NOTE

Derivative Prohibition: Defending Compulsory Process in State Prosecutions

*Christine Wong**

ABSTRACT

As federal law enforcement agencies take on greater roles in state investigations, criminal defendants in state courts are increasingly forced to subpoena federal agencies for evidence necessary to raise a defense. However, the state defendant seeking information from a federal agency faces three major obstacles: (1) sovereign immunity; (2) derivative jurisdiction; and (3) federal "housekeeping" regulations. Despite the existence of a constitutional right to compulsory process, the application of these legal doctrines effectively bars enforcement of state subpoenas. The resulting injustice devalues defendants' constitutional rights and undermines confidence in the fairness of the judicial system as a whole.

Although courts recognize the evolution of law enforcement practices, current law does not leave many options for judges or defendants. Existing "remedies" include time-consuming Administrative Procedure Act litigation or outright dismissal of prosecutions by state judges, neither of which is an effective or proper remedy for the state defendant looking to enforce her Sixth Amendment rights. This Note proposes an amendment to the federal officer removal statute that will eliminate derivative jurisdiction for cases removed under that section. This amendment will allow district courts to exercise the same jurisdiction over federal agencies that they would exercise in cases originally filed in federal court. In practice, federal judges will be permitted to

* J.D., expected May 2014, The George Washington University Law School; B.A., 2011, University of California, Berkeley. With heartfelt thanks to all who made this Note possible.

consider defendants' constitutional rights on the merits, and defendants will no longer face an absolute bar to subpoenas of federal agencies.

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INTRODUCTION

Dana Defendant[1] has just been charged in state court with drug possession. Dana plans to present a defense at trial that she worked as an informant for the United States Drug Enforcement Administration ("DEA") at the time she was charged. Dana will testify that she participated in drug-related activities with the knowledge and permis-

[1] The following hypothetical is loosely based on the facts of several cases. *See, e.g.*, United States v. Williams, 170 F.3d 431 (4th Cir. 1999); Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998); Buford v. State, 282 S.E.2d 134 (Ga. Ct. App. 1981); State v. Parker, 661 So. 2d 603 (La. Ct. App. 1995).

sion of the DEA. To support her defense, Dana issues a subpoena to Agent Anderson, her contact with the DEA, seeking to compel Anderson to testify and produce her confidential informant file. The DEA refuses to respond and argues that the subpoena does not comply with federal "housekeeping" regulations governing the production and disclosure of information by Department of Justice ("DOJ") employees in federal and state court proceedings.[2] The DEA claims, however, that even if Dana had properly complied with its housekeeping regulations, federal agencies are protected by sovereign immunity and not required to obey subpoenas issued by state courts. Unconvinced, the trial judge orders the DEA to produce both Dana's file and Anderson in time for trial.

Instead of producing the evidence, the DEA removes the subpoena to the federal district court across the street and files a motion to quash the subpoena. Now in front of a federal judge, the DEA again claims that it is protected by both its housekeeping regulations and sovereign immunity. Dana insists that the DEA's housekeeping regulations do not provide a privilege that outweighs her Sixth Amendment right to obtain witnesses in her favor[3] and that sovereign immunity should not apply now that the subpoena is in federal court.

Although federal courts can issue subpoenas to government agencies in federal prosecutions, in this case, the judge sides with the DEA. The judge agrees that if Dana failed to follow the requirements of the housekeeping regulations, the state court cannot compel Anderson to testify or produce the documents. Moreover, because Dana's case was originally filed in state court and then removed to federal court, the doctrine of derivative jurisdiction applies.[4] This means the federal court cannot do anything in the case that the state court was not allowed to do.[5] The judge decides that the state court was barred by both sovereign immunity and the housekeeping regulations from issuing the subpoena. Because the state court had no power to subpoena the DEA, the federal court also lacks that power on removal. The judge thus grants the DEA's motion and quashes Dana's constitutional rights along with the subpoena.

Back in state court, Dana is left with no testimony, no file, and two possible remedies, neither of which is likely to keep her out of jail.

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2 *See* 28 C.F.R. §§ 16.21–16.29 (2013). As an agency located within the DOJ, the DEA and its employees are bound by the same regulations. *See id.* § 16.21.

3 U.S. CONST. amend. VI.

4 *See* 28 U.S.C. § 1442 (2012).

5 *See infra* Part I.B.

On the one hand, Dana can return to federal court as a plaintiff and challenge the DEA's action under the Administrative Procedure Act ("APA").[6] This would get her around the sovereign immunity problem because the APA waives sovereign immunity for suits filed under that statute.[7] Her criminal trial, however, will not wait for an APA claim that could take years to litigate, and an APA suit is not the proper forum to assert her Sixth Amendment rights.[8] On the other hand, Dana can appeal to the state judge's sense of fairness and ask to have the prosecution dismissed entirely. After all, how can she present an effective defense when the government withholds key evidence by hiding behind an impenetrable knot of legal doctrines?

The judge is sympathetic but unmoved, realizing that it will be far more difficult to explain the outright dismissal of this case and the many others like it in her upcoming election than to let the trial proceed.[9] Dana must thus face the jury without any evidence to support her testimony that the charges stem from her activities as an informant. With unappealing options all around, she enters a guilty plea and finds herself in jail, all the while wondering what her Sixth Amendment rights are truly worth.

The plight of Dana Defendant is a very real illustration of the harmful consequences of retaining derivative jurisdiction in removal actions against federal agencies. The constitutional rights of any state court defendant seeking information from a federal agency are frustrated by three interconnected obstacles: (1) sovereign immunity; (2) derivative jurisdiction; and (3) federal "housekeeping" regulations. As federal law enforcement agencies become more and more involved in state investigations and prosecutions, federal courts must be allowed to consider the merits of Sixth Amendment claims without running into a series of legal obstacles. Otherwise, defendants recruited into working as confidential informants for law enforcement will face the prospect of profoundly unjust trials and undeserved fines or jail time. These outcomes not only devalue defendants' Sixth Amendment rights, but also undermine confidence in the efficacy of the entire judicial system.

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6 Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

7 *See* 5 U.S.C. § 702.

8 *See infra* Part IV.C.

9 Note that this particular concern is not present where the state does not elect trial judges.

This Note argues that to vindicate a state criminal defendant's Sixth Amendment compulsory process rights, 28 U.S.C. § 1442 should be amended to eliminate derivative jurisdiction in removal actions against federal officers and agencies. Part I provides relevant background information on the discrete areas of law related to cases like Dana Defendant's. Specifically, this Part discusses sovereign immunity, removal and derivative jurisdiction, federal "housekeeping" regulations, and the Compulsory Process Clause of the Sixth Amendment. Part II addresses the problems that state criminal defendants face when attempting to exercise their compulsory process rights, following Dana's case as she navigates the obstacles created when these areas of law intersect. Part III proposes an amendment to 28 U.S.C. § 1442 that will eliminate derivative jurisdiction for cases removed under that section, allowing district courts to exercise the same jurisdiction over federal agencies that they have in cases originally filed in federal court. Part IV addresses why existing options are not effective remedies, as well as potential counterarguments to the amendment.

