APPENDIX

METHODOLOGY FOR LOCATING CASES†

In locating cases relevant to contempt against federal agencies, I initially performed traditional legal research in treatises, secondary literature, and cascades of citations in appellate case law. But, given the inadequacy of these methods for researching a subject that higher courts have deliberately avoided developing, I ended up relying on three other avenues: (a) searches of opinions in the Westlaw database, (b) searches of docket sheets in the Bloomberg Law database, and (c) interviews with experienced attorneys.

I. OPINIONS IN THE WESTLAW DATABASE

My team and I searched for federal judicial opinions in the Westlaw ALLFEDS database. This database contains all opinions published in the U.S. Reports (Supreme Court back to 1790), the Federal Reporter (courts of appeals back to 1880 and district courts in 1880–1933), the Federal Supplement (district courts back to 1933), the Federal Rules Decisions (district courts back to 1941), and the Bankruptcy Reporter (district courts and bankruptcy courts back to 1979). It also contains federal court opinions published in many other subject-specific publications, plus any unpublished federal court opinions that any court or attorney forwards to Westlaw. It also appears that Westlaw harvests opinions that federal courts have posted on their public websites, at least in recent years.

Practically, the database captures the large majority of the written product of the Supreme Court and the courts of appeals. For the district courts, the situation is more complicated. Within a single lawsuit in district court, there will be some number of judicial orders, ranging from one to thousands. Each order is noted in the docket sheet by its title (e.g., “Order Denying Plaintiff’s Motion for Contempt”). An order may include an opinion (that is, a reasoned explanation), or not. If there is an opinion, it may be published in a reporter, or not. If it is not published in a reporter, it may still end up in the Westlaw database by various means, or not. Which orders result in opinions and which opinions get published are matters of loose Judicial Conference guidance and of courts’ and judges’ individual practices. Which unpublished opinions reach the Westlaw database is a matter of evolving company practice.

A study of four district courts during 2003 sheds light on these tendencies, at least as they stood at that time. Across all orders in all cases, only 3% of orders resulted in opinions that ended up on Westlaw (or the other major opinion database, Lexis). But 81% of the orders were ministerial (e.g., orders scheduling submission of briefs), which nobody would expect to result in an opinion. Of the nonministerial orders, which still might include many small matters without opinion, 16% resulted in opinions that reached Westlaw (or Lexis).

Thus, if contempt findings against agencies were distributed randomly across all nonministerial orders, we would expect the Westlaw ALLFEDS database to capture only 16% of them. But there is reason to think the proportion is much higher than that. There are two major theories of what motivates district judges to write published opinions (i.e., opinions they forward to Westlaw). The first is that they tend to publish opinions that involve novel or consequential issues. The second is that they tend to publish opinions for orders on which they fear reversal by an appellate court. If either or both of these theories are correct, we would expect judges to tend to write published opinions for contempt orders against federal agencies. As to the first theory, holding a federal agency or high official in contempt is likely to seem novel and consequential, and if the order involves fines against the agency, it raises unsettled issues of sovereign immunity. As to the second theory, findings of contempt against agencies are orders that by definition are against the federal government, which always has the resources to appeal. While the default principle is that civil contempt orders are not immediately appealable if the contemnor is a party and the case has not yet gone to judgment, my project is mainly about contempt orders after the merits are determined and the issue is compliance with a judgment, at which point appeal is usually available. Further, criminal contempt orders are always immediately appealable. Therefore, the cache of district court opinions in the Westlaw ALLFEDS data-

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2 Id. at 710.
3 Id. at 720.
4 See id. at 690–700.
5 Professor Hoffman and colleagues review the first theory, id., and find that it is not supported by the data, id. at 690, while they conclude that the second theory is “not excluded by the data, but more work is needed to determine whether [the theory] offers a complete explanation of judicial motivation,” id.
7 On this point, plus other avenues for appellate review of civil contempt orders, see id., text accompanying notes 47–48, 64–73.
8 See id. § 3917.
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base is a very promising, though not perfect, place to look for contempt findings against agencies.

