

⁶¹ See *United States v. Reynolds*, 345 U.S. 1 (1953); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) (holding that Section 301 does not allow federal agencies to withhold government information against a valid subpoena); *F.A.C., Inc. v. Cooperativa de Seguros de Vida*, 188 F.R.D. 181 (D.P.R. 1999).

⁶² 345 U.S. 1 (1953).

⁶³ *Id.* at 3.

⁶⁴ *Id.*

⁶⁵ *Id.* at 3–4.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 4–5.

⁶⁸ *Id.* at 10–11.

Thus, the Court recognized that the housekeeping privilege was no privilege at all. When the Air Force first claimed a right to withhold on the authority of the housekeeping statute, the Court stated that the Air Force had no such privilege.⁶⁹ It was only when the Air Force lodged a formal claim of executive privilege that the Court upheld the refusal to produce the accident report.⁷⁰

B. The Housekeeping Privilege Today: A Privilege in Fact Rather than in Law

Numerous challenges face litigants who wish to obtain information from an executive agency. Regulations promulgated under the housekeeping statute, in conjunction with the immunity of federal employees from contempt of court sanctions under *Touhy*, create a de facto privilege to withhold any information that a federal agency determines to withhold. The Administrative Procedure Act (APA)⁷¹ offers some hope for review of an agency decision, but courts have not granted relief unless the agency decision to withhold was not made in accordance with the agency's own policies.⁷² Because most federal agencies follow a general policy of nondisclosure,⁷³ it is extremely difficult to show that a decision to withhold was not

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 5 U.S.C. §§ 551–59, 701–06 (2000).

⁷² *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999) (upholding agency decision to withhold where agency acted reasonably and complied with its own regulations); *Davis Enters. v. U.S. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989) (same); *Houston Bus. J. v. Office of the Comptroller of the Currency*, 86 F.3d 1208, 1212 n.4 (D.C. Cir. 1996) (stating that federal courts will use the “arbitrary and capricious” standard to review agency decisions to prevent employee testimony). *But see* 5 U.S.C. § 706(2)(A) (2000) (stating that relief is authorized, inter alia, when agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” (emphasis added)).

In both *COMSAT* and *Davis Enterprises*, the party requesting disclosure did not challenge the legality of the agency policies themselves. *See COMSAT*, 190 F.3d at 277 (“*COMSAT* does not contest the underlying validity of NSF’s *Touhy* regulations.”); *Davis Enters.*, 877 F.2d at 1184 (“Appellants have not challenged the validity of the EPA’s power to promulgate regulations which grant the agency discretion to determine whether to comply with subpoenas or requests for employee testimony in private litigation.”). For that reason, the courts had no occasion to consider whether the agency actions were “not in accordance with law” or outside of statutory authorization. In calling to light the litigants’ failure to question the legality of the regulations, the courts hinted that meaningful review of agency decisions to withhold would require a challenge to the regulations themselves. That is, if regulations allow an agency to withhold without a privilege, a disappointed litigant would have to challenge the regulations themselves. Accordingly, a litigant wishing to make use of a meaningful standard of review under the APA might find availing a challenge to the regulations themselves.

⁷³ *See, e.g.*, Federal Labor Relations Authority, 5 C.F.R. § 2411.11 (2005).

No . . . officer or employee . . . shall produce or present any files,

based on agency policy. According to one commentator, only three agencies have policies for the release of information that are roughly coterminous with the boundaries of executive privilege.⁷⁴ Moreover, the time and expense required to bring an APA suit ensure that it will often be impossible for a litigant to obtain evidence from a recalcitrant federal agency.⁷⁵

The courts have held that the proper method of challenging federal agency decisions to withhold information is by a collateral suit against the agency itself.⁷⁶ These collateral suits are brought under the APA⁷⁷ against the agency itself — not against individual employees of the agency. Thus, the challenges circumvent the problem of *Touhy*, i.e., forcing an agency employee to decide between complying with a court order and obeying the commands of his employer. These lawsuits,

documents, reports, memoranda, or records . . . or testify in behalf of any party to any cause pending . . . in any court . . . with respect to any information, facts, or other matter to their knowledge in their official capacity . . . whether in answer to a subpoena [sic] . . . or otherwise, without . . . written consent

Id. See also Office of Admin., Executive Office of the President, 5 C.F.R. § 2502.31 (2005) (“No employee . . . shall, in response to a demand of a court . . . disclose any information or produce any material acquired as part of the performance of his official status without the prior approval of the Deputy Director.”).

⁷⁴ See Kiesel, *supra* note 51, at 1656–57 (“[O]nly the regulations of the Department of Justice, the Department of Defense, and the Agency for International Development provide standards that comport with any traditional common law notion of privilege.” (footnotes omitted)).

⁷⁵ *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 780 n.11 (9th Cir. 1994) (“[C]ollateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may ‘effectively eviscerate[]’ any right to the requested testimony.” (quoting *In re Boeh*, 25 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J., dissenting) (second alteration in original))).

