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Balancing Government Efficienty and the Protection of Individual Liberties: An Analysis of the Conflit between Executive Branch "Housekeeping" Regulations and Criminal Defendants' Rights to a Constitutionally Fair Trial

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BALANCING GOVERNMENT EFFICIENCY AND THE PROTECTION OF INDIVIDUAL LIBERTIES: AN ANALYSIS OF THE CONFLICT BETWEEN EXECUTIVE BRANCH "HOUSEKEEPING" REGULATIONS AND CRIMINAL DEFENDANTS' RIGHTS TO A CONSTITUTIONALLY FAIR TRIAL†

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> The twentieth century has witnessed a revolutionary expansion in the state's sphere of competence accompanied by a concomitant increase in its effective power. Permeating all areas of endeavor, its activities and spokesmen too frequently exalt the desideratum of efficiency at the expense of values which, at least in the constitutional order, ought to be of paramount and guiding influence.[1]

Introduction

Three Justices dissented from the Supreme Court's recent denial of certiorari in *Taliaferro v. Maryland*,[2] which challenged the validity of a Maryland Rule of Criminal Procedure author-

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[1]R. Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty 7 (1960).

[2]103 S. Ct. 2114 (1983). Justices White, Brennan, and Blackmun dissented. The Maryland Court of Appeals had affirmed petitioner's conviction by a 4-3 vote. Taliaferro v. State, 295 Md. 376, 456 A.2d 29 (1983). As framed by Justice White, the case presented the question "whether the exclusion of a witness merely for failure to abide by a discovery rule . . . impermissibly infringes upon a defendant's Sixth Amendment right to offer witnesses on his behalf." 103 S. Ct. at 2114 (citations omitted).

izing the trial judge to exclude highly exculpatory defense alibi evidence because the defendant had failed to disclose the name of the proposed witness to the prosecutor in a timely fashion. Justice White's opinion for the dissenters recognized that the policy favoring efficient prosecutorial and judicial administration, which is the basis for similar defense disclosure requirements and witness exclusion sanctions in thirty-five states, conflicts with the basic right of an accused to present a defense.[3]

Coincidentally, two weeks later in *Federal Trade Commission v. Grolier Inc.*,[4] the Court unanimously held that the Freedom of Information Act (FOIA)[5] and the Federal Rules of Civil Procedure[6] usually do not require a federal agency to disclose intra-agency litigation memoranda to the public or to an adversary in litigation, regardless of when the memoranda were drafted or how the information contained therein was developed.[7] The opinion recognized that exemptions from disclosure

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[3]103 S. Ct. at 2115. Md. R. Proc. 741(d)(3) requires criminal defendants to provide the state prior to trial with the name and address of each alibi witness which the defendant intends to call at trial. Taliaferro attempted to call an alibi witness on the second day of trial without having complied with Rule 741. An alibi was his only defense. The trial court excluded the witness, even though the state requested only a continuance, not witness exclusion. *Id.* at 2114.

As Justice White's opinion noted, the Maryland Rule's sanction of excluding defense witnesses, like Fed. R. Crim. P. 12.1, has never been upheld by the Supreme Court, has been rejected by the Fifth Circuit, United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981), and has been criticized by several commentators. *See* 2 ABA Standards for Criminal Justice § 11-4.7(a) and accompanying commentary (2d ed. 1980); Alicea v. Gagnon, 675 F.2d 913 (7th Cir. 1982); Note, *Preclusion of a Defendant's Alibi Testimony for Failure to Provide Pretrial Notice of his Alibi Defense is Unconstitutional in the Absence of Evidence of Intentional Suppression of Alibi Evidence to Gain A Tactical Advantage*, 52 U. Cin. L. Rev. 267 (1983).

[4]103 S. Ct. 2209 (1983). Interestingly, Justice White wrote the opinion for the Court.

[5]5 U.S.C. § 552 (1982).

[6]In particular, see Fed. R. Civ. P. 26(b)(3), which had been amended in 1970 to "clarify the extent to which trial preparation materials [i.e., work product] are discoverable in federal courts." 103 S. Ct. at 2213.

[7]The specific issue addressed in *Grolier* was whether the FOIA included an exemption from federal agency disclosure to the public for intra-agency

under FOIA, particularly Exemption 5 regarding intra-agency memoranda, were intended by Congress to be "as narrow as is consistent with efficient Government operations,"[8] but nevertheless indicated a need to "provide a categorical rule" broadly restricting FOIA disclosure requirements.[9]

The two opinions underscore, in their area of overlap, a direct and growing conflict between the need for government efficiency and the protection of civil liberties.[10] Whereas *Taliaferro* raises the issue of whether a trial court may use procedural rules to restrict a criminal defendant's right to present exculpatory evidence of a general nature at his trial, *Grolier* focuses upon the extent to which any person may obtain internally developed information from a federal agency, regardless of the intended use of the information. The citizen's immediate need and constitutional interest in utilizing information in order

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memoranda generated in connection with litigation which has been terminated at the time of the request for disclosure. 103 S. Ct. at 2211. In holding that such litigation-generated memoranda remained protected from disclosure, the Court provided alternative bases for supporting the refusal of the Federal Trade Commission to disclose agency documents: a broad reading of the work-product doctrine, Rule 26(b)(3), and a parallel reading of congressional intent underlying the FOIA. 103 S. Ct. at 2213, 2214. Justices Brennan and Blackmun agreed with the first rationale but found the second unpersuasive. 103 S. Ct. at 2216–18.

[8]103 S. Ct. at 2212, quoting from S. Rep. No. 813, 89th Cong., lst Sess. 9 (1965). The particular provision of the FOIA at issue was 5 U.S.C. § 552(b)(5) (1982): "This section does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ."

[9]103 S. Ct. at 2215. The Court deemed even this categorical rule necessary to further the Act's purpose "of expediting disclosure." *Id.* The rule, protecting government secrecy under both the work-product doctrine and the FOIA, relates to pretrial discovery in civil cases, not to trial disclosure in criminal cases, and affects primarily "mental impressions, conclusions, opinions, or legal theories of an attorney." 103 S. Ct. at 2213. Nevertheless, the decision represents one recent step toward a rule of government secrecy.

[10]The role of government efficiency underlies many recent judicial interpretations of the Freedom of Information Act. For a summary of recent cases, see Nat'l L.J., Aug. 22, 1983, at 3, col. 1. For a broader look at the entire question, see D. Yates, Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government (1982).

to assure the integrity of a criminal trial, as in *Taliaferro*, and the citizen's general right to obtain information possessed by the executive branch of government to assure that government remains democratically responsive, as in *Grolier*, each conflict with the need for government efficiency. When the citizen's immediate and constitutionally defined use for information possessed by the executive branch conflicts with the government's interest in efficiency, the failure to comply with efficiency-promoting government regulations designed to regulate access to that information creates substantial tension.

This Article addresses the issue of whether an accused person should be entitled to obtain and use at trial relevant government information or the testimony of government employees to prove his innocence, regardless of whether he has revealed in advance to his adversary his intended use of that information or the specific content of that testimony. Part I describes the federal "housekeeping" statute and the Justice Department's housekeeping regulations,[11] which require that

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[11]Housekeeping regulations are those internal rules promulgated by an executive branch agency pursuant to 5 U.S.C. § 301 (1982), *see infra* note 15, to regulate the control of government property and employees. This Article focuses primarily upon current Justice Department housekeeping regulations. *See infra* notes 36–46 and accompanying text.

Since the housekeeping regulations restrict disclosure of government information pursuant to "demand," including particularly a trial subpoena, they do not apply directly to requests for information authorized by the FOIA, which has its own procedural requirements. This Article therefore, will not address possible constitutional challenges to the refusal of agencies such as the Federal Trade Commission to disclose exculpatory investigation memoranda pursuant to a FOIA request by a person who is being prosecuted by the Justice Department for a criminal antitrust violation. Such challenges were not at issue in *Grolier*. Obviously, the use of the FOIA is an alternative method to a trial subpoena for obtaining government information relevant to a criminal trial. The premise of this Article is that a trial subpoena issued on behalf of a criminal defendant, involving judicial enforcement of the defendant's compulsory process rights, should receive more deference in the balancing between the claims of government efficiency and the rights of the individual. *But see* Hatch, *infra* note 14. As noted above, the societal interests underlying the compulsory process clause overlap with but are not identical to the goals of the FOIA. It follows that limitations upon those interests and goals sought by the executive branch are similarly related.

subpoenaed government employees not disclose evidence unless the person seeking that evidence has first summarized the requested evidence in advance, explained its intended use, and obtained permission from a designated official for its release. Part II of the Article will identify inconsistent recent appellate court decisions which have assessed the validity of the regulations and, more particularly, the validity of the exclusion of a government witness when the defendant has not complied with the regulations. Part III will analyze the regulations and their background in greater depth, relating them to the underlying "official information" privilege, which, when included in proposed Rule 509 of the Federal Rules of Evidence, was rejected by Congress in the wake of Watergate.[12] Finally, Part IV critiques the regulations as applied in federal criminal cases and concludes that such application is inconsistent with the due process and compulsory process clauses of the fifth and sixth amendments, the Federal Rules of Evidence, and the Federal Rules of Criminal Procedure.

An examination of the housekeeping regulations is particularly timely in the context of the Burger Court's continuing emphasis in its criminal procedure jurisprudence upon determining with finality the ultimate guilt or innocence of the accused, rather than upon protecting his civil liberties from government intrusion,[13] and in light of the Reagan Administration's general movement toward greater government secrecy as a means of promoting more "efficient" government operations.[14]

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[12]*See infra* notes 143–51 and accompanying text.

[13]*See* Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching As A Bar To Reprosecution Under The Double Jeopardy Clause After Oregon v. Kennedy*, 69 Cornell L. Rev. 76 (1983).

[14]*See* N.Y. Times, Aug. 26, 1983, at A13, col. 1 (presidential directive requires executive branch employees to sign a secrecy pledge). *See also* N.Y. Times, Oct. 23, 1983, § 4, at 1, col. 3 (Reagan Justice Department supports random lie detector tests for officials with access to confidential information).

With respect to proposed legislative changes authorizing greater government secrecy, see S. 774, 98th Cong., 1st Sess. (1983), The Freedom of Information Reform Act, introduced by Senator Orrin Hatch; and Senator Hatch's comments in 129 Cong. Rec. S2688 (daily ed. Mar. 11, 1983). *See also* Hatch, *The Freedom of Information Act: Balancing Freedom of Information With Confidentiality For Law Enforcement*, 9 J. Contemp. L. 1 (1983).

