

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO**

COMMONWEALTH OF PUERTO RICO

Plaintiff

vs.

UNITED STATES OF AMERICA;
ALBERTO R. GONZALES, in his Official
Capacity as U.S. Attorney General; ROBERT
MUELLER, in his Official Capacity as
Director of the Federal Bureau of
Investigation; HUMBERTO S. GARCÍA, in
his Official Capacity as United States Attorney
for the District of Puerto Rico; LUIS S.
FRATICELLI, in his Official Capacity as
Special Agent in Charge of the Federal Bureau
of Investigations in Puerto Rico;

Defendants

Civil No: 06-1305 (DRD)

ACTION FOR:

DECLARATORY JUDGMENT

and

INJUNCTIVE RELIEF

**PRELIMINARY MEMORANDUM OF LAW IN SUPPORT OF
THE COMMONWEALTH OF PUERTO RICO'S COMPLAINT AND REQUEST
FOR DECLARATORY AND INJUNCTIVE RELIEF**

TO THIS HONORABLE COURT:

Comes now Plaintiff, THE COMMONWEALTH OF PUERTO RICO
("Commonwealth"), through the undersigned attorneys, and respectfully STATES and
PRAYS as follows:

I. INTRODUCTION

On this same day, the Commonwealth has filed the instant action for declaratory
and injunctive relief, on the issue of defendants' arbitrary, unjustified, illegal and
unconstitutional refusal to disclose material information necessary for the completion of

the Commonwealth's ongoing investigation into the events allegedly leading to the injury of members of the press and/or the public, including but not limited to Mr. Valentín Quintana, on February 10, 2006, due to the alleged use of excessive force (including the alleged use of pepper spray) by FBI agents.¹ Given the fact that such suit addresses important constitutional issues of federalism, for the benefit of the Court, the Commonwealth files the present memorandum in order to briefly and preliminarily state its legal theory.

This is a suit seeking declaratory and injunctive relief to vindicate the Commonwealth's sovereign authority to enforce its criminal laws. The Commonwealth has ample power under the principles of federalism embodied in the United States Constitution to enact and enforce criminal laws pursuant to the police power reserved to the sovereign Commonwealth and States. This includes the power to investigate possible criminal behavior within its jurisdiction. Defendants cannot hide federal officers under a cloak of absolute immunity from prosecution under state criminal laws by refusing to comply with the Commonwealth's or the States' requests for information pursuant to criminal investigations.

Defendants' blanket and wholesale failure to comply with the Commonwealth's requests for information in this case, including their denial to provide even the names of the FBI agents and officials involved in the incident being investigated, constitutes an impermissible interference with the Commonwealth's sovereign power that requires this Honorable Court's immediate intervention. Thus, through the present action the Commonwealth seeks a judgment which: (i) declares that Defendants' actions are unjustified, arbitrary, illegal and unconstitutional violations of the Commonwealth's

¹ The instant memorandum is being served with the summons papers on the named defendants.

sovereign authority; and (ii) permanently enjoins Defendants from withholding any information relevant to the Commonwealth's investigation, and orders Defendants to comply with the Commonwealth's requests and produce the subpoenaed information, objects and documents.

II. DISCUSSION

A. The Commonwealth, like a State, can seek judicial intervention to vindicate its sovereign interests in the instant case and thus redress any impermissible federal interference with its sovereign authority to enforce its criminal laws and punish offenders.

A State has a judicially cognizable interest in the preservation of its own sovereignty. Bowen v. Public Agencies Opposed to Social Sec., 477 U.S. 41, 50 n. 17 (1986). Therefore, it has been recognized that States have a cause of action to vindicate their sovereign interests. Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d 31, 41-44 (1st Cir. 2002). See also, Printz v. U.S., 521 U.S. 898 (1997) (supporting a State's cause of action when the federal government violates their sovereignty).

Among the core components of a State's sovereignty is the ability to punish wrongdoers and enforce its criminal laws. Heath v. Alabama, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) ("States [have] sovereign power to punish offenders[.]"); U.S. v. López, 514 U.S. 549, 560 n. 3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'"); Texas Office of Public Utility Counsel v. F.C.C., 183 F.3d 393, 449 ("states have a sovereign interest in 'the power to create and enforce a legal code.'") (5th Cir. 1999); Margaret Meriwether Cordray, The Limits Of State Sovereignty And The Issue Of Multiple Punitive Damages Awards, 78 Or. L. Rev. 275, 306 (1999).

