Sovereign Immunity

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§ 2.01 THE ISSUE

The government often plays an active role in the litigation of disputes related to the bank examination privilege. Indeed, the privilege “belongs solely” to regulatory entities, and “may not be asserted by third parties on behalf of the banking agencies.” A regulator “must be allowed the opportunity to assert the privilege and the opportunity to defend its assertion.” To be sure, banks also have a significant interest in such disputes. After all, a regulatory audit might contain opinions or information that a bank considers privileged or confidential. Furthermore, because regulators frequently provide banks with copies of audit reports, a litigant might seek to bypass the regulator that conducted such an audit and wrest the document from the bank to which the report was issued. But in the end, most regulators maintain that, even if such an audit report happens to be in the physical possession of a financial institution, the report remains government property, and remains privileged.

For example, the Office of the Comptroller of the Currency (OCC) defines “non-public OCC information” as including, among other things, “[a] report of examination, supervisory correspondence, an investigatory file compiled by the OCC . . . in connection with an investigation, and any internal agency memorandum, whether the information is in the possession of the OCC or some other individual or entity.” Such nonpublic OCC information “remains the property of the OCC,” and the OCC forbids the dissemination of such information “without the prior written permission of the OCC.” Indeed, “no person obtaining access to non-public OCC information under this section may make a copy of the information and no person may remove non-public OCC information from the premises of the institution, agency, or other party in authorized possession of the information.”

Because of the government’s important role in this area, the bank examination privilege can become entangled with another legal concept: the doctrine of sovereign immunity. Pursuant to the doctrine of sovereign immunity, “[t]he United States, as
sovereign, is immune from suit save as it consents to be sued."5 That is, “[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”6 Each of the 50 states also has sovereign immunity.7 Various federal and state statutes waive sovereign immunity in particular areas.8 Such a statute also might require a party to meet a specified burden of proof before a court can grant a request for relief against the government.9

On occasion, when a party seeks nonpublic bank examination records, a regulator raises a sovereign immunity objection while also invoking the bank examination privilege.10 In such circumstances, a successful sovereign immunity defense might eliminate the need to determine the applicability of the privilege. Conversely, if the sovereign immunity argument does not prevail, the privilege issue might come into the foreground.

In one case, for example, the plaintiffs subpoenaed the OCC. In addition, the plaintiffs asked a bank to produce documents that, in the OCC’s view, constituted nonpublic OCC information. The OCC contended that the subpoena served on the OCC and the discovery demand served on the bank were equally improper. In regard to both, the OCC invoked the doctrine of sovereign immunity and the bank examination privilege. The court agreed that sovereign immunity protected the OCC. Thus, in relation to the OCC subpoena, the privilege issue was a moot point. But the court held that the OCC’s sovereign immunity defense could not extend to the discovery demand served on the bank. As a result, it was important to determine whether the privilege encompassed the bank’s documents.11

§ 2.02 OVERVIEW OF THE DOCTRINE

At the federal level, the “axiomatic” principles of sovereign immunity are that, first, “the United States may not be sued without its consent,” and, second, “the existence of consent is a prerequisite for jurisdiction.”12 While the Constitution does not expressly address the sovereign immunity of the United States, courts have found that such immunity is implied.

Sovereign immunity can apply to a lawsuit against a federal regulatory agency.13 Sovereign immunity also can defeat a lawsuit that, “although nominally directed against [an] individual officer” of such an agency, in substance seeks “compulsion against the sovereign.”14 In addition, a lawsuit can raise sovereign immunity concerns if the judgment “would expend itself on the public treasury or domain,” if the judgment would “interfere with the public administration,” or “if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.”15

There are several exceptions to the doctrine of federal sovereign immunity. For example, under some circumstances, a person can bring a Bivens action against an individual federal employee to seek damages for a violation of constitutional rights.16 Furthermore, “where the [executive branch] officer’s powers are limited by statute,
his actions beyond those limitations are considered individual and not sovereign actions." Thus, when an officer "is not doing the business which the sovereign has empowered him to do, or he is doing it in a way which the sovereign has forbidden," his actions are ultra vires his statutory authority, and as such "may be made the object of specific relief." Similarly, a person can seek injunctive relief if "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional."