I. An Overview of the Federal Housekeeping Statute and Justice Department Regulations

A. The Housekeeping Statute

The General Housekeeping Statute,[15] originally enacted in the late eighteenth century,[16] authorizes the head of an executive department to promulgate regulations respecting the government of his department, the performance of its business, and the custody of its records, provided the regulations are otherwise consistent with law.[17] Although Congress did not intend the Housekeeping Statute to be a secrecy statute,[18] numerous courts during the first half of the twentieth century cited it as the principal or sole authority for executive departments to withhold information from the courts.[19]

In order to eliminate any doubt and to rectify erroneous precedent, Congress amended the Housekeeping Statute in 1958, making explicit the fact that the section does not itself

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[15]5 U.S.C. § 301 (1982) provides:

> § 301. Departmental regulations
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> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of his 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.

[16]Act of July 27, 1789, ch. 4, 1 Stat. 28; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

[17]The Housekeeping Statute does not authorize a rule whose effect would be to deprive one of his constitutional rights. Furthermore, the regulations must not be in conflict with express statutory provisions. Parsons v. State, 251 Ala. 467, 38 So. 2d 209 (1948)(and cases cited).

[18]H.R. Rep. No. 1461, 85th Cong., 2d Sess. 1 (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News 3352.

[19]*See, e.g.*, United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900). *See also* Hardin, *Executive Privilege in the Federal Courts*, 71 Yale L.J. 879, 882 (1962); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142 (1976).

create a privilege: "This section does not authorize withholding information from the public or limiting the availability of records to the public."[20] Since 1958, courts have recognized that the statute does not confer a privilege upon the heads of executive departments and that it cannot bar a demand for production of nonprivileged evidence or judicial determination of questions of privilege.[21] Although the amendment was designed to undercut the statutory basis of a broad executive privilege,[22] it did not end the struggle between litigants and the government over access to government documents.[23]

Regulations promulgated under the Housekeeping Statute have been the subject of only two Supreme Court cases. In both *Boske v. Comingore*[24] and *United States ex rel. Touhy v. Ragen*[25] the Court examined executive department regulations

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[20]Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547.

[21]Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971)(5 U.S.C. § 301 does not create a privilege); EEOC v. Los Alamos Constr. Co., 382 F. Supp. 1373 (D.N.M. 1974); Denny v. Carey, 78 F.R.D. 370 (E.D. Pa. 1978)(Congress ended any doubt as to whether 5 U.S.C. § 301 should affect the scope of discoverable records by the 1958 amendment).

[22]Prior to the amendment, departments claimed a "general housekeeping" privilege for documents within their control on the basis of 5 U.S.C. § 301. Hardin, *supra* note 19, at 887.

[23]*Id.*

[24]177 U.S. 459 (1900). The government first attempted to withhold information from the judiciary on authority of the Housekeeping Statute in 1900. In *Boske*, a collector for the Internal Revenue Service (IRS) refused to comply with a court order directing him to produce certain reports in the possession of the IRS. The collector

> based his refusal on a Treasury Department regulation promulgated pursuant to the housekeeping statute, which barred all subordinate employees from disclosing Internal Revenue Service records in court proceedings. The Supreme Court upheld the validity of the Treasury Regulation insofar as it prohibited collectors from producing records of the Department without securing permission from the Secretary.

Note, *supra* note 19, at 145. In dicta, the Court indicated that the Secretary's privilege might be absolute. 177 U.S. at 470. Such an implied recognition of absolute executive privilege probably has not survived United States v. Nixon, 418 U.S. 683 (1974), even in the context of a civil proceeding.

[25]340 U.S. 462 (1951). *See infra* notes 47–58 and accompanying text.

in the context of a request for disclosure of documents. Neither decision discussed the applicability to employee testimony of regulations promulgated pursuant to the Housekeeping Statute. The Justice Department (DOJ) Regulation in *Touhy*[26] and the section of the Treasury Regulation focused upon in *Boske*[27] dealt

[26]Order No. 3229 is reproduced and discussed *infra* at note 49.

[27]The Treasury Regulation examined in *Boske* is as follows:

> Treasury Department, Office of Commissioner of Internal Revenue.
> Washington, D.C., April 15, 1898.
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> The following regulations are issued as supplementary to the instructions and suggestions contained on pages 41 and 42 of the Regulations, series 7, No. 12, Revised. August 3rd, 1896:
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> All records in the offices of collectors of internal revenue or of any of their deputies are in their custody and control for purposes relating to the collection of the revenues of the United States only. They have no control of them, and no discretion with regard to permitting the use of them, for any other purpose. Collectors are hereby prohibited from giving out any special tax records or any copies thereof to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to *subpoenas duces tecum* or otherwise. Whenever such subpoenas shall have been served upon them, they will appear in court in answer thereto, and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. The information contained in the records relating to special tax payers in the collector's office is furnished by these persons under compulsion of law for the purpose of raising revenue for the United States; and there is no provision of law authorizing the sending out of these records or of any copies thereof, for use against the special tax payers in cases not arising under the laws of the United States. The giving out of such records or any copies thereof by a collector in such cases is held to be contrary to public policy and not to be permitted. As to any other records than those relating to special tax payers, collectors are also forbidden to furnish them, or any copies thereof, at the request of any person. Where copies thereof are desired for the use of parties to a suit, whether in a state court, or in a court of the United States, collectors should refer the persons interested to the following paragraph in rule X of the rules and regulations of the Treasury Department, namely: "In all cases where copies of documents or records are desired by, or on behalf of, parties to a suit, whether in a court of the United States, or any other, such copies shall be furnished to the court only, and on a rule of the court upon the Secretary of the Treasury requesting the same." Whenever such

solely with document disclosure. The distinction is potentially significant because documents are normally the property of the party possessing them[28] and thus implicitly subject to some control by their owner, even in the absence of a privilege. Employee testimony, on the other hand (or the ideas such testimony would communicate), is not necessarily subject to the control or ownership of the employer.[29] In other words, the determination of an employer's right to control employee testimony is directly related to and should precede the ultimate determination of the existence of a privilege.

Federal courts, however, have extrapolated from the *Touhy* and *Boske* decisions a basis for upholding the validity of regulations which apply to all employee testimony concerning information acquired during their employment.[30] The Housekeeping Statute itself expressly authorizes regulations for the custody and use of departmental records, whereas it only impliedly establishes a basis for regulating employee testimony through the

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> rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which make it necessary to decline, in the interest of the public service, to furnish such a copy.

177 U.S. at 460–61.

[28]*See generally* 63 Am. Jur. 2d *Property* § 36 (1972); 73 C.J.S. *Property* § 25(c) (1983).

[29]*See generally* 2 R. Callmann, The Law of Unfair Competition, Trademarks & Monopolies §§ 14.30, 14.31 (4th ed. 1982)

[30]*See, e.g.*, Marcoux v. Mid-States Livestock, 66 F.R.D. 573 (W.D. Mo. 1975) (*Boske* and *Touhy* held that a subordinate will not be compelled to testify and produce documents in private litigation when a department head forbids disclosure); North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C. 1967)(*Touhy* held that regulations prescribed by Attorney General with regard to production of documents and failure of person charged to testify were valid). Criminal cases relying on *Touhy* as a basis for finding the present DOJ Regulations valid include United States v. Bizzard, 674 F.2d 1382 (11th Cir.), *cert. denied*, 103 S. Ct. 305 (1982); United States v. Marino, 658 F.2d 1120 (6th Cir. 1981); United States v. Allen, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977).

provision authorizing regulations governing the "conduct" of employees. The absence of express language endorsing the regulation of testimony raises questions as to exactly what type of regulation can be promulgated under a statute not intended to create a privilege.[31]

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[31]In Stegall v. Thurman, 175 F. 813 (N.D. Ga. 1910), the court examined the Treasury Department's regulation of testimony pursuant to the predecessor of 5 U.S.C. § 301. The question there was whether the government can regulate an employee testifying as to what he discovers "by the use of his senses, what he sees with his eyes." *Id.* at 819. The court concluded that information obtained by a person solely in his official capacity cannot be divulged by him when called as a witness in a state court. *Id.* at 822 (citing *In re* Lamberton, 124 F. 446 (W.D. Ark. 1903)). The Treasury Regulation in question expressly required the employees to decline to testify to facts coming to their knowledge in their official capacity. According to the court, if *Boske* held that a subordinate cannot be forced to disclose government documents in a state court, he should not be compelled to do the same thing indirectly by disclosing what he has discovered in the discharge of his duties as the result of information contained in the documents. *Id.*

Therefore, the court found the Treasury Regulation governing testimony promulgated after *Boske* valid not on the basis of language in the predecessor of 5 U.S.C. § 301, but on the ground that failure to extend the reasoning of *Boske* to employee testimony would undercut the holding of *Boske*. The court did state that an employee may testify to matters he observes "otherwise than officially." *Id.* at 823. Presumably, the court was suggesting that an employee can testify to these matters because there is no potential government privilege which will cover this testimony, not because the government has no proprietary interest in the information. Both the IRS Regulation in question and the DOJ Regulation limit their coverage to information acquired in one's official capacity.

The opinion in *Stegall* gives inadequate attention to delineating the proper scope of official information, failing to sufficiently acknowledge that before the question of executive privilege arises the court must determine whether the information possessed by a government employee is the property of the employer and thus subject to the employer's control. In other words, although there may be no meaningful distinction between government documents and employee testimony based upon those documents with respect to whether an evidentiary privilege exists, there may very well be a question of whether the government has any right to regulate certain employee testimony at all. For example, no non-governmental employer could assert a property interest in all information perceived by an employee during his job, even if the employee received the information while performing official duties. *See generally* Callman, *supra* note 29, at §§ 14.30, 14.31. The question of what is or is not an employer's proprietary information or trade secret is beyond the scope of this Article.

One court has held that the Housekeeping Statute cannot be asserted as authorization for a regulation which reaches the testimony of former employees.[32] The court noted that the Housekeeping Statute on its face applies only to employees and not to former employees. According to this court, even if the Housekeeping Statute did apply to former employees, it is procedural in nature and creates no evidentiary privilege.[33] When a court determines, therefore, that no privilege attaches to the information a litigant seeks, the Housekeeping Statute should not be used as a procedural basis for withholding information.[34] Accordingly, a litigant's failure to comply with certain procedures embodied in a regulation which lacks statutory authority should not be used to withhold information from that litigant. Lack of compliance with the Justice Department Regulations, which purport to reach the testimony of current and former employees, has nevertheless been used frequently as a basis for nondisclosure.[35]

B. The Justice Department Housekeeping Regulations

The current DOJ Regulations,[36] issued pursuant to the Housekeeping Statute, prohibit officers and employees of the department from divulging files, documents, records, and other official information, except as permitted by the Attorney General.[37] The regulations set forth general procedures to be followed with respect both to production or disclosure of materials in the department's files and to testimony of former or current employees upon demand by other parties.

