A LEVEL PLAYING FIELD: WHY CONGRESS INTENDED THE BOARDS OF CONTRACT APPEALS TO HAVE ENFORCEABLE SUBPOENA POWER OVER BOTH CONTRACTORS AND THE GOVERNMENT

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I. INTRODUCTION AND SUMMARY

The Contract Disputes Act of 1978[1] (CDA) gave the Boards of Contract Appeals authority to authorize depositions and discovery proceedings and to require by subpoena the attendance of witnesses and production of docu-

1. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. § 610 (2000)).

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ments. The CDA further provides a mechanism for the enforcement of subpoenas in the case of contumacy or refusal to obey a subpoena:

> A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpena *by a person* who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.[2]

Although the first sentence of section 610 does not limit to whom a subpoena may be issued, the second sentence describes the enforcement procedure as applicable to "persons."

The Department of Justice (DOJ), which is charged by the CDA to enforce subpoenas in the district court when requested by a board, recently has taken the position that "a person" in this context does *not* include an agency of the Federal Government. Based on DOJ's objections, the Office of Federal Procurement Policy reportedly delayed the release of rules for the newly created Civilian Board of Contract Appeals (CBCA).[3] When the CBCA's rules were finally issued on July 5, 2007, the Federal Register notice announcing the new rules explained:

> Questions have been raised about the scope of the Board's subpoena authority over federal agencies. The Department of Justice has recently provided advice concluding that the statute that granted subpoena authority to the separate agency boards of contract appeals, and that provides such authority to the consolidated Board, does not provide the necessary legal authority for a board to enforce a subpoena against a federal agency. Therefore, the agency does not interpret the term "person" where it is used in 6101.16 to include the United States or component federal agencies.[4]

Assuming DOJ is correct that there is no ability to petition a district court to compel compliance with the subpoena when an agency official simply refuses to comply, responding to a Board subpoena, in effect, becomes optional at the discretion of the agency. This situation would be most acute in the case of a *nonparty* agency that has no immediate stake in the outcome of

2. 41 U.S.C. § 610 (emphasis added).

3. *See* Paul R. Hurst & Andrew D. Irwin, *DOJ's Noncompliance Stymies Approval of New Contract Boards' Procedural Rules*, 49:3 Gov't Contractor ¶ 21 (2007).

4. Interim Rule, 72 Fed. Reg. 36794, 36795 (July 5, 2007). DOJ's position as described in the CBCA Rules Notice appears to be concerned solely with the board's power to enforce a subpoena against an agency or agency official. As far as the authors are aware, it is undisputed that the boards have the power to *issue* subpoenas to an agency or agency official—indeed, DOJ conceded as much in recent litigation before the Department of Agriculture Board of Contracts Appeals. *See infra* notes 10–16 and accompanying text.

the litigation before the board. There is reason to doubt that nonparty agencies will be motivated to comply with a board subpoena simply because the board might draw an adverse inference on a factual matter in the absence of the subpoenaed evidence—particularly if the nonparty agency in possession of the documents is not directly affected by the ruling and has other motivations not to comply.

In considering this issue, we have (a) examined relevant legal authority regarding the issue of whether the term "person" for purposes of the contumacy provision might include an agency (or agency custodian) and (b) reviewed the legislative history of the CDA to determine whether it offers a relevant context for interpreting the meaning of "person" as used in section 610.

As discussed more fully below, the dispute regarding the proper interpretation of section 610 of the CDA is part of a broader question of statutory interpretation as to whether the term "person" when used in a statute includes the sovereign and the sovereign's officials acting in their official capacities. In fact, the controversy regarding the CDA arose as DOJ was litigating the related issue of whether the United States is a "person" within the meaning of Federal Rule of Civil Procedure 45(a)(1)(C) (Rule 45), which provides that "every subpoena shall . . . command each person to whom it is directed to attend and give testimony." In this dispute, DOJ relied primarily on an established interpretive presumption, discussed below, that the term "person" does not include the sovereign or its officials when used in a statute.

Our review of the relevant statutes and case law, discussed in Part II.B below, indicates that DOJ's focus on the interpretive presumption as to the meaning of the term "person" as used in the contumacy provisions of the CDA has some validity. However, the case law is also clear that the presumption is not meant to be conclusive. The Supreme Court has long recognized that it is a rebuttable presumption that is negated if the context, legislative history, or executive interpretation of a specific statute indicates a broader or narrower meaning of the term.[5] In fact, a recent analysis concerning whether the Federal Government is a "person" for purposes of being subject to a district court's subpoena power under Rule 45 resulted in a decision that the Federal Government, indeed, was a "person" for that purpose. Although the case law on this subject is complicated and susceptible to varying interpretations, we believe that the meaning of the term "person" as used in section 610 cannot be settled without a close examination of the statutory intent and context of this provision.

Accordingly, Part II.C of this article examines the context in which the term "person" was used in section 610 of the CDA and, in particular, the legislative history surrounding section 610. Although the CDA does not define

5. In similar fashion, the Dictionary Act, 1 U.S.C. § 1 (2000), also suggests that the term "person" may not include the Federal Government. However, the Dictionary Act also expressly contemplates that, in interpreting a statute, one must consider a word's "context" and the possibility that this context may sometimes result in a different interpretation. *Id.*

the term "person," there is substantial evidence in the legislative history that the boards' subpoena powers, like Rule 45, were intended to (1) provide a liberal opportunity for discovery, (2) ensure due process by treating contractors and agencies equally and fairly in the discovery process, and (3) vest in the boards discovery and subpoena powers comparable to those of the courts. Moreover, the legislative history most directly relevant to DOJ's role in securing enforcement of subpoenas in district court indicates that DOJ assumed it would be enforcing the boards' powers in an efficient and neutral way to effectuate the purposes of the CDA. Thus, while we do not suggest that the CDA's legislative history is dispositive on the subject, we believe it provides a substantial basis to believe that the term "person" in section 610 of the CDA was intended to include the Federal Government, just as that term has been interpreted to apply to the Federal Government in Rule 45 subpoena enforcement cases.

II. ANALYSIS OF CASE LAW REGARDING WHETHER THE TERM "PERSON" IN STATUTES AUTHORIZING ISSUANCE OF SUBPOENAS INCLUDES FEDERAL AGENCIES

The CDA does not expressly define the term "person," and although that term is used in several other sections of the CDA,[6] these usages do not specify whether the term was meant to include the Federal Government or its officials. Given the absence of an express definition of "person" in the statute, we have conducted research that identifies two lines of cases relevant to the issue of whether the term "person" was meant to include a federal agency or an officer of a federal agency. The first line of cases addresses the application of the Dictionary Act,[7] to which the courts turn when the meaning of a term is not defined in a statute they are interpreting. As discussed below, the Dictionary Act defines "person" in a way that generally *excludes* the United States; however, it also specifically envisions that the context in which a term is used in a statute may compel a different meaning.

The second source of authority is a line of Supreme Court decisions that establish a presumption that "person" does not include the sovereign or its officials acting in their official capacity. Again, however, the case law provides that this presumption can be overcome where the context, the legislative history, or the executive branch's past interpretation of the statute indicate an intent to include the Federal Government within the meaning of that term.

Finally, this section also addresses a recent decision of the D.C. Circuit regarding the question of whether the Federal Government is a "person" under Rule 45 for purposes of being subject to the district court's subpoena power. In *Yousuf v. Samantar*,[8] the court ruled that the Government indeed was a "person," in part because the Federal Rules were designed to provide a

6. 41 U.S.C. §§ 601, 605, 613 (2000).
7. 1 U.S.C. § 1.
8. 451 F.3d 248, 254 (D.C. Cir. 2006).

