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November 28, 2006

Mr. Peter G. McCabe
Secretary of the Committee on Rules of
Practice and Procedure of the Judicial
Conference of the United States
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 45

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On November 16, 2006, the Section unanimously approved the enclosed report entitled "Treating the Federal Government Like Any Other Person: Toward a Consistent Application of Rule 45." On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

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GKA:sm
Enclosure

cc: Lesley F. Rosenthal, Esq., Chair (w/encl.)
Mark H. Alcott, Esq. (w/encl.)
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TREATING THE FEDERAL GOVERNMENT LIKE ANY OTHER PERSON: TOWARD A CONSISTENT APPLICATION OF RULE 45

I. Introduction

On June 16, 2006, the District of Columbia Circuit Court of Appeals in *Yousuf v. Samantar*[1] halted a disturbing trend that had emerged over the previous two years, principally in the D.C. district courts. The district courts had concluded that an agency of the federal government could not be subpoenaed as a "person" under Rule 45 of the Federal Rules of Civil Procedure to produce documents in cases to which the government was not a party.[2] The Court of Appeals, after finding that "the text of the Rule is unhelpful," nonetheless held that "the Government is a 'person' subject to subpoena under Rule 45 regardless whether it is a party to the underlying litigation."[3] Accordingly, Rule 45 or the Advisory Committee notes or both should be amended to make it explicit that the federal government may be

[1] 451 F.3d 248, 255 (D.C. Cir. 2006).

[2] *See Truex v. Allstate Ins. Co.*, No. 05-0439 (ESH), 2006 WL 241228, at *5 (D.D.C. Jan. 26, 2006); *SEC v. Biopure Corp.*, No. 05-506 (RWR/AK), 2006 U.S. Dist. LEXIS 12889, at *15 (D.D.C. Jan. 20, 2006); *AlohaCare, Inc. v. Hawaii ex rel. Dep't of Human Servs.*, No. 04-498 (CKK), 2005 U.S. Dist. LEXIS 41202, at *21 (D.D.C. June 28, 2005); *Ho v. United States*, 374 F. Supp. 2d 82, 84 (D.D.C. 2005); *United States ex rel. Taylor v. Gabelli*, 233 F.R.D. 174, 176 (D.D.C. 2005); *Yousuf v. Samantar*, No. 05-110 (RBW), 2005 WL 1523385, at *4 (D.D.C. May 3, 2005), *rev'd*, 451 F.3d 248, 257 (D.C. Cir. 2006); *Lerner v. Dist. of Columbia*, No. 00-1590 (GK), 2005 WL 2375175, at *5 (D.D.C. Jan. 7, 2005); *see also Robinson v. City of Phila.*, 233 F.R.D. 169, 172 (E.D. Pa . 2005).

[3] 451 F.3d at 257; see *also In re Vioxx Prods. Liability Litig.*, 235 F.R.D. 334, 342 (E.D. La. 2006). This proposition was first expressed in *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958). Justice Douglas cited nothing for this principle; it was self-evident. It should also be noted that, prior to the D.C. Circuit decision in *Al Fayed v. CIA*, 229 F.3d 272 (D.C. Cir. 2000) (interpreting 28 U.S. C. § 1782, permitting discovery in aid of foreign tribunals), it had been assumed that Rule 45 applied to the federal government even when not a party. See *Vioxx*, 235 F.R.D. at 343 (citing cases explicitly and implicitly holding that federal government was subject to sub poena). A later D.C. Circuit case, *Linder v. Calero – Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001) considered whether *Al Fayed* required a finding that Rule 45 did not apply against the federal government without actually deciding the issue.

subpoenaed under the standards of Rule 45 to provide documents or testimony as a third party to cases pending in the federal courts.[4]

The district court cases that excused federal government agencies from the scope of Rule 45 did so on the grounds, as urged by the federal government,[5] of: (a) a presumption that the sovereign may not be considered a "person," (b) the Dictionary Act[6] definition of "person" does not mention the federal government or its agencies, and (c) the lack of an explicit statement in Rule 45 covering the federal government. These arguments were rejected by the Court of Appeals in *Yousuf*.

II. No Presumption Of Sovereign Immunity Applies To Rule 45

In *In re Vioxx Products Liability Litigation*,[7] the district court exhaustively analyzed Supreme Court precedent regarding the "recognized interpretative rebuttable presumption that with regard to the application of substantive laws, the sovereign may not be considered a 'person.'"[8] The court in *Vioxx* and the D.C. Circuit in *Yousuf*, relying on the Supreme Court's decision in *Nardone v. United*

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[4] Rule 45(a)(1) provides:

> Every subpoena shall (A) state the name of the court from which it is issued and (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and (D) set forth the text of subdivisions (c) and (d) of this rule. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

A party is required to comply with a request for deposition or documents by mere notice under Rules 30 and 34. *See* Rules 30(a)(1) and 30(b)(1) and Rule 34(a). Both rules refer to discovery from non-parties by subpoena under Rule 45. *See* Rules 30(a)(1) and 30(b)(1) and Rule 34(c).