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[32]Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913 (E.D. Pa. 1979).

[33]*Id.* at 917.

[34]*Id.*

[35]*See infra* note 79 and accompanying text.

[36]28 C.F.R. § 16.21–.29 (1983). The regulations supersede various department orders which have appeared in this century. The order most frequently cited and at issue in the *Touhy* case was Order No. 3229, 11 Fed. Reg. 4920 (1939).

[37]Timbers & Cohen, *Demands of Litigants for Government Information*, 18 U. Pitt. L. Rev. 687, 690 (1957). This description is actually of Order No. 3229, which substantially differs from the current, much lengthier DOJ Regulations.

In proceedings in which the government is not a party, an employee of the DOJ may not, in response to a demand for documents, disclose such documents without approval of a designated DOJ official.[38] The regulations also provide that the responsible United States attorney request a summary of the information sought and its relevance to the proceeding.[39]

When a government employee receives a subpoena to appear in court, the regulations similarly require, whether or not the government is a party, that the moving party submit a statement setting forth a summary of the testimony sought and its relevance to the proceeding to the United States attorney.[40] If the Justice Department consents to the testimony, the scope of

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[38]28 C.F.R. § 16.22(a) (1983) provides:

> (a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

[39]28 C.F.R. § 16.22(d) (1983) provides: "When information other than oral testimony is sought by a demand, the responsible United States attorney shall request a summary of the information sought and its relevance to the proceeding." In proceedings to which the government is a party, the attorney handling the case is authorized to reveal unclassified documents after seeking approval from certain designated parties. 28 C.F.R. § 16.23(a) (1983).

[40]28 C.F.R. § 16.22(c) (1983) provides:

> (c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible United States attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

See also 28 C.F.R. § 16.23(c) (1983)(governing testimony in cases to which government is party).

the demand as summarized limits the testimony of the employee.[41]

In the event that the designated official considers the information to be confidential, the regulations set forth a procedure for referring the decision to superiors in the DOJ.[42] The regulations enumerate factors to be considered in determining whether disclosure should be made, such as whether disclosure is appropriate under the rules of procedure governing the case or under relevant substantive law concerning privilege.[43] They also specify instances in which disclosure will not be made by any DOJ official, including cases where disclosure would violate a statute or reveal classified information.[44] If disclosure would reveal law enforcement investigatory records or the identity of an informant, it will not be made unless the Attorney General determines that the administration of justice requires disclosure.[45]

In the event that a court refuses to stay a proceeding until a DOJ determination is made or the court itself determines that a claim of privilege is not warranted, the regulations instruct employees to decline to comply with the demand for information.[46] The validity of this rule, prohibiting document disclosure

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[41]28 C.F.R. § 16.22(c) (1983).
[42]28 C.F.R. § 16.24 (1983).
[43]28 C.F.R. § 16.26(a) (1983).
[44]28 C.F.R. § 16.26(b) (1983).
[45]28 C.F.R. § 16.26(c) (1983).
[46]28 C.F.R. § 16.28 (1983) provides:

> If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.27 of this chapter pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions rendered in accordance with §§ 16.24 and 16.25 of this part not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall, if so directed by the responsible Department official, respectfully decline to comply with the demand. *See* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951).

The regulations do not make any recommendations regarding the manner in which the DOJ will proceed after the employee declines to respond in the face of a court demand.

by a subordinate in the face of a court order, was first addressed by the Supreme Court in *United States ex rel. Touhy v. Ragen*.[47] Touhy, a state prisoner, brought a habeas corpus proceeding in connection with which he subpoenaed an agent of the Federal Bureau of Investigation to appear and produce certain files.[48] The agent, when put on the stand, refused to produce the documents.[49] The district court ordered the witness to produce the

[47]340 U.S. 462 (1951). The *Touhy* Court examined the validity of Order No. 3229, the predecessor of the current regulations.

[48]The record indicates that the subpoena issued and served upon the FBI agent also named the Attorney General. 340 U.S. at 465.

[49]The agent acted in reliance upon DOJ Order No. 3229 (1946), the predecessor of 28 C.F.R. § 16.28 (1983). Order No. 3229 provided:

> Pursuant to authority vested in me by R.S. 161, U.S. Code, Title 5, Section 22, *It is hereby ordered*:
>
> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshalls, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a subpoena *duces tecum* is served to produce any such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.
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> Supplement No. 2 to that order, dated June 6, 1947, provides in part:
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> TO ALL UNITED STATES ATTORNEYS
>
> PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM
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> Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, docu-

subpoenaed material and held him in contempt for his refusal to do so.[50] The Supreme Court, affirming the Seventh Circuit's reversal of the lower court, held that a DOJ employee cannot be held in contempt for refusal to produce requested material when release of that material has not been authorized by the appropriate official.[51]

The *Touhy* Court limited its opinion to finding that a regulation which centralizes responsibility in a department for determining whether to claim a privilege for department-controlled documents is consistent with the Housekeeping Statute. The Court noted that its decision did not address the "ultimate reach of the authority of the Attorney General to refuse to produce at a Court's order the government papers in his hands . . . ."[52] According to the Court, "the validity of the superior's action

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ments, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records.

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. . . It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interest the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

340 U.S. at 463–64.

[50] *Id.* at 465.

[51] *Id.* at 468.

[52] *Id.* at 467.

[was] in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers."[53] Justice Frankfurter, concurring, pointed out that the Court did not intend for its decision to imply authority in the government to "shut off an appropriate judicial demand" for papers.[54]

The *Touhy* decision is narrowly focused.[55] Although the decision upheld the validity of the DOJ Regulations before it, it did so in a limited sense, since it dealt with a DOJ order which only governed production of government documents, as opposed to employee testimony.[56] It is not certain that the Supreme Court today would find that the Housekeeping Statute authorizes all aspects of the current DOJ Regulations.[57] Even if Congress did enact a statute which authorized a regulation similar in coverage to the DOJ Regulations, the application of that regulation in federal criminal cases would raise questions regarding its constitutional validity. When a regulation is determined to contravene constitutional rights or express statutory provisions, of course, it no longer carries the weight of law.

Thus, in short, the DOJ Regulations approved by the *Touhy* Court, more limited than the current regulations, (i) governed access to documents which clearly were government property but did not address access to employee testimony; (ii) provided

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[53]*Id.*

[54]*Id.* at 472 (Frankfurter, J., concurring). Justice Frankfurter noted that although there was no doubt that the Attorney General could be reached by legal process, what disclosures he could be required to make were another matter (*i.e.*, a question of privilege). *Id.* at 473.

[55]*See, e.g.*, United States v. Feeney, 501 F. Supp. 1337 (D. Colo. 1980).

[56]The order upheld by the Court did not discuss regulation of employees' non-documented testimony. It referred to a subpoena duces tecum rather than a subpoena ad testificandum. Moreover, the Court pointedly noted, "[n]or are we here concerned with the effect of a refusal to produce in a prosecution by the United States. . . ." (citation omitted). *Id.* at 467. The Court also noted, as had the court of appeals, that the Attorney General's order placed the burden of seeking approval for disclosure on the employee; the order also specifically acknowledged that subpoenaed material "must be submitted 'to the Court for determination as to its materiality to the case'" even without and prior to review by the Justice Department. That had not occurred in this case only because the trial court had not required such *in camera* disclosure. *Id.* at 466.

[57]*See supra* notes 32–34 and accompanying text.

that submission of evidence by the subpoenaed government employee to the Court for *in camera* review, even in the absence of the Attorney General's approval, was appropriate, and, most important, (iii) did not address the validity, under the due process and compulsory process clauses, of the state defendant's conviction.[58] Furthermore, as described below,[59] these regulations have been held not to have the force of law except insofar as they apply to internal departmental issues. Nevertheless, certain recent court decisions have relied on *Touhy* to uphold the application of current DOJ Regulations in situations not examined by the *Touhy* Court.[60] The next section discusses recent case law in this area.

II. Spotlighting The Problem Through Conflicting Recent Precedent and Policy

Two appellate decisions reported in 1981, both addressing the conflict between a criminal defendant's need for evidence within the government's possession and the government's need for efficient decisionmaking procedures, have reached diametrically opposite results concerning the dispositive effect of the federal housekeeping regulations.

In *United States v. Marino*,[61] the defendants, charged with several drug and related offenses, sought to discredit the government's main witnesses. Those witnesses, John and Cat Peltin, claimed to have participated with the defendants in a cocaine importation conspiracy but then took steps to withdraw from the conspiracy.[62] In particular, the Peltins informed the

[58]A regulation which is addressed and adapted to the enforcement of an act of Congress normally has the force and effect of law if it is not in conflict with express statutory provisions. Maryland Casualty Co. v. United States, 251 U.S. 342 (1920). By finding the predecessor of the current regulations consistent with law, the *Touhy* Court may have in some sense accorded them the force and effect of law.

See also Comment, *Executive Privilege and the Congress, Perspectives and Recommendations*, 23 De Paul L. Rev. 692, 709 (1974).

[59]*See infra* note 83 and accompanying text.

[60]*See supra* note 30; *infra* note 160.

[61]658 F.2d 1120 (6th Cir. 1981).

[62]Marino, one member of the conspiracy, gave $30,000 to Cat Peltin and her sister, Williams, another convicted co-conspirator, to purchase cocaine in

United States Drug Enforcement Administration (DEA) about the conspiracy, and received immunity from prosecution; they also obtained a $5,000 cash bonus from the government and a monthly stipend of $815 under the federal Witness Protection Program in exchange for their trial testimony.[63]

After the Peltins testified for the government and were cross-examined by the defendants, the defendants sought to subpoena federal personnel who had more direct knowledge of the Peltins and of the circumstances surrounding their negotiations with the government. The defendants believed that the Peltins' credibility and truthfulness, central to the case, could be more directly impeached. The prosecution denied the defendants the witnesses' testimony for failure to comply with Justice Department regulations requiring that the prosecutor be provided in advance with a summary of the intended questioning of the federal employees.[64]

In affirming the convictions of each of the defendants, the Sixth Circuit did not actually recognize the relative importance for the defense of securing the testimony of the federal employees. The court merely attributed formal and dispositive effect to the procedural requirements of the Justice Department's regulations:

> The Department of Justice has a legitimate interest in regulating access to government information contained in its files or obtained by its employees during the scope of their official duties. Without a procedure governing demands by potential litigants, the efficiency of the Department could be greatly impaired. The question of

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Peru and return with the cocaine hidden in Cat's wheelchair. Cat Peltin traveled to Peru, gave $30,000 to Castello, another co-conspirator, but then returned without the cocaine. The purchase was not completed. Later, the plan was changed so that cocaine was to be shipped to Peltin's home hidden inside furniture. 658 F.2d at 1122.

