NOTES

CLOSING THE *TOUHY* GAP: THE APA, THE FRCP, AND NONPARTY DISCOVERY AGAINST FEDERAL ADMINISTRATIVE AGENCIES

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In the 1951 case United States ex rel. Touhy v. Ragen, *the Supreme Court determined that courts can't hold federal agency officials in contempt for refusing to comply with nonparty subpoenas if they do so pursuant to valid agency regulations. Though the Court suggested that litigants could still challenge these noncompliance decisions, it didn't flesh out what that process would look like. Following* Touhy, *federal courts have split. When it comes to civil, federal court litigation, a plurality of circuits evaluate agencies' noncompliance decisions under the Administrative Procedure Act (APA), while a minority of circuits do so under the Federal Rules of Civil Procedure (FRCP).*

This Note serves two primary purposes. First, it estimates the effect of the APA–FRCP split on nonparty discovery outcomes. Using a logistic regression analysis, it finds that a litigant proceeding under the FRCP can expect about a twenty-six percentage-point greater chance of obtaining discovery compared to a similarly situated litigant proceeding under the APA. Second, it proposes ways to mitigate the breadth and potency of the split. Courts can limit the number of contexts where the circuit split comes into play by applying traditional tools of interpretation to the statute giving agencies authority over their employees' subpoena responses. And plurality-approach courts can close the discovery-outcome gap (where the split remains) by ensuring their analyses import into the Touhy *context the APA's administrative law safeguards, not just its deferential arbitrary and capricious standard.*

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INTRODUCTION

An estimated 2.68 million civilians work for federal administrative agencies.[1] Their work spreads across more than one hundred agencies, each with its own area of expertise.[2] As then-Professor Felix Frankfurter remarked in 1927 and is even more so the case today, the subject-matter expertise of administrative agencies runs "the whole gamut of human affairs."[3] It's no wonder then that parties involved in lawsuits often turn to agencies for information to help build a case or mount a defense,[4] even when the federal government isn't a party to the underlying litigation.[5]

Take, for example, a recent lawsuit against the sheriff's office of a small county in North Carolina.[6] Larry Lamb, having spent two decades in prison for a crime he did not commit, alleged that the Duplin County Sheriff's Office deprived him of his constitutional rights by coaching a witness to fabricate her testimony and failing to disclose that the witness had a long and less-than-truthful history as a criminal informant for both state and federal law enforcement.[7] To prove his claim, Lamb served a subpoena on the FBI requesting documents related to the Bureau's work

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1. Jennifer L. Selin & David E. Lewis, Admin. Conf. of the U.S., Sourcebook of United States Executive Agencies 10 (2d ed. 2018), https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf [https://perma.cc/R2Z7-7PF5].

2. Id. at 12. This estimate uses the categorization of the Freedom of Information Act's (FOIA) website. See FOIA, https://www.foia.gov/#agency-search [https://perma.cc/8J6Z-GVKB] (last visited Oct. 7, 2019). The statutory definition of "agency" in the Administrative Procedure Act (APA), however, is ambiguous. See 5 U.S.C. § 551(1) (2018); Selin & Lewis, supra note 1, at 12. Therefore, estimates of the number of federal agencies vary from one source to another. See Selin & Lewis, supra note 1, at 12.

3. Felix Frankfurter, The Task of Administrative Law, 75 U. Pa. L. Rev. 614, 614 (1927).

4. See, e.g., CF Indus., Inc. v. Dep't of Just. Bureau of Alcohol, Tobacco, Firearms & Explosives, 692 F. App'x 177, 178–79 (5th Cir. 2017) (describing a defendant-corporation's attempt to retrieve DOJ records to show that a criminal actor—and not the corporation—caused a factory explosion that killed fifteen people and was the subject of a wrongful death suit); Plaintiffs' Original Complaint for Judicial Review Pursuant to the Administrative Procedure Act at 5, 7–9, Hasie v. Off. of the Comptroller of the Currency, No. 5:07-cv-208-C (ECF), 2008 WL 4549881 (N.D. Tex. May 9, 2008), 2007 WL 3311850, at *2–3 (seeking suspicious-activity reports from the Office of the Comptroller of the Currency to prove lack of probable cause in a malicious-prosecution suit).

5. See, e.g., Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) ("[T]he National Weather Service alone receives hundreds of requests a year from private litigants seeking to introduce evidence about weather patterns . . . ."); Alex v. Jasper Wyman & Son, 115 F.R.D. 156, 157 n.3 (D. Me. 1986) (noting that over 1,500 subpoenas are served annually on DOL employees); Joshua Jay Kanassatega, The Discovery Immunity Exception in Indian Country—Promoting American Indian Sovereignty by Fostering the Rule of Law, 31 Whittier L. Rev. 199, 228 (2009) ("Perhaps the largest non-party source of facts and information is the United States government.").

6. Lamb v. Wallace, No. 7:16-CV-44-FL, 2018 WL 847242 (E.D.N.C. Feb. 13, 2018).

7. Id. at *4–6.

with the witness.[8] The FBI, however, flatly rejected Lamb's subpoena, citing its own regulations for the authority to do so.[9]

Subpoenas—like the one Lamb served on the FBI—seeking deposition testimony, trial testimony, the production of nontestimonial evidence, or some combination of the three from parties not involved in an underlying action are called nonparty subpoenas.[10] Generally, the relevant rules of procedure govern whether a litigant can expect a response to a nonparty subpoena, with nonparty discovery tending to be a relatively straightforward and requester-friendly process.[11] But when the subpoena recipient is an agency (e.g., the DOJ) or a subcomponent thereof (e.g., the FBI), the process gets more complicated.

Before an agency official can comply with a nonparty subpoena, an agency head—or an official with delegated authority—must determine that the litigant satisfied the department's *Touhy* regulations.[12] These regulations, which are named for a midcentury Supreme Court case and differ slightly from agency to agency, govern whether an agency employee is authorized to submit to judicial process.[13]

Agencies get the authority to promulgate *Touhy* regulations from the Federal Housekeeping Statute, which reads: "The head of an Executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property."[14] The statute's next sentence lays out what, at first blush, might look like a broad caveat but, in reality, is a narrow clarification of agencies' authority: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[15] Under this statute, nearly every administrative agency has adopted *Touhy* regulations restricting to some degree its employees' ability to comply with work-related subpoenas.[16]

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8. Id. at *4.

9. Id.

10. See, e.g., Natasha Breaux, Comment, Analysis of the Proposed Amendments to Federal Rule of Civil Procedure 45 Pertaining to Nonparty Subpoenas for Documents, 50 Hous. L. Rev. 191, 192–94 (2012).

11. See, e.g., Fed. R. Civ. P. 45(d)(3)(A) (permitting federal courts to quash subpoenas only if they are procedurally defective, exceed a court's territorial jurisdiction, would create an "undue burden," or would require the disclosure of privileged material); Cal. Civ. Proc. Code § 1987.1(a) (2020) (permitting California state courts to quash or modify subpoenas if they make "unreasonable or oppressive demands").

12. These regulations are named after the Supreme Court case, United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), which section I.A.3 details below.

13. See COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 272 n.3 (4th Cir. 1999).

14. 5 U.S.C. § 301 (2018).

15. Id.; see also infra section I.A.4 (discussing the addition of this sentence to the Housekeeping Statute).

16. See, e.g., 6 C.F.R. §§ 5.41–5.49 (2020) (DHS); 10 C.F.R. §§ 202.21–202.26 (2020) (Department of Energy); 15 C.F.R. §§ 15.11–15.18 (2020) (Department of Commerce); 21 C.F.R. §§ 20.1–20.3 (2020) (FDA); 28 C.F.R. §§ 16.21–16.29 (2019) (DOJ); 32 C.F.R.

Touhy regulations fall into two broad categories. Regulations in the first category are *procedural*. For example, a party may need to submit, in addition to a subpoena, a letter providing a "summary of the information sought and its relevance to the proceeding."[17] For the most part these procedural regulations are easy enough to comply with,[18] though they do pose obstacles for unwary litigants, especially those proceeding pro se.[19]

Regulations in the second category are *substantive*. These regulations, which are the focus of this Note, tend to be extremely difficult to satisfy.[20] For example, a party may need to show that an agency's compliance with a subpoena serves the "public interest" even when considered against the government's need "to avoid spending . . . time and money . . . for private purposes" and the risk that compliance would undermine the agency's "performance . . . of its mission and duties."[21] No easy task.

If an agency determines a litigant failed to satisfy its *Touhy* regulations, the litigant can challenge the agency's decision in court. But what happens next is the subject of a circuit split that's now over twenty-five-years old.[22] A plurality of circuits require a litigant to challenge the agency's subpoena noncompliance under the Administrative Procedure Act (APA). The litigant bears the burden of showing, with reference to the agency's own regulations, that the agency's action was arbitrary and capricious.[23] A minority of circuits, however, permit a litigant to proceed as if the government was any run-of-the-mill nonparty. The Federal Rules of Civil Procedure (FRCP) govern, and the agency bears the burden of showing

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§§ 97.1–97.6 (2019) (DOD); 38 C.F.R. §§ 14.800–14.810 (2019) (VA); 40 C.F.R. §§ 2.401–2.406 (2019) (EPA).

17. 28 C.F.R. § 16.22(d).

18. See Juan G. Villaseñor, How to Properly Seek Testimony or Documents from a Federal Agency, Colo. Law., Aug. 2016, at 37, 40–41 ("The potential roadblocks that a party may encounter by subpoenaing a federal agency or employee without complying with the agency's *Touhy* regulations are avoidable."); see also Gregory C. Sisk, A Primer on Civil Discovery Against the Federal Government, Fed. Law., June 2005, at 28, 33 (arguing that "being forewarned is to be forearmed" in the *Touhy* context and litigants should "be able to respond appropriately" to agencies' procedural requirements).

19. Santini v. Herman, 456 F. Supp. 2d 69, 72 (D.D.C. 2006) ("Although [Plaintiff] is representing herself and is entitled to some leeway as a *pro se* litigant . . . she must follow the procedures of the DOJ's *Touhy* regulations . . . ."); Meisel v. Fed. Bureau of Investigation, 204 F. Supp. 2d 684, 689–91 (S.D.N.Y. 2002) (dismissing a case for lack of jurisdiction because the litigant did not attach a satisfactory "Statement of Scope and Relevance" to his subpoena as required by the FBI's *Touhy* regulations).

20. See infra section II.B (describing the unlikelihood of obtaining discovery under a standard employed by a plurality of circuits that gives great weight to agencies' *Touhy* regulations).

21. 6 C.F.R. § 5.48(a)(3), (5), (7).

22. See infra section I.B; see also Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778–80 (9th Cir. 1994) (creating the circuit split by holding that discovery disputes against nonparty agencies should be evaluated under the FRCP).

23. See infra section I.B.1.

that compliance would be unduly burdensome or require the disclosure of privileged material.[24]

This circuit split has produced a large body of literature, with the bulk of it advocating for a particular resolution of the split.[25] Two untested assumptions characterize much of the subject's literature. The first is that litigants proceeding under the FRCP prevail at a significantly greater rate than litigants proceeding under the APA.[26] The second is that the circuit split will be readily resolved by either an outside actor (i.e., Congress or the Supreme Court) stepping in or a lower-court-generated consensus trending toward application of the FRCP.[27]

This Note tests these two assumptions. While the first withstands scrutiny, the second does not. Based on a logistic regression analysis, a litigant proceeding under the FRCP can expect a roughly twenty-six percentage-point greater chance of obtaining discovery against a nonparty federal agency compared to a similarly situated litigant proceeding under the APA.[28] But neither Congress nor the Supreme Court has shown much interest in resolving the APA–FRCP split; and the suggested trend toward employing the FRCP enjoys little support in reality.[29]

Given these two findings, it's time to face an odd state of affairs as the circuit split inches toward three decades of existence: The circuit split significantly undermines federal court uniformity, but its resolution doesn't appear to be on the horizon. As a result, courts employing the plurality, APA-based approach need to take care that litigants in their jurisdictions are not disadvantaged compared to litigants in courts employing the minority, FRCP-based approach. Fortunately, this Note argues, plurality-approach courts can do just that while avoiding major departures from their precedent. Plurality-approach courts can mitigate the unfairness otherwise created by the *Touhy*-derived circuit split by vigilantly applying traditional tools of statutory interpretation to the Federal Housekeeping Statute and ensuring that their approach imports into the *Touhy* context the APA's administrative law safeguards, not just its deferential arbitrary and capricious standard.

This Note proceeds in three Parts. Part I provides an overview of the *Touhy* doctrine, describing its historical development, its foundational cases, and the circuit split over its reach in the federal-civil context. Part II serves two purposes. First, it tests the two above-described assumptions (differing success rates and imminent resolution), finding support for the former but not the latter. Second, it explains how these two findings place federal courts in the middle of two key commitments: federal court

24. See infra section I.B.2.

25. See infra note 126 and accompanying text.

26. See infra note 127 and accompanying text.

27. See infra notes 128–129 and accompanying text.

28. See infra section II.B.

29. See infra section II.C.

uniformity and adherence to precedent. Part III then offers ways of mitigating this tension by limiting the scope of intercircuit disagreement and making APA review of *Touhy* decisions rigorous enough to narrow the APA–FRCP gap in discovery success rates.

I. THE *TOUHY*-DERIVED CIRCUIT SPLIT IN THE FEDERAL-CIVIL CONTEXT

This Part overviews the development of the *Touhy* doctrine and describes the current state of the nearly three-decades-old circuit split concerning *Touhy*'s reach in the federal-civil context. Section I.A describes the Housekeeping Statute's precursors, codification, early judicial treatment, and 1958 amendment. Section I.B then describes the two camps in the split over the proper standard of review to apply when a nonparty agency declines to comply with a federal court–issued subpoena.

A. *Historical Development*

1. *The Federal Housekeeping Statute's Precursors.* — A federal agency can't act unless Congress has delegated it the authority to do so.[30] Therefore, the development of the *Touhy* doctrine necessarily begins with the Federal Housekeeping Statute,[31] which now reads: "The head of an Executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."[32]

The roots of the Housekeeping Statute trace back to just after the Founding.[33] In 1789, the First Congress passed an act establishing the U.S. Department of Foreign Affairs (now the Department of State).[34] The second section of that Act provided: "And be it further enacted, [t]hat there shall be . . . [a] Chief Clerk . . . who . . . shall . . . have the charge and custody of all records, books and papers appertaining to the said

30. See City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 297–98 (2013) ("Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress . . . . [The question] is always whether [an] agency has gone beyond what Congress has permitted it to do . . . .").