[5] *See, e.g., AlohaCare, Inc.*, 2005 U.S. Dist. LEXIS 41202, at *7, *12-*13, *15-*21.

[6] 1 U.S.C. § 1.

[7] 235 F.R.D. at 339-41.

[8] *Id.* at 339. The seven cases generally cited for this presumption of statutory construction are *Vermont Agency of Natural Resources v. United States ex. rel. Stevens*, 529 U.S. 765, 778-88 (2000) (state not subject to *qui tam* liability and not a "person" under 31 U. S. C. § 3729(a)); *International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79-87 (1991) (federal agency not a "person" under 28 U. S. C. § 1442 (a)(1) – reading would produce absurd results, as an agency would be acting under an officer of same agency); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 72-87 (1989) (state not a "person" under 42 U.S.C. §1983 and subject to liability for rights violation); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666-69 (1979) (state not a "white person" under 25 U.S. §194 permitting suit); *United States v. United Mine Workers*, 330 U.S. 258, 269-89 (1947) (federal government not an "employer" under 29 U.S.C. § 52 enabling it to be divested of sovereign power to seize mines); *United States v. Cooper Corp.*, 312 U.S. 600, 604-14 (1941) (holding United States was not a "person" under Sherman Act subjecting it to treble damages). Finally, in *United States v. Fox*, 94 U.S. 315, 321 (1876), cited in *Cooper*, the Supreme Court, without any presumption, ruled that the federal government could not be a "person" under the New York Statute of Wills as it would cause New York to have impliedly divested sovereign control of land within its borders. In addition to these cases consisting statutes using the word "person" in the context of a sovereign, the dissent in *Vermont Agency of National Resources* cited several cases for the proposition that a statute is pressured only not to be apply to the enacting sovereign, 529 U.S. at 789-802 (Steve, J. dissenting). *See also* cases cited in *Vioxx*, 235 F.R.D. at 342. A complete catalogue of federal statutes using the word "person" is outside the scope of this report.

States,[9] found that this presumption applied in only two classes of cases: (1) "where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest," such as a statute of limitations; and (2) where deeming the government a person would "work [an] obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."[10] Both the *Yousuf* and *Vioxx* courts found that Rule 45, as a procedural rule, fell into neither class.[11] The government has no "established prerogative" not to respond to

subpoenas, and application of Rule 45 would work no "obvious absurdity."[12] Therefore, there is no presumption that "person" as used in Rule 45 excludes the federal government as a matter of sovereign immunity.[13]

III. The Dictionary Act Is Inapplicable

The Dictionary Act states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise - . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," but not the federal government.[14] Nonetheless, without reaching the question of whether the Dictionary Act applies to judicially-adopted rules, the D.C. Circuit in *Yousuf* rejected its applicability. The Dictionary Act was passed in 1947, and, when Rule 45 was adopted in 1937, the predecessor of the Dictionary Act, the Act of Feb. 25, 1871, 16 Stat. 431, provided that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."[15]

IV. Under Ordinary Rules Of Statutory Construction Rule 45 Includes The Federal Government

The D.C. Circuit in *dicta* in *Al Fayed v. CIA*,[16] which interpreted 28 U.S.C. § 1782 as not including the federal government within the word "person" for purposes of enforcing a foreign country subpoena, and in *Linder v. Calero-PortoCarrero*,[17] which declined to decide the issue because the government had not raised it below, suggested that it was an open question whether "person" in Rule 45 included the federal government. In subsequent decisions, exemplified by *AlohaCare*, the D.C. district court, building on *Al Fayed* and *Linder*, had found that, although Rule 30(b)(6) included the federal government within the description of a person for purposes of an oral deposition, the federal government was not included within the definition of a person for purposes of

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[9] 302 U.S. 379, 383-84 (1937).

[10] *Yousuf*, 451 F.3d at 254; *Vioxx*, 235 F.R.D. at 340.

[11] *Yousuf*, 451 F.3d at 254; *Vioxx*, 235 F.R.D. at 341-42.

[12] *Yousuf*, 451 F.3d at 254.

[13] *Vioxx*, 235 F.R.D. at 342.

[14] 1 U.S.C. § 1.