Cat Peltin's husband, John, then contacted the Drug Enforcement Administration and revealed the plan to them. The exact chronology of John Peltin's contacts with the government, as well as the details of his negotiations, were not disclosed. *Id.*

[63]*Id.*

[64]*Id.* at 1125. See *supra* notes 36–46 and accompanying text, for a description and analysis of the regulations.

> whether these procedures deny the defendants their Sixth Amendment right to call and cross-examine witnesses is not reached until the defendants follow the procedures and then have their demands denied. Because Marino and Castello failed to make a demand in accordance with 28 C.F.R. § 16.23(c), they have no constitutional claim.[65]

The court thus assumed that (i) the housekeeping regulations had the force of law and were consistent with the underlying legislation, and (ii) such procedural law pretermitted and supplanted fundamental sixth and fifth amendment protections. Such an approach recently has become the rule in federal criminal cases.[66]

A state appellate court, on the other hand, has taken a different approach to the applicability of the same federal regulations in a criminal case. In *Buford v. State*,[67] the Georgia Court of Appeals held that a defendant's failure to comply with DOJ Regulations[68] for requesting disclosure of documents for

[65]*Id.* The Court's suggestion that the regulations support the "efficiency" of the department is discussed *infra* at notes 140–42 and accompanying text. Governmental efficiency, in fact, would be aided if the government, not the defendant, were required preliminarily to seek the trial court's *in camera* review of the materiality of the subpoenaed information, as the Justice Department order upheld in *Touhy* suggested. See *supra* note 49 for the text of that order.

[66]*See infra* notes 79, 160. For example, in United States v. Bizzard, 674 F.2d 1382 (11th Cir.), *cert. denied*, 103 S. Ct. 305 (1982), the defendant had subpoenaed, pursuant to court order, the former prosecutor, who had resigned from government service, as a hostile defense witness. When the government's key witness, an alleged accomplice, again refused to implicate the defendant at trial, the government was allowed to read his prior statement to the jury. The defendant had sought the former prosecutor's testimony to prove that the accomplice had intended to recant his accusation, received threats from the prosecutor and an F.B.I. agent, and then decided to say nothing. Because the defendant, although generally describing the subject of the intended testimony, refused to disclose in advance to the government the specific nature of his intended questioning of the former prosecutor, the trial court quashed the defense subpoena. The author of this Article argued this case for Bizzard before the Eleventh Circuit.

[67]158 Ga. App. 763, 282 S.E.2d 134 (1981).

[68]28 C.F.R. § 16.21–.29 (1982); *see supra* notes 36–46 and accompanying text.

trial did not bar the trial court from ordering production of the documents. Since the trial court had failed to compel production of the defense evidence, the court of appeals vacated the defendant's conviction.[69]

Indicted for possession of controlled substances, the defendant in *Buford* claimed that he was an informant for the United States Drug Enforcement Administration. In an attempt to substantiate his defense, the defendant issued a subpoena duces tecum to a DEA agent requesting him to appear and bring documents concerning defendant's connection with the DEA.[70] The State of Georgia successfully moved to quash the subpoena on grounds that compliance with the subpoena was inconsistent with DOJ housekeeping regulations and sought confidential information.[71]

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[69]158 Ga. App. at 764–68, 282 S.E.2d at 135–38.

[70]*Id.* Buford requested the following information:

> [T]he DEA telephone toll receipts for the period in question; all information pertaining to Buford's contact with the DEA, all information pertaining to a certain arrest in Alabama (towards which Buford contends he provided information); and all manuals or documents pertaining to policies and procedures of the DEA with regard to termination of confidential informants.

Id. at 764–65, 282 S.E.2d at 136. It is unclear from the record whether Buford desired to elicit testimony from the DEA agent once he appeared in court. The court did not examine directly the DOJ's regulation of testimony.

[71]*Id.* at 765, 282 S.E.2d at 136. The DOJ never considered the request and thus never asserted a privilege. Only the DOJ could assert a privilege for the information within its custody. *See infra* note 99 and accompanying text. Whether confidential or not, the information sought by the subpoena was highly relevant. Buford's defense at trial was that, as an operative and informant for the United States Drug Enforcement Administration, his work with that department necessitated his active involvement in drug-related activities, with the DEA's knowledge and permission. Witnesses for the DEA admitted that Buford had been an operative for six months, but stated that his services had been terminated in September 1976, and that the DEA had had no contact with him since that time. Buford testified that he had received no notice of any such termination. He produced a witness who testified that she had heard Buford make telephone calls to DEA agents after September 1976, the date of the alleged termination, as well as a telephone bill which showed a call made to the DEA number in Atlanta from Buford's mother's residence, where Buford also lived, in February 1977.

The Georgia Court of Appeals held that, although valid as a mechanism for removing discretion from subordinates regarding disclosure of documents,[72] the regulations could not be used to withhold or limit the availability of information to litigants, particularly in criminal trials.[73] Drawing from *United States v. Nixon*,[74] the court noted that it had a duty to guarantee the defendant's right to confrontation and compulsory process[75] even in the face of an attempt to suppress information through a claim of executive privilege.[76] To withhold relevant and material information on the basis of privilege "would impair the basic function of the courts."[77]

The court concluded that the trial court, upon a determination that the information requested is material, should ask the Attorney General to disclose such information.[78] Furthermore, upon an assertion of privilege by the Attorney General, the trial court should evaluate the claim and order disclosure of all materials necessary for due process. If the trial court were to uphold a motion to quash a subpoena because of defendant's failure to comply with the DOJ Regulations, it would be abandoning its duty to the criminal justice system by permitting the trial to continue without information which could be critical to the defendant's case. The *Buford* court thus indicated that a court's duty to marshall evidence and guarantee the defendant's constitutional rights of confrontation and compulsory process overrides the state's interest in asserting a technical violation of internal regulations by the defendant as a basis for foreclosing the defendant's access to necessary information.

The *Buford* opinion, in refusing to uphold a witness exclusion sanction, represents an important departure from the approach of federal case law, such as *Marino*, regarding the effect of a defendant's noncompliance with the DOJ Regulations. In

[72]*See* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951).

[73]158 Ga. App. at 766, 282 S.E.2d at 137. The DOJ Regulations are promulgated under the Federal Housekeeping Statute, 5 U.S.C. § 301 (1982), which does not authorize the withholding of information. *See supra* note 15.

[74]418 U.S. 683 (1974).

[75]158 Ga. App. at 767, 282 S.E.2d at 137. *See* U.S. Const. amend. VI.

[76]*See infra* notes 111–117 and accompanying text.

[77]158 Ga. App. at 767, 282 S.E.2d at 137 (citing United States v. Nixon, 418 U.S. 683, 712 (1974)).

[78]*Id.* at 768, 282 S.E.2d at 137.

federal criminal cases in which defendants have been denied access to documents or testimony because of failure to comply with DOJ Regulations, federal appeals courts, such as in *Marino*, consistently have refused to examine sixth amendment claims, holding that such constitutional claims are reviewable only when a defendant follows the requisite procedures and is denied disclosure.[79]

The federal courts have failed to recognize that the effect of their decisions is to permit the regulations to constitute a real barrier against disclosure. While the Justice Department may have a legitimate interest in some cases in regulating access to "official" information by requiring the approval of the Attorney General, the DOJ Regulations do not create a privilege preventing disclosure of that information in a judicial proceeding.[80]

By effectively barring disclosure at the trial level and review at the appeals level, the regulations in fact conflict with the express language of their authorizing statute.[81] The Housekeeping Statute[82] permits departments to promulgate regulations regarding the custody of papers and records, but not regulations which bar or limit access to department documents in a manner which interferes with the integrity of a criminal trial. The Housekeeping Statute only authorizes regulations consistent with law. In fact, regulations promulgated pursuant to the statute which relate to the internal operations of an agency have been held not to have the force of law even with respect to the rights of third parties.[83]

Although valid to control internally the release of government property, the DOJ Housekeeping Regulations as applied in federal criminal cases undermine a defendant's sixth amendment rights to the same extent as does the alibi witness exclusion

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[79]*See* United States v. Fricke, 684 F.2d 1126 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1250 (1983); United States v. Bizzard, 674 F.2d 1382 (11th Cir.), *cert. denied*, 103 S. Ct. 305 (1982); United States v. Marino, 658 F.2d 1120 (6th Cir. 1981); United States v. Estrella, 567 F.2d 1151 (1st Cir. 1977); United States v. Allen, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977).

[80]*See supra* note 20.

[81]5 U.S.C. § 301.

[82]*See supra* note 15 for the text of the statute.

[83]The statement of procedural rules governing employee conduct promulgated, for example, by the Internal Revenue Service pursuant to 5 U.S.C. § 301 does "not have the force and effect of law." Einhorn v. DeWitt, 618 F.2d 347, 350 (5th Cir. 1980)(citations omitted).

sanction at issue in *Taliaferro*. The *Buford* court, cognizant of these problems, recognized that the judiciary is not precluded by regulation from calling upon the Attorney General, if necessary, to ensure a defendant's right to a fair trial at which the selected jury has the opportunity to weigh all relevant evidence.[84] It refused to defer to the government's claim for efficiency, which effectively would elevate any piece of information which might be the subject of an executive branch employee's testimony to the status of privilege adhering to the government. The next section of this Article discusses the basis for such a claim of privilege.

III. Government Privilege and the Government's Right to Restrict the Disclosure of Information

The overview of the DOJ Regulations and the Housekeeping Statute contained in the first part of this Article[85] reveals that neither confers upon the Justice Department a privilege to withhold information. The regulations are procedural in nature and may not vest any substantive authority concerning executive relationships with other institutions.[86] Technically, therefore, the question of privilege arises only after a department head determines that disclosure is not appropriate, whether in response to the request of a party who has followed the procedures set forth in the regulations, or pursuant to a demand by a trial judge. Furthermore, when testimony rather than documents is sought, the question of privilege should not arise unless it has been determined that the government employer has some property interest in the employee's testimony.

Rule 501 of the Federal Rules of Evidence[87] defines the extent of privilege in the federal courts, but it does not address

[84]After the court of appeals rendered its decision, the DEA provided the information to the defendant. Buford v. State, 162 Ga. App. 498, 291 S.E.2d 256 (1982).

[85]*See supra* notes 20–21 and accompanying text.

[86]*See supra* note 83.

[87]Rule 501 provides as follows:

GENERAL RULE

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of

the scope of official information or trade secrets which might be known to an employee yet also be the property of the employer. Enacted in 1975,[88] Rule 501 codified the existing common law of privileges and provided that privileges should continue to develop under a uniform standard applicable in both criminal and civil cases. The Rule provides, however, that federally evolved rules of privilege should apply in federal criminal cases.[89] When the Attorney General contends that the information requested by a defendant is confidential, therefore, Rule 501 theoretically allows him to assert any of the privileges recognized by the federal courts as reserved for the government;[90] Rule 501, however, does not specifically address the impact upon a federal prosecution of a successful assertion of government privilege in response to a defense subpoena.