The United States can waive its sovereign immunity. A waiver must be "unequivocally expressed in statutory text." Congress may impose "limitations and conditions" on a waiver. Such limitations and conditions "must be strictly observed, and exceptions thereto are not to be implied." Congress may condition or limit a waiver by, among other things, specifying a standard of judicial review.

An individual state also can assert, or waive, its own sovereign immunity. In part, state sovereign immunity is codified in the Eleventh Amendment to the Constitution. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Thus, the Eleventh Amendment confirms that states are immune to actions brought in federal court by citizens of other states or by foreign nationals.

Ultimately, however, "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Rather, state sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments."

Substantively, state sovereign immunity is similar in many respects to federal sovereign immunity. State sovereign immunity can extend to "arms of the State," including regulatory agencies. Like the Federal Government, "a State may waive its sovereign immunity and consent to suit." In addition, state sovereign immunity is subject to certain exceptions concerning matters of constitutional law and other conduct exceeding an officer’s legal authority. First, "Congress may abrogate the States' immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment." Thus, Congress may create a cause of action that allows a plaintiff to seek relief against a state for specified violations of constitutional rights. Second, a plaintiff may name an officer of a state government "in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." Third, a person may bring an Ex parte Young action against an officer of a state government to obtain injunctive or declaratory relief with respect to "an ongoing violation of federal law."
§ 2.03 FEDERAL LITIGATION

[1] Summary

In federal court, the relationship between the sovereign immunity doctrine and the bank examination privilege is, in large part, a function of the specific procedural posture of a case. Sovereign immunity is unlikely to apply when parties demand examination records from banks. Sovereign immunity also is usually a non-issue when the government is a party to a case and is served with a demand by an adversary. But when a party serves a third-party discovery request on a regulator, the legal landscape is more complex.

[2] Bank Documents

When a party demands that a bank produce a regulatory examination report, the applicability of the sovereign immunity doctrine is related to the question of possession, custody, and control. Under the Federal Rules of Civil Procedure, it is improper to demand discovery from a witness if the witness does not have possession, custody, or control of the sought-after documents or information. But if a witness has possession, custody, or control of evidence, the witness potentially can be compelled to produce it.33

As a result, when a party demands that a bank produce a regulatory examination report, an important threshold question is whether the bank has possession, custody, or control of the document. The policies of many regulators provide that regulatory examination reports that are physically located in a bank's files are government property. Accordingly, one might argue, such a report is in the possession, custody, or control of the government, and the bank cannot be compelled to produce such a report. One might further contend that, to the extent that such a discovery demand is meant to force the government to permit the release of the document, sovereign immunity bars enforcement of the demand.

The proponent of such a discovery demand might maintain that, if a bank has a copy of such a report, then the bank has the practical ability to turn it over in a lawsuit. The proponent of such a demand might argue that the possession, custody, and control test therefore is satisfied. That party also might posit that, because the bank is a nongovernmental entity, sovereign immunity is not a relevant concern.

In 1958, in Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, the U.S. Supreme Court issued an opinion that, as interpreted by some lower courts, sets the framework for analyzing this issue. In Rogers, a party served a discovery demand on a Swiss bank. The bank objected to the request on the ground that the Swiss authorities had classified the documents as government property. Nonetheless, the Court found that the bank still had possession, custody, and control over the evidence. The bank's dilemma, the Court held, was not "fully analogous to one where documents required by a production order have ceased to exist,"
or have been taken into the actual possession of a third person not controlled by the party ordered to produce, and without that party’s complicity.”

In a subsequent case, a party asked a financial institution to produce records that were in the institution’s physical possession but that legally belonged to the institution’s federal regulator, the Office of Thrift Supervision (OTS). The institution objected to the request based on lack of possession, custody, or control. Citing Rogers, the court rejected that argument. There was “no compelling reason to relieve [the institution] from the relatively straightforward discovery methods outlined in [the Federal Rules of Civil Procedure] simply because the source agency has attempted to mandate a different procedure.”