⁷⁶ *Boeh*, 25 F.3d at 764 n.3; *Davis*, 877 F.2d at 1185–86; *Hayes Int’l, Inc. v. U.S. Dep’t of Navy*, 685 F. Supp. 228, 230 (M.D. Ala. 1987); see also *Coleman*, *supra* note 10, at 691–94; *Richmond*, *supra* note 47, at 184 n.71.

⁷⁷ 5 U.S.C. §§ 701–06. See *COMSAT Corp.*, 190 F.3d at 277 (citing *United States v. Williams*, 170 F.3d 431 (4th Cir. 1999)). In *Williams*, the court explained that the APA was the appropriate avenue for review of an agency decision not to comply with a state court subpoena. 170 F.3d at 434. The *COMSAT* court cited *Williams* for the proposition that the APA was the only waiver of sovereign immunity that would allow review of an agency decision to withhold. 190 F.3d at 277. The *COMSAT* opinion then criticized the Ninth Circuit for allowing judicial review of an agency decision to withhold because the Ninth Circuit’s judicial review did not apply the deferential standards of the APA. *Id.* There is a significant difference between the subpoena in *Williams* and the subpoena at issue in the Ninth Circuit case, *Exxon Shipping*, 34 F.3d 774. The subpoena in *Williams* was issued from a state court, *Williams*, 170 F.3d at 432, while the subpoena before the Ninth Circuit issued out of a federal proceeding, *Exxon Shipping*, 34 F.3d at 776. While *Williams* might have held that the APA is the only waiver of sovereign immunity effective to review a refusal to comply with a state court subpoena, it did not hold that an agency’s decision to ignore a federal subpoena was reviewable only under the APA. *Williams*, 170 F.3d at 433–34.

therefore, also do not implicate the holding in *Touhy*;⁷⁸ that holding was only that the head of an executive department could issue regulations withdrawing from employees the “power to release department papers.”⁷⁹

Actions brought under the APA also sidestep another problem: sovereign immunity. Sovereign immunity prevents state courts from enforcing subpoenas against the federal government.⁸⁰ If a state court seeks to compel a federal employee to comply with a subpoena, the federal employee can remove the matter to federal court.⁸¹ The federal court will recognize that the state court had no jurisdiction to compel compliance from a federal employee.⁸² Because federal courts on removal derive their jurisdiction from the state court from which the matter was removed, the federal court will also determine that it lacks jurisdiction to enforce the subpoena.⁸³

Sovereign immunity also prevents a private litigant from compelling the federal government to do anything, except where the federal government has waived this right.⁸⁴ Where it agrees to be a party to a lawsuit, the federal government waives any sovereign immunity objections to the equal application of the rules of procedure.⁸⁵ In such cases, the government agrees to be bound by the same rules of procedure as bind other litigants. Therefore, the federal government as a party would be bound by the discovery rules of the Federal Rules of Civil Procedure, just as any other litigant. The federal government would also waive sovereign immunity under the APA.⁸⁶ Even where the noncompliant federal agency is not a party to the matter in which a subpoena is issued, therefore, review of its decision not to comply will not be barred by a claim of sovereign immunity.

⁷⁸ See *Exxon Shipping*, 34 F.3d at 777 (“Here, unlike in *Touhy*, the agencies themselves are named defendants. Thus, the ultimate question of federal agencies’ authority to withhold discovery, including deposition testimony, is squarely at issue.”).

⁷⁹ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467 (1951).

⁸⁰ *Smith v. Cromer*, 159 F.3d 875, 879 (4th Cir. 1998) (“Where an agency has not waived its immunity to suit, the state court (and the federal court on removal) lacks jurisdiction to proceed against a federal employee acting pursuant to agency direction.”); see also 28 U.S.C. § 1442 (2000) (authorizing federal officers sued in state court for actions taken under color of their federal offices to remove the suits to federal court).

⁸¹ See *Boron Oil Co. v. Downie*, 873 F.2d 67, 68 (4th Cir. 1989) (describing a federal employee’s removal to federal court of a state court subpoena proceeding).

⁸² See *id.* at 70.

⁸³ See *id.*

⁸⁴ E.g., *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Semon v. Stewart*, 374 F.3d 184, 190 (2d Cir. 2004).

⁸⁵ *Al Fayed v. CIA*, 229 F.3d 272, 275 (D.C. Cir. 2000) (“Where the government is a party to a suit it is, unsurprisingly, subject to the [Federal] Rules [of Civil Procedure].” (citing *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958))).

⁸⁶ *Id.* at 275 (explaining that the federal government waived its claim to sovereign immunity for actions not seeking monetary relief by a 1976 amendment to the Administrative Procedure Act).