> a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[88]Article V of the Federal Rules of Evidence as approved by the Supreme Court set forth nine nonconstitutional privileges. When the Rules were submitted to the Congress the matter of privileges raised considerable controversy, and Congress substituted for the specific rules of Article V the present single Rule 501. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 501[01] (1982). One of the most controversial of the specific privileges approved by the Supreme Court was the government privilege for state secrets and official information set forth in proposed Rule 509. *Id.* at ¶ 501-17. For a discussion of Rule 509, see *infra* notes 143–51 and accompanying text.

[89]In diversity of citizenship cases, federal courts are required by the specific language of Rule 501 to apply state law of privilege.

[90]Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977). Whether or not information in the custody of executive departments should be disclosed in judicial proceedings depends upon a balancing of the need for disclosure against other policies, such as the policy of protecting military secrets. Evidentiary privileges established at common law protected military and state secrets and the identity of government informers. 8 J. Wigmore, Evidence § 2378, at 794 (McNaughton rev. ed. 1961). Congress also has enacted statutes protecting various government communications and reports. *Id.* at § 2374. For further discussion of asserted bases for privilege, see Hardin, *supra* note 19, at 881–83.

The privileges available to the government as recognized by the courts fall into broad categories. The first, and most relevant to this Article, encompasses the claim of executive privilege, which is based on the constitutional doctrine of separation of powers.[91] The Supreme Court has recognized an executive privilege against disclosure of documents containing military or diplomatic secrets[92] and documents containing

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[91]Agencies have claimed that by virtue of the separation of powers doctrine, they have an inherent right to withhold information under an "executive privilege." Carrow, *Governmental Non-disclosure in Judicial Proceedings*, 107 U. Pa. L. Rev. 166, 170 (1958).

President Nixon asserted this argument in support of his claim of absolute privilege in United States v. Nixon, 418 U.S. 683 (1974). The President argued that "the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." *Id.* at 706. The Court held that the doctrine of separation of powers could not sustain an absolute, unqualified privilege of immunity from judicial process and that the interest in preserving the confidentiality of the information could be protected by conducting an *in camera* examination. *Id.*

For an argument disavowing the basis of an executive privilege in the separation of powers doctrine, see R. Berger, Executive Privilege: A Constitutional Myth (1974).

[92]United States v. Reynolds, 345 U.S. 1, 7 (1953). In *Reynolds*, three civilian observers were killed when an Air Force bomber crashed while testing secret equipment. Their widows filed suit under the Federal Tort Claims Act. Before trial, the plaintiffs moved under Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force's official investigation report and for those statements of the three surviving crew members that were taken in connection with the investigation. The Government claimed privilege pursuant to Air Force regulations promulgated under the Housekeeping Statute and based upon state secret considerations. *Id.* at 3–4. Both the district court and court of appeals rejected the government's claim and ordered *in camera* disclosure. Reversing, the Supreme Court said that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officials." *Id.* at 9–10. The Court, however, went on to say that in a civil case an *in camera* examination would not be necessary if the government could demonstrate to the court that there is a reasonable danger that disclosure will expose military secrets. *Id.* at 10. The Court concluded that there was sufficient evidence on the record to establish that state secrets might be revealed and thus declined to order an *in camera* examination. The Court's decision may represent a compromise designed to avoid clashes between the judiciary and the executive.

Because the Court limited its analysis to civil proceedings and to the state secret privilege and did not address the official information privilege, it is

deliberations of high executive officials.[93] The lower courts have also recognized an executive privilege for intergovernmental documents reflecting policy determinations.[94] Courts have occasionally recognized three other forms of privilege claimed by the various executive agencies:[95] a law enforcement evidentiary privilege;[96] an informer privilege;[97] and, finally, an official information privilege,[98] the theory underlying non-disclosure in *Buford* and *Marino*. A governmental or executive privilege belongs to the government and can be asserted or waived only by it.[99]

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unclear why lower courts have broadly cited *Reynolds* as controlling with regard to the Housekeeping Statute. *See* Note, *supra* note 19.

[93]United States v. Nixon, 418 U.S. 683, 703–07 (1974).

[94]Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd mem. sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

[95]Association for Women in Science v. Califano, 566 F.2d 339, 343 (D.C. Cir. 1977).

[96]Black v. Sheraton Corp., 564 F.2d 531, 541–47 (D.C. Cir. 1977). This privilege is based upon the harm to law enforcement efforts which might arise from public disclosure of government investigatory files. (The *Black* case is sometimes cited as Black v. United States; *see, e.g.*, *Women in Science*, 566 F.2d at 343).

[97]Roviaro v. United States, 353 U.S. 53 (1957). This privilege protects from disclosure the identity of persons who furnish information to law enforcement officials. The informer's privilege protects the government's interest in the flow of information concerning possible violations of the law.

[98]*Black*, 564 F.2d at 541–47. This privilege is designed to protect information which citizens give to the government. Analogous to the informer's privilege, this privilege is based on the government's interest in protecting the flow of information concerning the subject of a particular report. *See* Note, *supra* note 19.

For an in-depth review of the official information privilege, see Annot., 95 L. Ed. 425 (1951). "It seems also to be settled that, excepting the common law privileges mentioned above, a governmental privilege against disclosure of routine information cannot be exercised in judicial proceedings to which the government . . . is a party." *Id.* at 426.

[99]United States v. Reynolds, 345 U.S. at 7. *See* Timbers & Cohen, *Demands of Litigants for Government Information*, 18 U. Pitt. L. Rev. 687, 706 (1957).

The debate over the scope of executive privilege has arisen both in cases in which the government is a party and in cases in which the government is not a party. Where the government is a party, the official information privilege cannot be asserted successfully. Annot., *supra* note 98, at 425, 426. It follows

In the judicial context, privileges differ from other rules of evidence in their purpose.[100] Privileges represent "an adjustment between important but competing interests";[101] they are designed to promote extrajudicial relationships and interests by permitting witnesses to keep reliable evidence secret.[102] In most cases, the interests protected by privileges are deemed to be "more important than the unfettered determination of truth in judicial proceedings."[103] The government's assertion of privilege, however, is subject to limitations which do not similarly restrict an individual's claim of privilege. When the government is involved in a judicial proceeding, it may have an interest in withholding information, but it is also subject to the constitutional requirement that the proceeding meet due process standards.[104] Therefore, the scope of the government's privilege in

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that procedures embodied in the housekeeping regulations for predisclosure by an adverse party to the government serve no purpose at all except to prejudice the defendant, unless the subpoenaed government employee might be asked to reveal information rising to the level of "secrets of state."

The government as prosecutor is not necessarily the party who claims the executive privilege. In United States v. Nixon, 418 U.S. 683 (1974), the privilege was not asserted by the government prosecutor but by the President, a third party to the suit. Consequently, in that case the privilege did not force a choice between prosecution and disclosure. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 163 n.445 (1974) (author uses term "government privilege" to apply only when it is asserted by prosecution).

[100]Westen, *supra* note 99, at 160.

[101]Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966).

[102]*See* Westen, *supra* note 99, at 161. Rules of competence, unlike privileges, are designed to promote the integrity of the factfinding process by excluding potentially unreliable or misleading evidence. *Id.*

[103]*Id.* at 161. In explaining the role of privileges, Professor McCormick said:

> They do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

C. McCormick, Handbook of the Law of Evidence 152 (2d. ed. 1972).

[104]Carrow, *supra* note 91 at 168. The government has the duty to see that justice is done. Communist Party v. Subversive Activities Control Bd., 254 F.2d 314 (D.C. Cir. 1958).

a criminal case is limited by the requirements of fundamental fairness[105] and the individual's right to prepare his defense.[106]

The Supreme Court has declared that the precise boundaries of executive privilege will be determined by the judiciary, not the executive.[107] When the government asserts a privilege, the court should balance the interests at stake to determine whether disclosure would be more injurious to the government's need for secrecy than nondisclosure would be to the private litigant's defense.[108] In criminal cases, when the conflict between interests is irreconcilable, the courts have held that the government must choose between its interest in prosecuting the defendant and in preserving the privilege.[109] In explaining the rationale of this rule, the Supreme Court stated that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[110]

In *United States v. Nixon*[111] the Supreme Court clearly articulated the limitations to be imposed upon executive privi-

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[105]*Roviaro*, 353 U.S. at 60–61 (if necessary to defense, identity of informer must be revealed or prosecution dropped).

[106]*Id.* at 60.

[107]United States v. Nixon, 418 U.S. 683 (1974); United States v. Reynolds, 345 U.S. 1 (1953). "[I]t is emphatically the province and duty of the judicial department to say what the law is" with respect to the claim of privilege presented in this case. 418 U.S. at 703 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[108]United States v. Article of Drug Consisting of 30 Individually Cartoned Jars, 43 F.R.D. 181, 190 (D. Del. 1967).

[109]Roviaro v. United States, 353 U.S. 53 (1957); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944). If the government prefers to assert its privilege it must proceed without the testimony of witnesses impeachable by the privileged evidence. If the government withholds evidence forming part of an element of the prosecution's or defendant's case, it must waive prosecution. A court may also dismiss a civil suit when the government is the plaintiff. Hardin, *supra* note 19, at 890.

[110]*Reynolds*, 345 U.S. at 12. The government interests in secrecy can be protected by an *in camera* examination of the privileged information.

[111]418 U.S. 683 (1974). Although this Article focuses upon privileges claimed by the government as prosecutor, the *Nixon* decision provides direction on the matter of privilege. In *Nixon*, the President, a third party to the suit with no control over the case, asserted a claim of privilege.

lege in a criminal proceeding. Even though former President Nixon, who was asserting the privilege in this case, was only a third party to the suit, the Court refused to recognize an absolute privilege.[112] Although the Court recognized a presumption in favor of the privileged nature of presidential communications, it stated that this presumption must be examined critically in light of the constitutional protections guaranteed to the defendant in the criminal adversary system.[113] Noting that the President rested his claim of privilege upon a generalized interest in confidentiality,[114] the Court concluded that such a general claim must yield to "the fundamental demands of due process of law in the fair administration of criminal justice."[115] To allow a "privilege to withhold evidence demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process and gravely impair the basic function of the courts" to guarantee compulsory process.[116]

A claim of privilege by either the President or an executive agency thus should not interfere with the judiciary's role in reviewing that claim and presiding over a trial, even when the material sought to be disclosed is clearly the property of the government. Furthermore, when employee testimony is sought which would not reveal any obvious government secrets in a

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[112]*Id.* at 707.

