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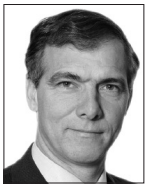
Expert Analysis

Escaping 'Nixon's' Legacy: the Proper Standard for Rule 17(c) Subpoenas



By **Robert J. Anello**

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Rule 17(c) of the Federal Rules of Criminal Procedure sets forth the means by which a criminal defendant can compel the production of documents from third parties. It is a critical mechanism by which defendants facing trial may realize their constitutional right to "put before a jury evidence that might influence the determination of guilt."[1] The practical utility of Rule 17(c) subpoenas has been limited, however, because courts have tended to hold them to a demanding standard that arose in the context of subpoenas addressed not to third parties, but to the government. That standard has become the touchstone in this area since the Supreme Court's ruling in *United States v. Nixon*, notwithstanding that in that case the court expressly left open the question whether a lower standard generally should be applied to subpoenas to third parties.

In recent years, courts have begun to depart from the rote application of the so-called *Nixon* standard, with Judge Shira Scheindlin of the Southern District of New York leading the charge. With the recent explosion in the quantity and variety of electronic evidence potentially available from third parties, practitioners should be aware of the unlikely provenance of the doctrine that will typically be asserted to challenge their Rule 17(c) subpoenas, and the growing body of decisions suggesting a more flexible standard.

As Southern District of New York Judge Richard J. Holwell has pointed out, this more flexible test would help remedy the anomaly that under the *Nixon* standard, "a defendant on trial for his life or liberty does not even have the right to obtain documents 'material to his defense'" from a third party, while a civil defendant in a common breach of contract case has a much broader right to obtain any documents "reasonably calculated to lead to the discovery of admissible evidence."[2]

Rule 17(c) Procedure

Rule 17(c) applies to trial subpoenas duces tecum sought by either the prosecution or the defense to secure the production of documents and objects. Subsection (c)(1) states, "A subpoena may order a witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them." Subsection (c)(2) provides that a court "may quash or modify the subpoena if compliance would be unreasonable or oppressive."

A party may seek a subpoena compelling the production of documents either at trial or before the trial commences. The second sentence of Rule 17(c)(1) contemplates a court's intervention to obtain a subpoena duces tecum returnable before trial. In contrast, the rule does not set forth the process for obtaining a subpoena duces tecum returnable at trial pursuant to the first sentence of (c)(1). Courts generally have held that a subpoena duces tecum returnable at trial is issued in blank by the clerk to counsel and served

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by counsel without the involvement of the court.[3]

History of Rule 17(c)

The Supreme Court first addressed the scope of Rule 17(c) in *Bowman Dairy v. United States*.[4] In *Bowman* a defendant charged with violations of the Sherman Antitrust Act sought to enforce a Rule 17(c) subpoena addressed to the government, seeking production of materials prior to trial. The court rejected the government's argument that the defendant's mechanism to obtain items in its possession was limited to Rule 16 of the Federal Rules of Criminal Procedure, which governs the parties' discovery obligations.

The court stated that if the government had materials not subject to Rule 16, they were subject to "subpoena under Rule 17(c) as long as they are evidentiary," that is, that they were sought as part of "a good-faith effort…to obtain evidence."[5] The court cautioned, however, that the breadth of Rule 17 should not be permitted to undermine the limits on discovery imposed by Rule 16. "Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."[6]

In 1952, the renowned Judge Edward Weinfeld of the Southern District of New York elaborated on the standard for Rule 17(c) subpoenas, again in the context of a pretrial subpoena duces tecum served on prosecutors. In *United States v. Iozia*, Weinfeld cited *Bowman* for the proposition that "there must be a showing of good cause to entitle the defendant to production and inspection of documents under Rule 17(c)."[7] He defined good cause as a showing by the defendant that: (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; (3) the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) the application is made in good faith and is not intended as a general fishing expedition.

In recent years, courts have begun to depart from the rote application of the so-called 'Nixon' standard.