31. See, e.g., 28 C.F.R. §§ 16.21–16.29 (2019) (referencing the Housekeeping Statute as the basis for the DOJ's *Touhy* regulations). Note, however, that some agencies—particularly those created after the Housekeeping Statute's codification—may have backup sources of statutory authority for their *Touhy* regulations. See 6 C.F.R. §§ 5.41–5.49 (2019) (citing Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.)); see also H.R. Rep. No. 85-1461, at 2 (1958) (noting that, in response to a congressional survey, eight agencies claimed they had authority beyond the Housekeeping Statute to promulgate housekeeping-type regulations).

32. 5 U.S.C. § 301 (2018).

33. See Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979).

34. Act of July 27, 1789, ch. 4, 1 Stat. 28.

department."[35] Similar provisions shortly appeared in acts establishing the Departments of War (now Defense),[36] Treasury,[37] and Navy.[38]

Unlike other legislation[39] (or even other aspects of these very same provisions[40]) that produced heated debate among the First Congress's nearly twenty attendees of the Constitutional Convention, the record-keeping aspect of these statutes elicited no controversy. The legislative histories of these statutes establishing the country's first administrative agencies are "barren of evidence from which can be determined the intent of Congress" in enacting the housekeeping provisions.[41] There was likely "no historymaking debate" because the provisions were not "historymaking proposal[s]."[42] They simply dealt with the "day-to-day business of Government," helping to get a nascent federal government up and running.[43] And as expected, the provisions enjoyed nearly "one hundred years of quiet existence" during which they did nothing more than structure internal agency procedure.[44]

2. Codification and Executive Branch Interpretation. — In 1874 the above provisions, previously spread across agencies' organic acts, were codified into Section 161 of the Revised Statutes[45] (the precursor to the U.S. Code[46]). The first known use of the Housekeeping Statute to deny a

35. Id. § 2.

36. Act of Aug. 7, 1789, ch. 7, § 4, 1 Stat. 49, 50.

37. Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67.

38. Act of Apr. 30, 1798, ch. 35, § 2, 1 Stat. 553, 554.

39. See, e.g., Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1515–17; Benjamin B. Klubes, The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation, 10 J. Early Republic 19, 19–41 (1990).

40. These provisions placing agencies' records in the custody of a Chief Clerk applied only after the President *removed* the relevant agency head. See, e.g., Act of July 27, 1789, § 2. But the provisions didn't impose criteria for when or under what circumstances the President could do so and were, instead, the kick-the-can products of a month-long, divided debate over presidential removal power. See John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1964 n.135, 2030–31 (2011). This congressional debate featured prominently in a major separation of powers decision handed down during the Supreme Court's 2019 Term. See Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197–98 (2020); id. at 2229–31 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

41. S. Rep. No. 85-1621, at 2 (1958).

42. H.R. Rep. No. 85-1461, at 2 (1958).

43. Id. at 1.

44. 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, 176 (1996); see also Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979) (noting the Housekeeping Statute's "long and relatively uncontroversial history").

45. *Chrysler Corp.*, 441 U.S. at 309; H.R. Rep. No. 85-1461, at 1.

46. Andrew Winston, The Revised Statutes of the United States: Predecessor to the U.S. Code, Libr. of Cong.: In Custodia Legis (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code [https://perma.cc/6QTL-862K].

request for government information came just three years later in 1877.[47] A reporter in California was investigating the "spoils system" of the Hayes Administration and attempted to acquire "files of recommendations for Federal jobs."[48] The DOJ advised President Hayes, however, that the President need not grant the reporter's request thanks to the authority granted by the Housekeeping Statute.[49]

3. *Early Judicial Treatment.* — A challenge to the Housekeeping Statute reached the Supreme Court about a quarter century later in *Boske v. Comingore*.[50] In a tax-enforcement action brought in state court against a distillery, the Kentucky state government subpoenaed David Comingore, a nonparty to the action and an employee of the U.S. Department of the Treasury.[51] The subpoena requested that Comingore produce tax-related reports he had prepared on the distillery.[52] Comingore refused, citing Treasury regulations promulgated under the Housekeeping Statute that subjected him to a fine of up to one thousand dollars if he "divulge[d] to any party" information about a business he oversaw.[53] The state court held Comingore in contempt and placed him in county jail, with his release conditioned upon the production of the requested reports.[54]

In an opinion by Justice Harlan that reads like an algebra-homework proof, the Supreme Court granted Comingore habeas relief.[55] The Court began with a condition: "If these regulations were such as the Secretary could legally prescribe, then, it must be conceded, the state authorities were without jurisdiction to compel [Comingore] to violate them."[56] It then determined step by step that this opening condition was satisfied. First, citing *McCulloch v. Maryland*,[57] the Court found that the Federal Housekeeping Statute was a valid exercise of Congress's power under the Necessary and Proper Clause.[58] Second, it determined that the Secretary of the Treasury, as an agency "head," was authorized to promulgate

47. H.R. Rep. No. 85-1461, at 1. See generally Ari Hoogenboom, Hayes and Civil Service Reform, *in* A Companion to the Reconstruction Presidents 1865–1881, at 431, 440 (Edward O. Frantz ed., 2014) (describing the breadth of the federal "spoils system" in the nineteenth century and President Hayes's attempts to "move[] with caution" to introduce reforms).

48. H.R. Rep. No. 85-1461, at 1.

49. Id. at 1–2.

50. 177 U.S. 459 (1900).

51. Id. at 462.

52. Id.

53. Id.

54. Id. at 463.

55. Id. at 460, 470.

56. Id. at 467.

57. 17 U.S. (4 Wheat.) 316, 424 (1819).

58. U.S. Const. art. I, § 8, cl. 18; *Boske*, 177 U.S. at 468–69.

regulations under the statute.[59] And third, pursuant to this authorization,[60] the Secretary could lawfully "take from a subordinate . . . all discretion as to permitting the records in his custody to be used . . . and reserve for his own determination all matters of that character."[61] Simply put: A state court can't hold a federal official in contempt for refusing to comply with a subpoena if the official acts pursuant to valid regulations.[62]

Just over a half century later, a case with a strikingly similar procedural posture made its way to the Supreme Court in *United States ex rel. Touhy v. Ragen*.[63] There was cause, however, to expect a different outcome (or, at least, different reasoning) given one distinguishing fact. George McSwain, an FBI agent, had disobeyed a *federal* court–issued subpoena.[64] Before 1951, you could reasonably read *Boske* as an opinion based on federal supremacy.[65] Yet *Touhy* proved to be *Boske* 2.0. The Court treated the presence of a federal court–issued subpoena as a distinction without a difference,[66] and reiterated that agencies can centralize subpoena-compliance authority.[67]

So, after *Touhy*, an agency official who acts pursuant to valid agency regulations is immune to courts' contempt powers *regardless* of whether a subpoena comes from a state or federal court.[68] But in extending *Boske* to federal court subpoenas, the Supreme Court left an important question unanswered: Once subpoena-compliance authority is centralized, "whether or on what conditions" can an agency actually refuse to permit its employees to comply with federal judicial process?[69]

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59. *Boske*, 177 U.S. at 467.

60. Id. at 469–70 ("There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law . . . ."). But cf. Guardians Ass'n v. Civ. Comm'n of N.Y., 463 U.S. 582, 614 n.2 (O'Connor, J., concurring) (questioning the continued validity of *Boske*'s treatment of agency rulemaking authority).

61. *Boske*, 177 U.S. at 470.

62. Id. at 467–70.

63. 340 U.S. 462, 463–66 (1951).

64. Id.

65. See U.S. Const. art. VI, cl. 2; supra note 56 and accompanying text; cf. Watts v. Sec. & Exch. Comm'n, 482 F.3d 501, 508 n.* (D.C. Cir. 2007) (Kavanaugh, J.) ("In general, state court subpoenas present entirely different issues []because of the Supremacy Clause and sovereign immunity[] . . . .").

66. *Touhy*, 340 U.S. at 469–70 ("This case is ruled by *Boske v. Comingore* . . . . We see no material distinction between that case and this.").

67. See id. at 468–70; supra note 61 and accompanying text.

68. See *Touhy*, 340 U.S. at 469–70; Boske v. Comingore, 177 U.S. 459, 467–70 (1900). But cf. Jonathan David Shaub, The Executive's Privilege, 70 Duke L.J. 1, 45 n.188 (2020) (stating that it's an open question how *Touhy* interacts with Congress's contempt powers).

69. *Touhy*, 340 U.S. at 469; see also id. at 470–73 (Frankfurter, J., concurring) ("Issues of far-reaching importance that the Government deemed to be involved in this case are now expressly left undecided . . . . In joining the Court's opinion, I assume . . . that the Attorney General can be reached by legal process.").

4. *Post-*Touhy *Misuse and the 1958 Amendment of the Housekeeping Statute*. — Further complicating the *Touhy* interpretive task for today's courts, the text of the Housekeeping Statute underwent a substantive change seven years after the Supreme Court's decision. In 1958, Congress amended the Housekeeping Statute to add a second sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[70] Scholarship shortly after this amendment thought its broad language would have wide-reaching effects, possibly bringing an end to the *Touhy* doctrine, full stop.[71]

Despite its arguable appearance, however, the 1958 amendment was a pinpoint response to a narrow problem that came to Congress's attention after *Touhy*: Courts and agencies were *citing* the Housekeeping Statute as a *substantive privilege* to withhold information.[72] The amendment's legislative history makes it clear that Congress harbored no greater ambition than correcting this misuse of the statute.[73] Congress did not intend to strip agencies of the ability to promulgate *Touhy* regulations centralizing subpoena-compliance decisions or overturn the *Comingore*–

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70. Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547 (codified at 5 U.S.C. § 301 (2018)).

71. See, e.g., Milton M. Carrow, Governmental Nondisclosure in Judicial Proceedings, 107 U. Pa. L. Rev. 166, 197 (1958) (arguing that another amendment to the statute is necessary to "preserve the rule of the *Boske* and *Touhy* cases"); Note, Discovery from the United States in Suits Between Private Litigants—The 1958 Amendment of the Federal Housekeeping Statute, 69 Yale L.J. 452, 459–60 (1960) ("A reamendment of [the Housekeeping Statute] should provide specifically that the housekeeping statute's grant of rulemaking power may be used by department heads to centralize in themselves authority to decide whether a subordinate will comply with a subpoena . . . .").

In recent decades some commentators have continued to argue that the 1958 amendment undercut *Touhy*'s viability. See Gregory S. Coleman, Note, *Touhy* and the Housekeeping Privilege: Dead but Not Buried?, 70 Tex. L. Rev. 685, 715 (1992); Richmond, supra note 44, at 183 & n.68.

72. S. Rep. No. 85-1621, at 3 (1958); H.R. Rep. No. 85-1461, at 2–5 (1958); 104 Cong. Rec. 15,891 (1958) (statement of Sen. Bible); 103 Cong. Rec. 7491 (1957) (statement of Sen. Hennings). In providing a historical account of the 1958 amendment, this section draws frequently on the amendment's legislative history. For perspectives on the use (or misuse) of legislative history in interpretive contexts, see generally Immigr. & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring in part and dissenting in part) ("Judges interpret laws rather than reconstruct legislators' intentions."); Robert A. Katzmann, Judging Statutes 11–22, 29–31, 102–03 (2014) ("Given my arguments that courts should respect Congress's work product, it will not surprise you that I find authoritative legislative history useful when I interpret statutes."); William N. Eskridge, The New Textualism, 37 UCLA L. Rev. 621, 636–40 (1990) (offering a hierarchy of legislative history sources).

73. H.R. Rep. No. 85-1461, at 2 (stating that the Housekeeping Statute had "been cited as authority" and "[t]he purpose of th[e] bill [was] to correct that situation"); 104 Cong. Rec. 6564 (statement of Rep. Moss) ("I hope that [this amendment] will require the departments of Government *merely to cite appropriate legal authority* for the withholdings." (emphasis added)).

Touhy defense to contempt.[74] Moreover, Congress did not wish to displace the many substantive privileges agencies *did* enjoy.[75]

The 1958 amendment shut the door on the existence of a substantive housekeeping privilege.[76] But its significance beyond this is the subject of continued debate.[77] Though some courts and commentators have looked to the amendment as expressing a particular congressional mood relevant to solving *Touhy*-related quandaries,[78] the amendment did not directly answer the questions left open by *Touhy*. Under what circumstances can agency heads legitimately refuse to permit their employees to testify or produce evidence in response to federal subpoenas? And with contempt off the table, what would a challenge look like procedurally?[79]

B. *The Circuit Split over* Touhy*'s Reach*

Following *Boske*, *Touhy*, and Congress's decisive but targeted 1958 amendment of the Housekeeping Statute, lower court disagreement over *Touhy* has abounded.[80] This section explores one part of that disagreement: the circuit split in the federal-civil context over whether the

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74. See S. Rep. No. 85-1621, at 9 (portraying the amendment as not calling into question the majority holding in *Touhy*); H.R. Rep. No. 85-1461, at 10 (noting that four out of five agencies that responded to a congressional survey question stated that they believed the then-proposed 1958 amendment would have no effect on the Supreme Court's rulings in *Touhy* and *Boske*).

75. S. Rep. No. 85-1621, at 6 ("In the opinion of the committee, the enactment of the pending bill will in no way affect, nor is it intended to affect, . . . an 'Executive Privilege' to withhold information . . . ."); H.R. Rep. No. 85-1461, at 10, 12 ("Witnesses and subcommittee members generally agreed that there are categories of information which should be withheld from the public."). See generally Sisk, supra note 18, at 31–33 (cataloging substantive privileges held by the government).

76. Gerald Wetlaufer, Justifying Secrecy: An Objection to the General Deliberative Privilege, 65 Ind. L.J. 845, 860–63, 869 (1990) (stating that the 1958 amendment "eliminated any broad privilege-in-effect that might have been approved by Justice Reed's decision in *Touhy*").

77. See Richmond, supra note 44, at 183–84 (noting that some scholars have read the 1958 amendment as a legislative override of *Touhy*, while others have "simply . . . ignored" it).

78. See, e.g., Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 777–78 (9th Cir. 1994) (determining that the legislative history of the 1958 amendment undermines the government's argument that a litigant must challenge a subpoena refusal under the APA); La. Dep't of Transp. & Dev. v. U.S. Dep't of Transp., No. 15-2638, 2015 WL 7313876, at *3–8 (W.D. La. Nov. 20, 2015) (using the 1958 amendment as an interpretive "backdrop" and concluding that agencies do not have the authority to promulgate *Touhy* regulations that reach former employees); cf. Universal Camera Corp. v. Nat'l Lab. Rels. Bd., 340 U.S. 474, 487 (1951) (noting, in a different context, that while Congress did not speak clearly, it "expressed a mood" when it enacted the APA and the Taft–Hartley Act).

79. See supra note 69 and accompanying text.

80. See Zoe Niesel, Terrible *Touhy*: Navigating Judicial Review of an Agency's Response to Third-Party Subpoenas, 41 Cardozo L. Rev. 1499, 1501 (2020); Christine Wong, Note, Derivative Prohibition: Defending Compulsory Process in State Prosecutions, 82 Geo. Wash. L. Rev. 247, 267 (2013).