There is some question as to whether the doctrine of sovereign immunity can be circumvented in any other way.⁸⁷ In *Exxon Shipping Co. v. United States Department of Interior*,⁸⁸ the Ninth Circuit refused to hold that sovereign immunity protects non-party federal agencies from valid federal court subpoenas.⁸⁹ This was based on the principle of separation of powers, which would be violated if the executive branch could use sovereign immunity to shield itself from the judiciary, a co-equal branch.⁹⁰ Furthermore, the Ninth Circuit found that such a conception of sovereign immunity would impair the “right to every man’s evidence.”⁹¹ The court thus concluded that the Federal Rules of Civil Procedure should govern discovery against federal agencies, even when they are not parties.⁹²

Other courts, however, have held that the APA is the only waiver of sovereign immunity for non-party federal agencies.⁹³ The Second Circuit addressed the question in *United States EPA v. General Electric Co.*⁹⁴ In that case, the court held “that the government may not be subject to judicial proceedings unless there has been an express waiver of its sovereign immunity.”⁹⁵ The Second Circuit found that the only such express waiver “that would permit a court to require a response to a subpoena in an action in which the government is not a party is found in the APA.”⁹⁶ The court further held that the Federal Rules of Civil Procedure governing discovery do not contain the required waiver.⁹⁷ In *COMSAT Corp. v. National Science Foundation*,⁹⁸ the Fourth Circuit agreed that the only waiver of sovereign immunity effective to require the federal government to answer a subpoena was the APA.⁹⁹ The court stated, “When the government is not a party, the APA provides the sole avenue for review of an agency’s refusal to permit its employees to comply with subpoenas.”¹⁰⁰

There is logic in the position of the *Exxon Shipping* court that separation of powers prevents one branch of the federal government from declaring itself immune

⁸⁷ *Id.* at 275 (noting that the law on this matter is “in some disarray”).

⁸⁸ 34 F.3d 774 (9th Cir. 1994).

⁸⁹ *Id.* at 778 (distinguishing between state court subpoenas and federal court subpoenas).

⁹⁰ *Id.*

⁹¹ *Id.* at 779 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

⁹² *Id.*

⁹³ *Al Fayed v. CIA*, 229 F.3d 273, 275–76 (D.C. Cir 2000) (“[A]t least two circuits, the Second and Fourth, have taken a more restrictive approach. Rejecting *Exxon* and viewing [the Administrative Procedure Act] as the only applicable waiver of sovereign immunity, they have applied the [Act].”).

⁹⁴ 197 F.3d 592 (2d Cir. 1999).

⁹⁵ *Id.* at 598.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 190 F.3d 269 (4th Cir. 1999).

⁹⁹ *Id.* at 274.

¹⁰⁰ *Id.*

from another branch.¹⁰¹ At bottom, both the executive and the judiciary are at the same level of sovereign power. It is nonsensical to declare that one organ of the sovereign is immune from another.¹⁰² However, this may not adequately answer the claim that sovereign immunity shields the federal executive from a subpoena issued by the federal judiciary. After all, all judicial proceedings are conducted by the power of the court. When a plaintiff sues a defendant, for example, it is by the power of the court that the defendant is compelled to answer. It is not the private plaintiff who commands the attention of the defendant. Yet sovereign immunity protects the sovereign from lawsuits by private citizens despite the fact that it is the power of the court that would command the sovereign as defendant to answer the complaint. If the simple fact of equality of power between the federal executive and the federal judiciary were enough to abrogate the defense of sovereign immunity, it would seem to abrogate that defense in all cases, including those in which the defense is unquestionably valid. The essential difference may lie in the fact that courts enforce subpoenas in aid of their own truth-seeking function; therefore, such subpoenas may be said to issue on the courts' behalf. While a court commands a defendant's attention on behalf of a plaintiff, a court demands evidence on its own behalf, in aid of its own essential function.

If the APA is the only way to challenge an agency decision not to produce documents, agencies are able to create their own privileges. Under the housekeeping statute, agencies have the authority to write policies for the production of documents in response to subpoenas.¹⁰³ Under the deferential standard of the APA, a litigant who has been rebuffed in an attempt to obtain documents can only prevail against an agency if the agency withheld the documents in contravention of the agency's own policies.¹⁰⁴ Therefore, agencies are able to use the housekeeping

¹⁰¹ *Exxon Shipping Co. v. U.S. Dept. Of Interior*, 34 F.3d 770, 778 (9th Cir. 1994).

¹⁰² Hirsch, *supra* note 20, at 104. Hirsch states:

When a state, acting through its court, attempts to exercise its visitorial 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 visitorial 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.

Id.

¹⁰³ 5 U.S.C. § 301 (2000).

¹⁰⁴ *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 277-78 (4th Cir. 1999) (approving the National Science Foundation's refusal to comply with subpoenas, where "[a]cting in accordance with the procedures mandated by its regulations, NSF reached an entirely reasonable decision to refuse compliance with [the] document subpoenas."). It appears no court has yet upheld a challenge under the APA to the validity of agency regulations requiring nondisclosure. However, it is likely that the APA would authorize such a challenge.

statute as authority to write regulations forbidding compliance with subpoenas. Those regulations are then used as the touchstone, under the APA's deferential standard, for determining whether an agency has improperly failed to comply with a subpoena. In essence, agencies cite the housekeeping statute as authority to create privileges to withhold. And when they have followed these housekeeping-statute-authorized regulations in determining not to comply with subpoenas, the agencies are entitled to prevail if their decisions are reviewed under the APA's deferential "arbitrary and capricious" standard. While the law of executive privilege might authorize withholding in certain circumstances, the APA's deferential standard does not question whether those circumstances were present; it asks only whether executive agencies followed their own procedures in deciding to withhold.

