

Taking *Touhy* Too Far: Why It Is Improper for Federal Agencies To Unilaterally Convert Subpoenas into FOIA Requests

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Federal agencies are special. The federal Housekeeping Statute and the Supreme Court’s decision in United States ex rel. Touhy v. Ragen allow agencies, unlike individuals and private organizations, to promulgate regulations governing their responses to subpoenas. These regulations—known as “Touhy regulations”—can take different forms. Most simply centralize the determination of whether the agency will comply with a subpoena in a senior agency official. But other agencies, including the Food and Drug Administration and the Department of Agriculture, have taken a different approach. Their Touhy regulations unilaterally convert subpoenas into requests for records under the Freedom of Information Act. Because relatively few agencies have adopted these subpoena-to-FOIA conversion regulations, the practice has received minimal scholarly attention. This Note fills that void. This Note argues that these conversion regulations take Touhy too far because they prejudice litigants and unduly interfere with the Judiciary’s core constitutional role. This Note further recommends a way for courts to respond when an agency employs these regulations to unilaterally convert a subpoena into a FOIA request.

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INTRODUCTION

The Securities and Exchange Commission just charged your client with securities fraud.¹ Your client is the founder and CEO of a mid-sized pharmaceutical company. The company spent several years and millions of dollars developing a new wonder drug. It would have been the first drug to treat a painful kidney disorder. There was just one small problem—the clinical trials did not go exactly as planned. The patients in the trials did not experience the level of pain reduction that the company expected. The Food and Drug Administration informed your client that it would not approve the drug based on the existing clinical data. But your client would not give up so easily. He made statements to investors indicating that FDA approval was still likely and reassuring them that the drug would be on the market soon. Your client believed that the drug could be fixed. He was wrong. After a few failed modifications, the FDA publicly announced that it would not approve the drug. That day, the company's stock price plummeted by more than sixty percent. On top of that, the SEC instituted an enforcement action against your client, claiming that he had committed securities fraud by misleading investors.

As you prepare to defend your client at trial, you quickly realize that there is key evidence in the FDA's files. The SEC claims that your client intentionally misled investors by giving them an overly optimistic prediction that the FDA would approve the drug. But you believe that FDA records will show that the agency initially told your client that the clinical trials were going well and that approval was likely, and that the agency only later reversed course and decided not to approve the drug. If this is the case, you will have a strong argument that your client did not intentionally mislead investors. You serve a subpoena on the FDA to obtain these critical documents.

Weeks go by with no response. Just as you are preparing to file a motion to compel, you receive a letter from the FDA. The letter acknowledges receipt of the subpoena but informs you that, pursuant to agency regulations, the FDA will treat your subpoena as a request for records under the Freedom of Information Act (FOIA). This strikes you as unusual. You sent the FDA a subpoena, not a FOIA request. You call the FDA. The agency's counsel confirms that, pursuant to agency regulations, your subpoena will be handled as a FOIA request. He also advises you that there is a backlog of FOIA requests waiting ahead of yours

1. This hypothetical is based on *SEC v. Selden*, 445 F. Supp. 2d 11 (D.D.C. 2006).

and that it may take several months before the agency can respond. You protest. You tell the agency that the documents you subpoenaed are critical to your client's defense. The FDA counsel says he will see what he can do, although he makes no promises. Several months later, on the eve of trial, you finally receive a package from the FDA. You tear open the package excitedly, hoping it contains the documents that will exonerate your client. But to your great dismay, many of the records have been significantly redacted. A letter accompanying the documents explains that the FDA withheld all of the information that was exempt from disclosure under the FOIA. Using these exemptions, the agency redacted critical information, including specific data from the clinical trials and information about the agency's internal discussions about the drug. Without this information, it will be much more difficult for you to convince the jury that your client was not intentionally lying when he told investors that he believed FDA approval was still likely. It appears that the redactor's black marker has erased your client's best hopes.

This hypothetical illustrates a fact of modern litigation—federal agencies are enormously important. They regulate nearly every sector of the American economy. Because of this omnipresence, agencies often possess records that are critical to the resolution of pending cases. A defendant might require agency information to mount a defense.² A newspaper sued for libel might need agency records to establish the affirmative defense of truth.³ Or a prisoner in a habeas corpus proceeding might require agency information to show that his conviction was the result of fraud.⁴

How is a litigant to obtain this critical information from a federal agency? At first blush, the answer seems simple—serve the agency with a subpoena. Federal agencies generally must comply with subpoenas issued under Rule 45 of the Federal Rules of Civil Procedure⁵ and Rule 17 of the Federal Rules of Criminal Procedure.⁶ But federal agencies are not like other parties that are subject to federal court subpoenas.⁷ Agencies may remind litigants of the pigs in George Orwell's *Animal Farm*, who famously declared, "all animals are equal[.]

2. See, e.g., *id.* at 12–13.

3. See, e.g., *Hous. Bus. Journal, Inc. v. Office of the Comptroller of the Currency*, U.S. Dep't of Treasury, 86 F.3d 1208, 1210 (D.C. Cir. 1996). In *Houston Business Journal*, a newspaper was sued for libel after publishing a story claiming that a Houston banker engaged in various financial misdealings. To establish the affirmative defense of truth, the newspaper subpoenaed bank examination records from the Comptroller of the Currency. *Id.*

4. See, e.g., *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 463–65 (1951).

5. FED. R. CIV. P. 45. The D.C. Circuit recently affirmed that federal agencies are subject to subpoenas under Rule 45 in *Yousuf v. Samantar*, 451 F.3d 248, 250 (D.C. Cir. 2006). In *Yousuf*, the Department of State made the creative argument that it was not a "person" within the meaning of Rule 45 and, therefore, was not subject to a subpoena issued under the rule. *Id.* at 253. The court rejected that argument, holding that the Department of State is a "person," and therefore is subject to subpoenas issued under Rule 45. *Id.* at 250.

6. FED. R. CRIM. P. 17.

7. See C. Coleman Bird, *Discovery from the Federal Government*, LITIGATION, Summer 1987, at 19, 19.

but some animals are more equal than others.”⁸ As arms of the federal government, agencies have a judicially cognizable interest in ensuring a properly functioning deliberative process, maintaining confidentiality, preserving scarce resources, and remaining neutral in private lawsuits.⁹ For this reason, courts recognize several privileges that apply only to agencies, including the official information privilege and the law enforcement privilege.¹⁰ Further, as sprawling bureaucratic organizations, federal agencies have an interest in centralizing their responses to subpoenas.

Recognizing these interests and the special status of federal agencies, the federal Housekeeping Statute authorizes agencies to prescribe regulations governing the “custody, use, and preservation of [their] records, papers, and property.”¹¹ In *United States ex rel. Touhy v. Ragen*, the Supreme Court interpreted the Housekeeping Statute to permit agencies to promulgate regulations centralizing their processing of subpoenas.¹² These regulations have come to be known as *Touhy* regulations.

Most federal agencies have adopted *Touhy* regulations of some sort.¹³ Many *Touhy* regulations centralize in a senior agency official the determination of whether the agency will comply with a subpoena. The regulations typically enumerate factors for that official to consider, including privilege, burden on the agency, and the need to protect confidential information. The Department of Justice,¹⁴ the Federal Emergency Management Agency,¹⁵ and the Department of Homeland Security,¹⁶ among many others, have adopted *Touhy* regula-

8. GEORGE ORWELL, *ANIMAL FARM* 148 (1954); see also Bird, *supra* note 7, at 19.

9. See 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, 195 (1996).

10. See *infra* section II.A.

11. 5 U.S.C. § 301 (2006).

12. 340 U.S. 462, 468 (1951). For a more in-depth discussion of *Touhy*, see *infra* notes 41–48 and accompanying text.

13. 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, 1145 & n.40 (1996) (listing many agencies’ *Touhy* regulations).

14. 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 further dictate that information 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(b).

15. FEMA regulations provide that “[t]he production of records held by FEMA in response to a subpoena duces tecum . . . is prohibited absent authorization by the Chief Counsel.” 44 C.F.R. § 5.84(a) (2010). The regulations direct the Chief Counsel to determine whether to disclose the subpoenaed materials, and state that “[g]enerally . . . documents shall not be withheld unless their disclosure is prohibited by relevant law or for other compelling reasons.” *Id.* § 5.84(c).

16. DHS regulations prohibit employees from producing documents in response to a subpoena “unless authorized to do so by the Office of the General Counsel.” 6 C.F.R. § 5.44(a) (2010). The regulations direct agency officials to consider several different factors in deciding whether to comply with a subpoena, including “substantive law concerning privilege,” “[t]he public interest,” “[t]he need

tions of this sort.

Other agencies take a different approach. Instead of centralizing the determination of whether the agency will comply with a subpoena in a single official, these agencies' *Touhy* regulations unilaterally convert subpoenas into requests for records under the FOIA. When a litigant serves one of these agencies with a subpoena, the regulations generally instruct an agency employee 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 as a FOIA request.¹⁷ The agency then sends the subpoena through its FOIA process. When the agency eventually responds to the subpoena, it may redact portions of certain records or withhold them entirely pursuant to one of several FOIA exemptions, just as the agency would with any run-of-the-mill FOIA request. A number of important agencies, including the Food and Drug Administration,¹⁸ the Department of Agriculture,¹⁹ the Office of the Comptroller of the Currency,²⁰ and the Consumer Product Safety Commission²¹ have *Touhy* regulations of this sort.

Because relatively few agencies have adopted these subpoena-to-FOIA conversion regulations, the practice has received minimal scholarly attention. This paucity of scholarship belies the practical and theoretical importance of the issue. The conversion regulations are problematic because they prejudice litigants and interfere with the Judiciary's core constitutional role.

When a litigant needs information in agency files for his case, converting his subpoena into a FOIA request could cause him serious prejudice. A FOIA request provides a litigant with access to a smaller universe of information than a subpoena, and it takes longer to get that information. As this Note explains, the FOIA provides agencies with nine exemptions—that is, grounds for refusing to disclose information—many of which are broader than common law privileges.²² And it may take the agency a long time to process the litigant's FOIA request.²³ Further, many of the agencies that have adopted conversion regula-

to avoid spending the time and money of the United States for private purposes," and "[t]he need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated." *Id.* § 5.48(a).

17. *See, e.g.*, 7 C.F.R. § 1.215 (2010).

18. 21 C.F.R. § 20.2(a) (2010) ("Any request for records of the Food and Drug Administration . . . by a subpoena duces tecum . . . shall be handled pursuant to the procedures established in [§ 20.23]."); *id.* § 20.23(a) ("Any written request to the Food and Drug Administration for existing records . . . shall be deemed to be a request for records pursuant to the Freedom of Information Act . . .").

19. 7 C.F.R. § 1.215(a) (2010) ("Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is not a party shall be deemed to be requests for records under the Freedom of Information Act . . .").

20. 12 C.F.R. §§ 4.33, 4.34, 4.37(a) (2010).

21. 16 C.F.R. § 1016.3(a) (2010); *see also* *Allstate Ins. Co. v. Hewlett-Packard Co.*, No. 8:08CV39, 2010 WL 2813659, at *1 (D. Neb. July 16, 2010) ("The CPSC treated the subpoena as a Freedom of Information Act . . . request, and as required by law, notified defendant of the request and gave it the opportunity to comment on release of the material prior to public disclosure.").

22. *See* 5 U.S.C. § 552(b) (2006, Supp. I 2007 & Supp. III 2009).

23. *See infra* section II.B.

tions, most notably the FDA, are important to a great deal of litigation. Just ask anyone involved in one of the massive class actions concerning defective drugs such as Vioxx or Fen-phen.²⁴ Litigants forced to run through these agencies' FOIA rigmarole—who face prejudice because of extensive delays and the agency's reliance on FOIA exemptions to withhold subpoenaed information—deserve an analysis of whether these conversion regulations are lawful.

