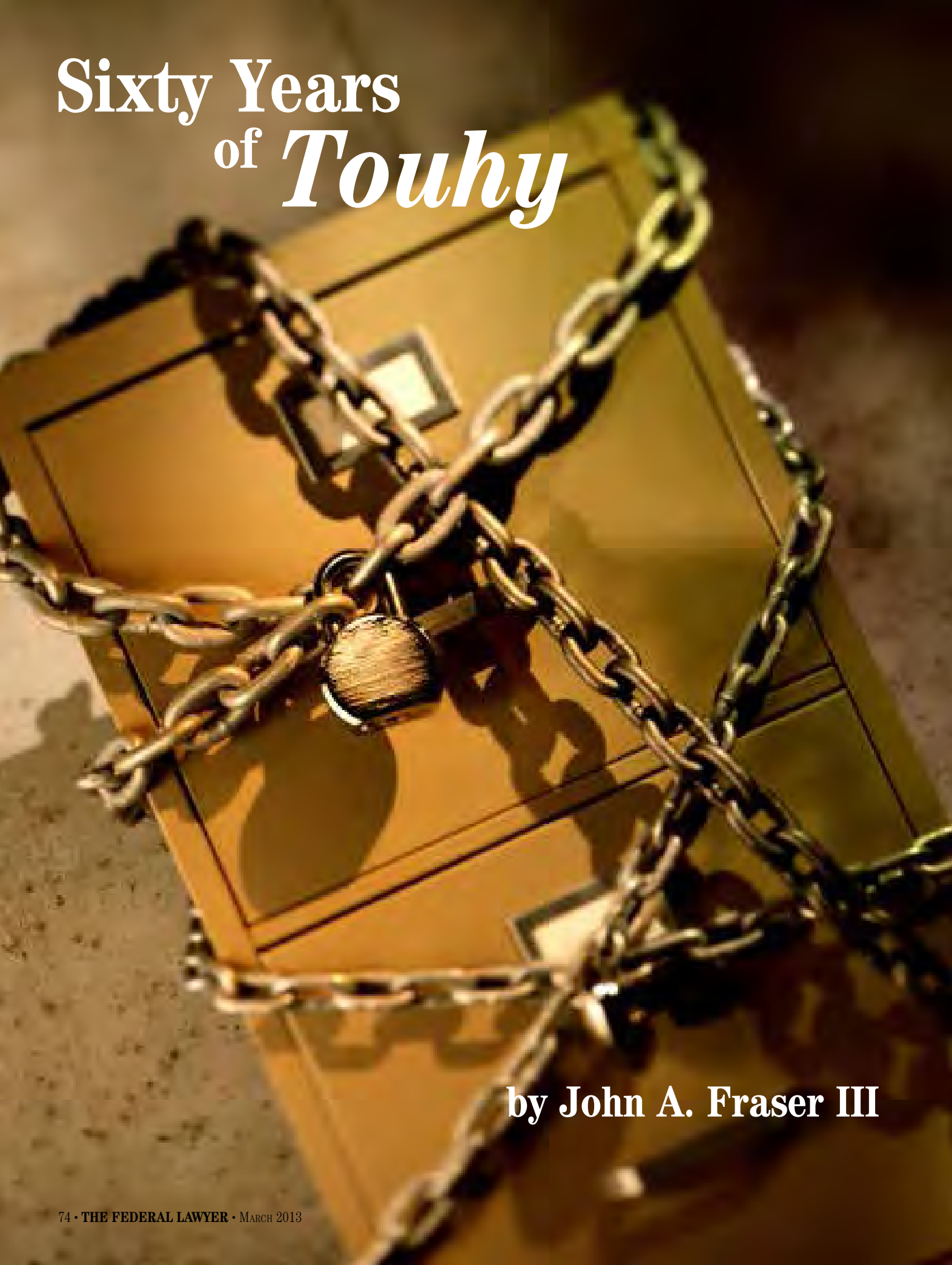
# Sixty Years of *Touhy*



by John A. Fraser III

Sixty years ago, in *United States ex rel. Touhy v. Ragen*,[1] the U.S. States Supreme Court sidestepped a direct confrontation between the judicial branch and the executive branch.[2] The confrontation grew out of a habeas corpus proceeding in which a notorious gangster and state penitentiary inmate[3] claimed that his conviction and imprisonment were the products of fraud. The district court where the habeas corpus matter was pending issued a subpoena duces tecum which directed the head of the local Federal Bureau of Investigation (FBI) office to appear and produce relevant FBI investigative records. The head of the FBI office appeared but respectfully declined to produce the records, citing a U.S. Department of Justice (DOJ) regulation that required the approval of the U.S. attorney general before such a production could occur. The DOJ regulation was in turn based on a "housekeeping" statute that empowered the heads of federal agencies to set regulations, inter alia, for recordkeeping and subpoena responses.

The district court held the FBI agent in contempt, ruling that the FBI records were relevant and that the housekeeping statute did not create a privilege against a court-ordered subpoena.[4] The U.S. Court of Appeals for the Seventh Circuit reversed, holding that the housekeeping statute created a statutory privilege against production of the records.[5] The Supreme Court granted certiorari,[6] and then sidestepped the primary issue of privilege. The Supreme Court held that the contempt power was not available to enforce a subpoena served on a subordinate federal employee when a valid regulation instructed the employee not to honor such a subpoena.[7]

In *Touhy*, the Supreme Court neatly avoided the confrontation between the executive and the judiciary created by a district court that wielded the contempt power to enforce a subpoena against the executive. *Touhy* exemplifies the judicial wisdom of not confronting the executive branch without a compelling need and an assurance of compliance. However, the ruling left many questions to be decided, including the division of labor between the judicial and executive branches in determining whether particular government records are privileged, or are in fact grist for the mill of civil litigation. If the contempt power is not available to enforce a civil subpoena, are other enforcement tools available? In practice, does the executive branch make the final determination of privilege for its documents?

In the ensuing 60 years, the U.S. Congress, numerous executive agencies, and the lower courts have responded to *Touhy* in a variety of ways. After *Touhy* was decided in 1951, numerous executive agencies adopted or revised regulations that implemented the housekeeping statute and attempted to delegate and regularize the executive discretion affirmed in *Touhy.* Through their *Touhy* regulations, executive agencies have sought to avoid serving as a cost-free source of discovery and expert opinions for civil litigants in cases where the government is not a party. In 1958, Congress tried without much effect to limit the practical consequences of *Touhy* by amending the housekeeping statute.