"liberal opportunity" for discovery and because, using normal rules of statutory construction, the court concluded that the term "person" should be given the same meaning it carries in other sections of the Rules, in which the term "person" is clearly meant to include the Federal Government.

A. *Summary of the Cases Underlying the Present Controversy*

The present controversy regarding a board's subpoena power under the CDA has its origins in discovery disputes that arose last year in two appeals at the former Department of Agriculture Board of Contracts Appeals (AGBCA): *Mountain Valley Lumber, Inc.*[9] and *Shawn Montee, Inc.*[10] Both appeals involved the Forest Service's suspension of timber contracts during litigation in several federal courts over whether the Forest Service's issuance of the contracts had violated the Agency's obligations under federal environmental law. The Forest Service suspended the timber contracts and the timber contractors filed CDA appeals at the AGBCA, claiming that the Forest Service's suspension of the contracts was unreasonable because the Forest Service knew or should have known when it awarded the contracts that the contracts would not withstand judicial scrutiny.[11]

In both *Shawn Montee* and *Mountain Valley*, appellants propounded traditional discovery requests directed to DOJ, which had represented the Forest Service in prior federal court litigation, and to the Council on Environmental Quality (CEQ), an agency that advises other agencies with regard to their compliance with federal environmental law. DOJ responded to the contractor's discovery requests on its own behalf, and on behalf of CEQ. Initially, it refused to comply voluntarily with the discovery requests on the basis that DOJ and CEQ were not parties to the proceedings at the AGBCA.[12] DOJ insisted that appellant "present a subpoena to DOJ or CEQ and not to the [Forest Service]."[13] The board, accordingly, issued subpoenas to both agencies, first in *Mountain Valley* and later in *Shawn Montee*. When DOJ refused to comply with the subpoena, the board requested that the U.S. Attorney for the District of Columbia seek enforcement of the subpoena in the district court pursuant to the provisions of the CDA.

The U.S. Attorney for the District of Columbia refused to initiate an enforcement action on the subpoena on the basis that the Federal Government is not "a person" for purposes of section 610 of the CDA.[14] The AGBCA rejected DOJ's position, finding both that the board had the authority under the CDA to issue subpoenas to federal agencies and the right to expect enforcement of subpoenas by DOJ.[15] The AGBCA stated that it would impose sanctions, including drawing adverse inferences against the Forest Service,

9. AGBCA No. 2003-171-1, 06-1 BCA ¶ 33,173 (2006).
10. AGBCA Nos. 2003-132-1 through 2003-136-1, 04-1 BCA ¶ 32,564 (2004).
11. *Id.*
12. *Mountain Valley Lumber, Inc.*, 06-1 BCA ¶ 33,173.
13. *Id.*
14. *Id.* at ¶ 33,339.
15. *Id.*

due to DOJ's contumacy and the resulting lack of evidence on an issue central to the appeal.[16] This article does not address the appropriateness of sanctions or the propriety of drawing adverse inferences, but rather focuses exclusively on the question of whether an agency or official of the Federal Government is "a person" for purposes of section 610 of the CDA.

B. *The Dictionary Act's Definition of "Person"*

Absent a definition of the term "person" in the CDA, the starting point for interpreting that term is the Dictionary Act, which provides:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
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> …
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.[17]

The Supreme Court and the courts of appeals have recognized that the Dictionary Act's definition of the term "person" notably omits any mention of the Federal Government, its agencies, or its officers and employees. In *United States v. United Mine Workers of America*,[18] the Court held that the United States is not a person within the meaning of the provisions of the Norris-LaGuardia Act, which divests courts of jurisdiction to issue injunctions prohibiting "any person or persons" involved in a "labor dispute" from engaging in certain acts,[19] and defined "labor dispute" to include any case that "involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees."[20] The Court reasoned that

> Congress made express provision, 1 U.S.C. § 1, for the term to extend to partnerships and corporations, and in § 13 of the [Norris-LaGuardia] Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.[21]

Similarly, in *Al Fayed v. CIA*,[22] the D.C. Circuit held that the United States is not a person under 28 U.S.C. § 1782(a), which provides for discovery in the federal courts at the behest of foreign and international tribunals:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal…[23]

16. *Id.*
17. 1 U.S.C. § 1 (2000).
18. 330 U.S. 258, 275 (1947).
19. 29 U.S.C. § 104 (2000).
20. 29 U.S.C. § 113 (2000).
21. *United Mine Workers*, 330 U.S. at 275.
22. 229 F.3d 272 (D.C. Cir. 2000).
23. *Id.* at 273 (quoting 28 U.S.C. § 1782(a)).

The court turned first to the Dictionary Act and the Supreme Court's holding in *United Mine Workers* and concluded that the definition of the term "person" in 28 U.S.C. § 1782(a), absent some contrary indication, excludes the United States.[24]

These cases notwithstanding, the Dictionary Act specifically envisions that the context in which the term "person" is used may compel a different meaning.[25] Moreover, the courts in both *United Mine Workers* and *Al Fayed* held that the term "person" in the statutes before them did not include the United States because of the absence of any persuasive evidence of contrary legislative intent. Both Courts recognized, however, that the term could be capable of other meanings in different contexts.[26]

C. *The Judicial Presumption That the Term "Person" Does Not Include the Sovereign*

The Supreme Court has consistently recognized that in the absence of evidence to the contrary, there exists a "longstanding interpretive presumption that the term 'person' does not include the sovereign or its officials acting in their official capacity."[27] This presumption generally parallels the definition of the term "person" in the Dictionary Act—i.e., absent evidence of congressional intent to the contrary, the term "person" does not include the Government. Applying this presumption, the Court has held:

- States are not "persons" within the meaning of the provisions of the federal civil False Claims Act,[28] allowing private parties to bring *qui tam* civil actions against "[a]ny person" who, inter alia, "knowingly presents . . . to . . . the . . . Government . . . a false or fraudulent claim for payment."[29]
- States and state officials acting in their official capacity are not "persons" within the meaning of 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."[30]

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24. *Id.* at 274 (citing United States v. United Mine Workers, 330 U.S. 258, 275 (1947)).

25. The Dictionary Act provides that its definitions apply "unless the context indicates otherwise." 1 U.S.C. § 1 (2000).

26. *United Mine Workers*, 330 U.S. at 275; *Al Fayed*, 229 F.3d at 274.

27. Vt. Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 766 (2000); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." (internal quotation omitted)); *Al Fayed*, 229 F.3d at 274.

28. 31 U.S.C. § 3730(a), (b)(1).

29. *Vt. Agency of Natural Res.*, 529 U.S. at 780–88; *see also* Galvan v. Fed. Prison Indus., Inc., 199 F.3d 461, 468 (D.C. Cir.1999) (holding that use of the word "person" in the False Claims Act does not constitute waiver of the Federal Government's sovereign immunity).

30. *Will*, 491 U.S. at 64–66; *see also* Inoye County v. Paiute-Shoshone Indians, 538 U.S. 701, 708–12 (2003) (holding that a Native American Tribe is not a "person" authorized to sue under section 1983).