Other decisions have reached similar results. In a case that ultimately was heard by the U.S. Court of Appeals for the Sixth Circuit, the Federal Reserve filed an amicus brief contending that, under the agency’s regulations, a court could not compel a bank to produce examination records. The court of appeals disagreed, finding that “parties in possession of documents forwarded to them by a federal agency have ‘possession, custody or control’ within the meaning of Rule 34, notwithstanding the fact that the agency by regulation retains ownership and restricts disclosure.” The court concluded: “Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information.”

This approach to the possession, custody, and control issue tends to deflect sovereign immunity objections. For example, in one case, a state court directed a financial institution to produce certain records belonging to the OCC. The OCC sought to overturn the order in federal district court on sovereign immunity grounds. The district court rejected the OCC’s position and held that, because the state court’s order was directed to a bank, “the state court has not ordered the OCC to do or not to do anything.” The district court elaborated, “even if the state court’s discovery order was wrong, that does not make the order an action ‘against’ the OCC,” and “[p]rotecting federal officials (and agencies) is different from—and much narrower than—protecting federal interests.” The district court noted that, pursuant to the bank examination privilege, the order likely was an incorrect decision, and explained that, at a later point, the OCC potentially could challenge the order on that basis. But according to the district court, sovereign immunity was the wrong paradigm for attacking the order.

The minority view is that, when an agency issues a regulatory examination report to a bank but does not relinquish legal ownership of the document, the bank indeed does not acquire possession, custody, or control. In one federal case, for instance, the plaintiffs demanded that a bank, the defendant, produce certain reports prepared by the Federal Deposit Insurance Corporation (FDIC) and the Maine Bureau of Banking. Although the bank in fact had copies of the requested documents, the regulations of the FDIC and the Maine Bureau of Banking provided that such documents legally
were not the bank’s property, and that the bank did not have the authority to produce the documents. The court concluded that the bank did not have possession, custody, or control of the documents, and that the plaintiffs’ discovery demand therefore was not viable. However, the court also noted that the plaintiffs previously had “sought unsuccessfully to obtain those documents from the FDIC directly.” This point may have been a factor in the court’s decision, as it might have appeared to the court that the demand served on the bank was merely repackaging the FDIC demand.


When the government is a party to a case, the government “is, of course, subject to the rules of discovery.” This means that, when the government brings a case, the doctrine of sovereign immunity does not exempt the government from discovery obligations. Similarly, if a person sues the government, and if the government is not immune to the claim, then the government also is not immune to discovery. Therefore, if the government, as a party, objects to a discovery demand based on the bank examination privilege, a court likely will review the objection on the merits rather than deferring to the government.

By way of illustration, in Federal Housing Finance Agency v. HSBC North America Holdings Inc., the U.S. District Court for the Southern District of New York heard a discovery dispute between the Federal Housing Finance Agency (FHFA), as plaintiff, and various financial institutions, as defendants. The defendants moved to compel the FHFA to produce a number of documents that the FHFA, based on the bank examination privilege, had withheld. To decide the motion, the court used the same methodology that courts routinely apply when banks seek to withhold information based on the privilege. First, the court considered whether the documents were within the scope of the privilege, which, in this case, they were. Then, the court conducted the standard multi-factor balancing test to determine whether the defendants had shown good cause to overcome the privilege. The court also reviewed a representative sampling of certain documents in camera. The overriding, if unstated, premise of this approach was that the court had the authority to review the FHFA’s position de novo, and to compel production to the extent the FHFA’s objections were not well-founded.


[a] Discovery Mechanisms

When the federal government is not a party to a case, federal law affords parties three possible mechanisms for seeking documents or information from the federal government: a Freedom of Information Act (FOIA) request, a Touhy request, and a subpoena. As explained next, when the sought-after documents or information consist of or relate to a confidential bank audit, a subpoena is potentially the most powerful of
these three tools. However, federal courts are significantly at odds regarding whether, or to what extent, sovereign immunity prohibits the enforcement of subpoenas as to government agencies.

[b] FOIA Requests

FOIA permits members of the public to request records from the federal government, and sets forth standards for administrative review of such requests. FOIA contains an express waiver of sovereign immunity. That waiver provides for judicial review when an FOIA request is rejected. The standard of judicial review is de novo. The agency bears the burden of persuading the court that an FOIA request should not be enforced.