I. EXISTING LAW

The dilemma faced by defendants in Dana's position arises at the intersection of several discrete areas of law. To understand how this combination obstructs the Sixth Amendment rights of state criminal defendants, this Part will first set out some basic principles related to: (1) sovereign immunity; (2) removal and derivative jurisdiction; (3) federal "housekeeping" regulations; and (4) Sixth Amendment compulsory process rights. Part II will provide a more detailed discussion of the problems created when these doctrines collide.

A. Sovereign Immunity

The first obstacle faced by state criminal defendants seeking information from federal officers and agencies is sovereign immunity. Sovereign immunity is an exclusively common law principle with deep roots in the English common law.[10] The doctrine protects both the United States and federal officials acting within the scope of their official duties from suits where immunity has not been waived.[11] Generally, such suits include actions where "the judgment sought would expend itself on the public treasury or domain, or interfere with the

10 Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–02 (2001).

11 *See* Malone v. Bowdoin, 369 U.S. 643, 648 (1962).

public administration,"[12] or if the judgment would "restrain the Government from acting, or . . . compel it to act."[13] The same principles apply when the suit is against a federal officer in his or her official capacity.[14]

Where the United States chooses to be a party to an action, as in a federal prosecution, the government waives any claim of sovereign immunity and is subject to the same rules of procedure and discovery as any private party.[15] The federal government also waives sovereign immunity in other contexts by consenting to be sued under certain statutes.[16] The extent of such statutory waivers need not be absolute, however, even when the government is a party to the action.[17] As a nonparty, on the other hand, sovereign immunity may still apply to protect the government from subpoenas, especially when issued by a state court.[18] It is generally uncontested that when the federal government is not a party to the underlying action, sovereign immunity is intended to protect federal agencies from having to comply with a myriad of state court orders and subpoenas.[19]

B. Removal and Derivative Jurisdiction

Sovereign immunity becomes especially problematic when applied to cases removed from state court. An action originally filed in state court may be transferred by the defendant to a federal court through a process known as removal.[20] As with sovereign immunity,

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12 Land v. Dollar, 330 U.S. 731, 738 (1947).

13 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949).

14 *See, e.g.*, Cousins v. Dole, 674 F. Supp. 360, 362 (D. Me. 1987).

15 United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958) ("The Government as a litigant is, of course, subject to the rules of discovery.").

16 *See, e.g.*, 5 U.S.C. § 702 (2012) (waiving sovereign immunity under the APA); Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) ("Congress, of course, has waived its immunity for a wide range of suits, including those that seek traditional money damages. Examples are the Federal Tort Claims Act and the Tucker Act." (citations omitted)).

17 *See* Lane v. Pena, 518 U.S. 187, 196 (1996) (noting that the Federal Government may waive sovereign immunity against liability without waiving immunity from monetary damages, as under the APA, 5 U.S.C. § 702).

18 Boron Oil Co. v. Downie, 873 F.2d 67, 70–71 (4th Cir. 1989) ("Even though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify . . . is inherently that of an action against the United States. . . . The subpoena proceedings fall within the protection of sovereign immunity even though they are technically against the federal employee and not against the sovereign.").

19 Envtl. Enters., Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987) (positing that if state courts could easily subpoena federal officials, officials would "find themselves spending all of their time doing nothing but complying with state court orders"). *But see* Chemerinsky, *supra* note 10, at 1216–23 (discussing and rejecting common justifications for sovereign immunity).

20 *See* Black's Law Dictionary 1409 (9th ed. 2009).

there is no constitutional basis for removal, though the power is created by legislation rather than through the common law.[21] Removal is therefore subject to absolute congressional control as to the time, process, and manner of its exercise.[22] The current statute governing general removals can be found at 28 U.S.C. § 1441.[23] Other statutes such as the federal officer removal statute mentioned above provide more specific contexts in which removal is permitted.[24] Pursuant to such statutes, cases must meet certain requirements before they can be removed to federal court. For example, cases typically must be within the original subject matter jurisdiction of the federal courts to be removable.[25]

Historically, the doctrine of "derivative jurisdiction" also stated that an action was not properly removable unless it was also within the subject matter jurisdiction of the state court in which it was commenced.[26] If the state court had no jurisdiction over the matter, the federal court would also lack jurisdiction upon removal.[27] This is true even if there would have been jurisdiction over an identical action originally filed in federal court.[28] In such a case, the federal judge would be forced to dismiss the action, as neither the federal court nor the state court would be permitted to exercise jurisdiction over the matter. Applied in this way, the doctrine created anomalous and inefficient results, most notably where the federal courts exercised exclusive jurisdiction over the subject matter of a case but were required to dismiss once it was removed from state court.[29] Consequently, derivative jurisdiction garnered much criticism from courts and legal scholars alike, who characterized it as "an archaic concept that impedes justice" and was "out of tune with the federal rules."[30]

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21 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816).

22 *Id.*

23 28 U.S.C. § 1441 (2012).

24 *See id.* § 1442 (providing for removals of state civil or criminal actions filed against federal officers or agencies).

25 *See, e.g.*, Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (2005) (citing 28 U.S.C. § 1441).

26 Lambert Run Coal Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377, 382 (1922) ("The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction.").

27 *Id.*

28 *Id.*

29 *See, e.g.*, *id.* at 382–83 (dismissing removed action against railroad because federal courts exercise exclusive jurisdiction over violations of Interstate Commerce Commission rules, but the case was erroneously filed in state court).

30 Welsh v. Cunard Lines, Ltd., 595 F. Supp. 844, 846 (D. Ariz. 1984); *see also* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3722 nn.102–03 (3d ed.).

In response, Congress amended 28 U.S.C. § 1441 by adding a new subsection, § 1441(e), which read: "The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."[31] The effect of this amendment was unclear and courts were split on the actual meaning of the language. Although some courts believed the amendment eliminated the derivative jurisdiction rule in all removal cases,[32] others continued to apply the traditional doctrine to removals under other sections.[33]

Perhaps in acknowledgment of the ambiguity of the prior rule, Congress again amended the statute in 2002.[34] Section 1441(e) was redesignated § 1441(f), and the introductory language was altered slightly to read: "(f) The court to which a civil action is removed under *this section* . . . ."[35] By this amendment, and with no apparent policy reasons, Congress made clear its intention to limit the abrogation of derivative jurisdiction to cases removed under § 1441 only.[36] Congress recently reconsidered abrogating derivative jurisdiction completely but decided to preserve the doctrine, primarily to avoid frustrating a plaintiff's choice of forum.[37]

Thus, in cases where an action is commenced in state court against a federal agency or official, such as a subpoena proceeding against a federal employee, derivative jurisdiction continues to act as a bar because the case is removed under § 1442.[38] Because both derivative jurisdiction and sovereign immunity are implicated when cases are removed, the federal agency may then shield itself from the fed-

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31 Judicial Improvements Act of 1985, Pub. L. No. 99-336, sec. 3(a), § 1441(e), 100 Stat. 633, 637.