[15] *Yousuf*, 451 F.3d at 253-54.

[16] 229 F.3d 272, 275-76 (D.C. Cir. 2000).

[17] 251 F.3d 178, 181 (D.C. Cir. 2001).

a third-party subpoena under Rule 45, even when an oral deposition was being sought.[18] *Yousuf* rejected such a distinction.[19]

First, *Yousuf* found that "the text of the Rule itself is unhelpful" in determining whether the federal government is a "person" bound by Rule 45.[20] The D.C. Circuit then "turn[ed] to the context in which the Rule resides, that is, to the Rules as a whole."[21] After reciting the Supreme Court's instruction in *Marek v. Chesny*,[22] that "words and phrases [in the Federal Rules of Civil Procedure] . . . *must* be given a consistent usage and be read *in pari materia*" (emphasis in original), the court found that Rules 4(i)(3)(A),[23] 14,[24] 19(a)(1), 19(a)(2),[25] 24,[26] and 30(b)(6)[27] all included the federal government within the scope of a "person" subject to the particular Rule and concluded that "person" in Rule 45 must be read similarly.[28]

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[18] 2005 U.S. Dist. LEXIS 41202, at *19. *See also Truex*, 2006 WL 241228, at *4; *Biopure*, 2006 U.S. Dist. LEXIS 12889, at *9, *15; *Ho*, 374 F. Supp. 2d at 84 n.4; *Gabelli*, 233 F.R.D. at 175-76; *Yousuf*, 2005 WL 1523385, at *3-*4, *rev'd*, 451 F.3d at 257; *Lerner*, 2005 WL 2375175, at *4-*5.

[19] *Vioxx* also rejected the distinction:

> [T]here is no language in Rule 45 which would lead this Court to determine that "person" includes the government when it is a party, but not when it is a non-party. Therefore, if the government is a "person" when it is a party and there is no language in Rule 45 differentiating parties from non-parties, principles of consistent interpretation require "person" as used in Rule 45 to encompass the government when it is both a party and a non-party.

235 F.R.D. at 342.

[20] 451 F.3d at 255.

[21] *Id.*

[22] 473 U.S. 1, 21 (1985).

[23] Rule 4(i)(3)(A) addresses a party's failure to serve "all *persons* required to be served in an action governed by Rule 4(i)(2)(A)" (emphasis added), which, in turn, governs "[s]ervice on an agency or corporation of the United States." *Yousuf*, 451 F.3d at 255.

[24] The United States may be impleaded as a third-party defendant under Rule 14, which provides for a "summons and complaint to be served upon a *person*." *See United States v. Yellow Cab Co.*, 340 U.S. 543, 556-57 (1951) (emphasis added).

[25] Although not expressly named in the Rules governing joinder, the "United States is a *person* described in Rule 19(a)(1), (2)." *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975) (emphasis added).

[26] The Untied States may intervene as of right under Rule 24, which requires "a *person* desiring to intervene [to] serve a motion." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 232-33 (D.C.Cir. 2003) (emphasis added).

[27] Rule 30(a)(1) states that "[a] party may take the testimony of any *person*, including a party, by deposition upon oral examination . . . The attendance of witnesses may be compelled by subpoena as provided in Rule 45" (emphasis added). Rule 30(b)(6) states that "[a] party may in the party's notice and in a subpoena name as the deponent a . . . governmental agency." The *Vioxx* court concluded, "reading Rules 30(a)(1) and 30(b)(6) in conjunction, a party may take the deposition of a governmental agency, whether a party or not, and compel the attendance of witnesses through the use of a Rule 45 subpoena." 235 F.R.D. at 342.

[28] *Yousuf*, 451 F.3d at 256.

V. The Applicable Standard of Review

Since *Yousuf*, the federal government has sought to prevent disclosure under third-party subpoenas on the grounds that the requestor has failed to comply with so-called *Touhy* regulations and that the government's withholding of information should be reviewed under the arbitrary and capricious standard of the Administrative Procedure Act ("APA") § 706(2)(A).[29]

In *United States ex rel. Touhy v. Regan*,[30] the Supreme Court held that an FBI agent could not be held in contempt of court for refusing to obey a subpoena to produce papers based on a regulation issued by the United States Attorney General under the Housekeeping Act[31] declaring such papers confidential, which it found within his authority to issue.[32] Thereafter, the APA was amended to provide that a reviewing court may set aside an agency action only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[33]

There is a split in authority as to the standard of review to apply in determining whether a federal agency has properly refused to comply with a subpoena. *Exxon Shipping Co. v. United States Dep't of Interior*[34] held that the undue burden standard of Rule 45 applied; *COMSAT v. Nat'l Service Foundation*,[35] held that the arbitrary and capricious standard of the APA controlled; *Houston Business Journal v. Gill*[36] held that a subpoena *duces tecum* was reviewed under the undue burden standard, while a subpoena *ad testificandum* was considered under the APA, and *United States Envtl. Protection Agency v. General Elec. Co.*[37] left the issue open.