For example, if a federal agency promulgated regulations requiring that no information ever be produced in response to a subpoena, that agency's refusal to comply with a subpoena would survive review under the APA's "arbitrary and capricious" standard.¹⁰⁵ Even if the information were clearly not subject to a claim of privilege, the agency would act in conformity with its own regulations by refusing to produce the information. And a court will only overturn an agency decision not to comply with a subpoena if the decision is not made according to the agency's own regulations.¹⁰⁶ Therefore, under the APA's deferential review, the agency refusal to produce would be upheld notwithstanding that the law of executive privilege does not permit withholding.

The law of privilege is further frustrated by the cost in time and money of obtaining review of an agency determination to withhold. In *Exxon Shipping*, for example, the Ninth Circuit acknowledged "that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate[]' any right to the requested [information]."¹⁰⁷

The Department of Justice regulations are a good example of regulations that bear some relationship to the law of privilege. Codified at 28 C.F.R. §§ 16.21, et seq., these regulations require that the recipient of a subpoena for information acquired within the scope of the recipient's employment with the Department notify a superior.¹⁰⁸ The superior will then begin the process of determining whether or not to comply with the subpoena. The regulations list six factors relevant to a possible

See supra note 72.

¹⁰⁵ The APA likely also includes a more searching standard of review. If an agency decision is in accord with the agency's own regulations — and is therefore not "arbitrary and capricious" — a disappointed litigant may challenge the validity of the agency's regulations.

See supra note 72.

¹⁰⁶ *See supra* note 72 and accompanying text.

¹⁰⁷ *Exxon Shipping Co. v. U.S. Dept. Of Interior*, 34 F.3d 774, 780 n.11 (9th Cir. 1994) (first alteration in original) (quoting *In re Boeh*, 23 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J., dissenting)).

¹⁰⁸ 28 C.F.R. § 16.22(a) (2004).

claim of privilege, to be considered in making the determination.¹⁰⁹ These factors mandate consideration of specific national security interests,¹¹⁰ and of the law enforcement investigatory privilege,¹¹¹ among other privileges.¹¹²

By contrast, the Department of Transportation regulations bear little relationship to the law of executive privilege. The regulations require that a Department employee refuse to give testimony or produce records “unless authorized.”¹¹³ The criteria by which those empowered to grant authorization determine whether testimony or record production will be authorized are not clearly set out.¹¹⁴ However, the regulations do state broad purposes that are not in accord with the law of executive privilege, including the conservation of Department resources.¹¹⁵

II. EXECUTIVE PRIVILEGE

It is often necessary to the accomplishment of some worthy objective of the government that certain matters be kept secret. For that reason, the courts have long held that the government has a privilege with respect to matters for which the public interest requires secrecy.¹¹⁶ This privilege can be divided into two broad categories:

¹⁰⁹ *Id.* § 16.26. The six factors are (1) whether “[d]isclosure would violate a [specific] statute . . . or a rule of procedure,” (2) whether “[d]isclosure would violate a specific regulation,” (3) whether “[d]isclosure would reveal classified information,” (4) whether “[d]isclosure would reveal a confidential source or informant,” (5) whether disclosure would compromise secret law enforcement techniques, and (6) whether “[d]isclosure would improperly [compromise a] trade secret[.]” *Id.*

¹¹⁰ *Id.* § 16.26(b)(3).

¹¹¹ *Id.* § 16.26(b)(4–5).

¹¹² *Id.* § 16.26(a)(2) (requiring consideration of “the relevant substantive law concerning privilege”).

¹¹³ 49 C.F.R. § 9.5 (2004).

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 9.1(b) (stating that the regulations’ purposes are to conserve resources, keep the government out of private disputes or controversial issues not related to its function, and protect confidential information).

¹¹⁶ *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953); *see also Boske v. Comingore*, 177 U.S. 459 (1900) (recognizing that the public interest requires the secrecy of revenue information); *Totten v. United States*, 92 U.S. 105, 107 (1875) (noting that the public interest occasionally requires secrecy at the expense of a full judicial consideration of a dispute).

In *Totten*, the Supreme Court stated the general principle

that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for

an absolute privilege and a qualified privilege. The government has an absolute privilege for the protection of state secrets.¹¹⁷ The government has only a qualified privilege of secrecy for the protection of the public interest in other areas.¹¹⁸ In the context of the qualified privilege, the courts weigh the public interest in maintaining secrecy against the interests of the litigants in obtaining the information.¹¹⁹

A. *The State Secrets Privilege*

The Supreme Court first articulated the unqualified state secrets privilege in *United States v. Reynolds*¹²⁰ in 1953, though the Court had “hinted at its existence” before that.¹²¹ In *Reynolds*, the widows of civilians killed in a military aircraft accident sued the government in tort.¹²² The deceased civilians had been aboard an Air Force aircraft testing secret electronic equipment when the fatal accident occurred.¹²³ The plaintiffs attempted to obtain the official report of the Air Force’s accident investigation.¹²⁴ In response, the Secretary of the Air Force formally claimed that the report was privileged as a military secret.¹²⁵ The Court agreed with the Air Force.¹²⁶

The Court set out the system for evaluating claims of the state secrets privilege. The Supreme Court required “a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.”¹²⁷ Such a claim is not conclusive, though, because “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”¹²⁸

secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Id.