Lower courts have followed the narrow contempt holding of *Touhy*, but have found other methods of enforcing discovery from federal agencies, especially in civil cases where federal agencies are parties. A number of academic articles have criticized the alleged defects of *Touhy* and suggested a variety of "remedies" for the denial of the contempt power to district courts. The majority of lower courts have recognized that it is up to Congress to regulate the boundaries of the statutory "housekeeping privilege," and have therefore looked to the U.S. Code for the law that governs discovery from federal agencies. In contrast, two appeals courts have ruled that district courts must evaluate claims of privilege under Rule 45 of the Federal Rules of Civil Procedure, and not under *Touhy.*

This article explores 60 years of *Touhy* by first describing the legal background that led to *Touhy*. In the second section it relates the essentials of *Touhy* and its practical effects in subsequent administrative regulations and lawsuits. The third section describes the 1958 congressional legislative response to *Touhy,* and the very limited results of that legislation. The fourth section outlines how the majority of federal courts have looked to the U.S. Code for jurisdictional and statutory guidance on the boundaries of the "housekeeping privilege," which is based entirely on legislative acts dating back to 1789. The fifth section describes the U.S. Court of Appeals for the Ninth and District of Columbia (D.C.) Circuits decisions and a few academic articles which have assumed that federal judges must have the power to finally determine all questions of privilege, and have therefore insisted on judicial means for enforcement of subpoenas, despite *Touhy*.

The concluding section argues the point that judges are not endowed by the U.S. Constitution or the U.S. Code with the authority to independently and finally determine all questions of privilege, regardless of circumstances. At present, the U.S. Code empowers the heads of federal agencies to make initial determinations regarding the release of agency records and subjects those determinations to judicial review under circumstances and standards defined by the same code. Unless the determinations of privilege violate a statutory or constitutional standard, federal judges do not have inherent authority to overrule lawful executive branch or congressional determinations of privilege. Section VI argues that generalized notions of judicial supremacy should not be substituted for express statutory authority to determine privilege.

## The History of the Housekeeping Statute and Privilege Up to 1950

The first Congress passed the "housekeeping statute" in 1789 and authorized Secretary of State Thomas Jefferson (and other department heads) to act as official records custodians for the

new Republic.[8] As it reads today, the statute authorizes agency heads to "prescribe regulations for the ... custody, use, and preservation of [the agency's] records, papers, and property."

There are no pre-Civil War reported instances of court orders compelling officers of the executive branch to produce records or testimony in civil litigation where the federal government was not a party.[9] In 1842, President John Tyler described the prevailing practice of the executive branch:

> It is certainly no new doctrine in the halls of judicature or of legislation that certain communications and papers are privileged, and that the general authority to compel testimony must give way in certain cases to the paramount rights of individuals or of the Government. Thus, no man can be compelled to accuse himself, to answer any question that tends to render him infamous, or to produce his own private papers on any occasion. The communication of a client to his counsel and the admissions made at the confessional in the course of religious discipline are privileged communications. In the courts of that country from which we derive our great principles of individual liberty and the rules of evidence, it is well settled, and the doctrine has been fully recognized in this country, that a minister of the Crown or the head of a department cannot be compelled to produce any papers, or to disclose any transactions relating to the executive functions of the Government which he declares are confidential, or such as the public interest requires should not be divulged; and the persons who have been the channels of communication to officers of the State are in like manner protected from the disclosure of their names. Other instances of privileged communications might be enumerated, if it were deemed necessary. These principles are as applicable to evidence sought by a legislature as to that required by a court.[10]

After the Civil War and before 1900, the courts routinely ruled that the executive branch was not required to provide records or testimony in civil cases, and that the contempt power was not available to state or federal courts to require records or testimony.[11] The U.S. attorney general consistently opined that production of records and testimony was discretionary with the executive.[12] Where the United States was a party, the rule was different.[13]

In 1900, the Supreme Court approved an agency's reliance on the housekeeping statute as grounds for refusing to produce records in response to a subpoena. In *Boske v. Comingore*, a Kentucky state court held a federal revenue collector in contempt for refusing, in compliance with a regulation promulgated by the Commissioner of Internal Revenue, to produce tax records in response to a state court subpoena.[14]

The Supreme Court held in *Boske* that a Kentucky state court could not hold the federal revenue collector in contempt. Relying on the housekeeping statute, the Court held that an Internal Revenue regulation was a valid, constitutional exercise of the powers of the Secretary of the Treasury—and through him, the Commissioner of Internal Revenue—"'to prescribe regulations ... for the ... custody, use, and preservation of ... records, papers, and property.'" Thus, the Court held that the Secretary "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."[15]


Roger "the Terrible" Touhy in his FBI mug shot.

Between 1900 and 1951, under the housekeeping statute, executive agency heads determined which records or witnesses to release to civil litigants, and how to do so.[16] In effect, the agencies had a privilege against discovery.[17]

### *Touhy* and the *Touhy* "Privilege"

The Supreme Court unanimously decided *Touhy* in 1951, holding that a federal employee may not be held in contempt as a means of enforcing a district court subpoena for production of the records of the federal agency when that agency has instructed its employee to decline to honor the subpoena.[18] Although the Supreme Court had granted certiorari on a petition that presented the question of the existence of a statutory privilege against production of records, the Court declined to address that issue.[19] Justice Felix Frankfurter wrote a separate concurrence that specifically underlined the Court's narrow holding regarding the contempt power, and also noted that the existence of a privilege was not addressed by the Court. [20]

Since 1951, federal agencies have used the statutory lan-

guage of the housekeeping statute, in conjunction with *Touhy*, to justify agency regulations that require designated agency officials to give their approval before employees can testify or provide agency records in disputes to which the federal government is not a party.[21] Such regulations generally direct subpoenaed employees "respectfully [to] refuse to provide any testimony or produce any document" if the designated agency official does not authorize compliance with the subpoena.[22] Most *Touhy* regulations delegate to a senior official the determination of whether and how the agency will comply with a subpoena. The regulations typically list various factors for that official to consider, including privilege, burden on the agency, and the need to protect confidential information.[23]