The government has justified resistance to third-party subpoenas by citing rationales for enacting *Touhy* regulations in the first place: centralization as to whether subpoena will be obeyed or

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[29] *See Abdou v. Gurrieri*, No. 05-CV-3946 (JG) (KAM), 2006 WL 2729247, at *2, *4 (E.D.N.Y. Sep. 25, 2006); *SEC v. Selden*, 445 F. Supp. 2d 11, 13-14 (D.D.C. 2006).

[30] 340 U.S. 462 (1951).

[31] Now codified at 5 U.S.C. § 301, the Housekeeping Act provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Federal agencies have adopted regulations, now called *Touhy* regulations, governing disclosure of information in their control.

[32] 340 U.S. at 465, 468, 470. Concurring, Justice Frankfurter cautioned that "the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached." 340 U.S. at 472.

[33] 5 U.S.C. § 706(2)(A).

[34] 34 F.3d 774, 777 (9th Cir. 1994).

[35] 190 F.3d 269, 274 (4th Cir. 1999).

[36] 86 F.3d 1208, 1212 (D.C. Cir. 1996).

[37] 212 F.3d 689, 690 (2d Cir. 2000).

challenged, minimization of the use of governmental resources unrelated to official business, and a policy determination about the best use of an agency's resources.[38]

However, there is no reason that the government, like any other person, could not present any concerns about burden or privilege to a court for a determination as whether to quash a subpoena. Courts can consider all the federal government's policy arguments in the context of ruling on the need for compliance with the subpoena. In fact, courts have not had trouble determining issues of burden or privilege appropriately raised by the federal government.[39] Moreover, APA § 706(2)(A) explicitly provides that a court reviewing an agency action may set it aside if it is "not in accordance with law," that is, not in accordance with the standard of Rule 45.

The standards of administrative agency review should not be applied to an action to enforce a subpoena against the federal government under Rule 45. If a governmental agency has information relevant to a dispute, even if it is not a party, it should be required to produce that information, as any other person would, under the same standards as govern any other third party. There is no need to treat the federal government under a different standard under Rule 45. Accordingly, cases requiring exhaustion of administrative remedies before entertaining a motion to compel under Rule 45 and imposing an arbitrary and capricious standard in evaluating agency non-compliance are flawed. Rule 45 or the Advisory Committee notes or both should be amended to describe the appropriate standard to be applied to federal government agencies in reviewing subpoenas issued to them.

VI. Conclusion

Agencies of the federal government, if in possession of relevant and material evidence, should be compelled to provide it to litigants in a civil case to which it is not a party, like any other person. Because of the confusion principally in the D.C. district courts over whether agencies of the federal government should be subject to a subpoena under Rule 45 in a case in which they are not parties and because the D.C. Circuit has indicated that Rule 45 does not explicitly state that, when the Rule refers to a "person," it includes the federal government, Rule 45, the Advisory Committee notes or both should be amended to make explicit that a subpoena may be served and enforced under the standards of Rule 45 against the federal government or an agency thereof even when the United States is not a party to the litigation in which discovery is sought.

This report originated with the Section's Committee on Federal Procedure, chaired by Gregory K. Arenson. Its principal authors are Mr. Arenson and Stephen T. Roberts. The report was adopted as the position of the Section on November 14, 2006.

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[38] *See* the Memorandum of the United States Department of State in Opposition to Motion to Compel Compliance with a Rule 45 Subpoena, filed March 21, 2005 in connection with the *Yousuf v. Samantar*, No. 05-RL-00110 (RBW), in the District Court of the District of Columbia, 2005 WL 2523385. The government cited *Touhy*, 340 U.S. at 468; *COMSAT*, 190 F.3d. at 278; and *Boron Oil Co. v. Downie*, 873 F.2d 67, 73 (4th Cir. 1989).

[39] *See Vioxx*, 235 F.R.D. at 344-345 (the court considered policy reasons advanced by government and held that, even under an arbitrary and capricious standard, much less under an undue burden standard, the government decision not to produce a witness deprived a party of necessary evidence and ordered that testimony be taken); *Abdou*, 2006 WL 2729247, at *3-*4 (under both the arbitrary and capricious and undue burden standards, the government's interest in protecting its informant outweighed the need for a detective's testimony).