APA or the FRCP dictate a federal official's amenability to judicial process. Section I.B.1 describes the plurality, APA-based view, and section I.B.2 describes the minority, FRCP-based view.

1. *The Plurality Approach: APA Primacy.* — The U.S. Courts of Appeals for the First,[81] Fourth,[82] Tenth,[83] and Eleventh[84] Circuits have held that an agency's decision, made pursuant to *Touhy* regulations, can be set aside only if a litigant can prevail under the APA. A litigant bears the burden of proving the agency's decision was arbitrary and capricious.[85] Additionally, the Eighth Circuit issued an opinion with dicta suggesting it would follow the plurality, APA-based approach if a case squarely presented the issue.[86]

For plurality-approach courts that have articulated a rationale, sovereign immunity sits front and center.[87] The U.S. government is

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81. Cabral v. U.S. Dep't of Just., 587 F.3d 13, 22–24 (1st Cir. 2009) ("To obtain information from a federal agency, a party 'must file a request pursuant to the agency's regulations, and may seek judicial review only under the APA.'" (quoting Puerto Rico v. United States, 490 F.3d 50, 61 n.6 (1st Cir. 2007) (holding that a Puerto Rican prosecutor must seek relief pursuant to the APA for the FBI's refusal to comply with a subpoena stemming from a criminal investigation))).

82. COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 277–78 (4th Cir. 1999) ("We apply the APA's deferential standard of review in full recognition of the fact that one of our sister circuits has decided otherwise."); cf. Boron Oil Co. v. Downie, 873 F.2d 67, 69–72 (4th Cir. 1989) (holding that sovereign immunity bars enforcing a subpoena against a federal official in the state-civil context).

83. Saunders v. Great W. Sugar Co., 396 F.2d 794, 795 (10th Cir. 1968) (vacating a motion to compel an agency official to comply with a subpoena stemming from federal litigation and stating that the litigant must file a separate action under the APA); see also U.S. Steel Corp. v. Mattingly, 663 F.2d 68, 68 (10th Cir. 1980) (vacating a district court's enforcement of a subpoena against an agency official and stating that *Saunders* controls); Armstrong v. Arcanum Grp., Inc., 250 F. Supp. 3d 802, 806 (D. Colo. 2017) (describing a district court opinion applying both standards as an "outlier" (citing Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1275 (D. Colo. 2011))); Villaseñor, supra note 18, at 39 (stating that the APA is the only way of challenging *Touhy* denials in the Tenth Circuit).

84. Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197 (11th Cir. 1991) ("HHS filed a motion to quash a subpoena of one of its employees . . . . [T]he district court could only overturn HHS's action if such action was 'arbitrary, capricious, an abuse of discretion, or otherwise not contrary to law [sic].'" (quoting 5 U.S.C. § 706(2)(A) (1988) (misquotation))).

85. 5 U.S.C. § 706(2)(A).

86. In a decision on the scope of Tribal sovereign immunity, the Eighth Circuit wrote: "Concluding that a third-party subpoena is a 'suit' triggering the federal government's sovereign immunity is significant, but it does not give the Executive Branch a 'blank check' to ignore third-party subpoenas because the agency response may be judicially reviewed under the Administrative Procedure Act." Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1104 (8th Cir. 2012) (citation omitted) (citing 5 U.S.C. § 702); see also Quiles v. Union Pac. R.R. Co., No. 8:16-cv-00330, 2018 WL 734172, at *2 & n.2 (D. Neb. Feb. 6, 2018) (mentioning the *Alltel* dicta but applying both standards), adopted by No. 8:16CV330, 2018 WL 2148979. But cf. United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1254–56 (8th Cir. 1998) (taking a narrow view of agency authority under the Housekeeping Statute in a different context).

87. See Cabral v. U.S. Dep't of Just., 587 F.3d 13, 22–23 (1st Cir. 2009) (expanding prior First Circuit sovereign-immunity-based precedent to the federal-civil context (quoting

"immune from suit save as it consents to be sued."[88] Even though an agency is a nonparty in a *Touhy* situation, plurality-approach courts consider the issuance of a subpoena to be a suit *against* the sovereign, since a subpoena "'interfere[s] with . . . public administration' and compels [a] federal agency to act in a manner different from that in which the agency would ordinarily choose."[89] And, plurality-approach courts conclude, the only relevant waiver of sovereign immunity comes in the APA.[90] That waiver, however, has "an important limitation": A *Touhy* denial can be set aside only if it's arbitrary and capricious.[91]

This is bad news for litigants seeking nonparty discovery against a federal agency. Review under the APA's arbitrary and capricious standard is "narrow"[92] and "deferential."[93] Review is a step removed, and a reviewing court is not to "substitute its judgment for that of the [agency]."[94] That said, the court must still take the agency's "contemporaneous explanation"[95] and ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[96] Within this framework, an agency action is arbitrary and capricious if the agency "[(1)] relied on factors which Congress has not intended . . . , [(2)] entirely failed to consider an important aspect of the problem, [(3)] offered an explanation . . . that runs counter to the evidence . . . , or [(4)] is so implausible that it could not be ascribed to a difference in view."[97] Finally, the court retains the ability, albeit only in "unusual circumstances,"

Puerto Rico v. United States, 490 F.3d 50, 61 & n.6 (1st Cir. 2007)) ("[T]he state court may not enforce the subpoena against the federal government due to federal sovereign immunity . . . .")); *COMSAT*, 190 F.3d at 277–78 ("[I]t is sovereign immunity, not housekeeping regulations, that gives rise to the Government's power to refuse compliance with a subpoena."). See generally Richard H. Fallon, Jr., John F. Manning, Daniel L. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 877–80 (7th ed. 2015) [hereinafter Hart & Wechsler] (overviewing sovereign immunity).

88. United States v. Mitchell, 445 U.S. 535, 538 (1980) (internal quotation marks omitted) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).

89. Boron Oil Co. v. Downie, 873 F.2d 67, 70–71 (4th Cir. 1989) (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

90. See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *COMSAT*, 190 F.3d at 277.

91. 5 U.S.C. § 706(2)(A); *COMSAT*, 190 F.3d at 277. See generally Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (describing arbitrary and capricious review as "a catchall, picking up administrative misconduct not covered by the other more specific [subsections]").

92. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

93. Dep't of Com. v. New York, 139 S. Ct. 2551, 2569 (2019).

94. Id. (citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

95. Id. at 2573–76.

96. *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

97. Id.

to probe behind the administrative record to ensure that an agency's offered explanation is "genuine," not "contrived" or "pretextual."[98]

2. *The Minority Approach: FRCP Primacy.* — The U.S. Courts of Appeals for the Ninth[99] and D.C.[100] Circuits, on the other hand, have held that a nonparty federal agency must justify a subpoena noncompliance decision under the FRCP (not its own *Touhy* regulations). An agency bears the burden of showing that subpoena compliance would be unduly burdensome or reveal privileged material.[101] Additionally, district courts within the Sixth Circuit have read a decision declaring a particular Federal Reserve *Touhy* regulation ultra vires[102] as strongly suggesting the Sixth Circuit would adopt the minority, FRCP-based approach if a case squarely presented the issue.[103]

Though the Ninth and D.C. Circuits reach the same result (an FRCP-forward approach), the two circuits take different paths to get there. In its leading case on the topic, the Ninth Circuit sidestepped the sovereign immunity bar identified by plurality-approach courts[104] with two alternate arguments.[105] First, engaging in constitutional avoidance,[106] the Ninth

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98. *Dep't of Com.*, 139 S. Ct. at 2573–76; see also infra section III.C.2.

99. Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 780 (9th Cir. 1994) ("[D]istrict courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action."); see also United States v. Acad. Mortg. Corp., 968 F.3d 996, 1006 (2020) (reaffirming *Exxon*).

100. Watts v. Sec. & Exch. Comm'n, 482 F.3d 501, 508–09, 508 n.* (D.C. Cir. 2007) (Kavanaugh, J.) ("Rule 45 also supplies the standards under which district courts assess agency objections to a subpoena . . . . [A]n agency's *Touhy* regulations do not relieve district courts of the responsibility to analyze privilege or undue burden assertions under Rule 45.").

101. Fed. R. Civ. P. 45(d)(3)(A).

102. In re Bankers Tr. Co., 61 F.3d 465, 467–71 (6th Cir. 1995) ("The statutory authorities upon which the Federal Reserve relies, however, simply do not give it the power to promulgate regulations in direct contravention of the Federal Rules of Civil Procedure . . . . [The Housekeeping Statute] . . . does not provide 'substantive' rules regulating disclosure of government information." (quoting *Exxon Shipping*, 34 F.3d 774)), cert. denied, 517 U.S. 1205 (1996).

103. See, e.g., Gischel v. Univ. of Cincinnati, No. 1:17-cv-475, 2018 WL 9945170, at *2–4 (S.D. Ohio June 26, 2018) (applying the FRCP after noting *Bankers Trust*'s "instructive analysis"); Gardner v. Mich. State Univ., No. 1:12-cv-1018, 2013 WL 5320282, at *2–4 (W.D. Mich. Sept. 20, 2013) (applying the FRCP after stating that *Bankers Trust* "provides significant guidance on how the Sixth Circuit would rule"); In re Packaged Ice Antitrust Litig., No. 08-MD-01952, 2011 WL 1790189, at *2–3 (E.D. Mich. May 10, 2011) ("This court concludes that the Sixth Circuit would join the opinions of those courts . . . that have concluded that the Federal Rule of Civil Procedure 45 and various available privilege rules provide sufficient limitations on discovery to adequately address legitimate governmental interests . . . .").

104. See supra notes 87–91.

105. See *Exxon Shipping*, 34 F.3d at 778.

106. See generally United States ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) ("[W]hen the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the

Circuit concluded that granting deference to federal officials in the subpoena-compliance context "would raise serious separation of powers questions" and "violate the fundamental principle that 'the public . . . has a right to every man's evidence.'"[107] Second, even assuming sovereign immunity is relevant in the *Touhy* context, the court located a waiver not in Section 706 of the APA (as do plurality-approach courts[108]) but in Section 702 of that statute, which does not specify a standard of review.[109]

The D.C. Circuit's analysis initially tracked the Ninth Circuit's alternate-waiver approach,[110] but more recently the D.C. Circuit has focused on the text and purpose of the FRCP provisions that govern nonparty discovery.[111] Emphasizing the FRCP's goal of facilitating robust discovery, the D.C. Circuit rejected an argument that the United States fell outside of the FRCP's subpoena power.[112] "[P]erson" in Rule 45 (and throughout the FRCP[113]), the D.C. Circuit concluded, reaches far beyond "simply . . . natural person[s]."[114] From this starting point, the court's stance in the *Touhy*-derived circuit split followed intuitively. The FRCP apply to the government, and agencies can't promulgate regulations dis-

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other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.").

107. *Exxon Shipping*, 34 F.3d at 778–79 (internal quotation marks omitted) (quoting United States v. Bryan, 339 U.S. 323, 333 (1950)). The court, however, did not develop its separation of powers analysis beyond this by, for example, evaluating the *Touhy* plurality approach in light of Supreme Court precedent permitting Congress to—in certain circumstances—allocate adjudicatory power outside of Article III courts. See Hart & Wechsler, supra note 87, at 345–411.

108. See supra notes 87–91.

109. 5 U.S.C. § 702 (2018); *Exxon Shipping*, 34 F.3d at 779 n.9; see also Hart & Wechsler, supra note 87, at 902 (stating that the waiver now codified in Section 702 was adopted after the APA's original enactment and "applies to any suit [that meets Section 702's textual requirements], whether or not brought under the APA").

110. See Linder v. Calero-Portocarrero, 251 F.3d 178, 181 (D.C. Cir. 2001) ("[W]e have never read the waiver contained in APA § 702 to be limited by APA § 706."); Hous. Bus. J. v. Off. of the Comptroller of the Currency, 86 F.3d 1208, 1212 (D.C. Cir. 1996) (stating that a federal court litigant can file a motion to compel subpoena compliance because the government has waived its sovereign immunity under 5 U.S.C. § 702 (citing *Exxon Shipping*, 34 F.3d at 777–78)); cf. Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 398 n.2 (D.C. Cir. 1984) (stating in a footnote that the court "finds[s] no cause" to "graft onto discovery law a broad doctrine of sovereign immunity").

111. See Fed. R. Civ. P. 45(a)(1)(A)(iii) ("Every subpoena . . . must . . . command each person to whom it is directed to do [one of three enumerated acts] at a specified time and place . . . ."); Watts v. Sec. & Exch. Comm'n, 482 F.3d 501, 508 (D.C. Cir. 2007) (Kavanaugh, J.) (citing Yousuf v. Samantar, 451 F.3d 248, 257 (D.C. Cir. 2006)); *Yousuf*, 451 F.3d at 250, 253–57.

112. *Yousuf*, 451 F.3d at 253–57 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

113. Id. at 256 ("[This] reading, moreover, aligns the interpretation of Rule 45 with that of every other [FRCP provision] in which the word 'person' means more than simply a natural person.").

114. Id. at 253–57.

placing otherwise applicable Federal Rules.[115] And like its fellow minority-approach court,[116] the D.C. Circuit finds sovereign immunity largely irrelevant when a subpoena stems from litigation originating in federal court.[117]

Litigants able to seek nonparty discovery under the FRCP can count themselves fortunate. The FRCP seek to provide a "liberal opportunity for discovery"[118] and generally authorize discovery of all "relevant" matters.[119] That said, there are important limitations. Under Rule 45, a court will quash a subpoena if, inter alia, compliance would "subject[] a person to undue burden" or "require[] disclosure of privileged . . . matter[s]."[120]

For guidance on undue burden, courts have looked to the factors in Rule 26(b), reading them to apply to nonparty and traditional discovery alike.[121] In undue-burden analyses, courts consider whether (1) the information sought is cumulative; (2) the information could be obtained from another "more convenient" source; and (3) the burden on the subpoenaed party "outweighs its likely benefit," taking into account "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, [and] the importance of the discovery in resolving the issues."[122]

Courts rightfully apply these factors with care in the nonparty-discovery context, recognizing that the subpoenaed party has no dog in the fight but is nonetheless having an "unwanted burden thrust upon [it]."[123] Additionally, minority-approach courts recognize that federal agencies face unique subpoena-compliance burdens and have a legitimate

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115. *Watts*, 482 F.3d at 508 ("[A] challenge to an agency's refusal to comply with a Rule 45 subpoena should proceed and be treated not as an APA action but as a Rule 45 motion to compel (or an agency's Rule 45 motion to quash).").