In two respects, the substance of the bank examination privilege is, in effect, built into FOIA. First, FOIA Exemption 5 “incorporates civil discovery privileges.” Second, FOIA Exemption 8 permits agencies to withhold materials “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” Courts have interpreted Exemption 8 to mean that, if a document is within the ambit of the common-law bank examination privilege, FOIA should not be used as an end-run around the privilege.

At the same time, the bank examination privilege as codified in FOIA is stricter than the qualified bank examination privilege that courts have developed under the common law. Under the common law, a party potentially can overcome the bank examination privilege by showing, among other things, that the requested discovery is sufficiently important to the adjudication of a claim or defense. By contrast, “[i]n the FOIA context, a requesting party’s need for information is irrelevant,” and cannot outweigh a qualified privilege.

The underlying reason is that FOIA is concerned with disclosures by the government to the public, not with civil litigation. Accordingly, “it is not sensible to construe [FOIA] to require disclosure of any document which would be disclosed in [a] hypothetical litigation in which the private party’s claim is the most compelling.” Indeed, as a general matter, “[t]he primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery.” As a result, judges generally frown upon the use of FOIA “to supplement or displace rules of discovery.”

[c] Touhy Requests

[i] Requests for Disclosure

The federal housekeeping statute authorizes the head of an executive branch department to “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.” Pursuant to this statute,
executive branch departments, including bank regulators, have published regulations, known as *Touhy* regulations, that set forth procedures for citizens to follow in order to request documents or information as well as rules for agency personnel to observe when handling such requests.

For example, the OCC has published *Touhy* regulations relating to the disclosure of nonpublic OCC information, including bank examination reports. These regulations prohibit the disclosure of such reports unless “the requester has sought the information from the OCC pursuant to the procedures set forth in this subpart,” or a federal court has ordered production “in a judicial proceeding in which the OCC has had the opportunity to appear and oppose discovery.” A party seeking such discovery from the OCC must submit a written request to the OCC. In addition, “[t]he requester must explain, in as detailed a description as is necessary under the circumstances, the bases for the request and how the requested non-public OCC information relates to the issues in the lawsuit or matter.” In particular, the requester must

(A) Show that the information is relevant to the purpose for which it is sought; (B) Show that other evidence reasonably suited to the requester’s needs is not available from any other source; (C) Show that the need for the information outweighs the public interest considerations in maintaining the confidentiality of the OCC information and outweighs the burden on the OCC to produce the information; (D) Explain how the issues in the case and the status of the case warrant that the OCC allow disclosure; and (E) Identify any other issue that may bear on the question of waiver of privilege by the OCC.

In order to seek oral testimony from an OCC employee, the requester also “[m]ust show a compelling need for the requested information.”

When an agency requests a *Touhy* request, enforcing the request in court can be an uphill battle. Ordinarily, the Administrative Procedure Act (APA) is the only legal basis for challenging an agency’s rejection of a *Touhy* request.

The APA provides for judicial review when a person suffers a “legal wrong because of agency action,” or is “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” The APA contains a detailed provision describing the standards of judicial review that govern in an APA case. Among other things, the court “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” The court shall “compel agency action unlawfully withheld or unreasonably delayed.” The court shall “hold unlawful and set aside agency action, findings, and conclusions” that the court deems “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

In most cases, the APA standard of review is “highly deferential” to the agency. The court’s role typically is limited to analyzing whether the regulator’s decision


“was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Thus, in general, “no agency action should be set aside if the action is rational, based on relevant factors, and within the agency’s statutory authority.”

**[ii] Opportunity to Intervene**

When a party moves to compel a confidential regulatory audit from a financial institution, a court will give the regulator an opportunity to intervene. Of course, for that opportunity to be meaningful, the regulator must be told that such materials have been requested. Some courts place this responsibility on the movant. Some of these courts specifically require the movant to fulfill this responsibility by communicating with the agency by means of the agency’s *Touhy* protocol. Such courts will decline to hear such a motion until the movant has submitted a *Touhy* request and the regulator has reached a decision.

Other courts dispense with the formality of a *Touhy* request when the regulator receives reasonable due process through other mechanisms. The leading opinion for this proposition is *In re Bankers Trust Co.*, a decision of the U.S. Court of Appeals for the Sixth Circuit. In this case, the Federal Reserve was informally apprised of, and intervened in opposition to, a motion to compel a financial institution to produce confidential examination materials. The Federal Reserve contended, among other things, that the motion was improper because the movant had not observed the Federal Reserve’s *Touhy* process.