- The United States is not a "person" entitled to sue under section 7 of the Sherman Act.[31,32]

Importantly, where the context does not indicate otherwise, the presumption excludes not only the sovereign from the meaning of the term "person," but also officials acting in their official capacity. As the Court recognized in *Will*, "[o]bviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."[33]

While the presumption discussed above is an important starting point for interpreting what was intended by the term "person" in any particular instance, three aspects of its application substantially limit the appropriateness of relying exclusively on the presumption. First, and perhaps most important, the presumption is "not a 'hard and fast rule of exclusion.'"[34] Instead, the

> conventional reading of "person" may . . . be disregarded if "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law."[35]

In this manner, the presumption offers little more than a "default" rule of statutory interpretation and operates in the same manner as the Dictionary Act, which expressly recognizes that context may dictate a broader or narrower interpretation of particular instances of the term "person."[36]

Second, most of the cases that have applied the presumption involve instances "where it is claimed that Congress has subjected the states to liability to which they had not been subject before."[37] When states' rights are implicated, courts invoke the "clear statement rule," which essentially requires that legislation be more explicit when federal-state powers are implicated, that is, when a statute is interpreted so as to subject the states to liability. In *Will*, for example, the Court felt it did not find such a clear statement when interpreting "person" in 42 U.S.C. § 1983, stating:

> The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal government," it must make its intention to do so "unmistakably clear in the language of the statute." . . . Congress should make its

31. Act of July 2, 1890, ch. 647, 26 Stat. 210.

32. United States v. Cooper Corp., 312 U.S. 600, 604–06 (1941), *superseded by statute*, 15 U.S.C. § 15a.

33. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)).

34. Vt. Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 781 (2000) (quoting *Cooper Corp.*, 312 U.S. at 604–05).

35. Int'l Primate Prot. League v. Admin'rs of Tulane Ed. Fund, 500 U.S. 72, 83 (1991) (quoting *Cooper Corp.*, 312 U.S. at 605); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) ("[M]uch depends on the context, the subject matter, legislative history, and executive interpretation.").

36. 1 U.S.C. § 1 (2000).

37. *Vt. Agency of Natural Res.*, 529 U.S. at 781 (quoting *Will*, 491 U.S. at 64).

> intention "clear and manifest" if it intends to pre-empt the historic powers of the States…[38]

Unlike section 1983, the CDA does not implicate the Federalism concerns raised by statutes that provide federal rights at the expense of state sovereignty and, therefore, does not trigger the heightened clear statement rule followed in *Vermont Agency of Natural Resources* and *Will*.[39] That said, the D.C. Circuit has held that "the Supreme Court applies the constructional principle against finding 'person' to include a sovereign even in the absence of sovereign immunity or comity concerns."[40]

Finally, the presumption appears to have had its greatest utility in interpreting statutes enacted prior to the enactment of the current version of the Dictionary Act in 1947.[41] For the most part, the cases that have grappled with the presumption that person does not include a sovereign have dealt with statutes enacted under prior versions of the Dictionary Act.[42] Therefore, the term "person" in section 610 of the CDA—enacted under the current version of the Dictionary Act—presumably first would be interpreted under the Dictionary Act and secondarily under the line of cases dealing with the presumption. In either case, however, the outcome will likely turn on whether an examination of the context and legislative history of the CDA provides an "affirmative showing of statutory intent" to include the United States and its agencies.[43]

D. *Application of Federal Rule of Civil Procedure 45 to the United States When It Is Not a Party in Litigation*

Recent litigation over whether the United States is a "person" for purposes of subpoena enforcement under Rule 45 is instructive with respect to whether

38. *Will*, 491 U.S. at 65 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

39. Importantly, applicability of the presumption is not dependent upon the existence of Federalism concerns. In *Cooper Corp.*, for example, the Supreme Court applied the presumption to hold that the United States was not a "person" entitled to bring treble damage actions under section 7 of the Sherman Act, and that case did not involve issues of Federalism or even an extended discussion of sovereign immunity. United States v. Cooper Corp., 312 U.S. 600, 604–05 (1941).

40. Al Fayed v. CIA, 229 F.3d 272, 275 (D.C. Cir. 2000).

41. *See* Yousuf v. Samantar, 451 F.3d 248, 253–54 (D.C. Cir. 2006). Although the current version of the Dictionary Act omits any reference to governments or public entities in its definition of the term "person," earlier versions included "bodies politic and corporate" in that definition. *Id.*; *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 77–79 (1989) (Brennan, J., dissenting). While this amendment confirms that the term "person" in the current version of the Dictionary Act does not ordinarily include government agencies, the Act nevertheless expressly requires an examination of context to determine whether a broader meaning should apply in any given statute. 1 U.S.C. § 1 (providing that the definitions apply "unless the context indicates otherwise").

42. *E.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 781–83 n.12 (2000) (False Claims Act); *Cooper Corp.*, 312 U.S. at 604–06 (Sherman Act).

43. *Vt. Agency of Natural Res.*, 529 U.S. at 781; Int'l Primate Prot. League v. Admin'rs of Tulane Ed. Fund, 500 U.S. 72, 83 (1991) (quoting *Cooper Corp.*, 312 U.S. at 605) (The court must examine "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the [CDA] [to] indicate an intent, by the use of the term, to bring state or nation within the scope of the law.").

a court might view the Federal Government to be a person for purposes of enforcing a subpoena under CDA section 610. Rule 45 provides:

> Every subpoena shall:
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> …
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> command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person…[44]

In fact, it was not DOJ but the D.C. Circuit that first questioned whether the United States is a person under Rule 45. The Court raised the issue sua sponte in *Linder v. Calero-Portocarrero*,[45] an action to compel compliance with third-party subpoenas issued in a state court wrongful death suit.[46] The court in *Linder*, however, declined to answer its own question. After determining that the issue was not jurisdictional, *Linder* held that the Government had waived the issue by not raising it before the district court.[47]

DOJ, not surprisingly, began to raise and litigate the issue and obtained a number of district court rulings that found that the United States was not a "person" under Rule 45.[48] Following the suggestion in *Linder*, these courts based their rulings on the "longstanding interpretative presumption that person does not include the sovereign."[49] Other decisions, however, rejected the Government's position and held that the United States is a "person" under Rule 45.[50] Given this activity, it is not surprising that DOJ would take essentially the same position that the Federal Government is not a "person" for purposes of enforcement of CDA section 610.

In June 2006, the D.C. Circuit addressed the issue in connection with Rule 45, resolving it against the Government.[51] *Yousuf* looked even further back in time than previous cases had to examine the history of the presumption that the term "person" does not include the Government, specifically to the Supreme Court's decision in *Nardone v. United States*.[52] In *Nardone*, the Court held that federal agents of the United States were "persons" under 47 U.S.C. § 605, which provides that "no person" receiving or transmitting wire or radio communications shall divulge or publish contents of the communication to

44. Fed. R. Civ. P. 45(1), (1)(C).
45. 251 F.3d 178, 179–80 (D.C. Cir. 2001).
46. *Id.* at 179–80.
47. *Id.* at 181–82.
48. *E.g.*, Robinson v. City of Phila., 233 F.R.D. 169, 172 (E.D. Pa. 2005); Ho v. United States, 374 F. Supp. 2d 82, 84 n.4 (D.D.C. 2005); *see also In re* Vioxx Prods. Liab. Litig., 235 F.R.D. 334, 339 (E.D. La. 2006) (collecting cases).
49. *Robinson*, 233 F.R.D. at 172 (quoting Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 780 (2000)).
50. *In re Vioxx*, 235 F.R.D. at 339–42.
51. Yousuf v. Samantar, 451 F.3d 248, 248, 254 (D.C. Cir. 2006).
52. 302 U.S. 379 (1937).

anyone other than the addressee, except in limited circumstances.[53] Applying *Nardone*, *Yousuf* held:

> [A]t common law the Government was presumed not to be a "person" bound by statute in only two types of cases: (1) where the statute, "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 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."[54]

The *Yousuf* court concluded that Rule 45 does not fall into either category described in *Nardone*. First, the court held that the Government has no "established prerogative" not to respond when subpoenaed, noting that the Government had conceded in earlier cases that records requested for a suit in which it was not a party "could be secured by a subpoena duces tecum to the head of the Treasury Department."[55] Second, *Yousuf* concluded that application of Rule 45 to the Government would work no "obvious absurdity."[56] The court reasoned that "[t]he Rules were designed to provide a 'liberal opportunity for discovery' " and that "there is no indication the Government should be exempt from the obligation of a nonparty to provide its evidence pursuant to subpoena."[57]

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53. *Id.* at 382–85.