116. See supra note 107 and accompanying text.

117. See *Watts*, 482 F.3d at 508 n.* ("In general, state court subpoenas present entirely different issues []because of the Supremacy Clause and sovereign immunity[] . . . .").

118. Conley v. Gibson, 355 U.S. 41, 47 (1957); see also Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) ("[T]he Federal Rules of Civil Procedure strongly favor full discovery.").

119. Fed. R. Civ. P. 26(b)(1); cf. Fed. R. Evid. 401 (broadly defining relevance to include any piece of evidence making a "fact . . . of consequence" more or less likely to be true).

120. Fed. R. Civ. P. 45(d)(3)(A).

121. Fed. R. Civ. P. 26(b)(1)–(2); *Watts*, 482 F.3d at 509 (importing the Rule 26(b) factors into a Rule 45 determination); Hendricks v. Total Quality Logistics, LLC, 275 F.R.D. 251, 253 (S.D. Ohio 2011) ("Rule 45 does not list irrelevance or overbreadth as reasons for quashing a subpoena. Courts, however, have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." (internal quotation marks omitted) (quoting Barrington v. Mortage IT, Inc., No. 07-61304-CIV, 2007 WL 4370647, at *3 (S.D. Fla. Dec. 10, 2007))).

122. Fed. R. Civ. P. 26(b)(1)–(2).

123. *Watts*, 482 F.3d at 509 (internal quotation marks omitted) (quoting Cusumano v. Microsoft Corp., 162 F.2d 708, 717 (1st Cir. 1998)); see also Fed. R. Civ. P. 45(d)(2)(B)(ii) (instructing courts to "protect a person who is neither a party nor a party's officer from significant expense[s] resulting from [subpoena] compliance").

government interest in ensuring their employees and resources are not consistently diverted from agency priorities and duties.[124]

II. THE *TOUHY* DILEMMA: PLACING LOWER FEDERAL COURTS IN BETWEEN TWO CORE COMMITMENTS

Much ink has been spilled over *Touhy*, with the bulk of the scholarship focusing on the above-described circuit split in the federal-civil context.[125] Nearly all of that scholarship proposes a solution of how to *resolve* the split, with most commentators favoring the FRCP approach championed by the Ninth and D.C. Circuits.[126] Though commentators' arguments vary, they tend to share two basic assumptions. The first assumption is that the FRCP provide a requester-friendly standard under which litigants can expect to prevail at a significantly greater rate than they can under the APA's arbitrary and capricious standard.[127] The second is that the *Touhy*-derived

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124. See *Watts*, 482 F.3d at 509 (describing the cumulative impact compliance would have on agencies if they complied with every nonparty subpoena served on them); Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 779 (9th Cir. 1994) (noting that "federal agencies receive hundreds of requests each year from private litigants" and acknowledging the government's "concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations").

125. See supra section I.B.

126. See Kanassatega, supra note 5, at 234 (arguing that the minority approach "is closest to implementing the original intent of the drafters of the FRCP"); Jennifer Lynch, The Eleventh Amendment and Federal Discovery: A New Threat to Civil Rights Litigation, 62 Fla. L. Rev. 203, 246–50, 256 (2010) (arguing that a sovereign immunity defense to judicial process "hobbl[es] civil rights cases before they begin"); Coleman, supra note 71, at 700–01 (arguing that *Touhy* regulations permitting nondisclosure in the absence of a valid claim of privilege exceed agencies' statutory authority); 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, 1181 (1996) ("The courts, as neutral observers, are better equipped to balance the competing parties' interests than are self-interested agency heads."); Recent Cases, Ninth Circuit Rejects Authority of Non-Party Federal Agencies to Prevent Employees from Testifying Pursuant to a Federal Subpoena, 108 Harv. L. Rev. 965, 970 (1995) (arguing that it should be "federal courts' own standards of privilege and undue burden" and "not self-serving agency regulations" that "determine whether an agency employee should be required to testify"); Richmond, supra note 44, at 174 (arguing that the heightened ability of the government to resist judicial process undermines "the democratic ideal upon which this country was built"); William Bradley Russell, Jr., Note, A Convenient Blanket of Secrecy: The Oft-Cited but Nonexistent Housekeeping Privilege, 14 Wm. & Mary Bill Rts. J. 745, 765–69 (2005) (asserting that deference to agencies in the subpoena-compliance context undermines the separation of powers, Article III courts' search-for-the-truth function, and the rule of law). But see John A. Fraser III, Sixty Years of *Touhy*, Fed. Law., Mar. 2013, at 74, 79 (arguing that the "rhetorical argument" against *Touhy* on separation of powers and judicial-independence grounds "goes too far" and that courts should continue to use the APA to resolve discovery disputes against federal agencies).

127. See, e.g., Kanassatega, supra note 5, at 234 (stating that the "different balancing tests" of the plurality- and minority-approach courts "can and do produce different results for private litigants"); Grech, supra note 126, at 1181 (arguing that adopting of the FRCP-based approach would promote "greater openness of information"); Russell, supra note

circuit split in the federal-civil context will be short-lived. That is, an outside actor—Congress or the Supreme Court—will step in;[128] or the lower federal courts will reach consensus on their own as they follow a purported trend toward employing the FRCP in agency-related discovery disputes.[129]

This Note adds to the scholarship on *Touhy* by examining these two assumptions and explaining the consequences of its findings for lower federal courts. Section II.A describes the dataset that this Note uses. Section II.B uses a logistic regression analysis to test the first assumption and finds that it withstands scrutiny. A litigant proceeding under the FRCP can expect a roughly twenty-six percentage-point greater chance of obtaining nonparty discovery compared to a similarly situated litigant proceeding under the APA. Section II.C explores the second assumption and finds that it is not borne out. Congress and the Supreme Court have shown little interest in *Touhy*, and the suggested trend toward employing the FRCP does not exist. Section II.D then discusses the difficult position that these two findings place federal courts in. *Touhy* has created a long-standing circuit split that produces disparate outcomes for litigants but has created substantial expectation interests on both sides of the split.

A. *Dataset Formation*

This Note's analysis began with a dataset consisting of all federal cases that cite *United States ex rel. Touhy v. Ragen*[130] as of December 2020, which

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126, at 760–62 ("And when [agencies] have followed these housekeeping-statute-authorized regulations in determining not to comply with subpoenas, the agencies are entitled to prevail if their decisions are reviewed under the APA's deferential 'arbitrary and capricious' standard.").

128. See, e.g., Grech, supra note 126, at 1179 (arguing that Congress should amend the Housekeeping Statute to waive sovereign immunity against subpoenas and explicitly state a standard of review); Richmond, supra note 44, at 201 ("The United States Supreme Court should take the first case that presents itself and require lower courts to balance the various interests at stake when a non-party federal agency refuses to disclose information needed for a private lawsuit."); cf. Fraser, supra note 126, at 79 ("If Congress determines that the statutory protections for agency records are flawed, then Congress has the power to amend the housekeeping statute."); Wong, supra note 80, at 267 (arguing, in the criminal context, that Congress should amend the Federal Removal Statute to eliminate derivative jurisdiction and the Supreme Court should reconsider *Touhy*).

129. See, e.g., Elizabeth B. Partlow, Who Is Mr. Touhy, and What Does He Have to Do with My Subpoena?, S.C. Law., May 2016, at 24, 27 ("The modern trend is to analyze subpoenas to government agencies under Rule 45."); Grech, supra note 126, at 1181 (describing a "judicial trend towards full disclosure"); William A. Daniels, The *Touhy* Trap 23 (Apr. 22, 2016), http://www.daniels.legal/wp-content/uploads/2016/12/2016.04.22-the-touhy-trap.pdf [https://perma.cc/M8TK-EBCM] (unpublished manuscript) ("The law in this area is moving towards district courts enforcing subpoenas using their inherent powers under the FRCP."); cf. Richmond, supra note 44, at 184 ("Fortunately, there seems to be a recent trend among lower courts toward a greater level of scrutiny when they are faced with executive agencies that are reluctant to comply with requests for information.").

130. 340 U.S. 462 (1951).

amounts to 633 cases.[131] Several categories of cases were then removed from the dataset, including: (1) federal and state criminal cases;[132] (2) cases dismissed on procedural grounds;[133] (3) cases in which the agency is a party to the litigation;[134] (4) magistrate reports or district court opinions where a district court or appellate court later ruled on the discovery dispute;[135] (5) mid-twentieth-century cases that viewed *Touhy* as standing for the proposition that administrative agencies were *absolutely* immune to judicial process;[136] and (6) prior rulings where there were multiple dispositions by the same court related to the same (or a similar) discovery dispute.[137] This left 118 relevant decisions in which a federal court squarely resolved a discovery dispute involving a nonparty federal agency under the APA, the FRCP, or both.[138] Though cases decided under both standards

131. Dataset on file with the *Columbia Law Review*.

132. Generally, criminal defendants must proceed under the APA if they wish to immediately challenge an agency's refusal to comply with a subpoena. See, e.g., Miller v. Mehltretter, 478 F. Supp. 2d 415, 418 (W.D.N.Y. 2007) (applying the APA to a state criminal defendant's *Touhy* request). But see United States v. Bahamonde, 445 F.3d 1225, 1228 (9th Cir. 2006) (holding DHS *Touhy* regulations unconstitutional as applied to a federal criminal defendant after an agency official worked closely and continuously with the prosecution team). Criminal defendants possess constitutional rights not held by civil litigants, making criminal defendants more likely to prevail in discovery disputes against the government. See Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046, 1053 (8th Cir. 2007). Therefore, the dataset omits criminal-trial-related *Touhy* requests to avoid skewing the success rates of APA litigants.

133. A litigant's failure to comply with an agency's procedural *Touhy* requirements creates a jurisdictional defect and precludes a judgment on the merits of the discovery dispute. See 5 U.S.C. § 704 (2018) (rendering only "final agency action[s]" reviewable); Meisel v. Fed. Bureau of Investigation, 204 F. Supp. 2d 684, 690 (S.D.N.Y. 2002) (dismissing an APA-based *Touhy* claim on the grounds that the litigant did not attach a required "Statement of Scope and Relevance" to the subpoena).

134. *Touhy* applies only where the subpoenaed agency is *not* a party to the underlying litigation. See, e.g., Louisiana v. Sparks, 978 F.2d 226, 234 (5th Cir. 1992); Alexander v. Fed. Bureau of Investigation, 186 F.R.D. 66, 70–71 (D.D.C. 1998).

135. E.g., Abriq v. Metro. Gov't, No. 3:17-cv-0690, 2018 WL 4561247 (M.D. Tenn. July 27, 2018), adopted in part by No. 3:17-cv-0690, 2018 WL 4561244 (M.D. Tenn. Sept. 5, 2018); Moore v. Armour Pharm. Co., 129 F.R.D. 551 (N.D. Ga. 1990), aff'd, 927 F.2d 1194 (11th Cir. 1991).

136. See, e.g., Appeal of the Sec. & Exch. Comm'n, 226 F.2d 501, 517 (6th Cir. 1955) ("The record establishes that the appellant general counsel acted in conformity with the foregoing rules of the Commission. In doing so, he was protected in his claim of privilege by the principles announced in the opinions of the Supreme Court in [*Touhy* and *Boske*]."). In these cases, a "simple citation" to *Touhy* sufficed, meaning the discovery dispute was not resolved under either the APA or the FRCP. Richmond, supra note 44, at 184.

137. E.g., In re 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2020 WL 7232079 (N.D. Fla. Dec. 8, 2020); In re 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-MD-2885, 2020 WL 6438614 (N.D. Fla. Nov. 2, 2020). This is to avoid overweighting decisions by judges who issued per-subpoena rulings, as compared to judges who addressed multiple subpoenas in a single ruling.

138. Rulings in the alternate and claims reached after assuming compliance with procedural *Touhy* regulations were included as rulings on the merits. See, e.g., United States v. Brownfield, No. 1:10-MC-00004-R, 2010 WL 4962947, at *2 (W.D. Ky. Dec. 1, 2010) ("Even

are included in some descriptive statistics used in this Note, they were excluded from the regression analysis, leaving 105 decisions using either the APA or the FRCP.[139]

B. *The APA–FRCP Gap in Discovery Outcomes*

Courts,[140] commentators,[141] and litigants[142] generally assume (and for good reason[143]) that the chances of obtaining discovery against a nonparty federal agency are much better under the FRCP than under the APA. But there's overlap between the considerations in standard *Touhy* regulations and the FRCP;[144] a slew of recent cases have reached the *same result* under

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if Respondent had complied with the [*Touhy*] procedures . . . , quashing the subpoena is warranted as it is unduly burdensome . . . ."); Miskiel v. Equitable Life Assurance Soc'y of the U.S., No. CIV. A. 98-3135, 1999 WL 95998, at *2 (E.D. Pa. Feb. 24, 1999) ("Plaintiff has not challenged the government's decision under the APA. Further, the court could not conscientiously conclude from the record presented that the decision to withhold the requested documents was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" (quoting 5 U.S.C. § 706)).

139. This figure includes APA decisions issued by federal courts in relation to state court proceedings in order to increase the observations in the sample, permitting a greater number of control variables without overfitting the model. You might object to this on the grounds that there's something about federal causes of action that make them more likely to obtain nonparty discovery or that judges are more likely to grant discovery in cases they are personally managing (either of which could give the FRCP a statistical windfall). In response to the first objection, federal judges sit in diversity and regularly hear state law claims, meaning the FRCP sample is not composed of only federal causes of action. See 28 U.S.C. § 1332 (2018) (diversity jurisdiction); Eagle Rock Timber, Inc. v. Town of Afton, No. 08-CV-219-B, 2009 WL 10665040, at *1–2, 4–5 (D. Wyo. Nov. 18, 2009) (diversity suit decided under the FRCP). There could, however, be some merit to the second objection. Roughly nineteen percent (five out of twenty-seven) of state court litigation–related APA decisions in the dataset resulted in discovery whereas roughly twenty-nine percent (ten out of thirty-five) of federal court litigation–related APA decisions did so. But these samples are relatively small and don't permit many inferences: A one-tailed z-test of APA state decisions and APA federal decisions suggests that, despite this difference, there's a roughly eighteen percent chance the samples were drawn from the same population.

140. See, e.g., Upsher-Smith Lab'ys, Inc. v. Fifth Third Bank, No. 16-cv-556 (JRT/HB), 2017 WL 7369881, at *6 (D. Minn. Oct. 18, 2017) (describing the APA as the "more deferential standard"); Manzo v. Stanley Black & Decker, Inc., No. 13-CV-3963 (JFB) (SIL), 2017 WL 1194651, at *6 (E.D.N.Y. Mar. 30, 2017) ("[The APA] is significantly more deferential to the governmental agency . . . .").