[113]*Id.* at 711. According to the Court:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

Id.

[114]The Court indicated that its balancing process would have yielded different results had the President claimed privilege to protect specific military, diplomatic or sensitive national security secrets. 418 U.S. at 706.

[115]*Id.* at 713.

[116]*Id.* at 712.

civil or criminal proceeding, "judicial control over the evidence . . . cannot be abdicated to the caprice of executive officials."[117] Yet that is exactly what happened in *Marino*, when, in effect, the government was allowed to assert a privilege not to disclose information except upon the terms of its own unilaterally developed regulations.[118] The following section analyzes how federal courts should evaluate such claims of privilege in criminal proceedings such as *Marino*.

IV. The Impact of the DOJ Regulations Upon The Fairness of a Criminal Trial

The General Housekeeping Statute is drafted in general terms, without specific reference to federal criminal proceedings, and thus does not purport to authorize a rule whose application would deprive a person of his constitutional or statutory rights.[119] Regulations promulgated under the statute should be similarly flexible. An examination of the protections accorded a federal defendant in a criminal trial by the fifth and sixth amendments and the Federal Rules of Criminal Procedure reveals, however, that the DOJ Housekeeping Regulations conflict with these protections.

As noted above,[120] federal appeals courts assert that the validity of the DOJ Regulations was established in *United States ex rel. Touhy v. Ragen*[121] and therefore allow the government to deny access to information sought by defendants. In so deferring to the executive branch, these courts have overlooked the dilemma created by the regulations for the defendant seeking information and the narrow context in which the *Touhy* Court upheld the validity of the regulations. By requiring the defendant to submit a summary of the documents or testimony desired in order to trigger consideration of the request, the DOJ Regulations facially conflict with the defendant's due process right to reciprocal discovery and interfere with his sixth amendment right to prepare a defense. Because compliance with the regu-

[117] *Id.*

[118] *See supra* notes 61–66 and accompanying text.

[119] *See supra* notes 15–17 and accompanying text.

[120] *See supra* notes 30 and 79.

[121] 340 U.S. 462 (1951).

lations does not guarantee timely disclosure, or for that matter, any disclosure, the defendant is left in the position of deciding between exercising his constitutional rights and prematurely revealing his defense. By choosing to assert his constitutional rights he risks giving the government an advantage by disclosing part of his own case, including defense theories otherwise protected by the work-product doctrine and not discoverable by the government under the Federal Rules of Criminal Procedure.[122]

A. Due Process Concerns

Although a criminal defendant does not have a constitutional right to pretrial discovery, he does have a right to obtain and present relevant evidence at trial.[123] Moreover, in *Wardius v. Oregon*,[124] the Supreme Court held that a statute requiring the defendant to give pretrial notice of any alibi to the prosecution must provide the defendant with reciprocal discovery rights. The defendant in *Wardius* failed to follow such a state statute.[125] As a consequence of his noncompliance, the defendant, as in *Taliaferro*, was not permitted to introduce his alibi evidence at trial.[126] The Court held that the sanctions of the statute violated due process in the absence of reciprocal discovery.[127] It stated that in the absence of a strong showing of state interest to the contrary, discovery must be a "two-way street."[128] In examining the burden placed upon the defendant

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[122]Fed. R. Crim. P. 16(b).

[123]Webb v. Texas, 409 U.S. 95 (1972); Clinton, *The Right To Present A Defense: An Emergent Constitutional Guarantee* in *Criminal Trials*, 9 Ind. L. Rev. 711, 848 (1976).

[124]412 U.S. 470 (1973).

[125]The Oregon statute at issue was Ore. Rev. Stat. § 135.455 (1983) (formerly § 135.875)). The statute required that the defendant, because he proposed to rely on an alibi defense, advise the prosecuting attorney in advance of trial of the places where he claimed to have been at the time of the crime and the names and addresses of all alibi witnesses. *Id.*

[126]412 U.S. at 471; Ore. Rev. Stat. § 135.455(1) (formerly § 135.875(1)).

[127]412 U.S. at 472. The Court did not address the constitutional questions that might be raised by sanctions imposed upon the defendant by an otherwise valid notice-of-alibi rule. *Id.* at 472 n.4.

[128]*Id.* at 475.

by the statute, the Court explained: "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."[129] Although the state argued that the trial court might have exercised its discretion to construe the rule to require notice of the government's rebuttal witnesses, the Supreme Court found that the absence of mandatory reciprocal discovery rendered the statute facially invalid.[130]

The DOJ Procedural Regulations were not intended as a discovery scheme but rather were designed to efficiently expedite and centralize decisionmaking regarding the disclosure of government information; nevertheless, a premise of the regulations is that any information to which a government employee might testify is subject to governmental control. Moreover, pretrial disclosure of defense theories in order to obtain that information is obviously required by the regulations and such disclosure can be used by the prosecutor to his advantage at trial. The procedures for obtaining approval of a defense trial subpoena under the regulations closely resemble the procedures of the notice-of-alibi rule at issue in *Taliaferro*.[131] The defendant must identify those government witnesses he wishes to use at trial and submit a summary of the matters to which he expects the witnesses to testify in order for such testimony not to be

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[129]*Id.* at 476.

[130]*Id.* at 478–79. According to the Court, this argument was unavailing because of the lack of predictability about what the state court would have required. When the defendant was required to decide whether or not to reveal his alibi, he was faced with a statute which made no provision for reciprocal rights of discovery. Once the defendant submitted the alibi information, he could not retract it; even if the statute was invalidated later, the state would still have had the advantage. *Id.*

The *Wardius* Court did not clearly define the scope of the discovery a state must afford a criminal defendant under its rule. For a discussion of the state's reciprocal duty, see Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 Ky. L.J. 58 (1973). Fed. R. Crim. P. 12.1(b) requires the government to provide the identity of witnesses it will use to "establish defendant's presence at the scene of the alleged offense."

[131]The discussion from this point forward will proceed on the assumption that, in effect, the DOJ Regulations function like notice-of-alibi rules and thus should be subject to the same constitutional limitations.

excluded.[132] In the absence of any provision guaranteeing disclosure by the government to the defendant of its witness list or prosecution theory prior to trial, these procedures clearly do not provide a "two-way" flow of information. The defendant is required to reveal his expected evidence for which he should constitutionally receive disclosure of information in return. Under *Wardius*, the lack of reciprocal pretrial discovery and the absence of even the assurance that the defendant will be permitted to call the witness violate fundamental fairness and due process.[133]

Wardius did contain an exception to the "two-way" requirement: a "compelling state interest" might justify not guaranteeing "a two-way street."[134] Even assuming that the DOJ's interest in efficiency and confidentiality were sufficient to warrant an exception to the *Wardius* rule, the procedures contained in the regulations are unduly prejudicial. In order to secure testimony, the defendant risks, directly or indirectly, disclosing to his adversary prior to trial "his preliminary or speculative information,

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[132]*See supra* notes 38–46 and accompanying text. Since this Article focuses upon federal criminal cases, it will not fully address the comparable requirements of advance notice with regard to documents in cases to which the United States government is not a party. Very similar problems are encountered whether or not the federal government is a party.

[133]The argument set forth in the text is drawn from an analysis of the possible constitutional problems presented by the notice of insanity defense. Although a defendant must give notice of his intent to rely upon an insanity defense, no duty of reciprocal discovery is imposed upon the government. Fed. R. Crim. P. 12.2. No court has addressed the due process problems involved in requiring the defendant to give a notice of insanity defense, but one might argue that, under *Wardius*, courts should require the government to reveal the identity of witnesses the government will use to rebut the defense. According to one writer, the basis for such an extension of *Wardius* lies in trying to counterbalance the advantages the government possesses in its investigative techniques. Comment, *Amendments to the Federal Rules of Criminal Procedure--Expansion of Discovery*, 66 J. Crim. L. & Criminology 23, 31 (1975).

The rule at issue in *Wardius* is more directly analogous to the DOJ Regulations than to the notice of insanity rule. The *Wardius* case and the DOJ Regulations involve forced disclosure of names of defense witnesses, not just notice. Therefore, the DOJ is arguably within the scope of the *Wardius* rule.

[134]*Wardius*, 412 U.S. at 475. "But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.*

his interpretations or evaluations of evidence that he has, [and] his planning of trial strategy . . . ."[135] Furthermore, it is unreasonable to require the defendant to predict what he expects the witness will say before the witness has even testified and then limit him in the scope of his examination by this prediction.[136] Such a limitation would be particularly prejudicial in cases like *Marino*, where the defendant hoped to use government employees to impeach the trial testimony of the key government witness but could not know in advance of trial what that testimony would include.

The regulations also impose unnecessary burdens on the defendant without promoting the legitimate ends of justice.[137] Even if the Justice Department has a legitimate interest in preventing disclosure of confidential information, this interest and the interests of the defendant can be protected through less intrusive procedures than those now employed. A reasonable approach to this problem is one similar to that set forth in Fed. R. Crim. P. 17(b).[138] Rule 17(b) provides that a court will issue a subpoena for a named witness upon an ex parte application of a defendant, summarizing his intended use of the witness, when the defendant is financially unable to pay the witness's fees.[139] Although the court has the discretion to deny the request

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[135]Nakell, *Criminal Discovery for the Defense and the Prosecution--The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437, 476 (1972). The author discusses the disadvantages to the defendant if he is required to establish a foundation for receiving documents through discovery.

[136]*Id.* at 475.

[137]*Id.*

[138]Rule 17(b) provides as follows:

> Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

[139]An ex parte approach would also be appropriate for a request for documents.

based upon the defendant's failure to demonstrate the relevance of the witness's intended testimony, this procedure theoretically permits the defendant to keep confidential the names and expected testimony of the witnesses he wishes to subpoena.

Two factors support the use of an ex parte approach in requesting testimony of government witnesses. First, unlike the notice-of-alibi rules, the summary of testimony is not required and is not intended to aid the prosecutor in the preparation of his case.[140] Second, the trial judge constitutionally regulates the trial process and should be expected to evaluate the defendant's need for subpoenaed evidence before the Justice Department bureaucracy is required, in effect, to dismiss a prosecution in order to protect a secret. If the court decides that the request is for material and relevant information, then a claim of privilege by the government would not be likely to prevail at the defendant's expense. In such a case, the government will either have to allow the testimony or drop the prosecution.[141] If the government recognized that it was faced with such a choice, its decision whether to allow the testimony would be "informed." As the DOJ Regulations are now applied, Justice Department officials presumably must decide whether to disclose government information whenever a party seeks any information, including irrelevant evidence, before the trial court ever learns of the request. Such a result is hardly efficient, and may lead to vacillation or changes in policy depending upon subsequent judicial review.