My team and I searched the Westlaw ALLFEDS database for opinions that contained the word “contempt” in the same sentence as any one of the following words: “administration,” “administrator,” “agency,” “board,” “bureau,” “commission,” “commissioner,” “department,” “director,” “government,” “secretary,” or “service.” I chose these words because, for most federal agencies that are frequently sued, (a) the name of the agency contains one of the words, and (b) the title of the agency’s highest official — by which it is customary for a judge to refer to an official — contains one of the words.9 There are a few exceptional agencies that are frequently sued and would not be captured by these words; we did supplemental searches to capture cases that refer to these agencies or their head officials in the same sentence as the word “contempt.”10

The aggregate search, which we conducted in multiple waves going through the end of the year 2015, produced a total of 12,109 opinions.11


10 Each supplemental search followed this template: adv: (contempt /s (pto or office)) and “patent and trademark office”. The agencies searched for using this template are: the Patent and Trademark Office, the Office of Management and Budget, Customs and Border Protection, Immigration and Customs Enforcement, Citizenship and Immigration Services, the Federal Deposit Insurance Corporation, the Wage and Hour Division, the Office of the Comptroller of the Currency, and the Office of Personnel Management.

11 The first major wave was “adv: contempt /s (agency or commission or commissioner or department or administrator or secretary or administration or board or director or bureau).” This search went up to 6/17/2015 and produced 7208 case results. This was updated by a search with the same terms covering 6/17/2015 through 12/31/2015, producing eighty-seven results. The second major wave was “adv: (contempt /s (government or service)) % (contempt /s (agency or commission or commissioner or department or administrator or secretary or administration or board or director or bureau)).” It went up to 12/23/2015 and produced 4652 case results. This was updated by a search with the same terms covering 12/23/2015 through 12/31/2015, producing two results. The supplemental search for additional agency names (described in supra note 10), conducted on 3/20/2016 without end-date restriction, produced 160 results. Note that if you perform any of these searches in Westlaw today with these date restrictions, each might produce a slightly higher number of results, because opinions whose publication dates fall within the relevant date restrictions may have been added to the database between when we did the search and when you do it. I should also note that, in performing these searches, my research assistants moved through the results in order of relevance and necessarily spaced their work out over multiple research sessions, sometimes covering a period as long as five months in the case of the biggest search, which had 7208 results. When you bring up a search in Westlaw, the algorithm is run anew each time, even if you retrieve the search from your history. Because my research assistants were moving through the results in order of relevance, it is possible that changes in the relevance order might have caused them to miss some results due to reordering between one session and the next. However, Westlaw attorneys have informed me that shifts of more than five places along the number line in the relevance order are very unlikely within a five-month period and would occur only in
Law student research assistants vetted the results to eliminate any in which (1) the case was not in federal court; (2) defendants were not federal agencies or officials; (3) the discussion was about defendants being in contempt of Congress, rather than in contempt of court; (4) allegations of contempt were dismissed on procedural grounds unrelated to violations of an injunction, such as mootness of the contempt motion, denial of intervention to the party moving for a contempt finding, denial of a motion to reopen a bankruptcy case when doing so was necessary to a contempt finding, etc.; or (5) allegations of contempt were denied by the court as groundless, or their denial by a lower court was approved by a higher court as groundless, with no substantial discussion of contempt issues by the court.

The research assistants forwarded all remaining opinions to me, which numbered approximately 662.12 I examined these opinions to see whether the court made a contempt finding against the federal defendant, or whether the opinion contained any discussion of interest to the project. Sixty-seven of the opinions contained actual contempt findings, and another 150 contained discussion of interest for the subject.13 Nearly all opinions in both these categories dated from after 1945.

Among the opinions containing no finding but having other discussion of interest, thirty-three raised the possibility of holding federal defendants in contempt but left the matter open, for example, by waiting to see if the defendants would comply. In all these cases, my team and I have attempted follow-up research to see what ultimately happened. We were able to find out the resolution in nineteen of the thirty-three cases, mostly by using docket sheets available in the Bloomberg Law database (see Part II, below), which is available for cases after about the case of a sudden and extreme change in the law. Telephone Interview with Westlaw Attorneys (June 8, 2016). No such change has occurred recently in the area of contempt. So we can be confident that no more than a tiny number of results were skipped in this way.