Other agencies have taken a different approach to *Touhy* regulations: these agencies treat civil subpoenas as requests for records under the Freedom of Information Act (FOIA), first enacted in 1966.[24] In response to a subpoena, the regulations require employees to appear in court, "respectfully decline to produce the records" on the grounds that doing so is prohibited by the regulation, and state that the agency will handle the subpoena under FOIA.[25]

The agency then sends the subpoena to its FOIA office. That office may redact portions of records or withhold them entirely pursuant to FOIA exemptions. The U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), the Office of the Comptroller of the Currency, and the Consumer Product Safety Commission have *Touhy* regulations that treat subpoenas as FOIA requests.[26]

Lower courts have interpreted *Touhy* as preventing any contempt ruling against agency employees,[27] and have looked to the express provisions of the U.S. Code for other non-contempt means of subpoena enforcement when the agency is not a party to the suit. As is discussed below, the practical effect of *Touhy* (in most of the United States) is that agencies determine when and how much information and testimony will be released when other parties are in litigation. Under *Touhy* and the law that has developed under it, federal agencies do not serve as a free speaker's bureau, expert witness laboratory, and research agency for civil litigants. This is what is referred to by federal practitioners as the *Touhy* privilege.

### Congress Responds to *Touhy* in 1958

Congress amended the "housekeeping" statute in 1958 to clarify that it "does not authorize withholding information from the public or limiting the availability of records to the public."[28] Congress apparently believed that the housekeeping statute "was being miscited as statutory authority for nondisclosure."[29] The stated purpose of the 1958 Amendment was to clarify that the housekeeping statute confers no authority upon the head of a department to suppress information.[30] One court held that the amendment was meant to "knock[] the judicially sanctioned prop out from under the bureaucratic privilege claims."[31] But the 1958 Amendment left undisturbed the core principles of *Touhy*—that department heads have the authority to determine responses to subpoenas, and may delegate responses to discovery requests and immunize subordinates from contempt.[32]

The 1958 Amendment had little practical effect on federal agency refusals to produce information.[33] Some commentators believe that the amendment was intended to reverse *Touhy* by erasing its statutory base.[34] After the 1958 Amendment, however, courts have approved immunity from testimony beyond what was allowed in *Touhy*.[35] If the 1958 Amendment was passed to overrule the housekeeping privilege, it did not have that effect. In fact, *Touhy* is the case most often relied on by executive branch agencies and by courts when overruling demands for evidence from federal agencies.[36]

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### The Majority of Lower Courts Look to the U.S. Code for Guidance on the Limits of the Housekeeping Statute

If the contempt power is not available to enforce subpoenas, how then may a civil litigant seek to obtain information, documents, or testimony from a federal agency that is not a party[37] to the litigant's suit? The answer depends on the federal circuit in which the litigant has brought suit.

The U.S. Court of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have held that courts may review an agency's refusal to comply with a subpoena under the Administrative Procedure Act (APA).[38] Under the APA, courts will set aside agency actions that are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[39] The First and Second Circuits have held that a litigant in federal court need not file a separate action against an agency, but may move to compel compliance with a subpoena under the APA in the same suit where the subpoena was issued.[40] The D.C. Circuit has ruled that a separate APA action is necessary when the matter arises in state court. [41]

In those circuits where the APA provides the only path to challenge an agency decision not to produce documents or witnesses, agencies maintain broad practical discretion in responding.[42] This result is what is loosely referred to as the "*Touhy* privilege." Under the APA, a litigant who has been refused agency documents or testimony can prevail if the agency withheld the documents in contravention of the agency's regulations.[43] Therefore, agencies write regulations forbidding compliance with subpoenas, and the agency is not "arbitrary and capricious" under the APA when it complies with those same published regulations.[44]

Beyond the APA, the D.C. and Ninth Circuits have held that a litigant may challenge an agency's refusal to comply with a subpoena by filing a motion to compel compliance under Rule 45 of the Federal Rules of Civil Procedure.[45] A Rule 45 motion to

compel is more favorable to a party seeking discovery because it does not incorporate the APA's deferential standard of review, does not require a second lawsuit, and is heard by the judge who presides over the parties' dispute.[46] Under Rule 45, the judge conducts a "balancing" test in which the judge, rather than the Agency, weighs the asserted need for secrecy against the asserted need for release of the information.[47]

However, it is unclear whom a litigant should sue when she brings a Rule 45 motion to compel compliance with a subpoena against an agency. A litigant cannot sue an agency employee who refuses to disclose information pursuant to a valid agency regulation because *Touhy* prohibits the court from holding the employee in contempt.[48] Although the agency head is not protected by *Touhy* (which protects subordinate employees), the agency head may not easily be served within the court's territorial jurisdiction. A collateral action in the district where the agency's head office is located—often the District of Columbia—may be necessary.[49] The requirement of a separate lawsuit against the agency head in a different jurisdiction is a significant litigation burden.

Does FOIA provide a jurisdictional basis for court enforcement of subpoenas issued in litigation? On the face of the statute,[50] there does not appear to be any reason why an agency may not treat a subpoena as a written request for release of information under FOIA, and to treat FOIA as a codification of common-law privileges. However, the case law on this point is mixed. [51]

Will resorting to state court resolve the issue of a lack of contempt power in federal court? The answer is "no." State courts do not have the authority to hold federal employees in contempt, or to resolve claims of privilege asserted by federal agencies. Sovereign immunity prevents state courts from enforcing subpoenas against the federal government.[52] If a state court seeks to compel a federal employee to comply with a subpoena, the federal employee can remove the matter to federal court.[53] The federal court will recognize that the state court had no jurisdiction to compel compliance from a federal employee. Because federal courts on removal derive their jurisdiction from the state court from which the matter was removed, the federal court will also determine that it lacks jurisdiction to enforce the subpoena. [54]

**The Ninth and D.C. Circuits and Some Academic Articles Have Sought to Avoid *Touhy* by Arguing for Judicial Supremacy over All Questions of Privilege**

In *Exxon Shipping Co. v. U.S. Department of the Interior*, the Ninth Circuit held that neither *Touhy* nor the housekeeping statute allow federal agencies to forbid agency employees from complying with a court's subpoena.[55] *Exxon Shipping* is the first court of appeals' decision holding that the housekeeping statute does not grant agency officials the authority to withhold subpoenaed documents or employee testimony in a civil action to which the government is not a party. The Ninth Circuit ruling does not deprive the housekeeping statute and *Touhy* of all meaning, however. Centralized decision making is permissibly implemented through regulations that preclude individual employees from testifying or from producing records until a privilege determination is made by a responsible official.[56] The D.C. Circuit has followed *Exxon Shipping.*[57]

The holding in *Exxon Shipping* is expressly based on the doctrine of separation of powers, which the court reasoned would be violated if the executive branch decided privilege questions. Furthermore, the Ninth Circuit found that such an assertion of "sovereign immunity" would impair the "right to every man's evidence." The court thus concluded that the Federal Rules of Civil Procedure should govern discovery against federal agencies, even when the agency is not a party.