141. See supra note 127.

142. See, e.g., Donald v. Outlaw, No. 2:17-cv-00032, 2019 WL 3562158, at *2 (N.D. Ind. Aug. 6, 2019) (noting that the government argued the APA standard should apply, while the litigant argued the FRCP should govern the dispute).

143. Compare supra notes 92–98 and accompanying text (describing the APA's arbitrary and capricious standard), with notes 118–124 and accompanying text (describing the FRCP's standard for subpoena compliance).

144. Compare Fed. R. Civ. P. 45 (permitting a subpoena to be quashed if compliance would produce an undue burden or reveal privileged information), with 6 C.F.R. § 5.48 (2020) (enumerating undue burden and the existence of a privilege as two factors to consider). Additionally, some *Touhy* regulations require agency officials to specifically

both standards;[145] and some commentators have observed that courts are increasingly applying a more searching review under both the APA and the FRCP.[146] Given this, there's reason (burden allocations notwithstanding) to question whether the *Touhy* standard of review is as outcome-determinative as previously thought.[147] Using a logistic regression analysis based on the above-described dataset,[148] this section attempts to isolate and estimate the effect of applying the FRCP versus the APA on a litigant's chances of achieving nonparty subpoena compliance.

1. *Descriptive Statistics.* — Beginning with litigant success rates, the conventional wisdom on *Touhy* bears out. Based on substantive rulings in the dataset where a court applied only one standard of review, about sixty-nine percent of litigants prevailed in discovery disputes against a nonparty federal agency under the FRCP, while only about twenty-four percent of litigants did so under the APA.[149] In cases decided under both standards, litigants prevail about fifty-eight percent of the time. Though this FRCP–APA disparity is telling, we cannot—without more—causally attribute it to the standard of review applied.

2. *Regression Analysis.* — In order to estimate the causal effect of applying the FRCP versus the APA, this Note uses a logistic regression analysis.[150] As the U.S. District Court for the Southern District of New York summarized, "The basic regression method . . . isolate[s] the effect of one variable (the 'independent variable') on another variable (the 'dependent variable') by holding all other potentially relevant variables (the 'control variables') constant."[151] In this analysis, the independent variable is the standard of review applied (i.e., the FRCP or the APA), and the dependent

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consider, as one factor of many, whether compliance would be required under the rules of procedure governing the underlying litigation. See 28 C.F.R. § 16.26(a)(1) (2019).

145. See, e.g., *Donald*, 2019 WL 3562158, at *10–12; Taylor v. Gilbert, No. 2:15-cv-00348-JMS-MJD, 2018 WL 1334935, at *2–6 (S.D. Ind. Mar. 15, 2018); Quiles v. Union Pac. R.R. Co., No. 8:16-cv-00330, 2018 WL 734172, at *2–3 (D. Neb. Feb. 6, 2018), adopted by No. 8:16-cv-00330-JFB-SMB, 2018 WL 2148979 (D. Neb. May 10, 2018).

146. See Richmond, supra note 44, at 184.

147. Indeed, one commentator has gone so far as to argue that the circuit split is largely a "distinction without a difference." See Niesel, supra note 80, at 1544–48.

148. See supra section II.A.

149. Dataset on file with the *Columbia Law Review*.

150. Logistic regression is typically used where a dependent variable is binary (as opposed to a linear range of values). Fred C. Pampel, Logistic Regression 1–2 (2000) (overviewing the logic and interpretation of logistic regression analysis).

151. Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 396–97 (S.D.N.Y. 2014); see also Pampel, supra note 150, at 1–38 (overviewing the logic and interpretation of logistic regression analysis); Franklin M. Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 705–15 (1980) (explaining the mechanics of regression analysis and the assumptions that underlie it).

variable is the outcome (i.e., win or loss) of a discovery dispute against a nonparty federal agency.[152]

As shown in Table 1, the analysis controls for several variables, including:[153] (1) the type of underlying litigation; (2) what the subpoena sought (i.e., nontestimonial evidence and/or deposition/trial testimony); (3) the grounds on which the agency defended its subpoena noncompliance (i.e., burdensomeness/irrelevance, privilege, and/or another reason); (4) whether the subpoenaed agency had previously responded to a related *Touhy* or Freedom of Information Act (FOIA) request; (5) whether the subpoenaed agency was a law enforcement agency; and (6) the year of the decision.[154]

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152. This Note classifies a case as producing a litigant discovery win if the reviewing court ordered the agency to (1) comply in full or in part with the subpoena, or (2) produce requested nontestimonial evidence for in camera review by the court.

153. The dataset additionally records whether a litigant was pro se and whether the litigant sought information or testimony from a *former* agency employee. These variables, however, were excluded from the regression analysis; there were so few instances in which each was true that the few instances where they were created multicollinearity problems (e.g., four out of five pro se cases were decided under the FRCP). See infra note 154 (briefly explaining multicollinearity). To avoid overfitting the model, the analysis also took the various subpoena-recipient categories in the dataset (e.g., financial regulatory, law enforcement, medical, defense/military, other) and collapsed them into a binary law enforcement variable.

154. See infra Table 1. The first column in the table reports the log odds coefficient (*B*) for the independent variable ("FRCP") and each control variable ("Underlying Litigation" through "Year of the Decision"). Assuming statistical significance (see below), each coefficient estimates the direction (i.e., positive or negative) and size of a variable's log-odds effect on the dependent variable (a *Touhy* discovery win). See Pampel, supra note 150, at 19–21.

The second, third, and fourth columns indicate whether a first-column coefficient is statistically significant—that is, whether it's likely that a variable's estimated effect on the dependent variable is attributable to chance or to an *actual* relationship. The second column provides the standard error for each variable, measuring the "deviation of the actual values of the dependent variable in the sample from the values that would be predicted [by] the regression." Fisher, supra note 151, at 718–20. The larger the standard error, the less reliable the estimate. Id. at 718. The third column provides each variable's t-statistic, which is the ratio of a variable's coefficient to its standard error. Id. at 716–17. Most importantly, the fourth column provides a p-value for each variable. A p-value takes a variable's t-statistic and calculates the probability that a t-statistic of that magnitude would be found if, in reality, there was not an actual relationship between the given variable and the dependent variable. Ramona L. Paetzold, Multicollinearity and the Use of Regression Analyses in Discrimination Litigation, 10 Behav. Sci. & L. 207, 212–14 (1992). A common cutoff for significance is a p-value of less than 0.05. See Fisher, supra note 151, at 717; Paetzold, supra, at 214.

The fifth column indicates whether the regression analysis suffers from any multicollinearity problems. Multicollinearity exists when two or more of the independent/control variables are strongly correlated with one another. See Paetzold, supra, at 215–16. Regression analyses are meant to disentangle the effects of several variables; but when multicollinearity exists, a regression analysis can't serve this function. See id. A commonly used method of testing for multicollinearity is to calculate a variance inflation factor (VIF) for each variable—with the higher the VIF, the more cause for concern. See id. at 219–22. The suggested cutoff for acceptable VIFs varies, with some

TABLE 1: LOGISTIC REGRESSION MODEL 1
(WITH ALL AVAILABLE CONTROL VARIABLES INCLUDED)

Variable	*B*	SE	T-Statistic	P-Value	VIF
(Intercept)	-1.46	1.88	-0.8	0.44	NA
Standard of Review (FRCP Applied)	2.13	0.66	3.2	<0.001 ***	1.58
Underlying Litigation					
Contract Dispute	-1.60	1.03	-1.55	0.12	1.97
Educational/Employment Discrimination	-1.19	1.18	-1.07	0.29	2.62
False Claims Act; Securities; Common Law Fraud	-0.56	1.16	-0.49	0.63	1.94
Torts	-1.66	1.05	-1.58	0.11	2.66
Other	-0.22	0.98	-0.22	0.83	2.34
Type of Subpoena					
Deposition/Trial Testimony	1.16	0.94	1.22	0.22	3.24
Nontestimonial Evidence	1.19	1.04	1.14	0.25	3.63
Asserted Grounds for Noncompliance					
Burdensomeness/Irrelevance	-2.22	0.80	-2.76	0.01**	1.78
Privilege/Confidentiality	0.63	0.65	0.97	0.33	1.51
Other	0.55	0.68	0.81	0.42	1.44
Agency Had Previously Produced Some Documents/Testimony to the Litigant	-0.17	0.60	-0.29	0.78	1.09
Subpoenaed Nonparty Was a Law Enforcement Agency	-1.70	0.79	-2.16	0.03**	1.68
Year of Decision	0.03	0.02	1.14	0.25	1.31

Statistical Significance Indicators: * = P-Value < 0.10; ** = P-Value < 0.05; *** P-Value < 0.01.

In the above model, the independent variable (standard of review applied) and two control variables (burdensomeness/irrelevance as an asserted grounds for denial and a law enforcement agency as the subpoena recipient) are statistically significant. Table 2 shows the results of a regression model that includes only these three variables. Table 3 then takes the log odds reported in Table 2 and converts them into regular

authors suggesting as high as ten, see, e.g., id. at 221, and others suggesting a more stringent cutoff of five, see, e.g., Maria Lucia Passador & Federico Riganti, Shareholders' Rights in Agency Conflicts: Selected Issues in the Transatlantic Debate, 42 Del. J. Corp. L. 569, 608–09 (2018). The VIFs obtained in this analysis satisfy even the latter, more stringent threshold.

odds.[155] In other words, Table 3 reports the effect of applying the FRCP on the probability that a litigant obtains a discovery win.

TABLE 2: LOGISTIC REGRESSION MODEL 2
(WITH ONLY STATISTICALLY SIGNIFICANT CONTROL VARIABLES)

Variable	***B***	**SE**	**T-Statistic**	**P-Value**	**VIF**
(Intercept)	0.69	0.61	1.13	0.26	NA
FRCP Applied	1.91	0.50	3.80	<0.001 ***	1.03
Burdensomeness/Irrelevance as Grounds for Noncompliance	-2.16	0.62	-3.48	<0.001 ***	1.22
Subpoenaed Nonparty Was a Law Enforcement Agency	-1.16	0.61	-1.90	0.06 *	1.19

Statistical Significance Indicators: * = P-Value < 0.10; ** = P-Value < 0.05; *** P-Value < 0.01.

TABLE 3: INCREASED PROBABILITY OF A DISCOVERY-DISPUTE WIN UNDER THE FRCP VERSUS THE APA

	APA	FRCP	FRCP Odds Increase
Baseline Probability	0.67	0.93	0.26
Conditional Probability			
Burdensomeness/Irrelevance	0.19	0.61	0.42
Law Enforcement	0.38	0.81	0.42*
Both Burdensomeness/Irrelevance and Law Enforcement	0.07	0.33	0.26

*The discrepancy in the right-hand-column value is the product of rounding error.

The upshot is that even after accounting for potentially relevant variables, the effect of the standard of review applied remains both statistically significant and quite large. A litigant proceeding under the FRCP has an estimated twenty-six percentage-point greater chance of prevailing in a discovery dispute compared to a similarly situated litigant proceeding under the APA. And in instances where a litigant subpoenas a law enforcement agency or the agency defends its noncompliance on burdensomeness/irrelevance grounds, the estimated effect of proceeding under the FRCP increases to forty-two percentage points.

C. *(Lack of an) Imminent Resolution to the Circuit Split*

In addition to the differential-success-rate assumption described in the previous section, commentators have long assumed that the *Touhy*-derived circuit split in the federal-civil context would soon be resolved. But

155. See Pampel, supra note 150, at 21–23 (describing this process).

as the circuit split approaches three decades of existence, this assumption hasn't played out in reality.

1. *Outside Actor.* — Numerous commentators have weighed in on how the *Touhy*-based circuit split should be resolved, assuming an outside actor—Congress or the Supreme Court—would step in to sort out the lower courts' disagreement.[156] The circuit split, however, has failed to even register on Congress's radar.[157] And more generally, discussion of *Touhy* in congressional work product in recent decades has been quite limited,[158] with action even more so. The only *Touhy*-related legislation passed during the circuit split's lifetime is the Removal Clarification Act of 2011.[159] And that Act affects state (not federal) litigation, merely confirming that federal officials subpoenaed by state courts can seek the protection of a federal forum.[160]

Similarly, the Supreme Court has shown little interest in addressing the split—and may not have the chance to do so anytime soon. The Court has rejected petitions for certiorari arising from the federal-civil context,[161] as well as petitions raising related *Touhy* questions.[162] And several factors

156. See supra notes 126, 128 and accompanying text.

157. A search for "*Touhy*" and "circuit" on two databases, ProQuest Congressional and HeinOnline's U.S. Congressional Documents, produced no documents relevant to the circuit split.

158. See Legislative Proposals to Address Concerns over the SEC's New Confidentiality Provision: Hearing Before the H. Comm. on Fin. Servs., 111th Cong. 78–80 (2010) ("Some have argued, that instead of employing the language of Section 9291 [of the Dodd–Frank Act] to address public disclosure issues, the SEC should instead seek to expand or 'toughen' its *Touhy* regulations."); Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 118 (2007) (inquiring why the FBI, pursuant to its *Touhy* regulations, withheld information requested by a state prosecutor's office in the murder prosecution of a former FBI agent); Memorandum from Jack Maskell, Legis. Att'y, Am. L. Div., Cong. Rsch. Serv., to Charles Rangel, House Comm. on Ways & Means 1–2 (Apr. 26, 2004), https://fas.org/sgp/crs/crs042604.pdf [https://perma.cc/B5D9-P3H7] (arguing that agencies can't use *Touhy* regulations to resist congressional oversight).

159. Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (codified at 28 U.S.C. § 1442 (2018)) (defining "civil action" as "any proceeding . . . including a subpoena for testimony or documents"); see also Removal Clarification Act of 2010: Hearing on H.R. 5281 Before the Subcomm. on Cts. & Competition Pol'y of the H. Comm. on the Judiciary, 111th Cong. 10 (2010) (statement of Beth Brinkmann, Deputy Assistant Att'y Gen.) (noting that, once a subpoena dispute is removed to federal court, an agency's *Touhy* regulations govern the necessity of compliance).

160. 28 U.S.C. § 1442 (permitting the removal of, inter alia, civil actions against federal officials); see also, e.g., Utah v. Gollaher, No. 2:18-cv-309-DB, 2019 WL 1013416, at *2–3 (D. Utah Mar. 4, 2019) (permitting a nonparty agency official to remove a subpoena-compliance dispute to federal court).

161. See Olivas v. Boeh, 513 U.S. 1109, 1109 (1995) (rejecting a post–circuit split petition asking what the proper standard of review is for reviewing agency subpoena noncompliance decisions); Jackson v. Allen Indus., Inc., 356 U.S. 972, 972 (1958) (rejecting a similar petition submitted before the federal-civil circuit split developed).