32 *See* North Dakota v. Fredericks, 940 F.2d 333, 337 (8th Cir. 1991) ("Accordingly, the policy of Congress underlying new § 1441(e) supports the complete abandonment of the derivative-jurisdiction theory, even though the words of the statute clearly do not reach this far.").

33 *See* Palmer v. City Nat'l Bank of W. Va., 498 F.3d 236, 245 (4th Cir. 2007) (collecting cases).

34 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

35 *Id.* at 1827 (emphasis added to show amended language).

36 *See* WRIGHT ET AL., *supra* note 30, § 3722 nn.110–11.

37 *See* H.R. REP. NO. 112-10, at 3 (2011). Although the procedural posture of such cases is similar, several major distinctions arise when the underlying case is a criminal prosecution. *See infra* Part IV.B. As explained below, these differences make an amendment to the federal officer removal statute—at least for criminal defendants in state court—worth reconsidering.

38 *See* 28 U.S.C. § 1442 (2012) (containing no abrogation of derivative jurisdiction doctrine).

eral court when it would normally be required to submit to judicial enforcement.[39]

C. *The Federal "Housekeeping" Statute and* United States ex rel. Touhy v. Ragen[40]

Even without these doctrines as a shield, federal agencies are often permitted to raise an independent basis for withholding information under 5 U.S.C. § 301, the federal "Housekeeping Statute."[41] This statute provides that:

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.[42]

Federal agencies may promulgate their own "housekeeping" regulations pursuant to the statute.[43] The policy behind allowing these regulations is to conserve governmental resources when the government is not a party to a suit and to minimize involvement in matters unrelated to government business.[44] The Housekeeping Statute as originally adopted in 1789 was understood to be administrative in nature and did not create substantive privileges by which federal agencies could refuse to comply with subpoenas.[45] In fact, the House Committee on Government Operations added the final sentence of § 301 in 1958 in recognition of the fact that "through misuse [§ 301] ha[d] become twisted into a claim of authority to withhold information."[46]

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39 *See infra* Part II.A.

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

41 5 U.S.C. § 301 (2012).

42 *Id.*

43 *See, e.g.*, 28 C.F.R. §§ 16.22–16.29 (2013) (Department of Justice regulations). Note that these regulations provide only internal guidance for the department. *See id.* § 16.21(d).

44 Boron Oil Co. v. Downie, 873 F.2d 67, 70 (4th Cir. 1989) (citing Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290–91 (D. Mass. 1982)).

45 *See* Daniel C. Taylor, Note, *Taking* Touhy *Too Far: Why It Is Improper for Federal Agencies to Unilaterally Convert Subpoenas into FOIA Requests*, 99 GEO. L.J. 1227, 1235 (2011) (citing William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited but Nonexistent Housekeeping Privilege*, 14 WM. & MARY BILL RTS. J. 745, 749 (2005)). The express statutory language does no more than state that it is the department head who has custody of department records, and courts must thus order the head, rather than an employee, to produce those records. 5 U.S.C. § 301.

46 H.R. REP. NO. 85-1461, at 12 (1958).

The Supreme Court acknowledged the intention of Congress not to create any substantive privileges in its narrow holding in *United States ex rel. Touhy v. Ragen*.[47] *Touhy* began as a habeas corpus proceeding in the United States District Court for the Northern District of Illinois.[48] Touhy obtained a subpoena for records from an FBI agent to support a challenge to his conviction.[49] The agent refused to comply, pursuant to instructions from the Attorney General and applicable departmental regulations.[50] The Supreme Court held that the agent could not be held in contempt for failing to produce the records because he had acted in compliance with orders from the Attorney General and valid federal regulations.[51] In so holding, the Court specifically left open the question of the actual extent of the Attorney General's ability to defy a court order to produce documents in his possession.[52] Nevertheless, *Touhy* "is often cited for the proposition that an agency head is free to withhold evidence from a court without a specific claim of privilege."[53]

Now, a state defendant seeking information from a nonparty federal agency or officer must comply with both the Housekeeping Statute and applicable federal regulations as interpreted by the lower courts' misreading of *Touhy*. Often, as with the DOJ regulations set forth at 28 C.F.R. §§ 16.21–16.29, the requesting party is required to submit to the agency, along with the subpoena, an affidavit or statement "setting forth a summary of the testimony sought and its relevance to the proceeding."[54] This in turn limits the scope of the testimony the officer or employee is allowed to give.[55] Despite the implications for attorney work product protections, especially in criminal cases, courts have upheld such requirements.[56] Failing to follow

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

48 *Id.* at 463–64.

49 *Id.* at 464–65.

50 *Id.* at 465.

51 *Id.* at 468.

52 *Id.* at 469 ("The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling.").

53 Gregory S. Coleman, Note, Touhy *and the Housekeeping Privilege: Dead but Not Buried?*, 70 TEX. L. REV. 685, 687 & n.6 (1992) (collecting cases).

54 28 C.F.R. § 16.22(c) (2013).

55 *See id.*

56 United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999) ("Under the Justice Department regulations, a state criminal defendant is simply required to serve upon agency officials, in addition to his state court subpoena or other demand for information, a response to the United States Attorney's request for a summary of the information sought and its relevance to the pro-

the specific procedures set forth in the regulations will likely result in a denial from the agency that will then be upheld by a reviewing court.[57] Beyond these exacting procedural requirements, a defendant can also face problems when a court misinterprets these regulations as providing an agency with a substantive privilege to withhold information even in the face of a subpoena.[58] When the misread housekeeping privilege is combined with derivative jurisdiction and sovereign immunity, a state criminal defendant faces a triple bar to enforcement of a subpoena on a federal agency.

D. Sixth Amendment Compulsory Process

The criminal defendant's constitutional guarantee of compulsory process is the right most frustrated by sovereign immunity, derivative jurisdiction, and housekeeping regulations. The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[59] This right is applicable to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment.[60] Moreover, it is well established that "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense" and that "[t]his right is a fundamental element of due process of law."[61]

Unlike other Sixth Amendment rights, the compulsory process power must be affirmatively exercised by the criminal defendant.[62] Once invoked, it is clear that defendants have the right, at a minimum,

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ceeding."). For an extended discussion of the constitutional issues presented by allowing these types of requirements in federal prosecutions, see Milton Hirsch, *"The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years After* United States ex rel. Touhy v. Ragen, 30 FLA. ST. U. L. REV. 81, 111–23 (2002).