Similarly, an author argued in a 1996 article that the courts are always best-suited to balance the needs of the litigants and the confidentiality needs of the government.[58] One student note in 1995, argued that "the federal courts' own standards of privilege and undue burden that should determine whether an agency employee should be required to testify. ..."[59] Another student note in 2005, suggested that judges must have the power to decide all questions of privilege under the doctrines of "separation of powers" and "rule of law," and urged judges to create means of reviewing all such claims "on the merits."[60] A student article in 2011 argued that *Touhy* regulations adopted by federal agencies interfere with the "core constitutional role" of federal courts by preventing judges from applying "common-law" privilege rules to all government claims of privilege.[61]

The short answer to the Ninth Circuit and these academic authors is this: as to rule of law, the executive branch is also governed by the laws, even if the judges do not have the power to overrule all executive decisions. As to separation of powers, the doctrine does not require that judges finally decide all questions.[62] Who in the government decides a question of privilege is not determined by the doctrine of separation of powers, which requires that the branches of government remain separate in their respective spheres.[63] What powers belong in each "sphere"

is a question of law, for which the U.S. Code may well provide the answer. If the U.S. Code assigns a privilege issue to the executive branch, then that is the law that should be followed.[64]

## If *Touhy* Presents a Dilemma, Judicial Supremacy Is Not the Answer

In *United States v. Nixon*, the Supreme Court held: "It is the province of this Court 'to say what the law is' with respect to the claim of privilege in this case."[65] In a "state secrets" case, the Supreme Court rhetorically declared that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[66] These and other holdings form the basis for the rhetorical argument that federal judges *must* resolve all claims of privilege that are asserted in federal litigation. However, this rhetorical argument goes too far.

At bottom, this argument assumes that federal judges must have the power to make the *final* determination of whether government information is better released, or better kept in confidence.[67] Of course, it is a truism that federal judges decide questions of law over which jurisdiction is assigned to the federal courts. This truism aside, the question presented in each case is whether an Act of Congress or the U.S. Constitution has committed a particular privilege issue to federal judges, or to the executive, or to the legislative branch.

There are privilege and secrecy determinations which judges are not empowered to second-guess, even when those determinations are questioned in federal litigation.[68] These determinations include questions of information classification,[69]contracts for espionage,[70] military strategy,[71] patent applications,[72] scientific secrecy,[73] foreign relations and diplomacy,[74] atomic weapons safeguards,[75] qualifications for the military draft,[76] tax return confidentiality,[77] census record privacy,[78] and legislative privilege under the Speech and Debate Clause.[79] In these cases, federal judges do not have the authority to over-rule the substantive decision of another branch that the information in question should remain confidential. Judges do not weigh and "balance" the litigant's need for the information or testimony against the asserted privilege in these areas. Obviously, separation of powers is honored in such cases, despite the fact that the judges are not empowered to overrule the executive or the legislative assertions of privilege.

## Conclusion

The housekeeping statute of 1789, now codified at 5 U.S.C. § 301, provides the answer to critics of *Touhy* and the *Touhy* privilege. The statute sets the boundaries and authorizes executive branch assertion of the privilege. If Congress determines that the statutory protections for agency records are flawed, then Congress has the power to amend the housekeeping statute. Absent legislation assigning to them a final role as arbiters of privilege, the courts should abide by *Touhy* and the statute. ⊙

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## Endnotes

[1]340 U.S. 462, 463-65 (1951).

[2]Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These occasions for constitutional confrontation between the two branches should be avoided whenever possible. *Cheney v. U.S. District Court*, 542 U.S. 367, 390 (2004) (citations and internal quotations omitted).

[3]Roger Touhy was a notorious gangster, kidnapper, bootlegger, and organized crime chieftain known in the Chicago underworld as "Terrible Touhy" and "Roger the Terrible Touhy." See the FBI website www.fbi.gov/about-us/history/famous-cases/roger-the-terrible-touhy and the Wikipedia website www.en.wikipedia.org/wiki/Roger_Touhy (describing career and legal appeals).

[4]The district court held an FBI agent in contempt for refusal to produce certain FBI records that the district court deemed relevant to a habeas corpus proceeding. 340 U.S. at 465, but did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. *Id*. at 467-70.

[5]The Seventh Circuit reversed, holding that the DOJ had a statutory privilege against production of the documents under 5 U.S.C. § 301—the "housekeeping" statute. *United States ex rel. Touhy v. Ragen*, 180 F.2d 321, 327 (7th Cir. 1950).

[6]340 U.S. 806 (1951).

[7]The Supreme Court did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. 340 U.S. at 467-70.

[8]Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (codified as amended at 5 U.S.C. § 301 (2010)). The housekeeping statute now reads:

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

[9]In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143-44 (1803), the Secretary of State was the defendant, and Attorney General Levi Lincoln objected to being asked to testify regarding his duties and actions as acting Secretary of State, yet was required to testify to some events and allowed to assert a privilege as to other events. In particular, he successfully asserted a privilege against testifying as to the exact location and fate of the presidential commission that was the subject of the mandamus petition in the suit. *Id*. at 145. In the criminal prosecution of Aaron Burr, Chief Justice John Marshall (sitting as a trial judge on circuit duty) ruled that the Court did not have the power to compel President Thomas Jefferson to produce all portions of

the executive branch correspondence that the criminal defendant sought to compel. *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) ("In no case ... would a court be required to proceed against the president as against an ordinary individual."). It is also worth noting that, by the time of the Madison Administration, secret government documents were labeled as "secret," "confidential," and "private." Edward F. Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, 1 Int'l J. of Intelligence & Counterintelligence 10-11 (1986).

