# THE *TOUHY* TRAP

By William A. Daniels, Esq.
DANIELS LAW
Sherman Oaks, CA
www.DanielsLaw.com
(800) 573-0490

Table of Contents

## I. A TRAP FOR THE UNWARY

There's a trap for the unwary looking to subpoena documents or witnesses from federal agencies.

The trap is called, variously, the "Touhy doctrine" or the "Housekeeping Privilege."

The unwary may fall into this trap while subpoenaing documents or witnesses from non-party federal agencies.

### A. The evidence you are after.

Federal agencies loom large in our legal lives. When litigating a catastrophic event, a wildfire case qualifies, all the more so.

Forests, for example are managed by the U.S. Forest Service, which is part of the Department of Agriculture.

During one event, wildfire suppression might be handled by the Forest Service, or the Bureau of Land Management (Department of Interior), or by a combination of agencies.

Perhaps the National Interagency Fire Center was on scene. The Center coordinates resources from multiple agencies, including U.S. Fish and Wildlife Service and National Park Service (Interior), National Weather Service (Department of Commerce) or U.S. Fire Administration (Department of Homeland Security).

In some fire scenarios, you will find resources from the General Services Administration (an independent agency) or perhaps one or more branches

of the military (*e,g,,* Department of the Navy/Army/Air Force, which are Military Departments within the Department of Defense).

Any of those federal agencies may have documents or witnesses you need to make your case.

Most wild fire litigation will unfold in state court. Most trial lawyers who primarily practice in state court have little experience getting federal agencies to cooperate in discovery.

That, in a nutshell, describes what I call, the *Touhy* Trap. This paper is intended to help you navigate the *Touhy* Trap safely and productively.

**B. The process you will encounter.**

The problems raised when seeking discovery or testimony from federal agencies largely flow from sovereign immunity principals that attach to any governmental entity.[1]

Since the federal government is involved, obtaining discovery from a federal agency in state court, or in district court where the agency (or the United States) is not a party, will be regulation driven.

Most federal agencies publish regulations governing the criteria they will use to evaluate your discovery request under authority granted by the so-called "Housekeeping Statute."[2]

---

1 Comsat Corp. v. National Sci. Found., 190 F.3d 269, 277 (4th Cir. 1999) (citing Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir.1989)) ("[I]t is sovereign immunity . . . that gives rise to the Government's power to refuse compliance with a subpoena. As we have acknowledged, "subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign.")

So, 28 C.F.R. § 16.21 (2015), *et seq.* spells out the Department of Justice's housekeeping regulations, while the Department of Agriculture publishes theirs at 7 C.F.R. § 1.210 (1990), *et seq.*, the Department of Interior at 45 C.F.R. § 2.1 (1997), *et seq.*, etc.

A state court subpoena to a federal agency will likely generate a letter advising that the federal agency is not subject to state court jurisdiction (the federal government and state governments being co-sovereigns in our federal system) and asking for justification for your discovery requests.

The letter requires your thoughtful response for two important reasons.

First, it may be that the agency will provide you with what you need if you lay out your reasonable request succinctly.[3]

Second, the housekeeping regulations create an administrative remedy. So, for a court to eventually weigh in on any discovery dispute, exhausting that administrative remedy may well be a predicate to jurisdiction.

If you cannot work out a satisfactory arrangement with the agency and you are in state court, then your remedy is a collateral action in district court.

In the 9th Circuit, a federal judge will weigh your discovery requests using the Federal Rules of Civil Procedure guidelines. In other circuits, you may be forced to seek a remedy under the judicial review provisions of the

---

[2] 5 U.S.C. § 301 (1966).

[3] Anecdotal evidence suggests that a focused, limited request, may produce the required evidence without undue hassle. In preparing this article, I interviewed one former Assistant U.S. Attorney, now a sitting state court judge, who insisted that the DOJ practice was to at least try to comply with reasonable requests.

Administrative Procedure Act.[4] In an APA proceeding, you will bear the heavy burden of showing that in refusing discovery, the federal agency is "arbitrary and capricious."

If you are in district court and the subject agency or the United States is a party, then only the FRCP applies. If in a district court and the agency or the United States is not a party, then you can argue to enforce under the Federal Rules of Civil Procedure, or amend to add the agency as a co-defendant with an APA claim, or both.

Needless to say, this is an area that requires some thought and planning prior to trial.

The substantive law underlying the process is turgid and applied differently depending upon the circuit.

