



# ENVIRONMENT REPORTER



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## FEDERAL TESTIMONY

This article examines the question whether a federal agency such as EPA, or its employees, has discretion to comply or not to comply with a subpoena issued by a federal court. The question involves thorny legal issues such as separation of powers and tricky practical issues such as how to get an agency employee to testify for you in a case in which the agency is not a party. This article briefly addresses both of these issues.

### Testimony of Federal Employees: A “Speakers’ Bureau for Private Litigants?”

By LARRY SILVER AND DAVID ROMINE

This article examines the question whether a federal agency such as EPA, or its employees, has discretion to comply or not to comply with a subpoena issued by a federal court. The question involves thorny legal issues such as separation of powers and tricky practical issues such as how to get an agency employee to testify for you in a case in which the agency is not a party. This article briefly addresses both of these issues.

When a federal court issues a subpoena to an employee of an executive agency such as EPA, who decides whether the employee must comply, the court or the government? This question has been asked since at least 1807, when Aaron Burr, then on trial for treason, sought and obtained from the trial court (Chief Justice John Marshall, sitting on circuit court) a subpoena *duces tecum* on President Thomas Jefferson for papers and correspondence relating to Jefferson’s order to arrest Burr.<sup>1</sup>

In a criminal case such as Burr’s, the right to subpoena government officials flows from the Sixth Amendment right “to have compulsory process for obtaining witnesses in his favor.” Likewise, when the United States is a party in a civil case, it stands in the same shoes as a private litigant and is subject to the normal rules of discovery.<sup>2</sup> This is true even when the United States is a defendant.<sup>3</sup>

#### ‘Speaker’s Bureau’ for Private Litigants

However, what happens when the United States is not a party to the civil action in which a government employee’s testimony or documents are sought? In the environmental arena, this issue comes up with some frequency in private party disputes.

There are practical reasons why an environmental litigator will seek witnesses from the regulatory agencies in environmental disputes: sometimes the most ef-

<sup>1</sup> *United States v. Burr*, 25 F. Cas. 30 (D. Va. 1807) (No. 14,692d).

<sup>2</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958).

<sup>3</sup> *Mosseller v. United States*, 158 F.2d 380, 382 (2d Cir. 1946).

ficient and persuasive way to prove facts at issue at trial in an environmental case is through the knowledgeable, credible, and impartial staff of the relevant agencies—the Environmental Protection Agency or corresponding state environmental agencies. On technical and scientific issues where the line between fact and opinion is not always clear, often seen in litigation with environmental issues, a competent regulator may hold sway with the court in choosing between competing views of experts and consultants.

EPA, not surprisingly, has a countervailing interest in minimizing involvement of its employees in private disputes—which tends to divert time and resources from the agency's mission. How should the law balance the competing interests of private litigants and the regulatory agencies? How and when should courts assert their power over the executive branch by enforcing a subpoena against an executive branch employee? Must EPA become what the government has described as a “‘speakers’ bureau for private litigants’”?<sup>4</sup>

### **EPA Says It Makes the Decision**

EPA's official position (the same as many other federal agencies) on this issue is embodied in its regulations entitled “Testimony By Employees and Production of Documents in Civil Legal Proceedings where the United States is not a Party,” at 40 C.F.R. §§ 2.401 through 2.406.

The regulations require that *any* testimony by EPA employees in actions in which the United States is not a party must be approved by EPA's “General Counsel or his designee,” who, in consultation with other EPA personnel, “determines whether compliance with the subpoena would clearly be in the interest of EPA. . . .” 40 C.F.R. § 2.403. This means, in EPA's view, to get the testimony you want, you will need EPA approval. In effect, EPA's policy is that it alone decides whether to allow its employees to testify in private litigation.

If EPA denies the request, it shall “produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents.” 40 C.F.R. § 2.402(b). This rare use of the word “respectfully” in the regulations is perhaps a dead giveaway that EPA may be on shaky grounds here.

The regulations, specifically 40 C.F.R. § 2.404, cite *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Supreme Court held that an FBI agent who received a subpoena for documents in civil litigation in which the United States was not a party could not be liable in contempt for noncompliance because a valid order from the Attorney General forbid him from complying. The order at issue was similar to current EPA regulations at 40 C.F.R. § 2.404, which provides: “If the General Counsel [of EPA] or his designee denies approval to comply with the subpoena, . . . the employee must appear at the stated time and place . . . , produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents.”

The narrow issue the court decided was whether an order of the Attorney General trumped a valid subpoena or whether a subpoena trumped the order. The order won. As described below, some courts (but not

all) pay the same deference to regulations, like EPA's, that are similar to the order at issue in *Touhy*.