[10]3 Hind's Precedents 182 (1907). It should be noted that at common law, a bill of discovery was not generally available against a third party in civil litigation. John S. Smith, A Treatise on the Practice of the Court of Chancery 498 n.a (1842).

[11]*See In re Weeks*, 82 F. 729 (D. Vt. 1897) (ordering release of Internal Revenue employee who refused to testify about confidential federal records); *In re Huttman*, 70 F. 699 (D. Kan. 1895) (same); *Gardner v. Anderson,* 9 F. Cas. 1158 (C.C.D. Md. 1876) (communications between executive officials are privileged from civil subpoena).

[12]The statute was cited by the Attorney General in 1877 as the basis for advice to President Rutherford B. Hayes to maintain the confidential nature of certain government records. 15 Op. Atty. Gen. 378 (1877). *See* 16 Op. Atty. Gen. 24 (1878) (parties to private suit may not compel production of U.S. Department of Treasury records).

[13]*See, e.g., United States v. Hutton*, 26 Fed. Cas. 454, 459 (S.D.N.Y. 1879) (the court determines which confidential Treasury papers must be produced in discovery when the government is a party).

[14]177 U.S. 459, 462-63 (1900). A second federal statute made it a crime for a federal Treasury agent to divulge tax information without authorization. *Id*. at 462. Arguably, the commissioner's regulation prohibiting employees from producing tax information in response to a subpoena was also supported by the criminal statute.

[15]*Id*. at 470.

[16]*Bank of America v. Douglass*, 105 F.2d 100, 104 (D.C. Cir. 1939) (Treasury Secretary has power to determine use of department's documents); *Ex parte Sackett*, 74 F.2d 922 (9th Cir. 1935) (FBI agent may not be held in contempt to enforce subpoena); *In re Valencia Condensed Milk Co.*, 240 F. 310 (7th Cir. 1917) (contempt power not available to subpoena records from federal department); *Fowkes v. Dravo Corp.*, 5 F.R.D. 51 (E.D. Pa. 1945) (denying order to compel production of federal records); *United States v. Potts*, 57 F. Supp. 204, 206 (M.D. Pa. 1944) (quashing subpoena to the U.S. Attorney for the Middle District of Pennsylvania for grand jury witness list); *Walling v. Comet Carriers*, 3 F.R.D. 442 (S.D.N.Y. 1944) (quashing subpoena to U.S. Department of Labor); *United States ex rel. Bayarsky v. Brooks*, 51 F. Supp. 974 (D.N.J. 1943) (quashing subpoena issued to the U.S. District Attorney of New Jersey); *Federal Life Ins. Co. v. Holod*, 30 F. Supp. 713 (M.D. Pa. 1940) (motion to compel production of draft board records denied); *Harwood v. McMurtry*, 22 F. Supp. 572 (D. Ky. 1938) (denying subpoena against government); *Stegall v. Thurman*, 175 F. 813, 824 (N.D. Ga. 1910) (granting habeas corpus to federal employee jailed by state court for refusing to divulge evidence required to be kept confidential by Treasury regulation); *In re Lamberton*, 124 F. 446, 450-51 (W.D. Ark. 1903) (federal Internal Revenue agent discharged from state custody for contempt); *Parsons v. State*, 251 Ala. 467, 474, 38 So. 209 (1948) (U.S. Attorney General may decline to honor request for identity of informant); *Meyer v. Home Ins. Co*., 127 Wis. 293, 106 N.W. 1087, 1090 (1906) (federal departments cannot be compelled to produce documents or witnesses; such documents are privileged); 40 Op. Atty. Gen. 45, 49 (1941) (executive branch makes decision as to privilege without judicial supervision or review); 25 Op. Atty. Gen. 326 (1905) (cabinet official may decline to testify or produce records under state court subpoena).

[17]*See* Raoul Berger, *Government Immunity From Discovery*, 59 Yale L.J. 1451, 1464-66 & n.64 (1950) (rule that government may withhold evidence in third-party cases is "well-settled"); James Pike, *Discovery Against Federal Agencies*, 56 Harv. L. Rev. 1125, 1130 & n.19 (1943) (long-standing rule that when third parties seek discovery in private litigation, federal government is exempt).

[18]340 U.S. at 463-65.

[19]The district court held an FBI agent in contempt for refusal to produce certain FBI records that the district court deemed relevant to a habeas corpus proceeding. *Id*. at 465. The Seventh Circuit reversed, holding that the DOJ had a statutory privilege against production of the documents under 5 U.S.C. § 301, the "housekeeping" statute. *United States ex rel. Touhy v. Ragen*, 180 F.2d 321, 327 (7th Cir. 1950). The Supreme Court granted certiorari, 340 U.S. 806 (1951), but did not reach the broader issue of privilege presented by the petition, ruling instead that the power of contempt did not lie against the individual employee. 340 U.S. at 467-70.

[20]340 U.S. at 472 (Frankfurter, J., concurring).

[21]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, 1649 (1991). For a recent practitioner's commentary on the rules developed under *Touhy*, see Robert Peltz, *Who Is This Guy Touhy, and What Am I Supposed to Be Requesting?,* 86 Fla. B. J. 8 (2012).

[22]*See, e.g.*, 15 C.F.R. 15a.7(b) (2011) (U.S. Department of Commerce regulation).

[23]For example, DOJ regulations prohibit employees from complying with subpoenas in proceedings in which the government is not a party without the approval of designated department officials. 28 C.F.R. § 16.22(a) (2010). The regulations direct the responsible department officials to consider whether disclosure is "appropriate under the rules of procedure" governing the underlying case and the "relevant substantive law concerning privilege." *Id*. § 16.26(a). The regulations provide that information will not be disclosed in particular instances, such as where disclosure would "violate a specific regulation," "reveal classified information," or "improperly reveal trade secrets without the owner's consent." *Id*. § 16.26(6).

[24]5 U.S.C. § 552 (2010).