12 This number involves a bit of approximation because (a) during preliminary research, before enlisting the help of research assistants, I personally located fifty-two cases through more traditional research methods; (b) I asked the research assistants, in forwarding cases to me from the Westlaw searches, not to include the cases I had found in my preliminary research; and (c) it is possible that a few of the cases found in the preliminary research would not have shown up in any of our Westlaw searches.

13 In the course of my reading, I decided, for reasons of manageability, to eliminate from the project sixty-eight otherwise-relevant opinions (not included in the totals noted above of sixty-seven and 150) because they were from non-Article III courts (such as the Bankruptcy Courts, the Court of Federal Claims, and the Court of Veterans Appeals) or because they were from Article III courts hearing cases under bankruptcy law (bankruptcy not being central to my project, in part because the Bankruptcy Code contains sui generis provisions on sovereign immunity). Most bankruptcy opinions concerning contempt against federal agencies involve creditor federal agencies, especially the IRS, accidentally violating the automatic stay that is triggered when a person files for bankruptcy.
The remaining fourteen for which we could not determine the resolution were, with one exception, from prior to 1990.

The opinions themselves often led to other relevant sources. When opinions cited prior opinions that seemed like they might be relevant, I followed up and read those prior opinions. Also, for the approximately fifty cases that seemed most relevant (e.g., in which the court imposed significant sanctions or came near to doing so, or dealt with an important agency action, or discussed issues in unusual depth), I sought relevant filings such as orders and briefs through the Bloomberg Law database or Public Access to Court Electronic Records (PACER) database or, if the case was too old for those, through the paper records of the courts or the National Archives. Altogether, I obtained archival paper records for about twenty-five cases, though for a few of these cases, only the docket sheet survived, as federal court filings from before the electronic era (starting about 2003–2005) are sometimes not preserved. The dozens of briefs that I have obtained, electronically or from paper archives, have been helpful in locating yet more opinions.

II. DOCKET SHEETS IN THE BLOOMBERG LAW DATABASE

Though it produced numerous relevant documents, our Westlaw search had significant limitations. Undoubtedly, some relevant district court opinions are not in Westlaw. District court orders may be relevant but might have no opinions attached. And the search terms — which depend on the agency-relevant word appearing in the same sentence as the word “contempt” at least once — will not capture every relevant opinion that is in Westlaw.

My team and I therefore extended our research to federal court docket sheets. A docket sheet is a list including the title of every filing in a lawsuit. If a party is held in contempt, or if contempt is a serious issue in a suit, I think it is very likely that the word “contempt” will appear in the docket sheet at least once (e.g., in the title of a motion seeking contempt or of an order disposing of such motion).

We therefore sought to find as many docket sheets as possible in which (a) the word contempt appeared and (b) a federal agency was the defendant. The federal judiciary maintains the PACER database, which contains HTML docket sheets for nearly all federal lawsuits going back to about 1990. PACER also contains PDFs of the underlying filings themselves (except transcripts) for all cases since about 2000–2005 (depending on the court). But unfortunately, PACER has no word-search capability across docket sheets (or underlying filings). And even if it did, it charges for downloads by the page, making mass word searches very expensive.

Fortunately, the Bloomberg Law database has, since about 2012, harvested virtually all the docket sheets on PACER and made them available in a word-searchable format. Bloomberg Law has also har-
vested a large proportion of PACER’s PDFs of underlying filings. Some of these filings are immediately viewable, though for most, one must first click “Request” and wait about a minute. Bloomberg’s search covers some underlying filings, though it apparently does not cover the large majority for which a “Request” is necessary. My institution has a flat-fee subscription to Bloomberg Law, which allowed my team to perform word searches of the docket sheets and of covered underlying filings.

While Bloomberg Law can easily locate all suits in which the docket sheet (or any covered filing) contains the word “contempt,” it unfortunately has no exact way of identifying suits in which a federal agency is a defendant. Because the word “contempt” is so common, some targeting of the search toward suits with federal agency defendants was necessary. We had to devise the targeting method ourselves. We undertook two searches, each with a different, inevitably imperfect means of targeting suits with federal agency defendants.