The court disagreed. Given that the Federal Reserve already had intervened, the purpose of the *Touhy* process had been accomplished. Furthermore, the court held, “*i*t seems illogical . . . to require [the movant] to initiate the much more cumbersome procedure of serving a subpoena on the Federal Reserve in Washington, D.C. simply to enable [the movant] to obtain the same documents that [the bank] possesses. [The movant] would incur needless delays with such maneuvering and would be forced to litigate any objections to the subpoena before a D.C. district court that may not be as fully informed of the underlying facts and circumstances of the case.” A number of courts have concurred with this view.

**[d] Subpoenas**

**[i] Statutory Framework**

The Federal Rules of Civil Procedure have “the force of a federal statute.” Federal Rules of Civil Procedure 37 and 45 govern the enforcement of discovery subpoenas. Based on Rule 37 and Rule 45, a court can compel a response to a subpoena and impose penalties for noncompliance. Compared to other discovery techniques, a subpoena can be an advantageous method of requesting bank examination records from a regulator. First, when a party challenges an agency’s rejection of a *Touhy* request,
the agency normally is entitled to a “highly deferential” standard of judicial review.\textsuperscript{73} A subpoena can level the playing field. Because a subpoena is distinct from a \textit{Touhy} request, an agency served with a valid subpoena might have to argue any objections to the subpoena on the merits.\textsuperscript{74} Second, FOIA does not allow parties to overcome the bank examination privilege based on a showing of good cause.\textsuperscript{75} But the good cause exception potentially can help the proponent of a subpoena.

However, federal courts have struggled with the question of whether sovereign immunity prohibits judicial enforcement of subpoenas against federal agencies. As discussed in detail next, the case law regarding this issue is not uniform.\textsuperscript{76}

\textbf{[ii] United States Supreme Court}

The Supreme Court has not determined whether the doctrine of sovereign immunity prohibits the enforcement of subpoenas by federal courts with respect to federal administrative agencies. As explained next, the Court has heard cases in this general area, but has resolved these cases without reaching the sovereign immunity issue.

In the \textit{Touhy} case, instead of directing a subpoena to a federal agency, a party directed the subpoena to an individual agency employee and then sought to enforce the subpoena against that individual. Agency regulations prohibited the employee from complying. When the employee defied the subpoena, the district court held him in contempt.\textsuperscript{77}

The Supreme Court held that this finding of contempt was improper because an agency head “can validly withdraw from his subordinates the power to release department papers.”\textsuperscript{78} But the Court declined to consider an agency head’s authority to reject a subpoena on behalf of the agency as a whole. In a concurrence, Justice Frankfurter opined that an agency head indeed “can be reached by legal process.”\textsuperscript{79} The majority deemed this point to be outside the scope of the appeal. In short, “the Supreme Court stopped at the employee contempt issue and did not proceed to decide the ultimate sovereign immunity issue.”\textsuperscript{80}

Two other notable decisions also touched on, but did not comprehensively resolve, the relationship between sovereign immunity and third-party discovery. In \textit{U.S. v. Nixon}, the Supreme Court enforced a special prosecutor’s subpoena against the President. But \textit{Nixon} was a criminal case brought by the federal government. As such, the federal government essentially was seeking evidence from itself. Furthermore, in \textit{Nixon}, the special prosecutor had express authority to “use judicial processes to pursue evidence” from the President. Thus, the \textit{Nixon} decision does not necessarily model how courts should treat subpoenas served on federal administrative agencies by nongovernmental parties.\textsuperscript{81}

In \textit{Clinton v. Jones}, the Court explained that “the President is subject to judicial process,” including subpoenas, “in appropriate circumstances.”\textsuperscript{82} However, in this regard, the Court was referring broadly to cases involving the President’s unofficial
conduct, which would not raise sovereign immunity concerns, as well as cases involving the President’s official conduct, which could raise such concerns. The Jones case involved unofficial conduct. Therefore, the Court did not explore the sovereign immunity issue in detail. The Court only noted that, “if the materials or testimony sought by the court relate to a President’s official activities,” a district court must exercise “[s]pecial caution” before enforcing such a subpoena.83