57 *See, e.g.*, Kwan Fai Mak v. FBI, 252 F.3d 1089, 1093 (9th Cir. 2001) (holding that an agency's refusal to disclose requested information was not arbitrary or capricious where Mak failed to comply with procedural requirements of DOJ's "*Touhy* regulations").

58 *See, e.g.*, Envtl. Enters., Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987) (holding that parties seeking information from agencies must respect agency determinations about whether subpoenaed employees will comply with subpoenas); Hotel Employees–Hotel Ass'n Pension Fund v. Timperio, 622 F. Supp. 606, 607–08 (S.D. Fla. 1985) (quashing subpoenas under *Touhy*); *see also infra* Part II.C.

59 U.S. CONST. amend. VI.

60 Washington v. Texas, 388 U.S. 14, 18 (1967) ("The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.").

61 *Id.* at 19.

62 Taylor v. Illinois, 484 U.S. 400, 410 (1988) (characterizing other Sixth Amendment rights

"to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[63] From the earliest constitutional jurisprudence, it was established that no one—not even the President or a Member of Congress—was exempt from the compulsory process rights of even the humblest of defendants.[64] Accordingly, the right is now construed to provide a basic guarantee of a fundamentally fair trial and is often analyzed under the same standards as due process.[65]

This underlying principle of fairness justifies both the right to compulsory process and the imposition of limitations on that right.[66] Because it is not absolute, establishing a violation of the compulsory process right requires "more than the mere absence of testimony."[67] Supreme Court jurisprudence suggests that the defendant must make at least a plausible showing that the testimony unsuccessfully sought would have been both "material and favorable to his defense."[68] Aside from these limitations, it violates the fundamental fairness of compulsory process to require a defendant to overcome such insurmountable obstacles as sovereign immunity, derivative jurisdiction, and the Housekeeping Statute in order to obtain favorable witnesses and evidence for her defense.

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as shields against potential prosecutorial abuses and the right to compel the presence of witnesses and present their testimony as a sword to rebut the prosecution's case).

63 Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

64 United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (holding that there were no exceptions for presidents in the constitutional guarantee of compulsory process); United States v. Cooper, 4 U.S. (4 Dall.) 341, 341 (C.C.D. Pa. 1800) ("The constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases."). *But see* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").

65 *See, e.g.*, *Ritchie*, 480 U.S. at 56; *see also* United States v. Nixon, 418 U.S. 683, 709 (1974) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.").

66 *Taylor*, 484 U.S. at 411–12 (noting that compulsory process rights are subject to discovery and procedural rules to ensure the "orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case").

67 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

68 *Id.*

II. Obstacles Under the Current Removal Statute

In seeking the information and testimony needed from a third-party federal agency to present her defense, a state criminal defendant must first overcome three hurdles: (1) the agency is protected from the state court subpoena by sovereign immunity;[69] (2) the agency may remove the subpoena proceeding to district court, where the federal judge will inherit the sovereign immunity problem of the state court and also be barred from enforcing the subpoena;[70] and (3) the court may misinterpret a federal agency's housekeeping regulations as providing a substantive privilege and independent basis for withholding the information.[71] To obtain compulsory process from the agency, or even have her Sixth Amendment rights evaluated on the merits, the state defendant must first find a way around all three of these legal barriers.

For a concrete illustration of this problem, return to Dana Defendant facing a state drug possession charge. Dana knows that her best defense is the testimony of Agent Anderson, her contact with the DEA, as well as the confidential informant file that will show she only became involved with drugs through her work with the DEA. Through the state court, she issues a subpoena to Anderson in his official capacity as a DEA agent, requesting Anderson's testimony and her file. She has issued the same kind of subpoena to the state law enforcement agency, requesting the testimony of the officer who led the investigation into her activities and the arrest report in her file. Although the state authorities comply with her request, the DEA balks, raising objections based on sovereign immunity and the Agency's housekeeping regulations. At this point, Dana's real troubles begin.

A. Sovereign Immunity in State Court

The DEA asserts that as a federal agency, sovereign immunity protects the DEA and Agent Anderson from the subpoena power of the state court. Dana discovers what the DEA already knows—it is a well-established common law principle that the United States and its agencies and officers are immune from suit absent an express waiver of sovereign immunity.[72] Even though Dana's subpoena was issued to

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69 *See infra* Part II.A.

70 *See infra* Part II.B.

71 *See infra* Part II.C.

72 Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983), *abrogated on other grounds by* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990), *as*

Anderson directly, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."[73] Because forcing compliance with the subpoena would "interfere with the public administration" by taking Anderson away from his official duties and requiring him to testify about matters learned while he was acting as a DEA employee, the subpoena enforcement action is characterized as one directly against the government.[74] To successfully enforce her subpoena, Dana must show that the government has waived sovereign immunity in her case.

Although the DEA may have played a role in the events leading up to Dana's arrest, Dana was ultimately charged in a state court by state authorities, and therefore the United States and its agencies are not parties to the underlying prosecution. If Dana had been prosecuted in federal court, this would constitute a waiver of sovereign immunity, and the government would be subject to the same rules of discovery and procedure as any other litigant.[75] As the federal government has not willingly been made a party to either the prosecution or the subpoena proceeding, Dana must find an express waiver of sovereign immunity in a statute to show that the government has consented to being sued in her case.[76] Dana is unsuccessful, however, and her research seems to confirm that the state court may not compel the Agency's compliance.[77] Without any consideration of the impact on Dana's Sixth Amendment rights, Dana's subpoena has now become a worthless piece of paper.

B. Derivative Jurisdiction in Federal Court

Before Dana can formulate her next move, the DEA removes the subpoena proceeding to the federal district court across the street and immediately files a motion asking the federal court to quash the subpoena. In its notice of removal, the DEA asserts that any action commenced in state court against the United States or one of its agencies

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recognized in Fadem v. United States, 52 F.3d 202, 205–06 (9th Cir. 1995); *see also* Aminoil U.S.A., Inc. v. Cal. State Water Res. Control Bd., 674 F.2d 1227, 1233 (9th Cir. 1982) (citing Dugan v. Rank, 372 U.S. 609, 620–22 (1963)).

73 Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam).

74 Land v. Dollar, 330 U.S. 731, 738 (1947).

75 *See* United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958).

76 *See supra* Part I.A.