[25]*See, e.g*., 7 C.F.R. § 1.215 (2010).

[26]21 C.F.R. § 20.2(a) (2010) (FDA); 7 C.F.R. § 1.215(a) (2010) (USDA); 12 C.F.R. §§ 4.33, 4.34, 4.37(a) (2010). The U.S. Environmental Protection Agency has by regulation adopt-

ed the option to consider a subpoena either under *Touhy* or under FOIA. *See Hyde v. Stoner*, 2012 U.S. Dist. LEXIS 28121 (N.D. Ill. 2012) (describing EPA FOIA and *Touhy* regulations and citing 40 C.F.R. § 2.405).

[27]*See, e.g., In re Boeh,* 25 F.3d 761, 763 (9th Cir. 2004) (FBI agent may not be held in contempt under *Touhy*); *Swett v. Schenk,* 792 F.2d 1447, 1451-52 (9th Cir. 1986) (following *Touhy*); *Davis v. Braswell Motor Freight Lines, Inc*., 363 F.2d 600, 605 (5th Cir. 1966) (following *Touhy* to reject contempt remedy); *North Carolina v. Carr*, 264 F. Supp. 75, 80 (W.D.N.C. 1967), *appeal dismissed*, 386 F.2d 129 (4th Cir. 1967) (following *Touhy*); *Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288, 290 (D. Mass. 1982) (denying subpoena for documents under *Touhy*).

[28]Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (codified at 5 U.S.C. § 301 (2010).

[29]Note, *Discovery From the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute*, 69 Yale L.J. 452, 456 (1960).

[30]H.R. Rep. No. 85-1461 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3352. The amendment added one sentence to the statute: "This section does not authorize withholding information from the public or limiting the availability of records to the public." *Id*. at 3353.

[31]*EEOC v. Los Alamos Constructors, Inc*., 382 F. Supp. 1373, 1378 (D.N.M. 1974).

[32]*See Chrysler Corp. v. Brown*, 441 U.S. 281, 309-12 (1979) (describing how the 1958 Amendment to § 301 came about and holding that § 301 does not authorize the release of information that is otherwise confidential).

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

[34]Gregory Coleman, Touhy *and the Housekeeping Privilege: Dead But Not Buried*, 70 Tex. L. Rev. 685, 688-89 (1992) (*Touhy* does not mean that a government agency may withhold documents or testimony at its discretion; "is not good law and hasn't been since 1958").

[35]*See* Kiesel, *supra* note 21, at 1655-56 (arguing that federal agencies are improperly acting to resist subpoenas); John T. Richmond Jr., Note, *Forty-Five Years Since* United States ex rel. Touhy v. Ragen: *The Time Is Ripe for a Change to a More Functional Approach*, 40 St. Louis U. L.J. 173, 174, 183 (1996) (describing the existence and operation of a *Touhy* privilege, which the author criticizes).

[36]Coleman, *supra* note 34, at 687. *See also* Milton Hirsch, *"The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process After* United States ex rel. Touhy v. Ragen, 30 Fla. St. U. L. Rev. 81, 83 (2002) ("[*Touhy*] is the case most cited by both executive branch agencies in support of their regulations and by courts confronted by a demand for evidence withheld in reliance upon such regulations.").

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

[38]*See, e.g.*, *Hasie v. Office of the Controller of the Currency*, 633 F.3 361, 369 (5th Cir. 2011) (reviewing denial under APA); *Cabral v. U.S. Department of Justice*, 587 F.3d 13, 22-23 (1st Cir. 2009) (review of *Touhy* refusal only available under APA); *EPA v. Gen. Elec. Co.,* 197 F.3d 592, 598-99 (2d Cir. 1999) (affirming that "the APA provides the only express waiver of [sovereign] immunity by which General Electric can seek the documents it desires by way of discovery"); *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999) ("When the government is not a party, the APA provides the sole avenue for review of an agency's refusal to permit its employees to comply with subpoenas."); *Oklahoma v. Hopkins*, 1998 U.S. App. LEXIS 25779, 162 F.3d 1172 (10th Cir. 1998) (table) (refusing to enforce a subpoena served on an FBI agent for the purpose of defending against state criminal charges; other remedies include action in federal court pursuant to APA); *Edwards v. U.S. Department of Justice*, 43 F.3d 312, 314 (7th Cir. 1994) (proper review of refusal of subpoena compliance is APA); *Moore v. Armour Pharm. Co*., 927 F.2d 1194, 1197 (11th Cir. 1991) (evaluating agency's decision not to comply with subpoena to determine whether it was arbitrary, capricious, or an abuse of discretion under the APA); *Davis Enters. v. U.S. Environmental Protection Agency*, 877 F.2d 1181, 1186 (3d Cir. 1989) (same).

The Sixth Circuit has not decided this issue. *In re Packaged Ice Antitrust Litig.*, 2011 U.S. Dist. LEXIS 51116, at *9 (E.D. Mich. 2011).

The Eighth Circuit appears to follow a rule in which *Touhy* regulations are disregarded, or are treated as merely procedural. *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1251, 1254-55 (8th Cir. 1998). Under this rule, district courts determine whether to enforce subpoenas based on common-law or statutory standards, and give no weight or consideration to departmental regulations. *Carter v. High Country Mercantile*, 2009 U.S. Dist. LEXIS 65619, at **8-10 (W.D. Mo. 2009).

The D.C. Circuit allows APA review of refusal to produce documents or testimony when the issue arises in state court. *Houston Business J., Inc. v. Office of the Comptroller*, 86 F.3d 1208 (D.C. Cir. 1996). When the issue arises in federal court, the issue is resolved under Rule 45 of the Federal Rules of Civil Procedure. *Watts v. Securities & Exchange Comm'n*, 482 F.3d 501, 508 (D.C. Cir. 2007) (an agency's refusal to comply with a Rule 45 subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel (or an agency's Rule 45 motion to quash)); *Linder v. Calero-Portocarrero,* 251 F.3d 178, 181 (D.C. Cir. 2001) (holding that the waiver of sovereign immunity contained in the APA is not limited to actions brought under APA).

[39]*General Electric*, 197 F.3d at 599 (quoting 5 U.S.C. § 706(2)(A)). *See generally* APA, 5 U.S.C. §§ 701(a)(2), 702, 706(2)(A) (2010).

