The Discovery Immunity Exception in Indian Country – Promoting American Indian Sovereignty by Fostering the Rule of Law

Jay Kanassatega, Arizona Summit Law School
I. INTRODUCTION

It is axiomatic in federal court litigation that “every person within the jurisdiction of the Government is bound to perform when properly summoned.”¹ This axiom is fundamental to the public’s interest in the orderly operation of the “judicial machinery.”² The public policy underlying this maxim suggests that there should be few, if any, exceptions permitted to excuse a person from performing when

². Id.
properly summoned by a federal court. Or, as Dean Wigmore described it, "the public . . . has a right to every man's evidence."³

This axiom lies at the root of a federal court's effort to resolve discovery disputes, particularly disputes involving access to witness testimony and document production from non-parties, both at depositions and trials.⁴ In resolving disputes over a civil litigant's access to testimony and documents from non-parties, federal courts keep in mind discovery rules such as Federal Rules of Civil Procedure (FRCP) 26 (a)(1)(A), which requires litigants to disclose the identity and location of persons who know of any discoverable matter⁵ and apply, in particular, FRCP 45(c)(3), which sets out the parameters under which the court determines whether a litigant has a right to "every man's evidence."⁶ In applying the FRCP discovery rules, federal courts rarely recognize exceptions to the right to "every man's evidence" and when they do so, it has been implicitly determined that the need to protect a "substantial individual interest" outweighs the "public interest in the search for truth."⁷ For example, an exception exists when testimony is sought from a high ranking federal, state, or municipal government official, based, in part, on the government's

5. Id. at 26(a)(1)(A). The rule provides, in relevant part, that:
   [A] party must, without awaiting a discovery request, provide to the other parties: (i) [T]he name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment . . . .
6. Id. at 45(c)(3) The rule provides, in relevant part:
   On timely motion, the issuing court must quash or modify a subpoena that: (i) [F]ails to allow a reasonable time to comply; (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held; (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.
7. U.S. v. Bryan, 339 U.S. 323, 331 (1950); Wigmore, supra n. 3, at § 2192, 70.
interest in preserving the deliberative processes of such officials. The applicable rule prohibits the deposition, except in extraordinary circumstances.

A new exception has begun to emerge in the lower federal courts. This exception excuses Indian tribes, tribal officers, and tribal corporations and their employees—as non-parties to pending litigation—from providing testimony or producing documents in response to compulsory federal process. The exception is based on an extension of the federal common law doctrines of Indian tribal sovereignty and tribal immunity. I characterize this emerging exception as the "discovery immunity exception."

The predictability of the federal process normally afforded to litigants disappears with the application of the discovery immunity exception. Particularly in civil matters, application of the exception imposes significant burdens on parties litigating commercial disputes when seeking testimony from non-party tribal officials or employees, or documents or electronically stored information from a non-party Indian tribe, a tribal business or a corporation that does business with an Indian tribe or tribal corporate entity. There is no doubt that discovery disputes abound frequently in civil litigation, but discovery disputes wrapped in questions of Indian tribal sovereignty and tribal immunity add far greater complexity, uncertainty, and expense than the garden variety discovery wrangling. The discovery immunity exception, though a well intentioned attempt to protect Indian tribes, instead undermines Indian tribal sovereignty, and the Congressional policies aimed at promoting the development of strong and stable American Indian governments.

The federal courts were misguided in creating an exception to enforcement of federal process based on Indian tribal sovereignty and

8. See e.g. U.S. v. Morgan, 313 U.S. 409, 422 (1941); Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982); Capitol Vending v. Barker, 36 F.R.D. 45, 46 (D.D.C. 1964); infra Part VI, Sec. D.
9. This includes its agencies, political subdivisions, instrumentalities, tribe created-governmental organizations, and employees of the tribes.
10. See infra Part VI; see also U.S. v. James, 980 F.2d 1314, 1319 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993); Bishop Paiute Tribe v. Co. of Inyo, 275 F.3d 893, 900 (9th Cir. 2002); U.S. v. Menominee Tribal Enters., 2008 WL 2273285 at **14-16 (E.D. Wis. June 2, 2008).
11. See infra Part V, Sec. B for a detailed discussion of these doctrines.
tribal immunity for non-party testimony from tribal officials and employees, as well as documents from Indian tribes and their corporate entities. The federal courts are misguided for the following reasons: (1) They failed to utilize the existing balancing tests used to excuse high ranking government officials from giving deposition testimony; (2) they failed to properly apply FRCP 45(c)(3)(A) and to consider the policies underlying the rule; (3) they wrongly analogized the sovereignty and immunity of the United States to Indian tribal sovereignty and tribal immunity; and, (4) as a federal policy matter, the federal courts’ application of the discovery immunity exception undermines Indian tribal sovereignty.

The purpose of this article is to encourage federal courts to rethink reliance on tribal immunity as a basis to quash or modify process directed to Indian tribes and their elected and appointed officials and employees as non-parties to the underlying litigation. Federal courts should not apply tribal immunity to quash or modify otherwise valid federal process served on an Indian tribe pursuant to the FRCP 45. Instead, the court should approach the issue with an eye toward implementing Congressional policies aimed at supporting the development of strong governments for American Indian people. The best expression of Indian tribal sovereignty and self determination is active, robust legislative activity,13 not resorting to claims of immunity. Accordingly, the court’s focus should be on the public policies and substantive laws enacted by the involved Indian tribe with respect to regulating the public’s access to the Indian government’s officials, employees and records. To the extent that the Indian tribe has not enacted substantive law, the federal court should apply the balancing approach articulated in United States v. Bryan, as this test provides an opportunity for the tribe to demonstrate that its substantial interest in sovereignty and self government far outweighs the public’s search for the truth.14 To the extent the tribe cannot prevail under the Bryan test, the court should apply the standard outlined in FRCP 45(c)(3)(A) to determine whether to quash or modify the federal process.15 However, with respect to federal process served on a tribal

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13. See infra at Part III, Section B regarding Congress’ authorization to federal agencies with respect to promulgating regulations for public access to government records, as well as for testimony from government officials and employees.

14. U.S. v. Bryan, 339 U.S. 323, 331 (1950); see infra Part VI, Sec. B.

official, the court should determine whether that person is a "high ranking government official" in accordance with the law of the involved Indian tribe and, if so, the court should apply the standard used with respect to high ranking federal, state, and municipal government officials. As for federal process served on a tribal board member or corporate executive or tribal attorney, the court should apply a principle of proportionality reflected in FRCP 26(b)(2) by quashing or delaying the deposition of a high ranking corporate official whose role in the transaction is limited.\textsuperscript{16}

Following the introduction, Part II discusses four federal cases wherein the courts either applied or considered applying the discovery immunity exception. Part III briefly explains the discovery rules, the purpose and meaning underlying the rules, and the response from the United States with respect to whether it was subject to the FRCP's discovery provisions as a "party," a "non-party," and a "person." Part IV explores FRCP 45 and the role it performs in the judicial process.\textsuperscript{17} It presents an overview of the case law that has developed as the United States has resisted efforts by litigants to obtain testimony from government officials and employees and access to government information. Part IV then concludes with a review of the federal cases involving enforcement of federal process targeted at non-party federal agencies.

Part V discusses United States sovereignty and sovereign immunity as interpreted by the Supreme Court. It moves on to discuss United States sovereign immunity as applied to non-party discovery served on the United States. Then, it explores Indian tribal sovereignty and tribal immunity under United States law as construed by the Supreme Court. Part V concludes with a critique of why federal courts were wrong to apply the discovery immunity exception to equate

\textsuperscript{16} Fed. R. Civ. P. 26(b)(2)(C); see e.g. Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989) (the court quashed the deposition subpoena of a chairman of the board and CEO who lacked personal knowledge about the facts of the case); Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) ("We do not hold that opposing trial counsel is absolutely immune from being deposed. We recognize that circumstances may arise in which the court should order the taking of opposing counsel's deposition."); Thomas v. IBM, 48 F.3d 478, 482-84 (10th Cir. 1995) (chairman of the board who had no personal knowledge about the employee who brought an age discrimination claim).

\textsuperscript{17} Fed. R. Civ. P. 45.
United States sovereignty and immunity with Indian tribal immunity and sovereignty.

Part VI examines the existing tests that federal courts use to resolve disputes over federal process targeted at non-parties for testimony. First, it explains the policy interests underlying the importance of witness testimony in the efficient operation of the judicial machinery and a balancing approach designed to implement that policy as set out in the seminal case, United States v. Bryan.\(^{18}\) It then it applies the balancing approach in Bryan to the facts in United States v. James, the first case in which a federal appellate court affirmed application of the discovery immunity exception;\(^{19}\) Bishop Paiute Tribe v. County of Inyo, where the federal court affirmed the discovery immunity exception;\(^{20}\) and United States v. Menominee Tribal Enterprises, to illustrate the likely result had the balancing approach been applied appropriately.\(^{21}\) Second, it explains the standard set out in FRCP 45(c)(3)\(^ {22}\) and assesses, in the contexts of Catskill Development, LLC v. Park Place Entertainment Corporation\(^ {23}\) and Menominee, whether an Indian tribe is a “person” within the meaning of the rule and the immunity doctrine and the likely result of that application. Third, it discusses the general rule that applies when the federal process is directed at high ranking federal, state, and municipal government officials, as opposed to all other persons in the context of Catskill and Menominee. This section then discusses how that general rule should have been applied to resolve the dispute arising from the federal process served on the “high ranking” tribal officials in Catskill and Menominee, and the likely result had it been applied appropriately.

Part VII discusses the adverse implications of the discovery immunity exception for litigants and the commercial interests of Indian tribes. It then explores how application of the discovery immunity exception undermines Indian tribal sovereignty and threatens the abrogation of the tribal immunity doctrine. Part VIII makes

\(^{18}\) Bryan, 339 U.S. at 331.
\(^{19}\) U.S. v. James, 980 F.2d 1314, 1320 (9th Cir. 1992), cert. denied, 510 U.S. 838 (1993).
\(^{20}\) Bishop Paiute Tribe v. Co. of Inyo, 275 F.3d 893, 898 (9th Cir. 2002).
\(^{22}\) Fed. R. Civ. P. 45(c)(3).
recommendations for federal courts, American Indian tribes, and others to address the issue of enforcement of federal process in a way that is both consistent with federal common law notions of Indian tribal sovereignty and Congressional goals of Indian self-determination and self-sufficiency. It suggests that there are good reasons for Indian tribes to take primary control of their sovereign interests and embrace public policy and the rule of law by abandoning the discovery immunity exception. It advocates creating American Indian tribal policy and law to address the issue of public access to tribal officials and government records. This section also points out that strength comes from policy and the rule of law, not from overly broad claims of immunity. Accordingly, it also explains why this approach represents a substantive application of Congressional policies aimed at enhancing American Indian governments through the support for development of an Indian tribe’s legislative and judicial machinery. In the final analysis, this result serves the best interests of the United States and American Indian tribes as it fosters mutually cooperative intergovernmental relationships.

II. JAMES, BISHOP PAIUTE, CATSKILL, AND MENOMINEE: THE EMERGENCE OF THE DISCOVERY IMMUNITY EXCEPTION TO ENFORCEMENT OF FEDERAL PROCESS

In the following four cases, Indian tribes brought motions in federal court to quash or modify subpoenas for testimony or documents that were either directed to the tribe or one of its agencies, corporate entities, officials, or employees, as non-parties to the underlying litigation.\(^{24}\) \textit{James} and \textit{Bishop Paiute} involved efforts to quash criminal process by defendants seeking Indian government records in the possession of the respective Indian tribes.\(^{25}\) \textit{Catskill} and \textit{Menominee} involved efforts to quash civil process seeking deposition testimony and/or Indian government records in the possession of the Indian tribe or within the tribe’s control.\(^{26}\) In each case, counsel for the Indian tribe asserted that the immunity doctrine barred enforcement of the federal process. The following is a brief description of each

\(^{24}\) \textit{Bishop Paiute}, 275 F.3d at 902; \textit{James}, 980 F.2d at 1319; \textit{Catskill}, 206 F.R.D. at 81; \textit{Menominee}, 2008 WL 2273285 at *1.

\(^{25}\) Id. at 902; \textit{James}, 980 F.2d at 1319.

case, starting with the oldest of the four cases, *James*, and concluding with the most recent, *Menominee*.

**A. UNITED STATES V. JAMES**

In *United States v. James*, the defendant in a criminal prosecution appealed his conviction on the ground that the district court wrongfully quashed a *subpoena duces tecum* directed at an Indian tribe’s social services director for documents related to the victim’s alleged alcohol and drug problems. Counsel for the Indian tribe filed a motion objecting to the subpoena on grounds of tribal immunity, which led the district court to quash the subpoena and ultimately, resulted in an appeal by the defendant. The defendant argued, among other things, that immunity did not protect the tribe from valid federal process and even if it did, the tribe had expressly waived immunity by voluntarily producing to the United States other Indian government documents in the tribe’s possession.

The appeals court noted that the issue of waiver of immunity in the circumstance where the tribe was a third-party witness was one of first impression in the Ninth Circuit. The court first analyzed whether the tribe’s voluntary actions involving producing government documents to the United States constituted a waiver of the tribe’s “sovereign” immunity. The court then relied on the fact that the tribe’s social service agency was not the agency that had voluntarily provided documents to the United States and determined that no immunity waiver occurred. The court also explained that the tribe had an “increased privacy interest” to protect its enrolled members as confidentiality was pivotal to “promote free communication” between persons seeking services and service providers. The Ninth Circuit

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28. *James*, 980 F.2d at 1319.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1320.

33. *Id.*

34. *Id.*

35. *Id.*
affirmed the district court’s decision, noting that the tribe was the “holder of possibly relevant documents.”

B. BISHOP PAIUTE TRIBE V. COUNTY OF INYO

In Bishop Paiute v. County of Inyo, the Ninth Circuit revisited the discovery immunity exception, this time in the context of an action brought by an Indian tribe arising from the execution of a search warrant for payroll records possessed by one of the tribe’s corporate entities in connection with a state welfare fraud investigation. The tribe complained that in executing the search warrant, law enforcement officers seized documents containing confidential information on individuals who had no involvement in or connection to the fraud investigation and that the officers failed to provide the tribe with an opportunity to redact such confidential information. The district court determined that the tribe’s sovereign immunity did not bar execution of the search warrant against the tribe.

The Ninth Circuit reversed that part of the district court’s order with respect to the conclusion that the tribe’s sovereign immunity was not violated by issuance and execution of the search warrant. The court first took notice of the fact that the tribe had promulgated reasonable policies with respect to the confidentiality of employee records, and recognized that such policies were developed along the lines of federal and state guidelines. Next, the court compared the issue of tribal immunity to state sovereign immunity, and concluded that the tribe had a “fundamental right” to be free from state efforts to undermine tribal policies, as well as to make and be governed by its own laws. Then, the court applied its reasoning in James—the focus of the court’s inquiry was on the status of Indian tribes as sovereigns—and balanced the interests of the tribe in applying its policies against

36. Id.
37. Bishop Paiute Tribe v. Co. of Inyo, 275 F.3d 893, 898-99 (9th Cir. 2002).
38. Id. at 899.
39. Id.
40. Id.
41. Such administrative policies are a step in the right direction, but are not robust enough to provide the foundation for a balanced analysis of governmental interests, such as those reflected in public policy and law.
42. Bishop Paiute, 275 F.3d at 902.
43. Id.
the state’s interest of preventing welfare fraud and concluded that the tribe’s sovereign immunity was the superior interest. 44

C. CATSKILL DEVELOPMENT, L.L.C. V. PARK PLACE ENTERTAINMENT CORPORATION

*Catskill Development v. Park Place Entertainment* involved a private civil dispute between a non-Indian casino development group and a rival group raising tortious interference with contract and prospective business relations claims in connection with their relationship with the tribe. 45 Essentially, the plaintiffs complained that the rival group persuaded tribal officials to terminate the tribe’s agreements in connection with a proposed casino development. 46 During discovery in that case, the non-Indian commercial interest issued subpoenas for testimony and documents to three members of the tribe (two members of the gaming authority and the tribe’s executive director) and two attorneys for the tribe. 47 It also served a subpoena on the tribe’s bank, seeking bank records on the tribe’s casino related accounts. 48 The tribe brought motions for a protective order asserting that tribal sovereign immunity barred the development group from obtaining the requested discovery. 49 The development group disagreed, claiming that sovereign immunity did not protect the tribe’s officials from the subpoenas issued to them as non-parties. 50

The presiding magistrate judge concluded that tribal sovereign immunity barred enforcement of the federal process, and an appeal to the district court followed. 51 The district court, following the reasoning set out in *James* and *Bishop Paiute*, 52 reversed the magistrate judge, finding that a waiver of immunity existed in the contracts, and accordingly ordered the two gaming authority members to sit for

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44. Id. at 903-04.
46. Id.
47. Id.
48. Id.
49. Id. at 84.
50. Id.
51. Id.
52. *Bishop Paiute Tribe v. Co. of Inyo*, 275 F.3d 893, 902-04 (9th Cir. 2002); *U.S. v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992).
depositions. The district court affirmed the magistrate’s decision with respect to the tribe’s executive director on the ground that he was not a signatory to the contracts signed by the two gaming authority members. The court quashed one of the two non-party deposition subpoenas issued to two lawyers for the tribe, but required one of the lawyers to respond in writing to one written question concerning the source of the lawyer’s information for statements about plaintiffs he had made in public. To the extent the answer was not subject to the attorney-client privilege, the deposition could proceed as to that one issue. Lastly, the court affirmed the magistrate’s decision to quash a non-party subpoena duces tecum issued to a non-party bank for activity in one of the tribe’s bank accounts.