Understanding how discovery works in this area can save you many headaches, not to mention much time and expense.

## II. THE LEGAL FRAMEWORK.

### A. The Housekeeping Statute.

Our legal framework begins with a federal "housekeeping" statute[5] dating back to General George Washington's time. Originally, the statute read:

> The head of an Executive department ... may prescribe regulations for the government of his department, the conduct of its employees, the

[4] 5 U.S.C. §§ 701-706 (2011).

[5] 5 U.S.C. § 301 (1966).

> distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

In 1958, Congress amended the housekeeping statute by adding the following language:

> This section does not authorize withholding information from the public or limiting the availability of records to the public.

The 9th Circuit observed:

> According to the legislative history, Congress was concerned that the statute had been "twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress. The House Report accompanying the 1958 amendment explained that the proposed amendment would "correct" a situation that had arisen in which the executive branch was using the housekeeping statute as a substantive basis to withhold information from the public.[6]

The amendment did not stop federal agencies from pushing the envelope in promoting their notion of authority to control evidence in litigation.

[6] Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 777 (9th Cir. 1994).

## B. A Housekeeping "Privilege" takes shape.

While most federal agencies long had housekeeping regulations on their books, until the turn of the twentieth century, their impact as a limitation on discovery went largely unexamined.

That changed in 1900, when the U.S. Supreme Court decided *Boske v. Comingore*, 177 U.S. 459 (1900), which upheld the right of the Secretary of the Treasury to withdraw from subordinates all discretion over the use and production of tax records.

In deciding *Boske*, the court overturned a state court's contempt order against a tax collector who refused to respond to a subpoena *duces tecum* that sought records concerning a certain Kentucky whiskey distillery state authorities suspected was underreporting production.

In 1951, the U.S. Supreme Court revisited the contempt issue, relying on *Boske* in deciding *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951).

*Touhy* considered a state court contempt proceeding where a Department of Justice employee was subpoenaed to produce departmental records in a habeus corpus proceeding. The Attorney General withheld permission for the employee to comply, relying on the housekeeping regulations in place. The state court held the employee in contempt. The U.S. Supreme Court vacated the state court order.

The Supreme Court held that the employee could not be held in contempt because the DOJ housekeeping regulations withdrew from the employee,

and placed in the Attorney General, the decision regarding whether and on what terms to comply with the subpoena.

The opinion gave birth to the "*Touhy* doctrine," which, some sixty years later, continues to cause confusion and controversy in the law.

Note that both *Boske* and *Touhy* dealt with document subpoenas only. Also worth noting is Justice Frankfurter's concurring opinion in *Touhy,* where he stressed:

> Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process.[7]

Even so, in the years following the *Touhy* decision, federal courts often deferred to the executive in making evidentiary production decisions.

This deference is what courts and commentators refer to as, the *Touhy* doctrine.

The *Touhy* doctrine draws much criticism, but stubbornly endures in many circuits.

---

[7] U.S. *ex rel.* Touhy v. Ragen, 340 U.S. 462, 473 (1951) (Frankfurter, J., concurring).

As one commentator observed, “Federal agencies today often claim a privilege of confidentiality that is really no privilege at all.[8]

Here then, lies the crux of the *Touhy* trap.

## III. STATE COURT SUBPOENAS AND FEDERAL LAW.

### A. Enforcing state court subpoenas in District Court.

A classic procedural error in *Touhy* litigation is for a litigator to subpoena federal records or witnesses in a state court proceeding, ignore the relevant agency's housekeeping rules and then initiate a contempt proceeding in state court when the agency refuses to comply.

The government's recourse is fairly straightforward. Move to quash in the state court or, if the state court judge is unreceptive, remove the contempt proceeding to district court[9] and then move to vacate the state court order to compel discovery.

The case law suggests that the government will invariably prevail in this fact pattern.

### B. Removal jurisdiction.

State court contempt proceedings against a federal agency are subject to removal jurisdiction.[10]

---

[8] William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege*, 14 Wm. & Mary Bill Rts. J. 745 (2005).

[9] 28 U.S.C. § 1442 (2013).

[10] *Id.*

Since the jurisdiction of a federal court upon removal is essentially derivative of state court jurisdiction, the federal court lacks jurisdiction to enforce a state court subpoena.[11]

"The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause."[12]

## IV. DISTRICT COURT SUBPOENAS.

The results are different when the original or a collateral action are brought in federal court.

Since district courts and executive agencies are separate but equal branches of the federal government, there is no co-sovereign obstacle.