162. See Mockovak v. King County, 138 S. Ct. 328, 328 (2017) (denying certiorari to a petition that asked whether the amenability of a state police officer to state judicial process can be dictated by a federal agency that the officer worked with during a joint taskforce);

combine to make it difficult for a *Touhy* request to turn into a viable cert petition. First, *Touhy* regulations require litigants to jump through "procedural hoops."[163] Many don't do so successfully, and otherwise meritorious suits never receive a substantive ruling.[164] Second, *Touhy* disputes are collateral to the underlying suit. Unless the information requested is absolutely necessary to maintaining a suit (as it certainly can be[165]), a litigant may choose to forgo the costs of appealing an adverse discovery order[166] despite the availability of interlocutory relief in the *Touhy* context.[167] Third, district courts in undecided jurisdictions often dispose of easy *Touhy* disputes by ruling under both standards,[168] relieving appellate courts of the obligation to stake out a position.[169]

2. *Movement Toward Consensus*. — Alternatively, some courts[170] and commentators[171] have suggested there's a growing trend toward applying the FRCP in nonparty discovery disputes against federal agencies. Though the beginning of the asserted trend is often left ambiguous, it's generally

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Stebner v. Stewart & Stevenson Servs., Inc., 546 U.S. 1094, 1094 (2006) (rejecting a petition asking whether it was a due process violation for an appellate court to rely on affidavits not lawfully obtained through an agency's *Touhy* regulations); Kasi v. Johnson, 537 U.S. 1025, 1025 (2002) (denying certiorari to a petition claiming, inter alia, that the FBI's *Touhy*-request denial in a state court conviction constituted a *Brady* violation); Cromer v. Smith, 528 U.S. 826, 826 (1999) (denying certiorari to a petition arguing that a *Touhy* denial infringed on a criminal defendant's right to present a defense); Elko Cnty. Grand Jury v. Siminoe, 522 U.S. 1027, 1027 (1997) (rejecting a petition asking what the appropriate standard is for reviewing contempt orders removed to federal court that are based on a federal official disobeying a state grand jury subpoena); Redland Soccer Club, Inc. v. Dep't of Army, 516 U.S. 1071, 1071 (1996) (denying certiorari to a petition that, inter alia, asked whether *Touhy* regulations could be applied to former employees of an administrative agency).

163. Barnett v. Ill. State Bd. of Elections, No. 02 C 2401, 2002 WL 1560013, at *1–2 (N.D. Ill. July 2, 2002).

164. See supra note 133.

165. See, e.g., Portaleos v. Shannon, No. 5:12-CV-1359 LEK/TWD, 2013 WL 4483075, at *6 (N.D.N.Y. Aug. 19, 2013) (challenging the VA's denial of a subpoena seeking an ex-spouse's psychiatry records in connection with an underlying child custody suit).

166. FAQ, An Appeal to Reason, http://www.anappealtoreason.com/faq [https://perma.cc/G7EM-EMDW] (last visited Nov. 6, 2020) ("An average appeal can cost $20,000 to $50,000.").

167. Cf. Alltel Commc'ns, LLC v. DeJordy, 675 F.3d 1100, 1101–02 (8th Cir. 2012) (holding that a motion compelling an Oglala Sioux Tribal Administrator to comply with a subpoena was appealable under the collateral order doctrine of 28 U.S.C. § 1292(b) (2012)).

168. See., e.g, Estate of Williams v. City of Milwaukee, No. 16-CV-869-JPS, 2017 WL 1251193, at *2–3 (E.D. Wis. Mar. 30, 2017) (applying both the APA and the FRCP).

169. See U.S. Env't Prot. Agency v. Gen. Elec. Co., 212 F.3d 689, 690 (2d Cir. 2000) ("[D]epending upon the course of events after remand, it may be unnecessary for the standard of review to be decided in this case. For instance, the district court could find that the EPA was entitled to withhold the documents under either . . . standard of review . . . .").

170. See, e.g., *Williams*, 2017 WL 1251193, at *2 (describing the application of the FRCP as the "modern view").

171. See supra note 129.

associated with the turn of the century.[172] There's little evidence, however, that this trend exists in practice. Viewed at the court of appeals level, the composition of the *Touhy* split has been static over the past two decades. While one circuit abandoned the plurality approach to once again become an undecided jurisdiction,[173] another circuit has adopted the plurality approach.[174] And the district court level tells a similar story. Taking all substantive holdings in the dataset since 2000 by courts in arguably undecided jurisdictions, roughly thirty-nine percent came under the APA, thirty-two percent under the FRCP, and twenty-nine percent under both standards.[175] Far from an FRCP consensus, federal courts remain divided over *Touhy*.

D. *Two Jurisprudential Commitments Collide*

As section II.B describes, the APA-or-FRCP decision is extremely important in the *Touhy* context. But as section II.C notes, there's reason to believe congressional or Supreme Court intervention in the split isn't forthcoming. These two findings, taken together, place lower federal courts in a difficult position, caught between two core commitments: federal court uniformity and stare decisis.

1. *Federal Court Uniformity.* — The federal judiciary disfavors significant intercircuit conflicts,[176] as they are—at bottom—unfair to

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172. In re Packaged Ice Antitrust Litig., No. 08-MD-01952, 2011 WL 1790189, at *2 (E.D. Mich. May 10, 2011) (arguing that the court should "join the opinions . . . mostly in this century, that have concluded that Federal Rules of Civil Procedure 45 and various available privilege rules" apply); see also *Williams*, 2017 WL 1251193, at *2 (describing the trend as "modern").

173. See U.S. Env't Prot. Agency v. Gen. Elec. Co., 197 F.3d 592, 598–600 (2d Cir. 1999) ("On remand, the district court will, of course, review the EPA's refusal to respond to the subpoena under the standards for review established by the APA."), amended on rehearing, 212 F.3d 689 (2d Cir. 2000) (determining that the paragraph mandating APA review "which would otherwise be a holding . . . is not [to be] regarded as the opinion of the Court").

174. See supra note 81 and accompanying text.

175. Dataset on file with the *Columbia Law Review*. This calculation included cases seemingly in conflict with their circuits' precedent as issuing from undecided jurisdictions. See, e.g., Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1275 (D. Colo. 2011).

176. See Fed. R. App. P. 35(b)(1)(B) (listing a circuit split as a basis for reconsideration of a case en banc); Sup. Ct. R. 10(a) (listing a circuit split over an "important matter" as one of the bases for granting a petition for certiorari); Martha Dragich, Uniformity, Inferiority, and the Law of the Circuit Doctrine, 56 Loy. L. Rev. 535, 540–44 (2010) ("The importance of uniformity in federal law has long been assumed but is not free from debate . . . . The weight of commentary, however, favors uniformity."); Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1568–69, 1582–84 (2008) (noting that "[e]nsuring the uniform interpretation of federal law has long been considered one of the federal courts' primary objectives," but arguing that too much emphasis is placed on it); cf. Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 Harv. L. Rev. 869, 922 (2011) (stating that federal court uniformity is "a matter of great practical (and bipartisan) concern to political leaders").

litigants.[177] They "result in [the] unequal treatment of citizens . . . solely because of differences in geography."[178] And though some lower court disagreements may have only "negligible effect[s],"[179] others are "intolerable" due to their high stakes.[180] In assessing on which side of this line the APA–FRCP split falls, this Note uses the criteria set forth in an influential report by the Judicial Conference's Federal Courts Study Committee.[181] A circuit split is intolerable if it: (1) "impose[s] economic costs . . . to multi-circuit actors"; (2) "encourage[s] forum shopping"; (3) "create[s] unfairness to litigants"; or (4) "encourage[s] 'non-acquiescence' by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions."[182]

Satisfying all four of the above criteria, the *Touhy*-derived circuit split (as currently constructed[183]) is intolerable in a system that values uniformity. First, the circuit split likely imposes costs on multistate actors. It has created a complex procedural minefield in which even sophisticated parties can misstep[184]—incurring, for example, the costs associated with resubmitting a *Touhy* request,[185] seeking a delay to a summary judgment ruling,[186] or pursuing an appeal.[187] Second, with the chances of a discovery win so much higher under the FRCP,[188] any rational litigant would do what

177. See Frost, supra note 176, at 1582–84 (cataloging reasons offered for valuing uniformity).

178. Comm'n on Revision of the Fed. Ct. App. Sys., Structure and Internal Procedures: Recommendations for Change 3 (1975), https://www.fordlibrarymuseum.gov/library/document/0019/4520540.pdf [https://perma.cc/89AJ-CJUB]; cf. Hanna v. Plumer, 380 U.S. 460, 468 (1965) (describing the "twin aims" of *Erie* vertical uniformity as the "discouragement of forum-shopping and avoidance of inequitable administration of the laws" (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–75 (1938))).

179. Fed. Cts. Study Comm., Report of the Federal Courts Study Committee 124–25 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf [https://perma.cc/7965-VKNY] (internal quotation marks omitted).

180. See id.

181. Id. at 125.

182. Id.

183. See infra Part III (proposing ways courts can narrow the intercircuit discovery gap).

184. See, e.g., Retractable Techs., Inc. v. Becton, Dickinson & Co., No. 2:08-cv-16, 2011 WL 13136270, at *1–2 (E.D. Tex. Nov. 1, 2011) (quashing the subpoena of a plaintiff-biotech company served on the VA for not attaching an affidavit with its *Touhy* request).

185. See, e.g., Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046, 1051 (8th Cir. 2007) ("The magistrate denied this motion because Elnashar had not exhausted his administrative remedies . . . . After this ruling, Elnashar followed the *Touhy* procedures and resubmitted his request to the FBI.").

186. See Fed. R. Civ. P. 56(d)(1) (authorizing a court to defer a summary judgment decision if the nonmovant "cannot present facts essential to justify its opposition"); Wusstig v. Long Beach Police Dep't, No. 2:12-cv-05901-SVW-E, 2014 WL 12687443, at *3–4 (C.D. Cal. May 14, 2014) (evaluating a motion to defer after the DOJ rejected the plaintiff's request to depose an Assistant U.S. Attorney).

187. See An Appeal to Reason, supra note 166.

188. See supra section II.B.

they could to invoke the jurisdiction of a district court in the Ninth or D.C. Circuits.[189] Third, and relatedly, the split produces unfairness. Litigants in minority-approach courts are granted the benefit of a federal court subpoena and conduct discovery as if an agency was a run-of-the-mill nonparty.[190] Litigants in plurality-approach courts, on the other hand, must resort to a challenge under the APA's deferential arbitrary and capricious standard[191]—a process minority-approach courts save only for state court litigants.[192] Fourth, agencies presumably promulgate their *Touhy* regulations with the goal of structuring employee subpoena responses nationwide. But out of "obedience to . . . different holdings,"[193] decisions made pursuant to these regulations are effectively binding in only some parts of the country.[194]

2. *Stare Decisis.* — Both the Supreme Court and Congress often step in to sort out lower court disagreement.[195] But in this context, the lower federal courts seem to be on their own (at least for the foreseeable future).[196] Thus, the numerous calls by commentators for particular resolutions to the APA–FRCP split begin to sound like calls for at least a significant subset of appellate courts to reconsider their precedent.[197] But doing so to correct even a significant threat to federal uniformity would undermine another weighty jurisprudential commitment: stare decisis.

"Overruling precedent is never a small matter."[198] Though adherence to precedent is "not an inexorable command," it is nonetheless "a

189. See supra section I.B.2.

190. See supra section I.B.2.

191. See supra section I.B.1.

192. See Watts v. Sec. & Exch. Comm'n, 482 F.3d 501, 508 n.* (D.C. Cir. 2007) (Kavanaugh, J.) ("In general, state court subpoenas present entirely different issues []because of the Supremacy Clause and sovereign immunity[] . . . ."); Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778 (9th Cir. 1994) ("The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. Such limitations do not apply when a *federal* court exercises its subpoena power . . . ." (internal quotation marks omitted) (quoting In re Boeh, 25 F.3d 761, 770 (9th Cir. 1994) (Norris, J., dissenting) (citations omitted))).

193. Fed. Cts. Study Comm., supra note 179, at 125.

194. See supra section I.B.

195. See Gregory A. Caldeira & John R. Wright, Organized Interests and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1115–22 (1988) ("Our data, like those in other studies, demonstrate a substantial connection between a positive decision on certiorari on the one hand and the presence . . . of real conflict . . . on the other."); Stefanie A. Lindquist & David A. Yalof, Congressional Responses to Federal Circuit Court Decisions, 85 Judicature 61, 65–66 (2001) (noting that Congress resolved at least nineteen circuit splits over a nine-year period studied).

196. See supra section II.C.

197. See supra notes 126, 128 and accompanying text.

198. Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (internal quotation marks omitted) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015)).

foundation stone of the rule of law."[199] Too many departures from precedent too quickly, and the moral authority of the law suffers.[200] Therefore, courts depart from precedent only if and when there's a "special justification" to do so.[201] And for the following reasons, that justification would need to be "particularly 'special'" to warrant circuits departing from the positions they've staked out in the *Touhy* circuit split.[202]

First, each side in the circuit split believes its approach is the faithful interpretation of a doctrine based "not [on] a single case, but a 'long line of precedents'" dating back over a century to *Boske*.[203] The historical pedigree of the *Touhy* doctrine and the split itself warrants caution. Second, each circuit's interpretation of *Touhy* has presumably fostered substantial reliance within its jurisdiction.[204] Nearly every administrative agency has a set of *Touhy* regulations, which apply across subpoena type and every area of substantive law. A sudden departure from precedent would pull the rug out from beneath agencies and litigants. Third, the circuit split could be solved by legislative action,[205] as it largely amounts to a question of which statutory provision provides a valid waiver of the government's sovereign immunity.[206] This question, however, is a "ball[] tossed into Congress's court," which "so far, at least" Congress has been content holding onto.[207] Fourth, and importantly, courts already have the tools needed to significantly narrow the current gap in discovery success rates experienced under the two standards.[208]

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199. Id. (internal quotation marks omitted) (first quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991); then quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).

200. See id. (stating that adherence to precedent promotes the "actual and perceived integrity of the judicial process" (internal quotation marks omitted) (quoting *Payne*, 501 U.S. at 827)); see also Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting) (noting that the Court's decision "can only cause one to wonder which cases the Court will overrule next").

201. *Kisor*, 139 S. Ct. at 2422 (internal quotation marks omitted) (quoting Halliburton Co. v. Erica P. John Fund, 573 U.S. 258, 266 (2014)).

202. Id. at 2423 (quoting *Halliburton*, 573 U.S. at 266).

203. Id. at 2422 (quoting *Bay Mills*, 572 U.S. at 798); see also Boske v. Comingore, 177 U.S. 459 (1900) (holding that an agency official can't be held in contempt for failing to comply with a subpoena if they acted pursuant to valid agency regulations); supra section I.A.2.

204. See *Kisor*, 139 S. Ct. at 2422 (stating that courts must proceed with caution where a departure from precedent "would cast doubt on many settled constructions of [agency] rules").