D. UNITED STATES V. MENOMINEE TRIBAL ENTERPRISES

United States v. Menominee Tribal Enterprises was a quasi-criminal action brought by the United States under the civil provisions of the False Claims Act after a six year investigation. The case involved allegations concerning the submission of false invoices for payment, breach of contract, and other equitable claims. During discovery, the United States produced to Menominee certain investigative reports that purported to be records of interviews conducted by federal investigators. Counsel for one of the defendants then issued a deposition subpoena to one of the individuals

54. Id. at 90-91.
55. Id. at 92.
56. Id.
57. Id.
58. The author has personal knowledge and experience in connection with this case as a result of his past and current representation of the primary defendant. See U.S. v. Menominee Tribal Enters., 2008 WL 2273285 at *1 (E.D. Wis. June 2, 2008).
59. While essentially a civil case, the relief available under the FCA is draconian as it includes damages for each false claim, civil penalties, punitive damages, and cost recovery provisions. 31 U.S.C. § 3729 (2006).
who had submitted to an interview by the federal investigator.63 Thereafter, counsel for an Indian tribe brought a motion for a protective order to quash the deposition subpoena.64 Relying on James and Catskill, the tribe's counsel asserted that sovereign immunity barred the subpoena to the non-party witness, who at the time of service of the subpoena was a tribal legislator.65 The district court considered the tribe's immunity arguments,66 but ultimately concluded that immunity was not appropriate under the circumstances of the case.67

With this brief discussion of the facts, legal arguments of counsel, decisions and orders of the courts in the four cases in mind, Part III now examines the civil discovery rules; in particular, the applicable rule when parties seek testimony and documents from non-parties.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. THE FRCP DISCOVERY RULES EXPLAINED

Rules 26 through 37 of the FRCP provide the procedural framework for and limitations on discovery of information from parties and non-parties alike. In modern litigation practice, the universe of parties under the FRCP is vast. Parties include persons, public and private corporations, associations and partnerships, limited liability companies, governments and governmental agencies. Non-parties are those who stand outside of civil litigation, being neither a plaintiff, nor

63. Id at *9. The subpoena was issued to an individual tribal member, in her individual capacity, seeking testimony as to statements she made to a federal employee, a tribal employee, and a federal investigator at a time when she was not a tribal elected official. At the time the subpoena was served on her, she was an elected tribal legislator. Id.

64. Id. at *1; Fed. R. Civ. P. 45(c)(3)(A) provides authority for a nonparty to bring a timely motion to quash or modify a deposition subpoena issued under this rule. The tribe relied on Fed. R. Civ. P. 37(a)(2): "Appropriate Court. A motion for an order to a party must be made in the court where the action is pending." A protective order seems odd when the relief the tribe sought was to quash the subpoena. Nevertheless, the court granted the tribe's "motion for a protective order quashing the subpoena . . . ." Menominee, 2008 WL 2273285 at *14.

65. Id. at *11 (citing U.S. v. James, 980 F.2d 1314 (9th Cir. 1992); Catskill Dev. v. Park Place Ent. Corp., 206 F.R.D. 78 (S.D.N.Y. 2002)).

66. Id. at *10-14. The court went on to analyze the issue based on Fed. R. Civ. P. 26(b)(2), although arguably 45(c)(3)(A) was the more appropriate standard.

67. Id. at *12.
a defendant. When we think about the participants in civil litigation, most of us only think about parties and non-parties, but there is one other significant participant: The court. This is important because the FRCP discovery provisions establish or contemplate obligations and limitations for the court as well as parties and non-parties.

As to parties, the 1993 amendments to the discovery provisions of the FRCP brought fundamental changes to discovery. The 1993 amendments impose an obligation on counsel for parties to formulate a plan for discovery. Soon after litigation commences, opposing counsel confer about substantive discovery activities such as answering written interrogatories and taking oral depositions. They put together a plan for handling issues related to production of documents, in consideration of deadlines for completion of discovery as well as the timing of motion practice and trial. Ultimately, counsel for the parties meet to prepare a joint proposed discovery plan for the court's consideration in what is known as a Rule 26(f) meeting.

After the Rule 26(f) discovery meeting, counsel for parties then confront the second obligation under the 1993 amendments. FRCP 26(a)(1) requires parties to make certain mandatory disclosures to all other parties without waiting for discovery requests from an opposing party. The disclosures are designed to help a party prepare his or her case for trial or to make an informed decision about settlement. The disclosures include the identification of all individuals likely to have discoverable information and the subject of the information possessed by that individual that the disclosing party may use to support its claims or defenses. Also encompassed within the disclosure is an

69. See cmt. to Fed. R. Civ. P. 26(f). In addition to putting together the discovery plan, this rule specifically imposes an obligation on parties to discuss at the meeting issues related to the preservation of discoverable information. Fed. R. Civ. P. 26(f).
70. Issues relate to handling of electronically stored information, and inadvertent production of privileged documents and information. Id. at 26(f)(3)(C)-(D).
71. Id. at 26(f)(2). In practice, to the extent that parties do not agree to submit a joint report, which is not recommended because it is contrary to the rule, each party would likely submit a separate report and, later face the judge's wrath. Id.
72. Id. at 26(a)(1).
73. Cmt. to Fed. R. Civ. P. 26 ("A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.").
74. Id. at 26(a)(1)(A). The rule provides:
obligation to identify expert witnesses and to provide a detailed written statement of the testimony that the expert is expected to offer at trial.\textsuperscript{75} Counsel are expected to disclose the identity of persons who may be witnesses, as well as those persons who are expected to be deposed or called as witnesses by other parties (if their potential testimony is known).\textsuperscript{76}

Ultimately, the court receives the parties’ discovery plan and enters a scheduling order based on the plan. At that point, the bulk of discovery begins in earnest. FRCP 26(b) sets out the scope and limits of discovery.\textsuperscript{77} FRCP 26(b)(1) expressly authorizes parties to obtain discovery of the identity and location of persons having knowledge of any discoverable matter.\textsuperscript{78} FRCP 26(b)(2) imposes limitations on a party’s obligation to locate, retrieve, and “provide discovery of electronically stored information from sources that the party identifies

\textsuperscript{75}See cmt. to Fed. R. Civ. P. 26(a).
\textsuperscript{76}Id. at 26(b).
\textsuperscript{77}Id. at 26(b)(1). The rule provides in relevant part, that:

\textsuperscript{78}Id.
as not reasonably accessible because of undue burden or cost."\(^7\) FRCP 26(b)(5) authorizes a party to withhold information deemed by that party as privileged or comprised of trial preparation materials, but the rule also imposes an obligation on that party to prepare a privilege log and produce that log to all opposing counsel.\(^8\)

Pursuant to FRCP 30, depositions continue to be an important discovery tool in aid of preparing a case for trial. One of the significant amendments to FRCP 30 occurred in 1970 when a new provision was added to authorize a party to take a deposition of an "organization," specifically defined to include a governmental agency.\(^9\) In addition to depositions, written discovery in the form of FRCP 31 (depositions by written questions), FRCP 33 (written interrogatories), FRCP 34 (document production and entering property for inspection and other purposes), and FRCP 36 (requests for admission by written questions) each provide important procedural tools to obtain relevant and non-privileged information under the current discovery rules.\(^10\)

While the discovery rules impose a considerable number of obligations with respect to parties, FRCP 30, 31 and 34 impose obligations on non-parties. FRCP 30 and 31 concern depositions and are broad enough to reach a non-party by use of the phrase "depose any person."\(^11\) While FRCP 34 concerns document production and specifically references non-parties, a 1991 amendment clarified that the obligation to produce documents and things and to permit inspection of property is identical as between parties and non-parties.\(^12\) However,

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79. Id. at 26(b)(2)(B).
80. Id. at 26(b)(5).
81. Id. at 30(b)(6). The rule provides in relevant part, that:

[A] party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.

Id. Perhaps taking its cue from the litigation that ensued over the lack of a definition of the word "party" or "person" or "witness," Fed. R. Civ. P. 30(b)(6) defines the word "organization" broadly to include a governmental agency. Id.

82. See id. at 31, 33-34, 36.
83. Id. at 30(a)(1).
84. Id. at 34 ("As provided in Rule 45, a nonparty may be compelled to produce
non-parties have no obligation to answer interrogatories or requests for admission.  

The discovery provisions also impose obligations and limitations on the courts. The modern discovery provisions confer broad authority on the courts to control the discovery process. For example, courts are authorized to order discovery into anything “relevant to the subject matter” provided good cause is shown without limitation as to whether the person in possession of such information is a party or non-party. \(^8\) 

FRCP 26(b)(2)(A) authorizes the court to impose limits on the number of depositions (FRCP 30) and interrogatories (FRCP 33), and to impose limitations on the frequency and extent of discovery. \(^8\) FRCP 26(b)(2)(C) provides the court with broad authority to limit the frequency or extent of discovery otherwise allowed by the rules. \(^8\)

The discovery provisions provide two avenues to the court to protect parties and non-parties from any perceived discovery abuses. FRCP 26(c)(1) authorizes the court, for good cause shown, to issue an order to protect a party or person from improper discovery demands. \(^8\)

\(^8\) Note the difference between written answers to a deposition under FRCP 31 and written answers to interrogatories under FRCP 33.

\(^8\) The rule provides in relevant part, “For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”; but see cmt. to id. at 26(b)(1) (the comments to the 1983 Amendment to FRCP 26(b)(1) caution courts to be “careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.”)

\(^8\) Id. at 26(b)(2)(A) (“By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.”).

\(^8\) Id. at 26(b)(2)(C). The rule provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) [T]he discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

\(^8\) Id.

\(^8\) Id. at 26(c)(1) (“The court may, for good cause, issue an order to protect a party
FRCP 37 authorizes a party to move for an order compelling disclosure or discovery when the opposing party fails to sufficiently respond. 90

FRCP 45 provides a vehicle to obtain testimony and/or documents from non-parties for discovery and trial purposes using a subpoena. 91 FRCP 45, similar to 26(c)(1) and 37(a)(1), sets out the procedural basis to quash or modify requests for testimony or documents. 92 With respect to discovery sought from non-parties, litigants rely on FRCP 45 subpoenas to command non-parties to give testimony or produce documents. FRCP 45(c)(3) expressly empowers the court to quash or modify a subpoena on any one of four grounds upon filing and serving a timely motion. 93

In considering the obligations and limitations the discovery rules impose on “parties” and “non-parties,” including “persons,” it is curious that the discovery provisions of the FRCP and FRCP 45 do not specifically define these three important words. As a result, it is important to next consider the history of the discovery provisions of the FRCP as originally promulgated and the early position asserted by the United States as to whether it thought it was bound by the discovery rules and FRCP 45 when called upon to provide non-privileged testimony or to produce documents in aid of a private litigant’s claim or defenses as a non-party to the underlying action.

90. Id. at 37(a)(1) (“On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.”).
91. Id. at 45 (Rule 45 is not technically a rule of discovery; only FRCP 26 to 37 are designated as discovery rules. FRCP 45 is located in the section of the rules concerning trials.).
92. Id. at 45(c)(3).
93. Id. at 45(c)(3)(A). The rule provides:
   On timely motion, the issuing court must quash or modify a subpoena that: (i) [F]ails to allow a reasonable time to comply; (ii) requires a person who is neither a party nor a party’s officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the parties may be commanded to attend a trial by traveling from any such place within the state where the trial is held; (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.
   Id.
B. A REVIEW OF THE DESIGN AND IMPLEMENTATION OF THE DISCOVERY PROVISIONS OF THE FEDERAL RULES AS APPLIED TO THE SOVEREIGN UNITED STATES

In passing the Rules Enabling Act of 1934 (Act)\(^94\), Congress authorized the Supreme Court to create a uniform set of procedures to apply in the district courts of the United States.\(^95\) The Act was silent as

\(^{94}\) Rules Enabling Act of June 19, 1934, c. 651 §§ 1 & 2, 48 Stat. 1064, as amended 28 U.S.C. Sec. 2072 (2006). The Act authorized the Supreme Court to “prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” 28 U.S.C. § 723(b) (1940). The Act also prohibited those procedures from going into effect until after the Attorney General reported such procedures to Congress “at the beginning of a regular session thereof and until after the close of such session.” Id. at § 723(c). While Congress clearly reserved the power to review and modify any of the rules of civil procedure and subsequent amendments adopted by the Supreme Court, the Act does not expressly require Congress to explicitly approve the Federal Rules of Civil Procedure or any amendment thereof before it could become effective. See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure vol. 4, § 1004, 29-30 (3d ed. West 2002).

The Act would eventually apply to Alaska, Hawaii, the Virgin Islands, Puerto Rico, Guam, and the Canal Zone. See Alaska, 48 U.S.C. §§ 23, 90 (1940); Hawaii, 48 U.S.C. §§ 642, 645 (1940); the Virgin Islands, 48 U.S.C. §§ 1392, 1405(z) (1940); Puerto Rico, 48 U.S.C. §§ 863 – 865, 867 (1940); Guam, 48 U.S.C. §§ 1424-1424-3 (2006); and the Canal Zone, 48 U.S.C. § 1344 (1940). However, the Act specifically limited application of the rules to the “district courts of the United States and for the courts of the District of Columbia.” 28 U.S.C. § 723(b) (1940). Thus, Congress did not intend that the rules would apply in state courts, or to the courts of the territories and possessions of the United States. Nothing in the Act or current law suggests that Congress intended the rules to apply in the courts established pursuant to federal authorization on the various Indian reservations. See 25 C.F.R. § 11.100 et seq. (2009).

\(^{95}\) See Moore’s Federal Practice for a discussion of the history of the federal rules of civil procedure and a cogent analysis as to which branch of government (legislative or judicial) has the right to prescribe general rules of procedure for federal courts. Daniel R. Coquillete, Moore’s Fed. Prac. vol. 1, § 1.04, (1)(a)—(d) (Matthew Bender & Co. 2009); see also Sibbach v. Wilson & Co., 312 U.S. 1, 6-7 (1941) (Congress “may exercise that power [to make general rules applicable in the federal courts] by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . . ”) (citing Wayman v. Southland, 23 U.S. 1 (1825); Bank of the U.S. v. Halstead, 23 U.S. 51 (1825); Beers v. Haughton, 34 U.S. 329 (1835)). The scope of authorization under the Act is exclusively procedural in nature, extending only to making rules with respect to “forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.” Sibbach, 312 U.S. at 7.
to whether the set of procedures adopted would apply to the United States or to the individual states when they became a party to a civil action in the federal district courts, when an official representative of those governments was called upon to give testimony, or when an agency of any of those governments was called upon to produce documents and other tangible things. Likewise, the Act made no reference to whether the set of procedures adopted would apply to Indian tribes located within the territory of the United States, when an Indian tribal government became a party to a civil action in the federal district courts, when an official representative of their governments was called upon to give testimony, or when an agency of any of their governments was called upon to produce documents and other tangible things.

Notwithstanding the Act's silence as to whether the new procedure would be imposed on a sovereign, there was, at the time, no doubt that implementation of the new procedural rules would likely usher in new obligations for governments to assist the federal judiciary in the just, speedy, and inexpensive determination of cases. For example, one federal district court judge—asked in 1936 to review and

97. See e.g. Talton v. Mayes, 163 U.S. 376, 384 (1986) (“True it is that in many adjudications of this court the fact has been fully recognized that, although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.”); Worcester v. Georgia, 31 U.S. 515, 559 (1832) (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . .” While Worcester placed Indian tribes under Congressional authority, it nonetheless recognized the basic principle that the “weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.” Id. at 561.) In 1934, Congress enacted the Indian Reorganization Act, still in force today, which provided authorization for Indian tribes to organize governments under a legal structure approved by the Secretary of Interior. 25 U.S.C. § 476 et seq. (2006).
99. Charles E. Clark, The Proposed Federal Rules of Civil Procedure, 22 ABA J. 447, 448-49 (1936). The author was the Reporter to the Advisory Committee on Rules for Civil Procedure, Supreme Court of the United States. With respect to discovery, the rules were designed to provide for “examination before trial, orally or through written interrogatories, of a party or witness; for the listing of documents and tangible things, the discovery of their existence, and their production for inspection, copying, or photographing; for the physical and mental examination of parties; for the admission of facts and of the genuineness of documents; and for summary judgment in all, not merely a limited class of, cases.” Id. at 450.
comment on the proposed new rules—stated that they were designed to implement a uniform set of procedural rules in the lower federal courts and, to ease the litigation burdens on witnesses and parties, and to control the cost of litigation.\textsuperscript{100} The new FRCP represented "the first effort to meet the problem of pre-trial fact-gathering in a unified way."\textsuperscript{101} Commentators thought the new rules would completely renovate the procedures for discovery\textsuperscript{102} in federal civil actions.\textsuperscript{103} Commentators described the purposes of the new rules in slightly different, but generally consistent ways.

Specifically addressing the discovery provisions,\textsuperscript{104} one commentator expressed the view that the discovery provisions shifted that burden on to litigants to discover and bring to the court facts in support of whatever claim or defense the parties asserted.\textsuperscript{105} In other words, party presentation replaced judicial inquisition; however, the new system required the court to "sift and weigh" substantial and conflicting evidence.\textsuperscript{106} A commentator expressed the view that the pre-trial discovery rules would serve the two-fold purpose of determining whether the parties' claims and denials had merit and if so,

\begin{itemize}
  \item \textsuperscript{101} James A. Pike & John W. Willis, \textit{The New Federal Deposition-Discovery Procedure: I}, 38 Colum. L. Rev. 1179, 1186 (1938) [hereinafter Pike & Willis I.]. In a follow-up article, the commentators described the pre-trial benefits as: "(1) avoidance of surprise; (2) affording an intelligent basis for a trial brief; (3) the preservation of testimony likely to be needed." James A. Pike & John W. Willis, \textit{The New Federal Deposition-Discovery Procedure: II}, 38 Colum. L. Rev. 1436, 1453 (1938) [hereinafter Pike & Willis II.].
  \item \textsuperscript{102} At the time, commentators referred to discovery as "deposition-discovery" practice. Today, litigators consider depositions to be a one of the discovery tools. However, at that time, depositions were considered separate from discovery. \textit{See} Pike & Willis II, \textit{supra} n. 103 at 1436.
  \item \textsuperscript{103} Pike & Willis I., \textit{supra} n. 103 at 1179-80. The authors also commented that, "One glancing through the Rules relating to the deposition-discovery machinery would find it so natural and obvious that he would be little impressed. . . . [T]he new federal deposition-discovery practice affords the greatest opportunity for adequate trial preparation in the history of civil procedure." \textit{Id.} at 1180.
  \item \textsuperscript{104} Prior to adoption of the new discovery provisions, the only provision for "discovery" in federal court existed in equity cases, but not in non-equity cases. \textit{Id.} at 1183. Further, discovery was limited to "parties," including those persons on whose behalf an action was commenced, i.e., the real party in interest. \textit{Id.} at 1188-89.
  \item \textsuperscript{105} \textit{See} Edson R. Sunderland, \textit{Discovery Before Trial Under the New Federal Rules}, 15 Tenn. L. Rev. 737 (1939).
  \item \textsuperscript{106} \textit{Id.} at 737-39.
\end{itemize}
by what evidence. One commentator described this as "issue-pleading" and "fact-pleading." The consistent theme running through the comments is the positive impact the discovery provisions would have on parties and their right to access information from parties and non-parties alike. Interestingly enough, the question of whether the new discovery provisions would apply to a sovereign, whether a party or not, did not seem to be on anyone's mind.