77 *See* Sharon Lease Oil Co. v. Fed. Energy Regulatory Comm'n, 691 F. Supp. 381, 383 (D.D.C. 1988) (granting a motion to quash where the agency argued that under the doctrine of sovereign immunity, "it and its employees should not be subject to a subpoena issued in an action in a state court to which it or its employee is not a party").

or officers may be removed to the appropriate federal district court.[78] Dana agrees that the federal officer removal statute[79] entitles the DEA to remove the subpoena proceeding,[80] but is otherwise perplexed. Her subpoena was unenforceable by the state court, so why did the DEA move the case to federal court where sovereign immunity does not apply?[81] After all, the federal courts in the judicial branch are part of the same government as the agencies in the executive branch, and it is nonsensical to say that the federal government should be immune from itself.[82]

Dana is hopeful that the DEA has made a mistake and the federal judge will agree to hear her arguments about the importance of Anderson's testimony for her defense. To her dismay, the DEA cites to another obscure legal doctrine known as derivative jurisdiction, arguing that the federal court is also bound by sovereign immunity. Dana discovers that derivative jurisdiction prevents the federal court from exercising any power over her removed case because the state court was originally without jurisdiction.[83] This means that the extent of the federal court's jurisdiction on removal is "derived" from the state court's jurisdiction.[84] The federal court may not use the balancing test it regularly applies in federal prosecutions, weighing Dana's constitutional rights against the agency's actual need to keep the information confidential.[85]

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78 28 U.S.C. §§ 1442(a), 1446(a) (2012).

79 Section 1442(a)(1) provides:

> A civil action or criminal prosecution commenced in a State court against . . . [t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office [may be removed to federal court].

Id. § 1442(a)(1).

80 Section 1442(c)(1) provides that the term "civil action" as used in § 1442(a) includes "a subpoena for testimony or documents." *Id.* § 1442(c)(1).

81 *See In re* Boeh, 25 F.3d 761, 770 (9th Cir. 1994) (Norris, J., dissenting) (sovereign immunity and Supremacy Clause "limitations do not apply when a *federal* court exercises its subpoena powers against federal officials").

82 *See* Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778 (9th Cir. 1994) (allowing executive branch to conclusively determine whether federal employees may comply with valid federal court subpoenas "would raise serious separation of powers questions"); Hirsch, *supra* note 56, at 104. *But see* EPA v. Gen. Elec. Co., 197 F.3d 592, 597 (2d Cir. 1999) (noting that the sovereign immunity problem remains even in federal court, where the subpoena is issued as the subpoena of the litigant, not the court).

83 Lambert Run Coal Co. v. Balt. & Ohio R.R. Co., 258 U.S. 377, 382 (1922).

84 *Id.*

85 *See, e.g.*, Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 794 (D.C. Cir.

Although derivative jurisdiction was eliminated under the general removal statute,[86] that provision was limited to cases removed under § 1441, and Dana's case was removed under § 1442, which contains no such abrogation.[87] Though Dana understands why a federal agency might require protection from state court subpoenas,[88] she does not understand why a *federal* court should not have the power to enforce—or even the power to decide whether to enforce—a subpoena.

C. Touhy *and the Federal Housekeeping Statute in Federal Court*

Even without sovereign immunity and derivative jurisdiction standing in her way, Dana realizes there is something else that might bar her access to Anderson's testimony. Initially, Dana was convinced that the DEA's challenge to her subpoena under its housekeeping regulations was merely procedural, and she could win by showing that she had complied with the requirements of the regulation. After all, the Supreme Court's decision in *Touhy* interpreted the federal Housekeeping Statute as providing little more than a way for agencies to process requests for information.[89] Beyond that, the Housekeeping Statute and an agency's implementing regulations provide no substantive privileges.[90] Unfortunately for Dana, her case is being litigated in a court that reads *Touhy* and the housekeeping regulations as granting the agency wide discretion to withhold information even in the face of a subpoena.

Dana discovers that since the Supreme Court's decision in *Touhy*, the government has repeatedly claimed that a party's failure to follow procedures set forth in housekeeping regulations gives federal agencies unlimited discretion to decide whether to comply with state subpoenas.[91] Trial judges either accept such arguments or leave them

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1971) (stating that the balancing process should consider whether the "need for access to the documents . . . must be overridden by some higher requirement of confidentiality").

86 *See* 28 U.S.C. § 1441(f) (2012).

87 *See id.* § 1442.

88 *See* Envtl. Enters., Inc. v. EPA, 664 F. Supp. 585, 586 (D.D.C. 1987).

89 *See* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 468–69 (1951).

90 United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1255–56 (8th Cir. 1998) (citing NLRB v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961), for the proposition that "[s]ince 1958, it has been clear that the Housekeeping Statute cannot be construed to establish authority in the executive departments to determine whether certain papers and records are privileged" (internal quotation marks omitted)).

91 Boron Oil Co. v. Downie, 873 F.2d 67, 69–70 (4th Cir. 1989) (quashing subpoenas issued to the EPA on the grounds that they did not comply with regulations providing that "an employee . . . may testify in response to a subpoena only to the extent expressly authorized by the agency"); Sharon Lease Oil Co. v. Fed. Energy Regulatory Comm'n, 691 F. Supp. 381, 383 (D.D.C. 1988) (explaining the Federal Energy Regulatory Commission's argument that the

unaddressed when sovereign immunity disposes of the matter.[92] Undeterred, Dana tries to convince the judge that ruling in this manner will be going against a recent trend in the federal courts. Although agencies have successfully invoked the unsubstantiated "housekeeping privilege" to resist compliance with state subpoenas in the past, many federal courts are beginning to recognize—at least in federal cases—that the Housekeeping Statute and *Touhy* do no more than consolidate the authority to make a claim of privilege in the head of a federal agency.[93] Now that her subpoena is before a federal court, neither sovereign immunity nor housekeeping regulations should bar enforcement against the DEA. Notwithstanding this authority, the judge rejects her arguments. The judge decides that, given that derivative jurisdiction applies to this case, both sovereign immunity and the housekeeping regulations require the federal judge to dismiss the subpoena.

Dana is completely dumbfounded. If her case had originated in federal court, sovereign immunity alone could not provide a basis for the DEA to refuse to comply with the subpoena.[94] When Dana's case ended up in that same federal court through removal, however—a choice made not by her but by the DEA—the federal court inherited the state court's sovereign immunity problem thanks to derivative jurisdiction.[95] Even without this barrier, the federal court's misinterpretation of *Touhy* stands as an independent basis for dismissing her subpoena. If neither the state nor the federal court is permitted to even hear her Sixth Amendment arguments, how can she hope to obtain the necessary evidence to present her defense?

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agency and its employees should not be subject to state court subpoenas in actions where they are not a party); Hotel Employees–Hotel Ass'n Pension Fund v. Timperio, 622 F. Supp. 606, 607–08 (S.D. Fla. 1985) (quashing subpoenas under *Touhy*).

92 *See, e.g.*, Kwan Fai Mak v. FBI, 252 F.3d 1089, 1093 (9th Cir. 2001) (quashing subpoena where defendant failed to comply with requirements of "*Touhy* regulations"); Louisiana v. Sparks, 978 F.2d 226, 235 n.16 (5th Cir. 1992) (collecting cases dismissing state subpoena proceedings against federal officers on sovereign immunity grounds).