54. *Yousuf*, 451 F.3d at 254 (quoting *Nardone*, 302 U.S. at 383–84); *accord In re* Vioxx Prods. Liab. Litig., 235 F.R.D. 334, 340–41 (E.D. La. 2006) (explaining Supreme Court decisions issued subsequent to *Nardone* under the framework described in that case).

55. *Yousuf*, 451 F.3d at 254 (quoting United States *ex rel*. Touhy v. Ragen, 340 U.S. 462, 468–70 (1951) (Frankfurter, J., concurring)).

56. *Id*. at 254.

57. *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). DOJ argued before the AGBCA in *Mountain Valley* that applying the presumption was "the only way to avoid placing the Attorney General in the obviously paradoxical position of prosecuting an action that he would simultaneously be obligated to defend pursuant to 28 U.S.C. § 516." Mountain Valley Lumber, Inc., AGBCA No. 2003-171-1, 06-2 BCA ¶ 33,339 (2006). However, DOJ is called on to litigate against the Federal Government in other contexts and, on occasion, has found itself representing adverse parties in the same litigation. *See generally* Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?* 32 Wm. & Mary L. Rev. 893, 896 (1991) (observing that "the Supreme Court has never dismissed an action as nonjusticiable because it could be characterized as United States v. United States"); William C. Tucker, *The Mangled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies*, 16 Vill. Envtl. L.J. 149, 163–68 (2005) (discussing the justiciability of enforcement actions by the Environmental Protection Agency involving federal agencies). The issue is ultimately one of justiciability under Article III of the Constitution—not merely one of statutory interpretation—and court decisions addressing this issue indicate that its resolution in any given case is highly dependent on the individual circumstances of that case. *See* United States v. Nixon, 418 U.S. 683, 686 (1974) (concerning president's efforts to quash the subpoena issued by special prosecutor).

The test established by the Supreme Court in the *Nixon* case was "(1) whether the controversy is one that is typically justiciable, and (2) whether the setting of the case is one that demonstrates concrete adversity between the parties." *Id*. at 696; *accord* TVA v. EPA, 278 F.3d 1184, 1196 (11th Cir. 2002) (concluding that *Nixon* establishes the same two-part test); United States v. Fed. Mar. Comm'n, 694 F.2d 793, 810 (D.C. Cir. 1982) (same). The cases discussed in this section involving the enforcement of subpoenas under Fed. R. Civ. P. 45 demonstrate that actions to enforce subpoenas are "traditionally justiciable." Moreover, the setting of these disputes do involve two

Having concluded that the presumption did not apply, the court in *Yousuf* turned to "customary tools of statutory interpretation" to answer the question whether the United States is a "person" under Rule 45.[58] Following the "'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning,'" the court observed that the term "person" in Federal Rules of Civil Procedure 4 and 30 expressly includes the Government and that the term as used in Rules 14, 19, and 24 has been interpreted to include the Government.[59] Moreover, DOJ had a long history of *complying* with Rule 45 subpoenas and this was strong evidence of a consistent and longstanding "executive interpretation" of Rule 45. Accordingly, the *Yousuf* court concluded that "the 'purpose, the subject matter, the context, [and] the…history [of Rule 45]…indicate an intent, by the use of the term ["person"], to bring [the government] within the scope' of the Rule."[60]

adverse parties: the CBCA seeking documents or witnesses necessary to adjudicate a dispute on the one hand and a federal agency that does not wish to produce those documents or witnesses on the other. Here again, the Court's reasoning in *Nixon* is particularly apposite: "The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense… The independent Special Prosecutor [acting under authority delegated to him by the Attorney General through regulation] with his asserted need for the subpoenaed materials in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is that concrete adverseness which sharpens presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Nixon*, 418 U.S. at 696–97 (internal quotation omitted).

Finally, the fact that DOJ may be involved in both enforcing and defending against the subpoena is not dispositive. The Supreme Court addressed a similar situation in United States v. ICC, 337 U.S. 426 (1949), where the United States brought an action in federal district court to set aside an ICC order. In addition to being the named plaintiff, "[t]he United States was also made a defendant because of a statutory requirement that any action to set aside an order of the [ICC] 'shall be brought…against the United States.'" *Id.* at 429 (quoting 28 U.S.C. § 46). The Court dismissed the attorney general's entry of appearance on behalf of the ICC as a "surface anomaly," observing that the ICC's counsel had vigorously defended the ICC's interests. *Id.* at 32; *see also* Plaintiffs in All Winstar-Related Cases at the Court v. United States, 44 Fed. Cl. 3, 7 n.5 (1999) (finding a justiciable controversy where the Federal Deposit Insurance Corp. acted as both plaintiff and defendant, represented in each capacity by different lawyers with an internal firewall allowing the attorneys to be "as separate as if they worked for different law firms"). In an action to enforce a subpoena against a federal agency under the CDA, agency counsel presumably can adequately defend the interests of the subpoenaed agency (as in *Nixon*) or different attorneys at DOJ could represent each party (as happened with the FDIC in *Plaintiffs in All Winstar-Related Cases*).

58. Yousuf v. Samantar, 451 F.3d 248, 255 (D.C. Cir. 2006).

59. *Id.* at 255–56 (quoting Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995)).

60. *Id.* at 257 (quoting United States v. Cooper Corp., 312 U.S. 600, 605 (1941)). Notably, the pertinent language in Rule 45 was introduced in 1937, prior to the enactment of the current version of the Dictionary Act, 1 U.S.C. § 1. *Id.* at 253. This fact allowed the court in *Yousuf* to distinguish its earlier decision in *Al Fayed* on the ground that the statute at issue in *Al Fayed*, 28 U.S.C. § 1782, unlike Rule 45, postdated and was therefore governed by the Dictionary Act: "In *Al Fayed*, therefore, the Dictionary Act as amended in 1947 required that § 1782 be interpreted so as to exclude the Government." *Id.* at 254–55. This was because the movant in *Al Fayed* did not present persuasive contextual information (legislative history) as to the meaning Congress intended to assign to the term "person" when it enacted section 1782. The Dictionary Act and case law, including the *Al Fayed* decision, continue to stand for the proposition that the term "person" must be read in the context of other language in the statute under review and the legislative history of the statute.