[iii] Circuit Split

Federal circuit courts are not in agreement as to whether sovereign immunity impacts judicial authority to enforce subpoenas against federal regulatory agencies. Principally, the circuit opinions to date have focused on one specific aspect of this problem: whether the Federal Rules of Civil Procedure unequivocally waive the government’s sovereign immunity in regard to the enforcement of subpoenas. Rule 30 of the Federal Rules of Civil Procedure, which concerns deposition practice, notes that a deposition subpoena may name “a governmental agency.” By contrast, Rules 37 and 45, which concern subpoena enforcement, do not expressly state that a court may enforce a subpoena against an agency, or against an agency head. Rules 37 and 45 authorize a court to enforce a subpoena against a “person.” However, Rules 37 and 45 do not specify that administrative agencies or agency heads come within the definition of “person.”

In Yousuf v. Samantar, the Court of Appeals for the District of Columbia held that the federal government is a “person” for purposes of Rule 45.84 Thus, the court concluded, a party may challenge an agency’s rejection of a subpoena by moving to compel under the Federal Rules of Civil Procedure. A district court opinion from that circuit has further noted that the government has “a set of special privileges—e.g., executive privilege, state secrets, deliberative process—which it may invoke to prevent disclosures that would be inimical to national security or its internal deliberations.” Therefore, the court found, it is unnecessary to “graft onto discovery law a broad doctrine of sovereign immunity.”85

Several other circuit courts have taken a similar approach to this issue. The U.S. Court of Appeals for the Seventh Circuit, based on the reasoning of Yousuf, held that state administrative agencies are “persons” for purposes of Rule 45.86 The U.S. Court of Appeals for the Ninth Circuit, without directly deciding whether the government is a “person” under Rules 37 or 45, held that sovereign immunity cannot dilute a federal court’s authority to enforce a subpoena. In the Ninth Circuit’s view, allowing the executive branch to “make conclusive determinations on whether federal employees may comply with a valid federal court subpoena” would raise “serious separation of powers questions.”87

As interpreted by some lower courts, two other circuit opinions suggest a different perspective. In COMSAT Corp. v. National Science Foundation, the U.S. Court of Appeals for the Fourth Circuit applied the APA’s deferential standard of review to
decide whether a federal agency’s rejection of certain subpoenas was legally appropriate.88 In Moore v. Amour Pharmaceuticals, the U.S. Court of Appeals for the Eleventh Circuit did the same.89 Several lower courts have construed these two circuit court opinions as standing for the broad proposition that subpoenas are not enforceable against the government under Rules 37 and 45 of the Federal Rules of Civil Procedure.90 However, these circuit court opinions arguably do not stand for that proposition. The subpoenas at issue in these cases were directed at specific agency employees, rather than to an agency as an entity. As previously discussed, such a subpoena raises unique issues under Touhy. A court’s response to such a subpoena may not be indicative of the court’s policy toward agency subpoenas generally.

The U.S. Court of Appeals for the Second Circuit has held that the enforcement of a subpoena against an administrative agency would “compel [an agency] to act and therefore is barred by sovereign immunity in the absence of a waiver.”91 The court also has held that the APA is the only platform for challenging an agency’s rejection of such a subpoena.92 However, the court has not decided whether the APA’s deferential standard of review would govern such a challenge. The court has noted that “a plausible argument can be made in support of the idea that Section 706 of the APA is not necessarily the appropriate standard of review.”93 It is possible, the court has elaborated, to construe the APA in tandem with the Federal Rules of Civil Procedure. Under this interpretation, the APA waives the government’s sovereign immunity, but the Federal Rules of Civil Procedure supply the substantive standard of review. Thus, a court would examine an agency’s objections to a subpoena on a de novo basis.