A review of district court decisions on the deposition-discovery provisions after the new FRCP became effective did not reveal any cases in which lawyers for the United States litigated the issue of whether Congress intended to bind the United States to the new discovery provisions of the FRCP whether as a party or a non-party. Further, no reported decision seemed to address whether the United States was considered a "party", "person" or "witness" for purposes of the discovery provisions of the new FRCP. Perhaps this should not

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107. Id.
109. This includes U.S. agencies and officials.
110. In the initial discovery related disputes to which the United States was a party, government lawyers did not object to answering interrogatories or responding to document requests on the ground that the discovery rules were not applicable. See e.g. U.S. v. Am. Solvents & Chem. Corp. of Cal., 30 F. Supp. 107 (D. Del. 1939) (Overruling United States' objections to answering interrogatories under Rule 33 on the ground that disclosure would inform the defendant as to the facts underlying the government's case); Curtis v. U.S., 27 F. Supp. 459 (D. Mass. 1939) (Challenge to sufficiency of United States' answers to interrogatories under Rule 33); U.S. v. Aluminum Co. of Am., 26 F. Supp. 711, 712 (S.D.N.Y. 1939) (Rejecting United States' claim of right under Rule 34 to inspect documents produced in response to subpoena duces tecum in advance of a determination that information contained therein is admissible evidence). The issue of whether the United States is a "person" within the meaning of United States statutes, here the Sherman Act, eventually reached the Supreme Court. U.S. v. Cooper Corp., 312 U.S. 600, 603-04 (1941). The government acknowledged that the word "person" is frequently used in a context in which it is clear that its use does not include the sovereign. Id. at 605. However, it urged the Court to adopt a "wider application" when public policy evidences a statutory intent to include the sovereign. Id. The Court acknowledged that, "in common usage, the term 'person' does not include the sovereign; statutes employing the phrase are ordinarily construed to exclude it." Id. at 604. "But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by
be surprising because it conforms to the understanding of commentators at the time, including Professor Sunderland, who served as one of the reporters for the FRCP. Or, perhaps this is because the FRCP were new and somewhat experimental and all parties, including the government and the courts, were focused on understanding how the discovery provisions would work in reality, not in theory.

It did not take long for the district courts to determine that the new discovery procedures should apply broadly and be interpreted liberally. In one of the first cases to be decided under the then newly merged “deposition-discovery provisions” (FRCP 26-37) of the FRCP, Judge Ford articulated “liberality rather than restriction of interpretation be the guiding principle.” The 1947 case of Hickman

the use of the term, to bring state or nation within the scope of the law.” Id. at 604-05. Thereafter, compliance with the discovery rules—on the ground that the United States was a “party” to the underlying action—changed in the 1942 case, U.S. v. Gen. Motors Corp., when government lawyers objected to interrogatories, claiming that the United States, as a sovereign, was under no obligation to answer them. 2 F.R.D. 528, 529-30 (N.D. Ill. 1942). Government lawyers argued that the United States had never consented to be bound by the rule, a rule that changed its substantive legal rights, and until the United States consented, the court lacked jurisdiction to compel it to answer the interrogatories propounded by the defendant. Id. Finally, the Government argued that the rule was never intended to apply to the “sovereign” United States because the rule did not mention the U.S. specifically. Id. at 530 (citing William Blackstone, Commentaries vol. 1, 195). The court reasoned that the provision in FRCP 37(f) exempts the United States from the imposition of expenses and attorneys fees would have been omitted if the United States was not subject to the provisions of FRCP 33. Id. at 530. The court also reasoned that “[t]o hold that the rules do not apply to the United States except where it is particularly mentioned would lead to absurd results.” Id. The court summarily rejected the government’s challenge. FRCP 26(a) authorized a party to take testimony of “any person, whether a party or not” for the purpose of discovery, for use as evidence, or for both purposes. Sunderland, supra n. 107 at 742. Professor Sunderland believed that FRCP 26(a) was intended to make no distinction between discovery from private parties and officers and agencies of the government. Id. Moreover, the adoption of FRCP 26(a) was thought to have no impact on a then existing statute concerning requests for information from government agencies. Id. at 742-43.

111. Aside from the exemption conferred by statute (28 U.S.C. § 272 (1940)), the exclusion of privileged information under Rule 26, and “state secrets,” Professor Sutherland thought the right of discovery as between the private parties and the government were essentially the same. Sunderland, supra n. 107 at 742-43.

v. Taylor affirmed the wide scope and purpose of the new discovery provisions of the FRCP.\textsuperscript{113}

However, government lawyers soon launched an all out assault to test whether the FRCP in general and the discovery provisions in particular applied to the United States, specifically as a party, but implicitly as a non-party. Within three years after the FRCP were implemented, the government’s assault on the discovery rules to obtain preferential treatment began in earnest. That is when the government lawyers seized upon the fact that the words “party” and “non-party” and “person” were not defined in the discovery provisions of the FRCP. This fact opened the door to over seventy years worth of litigation as to whether the government is bound by the discovery provisions of the FRCP.

Initially, the government’s objections were comprised of a broad and general assault. Over time those objections became a sharper, more focused assault aimed at establishing preferential treatment for the government when it litigated in its own federal court, whether the FRCP explicitly provided for such treatment or not. First, the government asserted in a case arising under the Sherman Act, \textit{\ldots} that because the statute did not define a “person” and, absent such a

\begin{quote}
It is perfectly apparent that Rules 26 to 37, inclusive \ldots relating to depositions, discovery, depositions on oral examination and written interrogatories, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and the admission of facts and genuineness of documents were formulated with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute \ldots [t]hey were formulated with a view to simplifying the issues.
\end{quote}

\textit{Id.} at 910.

\textit{See also} Pike & Willis, \textit{supra} n. 103 at 1190. “[T]he new rule adopts the broadest possible idea and allows the free use of an unlimited deposition procedure for discovery.” (The ‘notice pleading’ provision of the federal rules of civil procedure [Rule 8(a)(2)] is “made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”) \textit{Conley v. Gibson}, 355 U.S. 41, 47 (1957) (citations omitted); \textit{See also Hickman v. Taylor}, 329 U.S. 495, 500-01 (1947) (“The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure \ldots The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”).

\textit{113. Hickman}, 329 U.S. at 507: “We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment.”
definition, the provisions did not and never were intended to apply to the United States.\textsuperscript{114} Second, relying on FRCP 26(b) and 34, the government objected to discovery requests on the ground that such requests sought "privileged" information and the court lacked authority to determine whether such information was privileged and therefore beyond the reach of discovery.\textsuperscript{115} Third, the government asserted that various federal statutes and regulations implementing those statutes trumped any obligation to comply with the discovery rules.\textsuperscript{116} In addition, to the extent federal employees followed lawful instructions to refuse to produce government documents, they could not be prosecuted for contempt of court.\textsuperscript{117}

In response to the federal government's initial assault on the general applicability of the FRCP, in \textit{Sherwood v. United States}, the Second Circuit Court of Appeals held that the FRCP (and presumably the discovery provisions) applied to the United States.\textsuperscript{118} Notwithstanding the ruling in \textit{Sherwood}, government lawyers were undeterred in their effort to secure preferential treatment for the government under the FRCP—in particular the discovery provisions—in circuits other than the Second Circuit. However, lower federal courts in other circuits were not persuaded by the claim that the discovery rules did not apply to the United States as a party to civil litigation.\textsuperscript{119} Significantly, some eighteen years after \textit{Sherwood}, the Supreme Court, in a summary statement in \textit{United States v. Proctor & Gamble}, seems to have put the issue of whether the government is subject to the discovery rules to rest for good.\textsuperscript{120} After \textit{Proctor & Gamble}, the question of whether the discovery rules applied to the

\textsuperscript{114} \textit{Cooper Corp.}, 312 U.S. at 604-06.
\textsuperscript{115} \textit{Fed. R. Civ. P. 26(b), 34; Reynolds v. U.S.}, 192 F.2d 987, 992 (3rd Cir. 1951).
\textsuperscript{116} \textit{Ex Parte Sackett}, 74 F.2d 922, 923-24 (9th Cir. 1935) (citations omitted).
\textsuperscript{117} \textit{Id.} at 922-23.
\textsuperscript{118} \textit{Sherwood v. U.S.}, 112 F.2d 587, 590 (2d Cir. 1940) ("Rules 1 and 81 carefully provide that they shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the proceedings which it was thought necessary to except by express statement in Rule 81, as well as the language of these rules, shows that the new 'civil action' includes actions against the United States.").
\textsuperscript{119} \textit{U.S. v. Gen. Motors Corp.}, 2 F.R.D. 528, 530 (N.D. Ill. 1942) ("To hold that the rules do not apply to the United States except where it is particularly mentioned would lead to absurd results.").
\textsuperscript{120} \textit{U.S. v. Proctor & Gamble Co.}, 356 U.S. 677, 681 (1958) ("The Government as a litigant is, of course, subject to the rules of discovery.").
government as a party to civil litigation was finally answered with a quiet but resounding “yes.”

However, between the time Sherwood and Proctor & Gamble were decided, government lawyers turned to a rule-based “privilege” argument to continue the effort to secure preferential treatment for the United States under the discovery provisions by routinely objecting to producing documents requested under FRCP 34. Since a party was only obligated to produce non-privileged documents, the government claimed that certain documents were privileged and not subject to discovery. While FRCP 26(b) authorizes inquiry regarding the “existence, description, nature, custody, condition, and location of any documents or other tangible things,” significantly the rule does not extend to any privileged matter. And neither FRCP 26(b) nor FRCP 34 define the word “privilege.” Privileges relied on by the government have included executive immunity, statutory immunity, public policy, informer privilege, military and state secrets, and special statutory privileges. In raising the privilege objection, the government appeared to rely both on an exception for non-discovery of privileged information in FRCP 26(b) coupled with the limitation on the court’s power imposed by FRCP 34.

Moreover, the United States government asserted that only the government, not the court, had authority to determine whether the government documents in question were actually privileged. This issue made it to the Supreme Court some twelve years after implementation of the FRCP. In United States v. Cotton Valley Oil Operators Committee, the government boldly asserted that it alone, not the courts, had sole authority to determine whether government documents

123. See Fed. R. Civ. P. 26(b), 34 (referring to “nonprivileged matter” but lacking reference to define the term).
124. These privileges are discussed more fully in Raoul Berger & Abe Krash, Government Immunity from Discovery, 59 Yale L.J. 1451, 1456-66 (1950); Mac Asbill & Willis B. Snell, Scope of Discovery Against the United States, 7 Vand. L. Rev. 582, 584-90 (1954).
125. Fed. R. Civ. P. 26(b), 34 (The court’s power to order production of documents extends only to matters “not privileged.”).
were privileged, and if so, whether to produce them in response to a Rule 34 request for production.  

In Cotton Valley, the government brought a civil action against the company for alleged violations under the Sherman Antitrust Act. During the investigation, federal agents seized company documents and interviewed company officers, employees, and others. After the government refused to produce certain documents, the company brought a motion to compel production. The district court ordered the government to produce the documents; when the government refused, the court dismissed the government’s complaint. On appeal, the Supreme Court affirmed the dismissal; accordingly, Cotton Valley stands for the proposition that the discovery rules apply to all civil litigants, including the government.

Failing to prevail on previous efforts to exempt or narrow the judiciary’s review of government agency decision making in connection with document requests under FRCP 34, government lawyers seized upon a federal statute, 5 United States Code (U.S.C.) Section 22, commonly known as the federal “housekeeping” statute, which authorized federal department heads to make regulations with

127. Id. at 720; Berger & Krash, supra n. 127 at 1453 ("[T]he Government maintained that it was 'exclusively within the authority of the Attorney General to determine whether such documents' were privileged.").
128. Id.
129. Id.
130. Id. The government did however answer certain interrogatories propounded under Rule 33 and responded to certain of the defendant’s requests for production of documents. Cotton Valley, 9 F.R.D. at 720.
131. Id. at 721.
132. U.S. v. Cotton Valley Operators Comm., 339 US 940 (1950) (per curiam decision affirming Cotton Valley 9 F.R.D. 719) Three years later, the Supreme Court had another opportunity to address the question of whether the court or the government had final authority to determine whether a government document was privileged. While evading an answer to this precise question, once again, the Court suggested that the judiciary had the final say on the issue. U.S. v. Reynolds, 345 U.S. 1, 3, 9-10 (1953) (The Court again upheld the right of the presiding judge to decide whether the government’s privilege claim had merit: “Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”). It is also noteworthy that commentators at the time thought the discovery rules applied equally to government agencies (and their officers and employees) on the one hand and civil litigants on the other. See Sunderland, supra n. 107 at 742-43 (noting that the new Rules did not affect 28 U.S.C. § 272 (1934) under which government officials could deny requests for government documents.).
respect to release of government documents. By relying on the housekeeping statute, the government shifted the issue from one of challenging the judiciary’s authority to control discovery to one that tested whether a court would enforce a statute, and in doing so, support the effort of government agencies to do the job Congress authorized and directed those agencies to achieve. This statute-based objection thus presented the courts with a direct conflict between a litigant’s procedural right to discover information from the government in aid of preparing his or her case for trial under the FRCP and the government’s claimed statutory right to control the release of government information regardless of whether that information was sought in the context of civil litigation. The case law that developed in response to the government’s reliance on the housekeeping statute illustrates the judiciary’s sensitivity to the government’s position, as courts began to routinely refuse to enforce subpoenas for government documents, generally deferring to agency decision-making.

Perhaps what colored the judiciary’s view in these cases was the fact that the subpoena duces tecum secured by private litigants to obtain discovery were directed toward federal employees, instead of government agencies or executive branch department heads. This

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133. 5 U.S.C. § 22 (amended and codified at 5 U.S.C. § 301 (1966)); see Berger & Krash, supra n. 127 at 1460 (5 U.S.C. § 22 provided that “[t]he head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property appertaining to it.”). See also Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998).

134. See Berger & Krash, supra n. 127 at 1460-61 for a cogent discussion of the history of 5 U.S.C. § 22 and its application to the discovery rules, which the authors characterize as “The Claim of Statutory Immunity.”

135. See U.S. v. Schine Chain Theatres, 4 F.R.D. 108, 109 (W.D.N.Y. 1944) (upholding as valid United States Department of Justice Order No. 3229, which “prohibit[ed] the disclosure of documents in the possession of the Department under the Attorney General,” promulgated under 5 U.S.C. § 22, quashing a subpoena duces tecum, but reserving court authority to order production of government documents if needed “for the contradiction of a witness or are necessary for the purpose of the trial”); Walling v. Comet Carriers, Inc., 3 F.R.D. 442, 443-44 (S.D.N.Y. 1944) (upholding as valid a United States Department of Labor regulation promulgated under 5 U.S.C. § 22, that prohibited “any document in the custody of the department . . . being taken or withdrawn by any person not officially connected with the department . . . without the written consent of the Secretary” and prohibited “a copy of any such document being furnished ‘to any person except with the written consent of the Secretary’” and quashing a Rule 34 production.).
approach placed a federal employee in the proverbial line of fire if the employee’s supervisor instructed him or her to refuse to produce the subpoenaed documents. This scenario came to a head in 1951 when the case United States ex rel. Touhy v. Regan reached the Supreme Court.\textsuperscript{136} Touhy marked the first time the Court addressed the issue of a contempt proceeding against a federal employee arising from judicial process issued by a federal court seeking production of government documents since a case decided in the year 1900, Boske v. Comingore.\textsuperscript{137} In Touhy, the Court, following Boske, determined that an FBI agent could not be held in contempt for failing to produce documents in possession of the Department of Justice in response to a subpoena duces tecum when the Attorney General of the United States ordered the agent to refuse to comply with the order.\textsuperscript{138} In Boske and Touhy, the Court rejected efforts to obtain government documents directly from government employees (instead of heads of government agencies) by way of Rule 30 and 34, combined with the enforcement provisions of Rule 45.\textsuperscript{139}

However, Justice Frankfurter, in a concurring opinion, raised a cautionary note that while a federal employee could not be held in contempt for following lawful instructions from the Attorney General, the Court’s decision should not be interpreted as authorizing the Attorney General, and, presumably all other executive branch department heads, to rely on the housekeeping statute as general authority to withhold government documents:

To hold now that the Attorney General is empowered to forbid his subordinates, though within a court’s jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham’s skeleton rattle.\textsuperscript{140}

\textsuperscript{137} Boske v. Comingore, 177 U.S. 459, 460 (1900) (granting writ of habeas corpus to release federal employee from state custody for failure to comply with state court order to produce documents).
\textsuperscript{138} Touhy, 340 U.S. at 469-70.
\textsuperscript{139} Boske, 177 U.S. at 460-61, 463 (However, the government acknowledged that the documents sought could be produced under subpoena duces tecum directed to the Secretary of Treasury or someone acted under his direction. See Touhy, 340 U.S. at 471-72 (Frankfurter, J. concurring)).
\textsuperscript{140} Touhy, 340 U.S. at 473 (Frankfurter, J. concurring).
Congress appeared to take heed of Justice Frankfurter's admonition some seven years later, when it amended the housekeeping statute to halt its perceived abuse by government officials,\(^{141}\) out of concern that government agencies were interpreting and applying the previously existing Section 22 to deny requests for disclosure of government information.\(^{142}\)

After \textit{Touhy}, government agencies promulgated a series of regulations concerning the public's access to federal employees and officers for purposes of deposition by oral or written examination under FCRP 30 and 31, as well as for purposes of securing access to government records. For example, in the aftermath of \textit{Touhy}, federal agencies promulgated regulations, known as "\textit{Touhy Regulations},"\(^{143}\) that over the years have molded and shaped the scope of the public's access to government information.\(^{144}\) In practice, obtaining testimony from government officials or employees and access to government information, whether as a party or a non-party to litigation, presents distinct challenges notwithstanding the discovery provisions of the FRCP, as courts routinely grant the government protective orders that foreclose a private litigant's right to access agency records as a part of pre-trial preparatory activities. On the positive side of disclosure, litigators, as well as the general public, have used Section 552(a) of the

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\(^{141}\) 5 U.S.C. § 301 (2006). The amendment provides: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

\(^{142}\) \textit{Id.} ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."); \textit{Chrysler Corp. v. Brown}, 441 U.S. 281, 308-10 (1979).