Federal agents are not exempt from the States' sovereign power to punish offenders. States have ample authority to enforce their own criminal laws and prosecute federal agents if they have acted unlawfully in carrying out their duties.² States ex rel. Drury v. Lewis, 200 U.S. 1, 7 (1906) (sustaining the authority of a state to prosecute an officer of the United States Army for an offense committed within the state); Idaho v. Horiuchi, 253 F.3d 359, 362 (9th Cir. 2001) vacated as moot 266 F.3d 979 (9th Cir. 2001)) ("federal officers [...] can be held accountable for violating the state's criminal laws."); City of Jackson v. Jackson, 235 F. Supp. 2d 532, 534 (S.D. Miss. 2002) ("a state may prosecute federal agents if they have acted unlawfully in carrying out their duties.").

In fact, it has been held that federal interference with a State's sovereign interest in punishing offenders and enforcing its criminal laws confers standing to sue in order to protect such interest. State of Alaska v. U.S. Dept. of Transp., 868 F.2d 441, 443 n. 1 (D.C. Cir. 1989) ("[a] States' sovereign interest in law enforcement is sufficient to support standing."); Engle v. Isaac, 456 U.S. 107, 128 (1982) (discussing "the States' sovereign power to punish offenders"); Wright & Miller, 13A Fed. Prac. & Proc. Juris. 2d § 3531.11 ("It is accepted that states have standing to protect [...] sovereign interests."); Maine v. Taylor, 477 U.S. 131, 137 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes."); Castillo v. Cameron County, 238 F.3d 339, 351 (5th Cir. 2001) ("[a] State has a sovereign interest in enforcing its laws."); Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1087 (D. Or. 2002) (recognizing standing to assert injury to sovereign interest); Maine v. Norton, 257 F. Supp. 2d 357,

² As it is known, in those cases, federal agents can assert a federal immunity defense. People of State of California v. Mesa, 813 F.2d 960, 965 n. 8 (9th Cir. 1987) ("federal immunity insulates a federal officer from state prosecution if the officer's acts 'are both (1) authorized by the laws of the United States and (2) necessary and proper to the execution of his responsibilities'").

374 (D. Me. 2003) (“Federal interference with this sovereign interest [in enacting and enforcing its own legal codes] is sufficient to confer standing”); Chiles v. Thornburgh, 865 F.2d 1197, 1208 (11th Cir. 1989) (“The state may assert an injury to its sovereign interest, that is its ability to exercise its power.”); State v. Bowsher, 734 F. Supp. 525, 536 (D.D.C. 1990) (“It is common ground that States have an interest, as sovereigns, in exercising ‘the power to create and enforce a legal code.’”).

Although Puerto Rico is not a State, its sovereign authority to enforce its criminal laws and punish offenders is unquestioned.³ U.S. v. Bonilla Romero, 836 F.2d 39, 42 n. 2 (1st Cir. 1987) (“Puerto Rico has been given such complete control over its local criminal affairs that it may freely prosecute criminal behavior under its own laws”); United States v. López Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) (“Puerto Rico’s status is not that of a state in the federal union, but, its criminal laws, like those of a state, emanate from a different source than the federal laws.”); People of Puerto Rico v. Shell Co., 302 U.S. 253, 262 (1937) (“the power to [...] enforce [its] laws [was] vested [in the

³ In this sense, the principles of the Tenth Amendment, which protects each State’s authority to enforce its own criminal laws within its territory, see Seth P. Waxman & Trevor W. Morrison, What Kind Of Immunity? Federal Officers, State Criminal Law, and The Supremacy Clause, 112 Yale L.J. 2195, 2206 (2003), Barry Latzer, The Decentralization Of Criminal Procedure: State Constitutional Law And Selective Disincorporation, 87 J. Crim. L. & Criminology 63, 123 (1996), are fully applicable to the Commonwealth of Puerto Rico. Similarly, the Commonwealth’s power to punish offenders and enforce its criminal laws is derived from its sovereign authority, which has been recognized in Public Law 600 of the 81st Congress, 64 Stat. 319 (1950), 48 U.S.C § 731b-731e (which was adopted “in the nature of a compact” to provide “for the organization of a constitutional government by the people of Puerto Rico”) and in Supreme Court and First Circuit precedent. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974) (“Puerto Rico, like a state, is an autonomous political entity, ‘sovereign over matters not ruled by the Constitution.’”). The First Circuit has clearly and unequivocally held that the Commonwealth of Puerto Rico enjoys sovereign immunity to the same extent as the States in an unbroken and consistent line of cases. See Jusino Mercado v. Puerto Rico, 214 F.3d 34, 39 (1st Cir. 2000) (citing a “phalanx of cases” in support of the Commonwealth’s sovereign immunity). In fact, the First Circuit has also applied Supreme Court precedent regarding the 10th Amendment rights of the States to Puerto Rico on at least two occasions. See Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841, 845-846 (1st Cir. 1982) and Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 700-701 (1st Cir. 1977) (apparently assuming application of 10th Amendment and National League of Cities v. Usery, 426 U.S. 833 (1976), to Puerto Rico) (these cases were disapproved of on other grounds by the Supreme Court due to the overruling of National League of Cities in García v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)).