The conversion regulations also raise broader separation of powers concerns. The Executive Branch's susceptibility to judicial subpoenas has long been an issue of scholarly interest and debate.²⁵ And well it should be. Information is the currency of the Judiciary's central constitutional role—deciding cases and controversies.²⁶ When the information that the Judiciary needs is in the hands of the Executive Branch, governmental interests collide. To the extent that the conversion regulations permit agencies to withhold more information from the Judiciary than they otherwise would with common law privileges, the regulations interfere with the Judiciary's search for truth and contravene “the longstanding principle that ‘the public . . . has a right to every man's evidence.’”²⁷ Also, by treating a subpoena as nothing more than a general request for information from a member of the public, executive agencies fail to afford the Judiciary the respect that it deserves as a coequal branch of government.

After detailing the problems with the subpoena-to-FOIA conversion regulations, this Note recommends a way for courts to respond. Courts should permit agencies to handle subpoenas using the same *procedures* that they use to process FOIA requests but should strenuously resist any effort to *substantively* convert a subpoena into a FOIA request. Most agencies have dedicated procedures and personnel in place to handle FOIA requests, and an agency should be free to channel any subpoenas it receives through its existing FOIA mechanisms. But processing a subpoena using FOIA procedures is altogether different from substantively treating a subpoena as a FOIA request, which allows an agency to invoke the broad FOIA exemptions to resist producing subpoenaed information. Courts should not allow this to happen.

24. See, e.g., *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1791–93 (2010) (detailing the FDA's involvement in problems with Vioxx and subsequent litigation); *Faison v. Wyeth, Inc.*, 353 F. Supp. 2d 1273 app. at 1281–82 (S.D. Ga. 2004) (detailing the FDA's involvement in problems with Fen-phen).

25. Much of the scholarly literature has focused on the existence or nonexistence of a so-called housekeeping privilege. See generally Don Lively, *Government Housekeeping Authority: Bureaucratic Privileges Without a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495 (1981); Gregory S. Coleman, Note, *Touhy and the Housekeeping Privilege: Dead but Not Buried?*, 70 TEX. L. REV. 685 (1992). The housekeeping privilege purportedly authorizes an agency to withhold information “when it decide[s] that disclosure [would be] against the public interest.” See Coleman, *supra*, at 687. Today, the emerging consensus among courts and commentators is that the housekeeping privilege is a myth. See *id.* at 715. It is authorized by neither the Housekeeping Statute nor by *Touhy*. See *id.* Agencies that wish to withhold subpoenaed records must advance a more specific claim of common law privilege. See *id.*

26. See U.S. CONST. art. III, § 2, cl. 1.

27. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (alteration in original) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

By focusing specifically on subpoena-to-FOIA conversion regulations, the scope of this Note is intentionally narrow. Three other limitations bear mention at the outset. First, this Note only addresses third-party subpoenas to federal agencies, that is, where the agency is not itself a party to the litigation. Most of the agencies with conversion regulations have different policies for responding to discovery requests in cases to which they are parties.²⁸ Second, this Note only addresses subpoenas *duces tecum* (for documents); it does not address subpoenas *ad testificandum* (for testimony). Again, most agencies have different policies for requests for records and requests for employee testimony. Finally, this Note only addresses federal court subpoenas; it does not address state court subpoenas directed towards federal agencies.²⁹

This Note proceeds as follows. In Part I, I briefly detail the history of subpoenas directed to federal agencies and the history of the FOIA. I also compare subpoenas and FOIA requests and the differing ways that litigants can use each to obtain information for judicial proceedings. In Part II, I explain why

28. Compare, e.g., 7 C.F.R. § 1.216 (2010) (USDA policy for cases in which the government is a party), with *id.* § 1.215 (USDA policy for cases in which the government is not a party). Also, where the agency is a party to the litigation, the court has additional tools to coax agency compliance without the need to resort to compulsory process. See Note, *Executive Immunity from Judicial Power To Compel Documentary Disclosure*, 51 COLUM. L. REV. 881, 886 (1951). Where the agency is a plaintiff, the court may dismiss the action if the agency does not produce requested records. *Id.* Where the agency is a defendant, the court may bar the agency from mounting certain defenses, or even enter default judgment for the other side if the agency refuses to produce records. See FED. R. CIV. P. 37(b)(2)(A); Note, *supra*.

29. In addition to many of the issues addressed in this Note, state court subpoenas directed to federal agencies also raise sovereign immunity and Supremacy Clause problems. Courts have held that a subpoena served on a federal agency employee is an action against the United States, subject to the federal government's sovereign immunity from suit. See, e.g., *Reynolds Metals Co. v. Crowther*, 572 F. Supp. 288, 290 (D. Mass. 1982) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692 (1949)). Various provisions of the Administrative Procedure Act (APA) and the Federal Rules of Civil and Criminal Procedure waive the government's sovereign immunity with respect to actions in federal court. See, e.g., *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999) ("The APA waives the government's sovereign immunity from suit . . ."); *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991) ("This court has held, however, that when the United States comes into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure [including the provisions imposing sanctions] as any other litigant." (citing *United States v. Gavilan Joint Cmty. Coll. Dist.*, 849 F.2d 1246, 1251 (9th Cir. 1988))). However, there is no generally applicable waiver with respect to actions in state court. Therefore, absent a specific waiver of sovereign immunity, state courts may not compel federal officials to testify or produce documents in response to subpoenas. See, e.g., *Smith v. Cromer*, 159 F.3d 875, 877–78 (4th Cir. 1998) (state court lacks jurisdiction to enforce subpoena against federal officials—two Assistant United States Attorneys and a DEA agent); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70–71 (4th Cir. 1989) (absent waiver of sovereign immunity, state court lacks jurisdiction to compel EPA employee to testify in response to subpoena); *United States v. McLeod*, 385 F.2d 734, 752 (5th Cir. 1967) (state court may not enforce subpoena directing federal officers to testify before state grand jury). Some courts have also analyzed the issue under the Supremacy Clause. In *Downie*, for example, the Fourth Circuit reasoned that the EPA's *Touhy* regulations governing the responses of its employees to subpoenas "have the force and effect of federal law which state courts are bound to follow." *Downie*, 873 F.2d at 71 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96 (1979)). Therefore, allowing a state court to compel the agency employee to comply with its subpoena would not only be contrary to the agency's *Touhy* regulations but would also "plainly violate[] both the spirit and the letter of the Supremacy Clause." *Id.*

converting subpoenas into FOIA requests harms litigants. Specifically, I detail how malleable FOIA exemptions provide agencies with broader grounds to resist producing information than common law privileges and the significant time delay that usually accompanies FOIA requests. In Part III, I explore the wider separation of powers implications of the conversion regulations. By depriving the courts of their right to “every man’s evidence,” the regulations interfere with the Judiciary’s central role under Article III. In Part IV, I detail the various judicial responses to the conversion regulations. Although courts generally have the tools available to resist an agency’s conversion of a subpoena into a FOIA request, too many courts simply acquiesce. I recommend how a court should respond when an agency converts one of its subpoenas into a FOIA request.

I. HISTORICAL BACKGROUND

A. SUBPOENAS TO FEDERAL AGENCIES

Since the earliest days of the Republic, the Executive and Judicial Branches have tussled over the Judiciary’s authority to obtain information from the President and his agents.³⁰ The history is long and complex because the interests implicated on both sides are critical. Subpoenas directed towards federal agencies give rise to a conflict between the Judiciary’s right to “every man’s evidence”³¹ and the Executive’s interest in maintaining the integrity of the deliberative process, conserving scarce resources, and remaining neutral in legal disputes.³²

This history begins with the first Congress, which passed the so-called Housekeeping Statute in 1789.³³ As it reads today, the statute authorizes agency heads to “prescribe regulations for the . . . custody, use, and preservation of [the

30. See Note, *supra* note 28, at 882–83. One of the first episodes of conflict over judicial access to Executive Branch information involved Aaron Burr’s trial for treason in which Chief Justice Marshall, sitting on circuit, issued a subpoena to President Thomas Jefferson directing him to produce correspondence with an army officer that Burr claimed was relevant to the proceeding. See *id.* at 882. Although Jefferson claimed that he had the ultimate authority to decide whether to produce papers in his possession, he ultimately “substantially fulfil[led]” the requirements of the subpoena. *Id.* at 882–83 (internal quotation marks omitted).

31. See *Branzburg*, 408 U.S. at 667, 688 (1972) (quoting *Bryan*, 339 U.S. at 331) (recognizing the public’s “right to ‘every man’s evidence’” in holding that “requiring newsmen to appear and testify before . . . grand juries” does not violate the First Amendment); see also Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 *FORDHAM L. REV.* 129, 190 (2007) (recognizing the “every man’s evidence” maxim as “the core and predominant principle of American evidence”).

32. See Grech, *supra* note 13, at 1167–71 (surveying the interests commonly cited by agencies in resisting disclosure); Richmond, *supra* note 9.

33. Act of Sept. 15, 1789, ch. 14, 1 Stat. 68 (codified as amended at 5 U.S.C. § 301 (2006)). 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

agency's] records, papers, and property."³⁴ Most commentators agree that the Housekeeping Statute was, as its name implies, meant to be purely ministerial.³⁵ It was not intended to create any substantive privilege of confidentiality for federal agencies.³⁶

The Housekeeping Statute languished in relative obscurity until 1900, when the Supreme Court for the first time blessed an agency's reliance on it 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.³⁷ The Supreme Court held that the state court could not hold the revenue collector in contempt.³⁸ Relying on the Housekeeping Statute, the Court held that the regulation was a valid exercise of the powers of the Secretary of the Treasury—and through him, the Commissioner—"to prescribe regulations . . . for the . . . custody, use, and preservation of . . . records, papers, and property."³⁹ 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."⁴⁰

The Supreme Court revisited the issue of agency responses to subpoenas in *Touhy*.⁴¹ Roger Touhy, incarcerated in an Illinois prison, instituted a habeas corpus action alleging that his conviction had been obtained by fraud.⁴² Touhy subpoenaed the agent in charge of the FBI Chicago field office for documents relating to his case.⁴³ The FBI agent refused to comply, relying on a Department of Justice regulation that prohibited FBI employees from producing Department records in response to a subpoena without the Attorney General's approval.⁴⁴ The district court held the FBI agent in contempt.⁴⁵ The Supreme Court

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

5 U.S.C. § 301.

34. 5 U.S.C. § 301.

35. See, e.g., William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited but Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 749 (2005) (noting that the statute "was just a housekeeping matter; having established an agency, Congress gave the head of that agency the authority over its records").

36. See, e.g., *id.* ("The statute was not intended to grant a privilege of confidentiality.").

37. 177 U.S. 459, 462–63 (1900).

38. See *id.* at 467.

39. *Id.* (quoting 5 U.S.C. § 301).

40. *Id.* at 470.

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

42. *Id.* at 463–65.

43. *Id.* at 464–65.

44. *Id.* at 463 & n.1.