205. See id. ("[E]ven if we are wrong . . . , 'Congress remains free to alter what we have done.'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 171–72 (1989))).

206. Compare supra notes 90–91 and accompanying text (Section 706 waiver), with supra notes 109–117 and accompanying text (Section 702 waiver).

207. *Kisor*, 139 S. Ct. at 2422 (internal quotation marks omitted) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015)); see also supra section II.C.1.

208. Cf. *Kisor*, 139 S. Ct. at 2421 (noting that the doctrine the Court was reviewing, when "[p]roperly understood," permits courts to "retain a firm grip" over agency decisionmaking).

III. MITIGATING THE CIRCUIT SPLIT'S UNFAIRNESS TO LITIGANTS

As Part II illustrates, two core commitments collide in the nearly thirty-year-old circuit split over the reach of *Touhy* in the federal-civil context. Given how outcome-determinative the standard of review applied is,[209] a commitment to federal uniformity requires that the intercircuit conflict somehow be resolved.[210] But given the unlikelihood of congressional or Supreme Court intervention,[211] previously proposed solutions to the circuit split[212] would require courts of appeals to depart from their longstanding precedent, running afoul of stare decisis.[213]

It's possible, however, for federal courts to navigate this circuit split without falling victim to either Scylla or Charybdis.[214] This Part argues that plurality-approach courts, employing traditional tools of statutory interpretation and foundational administrative law precedent, can both shrink the breadth of the circuit split and close the intercircuit gap in discovery rates by making APA review of *Touhy* denials more rigorous.[215]

Section III.A argues that judges should narrowly interpret "Executive department" and "employees" in the Housekeeping Statute to limit the scope of cases over which the two camps in the circuit split diverge. Section III.B proposes two procedural approaches courts should emphasize, which this Note argues will be particularly effective because of *Touhy*'s unique procedural posture. And section III.C discusses two substantive approaches to deploying the APA's arbitrary and capricious standard in the *Touhy* context.

A. *Keeping Housekeeping Authority Within the Housekeeping Statute's Limits*

Courts should ensure agencies' housekeeping authority extends no further than the text of the Housekeeping Statute authorizes. By carefully policing the boundaries of agencies' delegated authority, plurality-approach courts can limit the number of contexts in which APA review

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209. See supra section II.B.

210. See supra section II.D.1.

211. See supra section II.C.1.

212. See supra notes 126–128.

213. See supra section II.D.2.

214. See Homer, Odyssey 167 (H.B. Cotterill trans., George G. Harrap & Co. 1911) ("Thus then into the narrows we entered with pitiful groaning. Scylla on one side lay, on the other the mighty Charybdis.").

215. This Note does not take a stance on how Congress, the Supreme Court, or undecided courts of appeals should ultimately decide the APA–FRCP circuit split if they confront the issue head-on. See supra notes 126–128 (listing sources advocating for particular resolutions of the circuit split). This Note's proposals focus on closing the large and persistent intercircuit gap in discovery rates, thereby mitigating the unfairness to litigants that the split creates. See supra sections II.B, II.D. This Part proposes solutions applicable mostly to plurality-approach courts because, in this Note's view, Supreme Court administrative law precedent dictates that APA review of *Touhy* denials be more rigorous than that often conducted by plurality-approach courts.

even applies—decreasing the scope of disagreement with minority-approach courts.

Recall the statute's language.[216] Though fairly capacious, it's limited in two important respects: The statute permits regulations only by "Executive departments," and those regulations can only reach agencies' "employees."[217] Given these textual limits, courts should, first, flatly reject government actors' requests to extend *Touhy* housekeeping authority (or a variant thereof) beyond the executive branch.[218] Second, courts should hold that agencies lack the statutory authority to promulgate rules that apply to individuals who work with agencies but are not prototypical wage-earning or salaried employees.[219] Third, and importantly, courts should hold that agencies cannot promulgate regulations that reach *former* employees.

This last proposal can significantly shrink the situations over which plurality- and minority-approach courts diverge. Most agencies have promulgated *Touhy* regulations that purport to govern the amenability to process of their former employees—no matter how short the individual's tenure or how long since they've left the agency.[220] Often, these regulations have escaped too searching of judicial scrutiny.[221] But a recent opinion by Judge Furman of the U.S. District Court for the Southern

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216. See supra note 32 and accompanying text.

217. 5 U.S.C. § 301 (2018).

218. See, e.g., Isaacs v. Pacer Serv. Ctr., Nos. SA-14-MC-12-XR, 12-CV-40-JL (D.N.H.), 2014 WL 1652602, at *3 (W.D. Tex. Apr. 22, 2014) (rejecting the Pacer Service Center's argument that its subpoena-compliance decisions should be evaluated under an arbitrary and capricious standard); McKissock & Hoffman, P.C. v. Waldron, No. 10-7108, 2011 WL 3438333, at *2–3 (E.D. Pa. Aug. 5, 2011) (holding that the Administrative Office of the U.S. Courts is not an "agency" for APA purposes and that it can't opt into APA review of subpoena-noncompliance decisions by promulgating *Touhy*-like regulations).

219. See, e.g., In re Schaefer, 331 F.R.D. 603, 605–19 (W.D. Pa. 2019) (omitting any discussion of whether a political scientist consulting with the DOD fell within the scope of the agency's housekeeping authority); Forgione v. HCA Inc., 954 F. Supp. 2d 1349, 1355–59 (N.D. Fla. 2013) (holding that "employee" can't be read to reach "state workers, who by virtue of [a] state's voluntary agreement, conduct surveys later used by" a federal agency).

220. See, e.g., 5 C.F.R. § 1631.31 (2020) (Federal Retirement Thrift Investment Board); 6 C.F.R. § 5.41(a) (2020) (DHS); 10 C.F.R. § 202.21(a) (2020) (Department of Energy); 36 C.F.R. § 703.15 (2019) (Library of Congress).

221. See, e.g., United States ex rel. Proctor v. Safeway, Inc., No. 3:11-cv-03406-RM-TSH, 2019 WL 1040971, at *1–6 (C.D. Ill. Mar. 5 2019) (conducting an APA review of an agency's denial of a subpoena seeking the deposition testimony of a former employee); Armstrong v. Arcanum Grp., Inc., 250 F. Supp. 3d 802, 804–06 (D. Colo. 2017) ("[T]hese [*Touhy*] regulations govern testimony by employees, as well as former employees."); Charles v. Print Fulfillment Servs., LLC, No. 3:11-CV-553-H, 2014 WL 2779512, at *1–2 (W.D. Ky. June 19, 2014) ("Was the agency's decision not to produce documents, or permit one of its current or former employees to testify in this matter, an arbitrary and capricious abuse of discretion? The court finds that it was not.").

District of New York illustrates the analysis courts should engage in when confronted with *Touhy* regulations applicable to former employees.[222]

Though Judge Furman acknowledged that some uses (particularly in remedial statutes) of the word "employees" have been interpreted to reach former employees,[223] he determined at step one of a *Chevron* analysis[224] that the Housekeeping Statute's use of "employees" is unambiguous given its "text, structure, and purpose."[225] The statute reaches only *current* employees.[226] Judge Furman's analysis rested on three factors. First, drawing both on dictionary definitions[227] and hypotheticals drawn from everyday life,[228] he concluded that the "more natural reading" of the word, "employees," is "current employees."[229] Second, applying the linguistic canons, noscitur a sociis and ejusdem generis,[230] Judge Furman reasoned that "employees" must be read in light of the other terms of the statute, all of which "are plainly temporally limited."[231] Third, relying on the history of the Housekeeping Statute,[232] Judge Furman determined that reading "employees" to reach former employees would provide "a grant of authority to federal agencies that goes well beyond what history and reason would suggest."[233]

Under this reasoning, agencies are not left defenseless; instead, plurality-approach jurisdictions simply become minority-approach jurisdictions for the purposes of subpoenas served on former agency

222. Koopmann v. Dep't of Transp., 335 F. Supp. 3d 556, 559–66 (S.D.N.Y. 2018). For the subsequent decision in the litigation applying the FRCP, see Pirnik v. Fiat Chrysler Autos., N.V., No. 15-CV-7199 (JMF), 2018 WL 4054856, at *1–3 (S.D.N.Y. Aug. 24, 2018).

223. *Koopmann*, 335 F. Supp. 3d at 563–65 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding that "employees" in § 704(a) of Title VII of the Civil Rights Act applies to former employees)).

224. Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43, 843 nn.9–11 (1984) (requiring courts confronted with an agency interpretation of a statute it administers to engage in a two-step analysis that asks whether Congress has "directly spoken to the precise question at issue," then, if not, whether the agency's interpretation is "permissible"); see also *Forgione*, 954 F. Supp. 2d at 1358 (concluding that agency interpretations of the Housekeeping Statute do not warrant *Chevron* deference in the first place).

225. *Koopmann*, 335 F. Supp. 3d at 560–66.

226. Id. at 560–61.

227. Id. at 560 ("*Black's Law Dictionary*, for example, defines 'employee' as '[s]omeone who *works*'—present tense—'in the service of another person . . . .'" (quoting Employee, Black's Law Dictionary (10th ed. 2014))).

228. Id. at 561 ("If a business posts a sign on a door stating 'Employees Only,' it would plainly be unreasonable for a former employee to construe that as an invitation to enter.").

229. Id. at 560–61.

230. Id. at 561 ("[A] word is known by the company it keeps." (internal quotation marks omitted) (quoting Yates v. United States, 574 U.S. 528, 543 (2015))). See generally William N. Eskridge, Jr. & Phillip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, app. at 97–108 (1994) (cataloging and defining canons commonly used by the Supreme Court).

231. *Koopmann*, 335 F. Supp. 3d at 561.

232. Id. at 561–62; see also supra section I.A.

233. *Koopmann*, 335 F. Supp. 3d at 561–62.

employees.[234] Under the FRCP, agencies retain third-party standing to object to a subpoena on the grounds that the requested testimony would require the disclosure of information protected by one of the many substantive privileges agencies enjoy.[235]

B. *Procedural Approaches*

Even if the proposals in the preceding section are adopted and the scope of the intercircuit disagreement shrinks, the gap in discovery rates remains significant where plurality- and minority-approach courts do diverge. This section identifies two APA-imposed procedural requirements courts should emphasize in the *Touhy* context to help close the intercircuit gap in discovery outcomes.

1. *Unique Procedural Posture.* — Seemingly small increases to what courts require of agencies procedurally in the federal-civil *Touhy* context can go a long way toward improving agency reasoning and opening the door to discovery when agencies' *Touhy* denials fall short of a minimal level of clarity. Generally, if an agency fails to follow its own procedures or those required by the APA, a court will simply remand the action back to the agency for renewed proceedings.[236] So, in most contexts, findings of procedural insufficiency affect how agencies reason their way to outcomes, but they may not affect the outcomes themselves.[237] But that's not the case in the *Touhy* context when the underlying litigation originates in federal court.[238]

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234. Id. at 565–66 ("[The DOT] could conceivably challenge the subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure . . . ."). See generally supra section I.B (describing the plurality and minority approaches to evaluating *Touhy* noncompliance decisions).

235. *Koopmann*, 335 F. Supp. 3d at 566 (asserting that the court has "no doubt" that the agency has standing to assert the deliberative process privilege). See generally Sisk, supra note 18, at 31–33 (collecting the government's substantive privileges). The court, however, continued that it is "less obvious" whether agencies have standing to assert that a former employee's subpoena compliance would subject the agency to an undue burden. *Koopmann*, 335 F. Supp. 3d at 566.

236. See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (stating that the Court will not "intrude upon [an agency's] domain" by speculating what action it will take on remand); Nicholas Bagley, Remedial Restraint in Administrative Law, 117 Colum. L. Rev. 253, 257–65 (2017) (describing administrative law as largely characterized by "remedial purity" and arguing against this approach). In a decision from the 2019 Term, the Supreme Court did, however, briefly (and arguably in dicta) incorporate APA prejudicial error into its analysis. See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020) (citing 5 U.S.C. § 706 (2018)).

237. See Bagley, supra note 236, at 289 (noting that cases are often remanded under the APA for procedural violations even when "there's no substantial reason to think" complying with the overlooked requirement "would have led the agency to change its mind").

238. Note that the following discussion does not apply to state court actions *removed* to federal court. See, e.g., Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998).

Most plurality-approach courts do not require federal court litigants to file collateral APA suits to challenge a *Touhy* decision. Instead, courts resolve discovery disputes against nonparty agencies through motions to compel, quash, or modify that incorporate the APA's arbitrary and capricious standard.[239] The APA dictates the evaluation of the *merits* of the motion, but the FRCP dictate the reviewing court's *remedial* options. As such, the court is limited to granting,[240] denying,[241] or modifying[242] the subpoena-related motion. This means that a litigant win, even on relatively minor procedural grounds, is an outright discovery win: A motion to compel, for example, is granted, and the official is commanded to act.[243] With this in mind, the following sections propose two procedural emphases for the *Touhy* context.

2. *Section 555 Brief Statement.* — An agency's denial of a *Touhy* request is an informal adjudication,[244] subject to the relatively barebones procedural requirements of Section 555 of the APA.[245] Though most provisions in Section 555 place only minimal obligations upon agencies,[246] one provision may have some bite in the *Touhy* context: Agencies must provide "a brief statement of the grounds for denial."[247] No court, however, has explicitly analyzed—let alone set aside—a *Touhy* denial for failing to meet this procedural requirement.

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239. See 5 U.S.C. § 706(2)(A)); U.S. Env't Prot. Agency v. Gen. Elec. Co., 197 F.3d 592, 599 (2d Cir. 1999) ("[A]llowing the district court to proceed under the provisions of the APA to determine the propriety of the subpoena, without a separate and independent lawsuit . . . promote[s] judicial economy by allowing the underlying litigation to advance without delay."), amended on rehearing, 212 F.3d 689 (2d Cir. 2000); COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 277–78 (4th Cir. 1999) (reviewing a motion to compel under the APA's arbitrary and capricious standard); Moore v. Armour Pharm. Co., 927 F.2d 1194, 1197–98 (11th Cir. 1991) (reviewing a motion to quash under the arbitrary and capricious standard). But see Quezada v. Mink, No. 10-cv-00879-REB-KLM, 2010 WL 4537086, at *5 (D. Colo. Nov. 3, 2010) (noting that the Tenth Circuit requires a separate APA action despite "both efficiency and economy [being] compromised by the requirement").

240. See Fed. R. Civ. P. 45(d)(2)(B)(i); United States v. Safeway Inc., No. 11-cv-3406, 2019 WL 7208426, at *3 (C.D. Ill. Dec. 27, 2019).

241. See Fed. R. Civ. P. 45(d)(3); Barreto v. SGT, Inc., No. 8:17-cv-02716-PX, 2019 WL 3253373, at *4 (D. Md. July 19, 2019).

