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Jason C. Grech

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NOTES

EXXON SHIPPING, THE POWER TO SUBPOENA FEDERAL AGENCY EMPLOYEES, AND THE HOUSEKEEPING STATUTE: CLEANING UP THE HOUSEKEEPING PRIVILEGE FOR THE CHIMNEY-SWEEPER'S BENEFIT

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 same coach while a chimney-sweeper and a barrow-woman were in a 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.¹

In the United States, citizens generally have extensive rights to access governmental information. In the arena of discovery, the government is no more exempt, beyond certain limited privilege claims, from the evidentiary process than is the average citizen.² In fact, even the president may be subject to subpoenas for his testimony,³ an occurrence that would fulfill

1. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (John T. McNaughton rev. 1961) (quoting 4 THE WORKS OF JEREMY BENTHAM 320-21 (John Bowring ed., 1843)).

2. See Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495, 505 (1981).

3. See Susan Schmidt, *Presidential Court Appearance Sought*, WASH. POST, Feb.

Bentham's assertion.

The phrase "the public . . . has a right to every man's evidence" has echoed throughout Supreme Court opinions for decades.⁴ Courts and legislatures have rigorously upheld this basic principle,⁵ except, it seems, when discovery entails a subpoena of governmental agencies. This Note explores the difficulties that parties to civil litigation encounter when they attempt to subpoena a federal agency employee.⁶ It will examine the policies

2, 1996, at A4. Susan McDougal asked a federal court to subpoena President Clinton to testify in the Whitewater trial. *Id.*

4. See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting WIGMORE, *supra* note 1, § 2192); WIGMORE, *supra* note 1, § 2192; see also *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (stating that society is similarly entitled).

5. See, e.g., 5 U.S.C. § 552 (1994) (addressing public access to federal agency rules, opinions, orders, and records). The Freedom of Information Act (FOIA) provides the public with vast rights to procure copies of government documents and publications. FOIA does not discuss nondocumented information, such as testimony from government employees. See *id.*; see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979) (observing that FOIA was passed as a response to fears of governmental secrecy and abuse of power).

6. This Note does not address actions to which a government agency is a party. As this Note explains, it is well settled and accepted that the normal rules of discovery bind an agency when the government is a party to the litigation. See *infra* notes 50-54 and accompanying text.

Additionally, this Note is concerned only with civil actions. The government, acting as prosecutor, is an interested party in criminal cases, and the defendant's rights to information increase in the criminal context. See *United States v. Reynolds*, 345 U.S. 1, 12 (1953) ("[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (holding 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); *United States v. Feeney*, 501 F. Supp. 1337, 1341 (D. Colo. 1980) (stating that the rights of a defendant in a criminal case are greater than those of a party in a civil suit). But cf. *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir.) (holding that a defendant in a criminal proceeding must comply with the procedural requirements of agency regulations), *cert. denied*, 459 U.S. 973 (1982); *United States v. Allen*, 554 F.2d 398, 406 (10th Cir.) (finding that the defendant could not claim that the court had erred in refusing to require an agency employee to testify because the defendant had not followed the procedures under the agency's housekeeping regulation), *cert. denied*, 434 U.S. 836 (1977).

Furthermore, this Note examines only discovery requests related to information obtained by employees within their scope of employment. Normal discovery principles

and legal arguments that agencies advance to justify their refusal to allow discovery. In particular, this Note will concentrate on the use of the so-called "housekeeping privilege," examining the validity of this "privilege" and how judicial decisions have affected it.

Private parties to civil litigation frequently request the testimony of federal agency employees⁷ because agency employees, while fulfilling their job duties, obtain information critical to the cases of private litigants.⁸ Without access to this information, litigants lose important evidence. The courts consistently have found that fact finders must examine all the available evidence to determine the truth.⁹ Under the present system of regulations, however, private litigants face a difficult task when they seek the testimony of an agency employee. This Note explores the problems that litigants encounter when they attempt to gain access to governmental information in the form of testimony. This Note weighs the pros and cons of the current procedures; argues that a recent Ninth Circuit case, *Exxon Shipping Co. v. United States Department of the Interior*,¹⁰ is moving in the right direction by rejecting the restrictive majority interpretation of the housekeeping privilege; and proposes a legislative remedy.

govern information acquired outside a federal employee's scope of employment. See 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, 1648-49 n.5 (1991).

Lastly, this Note is concerned only with attempts to depose or receive the testimony of federal agency employees. Although there is some overlap, discovery of textual information usually is undertaken under FOIA because the statute requires prompt agency response and speedy judicial review. See 5 U.S.C. § 552(a)(6)(A)(i)-(ii); Lively, *supra* note 2, at 497 n.13.

7. See, e.g., *Davis Enters. v. EPA*, 877 F.2d 1181, 1188 (3d Cir. 1989) (referring to statistics showing that the Environmental Protection Agency "received seventy-one requests or subpoenas for testimony in private litigation" within two years of adopting a housekeeping regulation), *cert. denied*, 493 U.S. 1070 (1990); *Moore v. Armour Pharmaceutical Co.*, 129 F.R.D. 551, 554 (N.D. Ga. 1990) (stating that the Center for Disease Control receives an "overwhelming" number of inquiries), *aff'd*, 927 F.2d 1194 (11th Cir. 1991).

8. See, e.g., *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 776 (9th Cir. 1994) (stating that the appellants asserted that the requested testimony was "central to the underlying litigation").

9. See *infra* note 212 and accompanying text.

10. 34 F.3d 774.

Exxon Shipping helped to clarify the muddled waters of the housekeeping privilege by setting forth a standard for courts to use in evaluating agency denials of testimony.¹¹

This Note first examines the statutory and case-law basis for the housekeeping privilege. The first section will discuss the history of the Federal Housekeeping Statute¹² and the United States Supreme Court's interpretation of the statute's authority. The second section will explain how the housekeeping privilege has developed and how modern courts have interpreted, or misinterpreted, the privilege. The Note will then concentrate on the Ninth Circuit's recent decision in *Exxon Shipping* and how this case affects current agency practices. Finally, this Note will discuss the policy justifications that federal agencies have asserted and will weigh them against litigants' rights to full discovery and access to governmental information. This section of the Note will also compare the different standards of review that courts have applied in housekeeping cases and will determine the appropriateness of the *Exxon Shipping* test. Finally, this section will examine the continuing problems that litigants face and will propose legislative action to alleviate them.

THE BASIS FOR THE HOUSEKEEPING PRIVILEGE

The Statutory History of the Housekeeping Act

In 1789, during the presidency of George Washington, Congress "enacted [a bill] to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents."¹³ The statute was first codified in 1875 as section 161

11. See *infra* text accompanying notes 163-82; see also Recent Case, *Civil Procedure—Subpoena Power—Ninth Circuit Rejects Authority of Non-Party Federal Agencies To Prevent Employees from Testifying Pursuant to a Federal Subpoena—Exxon Shipping Co., v. United States Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994), 108 HARV. L. REV. 965, 967 (1995) ("The Ninth Circuit's holding in *Exxon Shipping* represents a welcome reassertion of the federal courts' ability to control their proceedings through their power to compel the production of documents and the testimony of witnesses.").

12. 5 U.S.C. § 301 (1994).

13. H.R. REP. NO. 1461, 85th Cong., 2d Sess. 1 (1958), reprinted in 1958 U.S.C.C.A.N. 3352, 3352; see also Lively, *supra* note 2, at 498 n.15 (noting that

of the Revised Statutes, and government agencies used it to deny access to information as early as 1877.¹⁴

In its original form, the Housekeeping Statute stated that "[t]he 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."¹⁵ Agency officials interpreted the language of this statute as a grant of complete authority over public access to agency information.¹⁶ Agency regulations spelling out guidelines for answering discovery requests for documents and testimony, commonly called housekeeping regulations, soon appeared.¹⁷

The Touhy Doctrine

Litigants eventually challenged agencies' usurpation of authority in court. In 1900, in *Boske v. Comingore*,¹⁸ the United States Supreme Court determined the validity of the housekeeping regulation of the Internal Revenue Service (IRS).¹⁹ A state trial court in Kentucky had held an IRS collector in contempt for refusing to provide certain documents during his deposition.²⁰ The Supreme Court heard the case²¹ after the collector challenged the contempt order in federal court on the ground that producing the documents was illegal under an IRS regulation.²²

several 1789 statutes authorized executive department heads to have custody and control of all office documents).

14. See H.R. REP. NO. 1461, *supra* note 13, reprinted in 1958 U.S.C.C.A.N. at 3352. The statute also was used "as a basis for a sort of official information privilege." 26A CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5682 (1992); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979) (stating that the statutory antecedents of the Housekeeping Statute were consolidated in 1874).

15. 5 U.S.C. § 22 (1952).

16. See *infra* note 33 and accompanying text.

17. For a list of current agency housekeeping regulations, see *infra* note 40.

18. 177 U.S. 459 (1900).

19. See *id.* at 467.

20. See *id.* at 464. The original action was brought by Kentucky against Elias Block & Sons to determine the amount of whiskey produced but not listed for state and county taxes. *Id.* at 461-62.

21. See *id.* at 465.

22. *Id.* at 465-67. The regulations stated that "[c]ollectors are hereby prohibited

The Court held that the regulation was valid under the Housekeeping Statute, stating that the Secretary of the Treasury,

under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may 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.²³

Consequently, the State could not hold the collector in contempt for complying with a legal regulation.²⁴

The Court came to virtually the same conclusion over fifty years later in *United States ex rel. Touhy v. Ragen*.²⁵ In *Touhy*, a prisoner in an Illinois state penitentiary brought a claim against the warden in federal district court.²⁶ The prisoner sought to subpoena a Federal Bureau of Investigation (FBI) agent, who he claimed had evidence that would exculpate him.²⁷ The agent, whom the court held in contempt for refusing to submit to the discovery request, claimed that he was exempt under the Department of Justice housekeeping regulations.²⁸

The Supreme Court followed its ruling in *Boske* and held that the regulation was valid under the Housekeeping Statute.²⁹

from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to *subpoenas duces tecum* or otherwise." *Id.* at 460-61.

23. *Id.* at 470. The Court also held that a regulation adopted under the Housekeeping Statute is valid unless it is "plainly and palpably inconsistent with law." *Id.*

24. *See id.* at 467.

25. 340 U.S. 462 (1951).

26. *Id.* at 463.

27. *See id.* at 464-65.

28. *See id.* at 463. The regulation, 11 Fed. Reg. 4920 (1946), stated that an "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 [sic], on the ground that the disclosure of such records is prohibited by this regulation," *Touhy*, 340 U.S. at 463-64 n.1.

29. *See Touhy*, 340 U.S. at 469-70. *Boske* and *Touhy* are slightly distinguishable because of the origins of their underlying actions. *Boske*'s subpoena was issued by a state court, whose contempt ruling the IRS employee appealed to the federal courts. *See Boske v. Comingore*, 177 U.S. 459, 464-65 (1900). In contrast, *Touhy* originated as a federal suit. *See Touhy*, 340 U.S. at 463. This distinction did not play a role in

The Court stated that centralization of the determination whether to challenge a subpoena is essential because of the variety of agency information and "the possibilities of harm from unrestricted disclosure."³⁰ The Court, however, limited its ruling to discovery requests against a subordinate agency employee by expressly refusing to determine an agency head's authority to disobey a discovery request.³¹ Commentators refer to the protection afforded agency subordinates that stems from this ruling as the "*Touhy* doctrine."³²

The 1958 Amendment

Despite the explicit limits of the *Touhy* ruling, the Housekeeping Statute was adapted by executive officials over the years as "a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws."³³ In

the Court's ruling in either case but has become an important distinction in subsequent cases. See *infra* notes 49-154 and accompanying text.