[5] Subpoena to State Government

Virtually every federal court to consider the issue has held that a federal subpoena directed to a state regulator does not raise sovereign immunity concerns. In general, these opinions have focused on the wording of the Eleventh Amendment, which refers to a “suit” against a state. These opinions have concluded that a subpoena is not a “suit,” and thus does not violate a state’s sovereign immunity. For example, the U.S. District Court for the Eastern District of California held that a third-party discovery request is not “a ‘suit’ or ‘suing’ the state within the meaning of the Eleventh Amendment,” and therefore does not violate a state’s constitutional sovereignty.94 It is unclear whether the reasoning of these opinions is on firm footing. As previously discussed,95 the Eleventh Amendment does not describe the full extent of the sovereign immunity of the states. Even if a subpoena does not present Eleventh Amendment concerns, it still may pose a sovereign immunity issue.

The real undercurrent of these opinions may be a sense of unease about eviscerating a federal court’s ability to act when a state administrative agency refuses to produce discovery in connection with a federal case. Under such circumstances, if the federal court lacks authority to resolve the discovery dispute, the proponent of the discovery demand might have to bring a collateral proceeding against the state.
regulator in state court. Delegating this issue to state courts could dilute a federal court’s ability to control the discovery process.

One opinion, also from the Eastern District of California, departed from the majority view and quashed a subpoena to a California state agency based on the sovereign immunity doctrine. The district court grounded its reasoning in the decision of the U.S. Supreme Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, where the Supreme Court held that “a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.”96 The district court found that California law arguably permits California state courts to enforce subpoenas against the California state government. But the district court held that California had not expressly granted federal courts that authority.97

### § 2.04 LITIGATION IN STATE COURT

#### [1] Summary

The sovereign immunity analysis may differ in some respects when a legal proceeding is situated in state court, as opposed to federal court. First, certain unique issues can arise when a party to a state-court proceeding seeks to subpoena documents or information from a federal administrative agency or its officers. Second, when a party to a state-court proceeding seeks evidence from a state administrative agency or its officers, or evidence over which such a state agency otherwise asserts an interest, federal law likely will have little or no say in the matter. Instead, to the extent that the agency resists the request, the law of the state in which the court is located will govern the resolution of the dispute.


Although some federal circuits permit federal district courts to enforce subpoenas against federal administrative agencies, it is well-settled that federal regulators are not subject to the subpoena power of state courts. “[A] state court litigant’s only recourse from a federal agency’s refusal to comply with a state court subpoena is to bring an APA claim—necessarily governed by the APA arbitrary and capricious standard—against the agency in federal court.”98

This rule applies even in those federal circuits that permit federal district courts to enforce subpoenas against federal agencies pursuant to the Federal Rules of Civil Procedure. As one such circuit court has explained:

When a litigant seeks to obtain documents from a non-party federal governmental agency, the procedure varies depending on whether the underlying litigation is in federal or in state court. In state court the federal government is shielded by sovereign immunity, which prevents the state court from enforcing a subpoena. . . . Thus, a state-court litigant must request the documents
from the federal agency pursuant to the agency’s regulations, . . . 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. . . . A federal-court litigant, on the other hand, can seek to obtain the production of documents from a federal agency by means of a federal subpoena.99

Federal administrative agencies or officers who are subpoenaed by state court litigants can remove the discovery dispute to federal court pursuant to 28 U.S.C. § 1442. This provision allows for the removal of civil actions brought against federal agencies or officers, and defines “civil action” to include, among other things, “a subpoena for testimony or documents.” Removal does not transform the matter into an APA proceeding or otherwise cure the sovereign immunity issue. Removal only means a change of venue. Upon the removal of such an action, the federal court’s principal role is to determine whether the state court from which the action was removed had the authority to enforce the subpoena.100

[3] State Administrative Agencies

Sovereign immunity issues can arise when a party to a state court case seeks information contained in a state regulator’s confidential audit of a financial institution. By way of illustration, in a New York state court case, a party attempted to enforce a third-party subpoena against the New York State Department of Health. The Department of Health objected to the subpoena on sovereign immunity grounds. Like the Federal Rules of Civil Procedure, the New York State Civil Practice Law and Rules (CPLR) permits the enforcement of subpoenas with respect to “persons.” The Department of Health argued that, in the relevant CPLR rules, the term “person” did not include state government. The New York State Court of Appeals decided the issue against the Department of Health, finding that the State was a “person” and could be ordered to comply with a state court subpoena.101