Thus, the *Yousuf* court affirms the proposition that the presumption that the Federal Government is not a "person" does not always apply and, more importantly, presumption or no presumption, statutory interpretation questions of this nature require a careful analysis of the context, legislative history, and executive interpretation of the CDA. Careful review of the case law that has addressed the issue of whether the Federal Government or its officials can properly be considered a "person" for purposes of application of a variety of statutes confirms that reference to available legislative history and contextual information, including the historical context that prevailed at the time a particular act was passed, is always considered important. This is so even in instances in which courts ultimately determined that legislative history and context relevant to interpretation of a particular statute did *not* signal congressional intent to bring the Government and its officials within the meaning of the term "person." Thus, in *Al Fayed*, for example, even while finding that the movant had failed to offer persuasive evidence of the requisite congressional intent and contextual evidence to show that the Government should be found to be a "person" under the terms of 28 U.S.C. § 1782, the D.C. Circuit quoted the Supreme Court in stressing the importance of examining available legislative history and contextual information to interpret each statute:

> The Court has identified a range of sources for grounds to overcome the presumptions: "[O]ur conventional reading of 'person' may therefore be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law.'" *Int'l Primate*, 500 U.S. at 83 (internal citation omitted). In this case none of these sources indicates an intent to override the presumption.[61]

61. Al Fayed v. CIA, 229 F.3d 272, 275 (D.C. Cir. 2000). The Supreme Court indicated that the term "context" as used in the Dictionary Act generally does not include legislative history. Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199–200 (1993) ("If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'"); *accord* Hubbard v. United States, 514 U.S. 695, 701 (1995). It is far from clear, however, what sources the Court meant to exclude from consideration. The Court in *Rowland* actually began its interpretation of the term "person" in the statute at issue by discussing the history of the statute, including prior versions of the statute and the reasons cited in the House Report accompanying the Public Law that included the term "person" in the statute. *See Rowland*, 506 U.S. at 198 n.2. Cases subsequent to *Rowland* have looked to legislative history to determine whether the Dictionary Act's definition of "person" should apply. *See Al Fayed*, 229 F.3d at 275–76. A full discussion of the rules of statutory interpretation is beyond the scope of this article. What is clear, however, is that "context" does include "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts," *Rowland*, 506 U.S. at 199, and that "context" includes "statutory purpose": "A focus on statutory text, however, does not preclude reasoning from statutory purpose," *Id.* at 211 n.12. Accordingly, although this article discusses sources that might be considered legislative history, it also relies on prior related acts as well as the overall statutory scheme of the CDA. *See infra* Section III. In the authors' opinion, these sources, standing alone, demonstrate that Congress intended the boards to have subpoena powers over both contractors and the Government. The statute is, on its face, a waiver of sovereign immunity whose purpose is to provide two alternative fora for the full resolution of contract disputes, and given this context and purpose Congress could not have intended to provide full authority to enforce subpoenas in one forum and only partial authority in the other.

The legislative history and context of the CDA, in contrast to that of the statute at issue in *Al Fayed*, is rich with discussion regarding what the architects of the CDA's subpoena provisions intended when they granted the boards enhanced subpoena powers, and this discussion is highly relevant to interpreting the term "person" in the contumacy provision of the CDA.

III. REVIEW OF CDA CONTEXT AND LEGISLATIVE HISTORY

As noted above, DOJ appears not to take issue with the boards' power to issue subpoenas to agencies and government officials, but rather contends that the Federal Government cannot be compelled to obey a board subpoena because the contumacy provisions of section 610 make reference to refusal to obey a subpoena by "a person" a term DOJ argues excludes the Federal Government and its officials. Unfortunately, there is no clear-cut discussion or explanation in the legislative history as to why the contumacy provision employed the word "person" and was worded the way it was. However, as detailed below, there is plentiful discussion of why it was believed to be vitally important to grant the boards enhanced discovery and subpoena powers, including statements to the effect that the subpoena power was intended to aid the *contractor* in developing its case.

Our review of the legislative history of the CDA indicates that subpoena power was extended to the boards to permit them to develop a full evidentiary record, limit any additional fact finding "on appeal," and put the parties on equal footing in terms of discovery. Three issues that were debated extensively in connection with the CDA were (1) whether contractors would have "direct access" to the courts (versus being required to proceed initially in all cases before the boards), (2) the extent to which the boards were perceived to be impartial forums that afford due process to contractors, and (3) the extent to which reviewing courts should consider the facts de novo and supplement the factual record. The discussion regarding discovery and subpoena powers for the boards was directly relevant to all three issues insofar as expansion of the "due process," that is, discovery and subpoena powers, at the boards put the parties on equal footing in development of a factual record and, as important, permitted development of a full factual record that would not require supplementation on appeal and that would be entitled to deference. In order to achieve that end, a consensus emerged that the boards needed discovery and subpoena powers comparable to those of the courts. Failure to apply the enforcement provisions to nonparty federal agencies would frustrate that purpose and result in the boards having very diminished discovery powers relative to the Court of Federal Claims. This difference, in fact, could become a significant factor in forum selection.

During consideration of the CDA and a number of competing bills, the most relevant testimony concerning this issue was offered by a DOJ witness, Mr. Irving Jaffe, Deputy Assistant Attorney General, Civil Division, who testified before Senate and House committees concerning his department's position on the legislation. As discussed more fully below, DOJ was very

supportive of extending subpoena powers to the boards and asserted that expansion of the boards' powers was a viable alternative to opening up already "over-crowded" federal courts to appeals of contracting officer decisions. Significantly, all of the bills offered to amend the contract disputes process (and there were several competing House and Senate bills) initially included the same language allowing the *boards* to directly petition the district courts in the event of a failure to comply. However, DOJ took the position that the boards must work through the department to enforce subpoenas, reasoning that situations invariably would arise where it might not be appropriate for agency counsel to handle such matters. DOJ, in contrast, would be in a position to efficiently and neutrally carry out this task.

Thus, although there is nothing in the legislative history of the CDA that directly addresses the question as to why the statute uses the term "person" in relation to contumacy, the legislative history does generally support the conclusion that the subpoena and enforcement powers were intended to apply equally to both parties. Moreover, there is nothing in the legislative history that would suggest that the boards' powers were somehow intended to be limited in the case of discovery involving nonparty federal agencies (or more limited than under the preexisting system where boards petitioned district courts to issue subpoenas). The legislative history of the CDA supports the view that the overall intent of the CDA subpoena provisions appears to be that boards should have subpoena powers comparable to the courts and that this subpoena power was intended to provide both the Government and the contractor with procedural due process needed to develop a full factual record.

A. *Board Practice Prior to the Contract Disputes Act*

In order to understand the changes to the boards' discovery practices brought about by the CDA, it is instructive to review the board's discovery practices prior to its enactment. Before passage of the CDA, boards had no authority to issue subpoenas, but regularly applied to the district courts under the provisions of 5 U.S.C. § 304 to request that a district court issue a subpoena to compel the testimony of a *nonparty* witness.[62] This statute, which is still in effect, provides:

> (a) The head of an Executive department or military department or bureau thereof in which a claim against the United States is pending may apply to a judge or clerk of a court of the United States to issue a subpena for a witness within the

62. *See, e.g.*, Carl W. Olson & Sons Co., IBCA No. 930-9-71, 73-2 BCA ¶ 10,269, at 10,269 n.6 (1973) ("There is…a procedure available under 5 U.S.C. § 304 by which the head of an agency may request a Federal Court to issue a subpoena ordering a witness to give testimony."); Gen. Dynamics Corp., Elec. Div., ASBCA No. 14466, 73-1 BCA ¶ 9960 (1973) (witness compelled to testify through request to federal court under 5 U.S.C. § 304); Gen. Instrument Corp., DOTCAB No. 67-9A, 72-1 BCA ¶ 9389 (1972) (witness compelled to testify through request to federal court under 5 U.S.C. § 304); The Chemithon Corp., GSBCA No. 4525, 77-1 BCA ¶ 12436 (1977) (requesting voluntary cooperation of witnesses through written correspondence but noting that, if witnesses refuse to cooperate, the board may seek action in a court of the United States for subpoenas pursuant to 5 U.S.C. § 304).