Commonwealth.]”); Olson v. Vélez, ___ F. Supp. 2d ___, 2005 WL 3837507, *4 (D.P.R. 2005) (“The Commonwealth of Puerto Rico is considered a separate sovereign for successive prosecution purposes[.]”). See, also, Alfred L. Snapp v. Puerto Rico, 458 U.S. 592, 601-608 n. 15 (1982) (noting that a State has a sovereign interest in enforcing its criminal code and recognizing that the Commonwealth is similarly situated to a state for purposes of bringing suit under its *parens patriae* power). For a discussion of the *parens patriae* power, as a “far broader sovereign power”, see Com. of Mass. v. Bull HN Information Systems, Inc., 16 F. Supp. 2d 90, 96 (D. Mass. 1998).

Therefore, like a State, the Commonwealth can redress in federal court Defendants’ refusal to disclose material information that is necessary to conduct a local criminal investigation; a denial that constitutes an impermissible interference with the Commonwealth’s sovereign power to punish offenders and enforce its criminal laws.

- B. Defendants’ refusal to disclose material information necessary for the completion of a local investigation is unwarranted and constitutes an impermissible interference with the Commonwealth’s sovereign powers.

Contrary to defendants’ assertions, production of the information is warranted for the following reasons:

1. Defendants’ actions are not premised upon any federal regulation or statute.
 - (a) The regulations invoked by Defendants to deny the information do not create an independent privilege authorizing the United States Department of Justice (“USDOJ”) to withhold information.

The pinpoint regulation invoked by Defendants for their denial, 28 C.F.R. § 16.21 et. seq., is part of a broader regulation scheme commonly known as the Touhy

regulations, 5 U.S.C. § 301, as such regulations were adopted in light of the Supreme Court's decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

However, as even the federal government has acknowledged in past cases, “the regulations simply set forth administrative procedures to be followed when demands for information are received” and “**do not ‘create an independent privilege’ authorizing the Department of Justice to withhold information.**” Kwan Fai Mak v. FBI, 252 F.3d 1089, 1092 (9th Cir. 2001) (emphasis added); James T. O'Reilly, 1 Fed. Info. Discl. § 7:3 (2005) (“Records processing and disclosure rules of the Justice Department do not create substantive rights or an independent privilege authorizing disclosure.”); see, 28 C.F.R. § 16.21(d) (“This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and **does not**, and may not be relied upon to **create any right or benefit**, substantive or procedural, enforceable at law by a party against the United States.”) (emphasis added).

In other words, such regulations do not grant a substantive privilege to withhold information and merely “[spell] out the authority for executive officials to set up offices and file Government documents.” William Bradley Russell, Jr., A Convenient Blanket Of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege, 14 Wm. & Mary Bill Rts. J. 745-746 (2005). If an agency is to withhold documents it must do so by asserting a privilege created by law; which Defendants have failed to assert in the instant case. The confidentiality privilege that Defendants seem to derive from the regulation itself is nonexistent. The denial is, thus, unfounded.

- (b) The regulations invoked by Defendants to deny the information do not apply to a law enforcement request by the Commonwealth or a State, such as the one here in question.

Moreover, the cited regulations do not even apply to a law enforcement request by the Commonwealth or a State, such as the one here in question. See 28 C.F.R. § 16.21(c) (“Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.”).

Thus, contrary to Defendants’ assertions, the cited regulations do not establish a valid ground for denying the Commonwealth’s information request.

2. Even assuming that the cited regulations do purport to establish a valid ground for denying the Commonwealth’s or a State’s request for information pursuant to a criminal investigation, such administrative action would be *ultra vires* and well outside Congress’s intent and the authority granted to the Executive under the Housekeeping Act.

However, assuming, *arguendo*, that the regulations do purport to establish a valid ground for denying a state’s information request, made pursuant to its investigative powers, we must look into the statute that enables the Attorney General to enact such regulations and determine whether or not Congress intended to delegate such power to the agencies. It is beyond peradventure that “a reviewing court will only sustain regulations where it is ‘reasonably able to conclude that the grant of authority contemplates the regulations issued.’” NLRB v. Beverly Enterprises-Mass, Inc., 174 F.3d 13, 32 (1st Cir. 1999).