\(^{143}\) 5 U.S.C. §§ 551-552 (2006); LRP Publications, 15 Fed. Discovery News 10 (Sept. 1, 2009) This article advocates that Indian tribal legislatures consider passing legislation to authorized tribal agencies to promulgate regulations concerning the public's access to tribal government records, as well as testimony from tribal government officials and employees.

\(^{144}\) \textit{Id.} The \textit{Freedom of Information Act (FOIA)}, 5 U.S.C. § 551 \textit{et seq.}, is an open government statute, essentially providing a legal mechanism for the public to request that a government agency open its records and release information in its possession. Unlike the "housekeeping statute," the FOIA is useful because FOIA imposes a general obligation on government agencies to make government information accessible to the public upon request. \textit{See Dept. of Air Force v. Rose}, 425 U.S. 352, 360-61 (1979) (With respect to the obligations \textit{FOIA} imposes on government agencies, the Supreme Court determined that "disclosure, not secrecy, is the dominant objective of the Act.").
Freedom of Information Act (FOIA) as an extra-judicial tool both to obtain information from the government, as well as to object to the release of such information.\textsuperscript{145}

The next part explores FRCP 45, its use of and meaning of the word "person," and the role it performs in the judicial process. It presents an overview of the case law with respect to the position taken by the United States in response to efforts by litigants to obtain testimony from government officials and employees, and access to government information. It concludes with a critique of the federal cases discussed in Part II for applying the discovery immunity exception and for failing to consider FRCP 45's issues and meanings.

IV. FEDERAL RULES OF CIVIL PROCEDURE 45

A. A FOCUSED LOOK AT THE SUBPOENA POWER OF FRCP RULE 45:
ITS PURPOSE AND MEANING—NOW AND THEN

Litigants are constantly on the hunt for facts and information to support their claims and defenses and FRCP 45 is a powerful tool in an attorney's arsenal. While that hunt might begin with the parties themselves using the discovery tools set out in FRCP 30 through 36, routinely the hunt expands to non-parties simply because non-parties can and frequently are sources rich in facts and information. Perhaps the largest non-party source of facts and information is the United States government. Thus, it is also unremarkable that private litigants seek access to facts and information in the government's possession.

\textsuperscript{145} Dept. of Int. and Bureau of Indian Affairs v. Klamath Water Users Protective Assn., 532 U.S. 1, 4-5 (2001). Another important FOIA provision is section 552(a)(4)(B), which provides, in relevant part, that federal district courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." While litigants have relied upon the FOIA's section 552(a) to obtain government information, government lawyers (and private litigants, as well) have relied upon FOIA's section 552(b), which lists nine different subject matter areas exempt from the disclosure obligation in section 552(a) to provide a shield to reject such requests. Thus, section 552(b) provides a third basis for government agencies to object to the release of government information. Nevertheless, § 552(a)(4)(B) empowers a federal district court to issue an order compelling release of the information withheld. In sum, with respect to FOIA, both government lawyers and private litigants have seized upon FOIA's section 552(b) exemptions to justify claims that information in possession of a government agency should not be publicly disclosed. Fed. R. Civ. P. § 552; Chrysler Corp., 441 U.S. at 291-94.
This section examines the government’s response to a litigant’s hunt for facts and information when the government is not a party to the litigation.

FRCP 45(a)(1) sets out the form and content of a federal subpoena, and FRCP 45(a)(2)-(3) provides authority for issuance of a subpoena. FRCP 45(b)(1) describes who may serve a subpoena, and the requirements for service of a subpoena on the named person, whether or not within the United States. FRCP 45(c) imposes obligations on a party or a party’s attorney to avoid undue burden or expense on a person subject to a subpoena and authorizes the court to impose sanctions for any violation of the rule. It also excuses a person commanded to “produce documents, electronically stored information, or tangible things, or to permit the inspection of premises,” from appearing in person at the place of production, “unless also commanded to appear for a deposition, hearing, or trial.” In addition, it authorizes a person commanded to “produce documents or tangible things or to permit inspection” to object to the subpoena. FRCP 45(c)(3) describes the procedure for a person subject to a subpoena to move the court for an order and, if any one of four separate grounds are satisfied, the court must quash or modify the subpoena. It also authorizes the court to “protect a person subject to or affected by a subpoena” if it requires, among other things, the person to disclose a “trade secret, or other confidential research, development, or commercial information,” or “an unretained expert’s opinion or information . . . .” Further, it authorizes the court to impose alternative conditions to quashing or modifying a subpoena if the serving party shows a “substantial need for the testimony or material that cannot be otherwise met without undue hardship” and “ensures that the subpoenaed person will be reasonably compensated.” FRCP 45(d) sets out the duties of the subpoenaed person in responding to a subpoena with respect to producing documents or electronically stored

147. Id. at 45(b)(1).
148. Id. at 45(c)(1).
149. Id. at 45(c)(2)(A).
150. Id. at 45(c)(2)(B).
151. Id. at 45(c)(3)(A).
152. Id. at 45(c)(3)(B).
153. Id. at 45(c)(3)(C).
information, or withholding information on privilege or other grounds for protection.\footnote{154}

As originally adopted, FRCP 45 empowered the court to issue an order that requires a "person," not just a party, to submit to oral examination by way of deposition and to produce documents at the deposition upon service of a valid subpoena or 

\textit{subpoena duces tecum}.\footnote{155} But, FRCP 45(d)(1) did not expressly authorize the court to issue a subpoena directed to a government agency as a non-party.\footnote{156} However, private litigants, as well as commentators, from the very beginning, thought a document subpoena targeted toward any "person," including a federal employee who was in possession or control of the requested documents, was the proper procedure to follow.\footnote{157} Perhaps the reason for this line of thinking is that when the drafters of the FRCP first presented them at a 1938 conference, they commented that, in their opinion, FRCP 45 was "so simple that it did not need any discussion."\footnote{158} Unfortunately, that optimistic view turned out to be wrong.

\section*{B. FRCP 45 AND ITS APPLICATION TO THE UNITED STATES GOVERNMENT}

Congress' adoption of the original FRCP (in particular, FRCP 45(d)(1)) created an early disconnect between the right of parties to a compulsory process to obtain documents from third "persons," and the statutory right of federal agencies to refuse to produce documents.\footnote{159} Case law reveals that in the first few years after implementation of the new discovery provisions, government agencies were served with third-party discovery requests, for example, under FRCP 34.\footnote{160} It

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\item \footnote{154} Id. at 45(d).
\item \footnote{155} Fed. R. Civ. P. 45(d)(1) (1939).
\item \footnote{156} Id.
\item \footnote{157} Sunderland, \textit{supra} n. 107 at 750 (Commentators thought "[d]ocuments in the possession of a third-party may, however, be ordered produced at a discovery examination by means of a subpoena duces tecum, obtained on application to the court, but tangible things are not embraced within the scope of such a subpoena."); \textit{see also} Holtzoff, \textit{supra} n. 110 at 220 ("by means of a subpoena duces tecum any person, irrespective of whether he is connected with the lawsuit, may be directed to produce a document at the taking of his deposition.").
\item \footnote{159} Initially, in response to at least state court process directed at federal employees.
\item \footnote{160} \textit{See e.g. Fed. Life Ins. Co. v. Holod}, 30 F. Supp. 713, 714 (M.D. Pa. 1940);
further appears that objections raised by government lawyers were limited to objections grounded in the substantive provisions of the discovery rule, as well as on a variety of statutory provisions.\textsuperscript{161} However, the objection that the word “person” did not include the sovereign United States was not among those objections. Moreover, commentators early on took the position that the government, as a third-party, could not refuse to comply with a valid subpoena for documents on two grounds: First, that the plain words of the discovery rules do not exempt the government, and second, pretrial knowledge of the facts is essential to a properly functioning judicial system.\textsuperscript{162}

Private litigants’ reliance on FRCP 45(c)(3)(A) to challenge the agency’s decisions to refuse to produce the requested documents reached a federal appeals court in a 1994 decision, Exxon Shipping Co.\textsuperscript{163} In Exxon, the Ninth Circuit determined that both the discovery rules and the court’s subpoena power under Rule 45 apply to the government as a third-party to litigation.\textsuperscript{164} In so holding, the Ninth Circuit determined that the discovery rules trump the housekeeping statute (and regulations promulgated in furtherance thereof), which over the years had been construed narrowly as containing no Congressional authorization to government agencies to refuse to disclose government information or to protect federal officials or employees from the reach of valid subpoenas issued under FRCP 45.\textsuperscript{165}


161. See \textit{e.g. Holod}, 30 F. Supp. 713-14 (rejecting plaintiff’s FRCP 34 demand to compel production of Defendant’s war record from the Selective Service Commission on ground that the rule does not provide for production of privileged documents); \textit{Pollen}, 26 F. Supp. 583-84, 586 (rejecting plaintiff’s FRCP 34 demand to produce certain drawings in a patent infringement case on the ground the documents were privileged “state secrets” (the United States intervened in the action to assert the objection)); \textit{but see Standard X-Ray Co. v. U.S.}, 3 Fed. Rules Serv. 393 (N.D. Ill. 1940) (rejecting government’s privilege-based claim).

162. See \textit{Berger & Krash, supra} n. 127 at 1466 (1949) (“At the base of the discovery procedure lies the conviction that pre-trial knowledge of all the facts is essential to an enlightened judicial system.”).

163. \textit{Exxon Ship. Co. v. Dept. of Int.}, 34 F.3d 774, 776 (9th Cir. 1994).

164. \textit{Id.} at 779.

165. \textit{See id.} at 775, 780. (5 U.S.C. section 301 “does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas. Rather, district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action. Under the balancing test authorized...
Other federal circuits have struggled to identify the legal basis under which private litigants may compel discovery from government agencies in actions to which the agency is not a party. By way of example, the D.C. Circuit, like the Ninth Circuit, started its analysis with the discovery rules and, in particular FRCP 45. The D.C. Circuit is the first federal appellate court to analyze the issue of whether the government is a "person" within the meaning of FRCP 45(b).\(^{166}\) In *Yousuf v. Samantar*, the United States government had relied upon principles of statutory construction to support its objection. It argued that the use of the word "person" in FRCP 45(a) does not include the sovereign because a statute that uses the same word is construed to exclude the sovereign, attempting to extend the reasoning in an earlier circuit case that applied a presumption,\(^{167}\) based on the definition of the word "person" in the *Dictionary Act*,\(^{168}\) that the Government was not a "person" within the meaning of a federal statute.\(^{169}\) Ultimately, the D.C. Circuit was required to follow Supreme Court precedents grounded in common law as to when the Government is presumed to be a "person."\(^{170}\) It applied the two-part common law rule and determined that the Government was a "person" pursuant to FRCP 45.\(^{171}\)

However, most circuits have not followed the approach set out by the Ninth or D.C. Circuits. Instead, the Second, Third, and Fourth Circuits, without any cogent analysis of whether the United States is a "person" within the meaning of FRCP 45(c)(3)(A), have been persuaded that the better approach is to scrutinize the procedural

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\(^{166}\) *Yousuf v. Samantar*, 451 F.3d 248, 251 (D.C. Cir. 2006).

\(^{167}\) Id. at 253 (citations omitted); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 180-81 (D.C. Cir. 2001).

\(^{168}\) Id. at 281 (citing 1 U.S.C. § 1 (2006)).

\(^{169}\) See 28 U.S.C. § 1782 (2006) (authorizing the district court to enter an order compelling a person to produce a document or other thing for use in a foreign proceeding).

\(^{170}\) *Yousuf*, 451 F.3d at 257 ("The term 'person' as used in the Federal Rules of Civil Procedure consistently means not only natural persons and business associations but also governments, including the United States.").

\(^{171}\) Id. at 254 (quoting *Nardone v. U.S.*, 302 U.S. 379, 383-84 (1937) (First, "where the statute, 'if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest,' such as a statute of limitations; and [second] where deeming the government a 'person' would 'work and obvious absurdity.'")
mechanism that gave rise to the agency’s decision to refuse the discovery requests. Under this approach, the courts begin with the proposition that the United States, as a sovereign, cannot be sued without its consent. The courts find “consent” in the Administrative Procedure Act (APA), in which Congress authorized judicial review of agency decisions (in this situation, the decision to refuse a discovery request). With sovereign immunity out of the way, the APA sets the standard for judicial review of agency decisions. However, judicial review is not always available. For example, review is not available where a statute precludes review or where the decision is committed to agency discretion by law. The APA directs courts to defer to agency policy-making decisions and interpretations of agency rules, and affirm other non-policy agency decisions under a deferential rational basis test. With this backdrop in mind, let us look at how the Second, Third, and Fourth Circuits approached the government’s refusal to provide discovery.

The Second and Third Circuits have interpreted the judicial review provisions of the APA as authorizing suits against an agency official by a person adversely affected or aggrieved by agency action. These circuits maintain that the APA provides sufficient authorization for courts to enforce a third-party document subpoena directed at the government. The procedure for doing so is a motion to compel in the context of the underlying litigation, instead of initiating a separate lawsuit against the government agency.

174. See id. at § 702, which provides, in relevant part, that “a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.”
175. Id. at § 701(a)(1)-(2).
179. Gen. Elec. Co., 197 F.3d at 599; Davis Enter., 877 F.2d at 1184.
180. See Gen. Elec. Co., 197 F.3d at 599 (“In our view, the APA allows the enforcement of a non-party subpoena duces tecum for discovery against the government through a motion to compel compliance.”); see accord Davis Enter., 877 F.2d at 1183.
Fourth Circuit varies from the Second and Third Circuits only in the procedural route for deciding the issue. In the Fourth Circuit, an agency's refusal to comply with a Rule 45 subpoena is a policy decision committed to the sole discretion of the agency that is reviewable under the APA. Thus, the agency's refusal must be contested in a separate lawsuit under the APA.

Of the approaches taken by these circuit courts, only the Ninth Circuit has noted that the four-part test set out in FRCP 45(c)(3) should be applied to quash or modify a subpoena. As such, the Ninth Circuit approach is closest to implementing the original intent of the drafters of the FRCP, that is, the government is a "person" within the meaning of the FRCP. Under the Second, Third, and Fourth Circuit standards, courts within those circuits must defer to the agency's interpretation of policy and, accordingly, the focus of those courts is on the agency decision-making process, instead of whether the requested documents are subject to some privilege under FRCP 45(c)(3)(A)(iii), or whether the request subjects the agency to some undue burden under FRCP 45(c)(3)(A)(iv), or alternatively, whether good cause exists to compel production of the documents under FRCP 26(b)(1).

To be sure, the different balancing tests articulated by the Ninth Circuit on the one hand, and the Second, Third, Fourth, and D.C. Circuits on the other, can and do produce different results for private litigants seeking agency records. This is because the Ninth Circuit approach essentially focuses on whether a document is privileged or whether producing the records would be burdensome for the agency, while the balancing test applied in the other circuits focus on the agency decision-making process, where either a presumption of validity or deference to agency rule-making applies. While the difference in approaches among the circuits is significant, no case has

181. *COMSAT Corp. v. Natl. Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999) ("When an agency is not a party to an action, its choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources.").
182. *See Exxon Ship. Co. v. Dept. of Int.*, 34 F.3d 774 (9th Cir. 1994); Fed. R. Civ. P. 45 (c)(3).
183. *See id.*
reached the Supreme Court to resolve the conflict and announce a nationwide test to apply in these types of cases.\textsuperscript{186}

In sum, enforcement of civil process targeted at the United States, as a non-party to civil litigation, is complicated and subject to multiple legal and policy considerations. That said, the issue is even more complicated and subject to tougher legal and policy considerations when applied to a federally recognized Indian tribe, as the Supreme Court has distinguished the sovereignty and immunity of the United States and the states from that of the Indian tribes.\textsuperscript{187} When the sovereign is an Indian tribe, the mix of legal and policy considerations creates a doctrinal quagmire that, in turn, has the potential to yield inexplicable and unintended results. The next section wades into this quagmire by examining the Supreme Court's jurisprudence on tribal sovereignty and the implications of that jurisprudence.

\textsuperscript{186} It is noteworthy that agency decisions under the APA are not the only procedure available to private litigants who seek documents from government agencies. Private litigants have access to FOIA, 5 U.S.C. section 552 et seq; Dept. of Air Force v. Rose, 425 U.S. 352, 361 (1979). FOIA is also a useful non-FRCP discovery tool because a FOIA request can be asserted both pre-suit and during litigation. See West's Fed. Admin. Prac. Part 19, c. 86, § 7422 (West 2009).