¹¹⁷ *Reynolds*, 345 U.S. at 11 (“[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).

¹¹⁸ *United States v. Nixon*, 418 U.S. 683, 706 (1974) (“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”).

¹¹⁹ *See id.* at 707.

¹²⁰ 345 U.S. 1 (1953).

¹²¹ J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 568 (1994). *See also Totten*, 92 U.S. at 107.

¹²² *Reynolds*, 345 U.S. at 2–3.

¹²³ *Id.*

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 3–5.

¹²⁶ *Id.* at 10–11.

¹²⁷ *Id.* at 7–8 (footnotes omitted).

¹²⁸ *Id.* at 9–10.

Rather, the courts must inquire into the circumstances of the claim.¹²⁹ If these circumstances show “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged,”¹³⁰ the claim is effective to block even an in camera inspection of the evidence.¹³¹ In maintaining judicial control over evidence, the Court announced that the necessity of the evidence will dictate the extent of the inquiry into the propriety of the privilege claim.¹³² A more searching inquiry is required if the need for the evidence is great.¹³³ The Court noted, however, that “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”¹³⁴ The same rule applies for diplomatic and national security secrets.¹³⁵ Therefore, when a claim of privilege has been made by the head of the relevant executive department, a court will determine whether the circumstances show that diplomatic, military, or national security secrets are at risk. If the court is satisfied that such secrets are at risk, the privilege is valid, and the court cannot force disclosure.

B. The Qualified Privileges

The law is different for other claims of executive privilege. Such claims will only prevail if the public interest in secrecy outweighs the litigants’ interest in the evidence. The deliberative privilege allows withholding of information used to help the government make policy.¹³⁶ The rationale behind the deliberative privilege is that open and honest communication is best fostered where there is no danger that the ideas exchanged will become public.¹³⁷ The privilege seeks to prevent a chilling of candid opinions from advisors.¹³⁸

The law enforcement investigatory privilege protects information that could harm law enforcement activities if revealed. This privilege ensures that confidential informants remain confidential, that investigations are not compromised before their conclusions, and that secret investigative methods are not revealed.¹³⁹

As a qualified privilege, the law enforcement investigatory privilege requires that the need of a litigant for information be weighed against the public interest in

¹²⁹ *Id.* at 10.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 11.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *United States v. Nixon*, 418 U.S. 683, 706 (1994) (noting that the rule “protect[s] military, diplomatic, [and] sensitive national security secrets”).

¹³⁶ *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001).

¹³⁷ *Id.* at 8–9.

¹³⁸ *Id.*

¹³⁹ *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988).

maintaining secrecy.¹⁴⁰ In balancing these interests, courts must consider a number of factors, including the following:

(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit [if the plaintiff is the party seeking discovery] is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the . . . case [of the party seeking discovery].¹⁴¹

The privilege takes into account the interests of the party seeking discovery, and where those interests are strong the privilege is weaker. As with the deliberative privilege, a claim of the qualified law enforcement investigatory privilege can only succeed where a neutral judicial balance reveals that the public interest in nondisclosure outweighs the litigants' interest in the information.¹⁴²

If there is a legitimate need to keep information secret, the law of executive privilege maintains secrecy. The housekeeping statute and the regulations promulgated under it work hand-in-hand with executive privilege by providing a mechanism for the centralized determination of whether to assert a claim of privilege. But the housekeeping statute does not grant a privilege in itself.

III. PROBLEMS WITH MISUSE OF THE HOUSEKEEPING PRIVILEGE

Use of the housekeeping privilege, which is really no privilege at all, presents at least three serious problems. First, the government of the United States is founded on the principle of separation of powers, and control of evidence is a power that belongs

¹⁴⁰ *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996).

¹⁴¹ *Id.* (quoting *In re Sealed Case*, 856 F.2d at 272).

¹⁴² *Id.*

to the courts.¹⁴³ Inasmuch as the housekeeping privilege allows executive agencies to create their own privileges to withhold information from the courts, it allows the executive branch to encroach on the legitimate province of the judiciary.¹⁴⁴ Second, withholding of relevant evidence decreases the reliability of judicial determinations of truth.¹⁴⁵ Privileges, therefore, require strong justifications. The housekeeping privilege allows withholding even in cases where no such justification supports withholding. This is particularly problematic in the context of criminal prosecutions because it runs afoul of the criminal defendant's right to compulsory process. Finally, the housekeeping privilege allows powerful executive agencies to flout the law of privilege by creating their own privileges.¹⁴⁶ If the concept of rule of law means anything, it means that officers of one branch of the government cannot create a separate law of privilege that applies to them.

A. Separation of Powers

The doctrine of separation of powers requires that the three branches of government refrain from sharing their respective powers among themselves. In *United States v. Nixon*,¹⁴⁷ the Supreme Court made this pronouncement about the essential power of the judiciary to adjudicate claims of executive privilege:

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case.¹⁴⁸

¹⁴³ See *United States v. Nixon*, 418 U.S. 683, 705 (1974) (holding that the judiciary has the authority "to say what the law is" regarding privilege (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

¹⁴⁴ See *infra* Part III.A.