30. *Touhy*, 340 U.S. at 468.

31. *Id.* at 467 ("We find it unnecessary . . . to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession . . ."); *id.* at 469 ("The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling.").

Justice Frankfurter again stressed this point in his concurrence. While agreeing that a subordinate agency employee could not be held in contempt, Justice Frankfurter believed that the agency head must be held accountable. See *id.* at 472 (Frankfurter, J., concurring). Justice Frankfurter stated quite fervently:

To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.

Id. at 473 (Frankfurter, J., concurring). He apparently was referring to Bentham's statement quoted at the beginning of this Note. See Kiesel, *supra* note 6, at 1653 n.26.

32. See Kiesel, *supra* note 6, at 1652.

33. H.R. REP. NO. 1461, *supra* note 13, reprinted in 1958 U.S.C.C.A.N. at 3353; see also 26A WRIGHT & GRAHAM, *supra* note 14, § 5682 (maintaining that use of housekeeping regulations "quickly became a common practice of government attorneys"); Gregory S. Coleman, Note, *Touhy and the Housekeeping Privilege: Dead But Not Buried?*, 70 TEX. L. REV. 685, 687 (1992) ("The decision in *Touhy* is often cited for the proposition that an agency head is free to withhold evidence from a court

1958, Congress passed a one-sentence amendment to the statute in an attempt to clarify its authority.³⁴ The amendment read: "This section does not authorize withholding information from the public or limiting the availability of records to the public."³⁵ The revision to the Housekeeping Statute was passed without a dissenting vote in either the House of Representatives or the Senate.³⁶ It was the first statute devoted solely to freedom of information³⁷ and was part of a concerted effort to increase access to governmental records and combat government secrecy.³⁸ Although the language of the amendment was direct in its demand for openness, the addition had little, if any, effect on federal agency responses to discovery requests.³⁹

without a specific claim of privilege.").

34. See H.R. REP. NO. 1461, *supra* note 13, reprinted in 1958 U.S.C.C.A.N. at 3353 (stating that the purpose of the bill was to correct the situation in which "executive officials have let every file clerk become a censor"); see also Coleman, *supra* note 33, at 688 (stating that Congress answered the public outcry against *Touhy* by passing the amendment).

35. H.R. REP. NO. 1419, 92d Cong., 2d Sess. 2 (1972). The current version of the Housekeeping Statute is located at 5 U.S.C. § 301 (1994).

36. 1 BURT A. BRAVERMAN & FRANCES J. CHETWYND, INFORMATION LAW § 1-2.2 (1985).

37. H.R. REP. NO. 1419, *supra* note 35, at 2.

38. See 1 BRAVERMAN & CHETWYND, *supra* note 36, § 1-2.1. Other measures at the time included the passage of FOIA and the revisions to section 3 of the Administrative Procedure Act. See *id.* § 1-2.

39. See H.R. REP. NO. 1419, *supra* note 35, at 2 (indicating that "some agencies are still relying on the original 1789 'housekeeping' statute as authority to withhold certain types of information from the public," despite the passage of the amendment fourteen years before the report); 1 BRAVERMAN & CHETWYND, *supra* note 36, § 1-2.2 (contending that a 1959 survey of agency procedures showed that "the amendment was completely ineffective").

Many commentators at the time of the amendment's passage and for many subsequent years believed that it would increase public access to agency information. See Milton M. Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 197 (1958) ("[T]he Federal 'Housekeeping' Act has been amended to preclude its use as a basis for regulations dealing with the nondisclosure of information by subordinate officials . . ."); G. Larry Engel, *Introduction: Information Disclosure Policies and Practices of Federal Administrative Agencies*, 68 NW. U. L. REV. 184, 187 (1973) (stating that misuse of the Housekeeping Statute ended with the 1958 amendment); John J. Mitchell, *Government Secrecy in Theory and Practice: "Rules and Regulations" As an Autonomous Screen*, 58 COLUM. L. REV. 199, 207-08 (1958); Note, *Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 YALE L.J. 452, 452 (1960) ("Litigants in suits to which the United States is not a party may seek

Federal Agency Regulations

As authorized by the Housekeeping Statute, most federal agencies have passed regulations limiting access to agency records and testimony from agency employees concerning agency business.⁴⁰ These regulations commonly give the heads of agen-

aid from the 1958 amendment of the federal 'housekeeping' statute in their attempts to obtain government-held information which, while not privileged, may not be divulged by subordinate officials under department regulations.") (footnotes omitted); Mark S. Wallace, Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 148 (1976) ("The demise of the housekeeping statute as a reliable roadblock to discovery of official information accelerated in 1958 when the statute was amended."); see also Coleman, *supra* note 33, at 689 ("Most, if not all, commentators agree that the amendment was intended to abrogate the de facto privilege that had arisen under various housekeeping regulations."). But see T.D. Taubeneck & John J. Sexton, *Executive Privilege and the Court's Right To Know—Discovery Against the United States in Civil Actions in Federal District Courts*, 48 GEO. L.J. 486, 494 n.36 (1960) ("It is now the position of the administration that the amendment is a virtual nullity.").

40. See, e.g., 5 C.F.R. §§ 1631.30-33 (1995) (Federal Retirement Thrift Investment Board); *id.* §§ 2502.30-33 (Executive Office of the President); 7 C.F.R. §§ 1.210-219 (1995) (Office of the Secretary of Agriculture); 10 C.F.R. §§ 9.200-204 (1995) (Nuclear Regulatory Commission); *id.* §§ 202.21-26 (Department of Energy); 12 C.F.R. § 261.14 (1995) (Federal Reserve System); 13 C.F.R. § 102.8 (1995) (Small Business Administration); 15 C.F.R. §§ 15a.1-7 (1995) (Office of the Secretary of Commerce); *id.* §§ 275.1-5 (National Institute of Standards and Technology); *id.* §§ 909.1-5 (National Oceanic and Atmospheric Administration); 16 C.F.R. § 4.11(e) (1995) (Federal Trade Commission); 17 C.F.R. § 200.735-3(b)(7) (1995) (Commodities Futures Trading Commission); *id.* § 230.122 (Securities and Exchange Commission); 18 C.F.R. § 388.111 (1995) (Federal Energy Regulatory Commission); 21 C.F.R. §§ 20.1-2 (1995) (Food and Drug Administration); 22 C.F.R. §§ 206.1-6 (1995) (Agency for International Development); 24 C.F.R. §§ 2004.1-7 (1995) (Department of Housing and Urban Development); 27 C.F.R. § 71.27 (1995) (Bureau of Alcohol, Tobacco and Firearms); 28 C.F.R. §§ 16.21-29 (1995) (Department of Justice); 29 C.F.R. §§ 2.20-25 (1995) (Office of the Secretary of Labor); *id.* §§ 1610.30-36 (Equal Employment Opportunity Commission); 32 C.F.R. §§ 97.1-6 (1995) (Office of the Secretary of Defense); *id.* §§ 516.33-49 (Department of the Army); *id.* §§ 1905.1-4 (Central Intelligence Agency); 33 C.F.R. § 1.20 (1994) (United States Coast Guard); 37 C.F.R. §§ 15a.1-7 (1995) (Patent and Trademark Office, Department of Commerce); 40 C.F.R. §§ 2.401-406 (1995) (Environmental Protection Agency); 44 C.F.R. §§ 5.80-89 (1994) (Federal Emergency Management Agency); 45 C.F.R. §§ 2.1-6 (1995) (Department of Health and Human Services); 47 C.F.R. § 0.463 (1994) (Federal Communications Commission); 49 C.F.R. §§ 9.1-19 (1995) (Office of the Secretary of Transportation); *id.* §§ 835.1-9 (1994) (National Transportation Safety Board).

Although the housekeeping regulations confer broad authority to agency heads, their provisions do not have the "force and effect of law." In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court held that § 301 authorizes only "rules of agency organization procedure or practice" as opposed to 'substantive

cies the power to refuse requests for the testimony of agency employees.⁴¹ If the agency head refuses to comply or does not respond to a request for testimony, the regulations often require the subpoenaed employee to appear before the court and respectfully refuse to answer any questions.⁴² This practice has led many state courts to mistakenly hold the subordinate agency employee in contempt, despite the relatively clear command of the *Touhy* doctrine.⁴³

The standards created by the regulations to guide agency determinations of when to comply with a discovery request are extremely varied and ill-defined. Some regulations allow an agency head to heed a subpoena request only when the testimony would "clearly be in the interests" of the agency,⁴⁴ when "necessary to prevent a miscarriage of justice,"⁴⁵ or even simply when it is "not . . . contrary to the public interest."⁴⁶ Often, housekeeping regulations provide no standard of determination at all, giving the agency head free rein.⁴⁷ This lack of direct,

rules," *id.* at 310. The Court stated earlier in the opinion that "[i]n order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics." *Id.* at 301. *But see Ex Parte Sackett*, 74 F.2d 922, 923 (9th Cir. 1935) (holding that the Department of Justice regulation had "the force and effect of law"); *Marcoux v. Mid-States Livestock, Inc.*, 66 F.R.D. 573, 579 (W.D. Mo. 1975) (stating that housekeeping "regulations have the force and effect of law, thereby preventing th[e] Court from punishing a subordinate official for conforming to that law").

41. *See, e.g.*, 40 C.F.R. § 2.404(a) (1995) ("The General Counsel or his designee . . . determines whether compliance with the subpoena would clearly be in the interests of [the] EPA and responds as soon as practicable."); Kiesel, *supra* note 6, at 1648-49.

42. *See, e.g.*, 40 C.F.R. § 2.404(b) (1995).

If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place . . . , produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents.

Id. The regulation cites *Touhy* for support. *Id.*

43. *See infra* notes 60-85 and accompanying text.

44. *See, e.g.*, 40 C.F.R. § 2.404(a) (1995).

45. *See, e.g.*, 49 C.F.R. § 9.1(c)(1) (1995).

46. *See, e.g.*, 17 C.F.R. § 230.122 (1995); *see also* 15 C.F.R. § 909.5(c) (1995) (stating that an employee may testify if it would be "in the public interest" to provide the information).

47. *See, e.g.*, 5 C.F.R. §§ 1631.30-33 (1995); *id.* §§ 2502.30-33; 10 C.F.R. §§ 9.200-204 (1995); *id.* §§ 202.21-26; 13 C.F.R. § 102.8 (1995); 21 C.F.R. § 20.1 (1995); 29 C.F.R. §§ 2.20-25 (1995); *id.* §§ 1610.30-36; 44 C.F.R. §§ 5.80-89 (1994); 47 C.F.R. §

unambiguous language allows agency heads great leeway in their decisions whether to allow a subordinate agency employee to testify. Such power is dangerous because it gives agency heads unfettered discretion to affect the outcome of private civil actions. Under current procedure, once an agency head makes a determination not to allow a litigant to obtain the testimony of an employee, the litigant often is without any viable recourse. As a result, courts must create and apply some clear oversight standard.⁴⁸

MODERN JUDICIAL DEVELOPMENT AND INTERPRETATION OF THE HOUSEKEEPING PRIVILEGE

Since the Supreme Court handed down its decision in *Touhy*, courts consistently have applied the *Touhy* doctrine to shield agency subordinates from the discovery process and contempt proceedings.⁴⁹ Housekeeping cases, however, also have arisen

0.463 (1994).