### **The Sovereign Exposed**

The government's strongest defense to a subpoena issued to one of its employees is sovereign immunity. A subpoena *duces tecum* served on an executive branch employee is a “judicial proceeding” against the sovereign that is barred by sovereign immunity in the absence of an express waiver.<sup>5</sup>

Sovereign immunity is not an absolute bar to subpoenas on government officials, however, even in the Second Circuit, because it has held that the sovereign has waived its immunity in the Administrative Procedure Act. Specifically, 5 U.S.C. § 702 allows judicial review of “agency action.” Under this reading, when an executive branch employee refuses to comply with a subpoena, that refusal is an “agency action” subject to judicial review.<sup>6</sup> In the tug of war between the executive and judicial branches, the finding of a waiver of sovereign immunity is the courts' way of pulling the decision whether to allow such testimony from the agency back to the court.

### **Majority: Court Decides, But Defers to EPA**

Even though judicial review is available, most appellate courts to address the issue will reverse an agency decision not to allow testimony only if the agency's decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under the Administrative Procedure Act.<sup>7</sup>

For example, in *Davis Enterprises v. United States EPA*, 877 F.2d 1181, 29 ERC 2079 (3d Cir. 1989), the U.S. Court of Appeals for the Third Circuit deferred to EPA's discretion not to allow its employee to testify in private litigation.<sup>8</sup> This is the same standard by which a refusal to allow testimony is reviewed in the U.S. Courts of Appeal for the Second, Fourth, and Eleventh Circuits.<sup>9</sup>

In the *General Electric* case, General Electric was a defendant in the underlying litigation regarding mercury contamination of a building that had been converted from a factory to residence and studio space. It subpoenaed EPA Region II for documents that it thought could help. The district court quashed the subpoena on the ground that the Administrative Procedure Act required General Electric to institute a separate action, rather than merely serving a subpoena in an existing action, to get the documents. The Second Circuit vacated and remanded the case, holding that a subpoena was sufficiently an “action” within the meaning of the Administrative Procedure Act. Importantly for the purposes of this article, however, the Second Circuit directed the district court to reconsider the subpoena in light of the “arbitrary and capricious” standard of Section 706 of the Administrative Procedure Act.

### **Minority: Court Decides; ‘Undue Burden’**

Two appellate courts accord no deference to agency action under these circumstances, holding that the gov-

<sup>5</sup> *EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597, 49 ERC 1877 (2d Cir. 1999).

<sup>6</sup> *Id.* at 599.

<sup>7</sup> 5 U.S.C. § 706.

<sup>8</sup> *Davis Enterprises* 877 F.2d at 1186.

<sup>9</sup> *EPA v. Gen. Elec. Co.*, 197 F.3d at 599; *Comsat Corp. v. Nat'l Science Found.*, 190 F.3d 269, 277-78 (4th Cir. 1999); *Moore v. Armour Pharm. Co.*, 927 F.2d 1194 (11th Cir. 1991).

<sup>4</sup> *Exxon Shipping Co. v. United States Dept. of Interior*, 34 F.3d 774, 779, 39 ERC 1852 (9th Cir. 1994).

ernment, like any other nonparty, is subject to discovery and is protected only by the familiar “undue burden” standard. In the U.S. Courts of Appeal for the Ninth and D.C. Circuits, the waiver of sovereign immunity in 5 U.S.C. § 702 is not limited to review of agency action under the “arbitrary and capricious” standard of 5 U.S.C. § 706.<sup>10</sup> In other words, the agency is in no better position to refuse to obey a subpoena than any other nonparty.

The Ninth Circuit has reached the same result, concluding bluntly: “We decline to hold that federal courts cannot compel federal officers to give factual testimony.”<sup>11</sup> In the underlying action in *Exxon Shipping*, Exxon was defending itself in the Exxon Valdez litigation, and subpoenaed deposition testimony and documents from ten government employees, including Department of the Interior and EPA personnel. The district court declined to enforce the subpoenas on the ground that the agencies’ actions were not “arbitrary and capricious;” the Ninth Circuit reversed and remanded for consideration in light of the ordinary discovery rules. The Ninth Circuit explained that it had confidence that the district courts would be able to prevent the federal government from becoming a “speakers’ bureau for private litigants” by “balancing the government’s concerns under the general rules of discovery.”<sup>12</sup>

In the view of the Ninth and D.C. Circuits, an agency does not have the discretion to refuse to comply with a subpoena. Instead, that discretion is vested in the courts. The only thing preventing an agency from becoming a “speakers’ bureau for private litigants” is the judgment exercised by a federal judge.

These decisions have created a split among the circuits regarding the proper standard of review of an agency’s refusal to provide testimony or discovery.