Even so, *Touhy* jurisprudence is not a straightforward critter.

### A. The U.S. is a party.

If the United States is a party in your district court action, there is no *Touhy* issue. Or, there shouldn't be.

When the United States is a party to litigation, "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[13]

---

[11] Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986).

[12] *In re* Boeh, 25 F.3d 761, 770 (9th Cir. 1994) (citing Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989)).

[13] U.S. v. Reynolds, 345 U.S. 1, 9–10 (1953).

> This would create a significant separation of powers problem. . . . Mindful of the separation of powers, the judiciary, not the executive branch controls the admission of evidence at trial. It is the court's prerogative, as well as the court's duty and responsibility under the Federal Rules of Evidence and the Rules of the United States Court of Federal Claims, to decide the factual and legal issues raised by the plaintiff's complaints, as well as to review objections to testimony when offered. The court will not abdicate its decision authority in this regard.[14]

Federal courts have recognized that neither the Housekeeping Statute nor *Touhy* authorize a federal agency to withhold documents or testimony from a federal court in litigation in which the United States is a party.[15]

This means, *Touhy* regulations should not come into play. However, that does not mean an enterprising government lawyer might not try to raise them as a discovery defense.

Also, note: Where there is a genuine privilege in play, attorney-client privilege, executive privilege, what have you, then the discovery dispute will play out according to the law of privilege.

---

[14] Gulf Grp. Gen. Enter. Co. W.L.L. v. U.S., 98 Fed. Cl. 639, 646-47 (Fed. Cl. 2011).

[15] *See,* Galarza v. Szalczyk, No. 10-6815, 2011 WL 1045119, at *3 (E.D. Pa. March 21, 2011) (citing Alexander v. F.B.I., 186 F.R.D. 66, 70 (D.D.C.1998)).

## B. The U.S. is NOT a party.

*1. The 9th Circuit does not recognize a Housekeeping Privilege.*

Ninth Circuit jurisprudence protects the district court's authority to enforce Federal Rules of Civil Procedure discovery rules where a federal agency is the resisting party.

The seminal case in this area is *Exxon Shipping Co. V. U.S. Dept. Of Interior*.[16]

In *Exxon,* the oil company was being sued by a variety of commercial fishermen, landowners, local governments, business and others following the massive *Exxon Valdez* oil spill. Exxon subpoenaed ten federal employees from five federal agencies to deposition. The government refused to produce the eight witnesses and two gave limited testimony. Exxon filed an Administrative Procedures Act action to compel testimony and the trial court found for the government. Exxon appealed. The 9th Circuit, reversed.

The Court of Appeal held that section 301 is "simply 'a "housekeeping statute."'" "The [U.S. Supreme Court] noted that nothing in section 301's legislative history indicated that Congress intended the statute to be a grant of authority to *withhold* information from the public."[17]

The 1958 amendment to section 301, the Court added, "explicitly sought to eliminate any perception that the section created an executive privilege."[18]

---

[16] Exxon Shipping Co. V. U.S. Dept. Of Interior, 34 F.3d 774, (9th Cir. 1994).

[17] *Id*. at 777 (citing Chrysler Corp. V. Brown, 441 U.S. 281, 310).

[18] *Id*.

> In summary, the district court erred in holding that § 301 authorizes federal agencies to refuse to comply with proper discovery requests. Section 301 does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas. Rather, district courts should apply the federal rules of discovery when deciding on discovery requests made against government agency, whether or not the United States is a party to the underlying action.[19]

The upshot is, in the 9th Circuit, discovery and trial subpoenas aimed at federal agencies will generally be enforced, so long as the requests comport with the restrictions found in the FRCP on relevance, burden, breadth, etc.

> As a practical matter, the issue boils down to whether the agencies' regulations or the Federal Rules of Civil Procedure should control when the two conflict. There is a split in authority on this issue but, in the Ninth Circuit, the Federal Rules of Civil Procedure generally trump the regulations.[20]

---

[19] *Id.* at 780.

[20] Newton v. Am. Debt Servs., Inc., No. 11-cv-03228-EMC (JCS), 2014 WL 2452743 (N.D. Cal., May 13, 2014).

In circuits following *Exxon*, the party seeking to compel discovery sidesteps the APA and proceeds directly under the FRCP.[21]

*2. Administrative Exhaustion.*

Even in the 9th Circuit, a litigant faced with a federal agency resisting discovery may be forced comply with the agency's *Touhy* regulations before seeking the court's assistance in obtaining records from banks or agencies.