The Touhy regulations were enacted by virtue of the power delegated in 5 U.S.C. § 301,⁴ commonly known as the “Housekeeping Act” which states that:

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

⁴ See Fai Mak v. F.B.I., 252 F.3d at 1092 n. 3.

custody, use, and preservation of its records, papers, and property. **This section does not authorize withholding information from the public or limiting the availability of records to the public.** (emphasis added)

The Housekeeping Act has been described as a “relatively unimportant ‘housekeeping’ statute that grants the heads of federal agencies the power to make regulations for ‘the custody, use, and preservation’ of agency records.” William Bradley Russell, Jr., A Convenient Blanket Of Secrecy: The Oft-Cited But Nonexistent Housekeeping Privilege, 14 Wm. & Mary Bill Rts. J. 745 (2005). However, it does not grant any evidentiary privilege to federal agencies. Id. at 748; In re Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995) (“[5 U.S.C.] Section 301, however, is nothing more than a general housekeeping statute and does not provide “substantive” rules regulating disclosure of government information.”); Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 778 (9th Cir. 1994) (holding that the Housekeeping Act does not in itself create a privilege when no privilege would otherwise exist.).

In fact, regulations that purport to create privileges are in violation of the act. See, Fai Mak v. F.B.I., 252 F.3d at 1092 (statute bars agency from using regulations under the Housekeeping Act to create a privilege); Landry v. F.B.I., 1997 WL 375881 *2 (E.D. La. 1997) (“neither 5 U.S.C. § 301 nor the Department of Justice’s Touhy regulations create a privilege or authorize the withholding of information”); Wright & Miller, 26A Fed. Prac. & Proc. Evid. § 5682 (“The writers and the better reasoned cases now agree that the housekeeping privilege is defunct.”). Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d at 777 (noting that Congress even amended the statute – adding the following sentence: “This section does not authorize withholding information from the public or limiting the availability of records to the public.” – since it was concerned that it had

been “twisted from its original purpose as a ‘housekeeping’ statute into a claim of authority to keep information from the public.”).

In sum, the Housekeeping Act does not grant a substantive privilege to withhold information, and the Touhy regulations are prohibited from doing so. U.S. ex rel. Roby v. Boeing Co., 189 F.R.D. 512, 514 (S.D. Ohio 1999) (“The housekeeping statute is designed to permit an executive agency to manage its internal affairs, including its procedures for releasing official information. However, the statute explicitly prohibits an executive agency from invoking the statute in order to withhold information.”). Therefore, if Defendants assert that the regulations establish a valid ground for denying the request, then such regulations are in violation of the Housekeeping Act and, thus, *ultra vires*.

3. The Housekeeping Act should be interpreted in a restrictive manner so as to avoid an unconstitutional reading which would implicate the Commonwealth’s and the States’ sovereignty.

When determining the reach of the regulation at issue in this case, and whether the statute under which it was promulgated permits such extension of the Executive’s hand, this Court should bear in mind several extremely important tenets that have been reiterated time and time again by the Supreme Court.

- (a) The USDOJ’s legal interpretation of the Housekeeping Act is not entitled to any type of deference.

First of all, it is axiomatic that a federal agency has only that authority explicitly granted to it by statute or that is necessary to carry out the purpose of the statute. See, e.g., Lyng v. Payne, 476 U.S. 926, 937 (1986) (“an agency’s power is no grater than that delegated to it by Congress”). Furthermore, it should be noted that “[a]n agency does not acquire special authority to interpret its own words when, **instead of using its expertise**

and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.” Gonzales v. Oregon, 126 S. Ct. 904, 916 (2006) (emphasis added). In this sense, “[d]eference in accordance with Chevron, however, is warranted only ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’ United States v. Mead Corp., 533 U.S. 218, 226-227, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Otherwise, the interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’ Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944).” Id. at 914-15.

The Attorney General has rulemaking power to regulate the internal paperwork of the USDOJ under the Housekeeping Act. The statutory dispositions pursuant to which he is authorized to make such rules, however, show that he is not authorized to make a rule establishing newfound evidentiary privileges which would effectively immunize federal officials from any criminal liability under state law. Hence, to the extent that the regulation in controversy attempts to do so, it is not entitled to Chevron deference. Similarly, the fact that, as explained in the previous section, the USDOJ’s interpretation of the Housekeeping Act “runs counter to the ‘intent at the time of the regulation’s promulgation,’ is an additional reason why Auer deference is unwarranted”, as well as any other type of deference. Id. quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotation marks omitted).

- (b) This Court should not read a preemptive breadth into the Housekeeping Act which would result in an unconstitutional intervention with the Commonwealth’s and the States’ sovereignty, absent a clear statement from Congress in the Act itself necessitating such ample preemption.

“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions--it does not, one might say, hide elephants in mouseholes.” Gonzales v. Oregon, 126 S. Ct. 904, 921 quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001). See also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”). Based on this commonsense idea of political transparency and reasonability, the Supreme Court recently explained that the scope of an explicit preemption provision is determined by reference to “two presumptions about the nature of” preemption. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

The first presumption is “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Id. (internal quotations marks omitted). Said first presumption is “consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” Id. On the other hand, the second presumption establishes that “any understanding of the scope of a pre-emption statute must rest primarily on ‘a fair understanding of congressional purpose.’” Id. quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530 n. 37 (1992) (emphasis suppressed). “The structure and purpose of the act as a whole is relevant to the latter inquiry.” Oregon v. Ashcroft, 192 F. Supp. 2d at 1087 citing Medtronic, 518 U.S. 470.