[40]*Cabral v. U.S. Department of Justice*, 587 F.3d 13, 22-23 (1st Cir. 2009) (review of *Touhy* refusal available under APA in same lawsuit); *General Electric*, 197 F.3d at 599 (same).

[41]*Houston Business J., Inc.*, 86 F.3d at 1208. An APA action

is also available in the Ninth Circuit when an agency declines to provide witnesses for state court litigation. *Sierra Pac. Indus. v. U.S. Department of Agric.*, 2011 U.S. Dist. LEXIS 147424 (E.D. Cal. 2011).

[42]The First Circuit asserts that the APA is the appropriate basis for review of *Touhy* refusals, but also holds that *Touhy* and the housekeeping statute create no privileges. The First Circuit decides privilege claims under the common law. *Puerto Rico v. United States*, 490 F.3d 50, 61 (1st Cir. 2007), *cert. denied*, 552 U.S. 1295 (2008).

[43]*COMSAT Corp.*, 190 F.3d at 277-78 (approving the National Science Foundation's refusal to comply with subpoenas, where "[a]cting in accordance with the procedures mandated by its regulations, NSF reached an entirely reasonable decision to refuse compliance with document subpoenas"). *Cf. Ceroni v. 4Front Engineered Solutions, Inc.,* 793 F. Supp. 2d 1268, 1276-78 (D. Colo. 2011) (under APA review, the district court finds that the U.S. Postal Service's decision not to supply testimony or inspection of premises was arbitrary and capricious, essentially because the district court deemed the evidence important).

[44]Of course, a district court that is determined to enforce a subpoena may acknowledge controlling precedents and then enter an order in disregard of those precedents. *See, e.g., Scott v. Lockheed Martin Aerospace Corp.,* 2006 U.S. Dist. LEXIS 46769, at **6-8 (S.D. Miss. 2009) (acknowledging applicable APA case law and reviewing subpoena refusal under rules of civil procedure).

[45]*See, e.g.*, *Watts v. Securities & Exchange Comm'n*, 482 F.3d 501, 508 (D.C. Cir. 2007) ("[A] challenge to an agency's refusal to comply with a . . . subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel . . . ."); *Exxon Shipping Co. v. U.S. Dep't of the Interior*, 34 F.3d 774, 780 (9th Cir. 1994) ("[F]ederal 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.'"). *See Yousuf v. Samantar*, 431 F.3d 248, 250 (D.C. Cir. 2006) (federal agencies are persons subject to subpoenas issued pursuant to Rule 45).

[46]Presumably, the presiding judge has more knowledge of why the information, documents, or testimony will be of help to the court or jury. At the same time, the presiding judge must be persuaded to consider the burdens inflicted on an agency that is used by litigants as a cost-free expert witness bureau. One agency successfully persuaded a federal judge that its employees should not be turned into tax-paid expert witnesses in products liability litigation. *Moran v. Pfizer*, 2000 U.S. Dist. LEXIS 11039, at **7-8 (S.D.N.Y. 2000) (FDA employees should not be required to serve as experts in Viagra litigation).

[47]*See*, e.g., *Exxon Shipping Co.*, 34 F.3d at 779-780 (discussing factors to be considered under Rule 45).

[48]*Touhy*, *supra*, 340 U.S. at 467-70.

[49]*See Securities & Exchange Comm'n v. Selden*, 445 F. Supp. 2d 11 (D.D.C. 2006). Selden issued two subpoenas to the FDA in connection with a proceeding in federal court in Massachusetts. *Id*. at 12-13. However, Selden determined that he needed to file a separate action to compel in federal district court in Washington, D.C. *See id*. at 12. It may also be possible to notice the deposition of an agency as a third-party witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure and require the agency to respond under its *Touhy* regulations. *See Metropolitan Life Ins. Co. v. Muldoon*, 2007 U.S. Dist LEXIS 94530 (D. Kan. 2007) (denying motion to quash, in part).

[50]5 U.S.C. § 552 (2010).

[51]*Association for Women in Science v. Califano,* 566 F.2d 339, 341-42 (D.C. Cir. 1977) (criticizing agency for treating subpoena as FOIA request); *Moore-McCormack Lines v. ITO Corp. of Baltimore,* 508 F.2d 945, 947-50 (4th Cir. 1974) (ruling that FOIA exemption 5 does not support rejection of subpoena); *Cofield v. City of LaGrange, Georgia,* 913 F. Supp. 608, 612-13 & n.4 (D.D.C. 1996) (noting that DOJ *Touhy* regulations incorporate FOIA exemptions, the court quashed a subpoena under the regulations, after analyzing the FOIA exemptions); *Securities & Exchange Comm'n v. Biopure Corp.*, 2006 WL 2789002, at *1 (D.D.C. Jan. 20, 2006) (FDA *Touhy* regulations that require submission of FOIA request rather than subpoena are to be enforced).

[52]*See Edwards v. U.S. Department of Justice*, 43 F.3d 312, 315 (7th Cir. 2004) (state court has no power to force disclosure of federal records); *United States v. Williams*, 170 F.3d 431, 434 (4th Cir. 1999) (APA is the appropriate avenue for review of an agency decision not to comply with a state court subpoena); *Boron Oil Co. v. Downie*, 873 F.2d 67, 68 (4th Cir. 1989) (describing a federal employee's removal to federal court of a state court subpoena proceeding).

[53]28 U.S.C. § 1442 (2010) (authorizing federal officers sued in state court for actions taken under color of their federal offices to remove the suits to federal court).

[54]*Smith v. Cromer,* 159 F.3d 875, 879 (4th Cir. 1998) ("Where an agency has not waived its immunity to suit, the state court (and the federal court on removal) lacks jurisdiction to proceed against a federal employee acting pursuant to agency direction.").

[55]34 F.3d 774, 778 (9th Cir. 1994).

[56]*See id.* at 780 & n.11.

[57]*See, e.g., Watts v. Securities & Exchange Comm'n*, 482 F.3d 501, 508 n.40 (D.C. Cir. 2007).

[58]Richmond, *supra* note 35, at 190-91.

[59]Note, *Civil Procedure–Subpoena Power–Ninth Circuit Rejects Authority of Non-Party Federal Agencies to Prevent Employees From Testifying Pursuant to a Federal Subpoena*, 108 Harv. L. Rev. 965, 970 (1995).

