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The Battle over the Scope of Rule 17(c) Subpoenas

Part One of a Two-Part Article

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White-collar prosecutions often turn on the paper trail. The government and the defense may agree on what business transactions took place, but disagree as to whether the defendant acted with a culpable state of mind. The often voluminous emails, memoranda, invoices, accounting entries and other business records that explain why relevant transactions took place, and give context to the defendant's actions, therefore are critical to both the prosecution's case and the defendant's ability to mount a defense.

But the playing field is not level — not even close. Whereas the government has virtually unlimited access to business records during a grand jury investigation, which it can put before the jury at trial, the only means by which a white-collar defendant can require the production of business records from a non-party is through a subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure. Federal courts, however, have almost uniformly given Rule 17(c) a restrictive interpretation. Under this interpretation, no documents will be produced unless the subpoena seeks documents that are not only admissible in evidence, but also specifically described in the subpoena — no small feat when the documents are not in the defense's possession.

Rule 17(c) Subpoenas

In the last 10 years, however, a handful of district court decisions, with the leading decision from the Southern District of New York, have adopted a more permissive standard for Rule 17(c) subpoenas. Under these decisions, a subpoena will be enforced if the documents it seeks are "material to the defense," and the request is not unduly burdensome. But this more expansive standard may be short-lived. Recently, the U.S. Court of Appeals for the Fourth Circuit became the first appellate court to enter the fray, adopting the more restrictive approach to Rule 17(c). Though seemingly a technical disagreement, the battle over Rule 17(c) is a high-stakes one, as the scope of Rule 17(c) can determine the extent to which a white-collar defendant will be able to gain access to documents to rebut the prosecution's arguments.

An analysis of the key Supreme Court cases addressing third-party discovery in criminal cases, and the well-considered analysis by courts in the Southern District, demonstrates that the Fourth Circuit's reasoning does not adequately address the district court decisions that advocate for a more flexible interpretation of Rule 17(c). In light of its potentially important role in trying to level the playing field, defense counsel should continue to press for a fairer application.

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The Restrictive View

The text of Rule 17(c) appears to authorize substantial discovery. The parties may compel the pretrial production of "any books, papers, or other objects" designated in the subpoena, and the court may direct production of "the designated items in court before trial or before they are to be offered into evidence." Further, Rule 17(c) provides that the court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." As Judge Kaplan of the Southern District of New

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York has written, "[o]n the face of it, [Rule 17(c)] appears to permit, subject to the court's discretion, the use of compulsory process to obtain pretrial disclosure in criminal cases provided only that compliance with a subpoena not be unreasonable or oppressive." *United States v. Stein*, 488 F. Supp. 2d 350, 364 (S.D.N.Y. 2007).

The Advisory Committee Note for Rule 17(c), which accompanied Rule 17(c) when it was adopted in 1944, reinforces the breadth of the rule's language. The Note states that the "rule is substantially the same" as Rule 45(b) of the Federal Rules of Civil Procedure, which broadly authorizes subpoenas for documentary evidence. At the time, Rule 45(b) also stated that the court may quash subpoenas only if they are "unreasonable or oppressive." The Supreme Court has made clear that Advisory Committee Notes should be given "weight" in interpreting the Federal Rules. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

Notwithstanding the textual similarity between Rule 17(c) and Rule 45(b) when they were enacted, and the Advisory Committee Note stating that they are "substantially the same," in practice, the rules have markedly different meanings. In a civil case, a party may use a Rule 45 subpoena to obtain discovery regarding any nonprivileged matter "that is relevant to any party's claim or defense" so long as the subpoena does not impose an "undue burden." Fed. R. Civ. P. 26(b), 45(d). Further, the information "need not be admissible in evidence to be discoverable."

The scope of Rule 17(c), however, has been interpreted in a much more restrictive manner. In a criminal case, where the defendant's liberty is on the line, a Rule 17(c) subpoena, unlike a civil subpoena, must satisfy two requirements in addition to relevancy: The subpoenaed material must be both admissible as evidence in court and described with specificity. No textual basis exists in the rule for either the admissibility or the specificity requirements. Nonetheless, federal courts almost uniformly impose these strict requirements.