The first presumption stated above is commonly referred to as the “clear statement requirement”. As to said requirement, the Supreme Court has explained:

[I]f Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.” Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. **Congress should make its intention “clear and manifest” if it intends to pre-empt the historic powers of the States**, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” United States v. Bass, 404 U.S. 336, 349 (1971).

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (emphasis added). “This plain statement rule is nothing more than an acknowledgment that **the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.**” Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (emphasis added). “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain with the States are numerous and indefinite.” López, 514 U.S. at 552 quoting The Federalist No. 45 at 292-293 (James Madison) (C. Rossiter ed. 1961).

- (c) The “clear statement” requirement and the absence of a deferential treatment with respect to the agency’s interpretations of law are of particular and forceful application in cases, such as the present one, where a different course of action would unduly interfere with the sovereign authority of the Commonwealth and the States to wield the most traditional and core functions of their police power.

Because the USDOJ’s action here would displace traditional state authority, a clear statement is a condition precedent to that action, or to Chevron or any other type of deference. This Court should not impute to Congress the intent to alter the usual state-federal balance or push the limits of congressional power unless the text of the statute in

question makes that intent unmistakable. Solid Waste Agency, 531 U.S. at 172-74; Jones v. United States, 529 U.S. 848, 858-59 (2000). Administrative authority to displace state authority in areas historically regulated by the States must likewise be supported by clear statutory language. Solid Waste Agency, 531 U.S. at 172 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)); Hillsborough County v. Automated Medical Labs., 471 U.S. 707, 715-16 (1985); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”) (quoting ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988)). Consequently, any USDOJ claim to deference or to an ample or lenient interpretation of the Housekeeping Act must surmount the “clear statement” hurdle, because the interpretation on which the USDOJ’s actions in this case are based impinges upon the Commonwealth’s sovereignty and police power to investigate and prosecute crimes within its jurisdiction.

The concerns described above regarding ample interpretations of federal statutes are “heightened where an administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” Solid Waste Agency, 531 U.S. at 173. “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” Bass, 404 U.S. at 349. “In divining congressional intent, it is a ‘cardinal principle’ of statutory interpretation that ‘where an otherwise acceptable construction of a statute would raise serious constitutional problems, [federal courts shall] construe the statute to avoid such problems

unless such construction is plainly contrary to the intent of Congress.” Oregon v. Ashcroft, 368 F.3d 1118, 1125 (9th Cir. 2004) aff’d Gonzales v. Oregon, 126 S. Ct. 904 (2006), quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

In the words of the Supreme Court itself: “Just as the conventions of expression indicate that Congress is unlikely to alter a statute’s obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority **to regulate areas traditionally supervised by the States’ police power**. It is unnecessary even to consider the application of clear statement requirements, [...] or presumptions against pre-emption, [...] to reach this commonsense conclusion. Gonzales v. Oregon, 126 S. Ct. at 925 (emphasis added and citations omitted). “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance’ **in the prosecution of crimes**.” Jones, 529 U.S. at 858 quoting Bass, 404 U.S. at 349 (emphasis added). See id. at 859-60 (Stevens, J., concurring) (noting the “kinship” between the presumption against preemption, the Court’s reluctance to believe that Congress intended to **intervene in criminal law, a matter of traditional state governance**, and the clear statement requirement).

The Defendants’ actions in this case will prevent Commonwealth law from operating as Commonwealth lawmakers intended. The necessary corollary to the Defendants’ position is the total and absolute immunization of federal officers from state criminal law. The affront to the Commonwealth’s sovereignty is the same in kind, even

if not necessarily in degree, as it would be if he were able simply to declare the Commonwealth's penal code invalid as applied to federal officers.

The text of the Housekeeping Act shows that Congress did not intend to grant the USDOJ the regulatory authority claimed here. In every preemption case, the purpose of Congress is "the ultimate touchstone." Medtronic, 518 U.S. at 485 quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). As discussed in the previous section, a cursory review of both the Housekeeping Act's text and its legislative history point towards its extremely limited purpose. The Housekeeping Act did not grant the USDOJ authority to redefine the States' sovereign power to investigate and prosecute. Hence, this Court should not give any type of deference to the USDOJ's interpretation of the Housekeeping Act, and should resist the invitation to read a preemptive breadth into said Act which would subject it to constitutional scrutiny due to an improper intervention with the States' sovereignty. Gonzales v. Oregon, 126 S. Ct. at 917-20.