¹⁴⁵ See *infra* Part III.B.

¹⁴⁶ See *infra* Part III.C.

¹⁴⁷ 418 U.S. 683 (1974).

¹⁴⁸ *Id.* at 704–05 (citations omitted).

In *United States v. Nixon*, the President had claimed the right to conclusively determine what information was protected by the executive privilege for communications with advisors.¹⁴⁹ The Supreme Court recognized, though, that it is the duty of the judiciary to determine whether the purposes served by a privilege justify the harm to the truth-seeking function of the courts in specific cases.¹⁵⁰ Separation of powers would be undermined if the executive were allowed to balance the interest in the privilege against the interest in truth-seeking, that is, if the executive were able to say conclusively “what the law is” with respect to its own claims of privilege.¹⁵¹

Yet this is exactly what the housekeeping privilege purports to allow. It allows executive agencies to write their own regulations for compliance with subpoenas and to measure the lawfulness of their decisions not to comply by reference to their own regulations. The law of privilege is to the contrary, though — it requires a balancing of the interests served by a privilege against the interest in truth-seeking.¹⁵² If an agency determines not to comply with a subpoena, the agency’s decision is likely to receive judicial review, under the APA, only to determine whether the decision complied with the agency’s own regulations. Agency regulations promulgated under the authority of the housekeeping statute are not questioned. Thus, the housekeeping privilege allows the executive branch to avoid a judicial balancing of the interests served by a privilege to withhold evidence and the

¹⁴⁹ *Id.* at 703.

¹⁵⁰ *See id.* at 710 n.18 (“Limitations are properly placed upon the operation of this general principle [the search for the truth] only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))); *see also id.* at 707. The Court stated:

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III

. . . .
Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.

Id.

This doctrine does not apply with equal force in the context of civil lawsuits because the judicial need for the information is not so great. *See Cheney v. U.S. Dist. Ct. for D.C.*, 124 S. Ct. 2576, 2589 (2004) (“The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions.’”) (citation omitted).

¹⁵¹ *Nixon*, 418 U.S. at 708–11.

¹⁵² *Id.* at 707.

interest in truth-seeking. This permits the executive branch to usurp an essential power of the judicial branch: the power to adjudicate claims of privilege.

*B. "Derogation of the Search for Truth"*¹⁵³

Privileges permit withholding relevant evidence and are, therefore, in "derogation of the search for truth."¹⁵⁴ For that reason, privileges require strong justifications. The housekeeping privilege, however, allows withholding in situations where there is no such justification. Naturally, this is problematic inasmuch as it reduces the reliability of judicial determinations of truth.

This is especially troublesome, though, in the context of criminal prosecutions. In *Nixon*, the Supreme Court recognized the strong interest in complete information in the context of criminal prosecutions:

The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.¹⁵⁵

Moreover, the Court noted that the criminal defendant's right to information is of a constitutional level.¹⁵⁶ It is possible for the reasons supporting a privilege to be sufficiently paramount, however, to overcome even this very strong need. But because the housekeeping privilege allows an agency to conclusively determine to withhold information without a neutral assessment of the interest in producing the

¹⁵³ *Id.* at 710.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 709.

¹⁵⁶ *Id.* at 711.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

information, the privilege allows withholding even where the sacrifice to the judiciary's truth-seeking function eclipses the harm that would be done by producing the information.¹⁵⁷

C. Rule of Law

One of the foundational principles of this nation — indeed, of enlightened government itself — is that law shall rule all men, including those who administer the law. Ideally, neutral laws govern the actions of both leaders and citizens. However, the housekeeping privilege contravenes this principle. Under that supposed privilege, a federal agency may write its own law of privilege. That self-written law may or may not comport with the real law of privilege. If it does not, a suit under the APA will not provide a remedy unless the agency violated its own law.

IV. PROPOSED SOLUTION

The housekeeping privilege “is not a privilege at all.”¹⁵⁸ For that reason, it should not be effective to allow a federal agency to withhold evidence. Nevertheless, federal agencies frequently assert the housekeeping privilege as a justification to withhold evidence subject to a subpoena.¹⁵⁹ In such situations, the only resort may be an expensive, time-consuming action against the federal agency withholding the evidence. This is a needless waste of resources.¹⁶⁰ Therefore, it would be wise to allow courts faced with a refusal to produce subpoenaed evidence to consider the

¹⁵⁷ This is not to say that agencies always decide to withhold information even when they determine that the harm in releasing the information is outweighed by the benefit to the truth-seeking function of a court. Indeed, the Department of Transportation's housekeeping regulations state that agency counsel has the discretion to release information that would otherwise not be released under the regulations if the release “is necessary to prevent a miscarriage of justice.” 49 C.F.R. § 9.1(c)(1) (2004).

¹⁵⁸ Coleman, *supra* note 10, at 685.

¹⁵⁹ See *supra* notes 46–52 and accompanying text.