## State Court Proceedings

If you are in state court, the chances that you will be able to compel the testimony of a federal employee are not good. Two appellate courts that have addressed the issue in the context of a civil suit have held that a state court may not compel the testimony of a federal employee.<sup>13</sup>

In *Boron Oil*, an EPA employee was subpoenaed by both parties in a tort action in West Virginia state court to testify about his investigation of a gasoline leak at a Boron service station. EPA moved to quash the subpoenas, but the motion was denied, and the employee was directed to testify. EPA removed the subpoena proceedings to federal court, where the district court again ordered the employee to testify. The district court held that sovereign immunity was not implicated because neither the United States nor EPA was a named party.

The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the subpoena was “an action seeking specific relief against a federal official,” so that sovereign immunity applied.<sup>14</sup> This meant that neither the state court nor the federal court on removal (whose jurisdiction was derivative of the state court’s) had “juris-

diction to proceed against a federal employee acting pursuant to agency direction.”<sup>15</sup>

The Fourth Circuit also relied explicitly on the Supremacy Clause, holding that EPA’s *Touhy* regulations “have the force and effect of federal law which state courts are bound to follow.”<sup>16</sup> The Fourth Circuit cited *Chrysler Corp v. Brown*, 441 U.S. 281, 295-86 (1979), for the proposition that federal regulations are “law” that is supreme over state law under the Supremacy Clause.

This does not necessarily mean that you are out of luck if you are in state court. *Touhy* regulations, including EPA’s, typically include a provision allowing the testimony of federal employees in state court as long as it is deemed by the agency to be in the best interests of the agency.<sup>17</sup>

*Swett v. Schenk* is instructive in this regard. In that case, the National Transportation Safety Board allowed an NTSB inspector to testify at a deposition in a state court proceeding, but only as to facts (not opinions). A controversy arose when the investigator refused to answer certain questions at his deposition on the ground that they asked for opinions. Plaintiff’s counsel, asserting the questions asked for facts only, sought, and got, a contempt order from the state court. The NTSB removed the proceeding to federal court, where the district court dismissed the contempt action, and the Ninth Circuit affirmed. Interestingly, the Ninth Circuit did not rely explicitly on either the concept of sovereign immunity or on the Supremacy Clause, holding only that the state court “lacked jurisdiction” to use contempt procedures against a federal employee.

In an attorney disciplinary action in Minnesota, the U.S. Department of Justice allowed the deposition testimony of an attorney in the U.S. Bankruptcy Trustee’s office at the request of the state Office of Lawyers Professional Responsibility, but denied the respondent attorney’s request to take the deposition of the trustee herself. The respondent subpoenaed the trustee in the disciplinary proceedings, but, on removal, the district court quashed the subpoena, and the U.S. Court of Appeals for the Eighth Circuit affirmed on the ground of sovereign immunity.<sup>18</sup>

These cases highlight the importance of persuading the applicable agency that the witness’s testimony will be in the agency’s interests (discussed below) so that the witness will testify without a subpoena. If the case is in state court, that is probably, but not necessarily, the only option.

For example, in *Davis Enterprises*, the underlying litigation was in state court. The party seeking the testimony of an EPA witness filed a separate action in federal court to challenge EPA’s refusal to allow the witness to testify. Filing in federal court may have avoided the Supremacy Clause issue, but the party seeking the testimony was still faced with overcoming the Third Circuit’s application of the “arbitrary and capricious” standard. The court held that EPA did not abuse its discretion in forbidding the witness to testify.

<sup>10</sup> *Linder v. Calero-Portocarrero*, 251 F.3d 178, 181 (D.C. Cir. 2001).

<sup>11</sup> *Exxon Shipping*, 34 F.3d at 778.

<sup>12</sup> *Id.* at 779.

<sup>13</sup> See *Boron Oil Co. v. Downie*, 873 F.2d 67, 29 ERC 1828 (4th Cir. 1989) and *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986).

<sup>14</sup> *Boron Oil*, 873 F.2d at 69.

<sup>15</sup> *Id.* at 70.

<sup>16</sup> *Id.* at 71.

<sup>17</sup> See, e.g., 40 C.F.R. § 2.403.

<sup>18</sup> *In re Charges of Unprofessional Conduct against 99-37*, 249 F.3d 821, 824-25 (8th Cir. 2001).