In the first search, we used the Bloomberg Law database of All Federal Court Dockets (including bankruptcy14) and entered “contempt” for the keyword. Under “Include,” we chose “Dockets and Documents,” to search not only the docket sheets but also the underlying filings. Our method for targeting federal agency defendants was to (a) enter as “Defendant” a disjunctive string of words that appear commonly in the names of federal agencies and the titles of their top officials15 and (b) enter as “Attorney or Firm” a disjunctive string of several words or phrases (including variations on, or abbreviations of, a single phrase) that might reflect an attorney’s affiliation with the Department of Justice (DOJ) or with a federal agency that has authority to litigate without DOJ.16 The search, which went through the end

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14 At the time this search was conducted, I had not yet decided to exclude bankruptcy cases. I later did decide to exclude them. See supra note 13.

15 To be exact:

* agency* or "commission" or "commissioner" or "department" or
* administrator* or "secretary" or "administration" or "board" or
* director* or "bureau"

We later performed a supplemental search that was the same except the string in the “Defendant” field was changed to include the word “service” and a series of specific agency names that would not be picked up by the words we had already used. To be exact:

* service or "customs and border protection" or "office of management and budget" or "immigration and customs enforcement" or
* "citizenship and immigration services" or "patent and trademark office" or "wage and hour division" or "comptroller of the currency" or "office of personnel management" or "federal deposit insurance corporation"

In the aggregate, these search terms are the same as the ones we used for the Westlaw searches, except that these terms exclude the word “government,” which is so ubiquitous in federal docket sheets as to make the search unmanageable.

16 To be exact:
Law student research assistants examined the individual dockets and identified 440 cases in which there was, at the very least, a plaintiff motion to hold a federal agency in contempt, or an initiation of a contempt proceeding by the judge (such as by an order to show cause).

Although 440 is a substantial number of relevant suits, we always knew the search would not cover all relevant cases, and it turned out to have a significant limitation that we discovered in the course of the search. Within an HTML docket sheet, the name and other identifying information for a party may be on a single line or broken up across multiple lines. Bloomberg’s search function for “Defendant” only discerns words in the first line. The problem is that a suit may name only the agency’s top official and not the agency itself as a defendant, and if that defendant happens to be listed by the court clerk with a line break between her name and her title, the “Defendant” search function will not find the title and will not capture the result. Because of this, the search was missing several relevant cases that we found, through other research avenues, against federal agencies with the word “contempt” in the docket sheet.

The list of agencies with independent litigation authority was drawn from Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 CORNELL L. REV. 769, 800 tbl.5 (2013).

17 The search was actually conducted as three distinct searches. The first search, with end-date restriction of 9/8/2015, produced 1814 suits (it had to be conducted in two parts, broken at the date 5/15/2003, to keep the results of each at a displayable level below 1000). The second search used the same terms from 9/8/2015 through 12/31/2015 and produced 34 results. The third search was the supplemental one described in supra note 15; it was conducted in 2016 with end-date restriction 12/31/2015, and it produced 215 results that were nonduplicative with the other searches.

18 For example, we searched in filings for mention of cases we had already found that most extensively discussed contempt against federal agencies.
Given this limitation, we performed a second search of the Bloomberg Law database using an alternative (still imperfect) method of targeting suits with federal agency defendants. Each docket sheet has a space at the top for “Jurisdiction,” in which the court clerk enters the basis for federal jurisdiction in the case. One option for “Jurisdiction” is “U.S. Government Defendant.” This is a much simpler identifier for suits against federal agencies than the terms we used in our first search. That said, it is underinclusive. In a suit against a U.S. government defendant, there will often be one or more additional bases for federal jurisdiction (most commonly “Federal Question”), but the clerk enters only one basis, and it appears to be the clerk’s choice which basis to enter. Thus, one can find docket sheets for suits against U.S. government defendants in which the “Jurisdiction” field says “Federal Question” rather than “U.S. Government Defendant.” Still, we decided to undertake a search on the basis of the “Jurisdiction” field to help make up for limitations of the first search (particularly the line-break issue).

