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June 29, 2006

Fed. R. Civ. P. 45 Subpoenas of the U.S. Government

On June 16, 2006, the Court of Appeals for the D.C. Circuit held in *Yousuf* v. *Samantar*,[1] that the word "person" in Rule 45 of the Federal Rules of Civil Procedure includes the U.S. Government.

I. BACKGROUND

The Supreme Court promulgated the Federal Rules in 1937 under the congressional grant of authority provided in the Rules Enabling Act.[2] Rule 45 sets forth procedures by which a "person" can be commanded to give testimony or produce documents or other tangible things in the course of civil litigation in federal courts. For instance, Rule 45(c) provides that a *person* served with a subpoena under Rule 45 shall have fourteen days to serve any objections in writing on the party issuing the subpoena.

The Dictionary Act provides guidance in construing the words used in any act of Congress.[3] As originally enacted in 1871, the Dictionary Act stated that the word "person" as used in all congressional statutes "may extend and be applied to bodies politic and corporate."[4] Congress made substantial amendments to the Dictionary Act in 1948 to provide that, unless the context indicates otherwise, the word "person" as used in any act of Congress shall be construed to mean an exclusive list of entities that does not include governments.[5] The Supreme Court has recognized a presumption of statutory construction that the word "person" does not include governments.[6]

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1 No. 05-5197, slip op. (D.C. Cir. June 16, 2006).

2 *See* Pub. L. No. 73-415; 48 Stat. 1064; *codified at* 28 U.S.C. § 2071 *et seq*.

3 *See* Act of Feb. 25, 1871, 16 Stat. 431, *amended by* Act of July 30, 1947, Pub. L. No. 80-278, 61 Stat. 633, *codified at* 1 U.S.C. § 1 (2000).

4 *See* Act of Feb. 25, 1871, 2, 16 Stat. 431.

5 *See* 1 U.S.C. § 1.

6 *See, e.g., Vermont Agency of Natural Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (applying

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II. FACTS AND PROCEDURAL HISTORY OF *YOUSUF*

On December 22, 2004, Yousuf and several other Somali nationals served the U.S. Department of State with a subpoena to produce documents relevant to a suit they filed in Virginia federal court against Samantar, another Somali national. In addition, plaintiffs filed document production requests directly with the State Department pursuant to its so-called *Touhy* regulations.[7]

The State Department received the request on January 13, 2005. The next day, while plaintiffs' *Touhy* request was still pending, State Department counsel informed plaintiffs that the agency would not comply with the subpoena. Plaintiffs petitioned the D.C. District Court to compel compliance.

The District Court applied the "longstanding interpretive presumption" that, as used in a statute, the term "person" does not include the U.S. Government, and finding the presumption unrebutted by plaintiffs held that the United States was not a "person" within the meaning of Rule 45, and thus was not subject to subpoena under the Rules. On appeal, plaintiffs argued: (i) that the Government had forfeited its objections to the production request by not filing them in accordance with the time requirements of Rule 45(c); and (ii) that the Government is a person for the purposes of Rule 45.

III. RATIONALE OF THE COURT

Before reaching the merits of the dispute, the Court of Appeals addressed a ripeness argument, advanced by the Government for the first time on appeal, that because the State Department could have produced the requested documents pursuant to plaintiffs' pending *Touhy* request, the refusal to comply with plaintiffs' subpoena was not a final agency action ripe for judicial review under the Administrative Procedure Act.[8] The Court of Appeals rejected the argument, observing that the APA was designed to limit judicial interference with the administrative decision-making process and that, in this case, the State Department had definitively decided not to comply with subpoena.[9]

The Court of Appeals next addressed plaintiffs' forfeiture argument, holding that the district court had not abused its discretion by entertaining the Government's objection to plaintiffs' subpoena. Conced-

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"longstanding interpretive presumption that 'person' does not include the sovereign"), citing *United States* v. *Mine Workers*, 330 U.S. 258, 275 (1947); *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941).

7 *See* 22 C.F.R. §§ 172.1-9 (setting forth parameters for U.S. Department of State disclosure of information upon request by litigants); *see also United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 468-70 (1951) (upholding regulations prohibiting release of information without approval from agency head).

8 *See Yousuf*, No. 05-5197, slip op. at 4.