45. *Id.* at 465.

overturned the contempt citation.⁴⁶ The Court held that the agent could not be held in contempt because the regulation he was following was a valid exercise of the Attorney General's power under the Housekeeping Statute to prescribe regulations for the "custody, use, and preservation" of department records.⁴⁷ The Court focused on the "necessity," given "the variety of information contained in the files of any government department . . . of centralizing [the] determination as to whether subpoenas duces tecum will be willingly obeyed or challenged."⁴⁸

Both *Boske* and *Touhy* have been cited in support of a so-called housekeeping privilege, which purportedly permits agencies to withhold subpoenaed evidence from a court without a more specific claim of privilege.⁴⁹ As many commentators have argued, this is a gross misreading of the Court's decisions.⁵⁰ The Court's holding in *Touhy* was decidedly narrower. The Court only held that courts may not hold an agency employee in contempt for refusing to comply with a subpoena when he acts pursuant to a regulation centralizing the decision whether the agency will comply in the agency head.⁵¹ The Court did not decide whether the Attorney General himself, if served with a subpoena, could legally refuse to comply.⁵² Indeed, Justice Frankfurter emphasized this "very narrow" nature of the *Touhy* Court's holding in his concurring opinion.⁵³

As if to make doubly clear that the Housekeeping Statute does not provide federal agencies with substantive grounds for withholding subpoenaed information, Congress amended the statute in 1958 to formally emphasize that it "does not authorize withholding information from the public or limiting the availability of records to the public."⁵⁴ Congress believed that the Housekeeping Statute "was being miscited as statutory authority for nondisclosure."⁵⁵ The purpose of the amendment was to "clarif[y] . . . that [the Housekeeping Statute] confers no

46. *See id.* at 468.

47. *See id.* (quoting 5 U.S.C. § 301).

48. *Id.*

49. *See, e.g.,* Milton Hirsch, "The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years After United States *ex rel. Touhy v. Ragen*, 30 FLA. ST. U. L. REV. 81, 83–84 & n.9 (2002); Richmond, *supra* note 9, at 178; Russell, *supra* note 35, at 752 (quoting Coleman, *supra* note 25, at 687) (citing Hirsch, *supra*, at 83).

50. *See, e.g.,* Hirsch, *supra* note 49; Richmond, *supra* note 9, at 178.

51. *See Touhy*, 340 U.S. at 468–70.

52. *Id.* at 469; *see also* Recent Case, *Federal Courts—Rules of Civil Procedure—Secretary of Air Force Subject to Discovery in Suit Under Federal Tort Claims Act*, 65 HARV. L. REV. 1445, 1446 (1952) ("[T]he Court [in *Touhy*] expressly left open the question . . . whether the determination that there is an executive privilege to withhold documents in a given case is a judicial question or one which is to be made finally by the executive.").

53. *Touhy*, 340 U.S. at 472 (Frankfurter, J., concurring) (emphasizing that the issues of "whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication").

54. Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (codified at 5 U.S.C. § 301 (2006)).

55. 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).

authority upon the head of a department to suppress information.”⁵⁶ The amendment thus “knocked the judicially sanctioned prop out from under the bureaucratic privilege claims.”⁵⁷ But the 1958 amendment left undisturbed what Congress saw as the core principle of *Boske* and *Touhy*—that “department heads can . . . centralize discretion to deal with discovery requests and thus immunize subordinates from contempt.”⁵⁸

Although some agencies continue to invoke an amorphous “housekeeping privilege” to resist disclosing subpoenaed records, the vast majority of courts and commentators that have addressed the issue recognize that the housekeeping privilege is a fiction.⁵⁹ An agency may promulgate regulations centralizing its response to subpoenas in a designated official or department, but the agency must assert a specific privilege to shield information from disclosure. These privileges, which I explore later in more detail,⁶⁰ include the state secrets privilege, the deliberative communications privilege, the informer’s privilege, and other privileges specifically created by statute.⁶¹

B. THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act’s purpose is, as the Supreme Court has recognized, “to ensure that the Government’s activities be opened to the sharp eye of public scrutiny.”⁶² The FOIA grew out of frustration with the regime of

56. *Id.*

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

58. Note, *supra* note 55.

59. *See, e.g.*, *Hous. Bus. Journal, Inc. v. Office of the Comptroller of the Currency, U.S. Dep’t of Treasury*, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (“[N]either the Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to withhold documents from a federal court.”); *In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995) (“Section 301 . . . is nothing more than a general housekeeping statute and does not provide ‘substantive’ rules regulating disclosure of government information.” (quoting *Exxon Shipping Co. v. U.S. Dep’t of Interior*, 34 F.3d 774, 777 (9th Cir. 1994))); *Exxon*, 34 F.3d at 778 & n.6 (“[N]either the [housekeeping] statute’s text, its legislative history, nor Supreme Court case law supports the government’s argument that [the statute] authorizes agency heads to withhold documents or testimony from federal courts. . . . Every commentator we are aware of who has addressed the issue has reached the same conclusion.”); *In re Motion to Compel Compliance with Subpoena Direct to Dep’t of Veterans Affairs*, 257 F.R.D. 12, 15 (D.D.C. 2009) (noting that *Touhy* regulations do not “confer a separate privilege upon the government, nor create a legal basis to withhold information pursuant to a federal subpoena”); *Coleman, supra* note 25, at 688–89 & n.21 (“The proposition for which *Touhy* is often cited—that a government agency may withhold documents or testimony at its discretion—simply is not good law and hasn’t been since 1958.” (citing *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971) (“In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.”))).

60. *See infra* section II.A.

61. *See generally* PAUL F. ROTHSTEIN & SUSAN W. CRUMP, *FEDERAL TESTIMONIAL PRIVILEGES: EVIDENTIARY PRIVILEGES RELATING TO WITNESSES AND DOCUMENTS IN FEDERAL-LAW CASES* ch. 5 (2d ed. 2007).

62. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (emphasis omitted); *see also* Anthony T. Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. LEGAL STUD. 727, 733 (1980) (“The act’s first and most obvious goal (reflected in its basic disclosure requirements) is to promote honesty and reduce waste in government by exposing official conduct to public scrutiny.”).

excessive governmental secrecy that the Roosevelt Administration erected during World War II and the Truman and Eisenhower Administrations strengthened at the beginning of the Cold War.⁶³ Many decried the “[h]abits of secrecy and censorship flowing from war.”⁶⁴ In response, the House of Representatives established the Special Subcommittee on Government Information, which came to be known as “the Moss subcommittee” after its chairman, Representative John E. Moss of California.⁶⁵ The Moss subcommittee succeeded in making government secrecy “a major political issue.”⁶⁶ The 1956 Democratic Party platform proclaimed that the “trend toward secrecy in Government should be reversed and . . . the Federal Government should return to its basic tradition of exchanging and promoting the freest flow of information possible.”⁶⁷ After a few modest legislative steps, including amending the Housekeeping Statute in 1958,⁶⁸ it became clear that sweeping legislation was necessary. Thus was born the FOIA. After the Act passed both the House and the Senate, President Lyndon Johnson signed it into law on July 4, 1966.⁶⁹

Initially, the FOIA was not particularly successful. The federal bureaucracy largely opposed it and refused to implement the Act’s dictates faithfully.⁷⁰ And the Act itself had almost no teeth. It contained no deadlines for agency compliance with records requests and no real penalties for violations.⁷¹ Recognizing that agency stonewalling was severely inhibiting the FOIA’s effectiveness and seizing on the national mood favoring openness in government following Watergate, Congress in 1975 enacted (over President Gerald Ford’s veto) amendments that strengthened the Act substantially.⁷² The amendments provided mandatory response times for FOIA requests, narrowed the breadth of some FOIA exemptions, and permitted judges to award attorneys’ fees to requesters who prevail in lawsuits to compel agency disclosure.⁷³

The FOIA’s structure is relatively straightforward. The Act broadly declares that every federal agency “shall make available to the public information” that is requested in accordance with certain procedural requirements.⁷⁴ But what the Act gives with one hand it takes away with the other. The Act lists nine

63. See HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 14–21 (1999).

64. HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 12–13 (1953).

65. FOERSTEL, *supra* note 63, at 21.

66. *Id.* at 27.

67. *Id.* (quoting *Freedom of Information*, U.S. NEWS & WORLD REP., Aug. 24, 1956, at 102, 114).

68. *Id.* at 33–35.

69. *Id.* at 42; see also Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2006, Supp. I 2007 & Supp. III 2009)).

70. See FOERSTEL, *supra* note 63, at 44–45.

71. *Id.* at 45.

72. See *id.* at 44–48.

73. *Id.* at 48.

74. See 5 U.S.C. § 552(a) (2006 & Supp. I 2007).

categories of information that are exempt from the disclosure requirement.⁷⁵ Agency information that falls under one of the nine FOIA exemptions need not be disclosed. Requesters who wish to contest an agency's decision not to disclose requested information may submit their dispute to mediation through the Office of Government Information Services⁷⁶ and also may file a complaint in federal district court.⁷⁷

C. COMPARING FOIA REQUESTS AND SUBPOENAS

On the surface, FOIA requests and subpoenas are two different avenues to the same destination—obtaining information from government agencies. But there are important distinctions between FOIA requests and subpoenas. They serve different purposes and have different philosophies towards disclosure.

Litigants use subpoenas to obtain information required for the resolution of concrete cases and controversies. Subpoenaed information must be relevant to the underlying case. Under the Federal Rules of Civil Procedure, information is discoverable by subpoena *because* it is relevant and *because* it will assist the court in resolving the case.⁷⁸ Privileges may shield some information from disclosure. Courts develop these privileges as part of the common law and apply them “in the light of reason and experience.”⁷⁹ Privileges reflect a societal determination that certain information should remain confidential notwithstanding its importance to the resolution of a pending case.⁸⁰ Parties may also object to subpoenas if gathering and producing the requested information would be unduly burdensome.⁸¹ A court faced with such a claim will balance this burden against the litigant's need for the information and determine whether compliance should be required or excused.⁸²

FOIA requests, in contrast, serve a different purpose. They provide members of the public access to general agency information in order to expose government-

75. *Id.* § 552(b) (2006, Supp. I 2007 & Supp. III 2009). For a detailed discussion of the nine categories of exempt information, see *infra* section II.A.

76. *Id.* § 552(h)(3) (Supp. I 2007) (“The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.”).

77. *Id.* § 552(a)(4)(B) (2006).

78. See FED. R. CIV. P. 26(b)(1). Subpoenas can be used to “obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.” *Id.*

79. FED. R. EVID. 501.

80. See MCCORMICK ON EVIDENCE § 72, at 130 (Kenneth S. Broun ed., 6th ed. 2006) (explaining rationale behind privileges as “the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice”).

81. See FED. R. CIV. P. 26(b)(2)(C)(iii); FED. R. CIV. P. 45(c)(3)(A)(iv).

82. See FED. R. CIV. P. 26(b)(2)(C)(iii); FED. R. CIV. P. 45(c)(3)(A)(iv); see also, e.g., *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 662–63 (D. Kan. 2003) (“Courts are required to balance the need for discovery against the burden imposed on the person ordered to produce documents.”).

tal functions to public scrutiny.⁸³ There is no relevancy requirement for FOIA requests.⁸⁴ Information must be disclosed because a citizen requests it, not because it is relevant to a particular proceeding.⁸⁵ Similarly, FOIA requests do not take into account the requester's need for the information.⁸⁶ Exempt materials need not be disclosed, no matter how strong the need, while nonexempt materials must be disclosed, no matter how weak the need.⁸⁷ Further, as courts have recognized, claims of privilege are inapposite in response to FOIA requests.⁸⁸ Congress has decided that some categories of information should be subject to disclosure while others should be exempt. An agency's authority to resist disclosure in response to a FOIA request is thus defined entirely by statute. Common law privileges are irrelevant, except to the extent that they inform certain statutory exemptions.

Although subpoenas and FOIA requests serve different purposes, employ different procedures, and provide access to different (although somewhat overlapping) universes of information,⁸⁹ litigants may choose to employ both as a means of securing information.⁹⁰ The FOIA offers litigants a baseline level of discovery that is available without the need to institute a formal legal proceeding or demonstrate relevance.⁹¹ When this baseline is not enough, subpoenas provide a more potent discovery tool depending on the subject matter of the underlying proceeding and the litigant's need for the information.⁹² But just because a litigant *could* seek information through either a subpoena or a FOIA request does not mean that the agency may make that choice for him by unilaterally converting his subpoena into a FOIA request. As explained in the

83. See *supra* note 62 and accompanying text.

84. 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, 1676 (1991).