> jurisdiction of the court to appear at a time and place stated in the subpena before an individual authorized to take depositions to be used in the courts of the United States, to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined on the subject of the claim.
>
> (b) If a witness, after being served with a subpena, neglects or refuses to appear, or, appearing, refuses to testify, the judge of the district in which the subpena issued may proceed, on proper process, to enforce obedience to the subpena, or to punish for disobedience, in the same manner as a court of the United States may in case of process of subpena ad testificandum issued by the court.[63]

Clearly, these subpoenas issued pursuant to 5 U.S.C. § 304 had "teeth" because, once issued, the subpoenaed party was subject to the court's contempt powers.

We are unaware of any pre-CDA decisions in which a board relied on 5 U.S.C. § 304 to request a subpoena for a current government employee. It appears that the boards instead relied on the inherent authority of the head of an agency to compel testimony of employees of the agency. The following passage from *Carl W. Olson & Sons Co.*[64] suggests that prior to the CDA, boards would simply direct depositions of agency employees under their own rules:

> Only the depositions of Messrs. Paul, Leaming, and Arthur are allowed, however. Messrs. Weide, Weinberg and Rippon have retired and the board has no authority to require their depositions to be taken. This board has no power to issue subpoenas compelling their testimony. Implicit in the language of Section 4.115 of our rules empowering the board to order depositions of "any person" is a condition that such persons be employed by or under the control of the parties.

Records of the Armed Services Board of Contract Appeals reveal instances in which the ASBCA invoked 5 U.S.C. § 304 to obtain an "administrative subpoena" to compel testimony for former government employees. This is significant because, as discussed below, if the Federal Government is not considered a "person" for purposes of the contumacy provisions, neither, arguably, are retired officials of the Federal Government. Although no statutory language mandated it, these requests were made through the DOJ, specifically, the assistant attorney general, Civil Division.

B. *Justice Department Testimony on Board Subpoena Powers*

The testimony offered by DOJ witness Mr. Irving Jaffe, Deputy Assistant Attorney General, Civil Division, and a statement submitted by the General Accounting Office[65] appear to have been very influential with respect to how the drafters of the CDA elected to frame the Act's subpoena provisions.[66] The

63. 5 U.S.C. § 304 (2000).
64. IBCA No. 930-9-71, 73-2 BCA ¶ 10,269 (1973).
65. Subsequently renamed the Government Accountability Office.
66. *See Contract Disputes: Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 95th Cong. (1977) (statement of Irving Jaffe, Deputy Assistant Attorney

thrust of Mr. Jaffe's testimony was that the boards should be independent of contracting agencies, invested with power to provide full due process for both parties, including the power to order ample discovery and issue subpoenas.[67] This, in turn, would permit appeals from board decisions that would not be de novo but, rather, would be based on a fully developed factual record that was entitled to substantial deference on appeal.[68] Mr. Jaffe testified, "[I]t seems to me that a full-scale due-process hearing ought to be had once, and then it ought to be reviewed under traditional judicial standards . . ."[69]

A central theme of Mr. Jaffe's testimony was the importance of procedural safeguards that protected *both* parties' rights to fully litigate the issues and develop a full factual record for appeal. Mr. Jaffe's prepared statement cited and commented on the following passage of the Report of the Commission on Government Procurement:

> [The] present system often fails to provide the procedural safeguards and other elements of due process that should be the right of litigants. Contractors are now forced to process most disputes through a system of agency boards of contract appeals that, while essentially independent and objective forums, *do not possess the procedural authority or machinery to ensure that all of the relevant facts and issues in complicated cases are brought before the boards and given adequate consideration. The boards lack adequate discovery and subpoena powers.*[70]

General, Civil Division, U.S. Department of Justice) [hereinafter DOJ House Testimony]; *see also Contract Disputes Act of 1978: Joint Hearings Before the Subcomm. on Fed. Spending Practices and Open Gov't of the S. Comm. on Governmental Affairs and the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the S. Comm. on the Judiciary*, 95th Cong. 175–241 (1978) (statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice) [hereinafter DOJ Senate Testimony].

67. DOJ House Testimony, *supra* note 65, at 100 ("We, of course, have always favored the investiture of the board with subpoena and discovery powers. We have supported that for many, many years. We had even offered to draft a bill for that purpose many years ago, but the bar did not cooperate.").

68. *Id.* at 98. Notably, the decision of the Supreme Court in United States v. Bianchi, 373 U.S. 709 (1963), brought an end to the ability of contractors to obtain de novo trials in the court of claims following an adverse board decision. As a result, court of claims litigation following *Bianchi* was limited to the record before the board with certain limited exceptions. The concern with inadequate due process at the board level created pressure for reform that culminated in passage of the CDA.

69. An interesting aside is that DOJ also advocated consolidation of the boards into two boards: one for the armed services and the other for civilian agencies. DOJ House Testimony, *supra* note 65, at 87 (statement of Mr. Jaffe) ("the current multiple agency appeals boards [should] be consolidated into two full time boards, one generally for the armed services, and a second generally for the civilian agencies, and . . . these two boards be given subpoena and discovery powers," citing Disputes in Connection with Contract Administration, 41 Fed. Reg. 10,488 (Mar. 11, 1976) [hereinafter Disputes] (stating administration position on Procurement Commission findings)). The executive branch position departed from the Commission recommendation by proposing "detaching the boards from individual agencies and vesting them directly with authority to decide appeals. If the boards, in the words of the Commission, are to be treated as 'independent quasi-judicial tribunals' and strengthened 'to ensure independence and objectivity of the Board members,' consolidation is the most effective and appropriate means of doing so." *Id.* at 10,489.

70. U.S. Comm'n on Gov't Procurement, 4 Final Report for the Commission on Government Procurement 3 (1979) (emphasis added). The CDA was one of several reform

Mr. Jaffe's statement goes on to state:

> [A]ccepting the view espoused by the Commission that the major problem is that the Boards of Contract Appeals as now constituted lack adequate discovery and subpoena powers and consist of members who are appointed by the agencies or depend on them for career advancement, the logical solution would appear to be to increase board status and independence rather than opening the federal courts (and, particularly, the over-crowded United States District Courts) to a potential substantial increase in direct "appeals" taken from numerous contracting officer "decisions" under Government contracts.[71]

DOJ's position with regard to expansion of board discovery and subpoena powers of the boards appears to have been motivated by several considerations. First, extending such powers to the boards would ensure that factual issues were settled at the trier-of-fact level and not relitigated on appeal.[72] Second, by granting these powers to the boards, Congress would eliminate any need for contractors to seek direct access to the courts, something that DOJ at the time opposed, because contractors would be assured due process and a fair de novo hearing before the boards.[73] (As a compromise, DOJ advocated access to the court of federal claims only for claims that were "certified" as appropriate, not based solely on the contractor's election.)[74]

A careful review of the testimony offered by DOJ reveals no suggestion that either Board subpoena power—or the mechanism for enforcement of Board subpoenas—should be dependent in any significant way upon the

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measures that adopted the 1972 recommendations of the Commission on Government Procurement.

71. DOJ House Testimony, *supra* note 65, at 86 (statement of Mr. Jaffe); *see also* DOJ Senate Testimony, *supra* note 65, at 178 (statement of Mr. Jaffe) ("We have long advocated, and I testified before a Senate select committee in 1964 or 1965, submitting a draft of legislation to give the boards of contract appeals, subpena [sic] power and broader discovery power. We certainly endorse that. *We believe that if the board is going to be the chief trier of the facts, it should have available by statute all the tools necessary to arrive at all the facts. We support that. We support anything that would make the boards of contract appeals independent and independent [sic], even of the agency who is the contracting agency. We want to eliminate any appearance of unfairness or partiality.*") (emphasis added).