Administrative exhaustion is jurisdictional, so seeking court intervention prior to exhaustion could prove a wasted exercise.[22]

> Plaintiff's request for information from the FBI is also fatally defective because of his failure to

---

[21] *See, e.g.,* Connaught Lab., Inc., v. Smithkline Beecham, PLC, 7 F. Supp. 2d 477 (D. Del. 1998) ("[I]n an action in federal court, sovereign immunity does not bar the federal court from enforcing a federal subpoena against the federal government."); *see also,* Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 398, n.2 (D.C.Cir. 1984).

[22] *See, e.g.*, Am. Sav. Bank v. Painewebber Inc*.,* 210 F.R.D. 721, 723 (D.Haw. 2001) (finding that plaintiffs were required to request unpublished Office of Thrift Supervision records through administrative process before matter was ripe for court to decide); In re Countrywide Fin. Corp. Sec. Litig., 2009 WL 5125089, at *2 (C.D.Cal. Dec. 28, 2009) (citing Painewebber, finding that plaintiffs were required to request non-public OCC records through administrative process before matter was ripe for court to decide); Bay Bank v. f/v ORDER OF MAGNITUDE, No. C05-5740-RBL, 2007 WL 737344, at *2 (W.D.Wash., March 7, 2007) (finding that plaintiffs were required to request FDIC records through administrative process before matter was ripe for court to decide); Raffa v. Wachovia Corp*,* 242 F.Supp.2d 1223, 1225 (M.D.Fla.2002) (finding that plaintiffs were required to request non-public OCC records through administrative process before matter was ripe for court to decide); Union Planters Bank, N.A. v. Cont'l Cas. Co., No. 02 CV 2321 MA/P, 2003 WL 23142200, at *2 (W.D. Tenn., November 26, 2003) (same, following Raffa); W Holding Co., Inc. v. Chartis Ins. Co. of P.R., No. 11-2271 (GAG/BJM), 2013 WL 6001087, at *2 (D.P.R., November 12, 2013) (in denying motion to compel production from non-party bank, recognizing split in authority and adopting approach requiring exhaustion of administrative procedures, "especially in light of the fact that [FDIC in its corporate capacity] is a party to this litigation ...").

> comply with the Department of Justice's *Touhy* regulations. Pursuant to 5 U.S.C. § 301 (known as the Housekeeping statute), the Department of Justice has enacted valid Touhy regulations to control the release of agency information.[6] See 28 C.F.R. §§ 16.21-16.29 et seq. While neither 5 U.S.C. § 301 nor the Department of Justice's *Touhy* regulations create a privilege or authorize the withholding of information from the public, they do govern the procedure by which that information may be released and by whom. *In re Boeh*, 25 F.3d 761, 764 (9th Cir.1994) (regulation does not create absolute privilege, only requires plaintiff to select a proper method of attempting to compel agent's testimony). **Such regulations are jurisdictional.[23]**

For the most part, however, compliance with the regulations places a relatively light burden on the subpoenaing party. Generally, the requirement is to simply set forth in writing the purpose, breadth and relevance of the requests, which a court considering a motion to compel will require in any event.

*3. Circuits recognizing a Housekeeping Privilege.*

A Housekeeping Privilege is acknowledged in circuits that do not follow *Exxon*, which will pose hurdles to obtaining discovery in those locales.[24]

---

[23] Landry v. F.B.I., No. Civ. A. 97-197, 1997 WL 375881, at *3 (E.D. La., July 7, 1997).

[24] *See, e.g.,* Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor, Inc., 159 F.R.D. 562, 571 (D.Kan.1994) (on motion to compel production from FDIC, finding that

This is despite the growing understanding among scholars and jurists that the Housekeeping Privilege rests on shaky foundations.

As one 10th District court trial judge observed:

> I have read the cases from other jurisdictions cited by the [plaintiff], and I agree that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." I see no principled reason, statutory or otherwise, "to hold that federal courts cannot compel federal officers to give factual testimony," as those officers should be "subject to the same rule of law that governs other mortals and [should] not be heard to refuse to testify to facts and opinions within [their] ken." Nevertheless, I am duty bound to follow applicable precedent from this Circuit. Such precedent indicates that the [] subpoena is not enforceable, at least not at this procedural juncture, pursuant to the *Touhy* doctrine.[25]

---

12 C.F.R. §§ 309.1 – 309.7 created an independent privilege and requiring plaintiff to seek records through administrative process); F.D.I.C. v. Flagship Auto Ctr., Inc., No. 3:04 CV 7233, 2005 WL 1140678, at *5-*6 (N.D. Ohio, May 13, 2005) (on motion to compel production from Federal Reserve, assuming that agency's regulations promulgated under 5 U.S.C. § 301 created independent privilege and requiring plaintiff to seek records through administrative process).