93 *See, e.g.*, Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007) ("*Touhy* regulations are only procedural, and do not create a substantive entitlement to withhold information."); Watts v. SEC, 482 F.3d 501, 509 (D.C. Cir. 2007) (quoting 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.05(1)(b) (3d. ed. 2006) for the proposition that a government agency may not cite its *Touhy* regulations as "the legal basis for any opposition to [a] subpoena"; rather, any ground for resisting disclosure "must derive from an independent source of law such as governmental privilege or the rules of evidence or procedure").

94 *See In re* Boeh, 25 F.3d 761, 770 (9th Cir. 1994) (Norris, J., dissenting).

95 *See* Lambert Run Coal Co. v. Balt. & Ohio R.R Co., 258 U.S. 377, 382 (1922).

III. Amending the Federal Officer Removal Statute

To prevent the fundamental unfairness present in Dana's case, Congress should amend 28 U.S.C. § 1442 to eliminate derivative jurisdiction in removal actions against federal officers and agencies. This amendment will not guarantee that defendants will receive the information they seek from federal officers, but rather will give them a chance to have their Sixth Amendment claims evaluated on the merits in federal court. Although abrogating derivative jurisdiction does not fully resolve the *Touhy* problem, allowing a subpoena enforcement action to proceed on the merits will allow federal courts to evaluate the merits of any legitimate *Touhy* claims at the same time.

A. Amending the Statute

The 2002 amendment to 28 U.S.C. § 1441(f), although apparently intended to eliminate ambiguities created by the 1986 amendment, inexplicably limited the abrogation of derivative jurisdiction to cases removed under § 1441.[96] This revision allows derivative jurisdiction, in conjunction with sovereign immunity, to effectively preclude state defendants from obtaining information from federal agencies to use at trial.[97] This result is especially unjust for defendants like Dana who are charged with crimes related to their work as confidential informants for the agency,[98] or when a federal agency has provided substantial cooperation in a state-level investigation.[99] More importantly, defendants are effectively stripped of the constitutionally protected right to obtain evidence and witnesses in their favor.[100]

A narrow and easily implemented solution is to add a subsection 1442(d) that is identical to § 1441(f). Such an amendment would read, in full: "The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil

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96 *See* Wright et al., *supra* note 30, § 3722 nn.110–11.

97 *See, e.g.*, Barnaby v. Quintos, 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005) ("In amending the statute in 2002, and replacing less precise language with much more specific language, Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code."); Wright et al., *supra* note 30, § 3721 ("[N]ew § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under 28 U.S.C.A. § 1441.").

98 *See, e.g.*, Smith v. Cromer, 159 F.3d 875, 877 (4th Cir. 1998) (defendant subpoenaed testimony of DOJ employees and production of his confidential informant file to facilitate preparation of his defense to state narcotics charges).

99 *See, e.g.*, United States v. Williams, 170 F.3d 431, 432 (4th Cir. 1999) (FBI provided investigative assistance in homicide case at request of state officials, but refused to respond to defendant's subpoena for files related to investigation).

100 *See supra* Part I.D.

action because the State court from which such civil action is removed did not have jurisdiction over that claim."[101] Using the existing wording of § 1441(f) removes the problems of drafting an entirely new statute that will clearly reflect Congress's intent. Because the identical language has already been interpreted by the courts,[102] it will be clear that the proposed subsection should *only* apply to removals under § 1442.[103] This also eliminates the need for Congress to evaluate each individual removal statute to determine whether derivative jurisdiction should be retained or abrogated in those cases.

B. Application of the Amended Statute

The adoption of this amendment would finally allow Dana Defendant to present her Sixth Amendment claims to a federal district court. The initial phase of the litigation would look the same, as the abrogation of derivative jurisdiction would not overcome the sovereign immunity bar that keeps the state court from enforcing the subpoena. Derivative jurisdiction only becomes relevant once a case is removed to federal court. That is, a federal agency remains free to contest the power of a *state* court to compel it to take a particular action. When the enforcement proceedings are removed to federal court, however, the course of Dana's case looks very different.[104]

The federal court, notwithstanding that the state court lacked subject matter jurisdiction over the action, could properly decide whether to enforce or quash the subpoena based on the merits of the parties' arguments. This consideration would weigh Dana's constitutional rights and need for the information against the interest of the DEA in keeping Agent Anderson's testimony and her confidential informant file out of the public record. This follows the federal courts' current practice of deciding whether to enforce federal subpoenas.[105]

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101 *See* 28 U.S.C. § 1441(f) (2012).

102 *See, e.g.*, Palmer v. City Nat'l Bank of W. Va., 498 F.3d 236, 245–46 (4th Cir. 2007) (citing cases and commentators all interpreting § 1441(f) to limit abrogation of derivative jurisdiction only for removals under § 1441).

103 *See, e.g.*, *id.* at 246 ("Whatever the intent of the 2002 amendment, its result was that § 1441(f) is more clear than former § 1441(e) in abrogating derivative jurisdiction only with respect to removals effectuated under § 1441.").

104 Note that Dana, as the "plaintiff" in the subpoena enforcement action, cannot remove the action to federal court on her own. 28 U.S.C. § 1441(a) (2012).

105 *See, e.g.*, Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) (focusing review on "whether the district court struck the correct balance" between "the government's need to protect investigative records pertaining to an ongoing criminal investigation" and the defendant's "need for the information requested"); *see also* Coleman, *supra* note 53, at 713–15 (articulating and collecting cases applying a "government privilege standard" for evaluating *Touhy* claims).

Using the same considerations that it would apply to a case originally filed in federal court, the federal judge would have the opportunity to give due consideration to both the constitutional rights of Dana and the privilege concerns raised by the Agency.[106] Dana's Sixth Amendment rights may still lose out in federal court when weighed against the Agency's interests, but abrogating derivative jurisdiction under § 1442 will ensure that she at least has a chance to win.

IV. COUNTERARGUMENTS

Amending the federal officer removal statute may be construed as too narrow, resolving the derivative jurisdiction and sovereign immunity issues but leaving *Touhy* and housekeeping regulations in the path of the state defendant. As discussed below, however, there appears to be a trend in the caselaw and among scholars towards resolution of this latter issue.[107] Although Congress recently rejected an amendment that would have abrogated derivative jurisdiction completely, the proposed amendment is limited to removals under § 1442 and gives proper weight to the competing interests of defendants, agencies, and courts.[108]

The other primary critique of the proposed amendment is that the Sixth Amendment rights of state criminal defendants are "not ripe for adjudication" because other remedies exist.[109] Specifically, defendants are encouraged to file a claim under the APA[110]—a statute that already contains a limited waiver of sovereign immunity—or to seek outright dismissal of the prosecution by the state court.[111] In practice, however, neither of these so-called remedies is particularly useful, and each has its own drawbacks.[112]

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106 Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 794 (D.C. Cir. 1971) (articulating a standard for in camera inspections).