Litigators, as well as the general public, have used FOIA's section 552(a) as an extra-judicial tool both to obtain information from the government, as well as to object to the release of such information. While litigants have relied upon the FOIA's section 552(a) to obtain government information, government lawyers (and private litigants, as well) have relied upon FOIA's section 552(b), which lists nine different subject matter areas exempt from the disclosure obligation in section 552(a) to provide a shield to reject such requests. Thus, section 552(b) provides yet another basis for government agencies to object to the release of government information that might be useful to parties in litigation. Nevertheless, section 552(a)(4)(B) empowers a federal district court to issue an order compelling release of the information withheld. But, judicial review of FOIA agency decision-making with respect to public access to documents, like judicial review under the APA, is subject to certain standards. In sum, with respect to FOIA, both government lawyers and private litigants have seized upon FOIA's section 552(b) exemptions to justify claims that information in possession of a government agency should not be publicly disclosed. See Dept. of Int. v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001); Chrysler Corp. v. Brown, 441 U.S. 281, 291-94 (1979).

A. United States Sovereignty and Sovereign Immunity Juxtaposed Against American Indian Tribal Sovereignty and Tribal Immunity

The term "sovereignty" emanates from feudal principles in France which were transported to England. Thus, emerged the English maxim that the "King or sovereign is the fountain of Justice." Sir William Blackstone wrote that the "law . . . ascribes to the King the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of objection to any other potentiate upon earth." While sovereignty rested with the King under English common law, in the United States, sovereignty rests with the people, who have delegated their sovereign power to the government as set out in the United States Constitution.

One important attribute of sovereignty is the immunity of the sovereign. This was recognized as a fundamental principle of English law. Likewise, the founding fathers of the United States recognized

188. Chisholm v. Georgia, 2 U.S. 419, 457-58, 471-72 (1793) (superseded by U.S. Const. amend. XI) ("There is a third sense in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what I presume to be one of the principal objections against jurisdiction of this Court over the State of Georgia. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States." Id. at 457).
189. Id. at 458.
190. Id. ("Hence it is, that no suit or action can be brought against the King, even in civil matters; because no Court can have jurisdiction over him; for all jurisdiction implies superiority of power.").
191. Id. at 472 ("In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns.") Thus, it is not a surprise that early in the nation's history, the United States Supreme Court recognized that while sovereignty is the right to govern, the Constitution never uses the word "sovereign." ("Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides," Id. at 472. "To the Constitution of the United States the term SOVEREIGN, is totally unknown." Id. at 454.)
192. William Blackstone, Commentaries Of Injuries Proceeding From or Affecting the Crown, *254-55 ("That the king can do no wrong, is a necessary and fundamental
The Supreme Court first articulated the concept of sovereign immunity in the 1809 case of United States v. Peters. Then in 1834, in the case of United States v. Clarke, Chief Justice Marshall applied the concept of sovereign immunity in the United States to actions brought by any party against the United States government. Less than two decades later, the 1850 case of Hill v. United States inextricably tied the rationale supporting immunity to the federal government, as a representative of the sovereign, to traditional notions of sovereignty. By 1868, in The Siren, the Court explicitly

principle of the English constitution: meaning only, as has formerly been observed, (b) that in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury: for being created for the benefit of the people, it cannot be exerted to their prejudice. (c) Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign, (d) (for who shall command the king?) (e) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." (Emphasis in Original)).

The Court did not articulate the first rationale underpinning sovereign immunity—interference of the courts with the performance of executive government functions—until 1840. Decatur v. Paulding, 39 U.S. 497, 516 (1840) ("The interference of the Courts with the performance of the ordinary duties of the executive departments of government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.").


U.S. v. Peters, 9 U.S. 115, 139 (1809) ("The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant."). However, in the 1827 case, U.S. v. Barker, the Supreme Court recognized and applied the general rule that in the interpretation of contracts to which the United States is a party, the United States is subject to the same rules as those of private persons. See 25 U.S. 559, 561 (1827).

U.S. v. Clarke, 33 U.S. 436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.")

Hill v. U.S., 50 U.S. 386, 389 (1850) ("No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign,
established immunity of the United States as a doctrine rooted in the common law (of England) and rested that doctrine on public policy.\textsuperscript{198} Later that same year, in \textit{Nichols v. United States}, the Court extended the immunity doctrine to every government.\textsuperscript{199} More recently, in \textit{Seminole Tribe of Florida v. Florida}, the Court had the opportunity to revisit the historical underpinnings of the sovereign immunity doctrine, this time in the context of sovereign immunity of a state.\textsuperscript{200} This case further illustrates the sovereignty and immunity distinction between the federal and state governments on the one hand, and Indian tribal government on the other.

### B. \textsc{Indian Tribal Sovereign Immunity}

Although the United States Constitution makes explicit reference to Indian tribes,\textsuperscript{201} Indian tribes are not recognized under United States law as either foreign nations or states.\textsuperscript{202} Nevertheless, the Supreme Court in the 1800s recognized Indian tribes as possessing some attributes of sovereignty in the same context as any sovereign state.\textsuperscript{203} The Court recognized that the United States had considered and treated or a government representing the sovereign, cannot \textit{ex delicto} be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared ...").

\textsuperscript{198.} \textit{The Siren}, 74 U.S. 152, 153-54 (1868) ("It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule.").

\textsuperscript{199.} \textit{Nichols v. U.S.}, 74 U.S. 122, 126 (1868) ("Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created.").


\textsuperscript{201.} U.S. Const., art. I, § 8 cl. 3 provides, in relevant part, that the Congress shall have power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

\textsuperscript{202.} \textit{Cherokee Nation v. Ga.}, 30 U.S. 1, 20 (1831) ("[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the constitution ...").

\textsuperscript{203.} \textit{Id.} at 55 ("In this view of [the Cherokee nation] situation, there is as full and complete recognition of their sovereignty ... ").
Indian nations as “distinct, independent political communities.” In the twentieth century, the Court recognized that Indian tribes were separate sovereigns. As “domestic dependent nations,” however, the Court also decreed that Indian tribes were completely under United States sovereignty. More recently, the Court has limited the scope and reach of Indian tribal sovereignty. The Court has suggested that Indian tribal sovereignty could be extinguished without the consent of an Indian tribe or its members. With respect to sovereign immunity, it was not the Supreme Court that first articulated application of the immunity maxim in connection with Indian tribes, but two early twentieth century federal appeals court decisions, both from the Eighth Circuit.

204. Worcester v. Ga., 31 U.S. 515, 559-60 (1832) (“The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ “)
205. Id. at 559 (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . ”); see also U.S. v. Kagama, 118 U.S. 375, 381-82 (1886) (“With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.”).
206. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).
207. Cherokee Nation v. Ga., 31 U.S. at 17 (“They [Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations.”).
208. Id. at 17-18 (“They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion [sic] with them, would be considered by all as an invasion of our territory, and an act of hostility.”).
210. U.S. v. Wheeler, 435 U.S. 313, 323 (1978) (Indian tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.”).
211. Adams v. Murphy, 165 F.304, 308-09 (8th Cir. 1908) (“Upon considerations of public policy such Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments.”) (citing Thebo
It would not be until 1919 that the Supreme Court would weigh in on the issue of immunity from suits in United States' courts and when the opportunity arose, the Court analogized immunity for Indian tribes with reference to immunity for municipalities and states. Twenty-one years later, in 1940, the Court applied immunity from direct suit to a cross-suit, again based on public policy grounds.

In 1977, things began to change subtly, but significantly. In *Puyallup Tribe, Inc. v. Department of Game*, while the Court affirmed application of sovereign immunity to bar suit against the tribe absent tribal or congressional consent, Justice Blackman cast doubt as to the continuing vitality of the sovereign immunity doctrine, as applied to Indian tribes. One year later, the Court emphasized that Indian tribes were cloaked not with sovereign immunity, but with federal common law immunity from suit in United States courts. In the 1986 case *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, the Court articulated a concept of limitations on the federal common law immunity that the Indian tribes possessed.

While recognizing that common law immunity was a "necessary corollary to Indian sovereignty and self-governance," the Court, in

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v. *Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) ("It has been the settled policy of [C]ongress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties.").

212. *Turner v. U.S.*, 248 U.S. 354, 357-58 (1919) ("Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace.").

213. *U.S. v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-513 (1940) ("The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity . . . . These Indian Nations are exempt from suit without Congressional authorization.").

214. *Puyallup Tribe, Inc. v. Dept. of Game of St. of Wash.*, 433 U.S. 165, 178-79 (1977) ("I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *U.S. v. U.S. Fidelity & Guaranty Co.* . . . . I am of the view that that doctrine may well merit re-examination in an appropriate case." (Emphasis Added) (citing 309 U.S. at 513-16)).


passing, noted that because Indian tribes possessed only quasi-sovereignty, such immunity is not congruent with the immunity possessed by the United States or the several states. More ominously, the Court added, “this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition.”

Clearly, the Court was signaling the imminent approach of storm clouds over the landscape of Indian tribal sovereignty and immunity. The Court would use the 1998 case, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* as the vehicle to completely undermine extension of English common law notions of immunity to Indian tribes. In *Kiowa*, the Court reviewed a state appellate court decision that had rejected application of immunity in a commercial dispute brought by a non-Indian corporate entity to enforce a promissory note executed by the tribe. It traced the development of the immunity doctrine, explaining how it developed “almost by accident.” Then, it attributed tribal immunity to a “passing reference” in the Court’s 1919 decision in *Turner v. United States* and characterized tribal immunity as “at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.” The Court then flatly stated there were reasons to “doubt the wisdom of perpetuating the doctrine.” Ultimately, the Court declined to abrogate tribal immunity; instead, it deferred to Congress.

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217. *Id.* at 890 (citing *Santa Clara Pueblo*, 436 U.S. at 58; *U.S. Fid. & Guar. Co.*, 309 U.S. at 513).
218. *Id.* at 891.
220. *Id.* at 753-54.
221. *Id.* at 756-57.
222. *Id.* (“Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident.”) *Id.* at 756. (“It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine.”) *Id.* at 757 (citing *Turner v. U.S.*, 248 U.S. 354 (1919)).
223. *Id.* at 758.
224. *Id.* at 760. While the Court has recognized that tribal officials share the immunity of the tribe, like any other public officials who share the immunity of the sovereign, that immunity attaches only when the official has acted within the scope of his or her official duties. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Puyallup Tribe, Inc. v. Dept. of Game of St. of Wash.*, 433 U.S. 163, 171-72 (1977)) (The tribe’s immunity does not immunize a tribal officer or individual members of the tribe from suit.).
Three years later, in *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, the Court once again considered the application of tribal immunity in the commercial context, this time in connection with the effect of a written agreement to arbitrate disputes in a standard AIA (American Institute of Architects) construction industry contract. The issue before the Court was whether an arbitration clause expressly waives tribal immunity from suit arising from a breach of the underlying contract. The Court made a short shrift of the tribe’s arguments against a finding of waiver in the standard contract, and concluded that the tribe clearly consented to arbitration in the agreement and to enforcement of any arbitration award in a state court.

The label that the Court uses to identify the immunity possessed by Indian tribes has significant legal consequences. *Wold Engineering* marked a line in the sand as the Court began a twelve year transition in which it would delete the word “sovereign” before the word immunity when making reference to the type of immunity Indian tribes enjoyed as a matter of federal common law and re-labeled it as tribal immunity. In a nutshell, while the Court retreated, there is little reason to believe that tribal immunity remains on solid ground.

**C. THE LOWER FEDERAL COURTS HAVE WRONGFULLY EQUATED UNITED STATES SOVEREIGNTY AND IMMUNITY WITH INDIAN TRIBAL SOVEREIGNTY AND IMMUNITY**

After *Kiowa*, there can be little debate as to whether the Supreme Court would sanction expansion of the tribal immunity doctrine by
THE DISCOVERY IMMUNITY EXCEPTION

approving application of the discovery immunity exception by the lower federal courts. The Court’s precedents in this area of law have distinctly narrowed the tribal immunity doctrine, so much so that the Court is one step away from complete abrogation of the doctrine. What purported to be the exclusive prerogative of Congress, the Court has usurped with little Congressional objection. The Court has determined whether to recognize, characterize or re-characterize, and diminish or expand the immunity possessed by an Indian tribe in the courts of the United States and the states and territories or possessions of the United States. By way of example, the Court has severed the link between the attributes of sovereignty and immunity possessed by the United States on the one hand, and the Indian tribes on the other. According to the Court, the United States possesses complete sovereignty, while Indian tribes possess status as quasi-sovereign entities. Equally significant, the Court has determined that Congress has plenary power over Indian tribes and the tribes are subject to

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232. The Court’s recognition of several federal statutes articulating Congress’ favorable policies might not be sufficient to save tribal immunity in the absence of explicit legislation. See e.g. *Indian Self-Determination and Education Assistance Act*, 25 U.S.C. § 450 (2006); *Indian Reorganization Act*, 25 U.S.C. § 476(h) (2006) (“Tribal sovereignty. Notwithstanding any other provision of this Act – (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section . . . .”); *Indian Financing Act*, 25 U.S.C. § 1451 (2006) (“It is hereby declared to be the policy of Congress . . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.”).


complete defeasance. While early in the twentieth century the Court was initially willing to equate immunity of an Indian tribe to that of the United States or a state, more recently, it has characterized the immunity possessed by Indian tribes as "tribal immunity," identifying it as a construct of federal common law, based on considerations of public policy and subject to limitations in ways appropriate to a dependent domestic nation and possible abrogation by Congress.

Indeed, the Court's frontal assault on the tribal immunity doctrine in *Kiowa* is formidable. Just three years after *Kiowa*, the Court swiftly and abruptly rejected the tribe's claim in *C & L Enterprises* that "no court on earth or even the moon" has jurisdiction over the plaintiff's suit because the tribe never "waived its sovereign immunity in any judicial forum." *C & L Enterprises* clearly signals that federal courts should not extend tribal immunity, particularly into areas where such immunity has never before been applied. Nevertheless, contrary to the Supreme Court's guidance, a Ninth Circuit panel reversed a lower federal court decision with respect to a conclusion that the tribe's sovereign immunity was not violated by the issuance and execution of a search warrant. Another court applied immunity to quash otherwise valid federal process issued under FRCP 45 directed to non-party Indian tribes, agencies, corporate entities, and their respective tribal officials, officers, and employees. To the extent the Court's position is that there is no doctrinal underpinning for tribal immunity, extending tribal immunity to prohibit enforcement of otherwise valid federal process is unwise and risky, as it could result in a decision abrogating the doctrine entirely.

The next part explores the general rule that recognizes the right to "every man's evidence" and the tests emanating from that rule. It

240. *Bishop Paiute Tribe v. Co. of Inyo*, 275 F.3d 893, 897-98 (9th Cir. 2002).
241. *Catskill Dev. v. Park Place Ent. Corp.*, 206 F.R.D. 78, 86-88, 93 (9th Cir. 2002).
applies those tests to the facts in James, Bishop Paiute, Catskill and Menominee, and assesses the likely result under each test if the test had been applied appropriately.

VI. THE THREE TESTS AVAILABLE TO RESOLVE DISPUTES CONCERNING FEDERAL PROCESS FOR NON-PARTY WITNESS TESTIMONY

A. THE GENERAL RULE IN FEDERAL COURT

In the seminal case of United States v. Bryan, the Supreme Court articulated the general rule with respect to a person’s obligation to testify: “[E]very person within the jurisdiction of the Government is bound to perform when properly summoned.” The general rule recognizes the right to “every man’s evidence.” In articulating the rule, the Court recognized the need for exceptions and set out a balancing approach to apply when a person objects to giving testimony. That person bears the burden of bringing forth sufficient facts to demonstrate that a need to protect her or his “substantial individual interest” outweighs the “public interest in the search for truth.” Significantly, the language used by the Court is broad, suggesting that its approach could be used in connection with compelled testimony before any legislative or judicial proceeding.

This general rule provides a foundation to understand how

242. While Bryan was a criminal prosecution arising from a person’s refusal to testify under Congressional subpoena, the Supreme Court did not limit the application of the balancing test to criminal proceedings. U.S. v. Bryan, 339 U.S. 323, 331 (1950).

243. Id.

244. Id.

245. In Bryan, the process at issue was a Congressional subpoena for testimony and documents. Id. at 331 (“[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned.”

246. Id. at 331.

247. See id.
important it is for people to testify and provide documents before "competent authority" and helps to explain why lower federal courts rarely grant exceptions to the rule. The general rule is reflected in the procedural rules governing criminal and civil matters in federal court.\textsuperscript{248} With this foundation in mind, Section B applies a balancing test that emanates from the general rule to the facts set out in \textit{James}, \textit{Bishop Paiute}, and \textit{Menominee} and assesses the likely result if the courts had applied the general rule appropriately. Section C explains the rule set out in FRCP 45(c)(3)(A) and discusses how this procedural rule should have been applied appropriately in the two civil cases previously discussed: \textit{Catskill Development, LLC v. Park Place Entertainment Corp.} and \textit{United States v. Menominee}. Section D discusses a new rule that applies when the federal process is directed at high ranking government officials (federal, state and municipal), as opposed to all other persons, followed by a discussion on how this rule should have been applied in \textit{Catskill} and \textit{Menominee} and the likely result had it been applied appropriately.

\section*{B. THE UNITED STATES V. BRYAN BALANCING APPROACH}

As stated above, federal courts apply the stated public policy underlying this maxim in a way that recognizes few, if any, exceptions\textsuperscript{249} to excuse a person from performing when properly summoned by a federal court.\textsuperscript{250} When a lower federal court recognizes an exception to the right to "every man's evidence," that decision is based on facts demonstrating a need to protect a "substantial individual interest" that outweighs the "public interest in the search for the truth."\textsuperscript{251} With regard to \textit{James} and \textit{Menominee}, tribal immunity might be a colorable argument, but that argument is fact based. Thus, the tribe in each case would need to present facts that, if accepted by the court, would constitute an exemption grounded in a substantial

\textsuperscript{249} \textit{Salter v. Upjohn Co.}, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.").
\textsuperscript{250} \textit{Bryan}, 339 U.S. at 331-32 ("Every exemption from testifying or producing records thus presupposes a very real interest to be protected. If a privilege based upon that interest is asserted its validity must be assessed.").
\textsuperscript{251} \textit{Id.} at 331.
To continue, the Bryan balancing approach must be applied to the facts in James, Bishop Paiute, and Menominee to assess the outcome.