In *United States v. Nixon*, the Supreme Court utilized Weinfeld's standard in addressing a subpoena addressed to a rather unique third party—the president of the United States.[8] That decision, addressing President Richard Nixon's motion to quash the Watergate special prosecutor's subpoena seeking the infamous White House tapes, was one of the most closely watched and politically charged legal disputes in our history. The special prosecutor sought the subpoena in the prosecution of several former high-ranking government and campaign officials, including Attorney General John Mitchell, and Nixon had been identified as an unindicted coconspirator in the case.

The court concluded, 8-0, that the special prosecutor had made the necessary showing to justify the subpoena under the test established in *Bowman* and *Iozia* for subpoenas to the prosecution. Because it found that such standard—which it summarized as "(1) relevancy; (2) admissibility; [and] (3) specificity"—had been met, the court explained that it "need not decide whether a lower standard exists" when the subpoena is issued to a third party, rather than to the prosecution.[9]

The highly unusual circumstances of *Nixon*—involving a subpoena to the president for bombshell evidence upon which the fate of a presidency would turn—make it quite understandable that the Supreme Court would decline to consider whether a lower standard should generally be applied to third-party subpoenas.[10] But the test applied in that case, now commonly referred to as the *Nixon* test, thereafter effectively became the benchmark in all cases analyzing Rule 17(c) subpoenas enforceable prior to trial.[11]

For years, commentators have pointed to the unfairness and illogic of strictly applying the *Nixon* test to defendants' third-party subpoenas,[12] and on occasion, counsel have had some success in convincing district courts to apply the test with some measure of flexibility when circumstances warrant.[13] More recently, however, a number of courts have addressed head-on whether the *Nixon* test is the proper standard for Rule 17(c) subpoenas to third parties.

In 2000, in *United States v. Nachamie*, Scheindlin considered the *Nixon* test in evaluating a group of 24 Rule 17(c) subpoenas that a defendant served on third parties.[14] "Unlike the [g]overnment, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena. Because the rule states only that a court may quash a subpoena 'if compliance would be unreasonable or oppressive,' the judicial gloss that the material sought must be evidentiary—defined as relevant, admissible and specific—may be inappropriate in the context of a defense subpoena of documents from third parties."[15]

Scheindlin suggested a different test for evaluating third-party subpoenas duces tecum served by a defendant, asking whether the subpoena was: "(1) reasonable, construed using the general discovery

notion of 'material to the defense'; and (2) not unduly oppressive for the producing party to respond."[16] The court ruled that under either this less stringent test or the *Nixon* test, with limited exceptions, the subpoenas at issue were proper.

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In 2008, Scheindlin again addressed the *Nixon* standard. In *United States v. Tucker*,[17] the defendant served a pretrial subpoena on the Bureau of Prisons seeking the production of recorded telephone calls for each of the government's cooperating witnesses, where there was evidence suggesting that one such witness received inducements not disclosed in his cooperation agreement. Surveying the law of criminal discovery and tracing the history of the *Nixon* standard, the court applied the less-stringent rule enunciated in *Nachamie*.[18] Scheindlin wrote: "The Constitution guarantees criminal defendants the right to confront their accusers, and 'the right to cross-examination has been held to be an essential purpose of the Confrontation Clause.' This right is meaningless if a defendant is denied the reasonable opportunity to obtain material evidence that could be crucial to that cross-examination."

Other district decisions have embraced the standard used by Scheindlin in *Nachamie* and *Tucker*, including a 2009 ruling from the Western District of New York,[19] and just last month, a decision from the Northern District of California.[20] In the KPMG tax shelter prosecution, under the unusual circumstances where the government had legal "control" of documents held by a third party pursuant to the terms of a deferred prosecution agreement, Southern District of New York Judge Lewis A. Kaplan found that there was "no conflict between the limited discovery afforded by Rule 16 and the broad words of Rule 17(c)" so long as the documents sought were material to the defense. Thus, Kaplan found no reason to limit Rule 17(c) beyond its plain language requiring production unless unreasonable or oppressive.[21]