85. See *id.*

86. *Id.*

87. See *id.*; see also *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) (“‘It is unsound to equate the FOIA exemptions and similar discovery privileges’ because the two schemes serve different purposes. FOIA is a statutory scheme directed to regulating the public access to documents held by the federal government; the public’s ‘need’ for a document is unrelated to whether it will be disclosed. By contrast, the public right of access to court documents is grounded on principles related to the public’s right and need to access court proceedings.” (citations omitted) (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984))).

88. See, e.g., *Ass’n for Women in Sci. v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977) (“The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.”).

89. See *Parton v. U.S. Dep’t of Justice*, 727 F.2d 774, 777 (8th Cir. 1984) (“[I]t is not the purpose of the [Freedom of Information] Act to benefit private litigants by serving as a supplement to the rules of civil discovery.” (citing *Miller v. Bell*, 661 F.2d 623, 626 (7th Cir. 1981))).

90. See Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 119–20 (1984).

91. See *id.* at 129.

92. See *id.* at 136–45. See generally Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843 (1981) (examining the issues that arise when the FOIA disclosure provisions and Federal Rules of Civil Procedure discovery provisions overlap in litigation).

next section, FOIA requests give litigants access to a significantly smaller universe of information than subpoenas.⁹³ This practical impact on the litigant's ability to procure necessary information and the corresponding interference with the Judiciary's right to every man's evidence are the most important effects of the subpoena-to-FOIA conversion regulations.⁹⁴

II. THE CONVERSION REGULATIONS HARM LITIGANTS' ACCESS TO INFORMATION

The subpoena-to-FOIA conversion regulations matter, first and foremost, because they prejudice litigants. The regulations effectively limit the amount of information that litigants can discover from a federal agency and burden litigants with what can be extraordinary delays. In this Part, I detail (A) how agencies can withhold more information from a FOIA request than from a subpoena, (B) the significant delays that litigants may face, and (C) the inadequate FOIA enforcement provisions.

A. SCOPE OF INFORMATION DISCOVERABLE

Simply put, converting subpoenas into FOIA requests limits the amount of information that litigants can access.⁹⁵ Litigants can use subpoenas to broadly "obtain discovery regarding *any* nonprivileged matter that is relevant to any party's claim or defense."⁹⁶ Tempering this broad authorization of discovery, the Federal Rules of Civil Procedure provide agencies that receive subpoenas several grounds on which to object.⁹⁷ The first ground is privilege. In federal court, privileges are defined with reference to the common law based on "reason and experience."⁹⁸ An agency must claim a privilege expressly, and the agency must provide a description of the withheld records that is sufficiently detailed to enable the demanding party to contest the claim.⁹⁹ An agency can also object to a subpoena if the burden or expense of gathering and producing the requested records outweighs the likely benefit,¹⁰⁰ the request "is unreasonably cumulative

93. See *infra* section II.A.

94. See *infra* Parts II–III.

95. See *Enwere v. Terman Assocs.*, No. C 07-1239 JF (PVT), 2008 WL 2951795, at *2 (N.D. Cal. July 24, 2008) ("The scope of records that can be obtained with a subpoena is broader than the scope of records that must be disclosed under FOIA." (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006))).

96. FED. R. CIV. P. 26(b)(1) (emphasis added).

97. See FED. R. CIV. P. 26(b)(2)(C), (b)(5)(A); FED. R. CIV. P. 45(c)(3)(A)–(B), (d)(2).

98. FED. R. EVID. 501.

99. FED. R. CIV. P. 26(b)(5)(A); FED. R. CIV. P. 45(d)(2); see also, e.g., *Ogden v. Dyco*, Civil No. 09-124-WDS, 2009 WL 3273221, at *2 (S.D. Ill. Oct. 9, 2009) ("Federal Rule of Civil Procedure 26(b)(5)(A) requires not only that an assertion of privilege be expressly claimed, but also that sufficient information be communicated to enable the privilege claim to be assessed.").

100. FED. R. CIV. P. 26(b)(2)(C)(iii); FED. R. CIV. P. 45(c)(3)(A)(iv). The claim of undue burden or expense must be made explicitly and supported with details. See *Long Beach Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 189 F. Supp. 589, 604 (S.D. Cal. 1960) ("The mere assertion that compliance with a subpoena is burdensome and onerous is alone not sufficient without showing of the manner and extent of the burden and the injurious consequences of compliance."). In balancing the

or duplicative,”¹⁰¹ the information can be obtained from another source that is less burdensome or expensive,¹⁰² the party issuing the subpoena has already “had ample opportunity to obtain the information” sought,¹⁰³ or the subpoena demands disclosure of trade secrets or other confidential commercial information.¹⁰⁴ A court may modify or quash a subpoena with any of these defects.

The FOIA, in contrast, provides agencies with significantly broader grounds to object to a demand for production of records. There are nine FOIA exemptions.¹⁰⁵ One of the exemptions—exemption five—incorporates all of the common law privileges that would apply to a subpoena.¹⁰⁶ It protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”¹⁰⁷ This exemption, in essence, allows an agency to refuse to disclose any information that would be privileged in civil discovery.¹⁰⁸ This exemption incorporates all of the common law privileges, including the deliberative process privilege, the work-product privilege, and the attorney–client privilege.¹⁰⁹ If exemption five were the only FOIA exemption, there would be little prejudice from converting a subpoena into a FOIA request because the FOIA exemptions would be coterminous with, but no broader than, the common law privileges. But exemption five is not the only FOIA exemption. There are eight others.

Four of the other FOIA exemptions bear a close relationship to specific common law and statutory privileges.¹¹⁰ But each of these exemptions stretches the privilege in a way that allows agencies to withhold more information. These exemptions are for: classified information (exemption one), information exempted from disclosure by statute (exemption three), trade secrets and confidential commercial information (exemption four), and law enforcement records

burden imposed by the subpoena against the need for the information, courts consider “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” FED. R. CIV. P. 26(b)(2)(C)(iii); *see also, e.g.,* *Goodyear Tire & Rubber Co. v. Kirk’s Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 662–63 (D. Kan. 2003).

101. FED. R. CIV. P. 26(b)(2)(C)(i).

102. *Id.*

103. FED. R. CIV. P. 26(b)(2)(C)(ii).

104. FED. R. CIV. P. 45(c)(3)(B)(i). The court may nevertheless order compliance with the subpoena if the party issuing it shows a substantial need for the trade secret or confidential commercial information. FED. R. CIV. P. 45(c)(3)(C)(i). The court may specify conditions for the production designed to safeguard the confidentiality of the information. *See* FED. R. CIV. P. 45(c)(3)(C).

105. 5 U.S.C. § 552(b) (2006, Supp. I 2007 & Supp. III 2009).

106. *See id.* § 552(b)(5) (2006).

107. *Id.*

108. *See* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (construing exemption five “to exempt those documents, and only those documents, normally privileged in the civil discovery context”); *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1185 (D.C. Cir. 1987) (holding that exemption five “unequivocally” incorporates “all civil discovery rules”).

109. *See* HARRY A. HAMMITT ET AL., *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS* 2008, at 143 (24th ed. 2008). *See id.* at 143–63 for a full discussion of these privileges.

110. *See* 5 U.S.C. § 552(b)(1), (3), (4), (7) (2006 & Supp. III 2009).

(exemption seven).¹¹¹

FOIA exemption one allows agencies to withhold information that is “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to such Executive order.”¹¹² This exemption is analogous to the “state secrets” or “military secrets” privilege recognized by the Supreme Court in *United States v. Reynolds*.¹¹³ The *Reynolds* privilege must be expressly claimed by the government agency “after actual personal consideration” of the subpoena by the responsible official.¹¹⁴ But there is an important difference between exemption one and the *Reynolds* privilege. Exemption one is automatic—if the information is properly classified as secret or confidential pursuant to an executive order, the agency need not produce it. Determination of the applicability of the *Reynolds* privilege, in contrast, remains with the court.¹¹⁵ The agency claiming the privilege must set forth its reasons (without actually disclosing the secret information), and the court ultimately decides whether the privilege applies.¹¹⁶ Although most courts give great deference to the government’s invocation of the privilege,¹¹⁷ the ultimate decision rests with the court, and the litigant requesting the information may try to persuade the court that application of the privilege is not warranted. FOIA exemption one affords the requesting party no such opportunity.

FOIA exemption three applies to information “specifically exempted from disclosure by statute[s]” that either “require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue . . . or establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld.”¹¹⁸ Exemption three incorporates nondisclosure provi-

111. *See id.*

112. *Id.* § 552(b)(1). In December 2009, President Barack Obama issued Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), which sets forth the procedures and criteria for classifying information as “top secret,” “secret,” or “confidential.” This Executive Order supersedes an Executive Order on the same subject that was issued by President Bill Clinton in 1995, Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995), and amended by President George W. Bush in 2003, Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). *See* Exec. Order No. 13,526, *supra*, at § 6.2(g).

113. *See* 345 U.S. 1, 6–8 (1953).

114. *Id.* at 7–8.

115. *Id.* at 8.

116. *Id.* (“The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.” (footnote omitted)); *see also id.* at 9–10 (“Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”).

117. *See, e.g.,* *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536–37 (E.D. Va. 2006) (“[I]n undertaking this inquiry, courts must . . . bear in mind the Executive Branch’s preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security.”). *But see* David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 325 (2010) (arguing that courts should not be so deferential to government invocations of the state secrets privilege).

118. 5 U.S.C. § 552(b)(3) (2006 & Supp. III 2009).

sions contained in other federal statutes,¹¹⁹ such as Rule 6(e) of the Federal Rules of Criminal Procedure (prohibiting the disclosure of grand jury information, subject to certain exceptions),¹²⁰ Title VII of the Civil Rights Act of 1964 (prohibiting the EEOC from disclosing matters pending before it),¹²¹ and section six of the Central Intelligence Agency Act of 1949 (authorizing the CIA to withhold personal information about agency employees).¹²² Although there are some statutes that explicitly prohibit government agencies from producing information in response to a subpoena,¹²³ exemption three is considerably broader because it incorporates all federal statutes that direct information to be withheld “from the public.”¹²⁴ Thus, many of the statutes that permit agencies to withhold information under exemption three may not authorize withholding the information in response to a subpoena.¹²⁵

FOIA exemption four exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹²⁶ Although there is a common law privilege that shields trade secrets or confidential commercial information, that privilege is qualified,¹²⁷ whereas the FOIA exemption is absolute. The Federal Rules of Civil Procedure explicitly recognize the qualified nature of the common law privilege.¹²⁸ The Rules provide that a court “may” modify or quash a subpoena that “requires . . .

119. OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 305 (2007).

120. FED. R. CRIM. P. 6(e); *see also, e.g.*, *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981).

121. *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (2006); *see also, e.g.*, *Frito-Lay v. EEOC*, 964 F. Supp. 236, 240–43 (W.D. Ky. 1997).

122. 50 U.S.C. § 403g (2006); *see also, e.g.*, *Lahr v. Nat'l Transp. Safety Bd.*, 453 F. Supp. 2d 1153, 1172 (C.D. Cal. 2006) (noting that the statute “requires the Director of National Intelligence to protect intelligence sources and methods from unauthorized exposure”), *aff'd in part, rev'd in part on other grounds*, 569 F.3d 964 (9th Cir. 2009).

123. *See, e.g.*, 13 U.S.C. § 9 (2006) (prohibiting disclosure of census information, subject to certain exceptions); 26 U.S.C. § 6103 (2006 & Supp. III 2009) (prohibiting disclosure of tax return information, subject to certain exceptions).