The facts in James demonstrate that one agency of the tribe voluntarily produced tribal government documents in its possession to the United States, while another tribal agency refused to produce documents to the defendant in response to a federal subpoena duces tecum. While it is not entirely clear from the Ninth Circuit opinion whether the tribe articulated any substantive interests, it is reasonable to assume that whatever interest was placed before the court was likely focused on the information contained in the documents it produced, as well as those it withheld. Nevertheless, the Ninth Circuit's decision reflects no claim by the tribe that the information in the documents was privileged in some respect (political integrity, health or welfare of the tribe, or economic security, to name a few) or qualified as protected law enforcement data, or subject to a trade secret or otherwise commercially sensitive. Thus, the documents at issue could merely reflect government data on an individual (associated with the provision of social services), as opposed to documents reflecting attorney-client communications, mental impressions of high ranking tribal government officials, or reflection of tribal policy-making activity. Further, the Ninth Circuit also identified an interest the tribe might have in the documents. The Ninth Circuit characterized this interest as an "increased privacy interest" designed to protect its enrolled members, reasoning that confidentiality was pivotal to promote free communication between persons seeking services and tribal service providers. While a cognizable interest seems to exist, it is questionable whether that interest is "substantial."

With these interests in mind, Bryan instructs that the tribe's interest must be balanced with the public's interest in the search for the
As the Ninth Circuit pointed out, one of the tribe's agencies turned over certain documents to federal law enforcement officials. As a policy matter, this act could suggest that the tribe aligned itself with the prosecution in aid of a law enforcement objective. In addition, the Ninth Circuit noted that the tribe possessed "possibly relevant documents." This fact also advances that law enforcement objective. On balance, it seems as though the tribe's actions demonstrate a higher concern for achieving a law enforcement objective—the search for the truth—than in protecting some substantial interest of the tribe.

To apply the Bryan balancing approach to the facts in Bishop Paiute, one must recall that county law enforcement officials executed a search warrant for documents (payroll records) possessed by one of the tribe's corporate entities in connection with a state welfare fraud investigation. The tribe complained that in executing the search warrant, county law enforcement officers seized documents containing confidential information on individuals who had no involvement in or connection to the fraud investigation and that the officers exceeded their jurisdiction. The Ninth Circuit first took notice of the fact that the tribe had promulgated reasonable policies with respect to the confidentiality of employee records; also recognizing that such policies were developed along the lines of federal and state guidelines. The Court also found that the officers failed to provide the tribe with an opportunity to redact such confidential information.

Here, the tribe's legal claim against the county illustrates the tribal interest implicated by execution of the search warrant. In a nutshell, the interest is county recognition of its administrative policies with respect to employee records in the context of a criminal investigation. As a collateral matter, the tribe also has an interest in preservation of the individual tribal employee's "right of privacy" concerning the information reflected in the seized documents, presumably from release to the public. On the other hand, the execution of the search warrant embraces the public interest in the

259. James, 980 F.2d at 1320.
260. Id.
261. Bishop Paiute v. Co. of Inyo, 275 F.3d 893, 898-99 (9th Cir. 2002).
262. Id.
263. Id. at 902.
264. Id. at 899.
search for the truth as to whether certain tribal employees had committed welfare fraud. Setting aside the procedural issues concerning law enforcement's execution of the warrant, the tribe's complaint focused on seizing payroll records of individuals who were not targets of the criminal investigation; as to this issue, the public's interest in the search for the truth concerning possible welfare fraud would seem to outweigh the tribe's interest in maintaining the privacy of information reflected in the payroll records. On the other hand, it is possible that the tribe had more substantial interests that were never asserted, i.e., the political integrity of the tribe and its sovereign right to be free from invasion by county law enforcement officials absent some demonstrable evidence that tribal officials had been obstructing justice or had otherwise been unreasonably non-cooperative in the search for evidence of criminal conduct. On this issue, the tribe's substantial interest as a sovereign should have prevailed under Bryan.

The Bryan balancing approach can also be applied to the facts in Menominee. As discussed earlier in Part II, the United States produced to Menominee an investigative report that purported to be a record of an interview with a tribal member (a tribal official) concerning matters under federal investigation. Apparently, the tribal member injected herself into the investigation by her voluntary agreement to sit for an interview conducted by a federal investigator. In addition to these statements, the tribal member made other statements to a second federal employee, as well as a tribal employee. In Menominee, the tribe made no claim that the information possessed by the tribal member in the documents was privileged in some respect or qualified as protected law enforcement data, or subject to a trade secret or otherwise commercially sensitive. Nor, did the tribe claim that the information passed to the federal investigator was privileged under some common interest agreement between the United States and the tribe or that the documents reflected attorney-client communications,

266. Id. at *12.
267. Id. at *9.
268. For example, the tribe's political integrity, health or welfare, economic security interests, to name a few. See id.
mental impressions of the high ranking tribal government official(s) or reflection of tribal law enforcement policy making activity.\textsuperscript{269}

With respect to the second part of the Bryan balancing rule, the public’s interest in the search for the truth, it appears that the tribe’s interest was aligned with the policy interest of the United States, \textit{i.e.}, gathering information in connection with a purported federal investigation. Here, the activities of the tribal member/tribal official do not seem to rise to the level of any tribal "substantial interest." To the contrary, like \textit{James}, the tribe’s interests were in advancing a law enforcement objective that is closely aligned with the public’s interest in the search for the truth.

In sum, both the Ninth Circuit in \textit{James} and the district court in \textit{Menominee} found a waiver of sovereign immunity in connection with the acts of tribal officials.\textsuperscript{270} Both courts admonished the tribes for assisting the United States in its prosecution, but wrongfully attempting to hide behind the shield of immunity.\textsuperscript{271} These courts seem to be saying that the public interest in the search for the truth outweighed the individual or tribal interest. While the Ninth Circuit identified the tribe’s interest in the private data on the individual,\textsuperscript{272} the \textit{Menominee} court did not do so.\textsuperscript{273} Neither court balanced the identified tribal interest against the public interest in the search for the truth.

Under the Bryan test, the Ninth Circuit in \textit{James} and the district court in \textit{Menominee} should have also determined whether tribal immunity was a "substantial interest" that outweighed the public’s interest in the search for the truth. Here, these courts would have had to construe immunity within the construct of federal common law and its limitations, and then determine whether application of tribal

\textsuperscript{269} See \textit{id}.
\textsuperscript{271} \textit{James}, 980 F.2d at 1320; \textit{Menominee}, 2008 WL 2273285 at *12.
\textsuperscript{272} The Ninth Circuit said:
\textit{There is an increased privacy interest on the part of tribal members in documents which detail emotional, mental, or physical problems of tribal members, more so than in documents which only refer to such problems in a general way. The tribal interest arises in protecting the details of the counseling from disclosure in order to promote free communication by tribal members needing those services.}
\textit{James}, 980 F.2d at 1320.
\textsuperscript{273} See \textit{Menominee}, 2008 WL 2273285.
immunity, as re-constructed by the Court in *Kiowa* is sufficient to bar enforcement of the federal process issued in these cases.

As to the initial issue, the Supreme Court's analysis of tribal immunity in *Kiowa* must guide any lower court's review and consideration.\(^\text{274}\) It appears the primary focus must be whether, and to what extent, application of tribal immunity to the detriment of interests of parties to the litigation specifically, and to the performance of judicial functions generally, serves any federal interests. Among the more prevalent federal interests would be the policy of nurturing the development of stable and effective Indian tribal governments.

For example, it has been established that federal courts have a long history of protecting high ranking government officials and federal employees from sanctions when those officials or employees comply with federal statutes and agency regulations\(^\text{275}\) with respect to federal civil process targeted at the production of government records and/or testimony.\(^\text{276}\) Federal courts should accord Indian tribes, as quasi-sovereign entities, the same respect for the tribal rule of law as the courts have done so with federal law and federal agency regulations. Respect for duly enacted tribal law concerning public access to tribal government records and data, properly promulgated tribal administrative procedures implementing such tribal laws, and that provide for judicial review of tribal agency decision-making encourages Indian tribes to embrace public policy and the rule of law. That, in turn, would implement Congress' policies aimed at nurturing the development of Indian self-determination and Indian tribal government. Considering the purposes served by the sovereign immunity doctrine, there seems to be little justification to refuse to apply those purposes with equal force to tribal immunity.

Here, the general rule regarding whether a suit is against a sovereign is set out in *Dugan v. Rank*.\(^\text{277}\) Neither *James* nor


\(^{275}\) See supra nn. 136-42 and accompanying text.

\(^{276}\) See e.g. 5 U.S.C. §§ 302, 551, 702 (2006) and various federal department regulations promulgating standards and guidelines to respond to third-party process for deposition testimony and production of government data.

\(^{277}\) *Dugan v. Rank*, 372 U.S. 609, 620 (1962) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (citing *Larson v. Dom. & For. Com. Corp.*, 337 U.S. 682, 704 (1949)) (citing *Land v.*
Menominee involved a "suit" against an Indian tribe, nor would any "judgment" be entered by the court against a tribe. Absent a judgment, it is difficult to understand how there could be any restraint on Indian tribal government to either keep it from acting or compelling it to act. Further, absent a judgment, it would be difficult to argue that there is some interference with the public administration. While it is certainly possible in an appropriate case to muster cogent arguments that might implicate an Indian tribe's quasi-sovereign interests, that case is certainly not one where, like in Catskill and Menominee, the tribe, its officials or employees voluntarily took overt actions to support a federal investigation or prosecution.

C. APPLICATION OF FRCP 45(c)(3)

FRCP 45 applies the general rule the Supreme Court articulated in Bryan with respect to persons who are not parties to the underlying litigation in the following ways. Recall that a non-party who objects to federal process seeking testimony or documents may present to the court arguments—in a motion brought pursuant to FRCP 45(c)(3)(A)—based on one or more of four grounds and, if she or he prevails on any one of those grounds, the court must quash or modify the subpoena. Before proceeding further, it is important to keep in mind that in the context of civil litigation, FRCP 26(b)(1) recognizes a party's right to obtain discovery of any "non privileged matter that is relevant to any party's claim or defense." That right is, of course, balanced by the right of a non-party to seek protection from the court under FRCP 45(c)(3)(A), as well as by the court's power (via motion or on its own) to limit the frequency or extent of discovery.

On the face of it, nothing in the FRCP explicitly or even remotely exempts a sovereign or a quasi-sovereign, or any of their officials or employees, from an obligation to comply with otherwise valid federal

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278. See supra n. 6.
279. See supra n. 6.
282. See supra n. 6.
civil process. While courts have struggled with this issue in the context of the sovereign United States, it does not necessarily follow that analysis of this issue with respect to quasi-sovereign Indian tribes leads to the same result obtained by the United States. The analysis of a motion to quash or modify federal process issued under FRCP 45(c)(3)(A) should have begun with two questions: (1) Whether an Indian tribe is a "person" within the meaning of FRCP 45, and (2) whether the rule implicates substantive or procedural rights.

As to the first question, it could clearly have been argued that nothing in the text of the FRCP generally, or FRCP 45 specifically, identifies an "Indian tribe" or makes any reference to an "Indian tribe" in connection with the rule's use of the word "person." Further, nothing in the history and purpose of FRCP 45 suggests that in 1936, the framers of the FRCP even considered whether an Indian tribe would be a "person" within the meaning of the rule. This fact alone should not have been dispositive of the question as it could be argued that the definition of the word "person" in the federal statutes is a relevant consideration, because the definition neither includes, nor excludes an "Indian tribe" in the meaning of that word. Significantly, though, the Dictionary Act's definition of the word "person" includes "corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals." Accordingly, such entities created pursuant to the law

284. See e.g. Yousuf v. Samanter, 451 F.3d 248, 257 (D.C. Cir. 2006). ("In sum, the 'purpose, the subject matter, the context, [and] the ... history [of Rule 45] ... indicate an intent, by the use of the term ['person'], ... to bring [the Government] within the scope' of the Rule." (quoting U.S. v. Cooper Corp., 312 U.S. 600, 605 (1941))); see also In re Vioxx Prod. Liab. Litig., 235 F.R.D. 334, 337-44 (E.D. La. 2006).
286. Neither the Catskill nor Menominee courts addressed this threshold issue. See Catskill, 206 F.R.D. at 81; Menominee., 2008 WL 2273285.
287. See Fed. R. Civ. P. 45 (c). The Supreme Court has determined that use of the word "person" in the FRCP includes the United States when it is a party. To the extent that the sovereignty of Indian tribes is subject to limitation by Congress (and the Supreme Court), it only stands to reason that an Indian tribe would be a "person" when that word is used in connection with the FRCP. See U.S. v. Proctor & Gamble Co., 356 U.S. 677, 681 (1950).
289. However, a corporate entity, i.e., corporation and its officers and employees are undeniably "persons" within the meaning of this word for purposes of the Dictionary Act. Id.
290. Id.
of an Indian tribe, as well as individuals, whether or not tribal members, would be "persons" whenever the word "person" is used in a federal statute, unless specifically excepted in the language of the statute.

In addition, it could be argued that the Supreme Court recognizes that the use of the word "person" in a federal statute is construed to exclude the sovereign. Thus, it could be argued that a quasi-sovereign Indian tribe, like the sovereign United States or a state is not included within the meaning of the word "person." The counter-argument is that this position does not consider the impact of the Supreme Court's determination that the sovereignty of an Indian tribe is not congruous with that of the United States or a state and, therefore, the court's application of the statutory construction rule might not apply in the circumstance of the tribes' motion.

In any event, it would have been reasonable for the courts in *Catskill* and *Menominee* to have reasoned that to the extent that the United States is deemed to be a "person" within the meaning of FRCP 45, that an Indian tribe would be a "person" subject to FRCP 45. Even if those courts concluded that the United States is not a person within the meaning of the rule, that result would not necessarily advantage the tribe for the same reason, because the sovereignty of an Indian tribe is not congruous with that of the United States or a state.

As to the second issue, the courts in *Catskill* and *Menominee* must analyze whether they had jurisdiction, in the first instance, to issue the subpoena for testimony and/or documents. Jurisdictional analysis is required because the tribal immunity defense is jurisdictional in nature. Moreover, the Supreme Court has made clear that a court's subpoena power cannot exceed its jurisdiction. Here, a side point should be made. Jurisdiction over the parties and the subject matter

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must be established by the court when an action is commenced in federal court. By the time a discovery subpoena is issued to a non-party, the court has already determined that jurisdiction is proper. However, that determination would not likely have included an analysis as to whether the court has jurisdiction over the Indian tribe who has either intervened in the underlying action under FRCP 24, or moved the court for a protective order under FRCP 26(c)(1), or moved to quash or modify a subpoena under FRCP 45(c)(3)(A), by making a special appearance limited to that motion.

Another consideration courts must address is “who” brought the motion: A party, a non-party Indian tribe, or both. This issue raises important considerations because in some federal circuits, if a party serves and files a motion to compel the United States to comply with a FRCP 45 subpoena, that party implicitly seeks to compel the sovereign United States to perform, i.e., to comply with the subpoena. In this instance, the sovereign immunity of the United States is implicated, as this is a motion for substantive relief, and, if no immunity waiver applies, immunity will divest the court of jurisdiction to enter an order compelling the United States to comply with the civil process.

In Catskill and Menominee, the Indian tribes asserted the motion to quash or modify the subpoena based on tribal immunity and the party on whose behalf the subpoena was issued defended that motion. In both cases, there was no pending motion from a party to compel the Indian tribes to do anything. Accordingly, immunity doctrine issues in the context of compelling the Indian tribes to act or

296. The party who issued the Rule 45 subpoenas in Catskill and Menominee did not move to the court to enforce the subpoenas, likely out of concern that application of tribal immunity might defeat the motion on jurisdictional grounds. See Catskill Dev. v. Park Place Ent. Corp., 206 F.R.D. 78 (2002); U.S. v. Menominee Tribal Enters., 2008 WL 2273285 (E.D. Wis. June 2, 2008).
297. See e.g. COMSAT Corp. v. Natl. Sci. Found., 190 F.3d 269, 277 (4th Cir. 1999).
299. U.S. v. Sherwood, 312 US 584, 586-88 (1941); Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989); Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1244 (8th Cir. 1995).
300. Or, in the alternative, moved for a protective order pursuant to FRCP Rule 37 (3)(b). See 206 F.R.D. at 84; 2008 WL 2273285 at *1.
301. Id.
refrain from acting would not have arisen, and the court would not have had to address the tribal immunity issue. On the other hand, if the courts in Catskill or Menominee had decided the tribal motions on one of the four grounds set out in FRCP 45(c)(3)(A) and denied the tribe’s motion, the tribal immunity issue might have reappeared if the person ordered to give deposition testimony failed to show up at her or his deposition, and the party who served the subpoena sought a contempt order from the court. The Indian tribes who brought motions to quash would likely assert that any order to compel it or its official to perform is barred by tribal immunity, relying on federal case law holding that under immunity, the sovereign cannot be compelled to perform.\textsuperscript{303}

Ultimately, it is likely that the Catskill and Menominee courts would have had to address the tribal immunity issue head on. That would mean analyzing the scope of tribal immunity within the context of FRCP 45 as well as a construct of federal common law, based on considerations of public policy, and subject to limitations in ways appropriate to a dependent domestic nation, and possible abrogation by Congress.\textsuperscript{304} Additional considerations might include the Supreme Court’s comment that Indian tribal immunity developed “almost by accident,”\textsuperscript{305} and the Court’s determination that it no longer considered the immunity possessed by the United States and an Indian tribe to be congruous.\textsuperscript{306} To the extent the courts in Catskill and Menominee would have had to determine the application of tribal immunity, the Supreme Court’s recent molding and re-shaping of the federal common law immunity doctrine, as it applies to the Indian tribes,\textsuperscript{307} likely would have raised serious doubt as to whether tribal immunity

\textsuperscript{303} Larson v. Dom. & For. Com. Corp., 337 U.S. 682, 704 (1949) (“For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act.”).