242. See Fed. R. Civ. P. 45(d)(3); Kerfoot v. FNF Servicing, Inc., No. 1:13-cv-33 (WLS), 2014 WL 6620222, at *4 (M.D. Ga. Nov. 21, 2014).

243. See, e.g., Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1279 (D. Colo. 2011) (holding a *Touhy* denial to be arbitrary and capricious due to the lack of involvement of a statutorily required official and, as a result, granting the litigant's motion to compel).

244. See 5 U.S.C. § 551(4)–(7) (defining "adjudication" as the "process for the formulation of an order," with "order" in turn defined as any "final disposition . . . other than rule making"); id. § 554 (stating that an adjudication must be a *formal* adjudication only when a statute requires that it "be determined on the record after opportunity for an agency hearing").

245. Id. § 555; Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990).

246. See *Pension Benefit*, 496 U.S. at 655–56.

247. 5 U.S.C. § 555(e).

To be sure, this Note does not argue for courts to read this provision out of proportion in the *Touhy* context. The brief-statement requirement is intended to impose a burden upon agencies that is, at most, "modest."[248] But when courts are confronted with short, boilerplate *Touhy* denials that do nothing more than restate an agency's regulations and declare that they apply,[249] courts should seriously consider setting these decisions aside as procedurally deficient. The brief-statement requirement certainly tolerates explanations "of less than ideal clarity,"[250] but the requirement is meant to meaningfully "facilitate[] judicial review."[251] Conclusory statements that fail to grapple with the facts of an individual *Touhy* request undermine this purpose. Moreover, plurality-approach courts would be in good company making this shift in the *Touhy* context. Demanding slightly more of agencies under Section 555's brief-statement requirement would track what courts have read the APA's "concise general statement" requirement to impose on agencies in the informal-rulemaking context.[252]

3. *The* Accardi *Principle*. — In addition to the requirements of Section 555 described above, agencies are bound by the procedural regulations they set for themselves.[253] Most agencies, for example, have promulgated regulations delegating their department heads' authority under the Housekeeping Statute to broader (but still senior) sets of agency officials.[254] When a *Touhy* denial facially shows that no official with

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248. In re Power Integrations, Inc., 899 F.3d 1316, 1320 (Fed. Cir. 2018) (internal quotation marks omitted) (quoting Roelofs v. Sec'y of the Air Force, 628 F.2d 594, 601 (D.C. Cir. 1980)).

249. See, e.g., OhioHealth Corp. v. U.S. Dep't of Veteran Affs., No. 2:14-cv-257, 2014 WL 4660092, at *6 (S.D. Ohio Sept. 17, 2014) (describing an agency's analysis under its undue-burden *Touhy* regulation, which merely stated that the "requests would be unduly burdensome"); Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1278–79 (D. Colo. 2011) (describing a *Touhy* denial as "devoid of any individualized factual analysis").

250. Cloud v. United States, No. 1:17-cv-316 (TJK), 2019 WL 1924363, at *8 (D.D.C. Apr. 30, 2019) (internal quotation marks omitted) (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

251. *Power Integrations*, 899 F.3d at 1319 (internal quotation marks omitted) (quoting Tourus Recs., Inc. v. Drug Enf't Admin., 259 F.3d 731, 737 (D.C. Cir. 2001)).

252. See 5 U.S.C. § 553(c); United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (stating that an agency must "enable [a reviewing court] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did" (internal quotation marks omitted) (quoting Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968))).

253. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954) ("Regulations with the force and effect of law supplement the bare bones of § 19(c) [of the Immigration Act of 1917]." (footnotes omitted)); Sec. & Exch. Comm'n v. Selden, 445 F. Supp. 2d 11, 14 (D.D.C. 2006) ("Federal agencies must 'follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions.'" (quoting Steenhold v. Fed. Aviation Admin., 314 F.3d 633, 639 (D.C. Cir. 2003))); Thomas W. Merrill, The *Accardi* Principle, 74 Geo. Wash. L. Rev. 569, 578–84 (2006) (describing the generalization of *Accardi*'s holding beyond the strict factual context in which it arose).

254. See, e.g., 39 C.F.R. § 265.12(b)(4), (d)(3)(i) (2019) (granting subpoena-compliance authority to the USPS General Counsel and Chief Field Counsels).

delegated housekeeping authority was involved in the processing of a subpoena, courts should invalidate the subpoena-noncompliance decision as procedurally deficient.[255] Although seemingly minor, such procedural infractions cut to the core of the justification for the *Touhy* doctrine.[256] The Supreme Court's decision in *Touhy* rested in part on the ability of centralized decisionmaking to promote greater consistency and more principled responses.[257] Failures to include required officials in *Touhy* evaluations or to otherwise comply with agency procedures indicate that an agency may have taken its power to centralize decisionmaking and converted it into a privilege to haphazardly withhold information from litigants.

C. *Substantive Approaches*

In addition to the statutory interpretation and procedural proposals described in the previous sections, this Note emphasizes two substantive approaches that plurality-approach courts can use to narrow the APA–FRCP discovery gap. Section III.C.1 argues that plurality-approach courts should require agencies to more seriously grapple with their regulations by setting aside a *Touhy* denial as arbitrary and capricious if it fails to consider a substantial portion of the agency's enumerated factors. Section III.C.2 argues that plurality-approach courts should remain open to the possibility that some *Touhy* denials, though based on facially valid reasoning, are pretextual attempts to avoid agency embarrassment and, therefore, are arbitrary and capricious.

1. *Failure to Consider All Relevant Factors.* — This section is in large part a substantive analog to section III.B.3. While that section urges courts to hold agencies to the procedures they've set for themselves, this section urges courts to hold agencies to the considerations they've determined are applicable in the *Touhy* context. An agency's *Touhy* regulations typically list about fifteen factors that an official must consider when making a subpoena-compliance decision.[258] This surfeit of factors has mostly worked to litigants' disadvantage.[259] They sweep broadly, providing officials with

255. See Ceroni v. 4Front Engineered Sols., Inc., 793 F. Supp. 2d 1268, 1278 & n.7 (D. Colo. 2011) ("Neither document makes any reference to the matter being reviewed by the USPS General Counsel or that the decision . . . was made by the General Counsel.").

256. Cf. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (noting that "[p]rocedural requirements can often seem" inconsequential but "serve[] important values of administrative law").

257. See United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1951) ("[T]he usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.").

258. See, e.g., 5 C.F.R. § 2608.202 (2020) (fifteen factors considered by the Office of Government Ethics); 6 C.F.R. § 5.48 (2020) (fourteen factors considered by DHS); 10 C.F.R. § 1707.202 (2020) (sixteen factors considered by the Defense Nuclear Facilities Safety Board); 38 C.F.R. § 14.804 (2019) (fifteen factors considered by the VA).

259. Cf. Davis Enters. v. U.S. Env't Prot. Agency, 877 F.2d 1181, 1186–88 (3d Cir. 1989) (describing the EPA's numerous *Touhy* factors favoring nondisclosure while noting that the

ample room to find that compliance would be against the agency's best interests.[260] And while the list tends to include some requester-side considerations,[261] these factors are often glossed over—even at the judicial review stage. Courts regularly uphold *Touhy* denials that fail to grapple with a substantial portion of an agency's enumerated factors, particularly those favoring disclosure.[262]

Plurality-approach courts, acting firmly within Supreme Court precedent, can and should reverse this trend. A canonical example of arbitrary and capricious action is "entirely fail[ing] to consider an important aspect of the problem."[263] If an agency, under its rulemaking authority, has identified certain factors for consideration, they are by definition "important aspect[s] of the problem."[264] Courts certainly should not adopt a blanket requirement that agencies must "spell out a 'formulaic incantation' of . . . applicable *Touhy* regulations in order to satisfy the APA."[265] An agency's stated analysis under one factor could implicitly cover others, or a handful of factors may truly be the only ones relevant to a specific *Touhy* request.[266] But courts should not tolerate the strategic deployment of *Touhy* factors, such that only those cutting in favor of noncompliance are considered.[267] There are weighty interests on both

court "would [not] have interpreted the EPA's interests [in disclosure] as narrowly as" the agency had done through its regulations).

260. See, e.g., 6 C.F.R. § 5.48 (instructing agency officials to consider, among other factors, the need to conserve agency resources, the need to maintain an appearance of impartiality, and whether compliance would be unduly burdensome).

261. See, e.g., 10 C.F.R. § 1707.202(b) (instructing agency officials to consider whether disclosure is necessary to prevent a miscarriage of justice); 28 C.F.R. § 16.26 (2019) (requiring officials to consider the seriousness of the underlying action and the importance of the relief sought).

262. See, e.g., Akal Sec., Inc. v. U.S. Immigr. & Customs Enf't, No. 09cv2277-W (NLS), 2010 WL 2731649, at *6 (S.D. Cal. July 9, 2010) (upholding a *Touhy* denial despite the agency having failed to consider whether disclosure would be required under the discovery regime applicable to the underlying action and whether disclosure would be in the public interest); Debry v. Dep't of Homeland Sec., 688 F. Supp. 2d 1103, 1110 (S.D. Cal. 2009) (same).

263. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also supra notes 92–98 and accompanying text (providing a brief overview of arbitrary and capricious review).

264. *State Farm*, 463 U.S. at 43.

265. Sauer Inc. v. Lexington Ins. Agency, Inc., No. 5:13-cv-180-F, 2014 WL 5580954, at *4 (E.D.N.C. Oct. 31, 2014) (quoting Spence v. NCI Info. Sys., Inc., 530 F. Supp. 2d 739, 745 (D. Md. 2008)).

266. See, e.g., Wilson v. Jackson Nat'l Life Ins. Co., No. 3:15-cv-926-J-39JBT, 2017 WL 10402568, at *5 n.7 (M.D. Fla. Dec. 27, 2017) ("[T]hough not specifically stated, the Coast Guard's reasons for denying Plaintiff's *Touhy* Request pertain to factors one, three, four, and seven. Factor two does not appear to be applicable.").

267. See, e.g., Rhoads v. U.S. Dep't of Veterans Affs., 242 F. Supp. 3d 985, 996 (E.D. Cal. 2017) ("Although the court is mindful that the VA is not required to take into account each of the [*Touhy*] factors . . . , [its] failure to take into account important factors . . . was arbitrary and capricious under the circumstances."); Portaleos v. Shannon, Nos. 5:12-CV-1359 (LEK/TWD), 5:12-CV-1652 (LEK/TWD), 2013 WL 4483075, at *6 (N.D.N.Y. Aug. 19,

sides of a *Touhy* request, and courts should ensure agency reasoning reflects that reality.

2. *Pretextual Reasoning and Disparate Treatment.* — In *Department of Commerce v. New York*, the Supreme Court for the first time set aside an agency action as arbitrary and capricious based on a finding that the agency's concededly valid rationale for its action was pretextual.[268] In doing so, however, the Court cautioned that pretext-based invalidations can occur only in the most "unusual circumstances."[269] First, to unlock the extra-record discovery necessary to sustain such a holding, there must be a "strong showing of bad faith or improper behavior."[270] Second, a finding of pretext invalidates an action only when the pretextual rationale is "the sole stated reason" for the agency action.[271]

Fully acknowledging *Department of Commerce*'s limited scope, courts should remain open to the possibility that the requisite "unusual circumstances" may arise in the *Touhy* context.[272] A *Touhy* request threatens to subject an agency to "the sharp eye of public scrutiny."[273] There's reason then to suspect that, in select circumstances, an agency may reason pretextually—for example, to avoid the embarrassment of confirming it relied on a criminal informant credibly accused of fabricating testimony.[274] Even before *Department of Commerce*, courts entertained pretext-like challenges to *Touhy* denials, permitting extra-record showings that agencies' facially valid rationales were nonetheless arbitrary and capricious because the agency acted differently under nearly identical circumstances.[275] Lower courts, now with the explicit sanction of

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2013) (finding an agency's failure to consider whether compliance would be required under the applicable rules of procedure to be "inexplicable").

268. 139 S. Ct. 2551, 2573–76 (2019). Professor Gillian Metzger notes that while *Department of Commerce* was the first time the Court *explicitly* set aside an agency action on pretext grounds, arbitrary and capricious review has long "serve[d] to identify pretextual decision making without calling it such." Gillian E. Metzger, The Roberts Court and Administrative Law, 2019 Sup. Ct. Rev. 1, 23–39. And the Court's decision in the 2019 Term invalidating the Trump Administration's attempt to rescind DACA seems to fit that characterization. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1907–10 (2020) ("An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision."). The Administration's offered reasons didn't own up to its "choice to destroy lives." Transcript of Oral Argument at 31, *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589), 2019 WL 5893724.

269. *Dep't of Com.*, 139 S. Ct. at 2576.

270. Id. at 2573–74 (internal quotation marks omitted) (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

271. Id. at 2575.

272. Id. at 2576.

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

274. See supra notes 6–9 and accompanying text.

275. See Rhoads v. Dep't of Veterans Affs., 242 F. Supp. 3d 985, 996–97 (E.D. Cal. 2017) (invalidating a *Touhy* denial since, among other reasons, the agency granted a nearly

the Supreme Court, should continue and expand this trend, ensuring judicial review of *Touhy* denials is more than an "empty ritual."[276]

CONCLUSION

The circuit split over *Touhy*'s ultimate reach in the federal-civil context makes litigants' chances of obtaining discovery against nonparty federal agencies depend, in large part, on geography. Nearly thirty years old, this circuit split has produced a substantial body of scholarship aimed at the fateful day Congress or the Supreme Court takes up the split. But this scholarship has overlooked low-hanging, nondisruptive steps courts can take here and now to mitigate the unfairness the split has produced. Applying traditional tools of statutory interpretation to the Housekeeping Statute and importing the administrative law safeguards the APA and Supreme Court precedent require, plurality-approach courts can limit both the breadth and potency of the longstanding APA–FRCP circuit split.

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identical request made by the litigant's opposing party); Sec. & Exch. Comm'n v. Chakrapani, Nos. 09 Civ. 325(RJS), 09 Civ. 1043(RJS), 2010 WL 2605819, at *10 (S.D.N.Y. June 29, 2010) ("Why could the government safely produce the documents to Koulouroudis and not to Contorinis? To date, the government has provided no satisfactory answer . . . . [T]he government's invocation of the law-enforcement privilege seems like a pretext to preserve the government's tactical advantage in its criminal trial against Contorinis."). See generally Travis O. Brandon, Reforming the Extra-Record Evidence Rule in Arbitrary and Capricious Review of Informal Agency Actions: A New Procedural Approach, 21 Lewis & Clark L. Rev. 981, 991–1000 (2017) (overviewing lower court approaches to APA extra-record discovery).

276. *Dep't of Com.*, 139 S. Ct. at 2576.