[25] Quezada v. Mink, No. 10-cv-00879-REB-KLM, 2010 WL 4537086, at *3 (D. Colo., November 3, 2010)

*4. Collateral Action Under APA.*

In those circuits recognizing a housekeeping privilege (and after exhausting administrative remedies), the party seeking discovery in a state civil proceeding will be required to bring a separate action in district court under the Administrative Procedure Act (APA).[26]

> In the instant case, Plaintiff's Motion to Compel must be denied and the United States' Motion to Quash must be granted as to the Department of Justice because Plaintiff has failed to file a collateral action in federal court under the APA challenging the Department of Justice's October 22, 2003 refusal to authorize the testimony of Assistant United States Attorneys Thomas Zeno and Richard Chapman.[27]

The APA standard for reversing an agency's privilege claim is high. The trial court presumes the agency action is valid and must find that refusing discovery constitutes "arbitrary and capricious" conduct.[28]

Still, sovereign immunity – the notion that the King/Queen cannot be sued without his/her consent – generally means the APA provides the sole route for district court jurisdiction where the government is not a party in a state court action.

---

[26] 5 U.S.C. § 706(2)(A).

[27] Lerner v. District of Columbia, No. Civ.A.00-1590 GK, 2005 WL 2375175, at *3 (D.D.C., January 7, 2005.)

[28] Agility Public Warehousing Co. K.S.C. v. Department of Defense, 110 F.Supp.3d 215, 220 (D.D.C. 2015).

> There is no question that the United States is immune from suit except where it consents to be sued and that any waiver of sovereign immunity must be "unequivocally expressed" and "strictly construed. The Administrative Procedure Act (the "APA"), 5 U.S.C. § 701 et seq., provides such a waiver and plaintiff names the United States "as a defendant under 5 U.S.C. § 702.[29]

The burden of bringing a separate federal action to obtain discovery is significant and obviously not appropriate for every case.

> We understand the dissenting opinion's point that it may be more cumbersome to challenge an assertion of privilege by an APA suit or mandamus action, but *Touhy, Sackett* and *Swett* preclude litigants and courts from first pursuing the option of contempt proceedings against subordinate officials who have been denied permission to respond to a subpoena. We follow those cases, and go no further "for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal."[30]

---

[29] Landry, *supra*, notes 1-2.

[30] In re Boeh, 25 F.3d 761, 767 (9th Cir. 1994) (citing, Touhy, 340 U.S. at 467, 71 (S.Ct. at 419)).

Where the original action is in federal court, the subpoenaing party should consider seeking to compel under the FRCP before seeking APA relief.[31]

*5. The U.S. is not a party in Qui Tam Actions for Touhy purposes.*

*Qui Tam* actions are authorized by a federal statutory scheme that has its roots in the Civil War. During that conflict, massive amounts of public funds poured into buying supplies for the war effort. Some of those goods were substandard. Indeed, the term "shoddy" comes from that era.

So, in *Qui Tam*, a plaintiff, known as a "relator," files a complaint under seal and serves a copy on the U.S. Attorney's office. The government has the opportunity to prosecute the case on its own, or can decline to prosecute, but allow the relator to carry on in its stead, with the U.S. serving as the real party in interest.

Even though the relator is prosecuting their case on the government's behalf (there is a bounty payable upon success), for *Touhy* purposes, *Qui Tam* discovery is treated as if the government is not a party.[32]

*6. Contempt proceedings.*

Under the Touhy doctrine, not only is a court prohibited from holding a federal officer in contempt for non-compliance with a subpoena when following a regulation to the contrary but a court cannot even investigate the appropriateness of the federal officer's reliance on the regulation in question.

---

[31] See, Connaught, *supra*, pages 479-480.

[32] *See,* U.S. ex rel. Farrell v. SKF USA, Inc., No. 94-CV-157A, 1998 WL 265242 (W.D.N.Y., May 18, 1998.)