In other words, courts in effect should exercise their authority to influence executive branch decisionmaking regarding trial evidence. If the government allows disclosure after being ordered to do so by the court, then the defendant is in a sense receiving reciprocal discovery rights under *Wardius*. If the prosecution is dropped, then presumably no one is at a disadvantage

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[140]Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191, 270 (1975). Once the court determines that the information sought is relevant, it can require the government to produce the information for an *in camera* inspection. The government therefore does not risk any greater disclosure by having the court evaluate the defendant's claim ex parte and its claim of privilege *in camera* than it would if the defendant had followed the procedures, been denied disclosure, and the court had requested an *in camera* examination to balance the interests of the two parties.

[141]*See supra* notes 109–10 and accompanying text.

vis-a-vis the protection of interests in secrecy or disclosure. If, on the other hand, the court determines that the request is not for material testimony, the court may deny the request without having unnecessarily exposed elements of the defendant's case to the prosecution. Therefore, requiring the defendant to submit to the prosecutor a summary of expected testimony or a list of documents in advance of trial is not only contrary to the notions of fairness espoused by the *Wardius* Court,[142] but also inefficient in some cases and unnecessary to protect the interests of the government.

The procedure proposed here is similar in purpose to the procedure set forth by proposed Rule 509 of the Federal Rules of Evidence.[143] The drafters of Rule 509, which was deleted by

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[142]*See supra* notes 124–33 and accompanying text.

[143]Proposed Fed. R. Evid. 509, 56 F.R.D. 183, 251 (1972), provided as follows:

> SECRETS OF STATE AND OTHER OFFICIAL INFORMATION
>
> (a) Definitions.
>
> (1) Secret of state. A "secret of state" is a governmental secret relating to the national defense or the international relations of the United States.
>
> (2) Official information. "Official information" is information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) subject to the provisions of 18 U.S.C. § 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U.S.C. § 552.
>
> (b) General rule of privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.
>
> (c) Procedures. The privilege of secrets of state may be claimed only by the chief officer of the government agency or department administering the subject matter which the secret in-

Congress in its enactment of the Federal Rules of Evidence,[144] sought to establish government privileges for secrets of state and official information. Under Rule 509, if the privilege claimed was for secrets of state, the government had to show that there was a reasonable likelihood that the requested evidence would disclose such a secret.[145] It was not clear whether the evidence requested had to be produced for the court's inspection.[146] Upon the government's motion the necessary showing could be made *in camera*.[147] If the privilege claimed was for official information,

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formation sought concerns, but the privilege for official information may be asserted by any attorney representing the government. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and to be heard thereon, except that, in the case of secrets of state, the judge upon motion of the government, may permit the government to make the required showing in the above form *in camera*. If the judge sustains the privilege upon a showing *in camera*, the entire text of the government's statements shall be sealed and preserved in the court's records in the event of appeal. In the case of privilege claimed for official information the court may require examination *in camera* of the information itself. The judge may take any protective measure which the interests of the government and the furtherance of justice may require.

(d) Notice to government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(e) Effect of sustaining claim. If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

[144]*See supra* notes 87–90 and accompanying text.

[145]Proposed Fed. R. Evid. 509(b) & (c), 56 F.R.D. at 251–52.

[146]Proposed Fed. R. Evid. 509(c), 56 F.R.D. at 251–252. *See* 2 Weinstein & Berger, *supra* note 88, ¶ 509[04].

[147]Proposed Fed. R. Evid. 509(c), 56 F.R.D. at 251–252. The approach adopted with respect to state secrets is consistent with United States v.

the government not only had to show that there was a likelihood that the requested evidence would disclose such information, but also had to produce the evidence for inspection by the court.[148] The court, however, could require in camera production and inspection.[149]

Under Rule 509, then, once the defendant issued a subpoena to the government, the evidence would be forthcoming at trial unless the government took the initiative and convinced the court that a privilege existed. Under the DOJ Regulations, however, the defendant must make a showing to his adversary, including pretrial disclosure of work product, before the Justice Department or a court will consider the materiality of his request. Both Rule 509 and the parallel proposals in this Article protect the defendant from having to reveal unnecessarily important tactical information to the prosecution in order to trigger disclosure.

Rule 509 also provided that if the government successfully claimed that information was privileged, the trial court had to take steps to protect the defendant's right to a fair trial.[150] The underlying reasons for congressional rejection of Rule 509 did not include disapproval of this element of protection accorded a defendant by the Rule.[151]

The DOJ Regulations are also arguably inconsistent with the Federal Rules of Criminal Procedure.[152] Fed. R. Crim. P.

Reynolds, 345 U.S. 1 (1953). It represents a compromise between the complete abdication of judicial control which would result from accepting as final the decision of a department officer, and the infringement upon security which would result from a requirement of complete disclosure to the judge, even though *in camera*. Advisory Committee Note to Rule 509(b), 56 F.R.D. at 254.

[148]Proposed Fed. R. Evid. 509(b) & (c), 56 F.R.D. at 251–52. When the Advisory Committee drafting Rule 509 agreed to add an official information privilege, it sought to codify the prevailing view of a qualified privilege subject to judicial review. 2 Weinstein & Berger, *supra* note 88, ¶ 509[02].

[149]Proposed Fed. R. Evid. 509(c), 56 F.R.D. at 251–52.

[150]Proposed Fed. R. Evid. 509(e), 56 F.R.D. at 252.

[151]Congress feared that this rule governing a litigant's access to government information would make it more difficult for Congress itself to obtain information. For a discussion of the Congressional reaction to Rule 509, see Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 Case W. Res. L. Rev. 747 (1975).

[152]This line of reasoning once again proceeds on the assumption that the DOJ Regulations are functionally a discovery mechanism.

16(b) provides for broad prosecutorial pretrial discovery. In an attempt to prevent overreaching by the prosecution, however, Rule 16(b) makes prosecutorial discovery available only when the defendant himself *successfully* seeks pretrial discovery.[153] The requirement of the regulations that a defendant submit his theory underlying testimony to the government as a prerequisite for consideration of his trial subpoena allows the government to obtain pretrial information from the defendant before the defendant is successful in obtaining trial evidence, contrary to the express provisions of Rule 16(b). The DOJ Regulations might have some claim to validity if they applied only to defense requests for a pretrial deposition of a government employee. It

[153]*See* Nakell, *supra* note 130, at 67; Nakell, *supra* note 135, at 502–10. Rule 16(b) provides as follows:

> (b) Disclosure of evidence by the defendant.
>
> (1) Information subject to disclosure.
>
> (A) Documents and tangible objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.
>
> (B) Reports of examinations and tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results of reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.
>
> (2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

goes without saying, however, that information not subject to pretrial discovery should nevertheless be subject to disclosure at trial unless demonstrably privileged.

Furthermore, Rule 16(b) does not provide for discovery of the names of witnesses and specifically excludes from discovery the statements of witnesses.[154] The DOJ Regulations require that the defendant reveal the names of government employees he wishes to call as witnesses and a summary of their expected testimony. Although not designed as a discovery scheme, the regulations elicit significant tactical information from the defendant contrary to the provisions of Rule 16. Since the Federal Rules of Criminal Procedure have the force of a federal statute,[155] the housekeeping regulations requiring disclosure of a defendant's witnesses and their expected testimony are invalid as applied in federal criminal cases in a manner inconsistent with law.[156]

B. The DOJ Regulations and A Defendant's Sixth Amendment Rights

In the criminal justice system, the need to develop all relevant facts to ensure that the guilty do not escape nor the innocent suffer supports full disclosure at trial. To ensure that

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[154]Fed. R. Crim. P. 16(b). Rule 16(b) also excludes from prosecutorial discovery the work product of the defendant's attorney. The work product principle is not and cannot be properly described as a privilege. The work product principle entitles a person to engage in a refusal, which is characteristic of a privilege; unlike a privilege, however, it must yield if sufficient showing of need is made. 2 D. Louisell & C. Mueller, Federal Evidence § 211 (1978); 8 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2025 (1970).

A defense lawyer's summary of what he expects a government employee to testify to is either work product, and thus not discoverable by the terms of Fed. R. Crim. P. 16(b), or it is the witness's statement and not discoverable until after the witness has testified. Fed R. Crim. P. 16(b), 26.2(a); 2 C. Wright, Federal Practice and Procedure: Criminal § 437 at 586 (2d ed. 1982). In either event, it is not discoverable before trial. The DOJ Regulations, on the other hand, require discovery of this summary before trial. This pretrial disclosure is disadvantageous to the defense since any element of surprise is lost.

[155]18 U.S.C. §§ 3771, 3772 (1982); 1 Wright, *supra* note 154, § 2; *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 13, 16 (1941)(civil rules).

[156]*See supra* note 17.

there is full disclosure, the courts must guarantee the availability of compulsory process.[157] As the Supreme Court held in *Washington v. Texas*,[158] compulsory process includes not only the right to compel the attendance of witnesses but also the right to introduce their testimony into evidence.

The DOJ Regulations frustrate the defendant's sixth amendment right to prepare his defense by the production and examination of witnesses.[159] The initial problem is that trial courts have interpreted the regulations to uphold prosecution motions to quash subpoenas for the testimony or documents requested when defendants have failed to comply with the regulations. Appeals courts compound the problem by elevating form—extralegal form, at that—over substance, and refusing to review the impact of the exclusion of relevant and material information upon the fairness of the trial, on the specious ground that absent compliance with the regulations by the defendant there is nothing to review.[160]

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[157]United States v. Nixon, 418 U.S. 683, 709 (1974).

[158]388 U.S. 14 (1967).

[159]As a general matter, the confrontation clause of the sixth amendment affects the manner in which the prosecution presents its case, whereas the compulsory process clause governs the manner in which the defendant presents his case. Because the DOJ Regulations burden the defendant in the preparation of his case, this analysis will focus on the compulsory process clause. Furthermore, one commentator suggests that the compulsory process clause is more important to the defendant and can substitute for the confrontation clause. Westen, *supra* note 99, at 182–83.

[160]United States v. Fricke, 684 F.2d 1126 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1250 (1983)(declining to review constitutional claims due to noncompliance and questionable relevance of information); United States v. Bizzard, 674 F.2d 1382 (11th Cir.), *cert. denied*, 103 S. Ct. 305 (1982)(defendant's claim of constitutional violations overlooks validity of regulations established by *Touhy*); United States v. Marino, 658 F.2d 1120 (6th Cir. 1981)(because of noncompliance, no constitutional claims); United States v. Estrella, 567 F.2d 1151 (lst Cir. 1977)(burden on defendant in face of noncompliance to show relevance and admissibility of documents); United States v. Allen, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977).