72. *See, e.g.*, DOJ Senate Testimony, *supra* note 65, at 226 (statement of Mr. Jaffe) (advocating that a reviewing court should not be able to consider evidence but for "newly discovered evidence," which presumes the ability to get all evidence before the boards).

73. In opposing use of the "clearly erroneous" standard of review of board decisions, Mr. Jaffe testified that if the trier of fact cannot fairly adjudicate the facts, "Congress should be considering…abolishing administrative procedures altogether *because if they can't make them fair, we shouldn't have them at all. Make them fair. If you can't make them fair, abolish them, but don't have two trials.*" *Id.* at 181 (emphasis added).

See DOJ House Testimony, *supra* note 65, at 86 (statement of Mr. Jaffe) (instead of permitting contractors direct access to U.S. district courts [a Commission on Government Procurement recommendation], problems would be better addressed by increasing discovery and subpoena powers of the boards as an alternative to opening up already "overcrowded" federal courts to contract appeals); DOJ Senate Testimony, *supra* note 65, at 203 (statement of Mr. Jaffe) ("*Provid[ing] subpoena and discovery authority [and other improvements to board's status]…would make wholly unnecessary any provision for direct access to courts*, splitting causes of action, and the related procedural complexities that will burden the courts and increase the costs of litigating without any benefit to the prompt and just resolution of disputes.") (emphasis added).

74. *See* DOJ Senate Testimony, *supra* note 65, at 226 (statement of Mr. Jaffe).

identity of the party subpoenaed. In fact, the testimony, suggests the opposite, stating:

> Improvements can be made and we favor . . . [provisions] which strengthen the existing disputes procedures by granting increased status to the Boards of Contract Appeals. We favor placing these boards on a statutory footing and would favor provisions ensuring their independence. We favor increasing the status and compensation of board members in order to obtain the most qualified persons. *We favor granting the boards the authority to compel the production of documents and testimony and, through the Department of Justice to use the courts to enforce subpoenas, where necessary.*[75]

With respect to the issue of enforcement of subpoenas in the event of contumacy or refusal to obey, the language in the several competing versions of the legislation, as originally introduced, was identical:

> In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony or both.[76]

Thus, all of these competing bills originally contemplated that the board judges, or perhaps their designees, would have the power to directly petition district courts to enforce board subpoenas. In prepared testimony commenting on the above-quoted language in section 11 of S. 3128, DOJ stated:

> This provision permitting boards to apply to a district court in a case of the contumacy or refusal of a person to comply with a subpoena should include the phrase: "... upon application of the agency board, *through* the Attorney General,..." Agency boards should be required to utilize the Attorney General for this purpose . . . [I]t would be most inappropriate for the agency counsel, who is defending against the claim before the board, to undertake this task, which could involve his opponent's evidence.[77]

This suggested change to the language was incorporated into the final version of the bill, and the above-quoted prepared statement appears to be the only evidence in the legislative history of the CDA that explains the rationale for this change.[78] This testimony, however, also seems to accept the possibility that government counsel might be placed in the position of having to advocate the enforcement of a subpoena against his or her own agency. Moreover,

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75. *Id.* at 191 (statement of Mr. Jaffe) (emphasis added); *see also* DOJ House Testimony, *supra* note 65, at 87 (statement of Mr. Jaffe) ("Full discovery and subpoena powers should, of course, be given to these boards.").

76. *See* S. 3128, 95th Cong. § 11 (1977); H.R. 664, 95th Cong. § 11 (1977); H.R. 3745, 95th Cong. § 10 (1978); H.R. 4793, 95th Cong. § 11 (1977).

77. DOJ Senate Testimony, *supra* note 65, at 230 (statement of Mr. Jaffe) (emphasis in original).

78. The report accompanying the final version of the bill states only, "Section 11 is amended to provide that the agency boards will apply through the Attorney General to the district courts in cases of contumacy or refusal to obey a subpoena." S. Rep. No. 95-1118, at 11 (1978) (commenting on the amendment to S. 3178).

this testimony can be read to suggest that DOJ would impartially enforce board requests for subpoena in situations where agency counsel might not be expected to do so.

In addition to Justice Department testimony, the General Accounting Office (GAO) also was supportive of broad subpoena powers for the boards, stating:

> All of the bills grant discovery and subpoena powers to the board of contract appeals. We agree that the boards should have this authority. This will ensure that the tools to make complete and accurate findings are available, and would minimize the need for a court to supplement the board on review.[79]

The House Report on the bill found this GAO testimony, and that of the Department of Justice, quite significant in connection with enactment of section 610 of the CDA.[80]

C. *Statements for the Record on Board Subpoena Powers*

During hearings and in floor debate on the Contract Disputes Act, and predecessor bills, several statements by members indicate the importance they placed on vesting the boards with subpoena power, specifically for the purpose of developing a complete record and, in particular, to help *contractors* in the development of their cases before the boards. For example, when introducing Senate Bill S. 2292, Senator Packwood stated, "Section 11 provides the administrative boards greater subpoena power by compelling the attendance of witnesses and requiring the submission of evidence through deposition and discovery techniques. These procedures will, in turn, aid the contractor in developing his case."[81]

Bestowing powers on the boards to compel testimony and develop a full record also was viewed as critical to enhancing credibility and effectiveness of the boards. As stated by Senator Metzenbaum upon introducing Senate Bill S. 3178 (95th Cong. 1978):

> [The 1972] report [of the Commission on Government Procurement] found that too often agency boards [ ] charged under the existing system with reviewing contract disputes had very little credibility with the parties to those disputes. Frequently, the boards were perceived by the parties as excessively responsive to the contracting agencies whose disputes they decided. Furthermore, the boards

79. *Contract Disputes: Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 95th Cong. 218, 221 (1977) (statement of Paul G. Dembling, General Counsel, General Accounting Office).

80. *See* H.R. Rep. No. 95-1556, at 31 (1978) (citing Comptroller General and DOJ testimony favoring "the investiture of contract appeals boards with subpena [sic] and discovery powers.").

81. 123 Cong. Rec. 36,830 (1977) (statement of Sen. Packwood on the introduction of S. 2292); *see also* 124 Cong. Rec. S. 8061, 8065 (1978) (statement of Sen. Chiles on introduction of S. 2787) ("Section 11 embodies part of the Commission's recommendation No. 3 and gives the administrative boards greater subpoena powers by compelling the attendance of witnesses and requiring the submission of evidence through deposition and discovery techniques. These proceedings will, in turn, help the contractor in developing his case.").

