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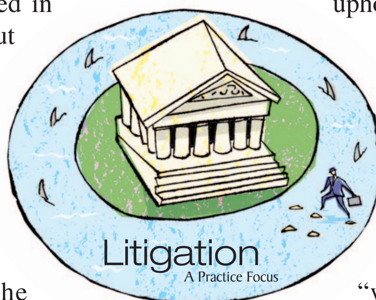
Can a Third Party Subpoena the Feds?

D.C. Circuit concludes that an agency is a 'person' under Rule 45. **By Robert R. Vieth and Tara M. Lee**

Does a civil litigant in federal court have the power to subpoena government documents if the government is not a party?

This may seem to be a basic question, but its answer has been surprisingly elusive and may depend on which federal court issued the subpoena. A civil litigant, for example, may be able to compel documents from agencies located in the U.S. Court of Appeals for the 9th Circuit, but not from those located in the 4th Circuit.



With its June opinion in *Yousuf v. Samantar*, the D.C. Circuit brought some clarity to the issue. The court rejected the government's latest grounds for refusing to comply with district court subpoenas, and it held that an agency of the U.S. government is subject to a federal subpoena issued under Rule 45 of the Federal Rules of Civil Procedure. Specifically, the court held that the government is a "person," as that term is used in Rule 45, and is therefore subject to the subpoena power of the federal courts.

Under the *Yousuf* decision a civil litigant may be able to compel an agency's compliance with a document subpoena issued by the D.C. District Court, but other circuits may excuse the agency from complying with the subpoena.

The Government's Position

Federal agencies are served with subpoenas every day. The government has not always claimed to be exempt from a subpoena, but in many cases the government has contended that it is not subject to subpoenas at all.

When the government chooses to fight, its principal argument has gone something like this: The government is protected by sovereign immunity; Section 702 of the Administrative Procedures Act (APA) provides the only waiver of sovereign immunity that applies to document subpoenas; the agencies have adopted "housekeeping" regulations that identify the factors they will consider in determining whether to comply with a document subpoena; the Supreme Court has upheld the validity of these housekeeping regulations in *United States ex rel. Touhy v. Ragen* (1951); the litigant must await the agency's final agency action on the document request before it may challenge it in a plenary suit against the agency under the APA; and so long as the agency's final policy decision to refuse the documents is consistent with the regulatory considerations, the court must uphold the agency's decision.

Faced with this argument, will a civil litigant be able to enforce its subpoena to a federal agency? If a state court issued the subpoena, the government's argument likely will carry the day. Some courts, however, seemingly would accept the government's traditional argument even with subpoenas from federal courts.

The 4th Circuit, for example, has stated that "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." In another case the 3rd Circuit reasoned that the Environmental Protection Agency "did not abuse its discretion or otherwise err in preventing [an agency employee] from using agency time to give deposition testimony, . . . in private litigation." The 7th Circuit has construed *Touhy* as "part of an unbroken chain of authority that supports the Department's contention that a federal employee cannot be compelled to obey a subpoena, even a federal subpoena, that acts against valid agency regulations." Although each of these quotations is arguably dicta, a party would be well served to try to avoid serving a document subpoena in these circuits.

A Flawed Argument

There are flaws in the government's traditional argument, at least as it applies to subpoenas a federal court issues.

First, it is not clear that the APA supplies the applicable waiver of sovereign immunity. Well before the APA was passed, courts have enforced document subpoenas against the government, noting serious concerns about separation of powers if the government were immune from subpoenas. In 1807, Chief

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Justice John Marshall, sitting as the trial judge in the treason trial against Aaron Burr, enforced subpoenas against the government, including one seeking a letter possessed by President Thomas Jefferson. Marshall feared that permitting the government to withhold the documents might "justly tarnish the reputation of the court."

Almost a century later, in *Boske v. Comingore* (1900), the government resisted a subpoena calling for a local revenue agent to produce official records of the Treasury Department, but conceded that the documents "could be secured by a subpoena duces tecum to the head of the Treasury Department." All of this, of course, predates the 1976 enactment of the APA's waiver of sovereign immunity.

The government's traditional argument is also based on an unjustifiably broad reading of the *Touhy* opinion. *Touhy* did not authorize the government to withhold properly subpoenaed documents; rather, the issue in *Touhy* was whether a federal official may be held in contempt for refusing to obey a document subpoena when his superior officer had directed him, by regulation, to disobey the subpoena. The court saw "no material distinction" between the facts of *Touhy* and the prior case of *Boske v. Comingore*, in which the government had conceded that agency records were obtainable by a subpoena directed to the agency head. Concurring in *Touhy*, Justice Felix Frankfurter emphasized, "There is not a hint in the Boske opinion that the government can shut off an appropriate judicial demand for such papers."

Congress may have thought it put an end to the traditional argument in 1958, when it amended the housekeeping act to provide that it "does not authorize withholding information from the public. . . ." Undeterred, the government continued to argue that *Touhy*, the Housekeeping Statute, and agency regulations authorize an agency to withhold records in the face of a subpoena.