¹⁶⁰ See *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). The court explained that the expense of formal requirements for obtaining review of an agency decision to withhold was unjustified:

To require service of process on the N.L.R.B. would open the possibility that some litigants would be deprived of the use of material, unprivileged evidence; it would impose an additional and unnecessary burden on parties seeking to obtain government records; it would lay a trap for the unwary. It would do this without the slightest compensating improvement in the disposition of justice.

merits of such a refusal. This position is bolstered by the strong policy favoring adjudication on the merits of a claim.

This is the approach taken by the Fifth Circuit Court of Appeals in *National Labor Relations Board v. Capitol Fish Co.*¹⁶¹ The defendant in this unfair employment practices case secured a subpoena to examine the National Labor Relations Board attorney who investigated the complaint.¹⁶² As instructed, the defendant asked the general counsel of the Board to grant the attorney permission to testify.¹⁶³ The Board refused to allow the attorney to testify, however, and the attorney's testimony was therefore not taken at the administrative hearing.¹⁶⁴ The Fifth Circuit held that privilege is the only real justification for a refusal to comply with a subpoena.¹⁶⁵ Therefore, the court held

that when a party has filed a request for evidence or testimony and the request can be properly denied only if the evidence or testimony is privileged, the question of privilege is as squarely raised by an unexplained refusal to comply as by an express claim of privilege, and the court must decide the question.¹⁶⁶

The court relied on the Supreme Court's decision in *United States v. Reynolds*, which allowed adjudication of the merits of a claim of privilege despite the fact that the head of the relevant department had not been named as the defendant.¹⁶⁷

This approach prevents abuses of the nonexistent housekeeping privilege. It also allows the legitimate use of the housekeeping statute as a way to centralize the decision to comply with, or object to, a subpoena.¹⁶⁸ Executive agency decision-makers will not be deprived of the opportunity to raise objections to subpoenas. With housekeeping regulations that require permission from an agency decision-maker before information is produced, the appropriate decision-maker must first decline to grant permission. Only then will a court consider possible claims of privilege that might relieve the agency's obligation to comply with a subpoena. If an agency wishes to raise its own claim of privilege, it is, of course, free to do so. It is only in cases where an agency decision-maker has, without explanation, refused to grant permission that this approach will make a difference.

¹⁶¹ 294 F.2d 868 (5th Cir. 1961).

¹⁶² *Id.* at 870.

¹⁶³ *Id.* The Board's regulations prohibited testimony of Board employees without permission from the Board itself or its General Counsel. *Id.* at 870 & n.1.

¹⁶⁴ *Id.* at 870-71.

¹⁶⁵ *Id.* at 874 ("In final analysis, justification for excluding government records rests on privilege.").

¹⁶⁶ *Id.* at 875.

¹⁶⁷ *Id.* at 874.

¹⁶⁸ See *supra* note 3 and accompanying text; *supra* note 44 and accompanying text.

This approach will also not affect valid claims of sovereign immunity. If a refusal to comply is based on sovereign immunity, the court must consider the claim of sovereign immunity. If sovereign immunity prevents enforcement of a subpoena, the mere fact that there is no privilege to avoid the subpoena will not change the outcome.

Finally, this approach would not turn agencies of the federal government into “speakers’ bureau[s]” for private litigants.¹⁶⁹ The federal discovery rules do not allow excessively burdensome discovery.¹⁷⁰ Federal agencies under this approach would have just as much right as any private entity to claim that discovery requests are unduly burdensome. This proposal changes the current state of affairs somewhat by ensuring that both sides are considered in a claim that a discovery request is unduly burdensome. Currently, an agency may consider only its own interests in determining that a discovery request would be too costly. This state of affairs allows some litigants who have a strong need for information to be frustrated in their attempts to obtain it, even where the cost to an agency of producing the information is relatively low.

This proposed solution is better than the use of the APA because it allows adjudication of the merits of a claim of privilege. In contrast, actions brought under the APA only compare agency noncompliance with the agency’s own regulations.¹⁷¹ If noncompliance is rooted in the regulations, an APA action is unavailing. Review of an incorrect agency determination to withhold will not invalidate that determination if the determination was made in accordance with agency regulations. The suggested approach, by contrast, would invalidate a decision to withhold if that decision was not based in law. This approach has another advantage over the APA: it does not place the high costs of a separate action between a valid claim and relief thereon.

Another approach would be necessary to combat the possibility that a federal agency would adopt regulations that prohibit the release of all agency information without regard to any possible privileges. An effective approach might merely declare invalid a blanket refusal to disclose. While an agency employee cannot be held in contempt of court for failure to comply, a court might nevertheless order an agency to comply.

¹⁶⁹ See *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (citation omitted). The government feared that allowing private litigants discretion to call government employees as witnesses in private litigation “will turn the federal government into a ‘speakers’ bureau for private litigants.” *Id.* (citation omitted).

¹⁷⁰ See *supra* notes 54–56 and accompanying text.

¹⁷¹ See *supra* notes 71–75 and accompanying text.