At least five housekeeping regulations, however, do provide stricter standards with which agency heads must comply. See 22 C.F.R. § 206.6 (1995); 27 C.F.R. § 71.27 (1995); 28 C.F.R. § 16.26 (1995); 32 C.F.R. § 97.6(b) (1995); *id.* § 1905.4(c); Kiesel, *supra* note 6, at 1656-57. For example, the Department of Justice regulation, 28 C.F.R. § 16.26 (1995), states:

(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 . . . , 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 . . . are those . . . to which any of the following factors exist:

(1) Disclosure would violate a statute, . . .

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified, . . .

(4) Disclosure would reveal a confidential source or informant, . . .

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, . . .

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

Id.

48. See *infra* notes 213-44 and accompanying text.

49. See *infra* notes 104-05. Although *Touhy* technically involved the discovery of documents, courts have repeatedly and consistently held that the reasoning in *Touhy*

in a myriad of other forms. The most important distinction is between actions that originate in state court and actions brought in federal court. Such a distinction is important because a litigant's ability to challenge an unfavorable discovery ruling by an agency largely depends on the forum.

Additionally, the composition of the parties plays a significant role in affecting a court's capacity to force agency subordinates to testify. Private litigants' rights vary depending on whether the United States is a party to the action.

This section examines the courts' treatment of the Housekeeping Statute in three different substantive and procedural settings: (1) suits involving the United States as a party, (2) suits originally brought in state court, and (3) suits originally brought in federal court.

Suits Involving the United States As a Party

The Housekeeping Statute has played a relatively minor role in providing agencies with an excuse to withhold employee testimony when the United States is a party to the litigation. In a civil action⁵⁰ in which the government is an interested party, agencies theoretically must abide by the same discovery rules as other litigants.⁵¹

The Supreme Court adopted this reasoning in *United States v. Reynolds*.⁵² In *Reynolds*, the widows of civilians killed in an Air Force plane crash sued the government and moved for the pro-

applies equally to subpoenas for testimony. See *Boeh v. Gates*, 25 F.3d 761, 766 (9th Cir. 1994) (listing cases in which courts have applied the *Touhy* doctrine to requests for agency employee testimony), *cert. denied*, 115 S. Ct. 898 (1995).

50. See *supra* note 6 (discussing criminal cases in which the government loses the privilege to withhold testimony stemming from its role as prosecutor).

51. See *Mosseller v. United States*, 158 F.2d 380, 382 (2d Cir. 1946) ("Having consented to the suit, the United States should be held to have placed itself in the position of an ordinary litigant before the court, to whom the rules of civil procedure ordinarily apply."); Lively, *supra* note 2, at 505 ("Supposedly, government is not excepted from the normal discovery and evidentiary processes, beyond the point of a valid privilege claim."); Coleman, *supra* note 33, at 689 n.23; Kiesel, *supra* note 6, at 1675 n.136 ("The Federal Rules of Civil Procedure apply to agencies when they are parties to civil litigation."); see also FED. R. CIV. P. 30(b)(6) (specifying nonparty organizations).

52. 345 U.S. 1 (1953).

duction of the official accident investigation report and statements from the surviving crew members.⁵³ The government argued that the housekeeping privilege "against revealing military secrets" excused production.⁵⁴

The Court refused to rule whether "the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest,"⁵⁵ thereby leaving open the ultimate question of the existence of a housekeeping privilege. Instead, the Court examined the merits of the motion under the language of Federal Rule of Civil Procedure 34.⁵⁶ The Court held that the head of the department with control over the matter must lodge a formal claim of privilege, and the court "must determine whether the circumstances are appropriate for the claim of privilege."⁵⁷ This holding suggests that the government is subject to the Federal Rules of Civil Procedure and is required to claim a privilege in order to withhold agency information.⁵⁸

53. *Id.* at 3. The motion was made under Rule 34. See *infra* note 56 for the text of Rule 34.

54. *Reynolds*, 345 U.S. at 6.

55. *Id.*

56. That version of Rule 34 provided:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not *privileged*, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Id. at 3 n.3 (emphasis added).

57. *Id.* at 8.

58. See also *United States v. Winner*, 641 F.2d 825, 832-33 (10th Cir. 1981) (holding that the Deputy Attorney General must advance a claim of privilege, reviewable by the court); *Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 755 (9th Cir. 1964) (requiring the National Labor Relations Board to claim a privilege under its house-

The Supreme Court also seemed to propound that courts may review an agency head's determination that a valid privilege exists. The Court stated that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."⁵⁹ *Reynolds*, therefore, and lower court opinions interpreting it, appear to require federal agencies to abide by normal discovery rules when an agency is a party to the suit.

Actions Brought in State Courts

Courts have given broader rights to federal agencies when the United States is not a party in the underlying litigation. Many parties seeking the testimony of a federal agency employee bring

keeping regulation in order to withhold information).

In *Winner*, the government brought a mandamus proceeding against the federal district court to force the court to vacate its discovery ruling. *Winner*, 641 F.2d at 827. The judge in the district court was the Honorable Fred M. Winner. *Id.* at 825. It is somewhat ironic that Judge Winner's discovery ruling was appealed because he has researched and written extensively on the Housekeeping Statute and the regulations based thereon. In 1960, Judge Winner delivered a speech to the Tenth Circuit Judicial Council entitled "Procedural Methods To Attain Discovery." Fred M. Winner, *Procedural Methods To Attain Discovery*, 28 F.R.D. 97 (1961); see also *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1375 (D.N.M. 1974) (Winner, J.) (claiming judicial and congressional support for his views). After reviewing the Supreme Court's decisions in *Boske*, *Touhy*, and *Reynolds*, Judge Winner concluded that a "claim of privilege must be supported by a showing of more than bureaucratic whimsy." Winner, *supra*, at 109.

In *Los Alamos Constructors*, the EEOC filed a claim, before Judge Winner, against a construction company for discriminatory employment practices. *Los Alamos Constructors*, 382 F. Supp. at 1374. Judge Winner examined in depth the case history of discovery from governmental agencies that are a party to an action, commenting that "[w]hen the government or one of its agencies comes into court (with very few exceptions), it is to be treated in exactly the same way as any other litigant." *Id.* at 1375 (brackets replaced with parentheses).

More recently, Judge Winner authored the opinion in *United States v. Feeney*, 501 F. Supp. 1337 (D. Colo. 1980). *Feeney* was a criminal case in which the defendant subpoenaed government officials. *Id.* at 1339. Judge Winner reiterated his earlier positions from the civil context and stated that "the rights of a defendant in a criminal case to full public presentation of the facts are even greater than are the rights of a party in a civil suit." *Id.* at 1341. Judge Winner again held that the government must assert a privilege to withhold testimony and that the agency head "must appear to explain and justify his insistence on secrecy," *id.* at 1347, and that the court had the power to determine the validity of a privilege claim, *id.*

59. *Reynolds*, 345 U.S. at 9-10. Courts that have examined the *Reynolds* opinion have reached that same conclusion. See, e.g., *Winner*, 641 F.2d at 832-33.

their cases in state courts under state law. If an agency head decides not to allow a subordinate to testify, private litigants in state court have many procedural hurdles to jump before they can adequately challenge the agency head's determination. Procedural demands force most state cases with housekeeping problems into federal court,⁶⁰ either through removal or through a collateral federal suit.

Actions Removed to Federal Court

Frequently, during state court trials, a litigant seeks to subpoena a federal agency employee for a deposition or testimony. Problems occur when the agency head directs a subpoenaed subordinate not to accede to the subpoena under the authority of the agency's housekeeping regulation. Despite the apparently straightforward application of the *Touhy* doctrine in such cases, state judges often hold the subordinate in contempt for refusing to comply with a court order. Such an unfortunate agency employee invariably will remove the case to federal district court under Title 28, § 1442 of the United States Code.⁶¹ Private litigants trying to enforce a state court's discovery order in federal removal cases face two obstacles: (1) the *Touhy* doctrine and (2) sovereign immunity. Federal courts limit private parties' ability to obtain needed agency testimony by relying on

60. In a few cases, state courts have invoked the *Touhy* doctrine to deny discovery. See, e.g., *State v. Tascarella*, 580 So. 2d 154, 157 (Fla. 1991) (holding that the trial court could not compel Federal Drug Enforcement Administration agents to testify but imposing sanctions on the state, by excluding evidence, in retaliation for noncompliance); *State v. Rice*, 335 N.W.2d 269, 276-77 (Neb. 1983) (sustaining a motion to quash discovery subpoenas under the *Touhy* doctrine).

61. 28 U.S.C. § 1442 (1988). The pertinent portion of the provision states:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons 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) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

Id. A contempt order qualifies under the section as an action against the agency official. See *infra* note 68 and accompanying text.

these legal impediments.

Federal Courts Invoking the Touhy Doctrine

*Smith v. C.R.C. Builders Co.*⁶² is an example of a case in which a federal court overruled a state court contempt order under the *Touhy* doctrine. After removal to district court, the agency employee, a supervisor at the Occupational Safety and Health Administration (OSHA), sought to quash the state court's contempt order.⁶³ The party seeking discovery argued that *Touhy* was "outdated and no longer the law in light of a post-*Touhy* amendment" to the Housekeeping Statute.⁶⁴ The court simply rejected this reading of the amendment, quashed the contempt order, and suggested that, to seek relief, the party should subpoena the agency head.⁶⁵

A similar incident occurred in *Swett v. Schenk*,⁶⁶ in which a California state court held an investigator for the National Transportation and Safety Board (NTSB) in contempt for refusing to answer certain questions.⁶⁷ After deciding that removal was proper under § 1442,⁶⁸ the Ninth Circuit stated that "the *Touhy* doctrine [was] jurisdictional and preclude[d] a contempt action regardless of whether [the agency's housekeeping regulation was] ultimately determined to protect the requested testimony."⁶⁹

Sovereign Immunity

In addition to the *Touhy* doctrine, litigants in a removal proceeding may face the imposing hurdle of sovereign immunity, an obstacle created by the United States' system of federalism. Several federal courts have determined that, absent any waiver, federal employees are immune from discovery orders from state

62. 626 F. Supp. 12 (D. Colo. 1983).

63. *Id.* at 13.

64. *Id.* at 14.

65. *Id.* at 15.

66. 792 F.2d 1447 (9th Cir. 1986).

67. *Id.* at 1449.

68. *Id.* at 1451.