124. *See* 5 U.S.C. § 552(b)(3) (2006 & Supp. III 2009).

125. *See Pleasant Hill Bank v. United States*, 58 F.R.D. 97, 99 (W.D. Mo. 1973) (“[A] Government document which is not available to the general public under the [FOIA] by virtue of a collateral non-disclosure statute yet may be discoverable by a civil litigant. The short of the matter is that exemption under subsection (b)(3) does not necessarily demonstrate privilege.”).

126. 5 U.S.C. § 552(b)(4) (2006). The D.C. Circuit has defined “trade secret” to mean “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.” *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has further explained that information should be considered “confidential” for purposes of exemption four “if disclosure of the information is likely . . . (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

127. *See, e.g.*, *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 356 (1979).

128. *See* FED. R. CIV. P. 45(c)(3)(C).

disclosing a trade secret or other confidential . . . commercial information”¹²⁹ but state that the court may nevertheless order production if the requester “shows a substantial need for the . . . material that cannot be otherwise met without undue hardship.”¹³⁰ Because exemption four is absolute and the corresponding common law privilege is qualified, converting a subpoena into a FOIA request deprives the litigant of the opportunity to persuade a court that his need for the information is significant enough to justify disclosure.

Finally, FOIA exemption seven protects from disclosure law enforcement records that fall into six specified categories, including records that “could reasonably be expected to interfere with enforcement proceedings” or “endanger the life or physical safety of any individual.”¹³¹ The common law privilege that protects against the disclosure of law enforcement materials is “substantially equivalent” to FOIA exemption seven.¹³²

In addition to exemption five (which directly incorporates all common law privileges),¹³³ and exemptions one, three, four, and seven (which expand particular common law and statutory privileges),¹³⁴ there are four other FOIA exemptions that provide wholly separate grounds for nondisclosure. Exemption two allows agencies to withhold information “related solely to . . . internal personnel rules and practices.”¹³⁵ Exemption six allows agencies to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹³⁶ Exemption eight allows agencies to withhold information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”¹³⁷ And exemption nine allows agencies to withhold “geological and geophysical information and data, including maps, concerning wells.”¹³⁸ In total, then, the nine FOIA exemptions authorize agencies to withhold significantly more information than the common law privileges allow. Exemption five, on its own, makes the FOIA exemptions coextensive with common law privileges,¹³⁹ and each of the other eight exemptions provides additional grounds for nondisclosure.

Beyond the substance of the actual exemptions themselves, three other

129. FED. R. CIV. P. 45(c)(3)(B).

130. FED. R. CIV. P. 45(c)(3)(C)(i).

131. 5 U.S.C. § 552(b)(7) (2006).

132. ROTHSTEIN & CRUMP, *supra* note 61, § 5:1, at 366–67 & n.24 (acknowledging the “possible but rarely cited exception” to the above proposition: category (C) of the rule, “that the disclosure would ‘constitute an unwarranted invasion of personal privacy’” (quoting § 552(b)(7))).

133. *See* 5 U.S.C. § 552(b)(5) (2006).

134. *See id.* § 552(b)(1), (3), (4), (7).

135. *Id.* § 552(b)(2).

136. *Id.* § 552(b)(6).

137. *Id.* § 552(b)(8).

138. *Id.* § 552(b)(9).

139. *See supra* notes 106–09 and accompanying text.

critical facts help to make FOIA exemptions broader than common law privileges. First, FOIA exemptions are absolute, whereas most common law privileges are qualified. Common law privileges generally do not automatically shield requested information from disclosure; most privileges are qualified, meaning a court will weigh the litigant's need for the information against the government's interest in nondisclosure.¹⁴⁰ If information is absolutely critical to a pending case and cannot be obtained from other sources, the litigant may be able to prevail even if a common law privilege applies. But the need of the requester is simply irrelevant to a FOIA request.¹⁴¹ If the information falls within the scope of a FOIA exemption, not even the most compelling demonstration of need will force agency disclosure.¹⁴²

Second, many courts tend to construe FOIA exemptions in a way that may limit access to the information in an agency's files that a litigant needs most. The Supreme Court, in its *Reporters Committee* decision, announced an interpretive framework for courts to apply when evaluating FOIA exemptions.¹⁴³ The Court stated that FOIA exemptions should be interpreted in light of the FOIA's "basic purpose . . . to open agency action to the light of public scrutiny."¹⁴⁴ That purpose is served when a FOIA request seeks information that "sheds light on an agency's performance of its statutory duties" but is not served when a FOIA request seeks "information about private citizens that is accumulated in various governmental files but . . . reveals little or nothing about an agency's own conduct."¹⁴⁵ With the Supreme Court's *Reporters Committee* gloss, agencies can use FOIA exemptions to broadly deny access to information in agency files

140. See, e.g., *Ass'n for Women in Sci. v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977) ("[A] court must balance 'the need of litigants for information possessed by the Government and the need of the Government to foster the flow of information provided to it.'" (quoting *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769 (1965))).

141. See, e.g., *In re Sealed Case*, 121 F.3d 729, 738 n.5 (D.C. Cir. 1997) ("[C]ourts have held that the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure."); Lively, *supra* note 25, at 510 n.88.

142. A clear example of this important difference between the FOIA and civil discovery is *Firestone Tire & Rubber Co. v. Coleman*, 432 F. Supp. 1359 (N.D. Ohio 1976). In *Coleman*, the court held that, although a subpoenaed agency report was exempt from disclosure under FOIA exemption five, the report still had to be produced in response to a civil discovery subpoena. See *id.* at 1371-72. The plaintiff's need for the report made the difference. *Id.* at 1372. The contents of the agency report were "crucial to the plaintiff's claim," and the "plaintiff ha[d] no alternative method of obtaining [the] information." *Id.*; see also ROTHSTEIN & CRUMP, *supra* note 61, § 5:1, at 364-65 ("[T]he problems of what a citizen should be able to get from a Government agency when he has simply the general interest of the citizen in finding what is going on and the problems of a litigant who has a particular need are obviously very different and almost by hypothesis what is the right solution for the first cannot be the right solution for the second.") (alteration in original) (quoting *Hearings on Proposed Federal Rules of Evidence, Subcomm. on Reform of Fed. Criminal Laws of the Comm. on the Judiciary*, 93d Cong. 274 (1973) (statement of Judge Friendly))).

143. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771-73 (1989).

144. *Id.* at 772 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)) (internal quotation marks omitted).

145. *Id.* at 773.

that does not directly shed light on the agency's own functions. Although this limitation may make sense for the statutory purposes of the FOIA, it makes little sense for civil or criminal litigants who often require agency records that reveal more about the actions of other private parties than about the agency's own internal functions. For example, information in FDA files about individuals who experienced adverse reactions to a prescription drug reveals little about the FDA's internal functions but would be critically important to a products liability action concerning that drug. Yet pursuant to the *Reporters Committee* rationale, the FDA would have a strong argument against disclosing that critical information.

Finally, many federal agencies are simply uncooperative when it comes to FOIA requests.¹⁴⁶ An agency's willingness to cooperate is the most important determiner of a FOIA request's success. An agency that chooses not to comply, or that makes spurious arguments for the application of various FOIA exemptions, will force the requester to undergo the time-consuming and expensive process of filing a separate action in district court to compel production.¹⁴⁷ Unfortunately, many recent presidential administrations have resisted moving towards full FOIA disclosure. Although the Carter Administration assumed a relatively cooperative stance and directed federal agencies to cooperate with most FOIA requests, subsequent administrations have reversed course.¹⁴⁸ The Reagan Administration's policy was to "defend all FOIA lawsuits unless there is no substantial legal basis for nondisclosure."¹⁴⁹ The George W. Bush Administration closely followed this more restrictive policy.¹⁵⁰ Although Barack Obama initially promised greater openness and transparency through enhanced compliance with the FOIA,¹⁵¹ thus far his promise remains largely unfulfilled.¹⁵²

146. See, e.g., *Public Citizen v. Office of U.S. Trade Rep.*, 804 F. Supp. 385, 388 (D.D.C. 1992) (chastising U.S. Trade Representative for "stonewalling" in response to FOIA request).

147. See 5 U.S.C. § 552(a)(4)(B) (2006).

148. See Lively, *supra* note 25, at 510 n.87.

149. See *id.*

150. See Memorandum from Attorney General John Ashcroft for the Heads of all Federal Departments and Agencies (Oct. 12, 2001), reprinted in HAMMITT ET AL., *supra* note 109, at 524. The Ashcroft memo assured federal agencies that the Department of Justice would defend their decisions not to disclose information pursuant to FOIA requests "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." *Id.* Indeed, the terrorist attacks of September 11, 2001, precipitated a significant contraction of the federal government's free information policies, resurrecting, in some important respects, the "culture of secrecy" that was the original impetus for the FOIA. See JACQUELINE KLOSEK, *THE RIGHT TO KNOW: YOUR GUIDE TO USING AND DEFENDING FREEDOM OF INFORMATION LAW IN THE UNITED STATES* 117-30 (2009); see also *supra* section I.B.

151. See Memorandum from President Barack Obama for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). The memo, issued the day after Obama's inauguration, enunciated "a clear presumption" that, "[i]n the face of doubt, openness prevails." *Id.* Therefore, the memo directed, "[a]ll agencies should adopt a presumption in favor of disclosure." *Id.*

152. See Nate Jones et al., Nat'l Sec. Archive, *Sunshine and Shadows: The Clear Obama Message for Freedom of Information Meets Mixed Results*, KNIGHT OPEN GOV'T SURV., 1, 3 (Mar. 15, 2010), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB308/2010FOIAAudit.pdf>. The report's principal conclusions are that few federal agencies have taken steps to affirmatively implement Obama's FOIA

Indeed, a recent study reveals that federal agencies denied fifty percent more FOIA requests during the first year of the Obama administration than during the last year of the Bush administration.¹⁵³

For all of these reasons, converting a subpoena into a FOIA request gives federal agencies broader grounds for withholding information. Accordingly, when an agency unilaterally converts a litigant's subpoena into a FOIA request, the agency effectively narrows the amount of information that the litigant can access. This limitation may seriously prejudice litigants in certain cases, especially where the critical information lies somewhere in the purgatory between a FOIA exemption and a privilege. In other words, if the critical information is covered by a FOIA exemption but arguably is not privileged, converting a subpoena into a FOIA request could mean the difference between victory and defeat.

B. TIME FOR COMPLIANCE

Generally, agencies must comply with subpoenas more quickly than they must comply with FOIA requests. Subpoenas issued under Rule 45 of the Federal Rules of Civil Procedure may specify the amount of time that an agency has to respond, subject to the court's authority to quash or modify subpoenas that do not allow reasonable time for compliance.¹⁵⁴ The FOIA statute also directs agencies to respond to FOIA requests within specified timeframes.¹⁵⁵ An agency must determine whether it will comply with a FOIA request within twenty business days.¹⁵⁶ The agency may request one extension of ten business days in "unusual circumstances," with further delay permitted if there are "exceptional circumstances."¹⁵⁷ If the agency denies the FOIA request and the requester appeals, the agency must decide the appeal within twenty business days.¹⁵⁸

Although the FOIA's statutory time limits may seem reasonable, there is a large gulf between the statutory commands and actual agency practice. In most cases, the prescribed time limits are more aspirational than binding, and agencies routinely fail to comply. Because of staff shortages and large backlogs,

directive and, by and large, there is no indication that agencies have been responding to more FOIA requests. *See id.* at 3. Indeed, the report found that, although four agencies were releasing more information and withholding less after Obama's first full year in office, five agencies actually regressed, withholding more information and releasing less. *Id.*

153. Andrew Malcolm, *Top of the Ticket: A Little Secret About Transparency*, L.A. TIMES, Mar. 21, 2010, at A28.

154. FED. R. CIV. P. 45(a)(1)(A)(iii) (subpoenas may order production of documents "at a specified time"); *id.* (c)(3)(A)(i) ("court must quash or modify a subpoena that . . . fails to allow a reasonable time to comply").