V. CONCLUSION

Federal agencies often claim the housekeeping privilege, which is really no privilege at all.¹⁷² Derived from a statute that allows the agencies to issue regulations for the management of agency documents, the “privilege” is thought to allow agencies to conclusively determine what information they will and will not release to the courts in response to valid subpoenas. Invocations of the “privilege” are most often based on a misstatement of the U.S. Supreme Court’s holding in *United States ex rel. Touhy v. Ragen*.¹⁷³ Agencies claim that case granted them the power to promulgate regulations that have the effect of creating evidentiary privileges. Such claims were weakened significantly when Congress amended the housekeeping statute to clarify that it did not justify withholding information.¹⁷⁴ Nevertheless, the “privilege” has persisted. Confusion among some courts as to the proper interpretation of *Touhy*, along with the difficulty of challenging agency decisions to defy subpoenas, have allowed this “privilege” to survive in fact if not in law.¹⁷⁵

The most widely accepted method of challenging an agency decision to withhold information is through the APA. Unfortunately, though, the difficulty of employing this method has been described as “‘effectively eviscerat[ing]’”¹⁷⁶ the right to the information. Moreover, a court reviewing agency actions under the APA judges the action only against the touchstone of the agency’s own policies. If the agency’s policies require withholding, the APA may not provide relief.¹⁷⁷

The law does grant the government special privileges to withhold information. The executive branch has the privilege to maintain state secrets, even in the face of a subpoena.¹⁷⁸ This privilege will be upheld no matter how strong the interest in disclosure of the secret. The executive also has qualified privileges to withhold information when the public interest in maintaining secrecy outweighs the judicial interest in having all the relevant evidence.¹⁷⁹ This privilege recognizes that people may refrain from giving the government confidential information if they fear that information may become public. But there are some situations where the harm done to the truth-seeking function of the courts by the preservation of confidentiality would outweigh the harm done by the release of such information. In such cases, the courts require the release of the information.

¹⁷² Coleman, *supra* note 10, at 685.

¹⁷³ 340 U.S. 462 (1951).

¹⁷⁴ Congress very explicitly stated, “This section does not authorize withholding information from the public or limiting the availability of records to the public.” 5 U.S.C. § 301 (2000).

¹⁷⁵ See *supra* notes 48–52 and accompanying text; *supra* notes 71–75 and accompanying text.

¹⁷⁶ Exxon Shipping Co. v. U.S. Dep’t of Interior, 34 F.3d 774, 780 n.11 (9th Cir. 1994) (quoting *In re Boeh*, 25 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J., dissenting)).

¹⁷⁷ The APA may allow a challenge to the agency’s policies themselves, however. See *supra* note 72.

¹⁷⁸ See *supra* Part II.

¹⁷⁹ See *supra* Part II.B.

The housekeeping “privilege” subverts this principle, though, because it does not allow the courts to weigh the interests in releasing information against the interests in nondisclosure. It therefore impairs the truth-seeking function of the judiciary even where the interest in maintaining secrecy does not justify such impairment.¹⁸⁰ In arrogating to the executive branch the power to adjudicate claims of privilege — a power that rightfully belongs to the judicial branch — the housekeeping “privilege” thus violates the concept of separation of powers.¹⁸¹ The use of this “privilege” also detracts from the rule of law inasmuch as it allows powerful federal agencies to avoid the reach of subpoenas despite the absence of any legal right to do so.¹⁸²

The courts should address these problems according to the rule articulated in *NLRB v. Capitol Fish Co.*¹⁸³ Under that rule, courts would automatically consider the merits of a real privilege whenever an executive agency attempts to rely on the housekeeping “privilege.”¹⁸⁴ This approach would not risk disclosing secret information where the interest in maintaining secrecy outweighs the interest in disclosure. Courts will not fail to consider the justification for maintaining secrecy in the way that agencies fail to consider the interest in disclosure. Indeed, courts are the bodies that traditionally balance these interests. It is conceivable, of course, that where an agency refuses to respond to a subpoena, a court will not understand the agency’s interest in confidentiality. In such a case, a court might erroneously assume that the agency’s interest in confidentiality is weaker than it is. But if a court fails to take proper account of the government interest in secrecy, nothing prevents the agency from making a formal claim of privilege stating the proper interest in secrecy. Under this proposed solution, then, no legal interest in secrecy is impaired, but the failure to consider appropriate interests in disclosure is remedied.

This proposal has the virtue of providing full consideration to both the interests of the executive in secrecy and the interests of the judiciary in truth-seeking. The proposal also prevents the obstacles of cost and time from becoming barriers to the determination of the legal authority of an executive agency to ignore a subpoena. Finally, the proposal would not require federal agencies to devote inordinate resources to the production of information in response to subpoenas. The only drawback is that agencies would lose the extra-legal ability to frustrate litigants whose need for information (1) outweighs the government interest in secrecy, and (2) outweighs the cost to the government of producing the information. Certainly, the argument that federal agencies would like to continue to exercise authority that they do not possess under law is not sufficient to overcome the benefits of this proposal.

¹⁸⁰ See *supra* Part III.B.

¹⁸¹ See *supra* Part III.A.

¹⁸² See *supra* Part III.C.

¹⁸³ 294 F.2d 868 (5th Cir. 1961).

¹⁸⁴ See *supra* notes 161–68 and accompanying text.