69. *Id.* at 1452.

courts under the doctrine of sovereign immunity.⁷⁰ This doctrine applies to suits in state court as well as to suits that defendant agency employees remove to federal court.⁷¹

In *Reynolds Metals Co. v. Crowther*,⁷² a federal district court decided that the doctrine of sovereign immunity barred it from compelling federal officials to testify.⁷³ The case involved a private civil action in state court. The subpoenaed Department of Labor employees removed the contempt proceeding, concerning their failure to comply with the litigant's discovery request, to federal court.⁷⁴ Basing its decision on Supreme Court precedent,⁷⁵ the court stated that "[i]t is . . . well-established that an action seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to the governmental privilege of immunity from suit."⁷⁶ The court feared that "significant loss of manpower hours would predictably result" if state courts routinely could force agency employees to testify in private litigation.⁷⁷

The District Court for the District of Columbia followed *Reynolds* by invoking sovereign immunity in *Environmental Enterprises v. EPA*⁷⁸ and *Sharon Lease Oil Co. v. Federal En-*

70. See *infra* notes 72-85 and accompanying text. But see Coleman, *supra* note 33, at 697-700. Coleman argues that the application of sovereign immunity in the housekeeping context is inappropriate and ill-founded. *Id.* at 697-98. Coleman also contends that courts' application of sovereign immunity is unjustifiably unequal and that sovereign immunity should apply to suits arising in federal court as well as to suits in state courts. *Id.* at 699.

71. The jurisdictional bounds of the state court also limit the jurisdiction of federal courts that receive cases on removal. See *Boron Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir. 1989); see also Coleman, *supra* note 33, at 696 ("[T]he federal courts will declare that they, too, may be incompetent to determine the merits of the government's claim because the case was initiated in state court."); *infra* note 85 and accompanying text.

72. 572 F. Supp. 288 (D. Mass. 1982).

73. *Id.* at 291.

74. *Id.* at 289.

75. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702-03 (1949) (holding that an action against a federal official was an action against the sovereign).

76. *Reynolds Metal*, 572 F. Supp. at 290 (citing *Larson*, 337 U.S. at 692).

77. *Id.*

78. 664 F. Supp. 585 (D.D.C. 1987).

ergy Regulatory Commission.⁷⁹ In *Environmental Enterprises*, the court quashed several discovery subpoenas and stated that "[a]s to sovereign immunity, there is obvious merit to the argument that federal officers should not be subpoenaed to testify in state courts [sic] proceedings of which they are not parties without their approval."⁸⁰ In *Sharon Lease*, the court similarly concluded that "the subpoena at issue must be quashed because the state court had no jurisdiction to compel a nonparty federal official to testify or produce documents absent a waiver of sovereign immunity."⁸¹

In *Boron Oil Co. v. Downie*,⁸² the Fourth Circuit similarly held that a state court, and thus a federal district court on removal, did not have jurisdiction over a federal agency employee when the government was not a party to the state court action.⁸³ The court found that a state court's assertion of authority to override an agency's housekeeping regulations violated the Constitution's Supremacy Clause.⁸⁴ The court further explained that "[w]here the state court lacks jurisdiction of the subject matter or of the parties, the federal court [on removal] acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."⁸⁵

79. 691 F. Supp. 381 (D.D.C. 1988).

80. *Environmental Enters.*, 664 F. Supp. at 586.

81. *Sharon Lease*, 691 F. Supp. at 385. While relying on sovereign immunity as the basis for its ruling, the court balanced the litigants' need for the testimony against the public interest in protecting government resources. *Id.* at 384. This suggests that the court might not apply sovereign immunity as a bar if the proponent of discovery could "demonstrate compelling need" for the evidence that "outweigh[s] the public interest involved." *Id.*

82. 873 F.2d 67 (4th Cir. 1989).

83. *Id.* at 68. The court relied heavily on the language of *Reynolds* (perhaps too heavily at times—the court used two direct quotes without citing *Reynolds*). Compare *id.* at 69 with *Reynolds Metals Co. v. Crawther*, 572 F. Supp. 288, 290 (D. Mass. 1982).

84. *Downie*, 873 F.2d at 71. The court also stated that federal agencies have a compelling interest in keeping their employees "free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." *Id.* This statement ignores the government's competing interest in ensuring justice in the judicial process through comprehensive fact-finding.

85. *Id.* at 70 (quoting *Minnesota v. United States*, 305 U.S. 382, 389 (1939)). Most recently, a federal district court in Indiana has addressed these same issues in *Bosaw v. National Treasury Employees' Union*, 887 F. Supp. 1199 (S.D. Ind. 1995).

Separate Collateral Federal Suits

State court proponents of discovery have attempted to bring separate collateral actions in federal court as a method of avoiding the *Touhy* doctrine and sovereign immunity. In such a proceeding, the litigant typically names the agency or the agency head as a defendant. By directly filing a legitimate separate complaint against the agency, a federal court attains original jurisdiction. Several courts have advised litigants to pursue this approach,⁸⁶ but parties seeking discovery from agency officials rarely have undertaken such a step.⁸⁷

Despite court assurances that a separate federal suit is the correct procedural path, litigants have, at times, been led astray. A litigant unsuccessfully attempted to follow this path in *Giza v. Secretary of Health, Education and Welfare*.⁸⁸ In *Giza*, the plaintiffs filed suit in federal district court seeking an order to compel the Food and Drug Administration to allow certain employees to testify.⁸⁹ The plaintiffs alleged that the court had jurisdiction: (1) under the Freedom of Information Act,⁹⁰ (2) under 28 U.S.C. § 1361,⁹¹ and (3) as a matter of comity.⁹² The

The court in *Bosaw* held that sovereign immunity and the Supremacy Clause barred the state court from ordering a federal officer to produce documents and that, therefore, the federal court, with derivative jurisdiction, could not render a decision on a motion to compel production of IRS records. *Id.* at 1217.

86. See, e.g., *Swett v. Schenk*, 792 F.2d 1447, 1452 n.2 (9th Cir. 1986) (advising that the proper method for challenging the refusal to testify would be a direct action against the agency pursuant to 5 U.S.C. § 702); *Smith v. C.R.C. Builders Co.*, 626 F. Supp. 12, 15 (D. Colo. 1983) (stating that the discovery proponent should subpoena the agency head); *infra* text accompanying note 116.

87. A limited number of litigants have filed collateral federal suits due to the extremely high costs associated with filing a separate action. Filing a new complaint also takes a significant amount of time. Such an action often would be moot by the time it was decided because of the progression and completion of the underlying state court action. See *infra* notes 245-49 and accompanying text.

88. 628 F.2d 748 (1st Cir. 1980).

89. *Id.* at 749.

90. 5 U.S.C. § 552 (1994).

91. 28 U.S.C. § 1361 (1988) (granting the district courts original jurisdiction over mandamus actions against federal officers).

92. *Giza*, 628 F.2d at 750. Comity is the principal that "courts of one . . . jurisdiction will give effect to laws and judicial decisions of another . . . jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

First Circuit upheld the district court's finding that it did not have jurisdiction to enforce a state court subpoena; however, the court refused to decide whether a federal court could compel the testimony of a federal official despite or against the agency head's instruction.⁹³

Parties have run into other deadends while following this path. In *Davis Enterprises v. EPA*,⁹⁴ the litigants were successful in getting the court to review the agency's denial of discovery, but the agency withstood the challenge. From underlying civil litigation in Pennsylvania state court, Davis Enterprises filed an action against the EPA for refusing to allow the deposition of an agency employee.⁹⁵ The Third Circuit adjudged that the decision was reviewable⁹⁶ but held that the court was "only free to determine whether the agency followed its own guidelines or committed a clear error of judgment."⁹⁷ The court went on to conclude that the EPA's decision was not arbitrary, capricious, or an abuse of discretion based upon the EPA's interests in conserving its resources and avoiding the appearance of favoring one party over another.⁹⁸

While federal courts have been reluctant to overrule agency decisions, even when directly challenged, a recent federal court of appeals case may crack open the door to discovery for private

93. *Giza*, 628 F.2d at 751-52.

94. 877 F.2d 1181 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

95. *Id.* at 1182. Davis Enterprises apparently brought suit under the Administrative Procedure Act (APA), alleging that the EPA's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A) (1994).

96. The EPA had argued and the district court had found that, under 5 U.S.C. § 701(a), the court could not review the EPA's decision. *Davis Enters.*, 877 F.2d at 1184. Section 701(a) of the APA creates an exception to the reviewability of agency decisions when "statutes preclude judicial review" or when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The EPA contended that the Housekeeping Statute (in this case, 5 U.S.C. § 301) and the *Touhy* doctrine provided "unfettered discretion on matters pertaining to control of its employees." *Davis Enters.*, 877 F.2d at 1185. The Third Circuit rejected this position. *Id.* at 1186.

97. *Davis Enters.*, 877 F.2d at 1186.

98. *Id.* at 1186-87. The court stressed that it disagreed with the EPA determination that its interests outweighed those of the public "in having public employees cooperate in the truth seeking process by providing testimony useful in litigation," *id.* at 1188, but the court could not substitute its judgment for that of the EPA, *id.* at 1186.

litigants by setting a stricter standard of review. The next section of this Note will discuss suits originally brought in federal court and the Ninth Circuit's decision in *Exxon Shipping Co. v. United States Department of the Interior*⁹⁹ in detail.

Actions Brought in Federal Courts

*Federal Law Causes of Action*¹⁰⁰

Litigants have had less difficulty attaining judicial review of an agency's determination not to allow an employee to testify when litigants have brought the underlying action in federal court. The Supreme Court's decisions in *Boske* and *Touhy* bind federal courts, as they do state courts and federal courts with limited jurisdiction,¹⁰¹ but many of the state court difficulties are not present in federal court. Sovereign immunity does not hamper federal courts,¹⁰² and litigants do not have to worry that the government will remove the discovery issue to a new forum.¹⁰³

99. 34 F.3d 774 (9th Cir. 1994).

100. This section concerns cases arising under 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

101. One of the first instances in which a federal court followed the Supreme Court's lead in housekeeping analysis was *Ex Parte Sackett*, 74 F.2d 922 (9th Cir. 1935). Citing *Boske*, the Ninth Circuit overturned a district court's contempt ruling against a subordinate Department of Justice (DOJ) employee. *Id.* at 923-24. The court stated that the DOJ regulation had "the force of law" and that the lower court "had no jurisdiction or power to punish an officer for conforming to that law." *Id.* at 923. The court refused to address "[w]hether or not the Attorney General could be compelled to produce such records in response to a subpoena or to testify concerning them." *Id.* at 924.

A few years after *Touhy*, the Sixth Circuit exonerated an employee of the Securities and Exchange Commission (SEC) from a district court's contempt order in *In re SEC*, 226 F.2d 501 (6th Cir. 1955). The court ruled that the SEC employee was protected by *Touhy* for acting in accordance with the SEC's rules. *Id.* at 517.

102. See, e.g., *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 398 n.2 (D.C. Cir. 1984). The court in *Northrop* discussed "whether sovereign immunity might bar an action to enforce a subpoena directed against the government when . . . the government is not itself a party to the litigation." *Id.* The court found that, since 1965, sovereign immunity has not applied to such a subpoena and that the government must assert a privilege to prevent discovery. *Id.*

103. The federal courts are still subject to agencies' separation of powers arguments. See *infra* text accompanying notes 206-09.

Litigants in federal courts, however, have a remaining hurdle. While federal courts have jurisdiction over local agency employees, the courts' jurisdiction may not extend to the agency head. In these situations, most federal courts refuse to force a subordinate agency employee to testify against the explicit orders of an agency head.¹⁰⁴ Courts so refusing contend that the *Touhy* doctrine removes any authority that a court may have had to compel a local official to testify.¹⁰⁵ As a result, litigants are stranded in federal actions in much the same way that they are in state actions. A separate action against the agency head is often a private litigant's only means of obtaining relief and compelling discovery.