The dominant view of Rule 17(c) thus severely restricts its usefulness in white-collar cases. As Robert Morvillo explained in an article outlining the impediments to trial preparation for white-collar defendants, "[i]t is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can comply with" Rule 17(c). Robert G. Morvillo et al., Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation, 42 *Am.Crim. L.Rev.* 157, 160 n. 12 (2005). As a practical matter, "requiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity." *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 320 (S.D.N.Y. 2011).

Next month, we will consider the competing interpretations of Rule 17(c), after briefly pausing to explain how we got here.

Part Two of a Two-Part Article

Editor's note: Last month, the authors noted that the only means by which a white-collar defendant can require the production of business records from a non-party is through a subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure. However, most federal courts have given Rule 17(c) a restrictive interpretation, requiring documents to be produced only if they are not only admissible but also specifically described in the subpoena. They conclude their discussion herein.

Before considering the competing, less restrictive, interpretation of Rule 17(c), we briefly pause to explain how we got here. The restrictive interpretation of Rule 17(c) has its genesis in two Supreme Court decisions, discussed below.

The Supreme Court Decisions

In *Bowman Dairy Co v. United States*, 341 U.S. 214, 220 (1951), a criminal antitrust case from 1951, the Court held that Rule 17(c) applies only to "evidentiary" materials and "was not intended to provide an additional means of discovery." Instead, according to *Bowman*, Rule 17(c) primarily was designed to "expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."

At first blush, the Court's narrow construction of Rule 17 is difficult to square with the text of the rule and Advisory Committee Note. But the Court's analysis makes sense in the limited context of the *Bowman* case. In *Bowman*, the defendant had issued a Rule 17(c) subpoena to the government — not to a traditional third party. When *Bowman* was decided in 1951, Rule 16 of the Federal Rule of Criminal Procedure specified the discovery obligations of the government, which were limited to records "obtained from others by seizure or by process." The Supreme Court thus reasonably was concerned that the balance struck by Rule 16, which provides only a "limited right of discovery" to the defendant, would be undone if the defendant could use Rule 17(c) to obtain substantial discovery from the government that was not required under Rule 16.

The next time the Supreme Court considered Rule 17(c), in the 1974 decision in *United States v. Nixon*, 428 U.S. 683 (1974), the Court addressed the more traditional situation involving a subpoena to a non-party, albeit an extraordinary non-party: the President of the United States. After a grand jury returned an indictment against President Nixon's staffers for the Watergate conspiracy, the Special Prosecutor issued a Rule 17(c) subpoena to the President for tape recordings of "precisely identified meetings between the President and others." The Court began its analysis of the subpoena by citing *Bowman* for the proposition that Rule 17(c) "was not intended to provide a means of discovery for criminal cases." Based on this restrictive understanding of Rule 17(c), the Court went on to state that the Special Pros-

ecutor's subpoena had to "clear three hurdles: 1) relevancy; 2) admissibility; and 3) specificity." This despite the fact that the Special Prosecutor had argued that *Bowman's* restrictive standard did not apply when "the subpoena *decus tecum* is issued to third parties [like the President] rather than to government prosecutors." Because the Special Prosecutor's subpoena met the heightened three-prong standard, however, the Court expressly stated that it "need not decide whether a lower standard exists" for more traditional subpoenas to third parties.

It is far from clear whether *Nixon's* statement that Rule 17(c) was not intended to be "a means of discovery in criminal cases" applies to the more typical case of a criminal defendant seeking documents from a third party. The *Bowman* decision, from which the language originated, was concerned with interpreting Rule 17(c) as an end-run around the limits of Rule 16 — a concern that has no application when a defendant subpoenas materials from a non-party. Moreover, the *Nixon* decision dealt with a subpoena issued by a prosecutor. By the time the prosecution issues a Rule 17(c) subpoena, it has already "had at [its] disposal the broad authority of the grand jury" to investigate the case. Peter J. Henning, Defense Discovery in White Collar Criminal Prosecutions, *Georgia State University Law Review* (1999) at 639. A criminal defendant is hardly in a comparable position. Finally, *Nixon* involved the extraordinary circumstance of a subpoena against a "coordinate branch of Government," and the Court specifically stated that a "lower standard" might be applicable to more traditional thirty-party subpoenas. Nonetheless, the federal courts reflexively have applied *Nixon's* strict standard of relevance, admissibility, and specificity to Rule 17(c) subpoenas ever since.