> often were viewed as lacking the authority and prestige needed to make sound and objective decisions and the procedures established by the boards have been widely criticized for failing to provide the necessary procedural safeguards and due process . . . [This] bill . . . addresses each of those problems . . . In addition the bill improves the fact-finding ability of boards by providing them with subpoena and discovery power.[82]

Likewise, in extended remarks on the Harris-Kindness Bill, Rep. Harris explained:

> The present system does not provide due process for litigants because the agency boards of contract appeals do not possess the procedural authority of machinery to ensure that all the relevant facts are brought before the boards and are given adequate consideration. Even though boards lack adequate legal powers for taking evidence and making decisions, the boards' findings of fact are essentially final on subsequent judicial review.[83]

These statements underscore the importance of procedural due process to the parties and, in particular, the contractor's ability to develop a full and complete factual record before the board and obtain "sound and objective" decisions. Moreover, it is reasonable to conclude from these statements that Congress and the administration believed that the boards should have discovery and subpoena power on par with the courts.[84]

D. *Report Language on Board Subpoena Powers*

The House and Senate Reports on the Contract Disputes Act provide little additional insight concerning the subpoena powers or enforcement mechanisms. The House Report states that "[a]gency boards are given authority to administer oaths, authorize depositions and discovery proceedings, and may require the attendance of witnesses and the production of books and papers by subpoena."[85] The Senate Report's discussion is somewhat more expansive, stating:

> Section 11 effectuates recommendation No. 3 of the Procurement Commission and gives the boards of contract appeals of the agencies power to administer oaths,

82. 124 Cong. Rec. 36,264 (1978) (statement of Sen. Metzenbaum); *see also* 124 Cong. Rec. 31,644 (1978) (statement by Rep. Harris) ("The agency boards of contract appeals are problem areas as well. They do not have the procedural authority, such as discovery and subpoena powers, to insure that all relevant facts and issues are brought before them."); 124 Cong. Rec. 11,248 (1978) (statement of Rep. Harris on introduction of H.R. 11002, named the "Harris-Kindness Contract Disputes Bill") ("[Boards] do not have the procedural authority, such as discovery and subpena [sic] powers to insure that all relevant facts are brought before them.").

83. 124 Cong. Rec. 11,249 (1978) (statement of Rep. Harris).

84. The executive branch position on the Procurement Commission recommendation G-7, addressing the issue of whether the Government and contractors should have equal rights to appeal board decisions, included the statement: "As long as a board performs an independent adjudicatory function for the initial trial of a case in a manner *fully equivalent to a court of original jurisdiction*, and not as an operating or management instrumentality of an agency, both sides should have substantially equal rights of appeal similar to those available if the case were actually tried in a United States court." Disputes, *supra* note 68, at 10,491 (emphasis added).

85. H.R. Rep. No. 95-1556, at 7 (1977).

> authorize depositions, and discovery, and issue subpoenas. It further provides a mechanism for enforcing these orders through the courts. It is the intent of this increased authority to improve upon the quality of the board records, *and to insure that the tools are available to make complete and accurate findings, thus minimizing the need for a court to supplement the board record on review*.[86]

The foregoing legislative history of the CDA strongly suggests that Congress intended that section 610's subpoena powers were to apply equally to the Government and contractors, and specifically that the term "person" was meant to include persons employed by both the Government and the contractor.

IV. "EXECUTIVE INTERPRETATION" AND PAST PRACTICE

As noted above in connection with the discussion of the *Yousuf* case, "executive interpretation" of a law over the course of time also is a relevant consideration in statutory interpretation. Although we have not exhaustively examined DOJ's past practice with respect to board subpoenas, select decisions by the boards issued after the CDA was enacted confirm that DOJ in the past has acted as if it were bound to comply with board subpoenas. For example, in *Heritage Reporting Corporation*,[87] a contractor requested that the GSBCA issue a subpoena to DOJ as one of the user agencies under a federal supply schedule contract administered by the GSA. DOJ moved to quash the subpoena on a number of bases, including that DOJ's compliance with the subpoena would be unduly burdensome. In *Heritage Reporting*, just as in *Linder* (involving Rule 45 subpoenas), DOJ did not argue that the agency was not a "person" and, therefore, could not be compelled to comply with a board subpoena.

In denying DOJ's motion to quash, Judge Williams noted the appellant's arguments in favor of enforcement:

> Heritage replied that the documents were critical to its appeal in that DOJ is the only source of the documents, the amount of money involved in the alleged breach is substantial, and denying access to documents held only by user agencies would undermine the discovery process and preclude actions for breach of Federal supply contract.
>
> For the reasons stated below, we deny the motion to quash the subpoena, and permit DOJ to develop the record further on its request for costs.
>
> …
>
> Militating against DOJ's valid concerns is one overriding circumstance—Heritage's unquestionable need for these documents to pursue this appeal. The documents indicating what orders, if any, were placed outside the schedule are the heart of appellant's proof. They are clearly relevant. Moreover, since respondent does not possess

86. S. Rep. No. 95-1118, at 31 (1978) (emphasis added).
87. GSBCA No. 10396, 90-3 BCA ¶ 22,977 (1990).

> this information, subpoenaing them from mandatory user agencies like DOJ is the only way appellant can secure them. Thus, we will not quash the subpoena.[88]

Thus, just as in the case of the Rule 45 subpoena, there is a history of DOJ compliance with board subpoenas. The facts that it took nearly 40 years for this issue to surface and that DOJ in the meantime appears not to have asserted that it could not be compelled under section 610 to produce documents are relevant to the interpretation of this law. Moreover, as noted above, the CDA was enacted to enhance pre-CDA practice. Under pre-CDA practice, DOJ attorneys routinely sought enforcement of subpoenas issued by district courts on behalf of the boards. These subpoenas, issued under the provisions of 5 U.S.C. § 304, were issued to be enforced against former government officials in their official, rather than personal, capacities. In other words, even pre-CDA practice included a mechanism for issuance and enforcement of subpoenas to former officials of nonparty government agencies to develop evidence in board proceedings. It is unlikely that Congress in enacting the CDA intended to frustrate or curtail this practice.

V. CONCLUSION

As noted above, prior to the passage of the CDA, the Boards of Contract Appeals did not have authority to issue subpoenas. Rather, they were required to apply to district courts for issuance of subpoenas. This practice, as a practical matter, would have been time-consuming and cumbersome and the 1972 Commission on Government Procurement concluded that it was not good enough for the boards. Significantly, however, the superseded process nevertheless involved DOJ, obtaining subpoenas to compel testimony or document production from, inter alia, retired government agency personnel with regard to their official duties while employed by the Federal Government. Moreover, these subpoenas had "teeth" because former government employees who did not comply were subject to the court's contempt powers. Thus, if DOJ's position stands with respect to enforcement of board subpoenas issued under the CDA, it arguably would represent a step *backward*.

The CDA was introduced in 1978 to improve and enhance board practice. To that end, section 610 vested the boards with subpoena authority to compel testimony and the production of documents and provided an enforcement mechanism that applies to any "person." The CDA does not define the term "person," but statutes and other case law tell us how this statute should be interpreted absent a definition. The Dictionary Act, a fundamental tool used in interpreting statutory language, does not include governmental entities in its definition of the term "person," but it also requires courts to examine the context, including legislative history, in which the term "person" is used in a specific statute. Similarly, the Supreme Court has held that, absent persuasive

88. *Id.* ¶¶ 4–5, 9.

contextual information to the contrary, the term "person" is *normally* not meant to apply to the Federal Government or its officials. Even when so ruling, however, it has cautioned that a contrary interpretation may be warranted where legislative history or other contextual information reveals a different legislative intent.

Here, the legislative history of the CDA reveals an intent to allow for liberal and complete discovery in line with what would be available in a court: provide due process for *both* parties and a process for development of a full and complete record that would be entitled to deference on appeal. This same legislative history also stresses the importance of permitting the *contractor* to develop its case in an independent and impartial forum, a board with greatly enhanced status. A DOJ witness, in fact, offered the most compelling testimony that it was imperative for the boards to have full, independent discovery and subpoena powers to ensure due process at the boards and allow for complete development of a factual record at the board level. DOJ also testified, and convinced Congress, that DOJ should be made responsible for enforcement of subpoenas so that they would be enforced in an efficient and even-handed manner. Accordingly, the goals of the CDA cannot be fully achieved unless the contumacy provisions of section 610 are interpreted to apply equally to Government and contractors. The term "person" must include every party with relevant evidence.