For example, in *Saunders v. Great Western Sugar Co.*,¹⁰⁶ Great Western subpoenaed several local officials of the Small Business Administration (SBA) during a federal antitrust suit.¹⁰⁷ The court felt that requiring litigants to bring an action against the agency head in the District of Columbia was a hardship and saw "no reason why the claim of governmental privilege may not be determined as satisfactorily in a federal court removed from the District of Columbia as in a court that is there located."¹⁰⁸ Nevertheless, neither 28 U.S.C. § 1361¹⁰⁹ nor 28 U.S.C. § 1391(e)¹¹⁰ granted the court jurisdiction over agency heads in this type of case; therefore, the court was bound by the

104. See, e.g., *Boeh v. Gates*, 25 F.3d 761 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995); *Saunders v. Great W. Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *Hubbard v. Southern Ry.*, 179 F. Supp. 244 (M.D. Ga. 1959) (refusing to enforce subpoena against a subordinate official in an action under the Federal Employers' Liability Act).

105. See *infra* note 109-11; see also *Marcoux v. Mid-States Livestock, Inc.*, 66 F.R.D. 573, 580 (W.D. Mo. 1975) (holding that the court was "without power to compel [an agency head], who is not a party to this action, to produce requested materials which are in his custody and are located outside the jurisdictional boundaries of this Court").

106. 396 F.2d 794 (10th Cir. 1968) (*per curiam*).

107. *Id.* at 794-95.

108. *Id.* at 795.

109. Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1994).

110. Section 1391(e) governs venue in "civil action[s] in which a defendant is an officer or employee of the United States or any agency thereof." 28 U.S.C. § 1391(e).

Touhy doctrine.¹¹¹

The Ninth Circuit faced a similar situation in *Boeh v. Gates*.¹¹² In *Boeh*, the plaintiff in a civil rights action in federal district court subpoenaed an FBI agent to testify.¹¹³ An official at the Department of Justice directed the agent not to obey the subpoena under the department's housekeeping statute, and the district court subsequently held him in contempt.¹¹⁴ The Ninth Circuit held that the FBI agent could not be held in contempt for complying with a valid regulation under the *Touhy* doctrine.¹¹⁵ The court stated that the proper method of attempting to compel the agent's testimony would be to bring the department head into court and contest his or her decision not to permit the subordinate's testimony.¹¹⁶ The court suggested that litigants could accomplish this either by filing a separate action under the Administrative Procedure Act (APA)¹¹⁷ or possibly by bringing a mandamus action against the department head to force the grant of permission to testify.¹¹⁸ The court stated that "[o]nce properly before the appropriate court, the [department head] or designated official could have claimed whatever privileges might shield [the agency employee's] testimony and the court could then have ruled on those assertions of privilege."¹¹⁹

Other courts have taken a different route to sidestep the *Touhy* doctrine and gain jurisdiction over agency heads. Several federal courts have found authority to review agency head decisions when the agency head directs the subordinate not to testi-

111. *Saunders*, 396 F.2d at 795. A similar situation arose in *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973). The Fifth Circuit concluded that a subpoena of local agency officials under Federal Rule of Civil Procedure 30(b)(6) could not "be used to obtain documents in custody of the head of a non-party government agency in Washington, D.C." *Id.* at 621.

112. 25 F.3d 761 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

113. *Id.* at 763. Neither the FBI agent nor the United States was a party to the action. *Id.*

114. *Id.* For a portion of the text of the Department of Justice housekeeping regulation, 28 C.F.R. § 16.26 (1995), see *supra* note 47.

115. *Boeh*, 25 F.3d at 763-64.

116. *Id.* at 764.

117. *Id.* at 764 n.3 (citing 5 U.S.C. §§ 701-706 (1984)).

118. *Id.*

119. *Id.* at 764 (citing *Committee for Nuclear Responsibility Inc. v. Seaborg*, 463 F.2d 788 (D.C. Cir. 1971); *NLRB v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961)).

fy under a claim of privilege.¹²⁰ This claim of privilege, whether expressly made or implicitly found in the agency head's direction to the subordinate, forms the foundation for jurisdiction over the agency head.¹²¹

For example, in *NLRB v. Capitol Fish Co.*,¹²² Capitol subpoenaed an attorney of the NLRB in an unfair labor practice hearing against it.¹²³ The NLRB refused to allow the subordinate employee to testify, and the trial examiner revoked the subpoena,¹²⁴ which Capitol subsequently appealed.¹²⁵ Although Capitol did not directly subpoena or bring an action against the NLRB, the court held:

[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.¹²⁶

The court held that the judiciary must test the validity of any privilege claim¹²⁷ and stated that to require direct service of the agency was a waste of time and resources.¹²⁸

In *McFadden v. AVOC Corp.*,¹²⁹ the defendant requested testimony from certain Army personnel, and the Army, although not a party to the action, ordered the person not to produce the statements.¹³⁰ The government, seeking to quash the discovery order, contended that, under *Touhy*, "the defendant must direct

120. See, e.g., *Capitol Fish Co.*, 294 F.2d at 875.

121. See, e.g., *McFadden v. AVCO Corp.*, 278 F. Supp. 57, 59 (M.D. Ala. 1967).

122. 294 F.2d 868.

123. *Id.* at 870.

124. *Id.* at 870-71.

125. See *id.* at 868.

126. *Id.* at 875.

127. *Id.*

128. The court emphasized that "[t]o 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." *Id.*

129. 278 F. Supp. 57 (M.D. Ala. 1967).

130. *Id.* at 57-58.

the subpoena to the Secretary of the Army personally.”¹³¹ The district court held that it could decide whether the Army had a valid reason for withholding the testimony because the Secretary of the Army had determined to assert a privilege.¹³² The court believed that centralization, the purpose of the Housekeeping Statute, had been fulfilled; therefore, judicial oversight was proper.¹³³ After finding that the Army did not have a valid reason for denying the testimony,¹³⁴ the court went on to proclaim that “[t]he courts and the litigants are entitled to accurate information in their search for truth, . . . and there would seem little reason for denying them access to it, when, as here, the chance of interfering with the Army’s future investigations is slight.”¹³⁵

A district court in *Rosee v. Board of Trade*¹³⁶ confronted a similar scenario in which the Secretary of Agriculture had directed a subordinate department employee not to produce requested documents.¹³⁷ Although the proponent of discovery did not bring an action against the Secretary of Agriculture, and although the Secretary did not lodge a claim of privilege, the court nonetheless examined the substantive merits of an implicitly alleged governmental privilege.¹³⁸ The court held that the government had “squarely raised” a claim of privilege by instructing the subordinate to refuse the discovery request.¹³⁹ The court found justification for such a position by distinguishing between agency determinations that certain material cannot be produced and agency determinations that the wrong employee was asked to comply with discovery.¹⁴⁰ In this case, the court held that,

131. *Id.* at 58.

132. *See id.* at 59.

133. *Id.*

134. *See id.* at 59-60.

135. *Id.* at 60.

136. 35 F.R.D. 512 (N.D. Ill. 1964).

137. *Id.* at 514.

138. *Id.* at 513-14.

139. *Id.* at 514.

140. The court stated:

The refusal of a subordinate to produce documents may be grounded on a determination by the department head going directly to “what documents can be produced” rather than to the narrow issue of who should be asked to produce. Were the determination only to the latter issue,

because the Secretary had determined that the agency would produce some documents but not others, an implicit claim of privilege had arisen.¹⁴¹ The court went on to overrule the Secretary's determination, stating that "[w]ithout statutory authority, an executive officer may not erect a privilege which will bar judicial scrutiny."¹⁴²

A fourth federal court made a similar ruling in *Denny v. Carey*.¹⁴³ *Denny* involved a class action claim in which the plaintiff moved under Federal Rule of Civil Procedure 37(a) to compel discovery from the Board of Governors of the Federal Reserve System.¹⁴⁴ The plaintiff failed to follow the guidelines of the Board's housekeeping regulations, but the court found that the Board had "waived any right to assert . . . non-compliance as a ground for not disclosing the report."¹⁴⁵ The court also concluded that there was no jurisdictional bar to the court's consideration of the Board's privilege claim,¹⁴⁶ stating that it was "the 'formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer,' which confer[red] upon [the court] jurisdiction to rule on that claim."¹⁴⁷

*Federal Diversity Jurisdiction Actions*¹⁴⁸

In diversity actions, federal district courts have original jurisdiction.¹⁴⁹ Although the action is based on state law, the feder-

Touhy would seem to control, but where it is clear that the department head has already made the substantive determination . . . no purpose is served by requiring that the request be made again, directly to the department head.

Id.

141. *Id.*

142. *Id.* at 515.

143. 78 F.R.D. 370 (E.D. Pa. 1978).

144. *Id.* at 371.

145. *Id.* at 372.

146. *Id.*

147. *Id.* at 373 (internal citations omitted) (quoting *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)).

148. This section concerns actions arising under 28 U.S.C. § 1332 (1994) (granting original jurisdiction in "civil actions where the matter in controversy exceeds . . . \$50,000" and diversity of citizenship exists between the parties).

149. 28 U.S.C. § 1332.

al courts are not limited in their authority to subpoena federal employees to the same extent as are state courts.¹⁵⁰ The federal district courts have the same jurisdiction, and litigants the same discovery obstacles, whether the case is a federal action or a diversity action.

For example, in *Tholem Supply Co. v. Continental Casualty Co.*,¹⁵¹ a federal district court quashed subpoenas for the testimony of Bureau of Alcohol, Tobacco, and Firearms (BATF) employees in an insurance contract dispute.¹⁵² The court held that the litigants' only recourse was "to procure service of the subpoena duces tecum upon the appropriate official, in this case the Director of the BATF."¹⁵³

*EXXON SHIPPING CO. V. UNITED STATES DEPARTMENT OF
INTERIOR*¹⁵⁴

Exxon Shipping arose as a result of the disastrous *Exxon Valdez* oil spill in Alaska in March 1989.¹⁵⁵ Exxon, in an underlying state damage action against it, sought discovery from employees of five federal administrative agencies who Exxon claimed had obtained information central to the litigation.¹⁵⁶ The government did not reply to the discovery requests or move to quash them, but instructed eight employees not to submit to a deposition, and instructed two others not to answer certain questions.¹⁵⁷

Exxon brought suit in federal court alleging that the Federal

150. See *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194 (11th Cir. 1991). In *Moore*, the Eleventh Circuit did not question the district court's command over federal employees but, rather, upheld the lower court decision to quash the discovery request under the "arbitrary [and] capricious" standard of the APA, 5 U.S.C. § 706(2)(A) (1994). *Moore*, 927 F.2d at 1197.

151. 859 F. Supp. 467 (D. Kan. 1994).

152. *Id.* at 468.

153. *Id.* at 470.

154. 34 F.3d 774 (9th Cir. 1994).

155. In 1989, fishermen, landowners, businesses, and local governments sued Exxon for compensatory and punitive damages. See *id.* at 775 (citing the underlying litigation).

156. *Id.* at 775-76. The information "included the extent of damage to Alaska's natural resources." *Id.* at 776.

157. *Id.* at 775.