The defendant in *Allen* was convicted on 20 counts of mail fraud. On appeal, the defendant contended that the trial court erred in not requiring the U.S. Attorney to testify at a hearing on the issue of pre-indictment delay under a subpoena issued to him. At the hearing, the U.S. Attorney advised the court that he declined to speak because he did not have permission to testify under DOJ Regulations. Noting that the defendant made no effort to

The courts of appeals which take this position in federal criminal cases either cite no direct authority for this position or cite civil cases as authority.[161] As described above,[162] the Supreme Court's holding in *Touhy* does not support such a position, since the *Touhy* Court did not address the validity of the DOJ procedures in terms of their impact on fifth or sixth amendment rights. Regulations which centralize decisionmaking regarding disclosure in the head of an executive department may be valid procedural mechanisms, but when these procedures are permitted to frustrate the exercise of constitutional rights, the application of the regulations and their impact upon a criminal trial must come under closer scrutiny.

The opinions which have denied review to defendants due to noncompliance have failed to exercise such scrutiny and thus have failed to safeguard the compulsory process rights of the defendant. The compulsory process clause guarantees the defendant "[t]he right to offer the testimony of witnesses and to compel their attendance, if necessary, [which] is in plain terms the right to present a defense . . . ."[163] If the sanction for noncompliance with the DOJ Regulations is the exclusion of material evidence, the defendant is deprived of his right to prepare a defense. There is no rational basis in the evidence itself, such

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submit a summary of the testimony for consideration as required by the Regulations, the Tenth Circuit concluded that the defendant was in no position to claim an error. The court found that in the absence of compliance with the regulations and a decision by the Justice Department not to permit the testimony it would not address the defendant's constitutional claim.

Only if the DOJ had denied disclosure would the court reach the question of whether such denial deprived the defendant of the constitutional guarantees of the fifth and sixth amendments. In determining that compliance was a prerequisite for review, the court acknowledged the validity of the DOJ Regulations as established by the *Touhy* case. 554 F.2d at 406–07.

[161]*See* cases cited *supra* note 160. Although the *Touhy* case upheld the validity of the regulations, it did not do so against a constitutional attack. The *Touhy* Court never examined the exclusionary effect of the regulations in cases of noncompliance. As for the civil cases which support compliance, they are distinguishable because they are civil cases and the sixth amendment protections are inapplicable. *See* Denny v. Carey, 78 F.R.D. 370 (E.D. Pa. 1978).

[162]*See supra* notes 55–58 and accompanying text.

[163]Washington v. Texas, 388 U.S. 14, 19 (1967).

as a concern over its competency or trustworthiness, for excluding entirely the testimony or document sought.[164]

Furthermore, this sanction permits the government to accomplish indirectly what it is not permitted[165] to accomplish directly: the promotion of government secrecy. If the defendant complies with the regulations and the information sought by him is material to his defense, the government is forced to disclose the information or drop the prosecution. Under present case law, however, a defendant who does not comply with the regulations is not even permitted to get to the *in camera* stage of review mentioned earlier. The judiciary, in effect, has abnegated its constitutional role. The government, therefore, is allowed to continue a prosecution which might have been halted had an *in camera* examination revealed information necessary for preparation of the defense. The negligent failure or reasoned refusal to follow the DOJ Regulations should not be a pretext for depriving the defendant of sixth amendment rights.[166]

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[164]The Supreme Court in *Washington* struck down a statute which barred the testimony of an entire category of witnesses because of their presumed untrustworthiness. The Court found that the statute arbitrarily denied the defendant the right to present information relevant and material to his defense by preventing him from putting a witness on the stand who was present and able to testify. *Id.* at 23.

The DOJ, with the acceptance of the courts, is doing what Texas attempted to do in *Washington*. Relying on confidentiality and efficiency rather than untrustworthiness, the DOJ is barring the testimony of all government witnesses where the defendant fails to follow the required procedures.

As discussed above, the DOJ's concerns with confidentiality and efficiency do not justify such a severe penalty when less extreme measures, such as *in camera* inspections, can adequately safeguard its interests.

[165]*See supra* notes 80–82 and accompanying text.

[166]*See* Braswell v. Wainwright, 463 F.2d 1148, 1155 (5th Cir. 1972). The court in *Braswell* held that excluding a witness upon no other basis than that he violated a sequestration order is impermissible when such an exclusion denies a criminal defendant a fundamental constitutional right. The state contended that since the defendant had not made a proffer to the state court of appeals of what he expected the testimony would have shown, as required by state law, there should be no relief in the state court of appeals. According to the Fifth Circuit, such a proffer may be desirable because it provides the appellate court with a basis for review, but the rule cannot serve to deprive the defendant of a constitutional right of compulsory process. *Id.* If noncompliance with a legitimate state rule cannot be the basis for the exclusion of

Even if a defendant complies with the DOJ Regulations, the procedures themselves narrow his sixth amendment rights in a further respect. The regulations stipulate that as a prerequisite for obtaining the testimony of a government witness, the defendant must submit a summary of the expected testimony which will define the scope of the testimony at trial if the government permits the witness to appear.[167] Once a witness takes the stand, his testimony may reveal other areas of relevant inquiry; yet, the regulations seek to limit testimony to what the defendant can specify in advance of the trial. The only basis for such a limitation is to avoid disclosure of privileged information. Case law reveals, however, that once a court determines that a witness possesses evidence which is relevant and material to the determination of a defendant's guilt or innocence, the defendant's sixth amendment right to elicit testimony, whether on direct or cross-examination, prevails over all testimonial privileges and forces the government to disclose or to abandon its prosecution.[168] This line of reasoning is premised upon the assumption, supported by the DOJ Regulation in effect at the time of *Touhy*, that the trial court has the authority to require the

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testimony which is important to the defendant's case, neither should noncompliance with the DOJ Regulations be a basis for exclusion. It is possible for a trial court or a court of appeals to gather information from the defendant which will enable it to determine the relevance of the desired testimony. The court need not rely on formal submissions.

[167]28 C.F.R. § 16.23(c). Although this provision does not explicitly limit testimony to the summary submitted, as does the provision governing testimony in a case to which the government is not a party, *see* 28 C.F.R. § 16.22(c), the scheme of advance approval implies that the testimony will be so limited.

[168]Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 581 n.38 (1978). If the evidence the defendant is seeking would impeach a witness, then the government must choose between preserving the confidential nature of the privileged information and thus striking the testimony of the witness or standing on the testimony and foregoing the confidentiality of the information. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 320 (1974).

If the evidence the defendant seeks would tend to contradict the elements of the charge against him, the government must drop the prosecution or forego the confidentiality of the information. *See, e.g., Roviaro*, 353 U.S. at 60–61; Jencks v. United States, 353 U.S. 657, 670-72 (1957). *See also Reynolds*, 345 U.S. at 12.

government to disclose its evidence *in camera*[169] to enable the court to determine whether the arguably privileged information is relevant to the defendant's case before having to decide whether the privilege should yield to the defendant's sixth amendment rights.[170]

In *Roviaro v. United States*,[171] the Supreme Court, in response to the government's claim of privilege regarding an informer's identity, concluded that the informer was an important witness whom the defendant had a right to confront. The Court held that if the government refused to reveal the informer's identity in order to preserve his usefulness as an informer, the case would have to be dropped.[172] While recognizing that the government had a legitimate interest in protecting its sources of information, the Supreme Court determined that the defendant had a superior right to prepare his defense.[173] Whether the privilege claimed by the Justice Department involves an informer's identity, an employee's perceptions or conduct, or an interdepartmental memorandum, case law holds that the privilege cannot extend so far as to allow concealment of exculpatory evidence from the defendant in a criminal case.[174]

The compulsory process clause does not deny the government's interest in secrecy or efficiency-promoting internal regulations, but it prohibits the government from invoking directly, or indirectly through prejudicial disclosure procedures, a privilege at the defendant's expense.[175] Limiting the scope of trial examination to the testimony of a witness which the defendant can predict impairs the defendant's right to gather information

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[169]*See Reynolds*, 345 U.S. at 10.

[170]See Westen, *supra* note 168, at 581 n.38.

[171]353 U.S. 53 (1957).

[172]*Id.* at 61.

[173]*Id.* at 60–61.

[174]*Id.* The compulsory process clause applies not only to the informer privilege, but to any government privilege that has the effect of concealing information from the defendant. *See* United States v. Powell, 156 F. Supp. 526, 530 (N.D. Cal. 1957), *mandamus denied*, 260 F.2d 159 (9th Cir. 1958); United States v. Schneiderman, 106 F. Supp. 731, 734, 738 (S.D. Cal. 1952), *aff'd sub nom.* Yates v. United States, 225 F.2d 146 (9th Cir. 1955), *rev'd on other grounds*, 354 U.S. 298 (1958).

In most cases the courts appear to say that the defendant's interest overrides contrary testimonial privileges. Westen, *supra* note 168, at 626 n.164.

[175]Westen, *supra* note 99, at 163.

either to establish directly his innocence or to impeach a witness. If the rationale for this requirement, protection of potentially privileged information, would eventually be overridden by sixth amendment interests, it is difficult to see any justification for the requirement.

Conclusion

The burdens imposed by federal executive branch housekeeping regulations in exposing the defendant's ideas to the prosecution prior to trial and limiting his right to prepare and present a defense are unreasonable and ultimately interfere with the reliability of guilt determination at trial. Contrary to the authorizing statute and the sixth amendment, the regulations work to prevent disclosure of information. They are thus similar to but lack the underlying justification of the alibi witness exclusion sanction at issue in *Taliaferro*.

The housekeeping regulations were not authorized by Congress to confer a privilege upon the Justice Department to withhold information; their limited role was to create an efficient mechanism for centralizing decisionmaking which may result in the assertion of a privilege. In cases where the government might wish to assert a privilege, however, the regulations actually defeat efficient operations because they do not allow for timely and relevant judicial input. Because the DOJ could never successfully assert a government privilege and still proceed against a defendant in a criminal trial without disclosure of demonstrably relevant information, it should not be permitted to achieve indirectly this same result by operation of its procedural regulations.

Moreover, as the *Buford* court pointed out:

> There is, since 1974 [*Nixon*], no longer any doubt that the trial court in a criminal case has the power, indeed the "manifest duty," to marshall the evidence and vindicate the constitutional guarantees of a criminal defendant's rights "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in favor of him . . . ."[176]

[176] 158 Ga. App. at 767, 282 S.E.2d at 137 (1981)(citing sixth amendment).

The trial court not only has the power and duty to require disclosure of information, but also can do so in a way that protects the interests of the government in assuring efficient government operations. In an adversarial setting where the prosecution commences its action from a superior vantage point, it should not be permitted to require the defendant to follow executive branch rules in order to exercise his constitutional rights. The procedural obligations, requirements, and safeguards embodied in proposed Rule 509 of the Federal Rules of Evidence, including *in camera* proffers to the trial judge, should be judicially adopted.