In other cases, the courts of the State of New York and other states have exempted state administrative agencies from certain forms of discovery based in whole or in part on the doctrine of sovereign immunity. However, when such an agency is sued or subpoenaed in federal court, those exemptions may evaporate. For example, in Andru- lonis v. United States,102 an individual sued the United States under the Federal Tort Claims Act in the U.S. District Court for the Northern District of New York, and the United States impleaded the State of New York as a third-party defendant. Sovereign immunity barred the plaintiff from suing the State directly. After the State was named as a third-party defendant, the plaintiff served interrogatories on the state. The State objected to such interrogatories on the basis of sovereign immunity. The State noted that, under New York law at that time, while the State was subject to certain discovery devices, parties could not require the state to answer interrogatories. Because the State had not consented to answering interrogatories in state court, the State argued, the federal court had no authority to grant the plaintiff’s motion to compel.
The district court agreed that New York law did not obligate the State to answer interrogatories in civil cases. However, the court nonetheless granted the motion to compel. The court cited the general principle that, in federal court, the Federal Rules of Civil Procedure take precedence over a state’s procedural rules. The court held that this principle outweighed the State’s sovereign immunity concerns. 103

Andrulonis highlights the distinction between, on the one hand, the vertical relationship between federal courts and individual states, and, on the other hand, the horizontal relationship among the judicial, executive, and legislative branches of state government. When a state government finds itself in federal court, state sovereign immunity may clash, as it did in this case, with certain fundamental norms of federal practice.

ENDNOTES

4. Id. § 4.36(d).
9. Id.
11. Id.
17. Larson, 337 U.S. at 689.
18. Id.
19. Id. at 690.
22. Id.
24. Larson, 337 U.S. at 708 (“As to the States, legal irresponsibility was written into the Constitution by the Eleventh Amendment; as to the United States, it is derived by implication. . . . The sources of the immunity are formally different but they present the same legal issues.”).
25. U.S. Const. amend. XI.
27. Id.
31. Alden, 527 U.S. at 757.
33. See Fed. R. Civ. P. 34.
34. Societe Internationale Pour Participations v. Rogers, 357 U.S. 197, 204 (1958).
36. In re Bankers Trust Co., 61 F.3d at 469.
37. Id. at 470.
the government, as plaintiff, was subject to the rules of discovery, but denying the defendant’s
motion to compel based on a straightforward application of those rules).
the government, as a defendant, was subject to the rules of discovery, and, accordingly, granting
the plaintiff’s motion to compel discovery from the government).
44. 5 U.S.C.S. § 552 (LexisNexis, current through PL 114-243).
47. 5 U.S.C.S. § 552(b)(8) (LexisNexis, current through PL 114-243).
privilege is “codified” in Exemption 8).
53. 5 U.S.C.S. § 301 (LexisNexis, current through PL 114-243).
54. 12 C.F.R. § 4.37(b) (2016).
55. Id. § 4.34(a).
56. Id. § 4.33(a)(1).
57. Id. § 4.33(a)(3)(iii).
58. Id. § 4.33(c)(1)(i).
60. 5 U.S.C.S. § 702 (LexisNexis, current through PL 114-243).
61. Id. § 706.
62. Id. 8.
63. Id.
64. Teva Parenteral Medicines, Inc. v. U.S. Dep’t of Health & Human Servs., 2012 WL
65. Id. (internal quotation marks omitted).
66. Id. 11.
67. See § 1.01, supra.
27, 2012); In re Countrywide Fin. Corp. Secs. Litig., 2009 WL 5125089 (C.D. Cal. Dec. 28, 2009);


70. Id. at 471.


73. Teva, 2012 WL 4788053, at *3.


76. See Wultz, 61 F. Supp. 3d at 278–79 (collecting cases).


78. Id. at 467.

79. Id. at 472 (Frankfurter, J., concurring).


83. Id. at 704 n.39.


86. Ott v. City of Milwaukee, 682 F.3d 552, 555–56 (7th Cir. 2012).

87. Exxon Shipping Co. v. U.S. Dep’t of Interior, 34 F.3d 774, 778 (9th Cir. 1994).


95. See § 1.02, supra.


100. Louisiana v. Sparks, 978 F.2d 226, 234–36 (5th Cir. 1992).


103. Id. at 45–46.