Housekeeping Statute did not authorize the government's refusal¹⁵⁸ and that the agencies' actions were illegal under the APA.¹⁵⁹ The agencies countered that agency regulations, promulgated under the authority of the Housekeeping Statute, allowed the agency heads to prohibit their subordinate employees from obeying discovery requests when the government was not a party to the litigation.¹⁶⁰ They relied heavily on *Touhy* and its progeny.¹⁶¹

The Ninth Circuit distinguished *Touhy* by clarifying that, in this action, the agencies, while not parties in the underlying action, were now named as defendants in a collateral suit.¹⁶² The court thus squarely took on the issue purposely left open by *Touhy*: what authority do federal agencies have to withhold information from the discovery process?¹⁶³ The court analyzed the text and legislative history of the Housekeeping Statute and found that the statute did not authorize agency heads to withhold testimony and documents from federal courts.¹⁶⁴ Rather, the Ninth Circuit concluded that the statute did not grant any authority in itself but was simply an administrative device to centralize control over agency information.¹⁶⁵ The court interpreted *Touhy* and *Chrysler Corp. v. Brown*¹⁶⁶ to support its holding that § 301 "did not provide 'substantive rules' regulating disclosure of government information."¹⁶⁷ The court, therefore, effectively rejected the argument that any independent house-

158. See 5 U.S.C. § 301 (1994).

159. See *id.* §§ 702-706. Exxon also claimed before the federal district court in Alaska that "the government's refusal to provide the requested discovery violated the Federal Rules of Civil Procedure and the U.S. Constitution because the United States was a de facto party to the action." *Exxon Shipping*, 34 F.3d at 776. Exxon did not appeal the district court's rejection of this claim. *Id.*

160. *Exxon Shipping*, 34 F.3d at 776. The district court agreed with the government's argument. *Id.* The Ninth Circuit stated correctly that, "[w]hen 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." *Id.* at 776 n.4; see *supra* text accompanying notes 50-59.

161. *Exxon Shipping*, 34 F.3d at 776.

162. *Id.* at 777.

163. *Id.*; see *supra* note 31 and accompanying text.

164. *Exxon Shipping*, 34 F.3d at 777-78.

165. *Id.* at 777.

166. 441 U.S. 281 (1979).

167. *Exxon Shipping*, 34 F.3d at 777 (quoting *Chrysler*, 441 U.S. at 310).

keeping privilege exists.

Additionally, the government maintained that agencies have the right to determine whether to comply with a discovery request under the principles of sovereign immunity.¹⁶⁸ The government cited *Downie* to support its argument.¹⁶⁹ The Ninth Circuit refused to apply the Fourth Circuit's decision in *Downie*; instead, the court limited *Downie* to its specific facts and rejected any extension of its holding.¹⁷⁰ The court appropriately found that *Downie*'s use of sovereign immunity was restricted to state court subpoenas and contempt actions or discovery requests from federal courts with limited removal jurisdiction.¹⁷¹ The court noted that sovereign immunity, which stems from the Supremacy Clause, does not apply when a federal court validly exercises its discovery powers over federal officials.¹⁷² The court strengthened its position by citing cases that held that judicial control over evidence cannot be inferior to the authority of executive branch officials.¹⁷³

In the last section of its opinion, the Ninth Circuit dealt with the government's claim of hardship as a justification for authority to deny discovery requests.¹⁷⁴ The court recognized that the government has a "serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations."¹⁷⁵ Nevertheless, the court held that these concerns must be addressed under the general rules of discov-

168. *Id.* at 778.

169. *Id.* (citing *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989)); see *supra* notes 82-85 and accompanying text.

170. *Exxon Shipping*, 34 F.3d at 778 & n.8.

171. *Id.* at 778.

172. *Id.*; see *Leyh v. Modicon, Inc.*, 881 F. Supp. 420 (S.D. Ind. 1995). The district court in *Leyh* directly confronted "whether the doctrine of sovereign immunity permits the head of a federal agency to refuse conclusively to permit an agency employee to testify in response to a command of a federal court." *Id.* at 422. The court agreed with the Ninth Circuit that agencies could not use sovereign immunity to refuse to comply. *Id.* at 423.

173. *Exxon Shipping*, 34 F.3d at 778-79. In a footnote, the court noted that the government had waived any potential claims to immunity under the APA's right of review. *Id.* at 779 n.9.

174. *Id.* at 779-80.

175. *Id.* at 779.

ery.¹⁷⁶ The court explained that the Federal Rules of Civil Procedure and any potential claims of privilege adequately protected the government agencies' interests.¹⁷⁷ The Ninth Circuit remanded the case to the district court to consider the government's denial of discovery under these standards.¹⁷⁸

Exxon Shipping broadened the public's discovery rights by putting to rest any government contention that the Housekeeping Statute sanctions agency denial of discovery in its own right. Under the court's holding, when a litigant directly challenges an agency's decision by filing suit under the Housekeeping Statute, the district court should apply the standard given by the Federal Rules of Civil Procedure.¹⁷⁹ The court did not reach Exxon's claim that the agencies' actions were arbitrary and capricious under § 706(2)(A) of the APA but reserved the right to review the government's decision under the APA.¹⁸⁰ The court further "acknowledge[d] that collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate[]' any right to the requested testimony."¹⁸¹ The court, however, failed to explain the difference between the burdens of filing an APA challenge and the burdens of filing a collateral Housekeeping Statute challenge.¹⁸² The real benefit of *Exxon Shipping* stems from the stricter standard of judicial review rather than any savings of litigants' time or money.

176. *Id.*

177. *Id.* at 779-80. "[W]e believe that federal district courts, in reviewing subpoena requests under the federal rules of discovery, can adequately protect both an individual's right to 'every man's evidence' as well as the government's interest in not being used as a 'speakers' bureau for private litigants.'" *Id.* at 780. For a discussion of the discovery rules under the Federal Rules of Civil Procedure, see *infra* notes 230-33 and accompanying text.

178. *Exxon Shipping*, 34 F.3d at 780.

179. *Id.* at 779-80.

180. *Id.* at 780.

181. *Id.* at 780 n.11 (alteration in original) (quoting *Boeh v. Gates*, 25 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J. dissenting), *cert. denied*, 115 S. Ct. 898 (1995)).

182. Considering the Ninth Circuit's decision in *Boeh*, it seems unlikely that the court meant to instill the district courts with the jurisdiction to review agency decisions without an independent direct action against the agency. See *supra* notes 112-19 and accompanying text.

DISCUSSION OF THE ALTERNATIVE STANDARDS
AVAILABLE FOR JUDICIAL REVIEW AND THE
CONTINUING PROBLEMS UNDER AGENCY HOUSEKEEPING

In the rare cases in which a party brings a procedurally proper challenge, the courts are split over the appropriate standard of judicial review of an agency head's decision. Courts constantly balance litigants' interests against those of agencies and have had difficulty establishing a just and workable standard of judicial review. The Ninth Circuit's holding that "district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action,"¹⁸³ is the boldest step that courts have taken to open access to agency employee testimony. Despite the optimistic expectations that this holding creates, many serious problems remain for lawmakers to solve.

Weighing the Policy Justifications Advanced by Agencies Against the Public's Right to Every Man's Evidence

To better understand the pros and cons of increasing discovery access to agency employees, one must weigh agencies' interests in prohibiting disclosure against private parties' rights to full discovery. These competing interests should form the backdrop to any judicial decision whether to compel discovery.

Federal Agency Interests

Federal agencies and executive officials repeatedly have defended the notion of a housekeeping privilege. Agencies assert a myriad of justifications for their denials of testimony, including the conservation of scarce government resources, the retention of agency impartiality, the protection of privileged information, and the preservation of separation of powers.¹⁸⁴

183. *Exxon Shipping*, 34 F.3d at 780.

184. Agency housekeeping regulations often announce a list of policy reasons to justify their procedures. A common example is the regulation of the National Institute of Standards and Technology (NIST), which states:

To carry out its statutory mission effectively, NIST must apply the

Conservation of Agency Resources

The most common governmental concern is the conservation of agency resources. Agencies fear that repeated discovery requests would disrupt their administrative duties. For example, in *Moore v. Armour Pharmaceutical Co.*,¹⁸⁵ the court recognized that requiring doctors from the Department of Health and Human Services to testify would interfere with that agency's "interest in maximizing the use of its limited resources in dealing with a national health crisis."¹⁸⁶

Other courts have additionally recognized and stressed the need to examine the cumulative effect on an agency's resources rather than the burden of an individual request. In *Davis Enterprises v. EPA*,¹⁸⁷ the court found that the EPA had a genuine interest in avoiding a drain of resources and that the EPA's "concern about the effects of proliferation of testimony by its employees is within the penumbra of reasonable judgmental decisions it may make."¹⁸⁸ Likewise, in *Reynolds Metals Co. v. Crowther*,¹⁸⁹ the court feared that "[i]f OSHA employees were routinely permitted to testify in private civil suits, significant loss of manpower hours would predictably result."¹⁹⁰

Commentators and litigants have attacked the cogency of the

expertise of the many scientific and technical experts it employs exclusively to the performance of its official duties, including providing scientific and technical advisory services to other Federal agencies. It is essential that NIST also maintain a policy of strict impartiality among private litigants, and that it ensure that its employees adhere to the responsibilities for which they were employed. To these ends, it is the policy of NIST that its employees shall not testify nor otherwise appear in legal proceedings not involving the United States or its officers or employees in their official capacity as a named party in order to produce data, information, or records which concern matters related to official duties of NIST employees or the functions of NIST.

15 C.F.R. § 275.1(c) (1995).

185. 927 F.2d 1194 (11th Cir. 1991).

186. *Id.* at 1197-98.

187. 877 F.2d 1181 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

188. *Id.* at 1187; *see also* *Alex v. Jasper Wyman & Son*, 115 F.R.D. 156, 158-59 (D. Me. 1986) (ordering a less burdensome discovery method because of "the important public policy favoring the conservation of government resources and the protection of orderly governmental operations").

189. 572 F. Supp. 288 (D. Mass. 1982).

190. *Id.* at 290.

government's interest in protecting its resources on many grounds. Under most agency housekeeping regulations, the subpoenaed employee must seek permission to testify from the agency head and, if denied, must appear before the court and cite the *Touhy* doctrine and the governing regulation.¹⁹¹ Such employees commonly, although unjustifiably, have faced contempt orders.¹⁹² Additionally, litigants may take direct action against the agency head.¹⁹³ Defending against such a discovery request can be extremely time- and resource-consuming in its own right. The expense of defending the agency decision "[u]nder current practice, . . . in some instances, may even be more costly to the agency in the long run than allowing the employee to testify when originally requested."¹⁹⁴

Furthermore, a discovery request is not any more burdensome to a federal agency than is a request to a private business seeking the testimony of its employees.¹⁹⁵ In fact, agency regulations do not even make allowances for offers of compensation from persons requesting discovery.¹⁹⁶ Finally, the use of the Federal Rules of Civil Procedure standard adequately takes account of any burden on the agency.¹⁹⁷

Retaining Agency Impartiality

Agencies also contend that providing testimony favorable to a particular side in litigation creates the impression that the agency is partial.¹⁹⁸ They reason that, as a representative of the government and the public as a whole, it is not within the agency's role to favor a particular party in private litigation. The Third Circuit in *Davis Enterprises v. EPA*¹⁹⁹ recognized this

191. Kiesel, *supra* note 6, at 1670-71.

192. See *supra* notes 60-85 and accompanying text.

193. See *supra* notes 86-99 and accompanying text.

194. Kiesel, *supra* note 6, at 1670-71.

195. See *id.* at 1671 n.119.

196. *Id.*

197. See *infra* notes 230-44 and accompanying text.

198. See *Moore v. Armour Pharmaceutical Co.*, 129 F.R.D. 551, 553 (N.D. Ga. 1990) (citing "the government's policy of remaining strictly neutral in private litigation" as a reason for refusing to allow depositions), *aff'd*, 927 F.2d 1194 (1991).