The Tide Begins to Turn

In 1997, however, a series of district court decisions in California and New York began to question the application of the *Nixon* standard to third-party subpoenas. For example, in *United States v. Tomison*, a district court in the Eastern District of California limited *Bowman* to the context of subpoenas to the prosecution and held that a motion for a Rule 17(c) subpoena could be made *ex parte* to protect the defendant's trial strategy. 969 F. Supp. 587, 594 (E.D. Cal. 1997). The court explained that "the purported need to insure that Rule 17(c) is not used as a discovery device" has "little application where the defendants seeks documents from a third party rather than the government." The court's reasoning in *Tomison* laid the groundwork for the Southern District decision that rejected *Nixon*.

In the 2008 decision in *United States v. Tucker*, 249 F.R.D. 58, 66 (S.D.N.Y. 2008), Judge Shira Scheindlin of the Southern District of New York found that the *Nixon* standard did not apply to a criminal defendant's Rule 17(c) subpoena to a third party. Judge Scheindlin also held that a defendant need only make the lesser showing that the subpoena was "(1) reasonable, construed as material to the defense, and (2) not unduly oppressive for the producing party to respond." Judge Scheindlin took the "reasonable" and "unduly oppressive" standard from Rule 17(c)(2), and borrowed the "material to the defense" standard from the government's disclosure obligations under Rule 16.

Importantly, however, Judge Scheindlin's decision made clear that it was not intended to turn Rule 17(c) into a "broad discovery device." Her standard required the defendant to provide "articulable suspicion" that the documents sought were material to the defense, and to draft a subpoena that "reasonably targeted" those documents.

Judge Scheindlin provided two primary justifications for rejecting the *Nixon* standard. First, citing the *Tomison* decision, she held that *Bowman's* concern with turning Rule 17(c) into "an additional means of discovery" was limited to situations where the defendant issues a Rule 17(c) subpoena to the government (as opposed to a third party). She also found that, *Bowman* and *Nixon* notwithstanding, "Rule 17(c) may well be a proper device for discovering documents in the hands of third parties."

Second, Judge Scheindlin recognized that, unlike the government, which has extremely broad power to seek evidence through a grand jury subpoena, "federal defendants' opportunities for discovery are severely constrained." She noted that the government has the power of search and seizure, as well as the extremely broad subpoena power of the grand jury. Because the defendant has no means other than a Rule 17(c) subpoena to obtain discovery from non-parties, Judge Scheindlin concluded that it was "fair to ask whether it makes sense to require a defendant seeking to obtain material from a non-party" to meet the *Nixon* standard. Reasoning that the defendant has a constitutional right to "put before the jury evidence that might influence the determination of guilt," and that right requires the "the ability to obtain" evidence in the hands of third parties, she held that the *Nixon* standard should not apply to a defendant's subpoenas to a third party.

Judge Scheindlin's reasoning in *Tucker* has been met with a mixed reaction. At least two district court decisions have applied the "material to the defense" standard rather than *Nixon's* three-prong test. *See United States v. Nosal*, 291 F.R.D. 403, 408 (N.D. Cal. 2013); *United States v. Soliman*, No. 06CR236A, 2009 WL 1531569, at *3 (W.D.N.Y. May 29, 2009). These decisions recognize that "[c]oncerns about the Confrontation Clause" — that is, a defendants' inability to obtain the evidence needed to effectively cross-examine government witnesses — and "the unequal access to discovery in criminal cases," warrant a "relaxing" of *Nixon's* "specificity factor." *Nosal*, 291 F.R.D. at 408. Another decision, *Rajaratnam*, 753 F. Supp. 2d 317, 320, has endorsed *Tucker* in lengthy dicta, while still another has stated the court would be "mindful" of *Tucker's* arguments while applying the *Nixon* standard (*United*

States v. Buske, No. 09-CR-65, 2012 WL 5497848, at *2 (E.D. Wis. Nov. 13, 2012)). Other courts have declined to follow *Tucker* absent guidance from an appellate court. *See, e.g., United States v. Yudong Zhu*, No. 13 CR. 761, 2014 WL 5366107, at *2 (S.D.N.Y. Oct. 14, 2014). And others have flatly rejected *Tucker* as a "distinct minority view." *United States v. Al-Amin*, No. 1:12-CR-50, 2013 WL 3865079, at *8 (E.D. Tenn. July 25, 2013).