107 *See infra* Part IV.A.

108 *See infra* Part IV.B.

109 Colorado v. Rodarte, No. 09-CV-02912-PAB-MEH, 2010 WL 924099, at *2 (D. Colo. Mar 9, 2010) ("The constitutional claims are not ripe for adjudication because [the defendant] has other remedies available. Those remedies may include dismissal of the charges or other ameliorative action by the state court, or an action in federal court pursuant to the Administrative Procedure Act." (quoting *In re* Gray, No. 97-6385, 1998 WL 712663, at *1 (10th Cir. Oct. 13, 1998)) (internal quotation marks omitted)).

110 *See infra* Part IV.C.

111 *See infra* Part IV.D.

112 Note that these options, albeit ineffective compared to the proposed solution, would still be available to the unsuccessful but determined defendant regardless of an amendment to the removal statute.

A. *Addressing the Residual Problem of* Touhy *and the Housekeeping Statute*

It must be acknowledged that amending the removal statute does not directly address all obstacles facing the state defendant under the existing law. Although a defendant may now argue her Sixth Amendment claims before a federal court, she still faces possible dismissal of her subpoena based on federal housekeeping regulations.[113] However, the *Touhy* problem is not as intractable as it first appears. As discussed previously,[114] federal courts are increasingly recognizing that housekeeping regulations do not give agencies substantive privileges to withhold requested information.[115] The proposed amendment to the derivative jurisdiction statute supports this trend by allowing federal courts to balance the state defendant's Sixth Amendment rights against an agency's claimed privilege, using the same analysis applied to federal cases.[116]

Under the existing statute, *Touhy* questions arising in state cases are rarely addressed on the merits, and thus rarely resolved with any clarity. Pursuant to the amended statute, however, federal courts facing a federal agency's resistance to a subpoena can conduct in camera reviews of disputed documents. During this review, the court will consider whether the requesting party's "need for access to the documents, or any part of the documents, for purposes of [the] litigation must be overridden by some higher requirement of confidentiality" established by the agency.[117] Some federal courts have already conducted such in camera reviews for proceedings initiated in state court.[118] If other circuits choose not to follow this trend when forced to confront the *Touhy* issue directly, it will create a circuit split that should be resolved by the Supreme Court. After more than sixty years of confusion, the Court should affirmatively settle the extent of a federal agency's power to withhold information in the face of a subpoena. An amendment to the removal statute, while not directly ad-

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113 *See supra* Part I.C; Part II.C. For an extended discussion of the specific problems presented by the intersection of Sixth Amendment compulsory process rights and *Touhy* regulations, see Hirsch, *supra* note 56.

114 *See supra* Part II.C.

115 *See* Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007); Watts v. SEC, 482 F.3d 501, 509 (D.C. Cir. 2007); Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 780 (9th Cir. 1994) (stating that *Touhy* regulations do not "create an independent privilege to withhold government information or shield federal employees from valid subpoenas").

116 *See, e.g.*, Florida v. Cohen, 887 F.2d 1451, 1454–55 (11th Cir. 1989).

117 Comm. for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 794 (D.C. Cir. 1971) (articulating a standard for in camera inspections).

118 *Cohen*, 887 F.2d at 1454.

dressing the issues faced by a state defendant under *Touhy* and the Housekeeping Statute, will thus facilitate a gradual resolution through the federal courts and the common law.

B. Limiting the Amendment to the Federal Officer Removal Statute

In the recent amendment to the federal officer removal statute, Congress again decided to preserve the doctrine of derivative jurisdiction in cases not removed under § 1441.[119] The legislative history to this amendment indicates that Congress decided to maintain "the status quo treatment of derivative jurisdiction" due to concerns that defendants were bringing third-party claims against federal employees merely to frustrate a plaintiff's choice of forum.[120] An amendment of § 1442, unlike the amendment rejected by Congress, would apply only to cases removed under that section. Moreover, any concerns that a defendant in a civil suit would add third-party claims against federal agencies for the sole purpose of litigating in federal court may be addressed under the existing provisions for remand.[121] If the claims against the government are legitimate, the case should in fact be litigated in a federal forum. If the defendant later drops the third-party claims, there is no subject matter basis for removal. The federal judge then has discretion to remand and even to require payment of any costs and fees incurred as a result of the improper removal.[122] It should be noted that these concerns are not applicable to the criminal cases discussed in this Note because, absent an independent basis for removal, a subpoena enforcement proceeding is the only aspect of the action that is removable.[123]

More importantly, the proposed amendment merits reconsideration by Congress given the significant interests at stake. Unlike a typical third-party claim brought in a civil action, subpoenas issued by criminal defendants have constitutional implications.[124] When a subpoena goes unenforced without any consideration by either state or federal courts, the Sixth Amendment compulsory process right is also ignored. This amendment, in contrast, provides a much needed balance between each of the important concerns raised in these cases. First, federal agencies are permitted to raise claims of privilege that

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119 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1087, 126 Stat. 1632, 1969–70 (to be codified at 28 U.S.C. § 1442).

120 *See* H.R. REP. NO. 112-10, at 3 (2011).

121 28 U.S.C. § 1447 (2012).

122 *Id.* § 1447(c).

123 *Id.* § 1442(c).

124 *See supra* Part I.D.

may entitle them to withhold requested information from defendants even after the statute is amended. Second, proper respect is shown for federalism because federal agencies are not asked to submit to the power of state courts, but instead are allowed to litigate their claims before a federal judge. Finally, courts must give proper consideration to a defendant's Sixth Amendment rights before simply dismissing a subpoena.

C. The APA as an Ineffective Remedy

The APA, enacted in 1946,[125] provides for "basic and comprehensive regulation of procedures in many agencies."[126] The general purpose of the APA is "[t]o improve the administration of justice by prescribing fair administrative procedure."[127] For the purposes of this Note, the relevant provision of the APA is 5 U.S.C. § 702, which provides a right of judicial review for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[128] This section waives sovereign immunity for actions filed under the APA "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority."[129]

Many federal courts have held that the APA is the proper vehicle by which a defendant should challenge an agency's decision to withhold requested information pursuant to its own regulations.[130] For the defendant waiting for potentially exculpatory evidence to present at trial, however, the APA represents a futile and ultimately inadequate remedy.[131] As noted by the dissent in *In re Boeh*,[132] "[f]orcing [the requesting party] to file a . . . cumbersome APA suit in the middle of

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125 Administrative Procedure Act ("APA"), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

126 Wong Yang Sung v. McGrath, 339 U.S. 33, 36 (1950).

127 APA, 60 Stat. at 237.

128 5 U.S.C. § 702.