In this second search, we used the Bloomberg Law database of All Federal Court Dockets (this time excluding bankruptcy\textsuperscript{19}) and entered “contempt” as a keyword. Under “Include,” we chose “Dockets Only,” to search only the docket sheets and not the underlying filings, since the first search suggested that serious consideration of contempt in the filings without mention of contempt in the docket sheet was very unlikely. Our method for targeting federal agency defendants was to include “U.S. Government Defendant” as a keyword, thus locating all suits in which that phrase had been written in by the clerk under “Jurisdiction.” The search, going through the end of 2015, produced 2612 suits,\textsuperscript{20} of which 451 duplicated our first search, leaving about 2161 unique results. Law student research assistants examined the individual dockets and identified all cases in which there was, at the very least, a plaintiff motion to hold a federal agency in contempt, or an initiation of a contempt proceeding by the judge (such as by an order to show cause), which numbered 997.

Taking the two searches together, we found 1437 (440 + 997) cases since 1990 in which, at the very least, a contempt motion was made against a federal agency, or a contempt proceeding was initiated by the judge (such as by an order to show cause).

Of the 440 relevant cases in the first search, research assistants identified twenty as apparently containing a contempt finding, noting

\textsuperscript{19} On my treatment of bankruptcy cases, see supra note 13.

\textsuperscript{20} Because the results exceeded 1000, they were broken up into multiple searches with breaks at particular dates. The search was run with an end-date restriction of 9/8/2015. In 2016, the search was updated with another search covering 9/8/2015 through 12/31/2015, which produced another four results.
that some seemed borderline. I conducted follow-up research on the twenty, and it turned out nine of these duplicated the Westlaw search or my own preliminary research; four had contempt findings with minimal sanctions (narrow awards of attorneys’ fees or other minor costs); and seven appeared to have contempt findings against agencies or officials on the face of the docket sheet but, on deeper examination of the docket sheet or of the underlying documents, had no such findings.

Of the 997 relevant cases in the second search, research assistants identified twenty-eight as apparently containing a contempt finding, noting that some seemed borderline. I conducted follow-up research on the twenty-eight, and it turned out that three were duplicated in the Westlaw search or my own preliminary research; eleven had contempt findings (mostly with sanctions consisting of attorneys’ fees or small fines against government attorneys, although in one, the court imposed a determinate fine schedule against the agency, after which the agency complied before any fines accrued); and fourteen appeared to have contempt findings against agencies or officials on the face of the docket sheet but, on deeper examination of the docket sheet or of the underlying documents, had no such findings.

To get a flavor of how litigation looks on the ground when plaintiffs seek a contempt finding and the judge rebuffs them, research assistants gathered unpublished judicial orders and federal agency briefs from most of the 420 suits arising from the first search in which the contempt proceedings did not result in a contempt finding. I examined docket sheets and sometimes filings in about 200 of these. They overwhelmingly focused on the case-specific issue of whether the agency was in violation or not, and possibly on the agency’s good faith effort to comply. There was virtually no discussion of sanctions or general issues like sovereign immunity.

Besides our two main Bloomberg Law searches, we also conducted a series of searches of the Bloomberg Law database seeking suits in which the “Nature of Suit” code was something relevant to administrative law, though we found little in this avenue. In particular, we performed a search for “contempt” in the keyword field with the following “Nature of Suit” entries: 893 (environmental matters) or 895 (FOIA).21 We avoided duplication with our other search by also including in the keyword field NOT “U.S. government defendant”. This produced 312 results, though only twenty-four involved contempt motions or other contempt proceedings against agencies or officials, and none contained actual contempt findings. We performed the same type of search for the following “Nature of Suit” entries: 460 (deportation); 465 (other

21 Bloomberg Law uses numerical codes, such as 893 for environmental matters, to categorize the nature of the suit.
immigration actions); and 861, 863, 864, 865 (various issues related to Social Security). This produced ten results, of which seven involved contempt motions or other contempt proceedings against agencies or officials, and no actual contempt findings.

III. INTERVIEWS

I conducted background interviews about the subject of contempt against federal defendants with (a) four attorneys who each had at least twenty years’ experience at DOJ defending litigation challenging federal agency action, plus a fifth attorney with at least fifteen years’ experience at DOJ in that capacity; (b) two former political appointees in sections of DOJ that regularly defend litigation challenging agency action; (c) four attorneys who each had at least twenty years’ experience working at public interest organizations that regularly litigate to challenge federal agency action; and (d) one current and one retired federal judge. All but one of the interviews were in person, and each lasted about one hour. The interviews were on background, so I do not cite them.