## Soliciting Federal Witnesses—‘How To’ Example

So how exactly do you get employee testimony from EPA, or another government agency, in a private lawsuit? The authors of this article faced this question as plaintiffs’ counsel in a private Comprehensive Environmental Response, Compensation, and Liability Act contribution case, *Action Manufacturing v. Simon Wrecking*, 428 F. Supp.2d 288, 62 ERC 1944 (E.D. Pa. 2006), appeal docketed, No. 06-3679 (3d Cir), related to the Malvern TCE Superfund Site in Malvern, Pennsylvania. The plaintiffs wanted testimony from EPA employees on, *inter alia*, two subjects: (i) EPA’s position on possible changes to the remedy selected in the record of decision that defendants argued would make the remedy less costly, and (ii) the defendants’ history of “cooperation with the government,” one of the “Gore factors” courts consider in an equitable allocation of liability in a CERCLA contribution action. Plaintiffs’ counsel identified a remedial project manager for the site and a cost recovery specialist as the EPA employees at the regional office who could provide the most pertinent testimony.

As a first step, which may seem obvious but was actually never taken by the plaintiffs in *Davis Enterprises*, *supra*, plaintiffs’ counsel subpoenaed the witnesses. This step puts the burden on the agency either to comply with the request or defy a court order. Whether justified or not, and whether it is within the agency’s discretion or not, defying a court order is not something the agency is likely to do lightly. Keeping in mind that they wanted the EPA employee as *their* witness at trial, plaintiffs’ counsel served a “friendly” subpoena by contacting the relevant EPA attorney ahead of time and requesting they accept service of the subpoenas on the witnesses’ behalf, which they did. Remember that EPA employees are people, too, and getting cold served with a subpoena to testify in court is not something that most people relish.

Plaintiffs’ counsel also asked politely the EPA attorneys most closely connected to the matter for the witness’s testimony. This can be done in conjunction with service of a subpoena, though probably most diplomatically accomplished by a letter to the EPA attorney with a copy of the subpoena and a request that EPA accept service. Both steps are contemplated by EPA’s regulations.<sup>19</sup> The regulations require that the request for testimony be in writing. Whether or not the regulations are ultimately adjudged to be valid, there is no downside in following them.

Asking politely also provides an opportunity to persuade the agency that having the witness testify will be in EPA’s interest. Under Sections 2.403 and 2.404, the agency will allow the testimony only if doing so “would clearly be in the interests of EPA.” At the Malvern Site, EPA cost reports showed that it had more than \$2 million in outstanding site costs. The defendants in the *Action Manufacturing* case were the only viable potentially responsible parties at the site, which numbered more than 200, that had not already settled their liability with EPA. Thus, the private contribution defendants also were the only remaining potentially responsible parties available to cover EPA’s outstanding costs. The

government attorneys were aware the plaintiffs in the private action would need to establish at trial the same fundamental elements of the defendants’ liability under Section 107 of CERCLA as would the government if it at a later date the government sought to recover its costs from the same defendants.

In the *Action Manufacturing* case, this common interest between private and government litigants may have contributed to EPA’s decision to allow its employees to testify. As it happens, EPA’s decision to cooperate in the *Action Manufacturing* case was quite helpful. In her findings of fact, the trial judge relied extensively on the testimony of the EPA witnesses, and determined that one of the defendants had “transporter” liability under Section 107(a)(4) of CERCLA, and that a second defendant was liable as its successor. The case is on appeal before the Third Circuit.

A few months after the trial, the United States filed a cost recovery action against the same defendants seeking its outstanding site costs. Thereafter, the United States filed a motion for partial summary judgment on the issue of the defendants’ liability under CERCLA Section 107, relying solely upon the collateral estoppel effect of the judgment in the private contribution trial. The government prevailed.<sup>20</sup>

Bear in mind that if EPA accepts a request for testimony in a private action, EPA may ask that its attorneys participate in your preparation of the witness. That is good for both you and EPA. Neither trial counsel nor the witness wants surprise on the stand during direct examination. If EPA declines the request and you still want the witness testimony, you will have a battle on your hands—not a promising prelude to supportive testimony.

In sum, the line separating judicial power from executive power has not been drawn clearly when it comes to attempting to require a government employee’s testimony through the subpoena power of the courts. Most courts of appeal that have addressed the issue apply the administrative law standard of “arbitrary and capricious” action when evaluating an agency’s refusal to respond to a subpoena. However, two courts of appeal treat the government like any other non-party litigant, applying the “undue burden” standard applicable to most discovery disputes. Finally, the authors recommend a “belt and suspenders” approach to getting a government witness to testify in your case, meaning you should both subpoena the witness and comply with the agency’s regulations regarding requesting the testimony. And remember—ask nicely.

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<sup>19</sup> See 40 U.S.C. § 2.403 (“Procedures when voluntary testimony is requested”) and § 2.404 (“Procedures when an employee is subpoenaed”).

<sup>20</sup> See *United States v. Simon Wrecking, Inc.*, 481 F. Supp. 2d 363 (E. D. Pa. 2007).