> The Ninth Circuit has explained that, "the *Touhy* doctrine is jurisdictional and precludes a contempt action regardless of whether [the relied upon regulation] is ultimately determined to protect the requested testimony." Accordingly, if a federal officer is relying (correctly or incorrectly) upon a properly promulgated regulation as a defense for non-compliance with a subpoena then the court is powerless to hold that officer in contempt. Thus, under the *Touhy* doctrine a court simply does not have jurisdiction to hold a federal officer following a proper regulation in contempt and a consideration on the merits cannot play a part in the court's decision.[33]

**C. Freedom of Information Act.**

There is a practice among some federal agencies to treat discovery subpoenas as Freedom of Information Act requests rather than court process.[34]

This presents a whole separate set of discovery hurdles.

---

[33] DeMore v. Superior Court of California in and for County of Alameda, No. C-99-3730 SC, 1999 WL 1134735, at *3 (N.D. Cal., December 9, 1999.)

[34] *See*, Daniel C. Taylor, Note*, Taking* Touhy *Too Far: Why It Is Improper for Federal Agencies To Unilaterally Convert Subpoenas in FOIA Requests*, 99 Geo. L.J. 1227 (2011).

FOIA requests are subject to various statutory exceptions, meaning the agency can withhold evidence in a FOIA production that might otherwise be responsive if there is a subpoena to enforce.

Documents can be redacted, not for legal privilege, but rather, for FOIA exception, leaving the record produced incomplete.

Also, the requesting party is generally responsible for certain costs in a FOIA production where a subpoenaing party seeking discovery is not.

Where possible, a litigator should consider challenging such agency practices through law and motion.

## V. AN OUTDATED AND ANACHRONISTIC RULE.

In the proper case, the *Touhy* doctrine may well be worth attacking, since initially, scholars, and more recently, trial judges, are recognizing it has morphed into something not quite wholesome and good.

As one trial court wrote:

> [T]he Court feels that it may be appropriate for Congress or the United States Court of Appeals for the Fifth Circuit to reexamine this outdated and anachronistic rule. While the Federal Government certainly has a valid interest at stake in controlling the dissemination of proprietary information, this interest is tempered by the public's right to information. District Courts are more than capable

of balancing these interests and determining when a subpoena should be quashed.

At the time of the *Touhy* decision, the statutory scheme that authorized the Attorney General to establish federal regulations governing the conduct of federal employees in response to subpoenas made it clear that "[t]he 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." In 1958, following the decision in *Touhy*, Congress recognized the importance of the public's right to information and attempted to limit the application of this provision by adding that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." This statute is the source of what is known as the "Housekeeping Privilege."

Commentators have suggested that the statute, at least after this change, "is ministerial in nature and does not create an independent privilege." Despite this, Courts have continued to follow the *Touhy* rule.

However, courts and commentators have begun to recognize the erosion of the policies underlying the *Touhy* rule. The United States Court of Appeals for the Ninth Circuit has concluded that the best way to determine when a subpoena issued by a federal court should be quashed is through the application of traditional discovery rules. As the Court noted, the discovery rules would allow courts to balance the legitimate interests of the Government in keeping certain information confidential with the "individual's right to 'every man's evidence.' "

This court recognizes that *Exxon* dealt with a subpoena issued by a federal court in a case in which the federal agency itself was a party to the litigation. The Court further notes that the *Exxon* court cited concerns with separation of powers in reaching its conclusion that sovereign immunity did prevent enforcement of the federally issued subpoena. While these important distinctions, and the law in the Fifth Circuit, require that the subpoena in this case be quashed, this Court sees no reason that a federal court cannot balance the relevant interests involved when the subpoena in question has been issued by a state court.

> Accordingly, Congress or the Fifth Circuit may wish to take another look at this issue.[35]

## VI. CONCLUSION.

The *Touhy* Trap is a trap for the unwary. Forewarned and forearmed, it is not a trap that you need fear.

While writing this article, I happened into a conversation with a sitting California Superior Court judge who is a former Assistant US Attorney.

I asked the judge for her take on *Touhy* and she offered her former office took all discovery requests seriously and attempted to comply where they could. She could only recall two instances, one as an AUSA, the other as a judge, where she witnessed motions to quash. Both were in state court.

The law in this area is moving towards district courts enforcing subpoenas using their inherent powers under the FRCP. That should be a comfort. Even so, please do tread carefully when considering what evidence you need from a federal agency in your fire case.

[35] Joseph v. Fluor Corp., No. 10-379, 2010 WL 797840, at *1-4 (E.D. La., March 2, 2010.)