199. 877 F.2d 1181 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

interest. The court held that, "[a]lthough it [was] certainly arguable that permitting [the agency subordinate] to give a deposition based on facts within his knowledge would not create the appearance of taking sides, the EPA's conclusion to the contrary [was] not capricious."²⁰⁰

Impartiality is a tenuous justification for withholding needed discovery. Commentators and judges have found that the idea that the public would view the act of providing evidence requested by a particular party as favoritism is "illusory."²⁰¹ As stated by the dissenting judge in *Davis Enterprises*, "[t]o withhold testimony that may be helpful to one side is to favor the other, but more importantly for society, is to prejudice proper resolution of the litigation."²⁰²

Protecting Privileged Information

Agencies further argue that the Housekeeping Statute bestows upon them the power to withhold evidence to protect privileged information. While the government has a valid compelling interest in protecting privileged information,²⁰³ the housekeeping regulations and agency withholdings under them "allow refusal of a much larger class of testimony than would be permitted if an agency had to rely solely upon privileges."²⁰⁴ The overinclusiveness of these regulations demonstrates that courts must test denials of evidence under a fair and more narrowly tailored standard that prohibits discovery of privileged information, such as the Federal Rules of Civil Procedure.²⁰⁵

200. *Id.* at 1186-87.

201. Kiesel, *supra* note 6, at 1673.

202. *Davis Enters.*, 877 F.2d at 1191 (Weis, J., dissenting); see also Kiesel, *supra* note 6, at 1673 ("[T]he nondisclosure of germane evidence by a federal agency tips the scales of justice unfairly in favor of a private litigant—the one whose case the evidence would harm.").

203. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450 (1985); see also Lively, *supra* note 2, at 507-10 (discussing the deliberative privilege).

204. Kiesel, *supra* note 6, at 1673.

205. See *infra* notes 230-44 and accompanying text; see also Lively, *supra* note 2, at 507 (suggesting that government employees' housekeeping interests should receive the same protection that any witness receives from annoyance, embarrassment, oppression, undue burden, or expense under Federal Rule of Civil Procedure 26(c)).

Preserving Separation of Powers

An undeveloped but potentially troublesome agency justification lies in the doctrine of separation of powers.²⁰⁶

It has been argued that the statute gave the executive branch control of public records, that the Congress has developed similar regulations for responding to judicial subpoenas of its records, and that the Housekeeping Act is simply a Congressional acquiescence in the right of the executive branch to do the same, that is, the privilege is justified, like the executive privilege, by the constitutional doctrine of separation of powers.²⁰⁷

Although federal agencies have not proffered separation of powers in defense of the housekeeping privilege, the United States Supreme Court has provided a basis for this argument. In *United States v. Reynolds*,²⁰⁸ the Court stated in dictum that "[i]t is said that [the precursor to the modern Housekeeping Statute] is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power."²⁰⁹

Private Litigants' Rights to Discovery

To understand the effect of federal agencies' current housekeeping policies, one must weigh agency justifications for control over employee testimony against private litigants' rights to that testimony. As stated at the beginning of this Note, the United

206. See *Boeh v. Gates*, 25 F.3d 761 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). Contrary to the argument advanced by the agencies, the private litigant in *Boeh* argued that the housekeeping regulation violated "the separation of powers by vesting an executive branch official with the heretofore exclusively judicial power to determine what evidence will be admitted in a civil trial." *Id.* at 764. The court rejected this approach. *Id.*

207. WRIGHT & GRAHAM, *supra* note 14, § 5682 (footnotes omitted); see also Kiesel, *supra* note 6, at 1659-60 n.58 (discussing separation of powers problems).

208. 345 U.S. 1 (1953).

209. *Id.* at 6 n.9. A full analysis of the application of separation of powers to the Housekeeping Statute is beyond the scope of this Note. For an explanation of separation of powers as it applies to government agencies, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

States Supreme Court repeatedly has found that "[t]he public . . . has a right to every man's evidence."²¹⁰ Testimony from governmental employees is a pure form of "public evidence." For federal agencies to limit access to this information without efficacious judicial review and under situations not covered by any viable privilege inhibits a fundamental right of the citizenry.²¹¹

The use of governmental testimony in judicial proceedings is essential to the fair and complete administration of justice. The Supreme Court has noted that "[m]odern instruments of discovery serve a useful purpose. . . . They, together with pretrial procedures, make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. Only strong public policies weigh against disclosure."²¹² Admittedly, this public interest is less quantifiable than agency costs, but to underestimate the importance that a full hearing of the relevant evidence plays in trials would cripple the legal system and its underlying mission to uncover the truth and ensure fairness. To put into place obstacles that effectively prevent litigants from getting agency employee testimony, as the current housekeeping rules do, impacts the public's interest at least as much as do agency costs, and it places government employees in unwarranted, protected positions.

Standards Available for Judicial Review

Courts are far from a consensus regarding the proper standard to use when examining an agency's housekeeping decision. The three most prominent standards are: (1) a balancing of in-

210. See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, 331 (1950).

211. Congress and the courts repeatedly have permitted public access to governmental information and have construed limits on access narrowly. See, e.g., 5 U.S.C. § 552 (1994); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

212. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (citations omitted); see also *Lively*, *supra* note 2, at 506 ("To accept housekeeping rationales as the foundation of a privilege would represent a substantial departure from the precept that all rational means for ascertaining truth should be drawn upon unless a transcending public interest would be jeopardized.").

terests test, (2) the "arbitrary and capricious" standard of the APA, and (3) the Federal Rules of Civil Procedure standard.

*Balancing of Interests Test*²¹³

At least one court has relied on a strict balancing of competing interests when reviewing an agency's claim of privilege.²¹⁴ In *Denny v. Carey*,²¹⁵ the court adopted a "balancing approach," stating that, "when the privilege is claimed, it is necessary to balance interests to determine whether disclosure would be more injurious to the consultative function of government than non-disclosure would be to the private litigant's defense."²¹⁶ Such a balancing test would undoubtedly take into account many of the factors laid out previously in this section.

The "Arbitrary and Capricious" Standard

Too often, courts have turned to the lenient standard of the APA. Under 5 U.S.C. § 702, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."²¹⁷ The judicial standard for reviewing agency actions is whether such actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹⁸

Several courts have applied the "arbitrary and capricious" standard when reviewing agency housekeeping decisions. In *Davis Enterprises*, the court tested the EPA's decision under the

213. One commentator termed this test the "government privilege standard." See Coleman, *supra* note 33, at 713.

214. In *Florida v. Cohen*, 887 F.2d 1451 (11th Cir. 1989), the court was concerned "whether the district court struck the correct balance when it concluded that, under the circumstances of this case, the government's need to protect investigative records pertaining to an ongoing criminal investigation outweighed [the defendant's] need for the information requested," *id.* at 1454. The court held that the district court had struck the correct balance. *Id.* at 1455. Because the underlying action was criminal in nature, it is unclear whether the court would apply this standard when reviewing a discovery request in a civil action.

215. 78 F.R.D. 370 (E.D. Pa. 1978).

216. *Id.* at 373-74 (quoting *United States v. Article of Drug Consisting of 30 Individually Cartoned Jars, More or Less*, 43 F.R.D. 181, 190 (D. Del. 1967)).

217. 5 U.S.C. § 702 (1994). For an example of how a circuit court treated an exception to the right of judicial review under 5 U.S.C. § 701, see *supra* note 96.

218. 5 U.S.C. § 706(2)(A).

APA standard and stated that it was "only free to determine whether the agency followed its own guidelines or committed a clear error of judgment."²¹⁹ The court concluded that the EPA had not abused its discretion.²²⁰

In *Moore v. Armour Pharmaceutical Co.*,²²¹ the Eleventh Circuit recognized that, normally, the Federal Rules of Civil Procedure "strongly favor full discovery whenever possible"²²² but ruled that the lower court could only overturn the agency's decision if it was arbitrary or capricious.²²³ In *Wade v. Singer Co.*,²²⁴ a district court stated that it was bound to adhere "to a governmental agency's decision not to allow its employees to give testimony at least where the party seeking the testimony fails to make a strong showing that the testimony is necessary."²²⁵ The court in *Wade* found that the agency "did not act arbitrarily."²²⁶

The problem with this approach is that, under such a standard, the courts only examine whether the agency made a rational decision. The courts do not assess the validity or merits of the agency heads' claims of privilege.²²⁷ As one commentator has noted, "such a standard assumes that the Housekeeping Act and the regulations established under its authority grant government agencies a privilege . . . which is subject only to a 'severely limited' scope of review."²²⁸ Such limited judicial review strongly disfavors private litigants. Because courts are extremely reluctant to find that an agency abused its discretion,²²⁹ pri-

219. *Davis Enters. v. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

220. *Id.* at 1188.

221. 927 F.2d 1194 (11th Cir. 1991).

222. *Id.* at 1197.

223. *Id.*

224. 130 F.R.D. 89 (N.D. Ill. 1990).

225. *Id.* at 92.

226. *Id.*

227. *See Coleman, supra* note 33, at 711 (arguing that reviewing agency decisions on their merits better preserves judicial function than reviewing for reasonable good faith on the agency's part).

228. *Id.*

229. *But see United States Steel Corp. v. Mattingly*, 89 F.R.D. 301 (D. Colo.), *rev'd*, 663 F.2d 68 (10th Cir. 1980). In *Mattingly*, the district court held the housekeeping regulation of the National Bureau of Standards (NBS) invalid under the "arbitrary

vate parties with real needs for agency information are realistically without recourse.

The Exxon Shipping Standard: The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure set out the guidelines for discovery in federal civil cases. Under Rule 30(b)(6), civil litigants have the ability to subpoena a federal agency.²³⁰ Rule

and capricious" test. *Id.* at 305. The district court examined the Housekeeping Statute and found that "it [was] unlikely that Congress would have empowered NBS to obstruct access to information, or suppress evidence needed by the courts, without expressing such an intent in a specific provision." *Id.* at 304. The district court did not even mention *Boske* or *Touhy* in its analysis but balanced the interests in disclosure against NBS's reasons for denial and concluded that "[i]n the interest of justice these regulations cannot be allowed to preclude the discovery sought by [the private litigant]." *Id.* at 305. This case, however, was an aberration, and its holding clearly ignores solid Supreme Court precedent upholding housekeeping regulations. See *supra* notes 18-32 and accompanying text. Citing *Touhy*, the Tenth Circuit overruled the decision in a four-sentence order. *United States Steel Corp. v. Mattingly*, 663 F.2d 68 (10th Cir. 1980). This is not to say, however, that a court will not someday find that an agency head's decision under a housekeeping regulation was arbitrary.

230. FED. R. CIV. P. 30(b)(6). The text of the Rule states:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

Id.