4. Even if this Court chose to make a liberal interpretation of the Housekeeping Act, a Congressional authorization of the actions undertaken by Defendants would unconstitutionally limit the Commonwealth's and the States' sovereignty.

In López, 514 U.S. 549, the Supreme Court reaffirmed that "[t]he Constitution creates Federal government of enumerated powers" and that "[t]his constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" López, 514 U.S. at 552 quoting Gregory, 501 U.S. at 458. Therefore, "[i]t is incontestible that the Constitution established a system of 'dual sovereignty.'" Printz v. United States, 521 U.S. 898, 918 (1997) quoting Gregory, 501 U.S. at 457; Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

“Although the States surrendered many of their powers to the new Federal Government, **they retained ‘a residuary and inviolable sovereignty’**”. Printz, 521 U.S. at 918-19 quoting The Federalist No. 39, at 245 (J. Madison) (emphasis added).

This is reflected throughout the Constitution’s text, Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101 (1869); Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State’s territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the “Citizens” of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which “presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights,” Helvering v. Gerhardt, 304 U.S. 405, 414-415, 58 S. Ct. 969, 973, 82 L. Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment’s assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Id. Consequently, the Supreme Court has unequivocally held that the Tenth Amendment is not the exclusive textual source of protection for principles of federalism in the Constitution:

Our system of dual sovereignty is reflected in numerous constitutional provisions, see supra, at 2376, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications. See, e.g., Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926) (finding by implication from Art. II, 1, 2, that the President has the exclusive power to remove executive officers); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (finding that Article III implies a lack of congressional power to set aside final judgments).

Id. at 923 n. 13.

Pursuant to this interpretation of the Constitution as a whole, the Supreme Court has explained that “the structure and limitations of federalism [...] allow the States “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” Gonzales v. Oregon, 126 S. Ct. at 923 quoting Medtronic, 518 U.S. at 475 (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985)). More to the point, however, “[i]n Morrison, the Supreme Court **explicitly warned against any interpretation of the enumerated powers of Congress that would create for Congress what the Founders denied to it--a general police power superseding that of the States.**” Oregon v. Ashcroft, 192 F. Supp. 2d at 1087, aff’d 368 F.3d 1118 (9th Cir. 2004), aff’d Gonzales v. Oregon, 126 S. Ct. 904 (2006), citing United States v. Morrison, 529 U.S. 598, 618-19 (2000) (emphasis added).

But the Supreme Court has made clear quite recently that the limits of the Congressional power are not the only factors to consider when assessing a challenge to State sovereignty. “In New York and Printz, we held federal statutes invalid, **not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.**” Reno v. Condon, 528 U.S. 141, 149 (2000). The Supreme Court’s pronouncements in Alden v. Maine are quite illustrative in this regard:

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, **it reserves to them a substantial portion of the Nation’s primary sovereignty**, together with the dignity and essential attributes inhering in that status. The States “form **distinct and independent portions of the supremacy**, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison).

Alden v. Maine, 527 U.S. 706, 713-14 (1999) (emphasis added). “**The States thus retain ‘a residuary and inviolable sovereignty.’**” Id. at 715 citing The Federalist No. 39, at 245 (emphasis added). “They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.” Id. See also New York v. United States, 505 U.S. 144, 163 (1992) citing Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (“[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers”); Tafflin, 493 U.S. at 458 (“[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government”); Gregory, 501 U.S. at 461 (“[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere”).

The Supreme Court, however, has established a second way in which the principles of federalism preserve the sovereign status of the States:

Second, **even as to matters within the competence of the National Government**, the constitutional design secures the founding generation’s rejection of “**the concept of a central government that would act upon and through the States**” in favor of “a system in which the State and Federal Governments would exercise concurrent authority over the people--who were, in Hamilton’s words, ‘the only proper objects of government.’”

Alden, 527 U.S. at 714-15 (citations omitted). “In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice.” New York, 505 U.S. at 166.

The Commonwealth has the power and the obligation of enacting and enforcing its criminal laws. As a quintessential part of said process, the Commonwealth must be

free to investigate those individuals who may be reasonably suspected of wrongdoing. The fulfillment of this duty is a matter of the greatest political and public import. Officers of the federal government, as previously discussed, are not absolutely immune from the exercise of the States' police power. In re Neagle, 135 U.S. 1 (1890), and its progeny are the law of the land. And the holdings in those cases are at the heart of the controversy before this Court: whether the federal government has the power to shield its officers from the States' unquestioned power as sovereigns to enact and enforce criminal laws. This is not an issue of the federal government's power to regulate the people, but of its alleged discretion to absolutely immunize its officers from state criminal law. The federal government's power to regulate the citizenry is not an issue in this case, the States' power to enforce its legitimately enacted criminal laws is. There is no conflict between federal and state regulation in this case. Herein lies the importance of making crystal clear that the Commonwealth does not seek to interfere, in any way, with the USDOJ's investigation and prosecution of possible federal criminal behavior. The Commonwealth only seeks that the USDOJ not interfere with its prerogative to investigate actions which may or may not constitute state crimes.