[60]Note, *A Convenient Blanket of Secrecy: The Oft-Cited But Non-Existent Housekeeping Privilege*, 14 Wm. & Mary Bill of Rts. J. 745, 766-70 (2005).

[61]Note, *Taking* Touhy *Too Far, Etc.*, 99 Geo. L.J. 1227, 1231, 1251-57, 1260 (2011). Beyond mere assertion, the article failed to explain how the final decision of all privilege issues under "common-law privilege rules" is a "core constitutional role" of the courts.

[62]"Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving v. United States*,

517 U.S. 748, 773 (1996) (rejecting argument that only the Congress may set rules for the U.S. Army). In another case, a federal statute directed the court of claims to defer to executive agencies as to whether the release of information would damage the United States. *Pollen v. United States*, 85 Ct. Cl. 673 (Ct. Cl. 1937). That statute effectively separated the executive branch decision on privilege from the Article I judges of the U.S. Court of Claims.

[63]*See, e.g.*, *Ex Parte Peru*, 318 U.S. 578, 589 (1943) (a district court is required to defer to the U.S. Department of State in its sphere of foreign relations and mandamus is available to compel its deference).

[64]Rule 501 of the Federal Rules of Evidence provides that the common law of privilege governs that "[u]nless any of the following provides otherwise: the United States Constitution; a federal statute . . . ."

[65]418 U.S. 683, 705 (1974) (citations omitted).

[66]*United States v. Reynolds,* 345 U.S. 1, 9-10 (1953). However, in *U.S. Environmental Protection Agency v. Mink*, 410 U.S. 73, 84 (1973), the Supreme Court held that district courts have no authority to second-guess or review classification decisions of the executive branch under FOIA. Once a document is found to be classified, the district court's role "is at an end." *Id*. Congress subsequently amended the FOIA to permit in camera review of classified material, but only in narrow circumstances. *Weinberger v. Catholic Action Network*, 454 U.S. 139, 144 (1981). Under the current FOIA, once a judge determines that a document is properly classified, the judge should not require *in camera* inspection or other discovery. *ACLU v. U.S. Department of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011).

Even more colorful quotes about separation of powers can be dredged from other cases involving subpoenas issued to the President or Vice President. *See Cheney v. United States District Court*, 542 U.S. 367, 382 (2004) ("[p]aramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"); *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) ("In no case . . . would a court be required to proceed against the president as against an ordinary individual.") (Chief Justice Marshall, declining to force production of evidence objected to by President Jefferson).

[67]This need for judicial authority is almost always asserted as a "balancing test" in which the need for the information is weighed against the harm to be inflicted on the public interest in continued confidentiality. *See*, e.g., *Exxon Shipping Co. v U.S. Department of the Interior*, 34 F.3d 774, 779-80 (9th Cir. 1994) (discussing factors to be considered under Rule 45). The person doing the "balancing" is always a federal judge when these authors argue in favor of a balancing test. Why such balancing cannot be performed by a knowledgeable executive or legislator is not addressed by these authors.

[68]Rule 501 of the Federal Rules of Evidence provides that the common law of privilege governs "[u]nless any of the following provides otherwise: the United States Constitution; a federal statute . . . ."

[69]50 U.S.C. § 403g (national security information).

[70]*Tenet v. Doe*, 544 U.S. 1 (2005) (suit to enforce espionage contract may not be entertained because of government privilege); *Totten v. United States*, 92 U.S. 105 (1876) (suit may not be entertained where it concerns secret contract for espionage).

[71]*Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (core strategic matters of war making); *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project,* 454 U.S. 139, 146-47 (1981) (whether the U.S. Navy complied with environmental law may be a military secret); *Lebron v. Rumsfeld*, ____ F.3d ____ , No. 11-6480 (4th Cir. 2012) slip op. at 14-15 (judicial review of military decisions strays from constitutionally assigned areas of judicial competence and executive and legislative authorities).

[72]35 U.S.C. §§ 122(d), 181 (2010). *See Hornback v. United States*, 601 F.3d 1382, 1385 (Fed. Cir. 2010) (describing effect of secrecy finding under Inventions Secrecy Act).

[73]*Pollen v. Ford Instrument*, 26 F. Supp. 583, 585 (E.D.N.Y. 1939) (denying subpoena for secret records of weapons development); *Firth Sterling Steel Co. v. Bethlehem Steel Co*., 199 Fed. 353 (E.D. Pa. 1912) (denying access to military weapons secrets).

[74]*El Masri v. Tenet*, 437 F. Supp. 2d 530, 536-37 (E.D. Va. 2006) (military and diplomatic matters; greater ability to predict effect of disclosure on national security); *Kumari Sabbithi v. Waleed KH N.S. Al Saleh*, 605 F. Supp. 2d 122, 126 (D.D.C. 2009) ("In view of the State Department's determination that the defendants are diplomats and its certification that as diplomats they are immune from suit pursuant to the Vienna Convention, the Court concludes that these defendants are entitled to diplomatic immunity.").

[75]42 U.S.C. § 2011 et seq. (2010) (atomic weapons); *Trulock v. Wen Ho Lee*, 66 Fed. Appx. 472, 476 (4th Cir. 2003) (action requiring release of nuclear secrets may not proceed after invocation of privilege).

[76]*Harrison v. Walsh*, 277 F. 569 (D.C. Cir. 1922) (draft records confidential by statute); *Federal Life Ins. Co. v. Holod*, 30 F. Supp. 713 (M.D. Pa. 1940) (motion to compel production of draft board records denied).

[77]26 U.S.C. § 6103 (prohibiting disclosure of tax returns, with exceptions).

[78]13 U.S.C. § 9 (prohibiting disclosure of census returns); *Baldridge v. Shapiro*, 455 US 345, 359 (1982) (affirming statutory and discovery privileges for census data, regardless of judicial findings of need).

[79]*United States v. Helstoski*, 442 U.S. 477, 487-88 (1979) (speech and debate privilege of Congress is not subject to judicial exceptions, although it can be waived); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (once it is determined that members are acting within the legitimate legislative sphere, the Speech or Debate Clause is an absolute bar to interference by courts).