\textsuperscript{305} Kiowa, 523 U.S. at 756.


\textsuperscript{307} See supra discussion at Part V, Sec. A, B.
accorded Indian tribes the same protection from third-party process that the United States would obtain, for example, in the Fourth Circuit.\footnote{308}

As Rule 45 was to be "so simple that it did not need any discussion," the drafters never contemplated that the United States would claim to be exempt from the rule.\footnote{309} When the issue arose, commentators believed that the United States was a "person" within the meaning of Rule 45.\footnote{310} While the Supreme Court determined that the United States was subject to the FRCP when it was a party to actions in federal court, it never addressed the issue within the meaning of FRCP 45.\footnote{311} Although the issue has recently reverberated in a number of federal circuits, the Court has not had the opportunity to resolve the issue; accordingly, there is a split in the approaches taken in circuits that have addressed the issue. Notwithstanding the different approaches, sovereign immunity is not a bar if the enforcement proceeding arises from judicial review of an agency decision.\footnote{312} To the extent the issue is brought to the court under FRCP 45, the courts that have addressed it resolve it by deeming the rule to be merely procedural instead of substantive. In this way, immunity was not implicated. While no federal court has addressed the issue of the application of FRCP 45 to federal process directed at Indian tribes and tribal officials, it seems reasonable to believe that the court would follow the foregoing line of analysis.

D. THE RULE APPLICABLE TO DEPOSITIONS OF HIGH RANKING GOVERNMENT OFFICIALS

High ranking government officials are considered to be in a class of persons to whom federal courts apply a presumption against sitting for deposition. In United States v. Morgan, the Supreme Court applied this reasoning to prevent invasion by litigants into the mental processes of such officials by way of deposition.\footnote{313} Federal courts apply a

\footnote{309. See Yousuf v. Samanter, 451 F.3d 248, 250 (D.C. Cir. 2006) (quoting ABA, supra n. 161.).}
\footnote{310. Id. at 257.}
\footnote{312. Yousuf, 451 F.3d at 251.}
\footnote{313. U.S. v. Morgan, 313 U.S. 409, 422 (1941) (comparing government officials to...
general rule that prohibits depositions of high ranking government officials "absent extraordinary circumstances." The rule implicitly requires a court to make a factual finding that the person objecting to the deposition is "high ranking" and a "government official." As is explained more fully below, courts also scrutinize the information possessed by that official and assess whether it could be obtained from some source other than the official. If the information is available from another source, the court will quash the deposition subpoena issued under FRCP 45. When the information is

judges. "It was not the function of the court to probe the mental processes of the secretary." (quoting Morgan v. U.S., 304 U.S. 1, 18 (1938)).

314. See U.S. v. Morgan, 313 U.S. at 422 (taking issue with a lower court order requiring the U.S. Secretary of Agriculture to sit for deposition); Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982) (affirming district court order vacating deposition notice to Governor of Missouri on the ground that the common law doctrine of "qualified immunity protected him from deposition absent a showing by plaintiffs of specific need. Plaintiffs failed to show that Governor Bond possessed information which was essential to plaintiffs' case and which could not be obtained" from other persons (citing Halperin v. Kissinger, 606 F.2d 1192, 1209-10, n. 120 (D.C. Cir. 1979) ("Where a showing of need has prevailed over a broad claim of privilege, a District Court might be well advised to require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high-level officials.").); In re U.S., 985 F.2d 510, 512-13 (11th Cir. 1993) (granting writ of mandamus to quash deposition subpoena issued to non-party Commissioner of Food and Drug Administration on the grounds that the case "does not present extraordinary circumstances or a special need for the Commissioner's testimony."); Simplex Time Recorder Co. v. Sec. of Lab., 766 F.2d 575, 586 (D.C. Cir. 1985) (relying on Morgan that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."); Peoples v. U.S. Dept. of Agric., 427 F.2d 561, 567 (D.C. Cir. 1970) ("Subjecting a cabinet officer to oral deposition is not normally countenanced."); see also In re Off. of Inspector Gen., 933 F.2d 276, 278 (5th Cir. 1991) (applying D.C. Circuit standard in Simplex to judicial enforcement of administrative subpoena); Kyle Engr. Co. v. Kleppe, 600 F.2d 226, 231-32 (9th Cir. 1979) (citing Peoples in affirming district court order vacating deposition notice targeted at the administrator of the Small Business Administration).

315. Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether, and absent extraordinary circumstances, such an order would likely be in error.")

316. U.S. v. Morgan, 313 U.S. at 422; Sweeney v. Bond, 669 F.2d at 546 (quoting Sweeney v. Bond, 519 F. Supp. 124, 129 (E.D. Mo. 1981); Capitol Vending Co., Inc. v. Baker, 36 F.R.D. at 45-6 ("If the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency or any litigation between private parties which may directly involve some activity of the agency, we would find that the heads of government departments... would be spending their time giving depositions and would have no opportunity to perform their functions.").
not available from another source, the court will generally allow the deposition to proceed, but may protect the official as set out in FRCP 45(c).

The prohibition of depositions of high ranking government officials is not automatic. Courts take a close look at the facts of each case before deciding whether to allow the deposition to proceed. Federal courts place the burden of proof on the party seeking to take the deposition to show “extraordinary circumstances.” Federal district courts have approached the issue the same, regardless of whether the subpoenaed official is a non-party or an official of a party to the underlying litigation. As discussed above in Part VI, Section B, to resolve whether extraordinary circumstances exist, some courts require the party objecting to the subpoena to bring forth facts sufficient to establish entitlement to relief under Rule 45(c)(3)(A) or FRCP 26(c) or 37. Other courts apply some variation of the rule emanating from Morgan. Still yet, some federal district courts apply a circuit wide standard, while others seem to have just created a general standard.

318. Salter, 593 F.2d at 651.
319. Id.
320. Id.
322. See Fed. R. Civ. P. 26(c), 37, 45(c)(3)(A).
323. See Simplex Time Recorder Co. v. Sec. of Lab., 766 F.2d 575, 586 (D.C. Cir. 1985) (“[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.”); accord In re Off. of Inspector Gen., 933 F.2d 276, 278 (5th Cir. 1979) (concerning judicial enforcement of administrative subpoena) (citing Simplex, 766 F.2d at 586).
The next section applies the general rule that federal courts use to determine whether to allow a deposition of a high ranking government official to the facts in *Catskill* and *Menominee*.

E. CONSIDERATION OF WHETHER THE SUBPOENAED PERSON IS A "HIGH RANKING GOVERNMENT OFFICIAL"

As the party moving to quash or modify the subpoena, the Indian tribes in *Catskill* and *Menominee* had the burden of proof as to the
status of the person targeted for deposition testimony. In other words, the tribe's moving papers had to set forth sufficient facts to establish that the subpoenaed person is a high ranking government official of a federally recognized Indian tribe.

In *Catskill*, deposition subpoenas were issued to two tribal members (each of whom was a member of the tribe's gaming authority), two of the tribe's attorneys, and the tribe's executive director. The *Catskill* court merely assumed the two members of the gaming authority were tribal officials, despite a tribal court ruling to the contrary. It also assumed the tribe's executive director was a tribal official and did not specifically discuss the issue with respect to the two non-member attorneys. In *Menominee*, a deposition subpoena was issued to a tribal member who was, at the time of service of the subpoena, an elected member of the tribal legislature. Like *Catskill*, the *Menominee* court did not analyze whether the subpoenaed individual was a tribal official. Moreover, neither court made any factual determination that a "tribal official" is a "high ranking government official" for the purpose of analyzing whether the depositions should be quashed or modified.

The question of the status of the subpoenaed person raises an issue of applicable law. None of the subpoenaed persons in *Catskill* or *Menominee* held a position under federal or state law, so these courts should have looked to the law of the respective Indian tribe to support the rule of decision. Seemingly, whether a position on a gaming authority board is "high ranking" depends on tribal law provisions with respect to the legal authority of the board and how members are selected. If the tribe's gaming authority is created pursuant to tribal law, and a member of that body is elected by the eligible voters of the

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327. *Catskill*, 206 F.R.D. at 81, 84.
328. The court never defined the term "tribal official," which is important with respect to the court's immunity analysis. *Id.* at 86 n. 6.
329. *Id.* ("For purposes of this motion I will assume that Ransom and Smoke are officials of the Tribe. I note, however that the Tribal Court ruling currently being appealed by Park Place found that the chiefs are not the leaders of the Tribe, and therefore may not be officials of the Tribe." (citations omitted)).
330. *Id.* at 90-91.
333. This approach would fulfill the Congressional policy of nurturing the development of Indian self-government. *Supra* n. 232.
tribe (or appointed by the elected officials of the tribe pursuant to the tribe's constitution or statutes),

that would seem sufficient to deem the position of a gaming authority member as "high ranking." To the extent a federal court would conclude that a person holding a similar position under federal, state, or municipal law to be high ranking, then a federal court should likewise determine that membership on a tribe's gaming authority is "high ranking." The same analysis applies to the position of tribal legislator. If a person elected by the voters in a federal, state or municipal election to the office of a senator, congressman, or municipal council member is considered to be "high ranking," then likewise a person elected by the eligible voters of the tribe as a tribal legislator should be considered "high ranking." However, the issue could become more fact sensitive when it involves the position of executive director, and is not an elected or appointed position for a fixed and specific term, and does not involve making policy decisions, like a member of the gaming authority or a tribal legislator.

Under this analysis, the two members of the tribe's gaming commission in *Catskill* were not "high ranking" tribal officials. At the time of the court's ruling on the motion, it had knowledge that the tribal court had ruled that these two individuals were not the leaders of the tribe and therefore not tribal officials, let alone "high ranking" tribal officials. The court's decision to ignore the tribal court's final decision is also puzzling, even if that decision was then on appeal. The court's decision as to the tribe's executive director is also curious.

Courts routinely make decisions based on facts, not assumptions, and the court should not have assumed that a tribal official, whether a member of the gaming authority or an executive director, is a "high ranking" tribal official. The court in *Menominee* accepted the tribe's reasoning that the tribal legislator position is "more akin to the position of the Executive Director" in *Catskill.* This conclusion seems wrong because, in a democracy, a legislator is unquestionably elected

334. The tribal statute at issue could be a federally-approved tribal statute pursuant to the tribe's federally-approved constitution under 25 U.S.C. § 476(a) (2006). The existence of this fact should enhance the likelihood that a federal court looks to tribal law to provide the rule of decision.


336. *Id.* at 90-91.

to a law-making position, while an executive director position is more akin to an administrator, a position that implements rules and regulations.

An additional consideration of the status issue is temporal. If the court had focused on the status of the subpoenaed person at the time of the facts giving rise to the issues in the case, it would have determined that the tribal legislator was not a tribal legislator at the time she consented to be interviewed by a federal investigator, and accordingly, she was merely a fact witness not entitled to hide behind her status as a “high ranking” tribal government official.338

The next part of the “high ranking” government officials test looks at the information possessed by the subpoenaed person. Here, courts look to determine whether the information sought from the subpoenaed person can be obtained from some other source or whether that person has firsthand information related to the underlying dispute.

F. CONSIDERATION OF THE INFORMATION POSSESSED BY THE “HIGH RANKING GOVERNMENT OFFICIAL” OR CORPORATE EXECUTIVE

With respect to high ranking tribal government and corporate officials, I advocate assessing the interest of the tribe or its corporate entity in the outcome of the underlying litigation. This section considers how courts apply the general rules for deposing high ranking government officials and corporate board members and executives.

The courts in Catskill and Menominee did not take a hard look at the information possessed by the subpoenaed persons. To recap this aspect,339 the court in Catskill ordered the two members of the tribe’s gaming commission340 to sit for deposition341 because they were


339. See supra Part II.

340. The court in Catskill did not consider whether the tribe’s gaming commission members were more like legislators or corporate board members. See Catskill, 206 F.R.D. at 86-91. The distinction is important because a different test applies when a non-party corporate board member or executive, or tribal attorney, is served federal process instead of the test for high ranking government officials. As to corporate board members and executives, the court should apply a principle of proportionality reflected in Fed. R. Civ. P. 26(b)(2) to quash or delay a noticed deposition or request for
signatories to the contract at issue in the litigation, a contract that contained a waiver of immunity provision. In Menominee, the court made passing references to the role the tribal legislator played in the federal investigation that led to the claims at issue in the litigation. But the court never explained why a person who consented to be interviewed by a federal investigator was not a person who possessed first-hand knowledge of matters relevant to a party’s claims or defenses.

The common factual thread between the two gaming authority members in Catskill and the tribal legislator in Menominee is that all three persons possessed first-hand knowledge of matters relevant to a party’s claims or defenses. The common legal thread between the two cases is that both courts found that any tribal immunity that existed had been waived. Moreover, the court in Catskill acknowledged that without deposing the two gaming authority members, no

documents from a corporate board member or executive whose role in the transaction is limited. See e.g. Lewelling v. Farmers Ins. of Columbus, Inc., 879 F.2d 212, 218 (6th Cir. 1989) (chairman of the board and CEO who lacked personal knowledge about the facts of the case); Pamida, Inc. v. E.S. Originals, Inc., 281 F.3d 726, 730-31 (8th Cir. 2002) (reaffirming Shelton in the context of pending litigation); Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) (“We do not hold that opposing trial counsel is absolutely immune from being deposed. We recognize that circumstances may arise in which the court should order the taking of opposing counsel’s deposition.”); Thomas v. IBM, 48 F.3d 478, 482-84 (10th Cir. 1995) (chairman of the board who had no personal knowledge about the employee who brought an age discrimination claim).

alternative source of information was available. With respect to an alternative source, the court in Menominee relied on the defendant's access to the federal investigator's interview report. However, it is relevant to know whether the tribal legislator made exculpatory statements to the investigator that he omitted from the report; and the only way to learn that information would be to depose the tribal legislator.

Lastly, by failing to make the distinction between whether testimony was sought from a non-party fact witness who was an Indian tribal governmental official, officer, or employee, or a truly disinterested non-party Indian tribal governmental official, officer, or employee, the Catskill and Menominee courts wrongly granted an overly broad testimonial exception not necessarily enjoyed by federal officials, officers, or employees. That result denied a party access to non-privileged matters relevant to a party's claim or defense, a procedural protection recognized by FRCP 26(b).

G. CONSIDERATION OF THE INTEREST OF THE TRIBE AND THE "HIGH RANKING TRIBAL GOVERNMENT OFFICIAL"

The interest of the Indian tribe should be a key inquiry in applying the general rule because, as we have seen in Bishop Paiute and Catskill, the underlying litigation involved the tribe's corporate activities, but not its governmental functions. Accordingly, the tribe might have motivations that are otherwise not present when federal process is targeted at high ranking government officials and the court should consider such motivations in determining the outcome of the tribe's motion.

It is particularly troubling that the courts in Catskill and Menominee never made an inquiry into whether the Indian tribe or subpoenaed person had any substantial interest in the outcome of the litigation. Notions of fundamental fairness are implicated if a federal court sits idly by while a person moves the court to modify or quash a subpoena, the outcome of which could deprive a party to the underlying case of non-privileged information relevant to her or his

347. Catskill, 206 F.R.D. at 89 n. 9.
348. Menominee, 2008 WL 2273285 at *14. The court ignored the obvious fact that the federal investigator exercised complete discretion as to what he would include and exclude in the report. See id.
claim or defense. But, that is the natural consequence of a court’s
decision, and this result should be unacceptable if it permits someone
with a direct personal interest in the outcome or one aligned with the
 subpoenaed party to withhold critical information from a party.

Here, the courts in Catskill and Menominee failed to make a
careful inquiry into the interest of the respective Indian tribes in the
outcome of the litigation.350 In Catskill, the record before the court
clearly indicates that the tribe had a “substantial individual interest” in
the outcome of the case351 If the tribe could succeed in preventing the
depositions of the two tribal gaming officials and the tribe’s executive
director, thereby also escaping production of the documents, the
defendant would not have access to information it asserted was
necessary to support its defenses. In this circumstance, the “public
interest in the search for truth” likely outweighed the Indian tribe’s
interests to enhance the probability that its corporate entity would
prevail in the outcome by keeping the defendant from accessing
information to support its claim.352 The tribe in Menominee had an
interest in the outcome of the litigation, as well. The court record
shows that the tribe was actively engaged in the federal investigation
against the defendants through written and oral communication with
federal employees and investigators.353 The court admonished the
tribe for its underhanded tactics of feeding information to federal
investigators, while hiding behind the shield of immunity when the
defendants sought to discover information from the tribe.354

In sum, application of the various tests to the facts in James,
Bishop Paiute, Catskill, and Menominee demonstrates that tribal
immunity was put at risk to achieve a limited objective. The next part
takes a hard look at the immunity issue.

350. This careful look should have included an analysis of the facts related to the
interest of the subpoenaed person in the outcome of the underlying litigation. See
Catskill, 206 F.R.D. 78; Menominee, 2008 WL 2273285.
351. Catskill, 206 F.R.D. at 83 (describing the scope of the Indian tribe’s business
relationship with plaintiff Catskill Development and defendant Park Place
Entertainment).
2, 2008).
354. Id. at *12.
VII. THE DISCOVERY IMMUNITY EXCEPTION UNDERMINES AMERICAN INDIAN TRIBAL SOVEREIGNTY

A. APPLICATION OF THE DISCOVERY IMMUNITY EXCEPTION HAS ADVERSE IMPLICATIONS FOR LITIGANTS

The courts in *James*, *Catskill* and *Menominee* simply got it wrong. In civil federal matters, the test as to whether to allow the deposition of a high ranking government official does not implicate any substantive right or policy embedded in the doctrine of immunity as applied to suits against the United States or a state. While immunity may be implicated when a high ranking government official has been sued in her or his official capacity, absolute immunity is not necessarily a defense to liability, nor is qualified immunity available to shield an official from otherwise valid federal civil process, aside from in limited situations.