Defendants' actions in this case involve a blanket wholesale denial of the Commonwealth's police power. The only statutory authority cited by Defendants to substantiate such action is the Housekeeping Act. To the extent that the Housekeeping Act could have possibly served to grant such an absolute immunity from criminal investigation and prosecution to federal officials, it would constitute an unconstitutional affront to the States' and the Commonwealth's sovereignty under the principles of federalism contained in the Constitution.

5. Contrary to Defendants' assertions, an Administrative Procedure Act claim is unwarranted in this case.

Although Defendants have directed the Commonwealth to the Administrative Procedure Act ("APA"), as the proper procedure to question their decision, under the law of the First Circuit, the Commonwealth is not barred from invoking this Court's equitable powers to protect its sovereign interests through the present suit. See Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d at 41-44.

APA review is unwarranted in this case because it would impose an undue burden – see Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 780 n. 11 (9th Cir. 1994) ("APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate' any right to the requested testimony")⁵ – on the exercise of sovereign criminal authority that would run afoul of the Tenth Amendment. However, in the event that this Honorable Court understands that an APA claim is warranted, which we deny, as stated in the Commonwealth's complaint, the present proceeding should be recast as an APA claim since, even under the APA, the denial is unfounded.

6. Even if this Honorable Court entertains the present proceeding as an APA claim, the requested information should be disclosed because Defendants' denial is, by definition, arbitrary and capricious, constitutes an abuse of discretion, is in excess of statutory authority, and is not substantiated by any valid privilege.

Although the Commonwealth does not concede that APA review is applicable, it has duly complied with the Department of Justice's Touhy regulations. The issuance of the subpoenas was a proper "demand" under such regulations. See 28 C.F.R. §

⁵ As for the extremely heightened standard of review under the APA, see Wright & Miller, 33 Fed. Prac. & Proc. Judicial Review § 8334 ("'Arbitrary or capricious' review communicates the least judicial role, short of unreviewability, in the word formula system. [...] [I]t applies in those administrative schemes in which the courts are to have a lesser role"); Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) (highly deferential standard of review afforded to agency decisions under the APA); Harrington v. Chao, 372 F.3d 52, 55 (1st Cir. 2004) (describing the APA standard of review as a "highly limited" standard.).

16.21(a)(2) (“demand” is a “subpoena, order, or other demand [...] of a court or other authority.”); Fai Mak v. FBI, 252 F.3d at 1092 (demands requesting information from the United States Department of Justice ordinarily take the form of a subpoena); Ferreira v. U.S., 350 F. Supp. 2d 550, 558 (S.D.N.Y. 2004) (same). The subpoenas were also properly served. It was precisely the United States’ Attorneys Office and the Federal Bureau of Investigations who requested that the subpoenas be addressed to the United States Attorney. Thus, having complied with said regulations, APA review may be proper in the event this Honorable Court deems it applicable, which we deny.

As has been resolved in this district, once a party complies with the pertinent regulations, it is for this Court to properly examine the agency’s reasons for the denial of information. See A.C., Inc. v. Cooperativa De Seguros De Vida, 188 F.R.D. 181, 186 (D.P.R. 1999) (“a regulation enacted pursuant to the agency’s “housekeeping authority [...] cannot bar a judicial determination of the question of privilege or a demand for the production of evidence found not privileged. [...] Thus, the United States’ contention that the Court cannot properly examine the agency’s reasons for the denial of evidence is incorrect. [...] [T]he United States must provide a basis for their privilege claim.”).

Under the APA, federal courts can set aside agency actions that are, *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”, 5 U.S.C. § 706(2)(A); “contrary to constitutional right, power, privilege, or immunity”, 5 U.S.C § 706(2)(B); or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”, 5 U.S.C § 706(2)(C). Fai Mak v. F.B.I., 252 F.3d at 1091.

With respect to the “arbitrary or capricious” standard of review, it has been held that an agency’s determination is arbitrary or capricious if the agency lacks a rational

basis for making the determination, or if the decision was not based upon consideration of the relevant factors. Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005). However, in cases where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power, the reviewing court should be especially cautious.

Defendants' denial is, by definition, arbitrary, an abuse of discretion, and in excess of statutory authority, because it is premised exclusively on a regulation that does not create a privilege. Defendants' wholly conclusory assertion, that disclosure of the information is not warranted under the regulations, simply lacks any valid explanation for the denial. Defendants did not assert a substantive privilege for the Court to consider, or even offer a valid explanation for the refusal to disclose. In any case, none of the information or items requested by the Commonwealth in the February 17, 2006, subpoenas would elicit production of investigatory records of the federal government. Disclosure of such information and items would not interfere with federal enforcement proceedings, nor would disclosure impair federal investigative techniques and procedures as set forth in section 16.26(b)(5) of Title 28 of the Code of Federal Regulations.