Holwell also examined the Rule 17(c) standard for third-party subpoenas at some length in a 2011 decision in *United States v. Rajaratnam*,[22] the highly publicized insider trading prosecution. Although Holwell found that the more rigorous *Nixon* standard was satisfied in the case before him, he quoted Kaplan in explaining in regard to the *Nixon* test that it is "'vitally important never to let the frequent repetition of a familiar principle obscure its origins and thus lead to mindless application in circumstances to which the principle was never intended to apply,'" that is, in the circumstances of a subpoena to a third party.[23] Focusing on the specificity prong of the *Nixon* test, the court stated that "requiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity."[24] Holwell concluded that applying Scheindlin's "material to the defense" standard would properly insure that a defendant has the right to obtain documents from third parties that is "no broader—but also no narrower—than the defendant's right to obtain such material from the government."[25]

Conclusion

The logic of the *Nixon* standard, developed in the context of Rule 17(c) subpoenas directed to the government, does not fit the context of a defendant's subpoena to a third party. Recent decisions addressing defense subpoenas to third parties properly recognize the constitutional issues at stake, and are a welcome step toward greater fairness.

1. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (citations omitted).
2. *United States v. Rajaratnam*, 753 F.Supp.2d 317, 321 n.1.
3. See, e.g., *United States v. Beckford*, 964 F.Supp. 1010, 1017 (E.D. Va. 1997); *United States v. Najarian*, 164 F.R.D. 484, 487(D. Minn. 1985); *United States v. Van Allen*, 28 F.R.D. 329, 345 (S.D.N.Y. 1961).
4. 341 U.S. 214 (1951).
5. Id. at 219-220.
6. Id. at 220 (internal citation omitted).
7. 13 F.R.D. 335, 338 (S.D.N.Y. 1952).
8. 418 U.S. 683, 699 (1974).
9. Id. at 699 n.12, 700.
10. Indeed, the court specifically noted the need for the "meticulous" application of Rule 17(c) in that case to ensure proper deference was given to "a coordinate branch of government." 418 U.S. at 702 (citing *United States v. Burr*, 25 F.Cas. pp. 30, 34 (No. 14,692d) (CC Va. 1807) (addressing whether President Thomas Jefferson's administration was required to produce documents in treason prosecution of former Vice-President Aaron Burr)).
11. It is important to note that *Bowman, Iozia*, and *Nixon* all examined a subpoena duces tecum returnable before trial where Rule 17(c) contemplates court intervention. Typically, the court has no role in the supervision of subpoenas duces tecum returnable at trial, unless and until a third party moves to quash.
12. See, e.g., H. Lee Sarokin and William E. Zuckerman, "Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption," 43 *Rutgers L. Rev.* 1089 (1991) and other commentary cited in *United States v. Tucker,* 249 F.R.D. 58, 64 n. 34 & 35 (S.D.N.Y. 2008).
13. See *Tucker*, 249 F.R.D. at 66 n. 54.
14. 91 F.Supp.2d 552 (S.D.N.Y. 2000).
15. Id. at 562-63.
16. Id. at 563.
17. 249 F.R.D. 58.
18. Id. at 66. The court noted that the fact that the subpoena was issued one day before the trial was scheduled to begin reduced the likelihood of the defendant going on a "fishing expedition" contrary to the dictates of the *Nixon* test.
19. *United States v. Soliman*, 2009 WL 1531569 (W.D.N.Y. May 29, 2009).
20. *United States v. Nosal*, __F.R.D.__, 2013 WL 782003 (N.D.Cal. March 1, 2013).
21. *United States v. Stein*, 488 F.Supp.2d 350, 366 (S.D.N.Y. 2007).
22. 753 F.Supp.2d 317 (S.D.N.Y. 2011).
23. Id. at 321 n.1 (quoting *Stein*, 488 F.Supp.2d. at 365).
24. Id.
25. Id.