The ability to subpoena a federal agency head located outside the jurisdiction of the court is questionable. In *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973), the court concluded that Rule 30(b)(6) could not be used "to obtain documents in custody of the head of a non-party government agency in Washington, D.C. by service of a subpoena duces tecum upon a local representative of the agency," *id.* at 621. The consequences of this ruling are very troublesome. Under the *Cates* holding, a federal court outside Washington, D.C., is unable to compel an agency head to testify, and such a court is therefore unable to review the agency's decision. It is not clear, however, whether this restriction would apply to collateral federal suits directly against the agency, and courts seem to be split over this issue. See *Exxon*

26(c), however, provides limits and protections for parties from whom discovery is sought.²³¹ Rule 26(c) allows courts to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense."²³² Additionally, the Federal Rules of Civil Procedure protect privileged material.²³³

Shipping Co. v. United States Dep't of Interior, 34 F.3d 774 (9th Cir. 1994) (holding that the Housekeeping Statute does not shield federal employees from valid discovery requests).

231. FED. R. CIV. P. 26(c). The text of the Rule states:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id.

232. *Id.*

233. FED. R. CIV. P. 26(b)(5). Rule 26(b)(5) allows a party to claim that information is privileged, but "the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *Id.*

Several courts have applied the Federal Rules of Civil Procedure standard to requests for agency testimony. In *Alex v. Jasper Wyman & Son*,²³⁴ a district court quashed a discovery subpoena, but not before examining the motion to quash under Rule 26(c).²³⁵ The court acknowledged that "the courts have 'established a trend . . . away from merely ratifying' government claims of privilege, and have engaged in balancing 'agency policies against disclosure with the legitimate demands of proper judicial administration.'"²³⁶ The court found, however, that the agency had provided discovery through "an alternate and less burdensome method."²³⁷

More recently, in *Leyh v. Modicon, Inc.*,²³⁸ a federal district court used the Federal Rules of Civil Procedure to review a subpoena of an EEOC employee. The court held that "the Federal Rules of Civil Procedure give the federal courts ample power and flexibility to prevent or restrict discovery that is obtainable from some other source that is more convenient, less burdensome, or less expensive, or where the burden or expense of the proposed discovery outweighs its likely benefit."²³⁹ After analyzing the Federal Rules of Civil Procedure factors, the court concluded "that a protective order should be granted" to prevent injuries to the EEOC.²⁴⁰ This ruling demonstrates that the Federal Rules of Civil Procedure still adequately protect agencies from inappropriate subpoenas.²⁴¹

In *Exxon Shipping*,²⁴² a federal court again held that the proper standard of judicial review was given by the Federal

234. 115 F.R.D. 156 (D. Me. 1986); see Kiesel, *supra* note 6, at 1673-82 (discussing the court's decision in *Jasper Wyman* and proposing a two-step approach to judicial review).

235. *Jasper Wyman*, 115 F.R.D. at 158-59.

236. *Id.* at 158 (quoting *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968)) (omission in original).

237. *Id.* at 159.

238. 881 F. Supp. 420 (1995).

239. *Id.* at 424.

240. *Id.*

241. The court warned that such discovery requests "should not become a routine method to find a short-cut to evidence or to being given pre-packaged cases" and should be reserved for "exceptional circumstances." *Id.* at 425.

242. 34 F.3d 774 (9th Cir. 1994).

Rules of Civil Procedure.²⁴³ The court stated that, "[u]nder the balancing test authorized by the rules, courts can ensure that the unique interests of the government are adequately considered."²⁴⁴ By using the Federal Rules of Civil Procedure standard, courts recognize that the Housekeeping Statute does not confer a substantive privilege and ensure private litigants that an independent, disinterested judicial body will give agency decisions more than just a cursory glance. Under such review, when available, the courts can protect the public's right to every man's evidence.

Continuing Problems for Private Litigants and a Proposed Legislative Solution

Although courts may and should adopt the equitable standards of the Federal Rules of Civil Procedure to review federal agency housekeeping decisions, many obstacles to discovery remain entrenched in the procedural framework of jurisdictional limits. Very few cases reach the procedural level required to obtain judicial review. As the housekeeping doctrine now stands, *Touhy* still requires litigants to bring a separate collateral action in federal court directly against the agency.²⁴⁵ Such a burden, in all practicality, destroys the housekeeping discovery rights of most litigants.²⁴⁶ One commentator has stated these difficulties succinctly:

243. See *supra* notes 154-82 and accompanying text.

244. *Exxon Shipping*, 34 F.3d at 780; see also *Sommer v. PMEC Assocs. & Co.*, No. 88 Civ. 2537(JFK), 1993 U.S. Dist. LEXIS 20401, at *10 n.3 (S.D.N.Y. Mar. 31, 1993) (denying a motion to quash by the Department of Labor, a nonparty, under Federal Rule of Civil Procedure 30(b)(6) and disagreeing that an independent APA suit was necessary). But see *Drave Corp. v. Liberty Mutual Ins. Co.*, No. 95-MC-229-CIV, 1995 U.S. Dist. LEXIS 12625, at *4 (D. Kan. Aug. 18, 1995) ("Nothing in Rule 30(b)(6) abrogates the long-standing rule that governmental agencies may refuse to allow the testimony of its employees in private litigation matters.").

245. Cases sidestepping this requirement rest on the shaky ground that an agency head's order to a subordinate not to testify is involvement sufficient to provide jurisdiction and allow judicial review. See *supra* notes 120-47 and accompanying text. Some courts have further restricted review to the D.C. federal district by denying jurisdiction over agency heads located there. See *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973); *supra* note 230.

246. See *Lively*, *supra* note 2, at 512 ("[U]nless such review is readily available and reasonably prompt, it may be meaningless.").

First, to obtain judicial review, the requesting litigant must bear the cost of a separate action against the agency official who decided not to allow the testimony. Second, if the agency decision maker is in another district, circuit, or country, the litigant must bring the collateral suit in a forum other than that of the underlying action. Finally, most of the non-disclosure regulations do not contain any standards for a court to use in the collateral action when reviewing a denial of testimony.²⁴⁷

Litigants entering the procedural maze that has developed under the auspice of the Federal Housekeeping Statute may require more than judicial intervention to find their way out with their full discovery rights intact. The current system, in which "[a] litigant who sought review of the agency's decision . . . would face extra procedural complications and practical problems of time, travel and money merely to reach the appropriate official,"²⁴⁸ requires the attention of Congress and legislative reform.²⁴⁹ A proper legislative solution requires three components: (1) the application of the Federal Rules of Civil Procedure standard to federal agency decisions, (2) the elimination of the need for a separate collateral action against the agency, and (3) the waiver of sovereign immunity in state actions removed to federal court.

By spelling out the applicable standard of review, Congress can remove the doubts that courts now entertain concerning any agency housekeeping privilege. Agencies do not deserve any special treatment in the area of discovery, and the Federal Rules of Civil Procedure adequately protect any interests agencies may have. Such a standard would force agencies to take account of the litigant's need for the information and should cause them to deny access only in cases of privilege or hardship. Litigants would also be less likely to challenge an agency determination if

247. Kiesel, *supra* note 6, at 1658-59 (citations omitted).

248. Lively, *supra* note 2, at 500.

249. See *id.* at 514 ("Any uniform solution for reaching agency officials in a convenient, timely and reasonably affordable manner may therefore require congressional assistance."). Courts have been uncharacteristically lame in protecting what seem to be historically judicial functions—the power to subpoena and control over relevant evidence.

agencies were to fully disclose the reasons for any denial.²⁵⁰

Removing the need for a collateral federal suit would eliminate the procedural and monetary obstacles associated with filing a separate action. It also would ensure prompt judicial review of agency decisions.²⁵¹ Such legislative action would require a congressional grant of jurisdiction.²⁵² Under such a statutory scheme, a federal court could not force a subordinate to testify against the orders of the agency head, but the litigant with a need for the evidence could challenge the agency's decision in the same forum.²⁵³ This would preserve the Housekeeping Statute's original purpose of centralizing decisionmaking, while providing substantive judicial review.

By waiving sovereign immunity, Congress could permit the enforcement of the rights of private parties in state courts.²⁵⁴ This action would give state courts concurrent jurisdiction to review agency decisions and help generate comity.²⁵⁵ Agencies remain protected by § 1442, which allows them to remove the proceeding to a federal forum if they desire;²⁵⁶ thus, they should not bear any additional burden or expense.

250. See FED. R. CIV. P. 26(b)(5) (requiring parties to explain why a privilege applies). In addition to a congressional instruction to federal agencies to comply with the Federal Rules of Civil Procedure standard, the courts should follow the Ninth Circuit's lead and examine agency determinations according to the Federal Rules of Civil Procedure. Recognition of the Federal Rules of Civil Procedure standard by Congress would not be necessary for the implementation of a uniform standard, but it would clarify the situation.

251. See Lively, *supra* note 2, at 514 ("Congressional action ensuring prompt and proximate review of agency refusals to authorize employee testimony would be consistent with the statutory mandate that housekeeping authority not be used to withhold information.").

252. See *id.*

253. Lively suggests that any extra burden to the agency would be resolved by "having a regional or United States attorney present the agency's claim." *Id.*

254. The Ninth Circuit in *Exxon Shipping* believed that Congress had already waived sovereign immunity for collateral federal suits under the APA's right of review in 5 U.S.C. § 702. See *Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 779 n.9 (9th Cir. 1994).

255. See Coleman, *supra* note 33, at 703-06 (presenting an argument for concurrent jurisdiction in state courts).

256. 28 U.S.C. § 1442 (1994).

CONCLUSION

The Housekeeping Statute, so simple and innocent in its language, has created quite a conundrum. Federal agencies have unfairly relied on the statute as having created a special housekeeping privilege. No compelling reason justifies singling out federal agencies and allowing them virtually unrestrained discretion to avoid discovery requests for employee testimony. The justifications advanced by agencies in support of this privileged status are weak and not unique to the government. Furthermore, the public's right to "every man's evidence" weighs against agency rationalizations. The fact that federal agencies have interests in limiting litigants' ability to force discovery from them also makes agencies biased decisionmakers.²⁵⁷ The courts, as neutral observers, are better equipped to balance the competing parties' interests than are self-interested agency heads.

Nationwide use of the *Exxon Shipping*-Federal Rules of Civil Procedure standard of judicial review would create greater openness of information and fulfill the judicial trend towards full disclosure.²⁵⁸ The *Exxon Shipping* standard would force agency heads to analyze all subpoenas for employee testimony as they would any other discovery request. The recognition by the Federal Rules of Civil Procedure of common-law privileges and competing interests adequately protects the government's legitimate concerns, while ensuring that private litigants have access to all relevant evidence.

Congress can ensure application of the *Exxon Shipping* standard by legislatively requiring agencies to follow the Federal Rules of Civil Procedure when reviewing requests for employee testimony. Furthermore, legislative grants of federal court jurisdiction over agency heads' housekeeping decisions and waiver of sovereign immunity would broaden litigants' ability to receive

257. See *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 876 (5th Cir. 1961) ("Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary—not in the party claiming the privilege and not in a party litigant.").

258. Several courts have sought a means to sidestep the *Touhy* doctrine in their pursuit of the litigant's need for relevant evidence. See notes 120-47 and accompanying text.

important evidence timely and cheaply. These proposed legislative reforms would provide a procedurally just method of reviewing agency determinations.

Courts should finally put the myth of a housekeeping privilege to rest and should force federal agencies to abide by the same standards applicable to all citizens.

Jason C. Grech