155. *See* 5 U.S.C. § 552(a)(6)(A)–(B) (2006 & Supp. I 2007).

156. *Id.* § 552(a)(6)(A).

157. *Id.* § 552(a)(6)(B).

158. *Id.* § 552(a)(6)(A).

FOIA requests often take months, or even years, to process.¹⁵⁹ Of fifty-seven federal agencies surveyed in a 2007 study conducted by researchers at The George Washington University, fifty-three reported backlogs.¹⁶⁰ Twelve of the agencies had requests that had been pending for ten years or more.¹⁶¹ And FOIA backlogs are not just a recent phenomenon. They have bedeviled information seekers for decades. For example, between 1989 and 1993, it took the State Department, on average, between 243 and 483 days to respond to FOIA requests.¹⁶²

Additionally, agencies with conversion regulations are not always willing to afford the subpoenas that they unilaterally convert into FOIA requests a reprieve from the often crushing time delays. For example, in a recent case in D.C. federal court, the FDA—an agency with conversion regulations—informed the court that it would be *three years* before the agency would “be able to *begin* its search for . . . documents” that were responsive to a subpoena.¹⁶³ Thus, as a practical matter, converting a subpoena into a FOIA request may force a litigant to endure extreme delays before receiving his requested information. Such a delay could seriously prejudice the litigant’s position in the underlying litigation.¹⁶⁴

C. REMEDY FOR NONCOMPLIANCE

Procedurally, the remedy available to a litigant for an agency’s refusal to disclose information pursuant to a FOIA request is actually more favorable and straightforward than the remedy for an agency’s refusal to comply with a subpoena. A FOIA requester may file an action in federal district court to contest an agency’s refusal to disclose records.¹⁶⁵ The FOIA specifically authorizes a requester to bring an action in one of four possible venues—where the requester resides, where the requester has his principal place of business, where the agency records are located, or in the District of Columbia.¹⁶⁶ The court decides the matter *de novo*, and the statute places the burden on the agency to prove that particular exemptions apply.¹⁶⁷

159. See FOERSTEL, *supra* note 63, at 76–78 (quoting several journalists expressing disappointment and aggravation at the extraordinary delays in the responses of many agencies to FOIA requests).

160. Catherine Nielsen, Nat’l Sec. Archive, *40 Years of FOIA, 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s*, KNIGHT OPEN GOV’T SURVEY, 4 (July 2, 2007), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/ten_oldest_report.pdf.

161. *Id.*

162. Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 335 (1994).

163. SEC v. Biopure Corp., No. 05-00506 (RWR/AK), 2006 WL 2789002, at *4 (D.D.C. Jan. 20, 2006) (emphases added).

164. The FOIA does require agencies to “promulgate regulations . . . providing for expedited processing of requests” where the requester demonstrates a “compelling need.” 5 U.S.C. § 552(a)(6)(E)(i) (2006). An agency may elect to expedite the processing of a subpoena that it unilaterally converts into a FOIA request, in which case, the litigant may gain some relief from the otherwise crushing delays.

165. See *id.* § 552(a)(4)(B).

166. *Id.*

167. See *id.*

In contrast to this simple statutory review scheme, the remedy for an agency's noncompliance with a subpoena is considerably less clear. Courts generally agree that litigants can file a motion to compel agency compliance with a subpoena, but they are split over the appropriate standard of review. The Second, Third, and Eleventh Circuits have held that courts may only review an agency's refusal to comply with a subpoena under the Administrative Procedure Act (APA).¹⁶⁸ The APA standard of review is deferential—courts will only set aside agency actions that are “‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”¹⁶⁹ The D.C. and Ninth Circuits have held, in contrast, that a litigant may challenge an agency's refusal to comply with a subpoena by filing a motion to compel under Rule 45 of the Federal Rules of Civil Procedure.¹⁷⁰ A Rule 45 motion to compel is considerably more favorable for a litigant because it does not incorporate the APA's deferential standard of review.

Additionally, it is unclear whom, exactly, a litigant should sue when he brings a motion to compel 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.¹⁷¹ Although the head of the agency is not protected by the *Touhy* doctrine, the agency head may not be within the court's jurisdiction.¹⁷² A collateral action in the district where the agency's headquarters are located—often the District of Columbia—will usually be necessary.¹⁷³ The requirement of a separate lawsuit against the agency head in a different jurisdiction to compel agency compliance is a significant burden for many litigants.¹⁷⁴

168. *See, e.g.*, *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”); *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 (quoting 5 U.S.C. § 706(2)(A))); *Davis Enters. v. EPA*, 877 F.2d 1181, 1186 (3d Cir. 1989) (same). *See generally* Administrative Procedure Act, 5 U.S.C. §§ 701(a)(2), 702, 706(2)(A) (2006).

169. *Gen. Elec.*, 197 F.3d at 599 (quoting 5 U.S.C. § 706(2)(A)).

170. *See, e.g.*, *Watts v. SEC*, 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 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.’”).

171. *See supra* note 51 and accompanying text.

172. *See Note, supra* note 55, at 455.

173. *See id.* at 452. This is precisely what Richard Selden had to do. *See SEC v. Selden*, 445 F. Supp. 2d 11 (D.D.C. 2006); *see also supra* Introduction. Selden issued two subpoenas to the FDA in connection with a proceeding in federal court in Massachusetts. *Selden*, 445 F. Supp. 2d at 12–13. But Selden had to file a separate action to compel against the FDA in federal district court in Washington, D.C. *See id.* at 12.

174. *See Note, supra* note 55, at 452. For some litigants, the practical burden of instituting a separate action against the agency head in another jurisdiction may be prohibitive. *See id.* (noting that such “collateral proceedings” are “inconvenient, costly, and time consuming”); *see also id.* at 455 (“Since

Therefore, at least procedurally, the method of enforcing agency compliance with a FOIA request is significantly clearer and simpler than the method of enforcing subpoenas. But what the FOIA gains with procedure, it loses with substance. In an action to compel under the FOIA, the court will apply the FOIA exemptions and will not consider the requester's need for the information.¹⁷⁵ Therefore, the FOIA remedy provides no relief to litigants who seek information that is covered by a FOIA exemption but arguably is not privileged.

Also, even more critically, the inherent coercive sanctions that federal courts typically use to enforce subpoenas are not available to compel compliance with a FOIA request. The only penal sanction that the FOIA specifically provides is quite weak.¹⁷⁶ If a court determines that an agency improperly refused to disclose requested information, the statute simply calls for an agency "proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding."¹⁷⁷ But this sanction does not provide an effective means for compelling an agency employee to disclose subpoenaed information. The sanction is simply a recommendation, not a command. And at any rate, slapping an agency employee on the wrist *after* he decides not to disclose subpoenaed information may be too late for the litigant, who may have already lost his case.

III. SEPARATION OF POWERS PROBLEMS

Not only do the conversion regulations cause concrete harm to litigants, they also pose serious problems for the constitutional separation of powers. The regulations frustrate the ability of courts to perform their constitutionally assigned role—deciding specific cases and controversies.¹⁷⁸ Further, by unilaterally recasting the commands of a coordinate branch, agencies adopting conversion regulations defy the wishes of Congress and fail to afford the Judiciary the respect that it deserves as a coequal branch of government.

Subpoenas issued to federal agencies give rise to two competing interests of constitutional magnitude. The court needs the subpoenaed information to faithfully and accurately resolve the case before it. At the same time, the agency has an important stake in preserving the integrity of its deliberative process, protecting its law enforcement functions, and vindicating other important organizational interests. The ultimate question is *who* gets to weigh the competing interests and decide whether subpoenaed information should be disclosed—the court or the agency? With the subpoena-to-FOIA conversion regulations, the

subordinate officials within a court's jurisdiction cannot under *Boske* and *Touhy* be held in contempt, and since the trial court ordinarily has no jurisdiction over the department head, discretion as to what information, if any, will be released [effectively] lies with the department's chief.").

175. See *supra* notes 86–87 and accompanying text.

176. See 5 U.S.C. § 552(a)(4)(F)(i) (Supp. I 2007).

177. *Id.*

178. See *supra* note 26 and accompanying text.

agencies wrest the authority to decide from the courts and effectively keep it for themselves. That is not proper.

Whenever an agency claims that it should not have to disclose subpoenaed documents, someone must balance the interests of the agency against those of the private litigant. And “balancing conflicting interests” is a job “for which judges are . . . peculiarly well-fitted.”¹⁷⁹ The Supreme Court expressed its strong agreement with this notion in *United States v. Nixon*, in which the Court declared that “it is the province and duty of [the courts] ‘to say what the law is’ with respect to” claims of executive privilege.¹⁸⁰ In other words, when evaluating the Executive Branch’s claims of privilege, it is the role of the courts to weigh the competing interests and determine whether the subpoenaed information should be disclosed.¹⁸¹ Indeed, if the Court in *Nixon* claimed the authority to determine the validity of a privilege asserted by the President himself, the Judiciary’s claim to deciding privileges asserted by agencies is even stronger.

It is, of course, unsurprising that the Supreme Court believes the Judiciary should retain the ultimate authority to decide agency claims of privilege. Such an assertion is no great feat for a Court that claims to be the final and authoritative interpreter of the Constitution.¹⁸² But in the context of subpoenas, the Court’s claim that it has the right “to say what the law is” is more than just a bald assertion of judicial power. Subpoenas are the Judiciary’s lifeblood. They are the means by which courts obtain information, and information is the currency of the Judiciary’s core constitutional role—deciding cases and controversies.¹⁸³ By depriving courts of information, privileges necessarily interfere with the Judiciary’s core role under Article III—indeed, privileges are “in derogation of the search for truth.”¹⁸⁴ For this reason, privileges are narrowly defined, and their assertion must be subject to rigorous evaluation.¹⁸⁵ It is to preserve their central constitutional province that courts vigilantly, and legitimately, guard their authority to decide claims of privilege.¹⁸⁶

Congress recognized the importance of leaving the development of privileges in the Judiciary’s hands when it enacted the Federal Rules of Evidence. The

179. See Note, *supra* note 28, at 888.

180. 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

181. See *id.* at 711–13 (weighing “the importance of the general privilege of confidentiality of Presidential communications” against “the constitutional need for production of relevant evidence in a criminal proceeding,” and concluding that the claimed presidential privilege must yield).

182. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

183. U.S. CONST. art. III, § 2, cl. 1.

184. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 384 (2004) (quoting *Nixon*, 418 U.S. at 710).

185. See *Nixon*, 418 U.S. at 710 (“[E]xceptions 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.”).

186. As the Ninth Circuit said in *Exxon Shipping Co. v. United States Department of Interior*, 34 F.3d 774 (9th Cir. 1994), allowing executive agencies “to make conclusive determinations on whether federal employees may comply with a valid federal court subpoena . . . would raise serious separation of powers questions.” *Id.* at 778. “[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” *Id.* (quoting *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

initial version of the Rules, which the Supreme Court drafted in 1973 and submitted to Congress for its approval, set forth specific privileges and enumerated the precise metes and bounds of those privileges.¹⁸⁷ Congress ultimately rejected this specific enumeration of privileges and instead enacted one simple rule—Rule 501—which provides that privileges “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”¹⁸⁸ In Rule 501, Congress expressed a clear intention to vest the development and interpretation of privileges—including privileges pertaining to the Executive Branch—in the courts.¹⁸⁹

The subpoena-to-FOIA conversion regulations throw all of this out the window. By unilaterally converting subpoenas into FOIA requests, agencies claim the authority to withhold information based on exemptions that are broader than common law privileges and that do not contain any room to consider the litigant’s need for the information. As such, the conversion regulations displace judicial authority to determine whether privileges apply. The conversion regulations purport to give agencies the authority to withhold all of the information that lies in the grey zone between FOIA exemptions and privileges. In other words, the regulations deprive the Judiciary of information that is exempt under the FOIA but is not privileged—information to which the Judiciary would otherwise have access. Although the FOIA provides requesters with the opportunity to contest an agency’s decision not to disclose requested information in district court,¹⁹⁰ courts in such actions are limited to determining whether the agency’s refusal complies with the FOIA itself, including its broad exemptions and the irrelevance of the litigant’s need.