Against this backdrop, the U.S. Court of appeals for the Fourth Circuit's decision in *United States v. Rand* became the first circuit court opinion to consider *Tucker's* challenge to the *Nixon* standard.

United States v. Rand

In *United States v. Rand*, 835 F.3d 451 (4th Cir. 2016), the government alleged that Michael Rand, the controller and then CFO of Beazer, a homebuilding company, improperly adjusted the company's earnings to meet Wall Street's expectations.

During the investigation of Beazer, the government had complete access to the company's books and records. Other than the selected entries he received from the government — which, while voluminous, were incomplete — Rand had no access to the relevant company documents. Rand went to trial twice, as a split verdict after the first trial was set aside for juror misconduct. Before each trial, Rand sought the production of Beazer's complete accounting records for certain accounts so that he could put his contested accounting decisions in context and show that they were reasonable. The district court denied both requests, finding that Rand had failed to satisfy the *Nixon* standard. Rand was convicted.

On appeal, Rand argued that the district court should have applied the *Tucker* standard rather than the *Nixon* standard. The Fourth Circuit disagreed, and held that the *Nixon* standard applies to a defendant's Rule 17(c) subpoena to a non-party. The court made three arguments in support of its holding.

In *Rand*, the Fourth Circuit quoted *Bowman* for the proposition that Rule 17(c) subpoenas were "not intended to provide a means of discovery for criminal cases," and emphasized that the *Bowman* Court "did not cabin" this limitation to "discovery from the government." Next, the court argued that the standard for quashing subpoenas set forth in Rule 17(c) — that is, subpoenas that are "unreasonable or oppressive" — "map[s] on quite well to the *Nixon* standard of relevance, admissibility, and specificity." In addition, the court argued that "the right to defend oneself does not extend" to obtaining "information that may not even be admissible at trial … or that is merely investigatory."

These arguments do not sufficiently address the objections that *Tucker* and its progeny have raised to the application of *Nixon* to non-party subpoenas. First, the Fourth Circuit's invocation of *Bowman* for the proposition that Rule 17(c) is not "a means of discovery in criminal cases" is not persuasive. *Bowman* dealt with a subpoena to the prosecution, not to a third party. Moreover, *Bowman's* rationale — that Rule 17(c) cannot be used as method to evade the "limited right to discovery" in Rule 16 — little sense in the context of a subpoena to a third party because Rule 16 does not apply to third parties.

Finally, because *Nixon*, decided after *Bowman*, explicitly left open the possibility that a "lower standard" might apply to subpoenas to third parties, *Bowman* cannot be read to foreclose that possibility. In short, the Fourth Circuit's analysis extends *Bowman* without adequate justification.

Contrary to the Fourth Circuit's assertion that *Nixon's* admissibility and specificity requirements "map on" to the text of Rule 17(c), the *Nixon* requirements go farther than the text of Rule 17(c). Rule 17(c)(2) permits the court to quash only "unreasonable or oppressive" subpoenas; it says nothing about admissibility or specificity. Furthermore, a subpoena does not need to seek documents that are admissible, or that can be specifically described in advance, in order to be reasonable.

The court's assertion that "the right to defend oneself does not extend" to obtaining information that might not be admissible or is "merely investigatory," is merely an uncited quotation from a district court decision from the Eastern District of Tennessee. If a criminal defendant has an articulable and reasonable basis to believe that subpoenaed information will bolster his defense, or will lead to evidence that will bolster his defense, and compliance with the subpoena would not be unduly burdensome, the *Nixon* standard will nevertheless deny him "the reasonable opportunity to obtain material evidence." *Nosal*, 291 F.R.D. at 408 (quoting *Tucker*, 249 F.R.D. at 67).

Conclusion

The Supreme Court denied Rand's petition for review in late November, leaving the Fourth Circuit's opinion as the only appellate authority to address the *Tucker* standard. Although *Rand* is a setback in the fight for a more permissive and equitable reading of Rule 17(c), the existence of an appellate decision engaging with the *Tucker* standard will surely draw more attention to this important interpretive debate. Given the questionable provenance of the *Nixon* standard, and the strong arguments favoring a broader reading of Rule 17(c), counsel should be prepared to press courts to apply the *Tucker* standard.

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