9 *See id.* at 5.

ing that the Government's objections to the subpoena were not timely filed, the Court of Appeals recognized that a "district court may, in unusual circumstances and for good cause, consider an untimely objection to a subpoena"[10] and identified factors to guide the lower courts' discretion, including "whether (1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery; (2) the subpoenaed witness is a nonparty acting in good faith; and (3) counsel for the witness was in contact with counsel for the party issuing the subpoena prior to filing its formal objection."[11] The court found that these factors justified the District Court's decision to entertain the Government's untimely objections.

Proceeding to the substance of the District Court's order, the Court of Appeals rejected application of the presumption that the word "person" as used in Rule 45 does not include the U.S. Government. The court observed that Congress enacted the Dictionary Act eleven years after the Federal Rules took effect and concluded that it could not control an interpretation of the Rules.[12] The court then examined the circumstances under which pre-Dictionary Act courts would apply a presumption against interpreting the word "person" to include governments. Finding only two such circumstances, the Court of Appeals concluded that those circumstances were not present in this case and that the District Court's presumption in favor of the Government was therefore inappropriate.[13]

Presumption aside, the Court of Appeals concluded that the word "person" as used in Rule 45 includes the Government. The court invoked the "normal rule of statutory construction" that identical words in the same act should be interpreted to mean the same thing, and observed the Supreme Court's specific admonition that courts give the words of the Rules consistent interpretation.[14] The court observed that, in several other Rules, courts had construed the word "person" to include the Government.[15]

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10 *Id.* at 7, citing *Concord Boat Corp.* v. *Brunswick Corp.*, 169 F.R.D. 44, 48 (S.D.N.Y. 1996); 9 James W. Moore et at., MOORE'S FEDERAL PRACTICE § 45.04[2] (3d ed. 2004) (quotations omitted).

11 *Yousuf*, No. 05-5197, slip op. at 7.

12 The court also queried whether the Dictionary Act, which applies to "any Act of Congress," rightly controlled the interpretation of the Rules, which Congress never enacted. *See id.* at 8-9.

13 At common law, courts allowed a presumption against interpreting the word "person" to include the government only if doing otherwise (i) would deprive the government of a recognized or established prerogative, or (ii) would result in obvious absurdity. *Id*. at 10; *Nardone* v. *U.S.*, 302 U.S. 379, 383-84 (1937).

14 *See Yousuf*, No. 05-5197, slip op. at 13, citing *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 571 (1995) (normal rule of statutory construction), and quoting *Marek* v. *Chesney*, 473 U.S. 1, 21 (1985) (courts must give Federal Rules consistent meaning).

15 *See Yousuf*, No. 05-5197, slip op. at 13-14, citing *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C. Cir. 2003) (holding United States is a "person" under Rule 24, governing intervention as of right); *Carlson* v. *Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975) (holding United States is a "person" under Rules 19(a)(1) & (2), governing joinder); *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 556-

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Against this backdrop, the Court of Appeals found no compelling reason to interpret the word "person" differently in Rule 45. Contrary to the Government's argument, the court found no impediment in the failure expressly to subject the government to Rule 45, pointing to other Rules that had been interpreted to include the U.S. Government despite their failure to include specific language.[16] Nor did the absence of any specific mention of the Government in Rule 45 indicate a prevailing presumption that government information should not be disclosed. Calling this argument "both illogical and anachronistic," the court pointed to two law review articles for the proposition that "such commentaries as considered the present issue suggested that the Government is indeed a 'person' subject to Rule 45."[17] Finding no reason to depart from the general rule that the government is a person for the purposes of the Rules, the Court of Appeals held that the U.S. Government is a person within the meaning of Rule 45.

IV. SIGNIFICANCE OF DECISION

Yousuf clarifies that the U.S. Government is subject to the provisions of Rule 45 and thus, must comply with subpoenas properly served in accordance with that Rule. Additionally, *Yousuf* holds that an agency's refusal to comply with a subpoena will constitute a final administrative action susceptible to judicial review under the Administrative Procedure Act, and that judicial review need not await an agency's processing of parallel disclosure request submitted under agency's regulations.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or cgilman@cahill.com; Jonathan I. Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.

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57 (1951) (holding United States is a "person" under Rule 14, governing third-party impleader).

16 *See Yousuf*, No. 05-5197, slip op. at 14.

17 *Id.* at 16; E. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 742-43 (1939); R. Berger & A. Krash, *Government Immunity From Discovery*, 59 YALE L.J. 1451, 1465-66 (1950).