Further, the sanctions for noncompliance available under the FOIA are significantly weaker than a court’s authority to compel compliance with a subpoena using its own inherent contempt power. Although the ability of courts to levy fines or contempt sanctions against federal agencies is an issue of ongoing debate,¹⁹¹ the unilateral recasting of subpoenas as FOIA requests permanently moots this debate in the agency’s favor. Under the FOIA, courts have no coercive sanctions available to them other than reviewing an agency’s

187. See GEORGE FISHER, EVIDENCE 842 (2d ed. 2008).

188. FED. R. EVID. 501; see also FISHER, *supra* note 187.

189. See FISHER, *supra* note 187.

190. See 5 U.S.C. § 552(a)(4)(B) (2006).

191. Some courts assert that coercive sanctions against agencies are barred by sovereign immunity, see *United States v. Horn*, 29 F.3d 754, 765 n.13 (1st Cir. 1994) (“The better reasoned decisions hold that, when the two doctrines lock horns, contempt is barred by sovereign immunity.”), whereas other courts have held that sovereign immunity poses no bar to the imposition of coercive sanctions for an agency’s defiance of a court order, see *Armstrong v. Exec. Office of The President*, 821 F. Supp. 761, 773 (D.D.C.), *aff’d in part, rev’d in part sub nom. Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274 (D.C. Cir. 1993) (per curiam) (concluding “that the doctrine of sovereign immunity does not prevent the imposition of coercive sanctions against” federal agencies “for their contempt of this Court’s orders”).

determination that information is protected by a statutory exemption.¹⁹² Courts are utterly without power in the FOIA remedial scheme to order agencies to disclose information that is statutorily exempt but that might not be covered by a common law privilege.

It is true, of course, that agencies possess some comparative informational advantages when it comes to evaluating certain claims of privilege. The agency, for example, knows its own deliberative process, and likely knows best what information should be kept confidential to preserve deliberative integrity. And courts generally recognize these advantages by, for example, according the government's claim that disclosure will pose a threat to national security a great deal of deference.¹⁹³ But the subpoena-to-FOIA conversion regulations go too far. By unilaterally converting subpoenas into FOIA requests, thereby giving themselves access to the full arsenal of broad FOIA exemptions, agencies aggrandize to themselves the authority to determine whether the litigant's demand for information is one with which they will comply. And because need is irrelevant to FOIA exemptions, the conversion regulations deprive the litigant of the right to have his need for the information balanced against the agency's interest in nondisclosure. Courts are uniquely positioned to perform this balancing.¹⁹⁴ Agencies are not. Therefore, the conversion regulations interfere with the judicial role by effectively solidifying the otherwise-applicable qualified common law privileges into absolute privileges, thereby robbing the litigant of the opportunity to demonstrate that his need for the information outweighs the agency's interest in nondisclosure.

The conversion regulations also arguably defy the wishes of Congress. Although the Housekeeping Statute specifically authorizes agencies to adopt regulations governing their responses to subpoenas,¹⁹⁵ the 1958 amendment to that statute clearly states that the statute does *not* "authorize withholding information from the public or limiting the availability of records to the public."¹⁹⁶ By unilaterally converting subpoenas into FOIA requests, which pro-

192. The only penal sanction available under the FOIA is relatively weak and virtually irrelevant to the issue under consideration in this Note. If a court determines that an agency improperly refused to disclose information pursuant to a FOIA request, the statute directs the special counsel to "promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding." 5 U.S.C. § 552(a)(4)(F)(i) (Supp. I 2007). This sanction, in addition to being weak, comes after the decision not to disclose requested information. Therefore, it does not provide a realistic means by which a litigant can compel an agency employee to disclose subpoenaed information.

193. *See supra* note 117 and accompanying text.

194. *See supra* note 179 and accompanying text. Courts evaluate qualified privileges all the time. These qualified privileges include the reporter's privilege, *see* ROTHSTEIN & CRUMP, *supra* note 61, § 8:6, the informer's privilege, *see id.* § 7:8, and the trade secrets and confidential commercial information privilege, *see id.* § 9:3. The oft-claimed attorney-work-product doctrine is also qualified in nature. *See id.* § 11:8. Thus, balancing a litigant's need for information against the need for confidentiality is a familiar task for courts.

195. *See* 5 U.S.C. § 301 (2006).

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

vides agencies with access to a litany of exemptions that are significantly broader than common law privileges, the conversion regulations arguably violate the clear text of the Housekeeping Statute. Although it is true that, by invoking the FOIA, agencies are relying on another act of Congress, Congress did not intend for the FOIA to apply to discovery proceedings. Not only do the text and structure of the FOIA seem to preclude its application to discovery proceedings,¹⁹⁷ the FOIA and judicial discovery also serve entirely different goals. The FOIA's purpose is to open the government's activities "to the sharp eye of public scrutiny,"¹⁹⁸ whereas the purpose of discovery is to provide courts with the concrete information they require to resolve cases and controversies.¹⁹⁹ Given these divergent purposes, it would be odd indeed to conclude that Congress intended to permit agencies to displace judicial discovery proceedings with the FOIA.

Finally, and somewhat more esoterically, the conversion regulations impose a type of dignitary harm on the Judiciary by failing to accord the Judiciary the respect that it deserves as a coequal branch of government. This dignitary harm occurs the moment an agency converts a subpoena into a FOIA request. Unilaterally recasting a subpoena as nothing more than a general request for information from a member of the public is especially problematic given the deference that courts typically afford agencies in other areas. Most notably, under *Chevron*, courts defer to an agency's reasonable interpretation of an ambiguous statute.²⁰⁰ Courts even defer to many agency claims of privilege, especially those concerning national security and state secrets.²⁰¹ With all of this deference running from courts to agencies, the subpoena-to-FOIA conversion regulations look more and more like a slap in the face. The conversion regulations are the exact opposite of deference. Instead of treating subpoenas as the commands of a coequal branch, the conversion regulations reduce them to the same status as a request for records from someone like Barbara Schwarz, who submits thousands of FOIA requests every year seeking evidence proving that she was born on a secret submarine base in the Great Salt Lake, that the government subjected her to mind control, and that her husband is being falsely

197. As the court noted in *Verrazzano Trading Corp. v. United States*, 69 Cust. Ct. 307 (1972),

if the [FOIA] were intended to apply to judicial discovery proceedings there would be no need for the provisions of [5 U.S.C. § 552(a)(4)(B)] which gives any person who has been denied information after a request the right to file a complaint in the appropriate United States district court to compel the production of records.

Id. at 308–09.

198. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989).

199. See *Verrazzano Trading Corp.*, 69 Cust. Ct. at 308 ("[T]he Freedom of Information Act was enacted to provide the public with the right to obtain information from administrative agencies and agencies in the executive branch of the government; it was not enacted to provide discovery procedures for obtaining information during litigation.").

200. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

201. See *supra* note 117 and accompanying text.

imprisoned, convicted of her own murder.²⁰² Therefore, aside from the concrete harm they cause litigants, the conversion regulations also impose a type of dignitary harm by failing to treat the Judiciary's commands with the respect that a coordinate branch of government deserves.

IV. JUDICIAL RESPONSES

When an agency insists on converting a duly issued subpoena into a FOIA request, Article III courts need not, and should not, acquiesce. Although many do not act like it, courts possess the tools to monitor agency compliance and refuse to allow an agency to substantively treat a subpoena as a FOIA request, even if the agency processes the subpoena according to its own internal FOIA procedures.

Because the subpoena-to-FOIA conversion regulations are likely to frustrate the Judiciary's right to every man's evidence, thereby harming individual litigants and interfering with the federal courts' core constitutional role, one would think that courts would fight back. No self-respecting federal judge would stand idly by while a federal agency unilaterally transformed a subpoena—a court's most potent tool for gathering information—into a mere FOIA request, would he? Unfortunately for many litigants, the answer is often yes. Although some courts actively resist the conversion regulations and give subpoenas their full effect, other courts have taken a far weaker stance, to the detriment of the litigants appearing before them.

The Fourth Circuit, for example, has paid too much deference to an agency's assertion of FOIA exemptions to resist a subpoena.²⁰³ In *Moore-McCormack Lines*, the plaintiff subpoenaed an accident report from the Department of Labor.²⁰⁴ The agency produced the document but redacted the "conclusions" section pursuant to FOIA exemption five.²⁰⁵ The district court ratified the agency's reliance on the FOIA exemption.²⁰⁶ Although the Fourth Circuit reversed, it did so because it determined that the claimed FOIA exemption did not authorize the redaction.²⁰⁷ The court also dismissed the agency's claim of privilege as an afterthought, concluding that information that is not exempt under the FOIA cannot be privileged.²⁰⁸ Therefore, the court viewed the agency's claim of privilege as merely a "restatement of its claim for exemption" under the FOIA.²⁰⁹ Although the court reached the correct result, its reasoning was entirely backwards. The plaintiff served the agency with a subpoena, not a

202. See Christopher Smith, *S.L. Woman's Quest Strains Public Records System*, SALT LAKE TRIB., May 11, 2003, http://www.cs.cmu.edu/~dst/Secrets/barbara_schwarz.html.

203. See *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Balt.*, 508 F.2d 945 (4th Cir. 1974).

204. *Id.* at 946–47.

205. *Id.* at 947; see also 5 U.S.C. § 552(b)(5) (2006).

206. See *Moore-McCormack Lines*, 508 F.2d at 947.

207. *Id.* at 948–50.

208. *Id.* at 949–50.

209. *Id.* at 950.

FOIA request. The court should have deemed the agency's assertion of a FOIA exemption as a claim of privilege, not the other way around. The court's backwards reasoning did not affect the result in the particular case before it because the subpoenaed information was not exempt under FOIA and therefore could not be privileged.²¹⁰ But this reasoning would have a real impact if a party subpoenaed information that was covered by a FOIA exemption but not privileged.²¹¹

In addition to the Fourth Circuit, the United States District Court for the District of Columbia has also exhibited excessive solicitude to agency conversion regulations in two cases. These cases should raise particularly large red flags for litigants because most federal agencies have their headquarters in Washington, D.C., and that is where many of the motions to compel subpoenas issued to those agencies will be brought. The first case, *Cofield v. City of LaGrange, Georgia*, involved a third-party subpoena seeking records in the Department of Justice's files concerning the City of LaGrange's compliance with Section Five of the Voting Rights Act.²¹² The Department produced some records from the file but withheld others, relying on several FOIA exemptions.²¹³ The pertinent agency regulation provided that materials in the Section Five files "that are exempt from inspection under the [FOIA] may be withheld at the discretion of the Attorney General."²¹⁴ Noting that the regulation "incorporates the exemptions of the [FOIA],"²¹⁵ the court proceeded to evaluate the department's claims that the deliberative process exemption, personal privacy exemption, and law enforcement exemption authorized the department to withhold the subpoenaed documents.²¹⁶ The court found that the FOIA exemptions protected most of the documents in the file and granted the department's motion to quash the subpoena as to those documents.²¹⁷

The court in *Cofield* bought into the department's conversion regulation hook, line, and sinker. By analyzing whether particular FOIA exemptions authorized withholding subpoenaed records, the court effectively limited the

210. *See id.* at 949.