The discovery immunity exception, as currently applied in the federal courts, is problematic. The court in *James* failed to apply the traditional balancing approach articulated in *Bryan*, which weighs an individual's interest against that of the public interest to determine whether to enforce civil process against third-parties. The courts in *Catskill* and *Menominee* failed to apply the test used within the federal district in which each court sits, failed to properly apply tribal

357. See *Nixon*, 418 U.S. at 706 (acknowledging the existence of a privilege, but only for confidential conversations between a president and her or his close advisors); *U.S. v. Reynolds*, 345 U.S. 1, 6-7, 10-11 (1953) (recognizing a limited privilege based on military secrets); *U.S. v. Morgan*, 313 U.S. 409, 422 (recognizing a privilege for mental processes of administrative decision-makers).
359. Reliance on tribal immunity is problematic for another reason. When the tribe makes a special appearance to assert a motion that essentially seeks to quash federal process on the ground of immunity, it is difficult to understand how a court’s decision on the motion translates into a ‘judgment,’ which is the lynchpin to the purposes served by application of the immunity doctrine. That is, to prevent a suit leading to a judgment that would “expend itself on the public treasury or domain, or interfere with the public administration” or if the effect of the judgment would be ‘to restrain the Government from acting, or to compel it to act.’ *See Dugan v. Rank*, 372 U.S. 609, 620 (quoting *Larson v. Dom. & For. Corp.*, 337 U.S. 682, 704 (1949) (citing *Ex Parte*
immunity as a construct of the federal common law, and failed to weigh whether the federal public policy of supporting the development of Indian self-government outweighs the public's interests in the search for the truth. To make matters worse, neither court offered any rationale as to why the tests currently applicable to process served on high ranking government officials should not have applied, or why it might be necessary for a different test to apply to Indian tribal officials than is applied to civil process targeted toward the United States government officials.

The FRCP discovery rules exist for a purpose: To allow parties to obtain non-privileged matters relevant to their claims and defenses. Application of the discovery immunity exception not only prevents a party from access to that information, but it creates a huge hole in FRCP 26(b)(1) as it carves out an immunity-based exception that applies only when that information is sought from a non-party who is either an Indian tribe, tribal agency, tribal official or employee. Because a tribe's corporate entity shares tribal immunity with its corporate officers and employees, the result from application of the discovery immunity exception is even more troubling. Any other federally chartered corporation, along with its officers and employees, likely would not be shielded from performance, as required by the subpoena, by the sovereign immunity possessed by the United States. Furthermore, application of the discovery immunity exception can provide a patently unfair advantage to one of the parties, particularly if that party is the United States or a federal agency.

For example, take the fact patterns in James and Menominee, where the tribes voluntarily produced tribal government data and records to federal investigators without disclosing that fact to the target of the federal investigation. At some point in a similar litigation, following an investigation that produces facts sufficient to commence the underlying cause of action, the target (or defendant at this point) is likely to learn from documents produced by the government or


deposition testimony in a civil matter, that the government has been in possession of the tribal data and records and statements at issue for some time and only then recently disclosed it to defendant's counsel. In a civil matter, the government's disclosure of the tribal data, records and statements, provided earlier from a tribal official, is not only non-privileged matter, but seemingly very relevant to the defendant's argument. If that matter was neither privileged nor relevant, the government would not have produced it to the defense, as federal prosecutors would be under no obligation to produce it under FRCP 26.

As discussed earlier, the district court in *James* concluded that the tribe did not waive immunity with respect to documents possessed by the tribe's social services. 361 The Ninth Circuit affirmed, reasoning that the tribe had an "increased privacy interest" to protect. 362 This is simply nonsense. Tribal officials produced the documents to federal investigators. Obviously, the tribal officials never thought the tribe had an interest to protect; otherwise, those documents never would have been produced to the investigators absent a subpoena. Furthermore, while the *Menominee* court rejected application of immunity, determining that immunity had been waived, to the extent that it applied, under the circumstances of the case, the court nevertheless determined that a fact witness—who voluntarily agreed to be interviewed by a federal investigator and who communicated in writing to federal agency employees about matters under investigation—need not sit for deposition about the very statements she made to the investigator, her oral communications with the federal employees, and the substance of her written communications to them. 363 In sum, the result reached by the courts in *James* and *Menominee* simply does not have the appearance of fairness with respect to the defendants' right of access to non-privileged matter relevant to their defenses. But for the courts' consideration of the discovery immunity exception, each court might have reached a different conclusion.

361. *See supra* at Part II, Sec. A.
362. *James*, 980 F.2d at 1320.
B. APPLICATION OF THE DISCOVERY IMMUNITY EXCEPTION HAS POTENTIALLY ADVERSE COMMERCIAL IMPLICATIONS FOR INDIAN TRIBES

Counsel representing non-Indian commercial interests will immediately recognize the risks raised by implications of court decisions applying the discovery immunity exception for any potential business transaction involving an Indian tribe or tribally-controlled entity. Worst case scenario, the mere fact that this issue looms in the distance as an obstacle to an enforceable dispute resolution regime might be sufficient to bring negotiations between the non-Indian and Indian parties to a standstill. Best case scenario, the business transaction is consummated, but the cost of doing business with the tribe becomes more expensive, and the tribe will be the party bearing that increased cost.

With respect to dispute resolution, there is little reason to doubt that counsel representing non-Indian commercial interests should be keenly aware that the potential for application of the discovery immunity exception would likely have real life negative practical implications, particularly when their client could find itself embroiled in a dispute to which it has no real interest.364 The mere existence of the exception also sends the wrong message to those who might want to engage in commercial activities with Indian tribes and understand that the possibility of litigation is a fact of life and information needed to support a claim or defense is possessed by parties and non-parties alike. The message to counsel for these interests is that the FRCP discovery rules might not provide the normal predictability for litigation or arbitration of disputes that counsel was taught in law school. The result is that for commercial interests, disputes that might not be only commercial in nature may implicate questions of tribal immunity as well, which adds far greater complexity, uncertainty, and expense than a garden variety commercial or discovery dispute.

The possibility for application of the discovery immunity exception must be eliminated. The advent of Indian gaming and the search for renewable resources on Indian lands suggests that commercial transactions in Indian Country are diverse, often worth millions of dollars, and can be expected to continue to grow. In addition to gaming, commercial activities in Indian Country are likely

364. E.g. Catskill, 206 F.R.D. at 85-6 (third-party subpoena duces tecum issued to non-party bank.).
to increase in the area of energy development on Indian land, such as energy generated by biomass, wind, oil, gas or coal, and in infrastructure development projects, such as the construction of schools, medical clinics, community centers, wastewater treatment facilities, and roads.\textsuperscript{365} Such commercial activity is bound to impact the economic vitality on the Indian reservation, within the adjacent local and regional economies, and in the state in which the commercial activity occurs.

If the past is any indicator of the future, increased commercial activity between Indian tribes, their tribally-controlled entities and non-Indian commercial entities will produce a significant number of contract disputes to which deposition testimony, as well as documents, will be sought from third-party elected and appointed officials of Indian tribes. Even commercial agreements that provide for resolving disputes through mediation or arbitration will be impacted by the possible application of the discovery immunity exception as access to documents and statements is an integral part of any dispute resolution procedure, be it litigation, medication, or arbitration. With respect to litigation or arbitration, the predictability of process normally afforded litigants by the discovery provisions of the FRCP seems to disappear when parties litigating commercial disputes seek documents or electronically stored information from an Indian tribe or a tribal business or to depose tribal officials and employees due to the possibility of an immunity claim. No doubt, discovery disputes abound in civil litigation, but discovery disputes wrapped in questions of Indian tribal sovereignty and tribal immunity add far greater complexity, uncertainty, and expense than garden variety discovery wrangling. The potential for application of the discovery immunity exception should not become an obstacle to increased economic activity in Indian Country.

Counsel representing Indian tribes will also immediately perceive the implications of asserting tribal immunity in an effort to quash or modify federal process. Given that Congress has taken no action to provide a statutory foundation for tribal immunity in light of the Court’s concerns in \textit{Kiowa}, any assertion of tribal immunity in the

context of quashing or modifying federal process just might put into play an opportunity for the Court to simply abrogate the immunity doctrine.

Here, it is important to make my position clear. I think tribal immunity continues to be a relevant and useful doctrine for Indian tribes when they are hauled into a federal or state court to defend some action in circumstances where an adverse judgment would seriously impact the tribal treasury or interfere with normal administration of services to tribal members. Furthermore, I believe tribal immunity is too important to risk the possibility of abrogation of what remains of the doctrine by using it under marginal circumstances, especially given the possibility that the doctrine would be the only viable defense to a lawsuit in a federal or state court arising from some catastrophic event (such as a major personal injury or consumer fraud case) that could bring financial ruin to the tribe as a government.

To put it simply, the costs of exercising tribal immunity to defeat otherwise valid federal process in the face of the threat of abrogation of the doctrine far outweighs any short-term benefit to be gained by refusing to produce some document or by objecting to a litigant’s access to first-hand non-privileged information relevant to a party’s claim or defense. As a practical matter, reliance on tribal immunity puts the courts of Indian tribes outside of the American judicial family as tribal immunity ignores the fact that all courts, including tribal courts, should have the same policy interests, i.e., guaranteeing litigants access to records and witness testimony. Moreover, reliance on tribal immunity sends the wrong message to federal and state courts. That is, that the tribe’s judicial policies do not include assisting litigants in the search for the truth, or that tribal courts have no interest in cooperative working relationships and recognition of authenticated records and judicial proceedings with the federal and state courts. The potential for either outcome is a result that Indian tribes should want to avoid.

In sum, businesses like stability, reliability, and predictability in commercial activity and the presence of Indian sovereignty and tribal immunity are threats to these concepts and increase the cost of doing business. Notions of sovereignty and tribal immunity unnecessarily create impediments to economic activity and commercial relationships as it poses a threat to the tribe’s ability to create a successful business climate in Indian Country. Furthermore, such concepts undermine tribal sufficiency and economic development, which are the very underpinnings of tribal self-government. Given this reality, an
environment of certainty and predictability of civil process and procedure is an essential feature of a good business climate for commercial transactions in Indian Country. It also aligns a tribe’s judicial system with the federal and state courts on an important judicial policy issue. The discovery immunity exception, though a well intentioned attempt to protect Indian tribes, instead undermines tribal self sufficiency and economic development which are not only the very underpinnings of tribal self-government, but are also the federal policy aimed at promoting the development of strong and stable tribal governments.

C. INDIAN TRIBES CAN REVERSE EROSION OF SOVEREIGNTY BY EMBRACING THE RULE OF LAW

Commentators in Indian law have routinely decried the erosion of sovereignty and tribal immunity in the aftermath of Supreme Court decisions between 1977 and 2001. I agree with these commentators. But tribal leaders and counsel for Indian tribes might want to consider the purpose for which tribal government exists, particularly in the context of economic activity, and further determine whether the tribe’s economic policies and practices might be overshadowing the tribe’s governmental interests. Such an assessment could reveal that the tribe’s interests are not always aligned with its economic interests. With respect to the discovery immunity exception, tribes might realize that adopting public policies and laws that embrace concepts of open government and public access to government data, but preserve the option for classifying government information as privileged or otherwise protected, particularly private data on individuals, better advances the tribe’s interests than following the approaches employed by the tribes in James, Bishop Paiute, Catskill, and Menominee. In this way, Indian tribes could use tribal law instead of tribal immunity to resolve the issue; and by doing so, enhance Indian sovereignty and implement Congress’ policy towards Indian tribes.

Moreover, Indian tribes have a significant interest in developing their judicial systems. Here, the tribal court has the same interest as a federal or state court, i.e., the tribal public’s interest in the orderly

operation of the judicial machinery. The federal public policy underlying the maxim that the public has a right to “every man’s evidence” is sound; Indian tribes and their counsel should embrace this maxim as sound tribal judicial policy. Moreover, tribal courts should adopt a rule that there should be few, if any, exceptions permitted to excuse a person from performing when properly summoned by a federal court. Adoption of such a rule would align tribal courts with their federal and state counterparts in ensuring that litigants have access to witness testimony and to non-privileged matters relevant to a party’s claims or defenses. Further, it would provide the legal mechanism for private litigants to rely on tribal processes to enforce their subpoenas, instead of the federal courts.

To the extent tribal law can provide the rule of decision as to whether the tribe or its high ranking tribal officials must respond to the federal civil process, federal courts have a unique opportunity to follow Congress’ lead in nurturing the development of Indian self-government. In this instance, federal courts should require the Indian tribe to exhaust tribal remedies—within a reasonable period of time—and inform the federal court as to whether the law of the Indian tribe is such that the tribe or its high level officials must comply with the federal civil process. If the tribal court’s decision is in the negative, the federal court could then take a hard look at the relevant facts and law and resolve the tribe’s motion under FRCP 45(c)(3)(A) standards, if possible, and if not, to then apply the Bryan balancing approach. To the extent a non-party Indian tribe moves a federal court for an order quashing or modifying an FRCP 45 subpoena for testimony or documents and the legislative branch of that tribal government has failed to enact a law setting out procedures for public access to testimony from tribal government officials or for tribal agency records and data, a federal court should apply FRCP 45(c)(3)(A) to resolve the issue.

In the alternative, federal courts are almost certain to continue to provide Indian tribes with no comfort with respect to federal process

368. The federal court would benefit from the factual record developed by the tribal court. See e.g. Natl. Farmers Union, 471 U.S. at 856 (“Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed” by the federal court.).
for tribal government records, data or testimony when Indian tribes are not parties to an underlying action. Nor should Indian tribes rely on arguments that equate tribal immunity with the sovereign immunity of the United States or the states. It seems clear that while some tribal officials may qualify as “high ranking” government officials, it would be unwise to rely on federal case law to support arguments that such tribal officials should be excused from complying with otherwise valid federal process.

In the absence of Indian tribes taking bold action to control their own destiny within the parameters of United States law, the Bryan balancing approach might prove to be an acceptable safe harbor that some Indian tribes might seek. It is a test that is broad enough to consider the Congressional policy toward Indian tribes, that is, to promote the development of Indian self-government through the self-deterministic efforts of elected leaders of the respective Indian tribes. Equally significant, it would effectuate the purposes of the FRCP, that is, the just, speedy, and inexpensive determination of every action. This framework is fair and balanced. It accords proper respect to the status of an Indian tribe as a government within the American political system and to high-level tribal officials as governmental officials, as well as upholds the key principle of litigants’ right to discover “every man’s evidence” on which an adversarial system rests.

VIII. RECOMMENDATIONS AND CONCLUSION

Indian sovereignty is important to American Indian people. While the contours of the immunity emanating from Indian sovereignty has been diminished, absent a stable tax base and other dependable sources of revenue, governments for American Indian tribes can ill afford to lose whatever vitality remains in that doctrine. Any short-term benefit gained by application of the discovery immunity exception most certainly is offset by the inherent risk that the Supreme Court might abrogate tribal immunity in an appropriate case and that Congress will not enact legislation to provide statutory immunity.

The Congress of the United States and the various state legislatures have enacted policies and laws to support the public’s interest in the orderly operation of the United States’ judicial machinery. These laws authorize federal and state agencies to promulgate regulations providing for access to the public to government records and testimony from governmental officials and
employees. Such legislation exemplifies Congress' intent to move away from reliance on sovereignty and immunity. The time has arrived for American Indian governments to embrace the concept of American Indian public policy and the rule of American Indian law with respect to open government and public disclosure, including for the conduct of its employees, except in limited circumstances, like the government of the United States. By substituting the development of American Indian public policy and the rule of law in furtherance of Congress' policy in the place and stead of asserting tribal immunity, counsel for American Indian tribes can begin to make a substantive difference aimed at preserving and protecting Indian sovereignty for the people for generations to come.

Embracing policy and the rule of law will advance Indian tribal sovereignty. It will provide counsel for Indian tribes who litigate enforcement of federal process issues with new legal arguments to use in persuading federal courts to apply the law of the tribe as the rule of decision in these cases. In that context, counsel for Indian tribes would possess a new legal tool for reversing existing law or for establishing new law by moving federal courts to apply the law of the tribe as the rule of decision in such cases. To the extent Indian law creates a conflict of law problem, counsel can put forth cogent arguments (policy and otherwise) well grounded in federal law and policy in favor of application of the law of the Indian tribe. Where the elected legislators of an American Indian tribe decide to refrain from embracing public policy and the rule of law, counsel for those tribes could argue in the alternative, that the court should create a multi-part balancing test, along the lines of Bryan, to apply exclusively to Indian tribes. The sovereignty that Indian tribes possess, as a matter of federal common law, provides a sufficient doctrinal foundation to support this approach, particularly in the circumstance where a federal court determines that the existing test applicable to high ranking government officials is inconsistent with the current legal status of an Indian tribe. This approach can resolve the problem created by the discovery immunity exception and do so in a manner consistent with the United States' federal Indian policy.

Application of rule of law principles based on cogent public policy interests is a reflection of the importance that American Indian governments place on the concept of open government, among other purposes. It provides stability and nurtures the development of effective tribal governments, which, in turn, enhances the goal of inter-
governmental cooperation within the American political system. The more Indian tribes that embrace rule of law principles, the more likely federal and state governments and their judicial systems will be disposed to defer decision-making to permit the development of tribal governments, a policy objective Congress has long advocated. To the extent that the American Indian tribe's judicial system can play a "vital role" in the development of governmental structures in and for the citizens of an American Indian tribe,\(^{369}\) tribal legislators, with the help of counsel for the respective American Indian tribe, should be well positioned to help their client achieve that objective through development of policy and the rule of law.