Defendants are now foreclosed from coming up with additional reasons or justifications which are not part of the administrative record on the basis of which Defendants decided not to disclose the requested information. Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; [S.E.C. v. Chenery Corp., 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself[.]").

III. CONCLUSION

We have grown accustomed to relying on the federal government to protect our liberties against the excesses of state law enforcement. Federal prosecutors may bring criminal charges against state police who violate the rights of citizens. [...] Those citizens may also seek redress by bringing private suits in federal court. [...] While state prosecutions of federal officers are less common, they provide an avenue of redress on the flip side of the federalism coin. When federal officers violate the Constitution, either through malice or excessive zeal, they can be held accountable for violating the state's criminal laws.

Idaho v. Horiochi, 253 F.3d 359, 361-362 (9th Cir. 2001) (en banc) vacated on other grounds (mootness) at 266 F.3d 979.

These words, from an *en banc* Ninth Circuit Court, distill the essence of federalism. As the Supreme Court explained in Gregory v. Ashcroft, 501 U.S. at 458, “[t]he constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

In the words of Alexander Hamilton, “[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.” The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961); Gregory v. Ashcroft, 501 U.S. at 458-459.

If this “double security” is to be effective, explained the Court in Gregory, 501 U.S. at 459, there must be a proper balance between the States and the Federal Government. “These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.” Gregory v. Ashcroft, 501 U.S. at 459.

The present case refers, precisely, to this “proper balance” between the States and the federal government, and it requires that this Honorable Court address whether the Commonwealth, as the States, can seek judicial intervention when the federal government interferes with its sovereign authority to exercise its criminal powers when federal agents are involved. There is no doubt that the Commonwealth, like a State, has the power to enforce its criminal laws within its territory. The Commonwealth must be free to investigate those individuals who may be reasonably suspected of wrongdoing. The federal government cannot shield its officers from the States’ unquestioned power as sovereigns to enforce criminal laws. However, Defendants’ actions in the present case amount precisely to that. Through the illegal refusal to disclose material information (of which the federal government is custodian) necessary for the completion of a local criminal investigation, Defendants have erected an undue barrier to the proper exercise of the Commonwealth’s sovereign criminal power.

This Honorable Court’s immediate intervention is warranted, and the exercise of its equitable powers proper. Defendants are not above the law.

WHEREFORE, the Commonwealth prays for: (i) entry of a declaratory judgment recognizing the rights of the Commonwealth of Puerto Rico and the Secretary, as Head of the Department of Justice for the Commonwealth of Puerto Rico, to conduct a

full investigation into the events allegedly leading to the injury of members of the press and/or the public, including but not limited to Mr. Valentín Quintana, on February 10, 2006, due to the alleged use of excessive force (including the alleged use of pepper spray) by FBI agents; (ii) entry of judgment permanently enjoining Defendants from withholding any information relevant to the Commonwealth's investigation, and ordering Defendants to comply with the Commonwealth's requests and produce the subpoenaed information, objects and documents; and (iii) any other applicable remedy at law or equity.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on the 23rd day of March, 2006.

ROBERTO J. SÁNCHEZ RAMOS
Secretary of Justice

S/ KENNETH PAMIAS VELÁZQUEZ
KENNETH PAMIAS VELÁZQUEZ
Special Aide to the Secretary of Justice
USDC-PR 219603
e-mail: kpamias@justicia.gobierno.pr

S/ JORGE R. ROIG COLÓN
JORGE R. ROIG COLÓN
Assistant Secretary of Justice
USDC-PR 220706
e-mail: jroig@justicia.gobierno.pr

S/ RAFAEL ROBLES DIAZ
RAFAEL ROBLES DIAZ
Director Civil Rights Task Force
USDC-PR No. 130207
e-mail: rarobles@justicia.gobierno.pr

S/ JORGE MARTÍNEZ LUCIANO
JORGE MARTÍNEZ LUCIANO

USDC-PR Bar No. 216312
e-mail: squalus@rocketmail.com

S/ ALFREDO ACEVEDO CRUZ
ALFREDO ACEVEDO CRUZ
USDC-PR Bar No. 220705
e-mail: lcdoacevedo@yahoo.com

S/ MICHAEL CRAIG MCCALL
MICHAEL CRAIG MCCALL
USDC-PR 210412
e-mail: michaelm@caribe.net

CIVIL RIGHTS TASK FORCE
Department of Justice
3rd Floor-Miramar
818 Ponce De León Ave.
San Juan, PR 00907
(787) 977-7717 Fax (787) 977-7729