211. In the district court proceedings in *Califano*, for example, the district judge accepted the agency's reliance on FOIA exemptions to withhold subpoenaed information. *Ass'n for Women in Sci. v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977). The district judge found the FOIA exemptions to apply and shielded the information from disclosure on that basis alone, without assessing whether the subpoenaed information would also be privileged. *See id.* Although the D.C. Circuit employed proper reasoning in affirming the district judge's order, evaluating the agency's assertion of FOIA exemptions as claims of privilege, *id.* at 347–48, this episode demonstrates that federal judges are far from uniform in adopting a strong response to agency conversion of subpoenas into FOIA requests.

212. 913 F. Supp. 608, 612–13 (D.D.C. 1996). Agency regulations required the Department of Justice to maintain a "Section 5 file" for each jurisdiction covered by the Voting Rights Act. *See id.*; *see also* 28 C.F.R. § 51.50(a) (2010).

213. *Cofield*, 913 F. Supp. at 612–13 & n.4.

214. 28 C.F.R. § 51.50(d) (2010).

215. *Cofield*, 913 F. Supp. at 615.

216. *See id.* at 615–20.

217. *Id.* at 620–21.

scope of information that the party issuing the subpoena could discover. Notably, nowhere in its analysis did the court consider whether the litigant's need for the records could overcome the FOIA exemptions, as the court presumably would have had it evaluated the department's reliance on FOIA exemptions as claims of common law privilege. In essence, the *Cofield* court aided and abetted the agency's effort to water down the subpoena—the court's most important information-gathering tool.

Similarly, in *SEC v. Biopure Corp.*, the court considered a motion to compel a subpoena issued to the FDA.²¹⁸ Although the court denied the motion primarily for reasons that are not relevant to this Note,²¹⁹ it concluded its order by chastising the litigant for failing to comply with the FDA's *Touhy* regulations by serving the agency with a subpoena instead of a formal FOIA request.²²⁰ The court even cited approvingly the FDA's contention that “[e]ven if [the] subpoenas could be construed as a valid request for FDA documents, . . . it will be approximately three years before FDA will be able to begin its search for responsive documents.”²²¹ This extraordinary solicitude for the FDA's conversion regulations should make any litigant nervous. Shockingly, the court said that the FDA does not even have to *acknowledge* a subpoena because its *Touhy* regulations require litigants to file a FOIA request instead.²²² In other words, the court's opinion would have required the litigant to substantively convert his own subpoena into a FOIA request, eliminating any possibility that the court could enforce the subpoena as a subpoena down the road.

The courts in *Moore-McCormack Lines*, *Cofield*, and *Biopure* got it wrong. A litigant appearing before these courts—or any court that employs similar reasoning—would be at a significant disadvantage in trying to subpoena information from an agency with conversion regulations. Thankfully, there is another way. Federal courts can resist conversion regulations and enforce subpoenas against federal agencies while still honoring agencies' authority under the Housekeeping Statute and the *Touhy* decision to enact regulations governing their responses to subpoenas. Courts should permit agencies to process subpoenas using their FOIA *procedures*, but should strenuously resist any attempt to *substantively* convert a subpoena into a FOIA request. For example, the Department of Transportation's *Touhy* regulations provide that third-party subpoenas “will ordinarily be handled in accordance with the Department's *procedures*

218. No. 05-00506 (RWR/AK), 2006 WL 2789002, at *1 (D.D.C. Jan. 20, 2006).

219. Judge Kay concluded that the FDA was not subject to the subpoena because it was not a “person” under Rule 45 of the Federal Rules of Civil Procedure. *Id.* at *4. The D.C. Circuit overruled this position in another case just a few months later, holding that federal agencies are subject to subpoenas issued pursuant to Rule 45. *See Yousuf v. Samantar*, 431 F.3d 248, 250 (D.C. Cir. 2006).

220. *See Biopure*, 2006 WL 2789002, at *4.

221. *Id.* (first alteration in original) (quoting Motion to Quash Subpoenas Duces Tecum and Opposition to Motion to Compel 7).

222. *See id.*

concerning requests for records [under the FOIA].”²²³ Most agencies have extensive procedures and dedicated staff in place for processing FOIA requests.²²⁴ For the sake of administrative convenience, an agency might choose to funnel subpoenas through its existing FOIA framework. Nothing in this Note’s analysis prevents an agency from making this choice. But an agency crosses the line when it *substantively* converts a subpoena into a FOIA request, invoking specific FOIA exemptions as grounds for nondisclosure and placing the subpoena at the back of the FOIA line. This is exactly what the USDA’s *Touhy* regulations seek to accomplish by requiring that subpoenas “shall be deemed to be” FOIA requests.²²⁵ When an agency substantively converts a subpoena into a FOIA request, courts should not acquiesce. Courts should continue to treat the subpoena as a subpoena.

How do courts do this? How do courts allow agencies to respond to subpoenas using their internal FOIA procedures but actively resist any substantive conversion of subpoenas into FOIA requests? There are two steps. Step one: allow the agency a reasonable amount of time to process the subpoena, but do not allow the agency to delay for too long. Step two: if the agency claims that FOIA exemptions allow it to withhold subpoenaed records, deem the reliance on the exemption as a claim of common law privilege and evaluate it as such.

Just like any party that receives a subpoena, an agency with conversion regulations should receive a reasonable amount of time to comply. If the agency chooses to use that time to run the subpoena through its internal FOIA mechanisms, the agency is free to make that choice. But courts should not permit the agency to delay for too long. A subpoena is not a run-of-the-mill FOIA request, and courts should not readily tolerate the extreme delays in response time that seem to plague most FOIA requests.²²⁶ Courts can monitor the agency’s response time with their existing authority under the Federal Rules of Civil Procedure to quash or modify subpoenas that do not allow reasonable time for compliance.²²⁷ This is exactly what the district court did in *SEC v. Selden*.²²⁸ In *Selden*, a criminal defendant served two subpoenas on the FDA seeking documents that were critical to his defense.²²⁹ After the defendant filed a motion to compel, the court directed the FDA to comply with Selden’s subpoena but noted that, under its *Touhy* regulations, the agency would treat the subpoena as a FOIA request.²³⁰ The court took steps to ensure that compliance with the subpoena would be reasonably timely. The court reminded the FDA that Selden

223. 49 C.F.R. § 9.13(a) (2010) (emphasis added).

224. See generally JAMES T. O’REILLY, 1 FEDERAL INFORMATION DISCLOSURE ch. 7 (3d ed. 2000) (detailing the general FOIA procedures within the agencies and suggesting strategies for successful FOIA requests).

225. 7 C.F.R. § 1.215(a) (2010) (emphasis added).

226. See *supra* section II.B.

227. See FED. R. CIV. P. 45(c)(3)(A).

228. 445 F. Supp. 2d 11 (D.D.C. 2006).

229. See *id.* at 12.

230. See *id.* at 14 & n.7.

sought the documents to prepare a defense to a pending SEC enforcement action and, therefore, admonished the agency to “engage Selden’s request, and formulate a response, with dispatch (rather than place Selden’s subpoena request at the back of the FOIA que [sic]).”²³¹ The court further directed the FDA to provide a status report on its processing of the subpoena.²³² *Selden* shows that courts can honor an agency’s decision to handle subpoenas pursuant to its FOIA procedures while, at the same time, utilizing their authority under the Federal Rules of Civil Procedure to ensure that compliance is reasonably prompt.

When the agency responds to the subpoena, courts should refuse to credit agency claims that particular FOIA exemptions authorize the withholding of subpoenaed records. When an agency substantively treats a subpoena as a FOIA request and asserts FOIA exemptions, courts should simply interpret reliance on the exemptions as claims of privilege and evaluate them as such. This was the approach that the D.C. Circuit took in *Association for Women in Science v. Califano*.²³³ In *Califano*, the Department of Health, Education and Welfare refused to produce certain subpoenaed records, relying on FOIA exemptions.²³⁴ The D.C. Circuit took the agency to task, emphasizing that the plaintiff sought the requested records “through the discovery process and not through [a] FOIA request.”²³⁵ Therefore, the Court read the agency’s assertion of the FOIA exemptions as a “claim of privilege,” which it found to be “clearly inapposite” because “[t]he FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.”²³⁶ The D.C. Circuit’s approach is the correct one. Treating agency assertions of FOIA exemptions as claims of common law privilege will enable the court to properly evaluate the agency’s privilege claims, including by taking the litigant’s need for the information into account.

With this solution, courts can effectively balance a litigant’s need for information against an agency’s interest in utilizing its internal FOIA mechanisms to process subpoenas. But this solution is not a silver bullet; it will still generate friction. A litigant serves an agency with a subpoena. The agency unilaterally converts the subpoena into a FOIA request and processes it as such. The court monitors the agency’s compliance with the now-FOIA request as if it were a subpoena and interprets the agency’s invocation of FOIA exemptions as claims of common law privileges. This hassle seems entirely unnecessary. Many other agencies have *Touhy* regulations that still treat subpoenas as subpoenas but simply centralize the determination of whether the agency will comply or assert a privilege in a designated official or department. At the end of the day, agencies with conversion regulations will arrive at the same result if they face courts that

231. *Id.* at 14 n.7.

232. *Id.*

233. 566 F.2d 339 (D.C. Cir. 1977).

234. *Id.* at 341–42.

235. *Id.* at 342.

236. *Id.*

appropriately assert their authority and refuse to acquiesce in the face of unilateral conversion. It would be far simpler for the agencies with conversion regulations to abandon them in favor of the more traditional variety of *Touhy* regulations. Doing so would more appropriately accord with congressional will, afford the Judiciary the respect that its commands deserve, and eliminate unnecessary constitutional friction. Until the agencies with subpoena-to-FOIA conversion regulations choose to abandon them, however, the best course is for courts to permit agencies to process subpoenas using their FOIA procedures but resist any attempts to substantively convert subpoenas into FOIA requests. Although some courts have already caught on to this solution, many have not. These courts still pay too much deference to the conversion regulations, to the detriment of the litigants who appear before them.

CONCLUSION

Federal agencies are immensely important to a great deal of modern litigation. Agencies often possess information in their files that is critical to the resolution of cases and controversies. But obtaining this information is not always easy. Most agencies have adopted *Touhy* regulations governing their responses to subpoenas from federal courts. The *Touhy* regulations that are likely to cause litigants the most difficulty are those that unilaterally convert subpoenas into FOIA requests. The FDA, the USDA, and other important agencies have adopted *Touhy* regulations of this sort.²³⁷

In this Note, I have explained why the subpoena-to-FOIA conversion regulations are problematic. They provide agencies with broader grounds to resist producing documents, thereby prejudicing litigants and interfering with the Judiciary's core constitutional role. I have also recommended the most appropriate way for courts to respond. Courts should allow agencies with conversion regulations to process subpoenas using their internal FOIA procedures but should strenuously resist any attempt to substantively convert subpoenas into FOIA requests. But this response is not a total panacea. Although it will likely mitigate much of the concrete informational harm to litigants, the conversion regulations still cause even deeper harm to the constitutional separation of powers. Even if the conversion regulations are simply the means by which an agency internally processes subpoenas, the regulations still fail to provide the Judiciary's commands with the respect due to a coequal branch of government. Although agencies are, and undoubtedly should be, free to adopt procedural regulations governing their responses to subpoenas, the subpoena-to-FOIA conversion regulations simply take *Touhy* too far.

237. See *supra* notes 18–21 and accompanying text.