129 *Id.*

130 *See, e.g.*, United States v. Williams, 170 F.3d 431, 434 (4th Cir. 1999); Hous. Bus. Journal, Inc. v. Office of Comptroller of Currency, 86 F.3d 1208, 1212 (D.C. Cir. 1996) ("If the agency refuses to produce the requested documents, the sole remedy for the state-court litigant is to file a collateral action in federal court under the APA."); Swett v. Schenk, 792 F.2d 1447, 1452 n.2 (9th Cir. 1986).

131 Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 780 n.11 (9th Cir. 1994) ("[W]e acknowledge that collateral APA proceedings can be costly, time-consuming, [and] inconvenient to litigants . . . ." (citing *In re* Boeh, 25 F.3d 761, 770 n.4 (9th Cir. 1994) (Norris, J., dissenting)).

132 *In re Boeh*, 25 F.3d at 767 (Norris, J., dissenting).

his civil rights trial is so burdensome that it effectively eviscerates his right to obtain [the agent's] testimony."[133]

First, seeking compliance through the APA is time-consuming. Not only does it take time to direct the request to the appropriate person in the agency and comply with the requirements of the agency's *Touhy* regulations, it also takes time for the agency to respond to the request. Because Dana Defendant knows what information she wants from the DEA and for what purpose, she may be able to file a proper request and even receive a response before her trial begins. But for a defendant who does not discover until a week into trial that a federal agency has provided substantial, but unspecified, assistance to the state investigation leading up to her arrest, it is unlikely that the trial will be stayed to await a decision from the agency.

Adhering to the lengthy request process is a necessary step, however, for a defendant to pursue an APA claim once the agency denies her request and the courts decline to enforce a subpoena.[134] When the state defendant returns to federal court as a plaintiff, initiating the third proceeding after the underlying prosecution and enforcement action,[135] she may wait years to resolve her APA claim given the relatively slower pace of civil litigation. Resorting to an APA claim unnecessarily multiplies litigation, wastes time and scarce judicial resources, and subjects the defendant to increased legal costs and fees.[136] Meanwhile, the defendant has either forfeited the right to a speedy trial or had to go to trial without the requested information.

Beyond questions of time or resources, a challenge under the APA raises serious questions about the role of the Housekeeping Act and agency *Touhy* regulations. Applying the abuse of discretion standard in an APA claim of this kind assumes that the agency does in fact possess a "housekeeping privilege" that is subject only to a narrow judicial review.[137] Under that standard, the defendant will only prevail if the agency withholds information in contravention of its own

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133 *Id.* at 770 n.4.

134 *See supra* Part II.C (discussing necessary compliance with *Touhy* regulations).

135 The inefficiency of an APA remedy could be ameliorated by allowing a district judge presiding over an underlying federal prosecution to review an agency's noncompliance with a subpoena pursuant to departmental regulations as if in an independent APA action. EPA v. Gen. Elec. Co., 197 F.3d 592, 599 (2d Cir. 1999). This shortcut is obviously not available when the underlying prosecution is in state court.

136 Note also that an APA claim is a civil action that would not allow the appointment of counsel for an indigent defendant, unlike in criminal or other civil actions that may result in loss of personal liberty. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 26 (1981).

137 Coleman, *supra* note 53, at 713–14.

policies, which it has broad discretion to enact.[138] In contrast, the proper inquiry should focus on whether the defendant was constitutionally entitled to the withheld information, and if so, how to properly vindicate those Sixth Amendment rights. In the end, not only are APA claims in these cases time-consuming and insufficient to address the constitutional rights at stake, but they are also overwhelmingly unsuccessful for defendants.[139]

D. Outright Dismissal by the State Court as a Problematic and Unlikely Remedy

Some appeals courts have suggested, as a last resort, that defendants may seek ameliorative relief from the state court itself by requesting dismissal of the entire prosecution.[140] There is little caselaw on this point because courts are understandably reluctant to go to such lengths on behalf of criminal defendants. Outright dismissal of a mass of criminal prosecutions not only looks bad for a judge seeking future reelection, but also creates tension between state courts, federal courts, and agencies.[141] Although it has been suggested that outright dismissal provides justice to the defendant and "justice writ large,"[142] such a remedy is too risky for most judges, and thus highly unlikely to be of any real benefit to defendants.[143]

CONCLUSION

Under the existing federal officer removal statute, federal agencies are permitted to ignore state court subpoenas by hiding behind the wall of sovereign immunity and derivative jurisdiction. With the combination of these two doctrines, state criminal defendants are left

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138 5 U.S.C. § 301 (2012).

139 *See, e.g.*, Massock v. Superior Court, No. C-99-3713 SC, 2000 WL 10240 (N.D. Cal. Jan. 4, 2000); DeMore v. Superior Court, No. C-99-3730 SC, 1999 WL 1134735 (N.D. Cal. Dec. 9, 1999). Perhaps the only exception is the case of *Johnson v. Reno*, 92 F. Supp. 2d 993, 995 (N.D. Cal. 2000), where the defendant successfully obtained relief under the APA—but not until his third APA suit.

140 *See* Colorado v. Rodarte, No. 09-CV-02912-PAB-MEH, 2010 WL 924099, at *2 (D. Colo. Mar. 9, 2010).

141 *See* Hirsch, *supra* note 56, at 135.

142 *Id.*

143 One notable exception is the case of *State v. Tascarella*, 580 So. 2d 154, 157 (Fla. 1991), in which the Florida Supreme Court approved the trial court's exercise of discretion in refusing to allow eleven DEA agents to testify on behalf of the prosecution where the agents had declined to appear for pretrial depositions duly noticed by the defendants. This case is exceptional, however, because Florida affords criminal defendants the qualified right to take pretrial depositions of material witnesses, and it was the prosecution that sought to elicit the agents' testimony at trial.

out in the cold, unable to seek relief from federal or state courts except by roundabout APA claims or unlikely ameliorative relief.

Such a result not only undermines the relationship between federal and state governments, but also effectively destroys the Sixth Amendment rights of countless defendants in state prosecutions. As federal law enforcement agencies rely on greater numbers of confidential informants and increasingly collaborate with local law enforcement, it is even more necessary to provide an effective remedy to such defendants.

An amendment to the federal officer removal statute provides a simple solution that allows a state defendant to have her Sixth Amendment rights considered on the merits by a federal court. The amendment is narrowly tailored to preserve the bar of sovereign immunity that protects federal agencies from state court powers, while permitting federal courts to hear cases that already fall within their traditional subject matter jurisdiction. Federal agencies are still allowed to assert any valid privileges for withholding information in the face of a state court subpoena, but their interests will be appropriately weighed against the defendant's constitutional right to compulsory process.