Another potential flaw in the government's traditional argument is its assumption that an agency's decision is subject to the arbitrary and capricious standard of review. Even if the APA supplies the applicable waiver of sovereign immunity, this does not mean the agency's decision regarding compliance with the subpoena is reversible only if it is arbitrary and capricious. Indeed, the APA empowers a court to decree unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." If Rule 45 applies to the government, does it not constitute the "law" with which the government must comply?

For these and other reasons, the 9th and D.C. circuits have rejected the government's traditional argument and reasoned that the government is subject to a valid federal court subpoena. Specifically, the D.C. Circuit stated in *Houston Business Journal v. Office of Comptroller of the Currency* (1996) that "neither the Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to withhold documents from a federal court." One might have thought that would have resolved the matter well before *Yousuf*.

Not a 'Person'?

Many agency subpoenas originate within the D.C. Circuit, which caused the government to try to find a way around the *Houston Business Journal* decision. The result is a contention that the government is not a "person," as that term is used in Rule 45, and therefore not subject to a federal court subpoena.

Remarkably, the genesis of this argument is found in the famous auto accident that killed Princess Diana and Dodi Fayed. Under a federal statute authorizing district courts to issue subpoenas to any "person" in connection with foreign judicial proceedings, Fayed's father sought documents from the CIA for use in connection with French legal proceedings related to the accident. The D.C. Circuit ruled that the U.S. government is not a "person" as the term is used in the statute. The court applied the "longstanding interpretive presumption" that the word "person," as used in a statute, does not include the United States. This case did not construe Rule 45, but the seeds had been planted.

Eight months later, in *Linder v. Calero-Portocarrero* (2001), the D.C. Circuit declined to decide whether the word "person" in Rule 45 includes the government, because that issue had not been raised before the District Court. The *Linder* court stated, however, that although many courts had long "assumed" that the government was subject to a subpoena, that "assumption may need to be re-examined in light of Al-Fayed."

After *Linder*, government attorneys and district judges accepted the invitation to re-examine the assumption that the government is subject to a subpoena. By January 2006, a number of district judges within the circuit had declined to enforce subpoenas against federal agencies on the grounds that the government is not subject to a Rule 45 subpoena.

Rule 45 Persons

For now, at least, *Yousuf* has put an end to this trend, as the D.C. Circuit rejected the government's argument that it is not a "person" under Rule 45.

The *Yousuf* opinion seems correct for a number of reasons. First, the government has not raised this objection in the many decades of practice under the Federal Rules, and this suggests the argument is based more on the creativity of government counsel than on a legitimate understanding of the intent of the rules.

Second, as the court in *Yousuf* noted, many other civil rules use the term "person," and those rules have been interpreted to include the government. Third, countless agency regulations recognize that subpoenas may be served on the agencies. Fourth, the decision protects the separation-of-powers concerns that underpin cases like Burr's and its descendant, *United States v. Nixon* (1974), which also involved a subpoena to a president. The decision also respects what John Henry Wigmore described as the entitlement of litigants to "every man's evidence."

Practical considerations also argue forcefully in favor of the decision. If the government had prevailed in *Yousuf*, a Rule 45 document subpoena to an agency would be nothing more than an administrative request for documents. Neither the deadlines of Rule 45 nor the compulsory process of Rule 37 would be available to the litigants or the court. For many civil litigants it simply is not feasible to pursue a plenary lawsuit under the APA challenging an agency's refusal to honor a document subpoena

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as arbitrary and capricious. Not only is the standard overly deferential to the government, but there simply may be insufficient time to pursue this satellite litigation within the deadlines imposed by the initial court.

The *Yousuf* decision should not impose any particular hardship on the government. Rules 45 and 26 comfortably accommodate objections and provide means to preserve governmental privileges and resources. The 14-day deadline for the assertion of objections may seem unfair to government counsel in many cases, but the courts, including the *Yousuf* court, have shown sympathy when the record reflects reasonable diligence by the agency and its counsel.

WHAT NEXT?

Assuming *Yousuf* is not reconsidered or overturned, it should prove significant. A party to a case in federal court in New Jersey, for example, may be able to subpoena documents from agency headquarters in Washington to take advantage of *Yousuf* and avoid adverse authority in the 3rd Circuit.

And though *Yousuf* addressed a document subpoena, what if a litigant requires testimony from agency personnel? An attempt to notice the deposition of a particular agency employee may run afoul of agency regulations and *Touhy*. The rationale of *Yousuf*, however, strongly suggests Rule 30(b)(6) is available for testimony by an agency designee, particularly since that rule specifically contemplates a deposition of a "governmental agency." Thus, *Yousuf* should clear away many of the roadblocks, and much of the confusion, surrounding third-party discovery from the federal government.

Robert R. Vieth is a partner and Tara M. Lee is an associate in the Reston, Va., office of Cooley Godward. The firm and its co-counsel, the Center for Justice and Accountability, represent the plaintiff-appellants in Yousuf.

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