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Fourth Amendment--The Presumption of Reasonableness of a Subpoena Duces Tecum Issued by a Grand Jury

Daniel E. Chefitz

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FOURTH AMENDMENT—THE PRESUMPTION OF REASONABLENESS OF A SUBPOENA DUCES TECUM ISSUED BY A GRAND JURY

United States v. R. Enterprises, Inc., 111 S. Ct. 722 (1991)

I. INTRODUCTION

In *United States v. R. Enterprises*[1] the United States Supreme Court held that a subpoena duces tecum[2] issued by a grand jury is presumed to be reasonable and that the recipient bears the burden of proving unreasonableness.[3] The Court stressed the importance of grand jury independence while making it more difficult for a recipient to quash a subpoena.[4] This Note explores the Court's opinion and concludes that the Court correctly placed the burden of proving unreasonableness on the subpoena recipient but inadequately defined the scope of the reasonableness standard.[5] As a result lower courts may not know when to employ the Court's standard of reasonableness. This Note attempts to clarify these ambiguities by predicting how courts will apply and interpret the Court's standard.[6] This Note also questions the Court's reliance on the independent investigatory nature of the grand jury in light of recent changes in the grand jury system.[7] Finally, this Note praises Justice Stevens' standard for balancing both sides' interests while considering how the grand jury presently operates.[8]

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1 111 S. Ct. 722 (1991).

2 A grand jury process compelling production of certain specific documents and other items, material and relevant to the grand jury investigation, which documents and items are in custody and control of person or body served with process. *See* FED. R. CRIM. P. 17 (1990).

3 *R. Enterprises*, 111 S. Ct. at 728.

4 *Id.*

5 *See infra* text accompanying notes 146-147.

6 *See infra* text accompanying notes 148-149.

7 *See infra* text accompanying notes 150-162.

8 *See infra* text accompanying notes 163-164.

II. BACKGROUND

A. THE SUPREME COURT'S HISTORICAL VIEW OF THE GRAND JURY'S INVESTIGATIVE POWER

In a line of decisions dating back to 1906, the Supreme Court consistently recognized that a grand jury enjoys broad investigatory powers.[9] The cases similarly stress the necessity of the grand jury's independence from judicial intervention and extensive procedural rules.[10]

Throughout the years, the Court has employed different standards to review a petition to quash a subpoena depending upon the recipient's specific challenge to the subpoena.[11] The Supreme Court in *Hale v. Henkel*[12] first recognized a reasonableness limitation to overly broad grand jury subpoenas.[13] An overly broad subpoena lacks specificity in describing the requested materials. The resulting burden on the subpoena recipient may violate the Fourth Amendment's protection from unreasonable search and seizure.[14] The Court employed a standard of "far too sweeping to be regarded as reasonable" to review breadth challenges.[15] The Court rejected the notion that a witness may not be questioned prior to the return of an indictment.[16] The Court reasoned that allowing the grand jury to examine witnesses will aid them in determining whom to indict.[17] In *Hale* the petitioner received a subpoena to testify and produce business papers to a grand jury.[18] Petitioner argued, *inter alia*, that it was physically impossible for him to get the requested materials together in the time allowed.[19] The Court determined that the request for business papers was not specific enough and thus, unreasonable.[20]

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9 Hale v. Henkel, 201 U.S. 43 (1906); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973); United States v. Calandra, 414 U.S. 338 (1974).

10 *See supra* note 9.

11 *Id.*

12 201 U.S. 43 (1906).

13 *Id.* at 65.

14 *Id.* at 76. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

15 *Hale*, 201 U.S. at 76.

16 *Id.* at 67-68.

17 *Id.*

18 *Id.* at 70.

19 *Id.*

20 *Id.* at 76-77. The subpoena lacked specificity because it requested

In *Branzburg v. Hayes*[21] the Court faced a First Amendment challenge to a subpoena which required newspersons to testify and divulge confidential sources to a grand jury.[22] The Court required the Government to establish that the information sought in a grand jury investigation related "directly" to the criminal conduct being investigated.[23] The Court recognized that when a grand jury subpoena infringes upon First Amendment interests, the government's burden of proof increases.[24] In the present case, the Court required the government to show a direct link between the newsperson's testimony about confidential sources and the investigation into drug trafficking.[25] The Court upheld the subpoena, finding that eradicating illegal drug trafficking constituted a "compelling state interest" and that the information pertaining to a drug transaction directly related to the grand jury investigation.[26] In so finding the Court stressed, "[i]t is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made."[27]

In *United States v. Dionisio*[28] the Court held that in general the Fourth Amendment's protection against unreasonable search and seizure does not apply to grand jury subpoenas.[29] Citing *Hale*, the Court noted however, that the Fourth Amendment does, "provide protection against a grand jury subpoena duces tecum too sweeping in its terms 'to be regarded as reasonable.' "[30] The Court rejected the argument that the Fourth Amendment required the government

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"all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies situated in seven different states. . . ."

Id.

21 408 U.S. 665 (1972).

22 *Id.* at 667. The First Amendment states: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

23 *Branzburg*, 408 U.S. at 708.

24 *Id.* at 700-701 (quoting Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963)). The "compelling interest" rule is based upon a line of cases that require official action with adverse impact on First Amendment rights be justified by a "compelling" public interest. *See id.* at 680 n.18.

25 *Branzburg*, 408 U.S at 700-701.

26 *Id.*

27 *Id.* at 701-702.

28 410 U.S. 1 (1973).

29 *Id.* at 9. *See supra* note 14 for the text of the Fourth Amendment.

30 *Dionisio*, 410 U.S. at 11-12 (quoting Hale v. Henkel, 201 U.S. 43, 76 (1906)).

to make a preliminary showing of reasonableness.[31] Thus, the Court ruled that the government need not make a preliminary showing of reasonableness before a grand jury witness would be required to furnish voice exemplars.[32] In *United States v. Mara*,[33] a companion case to *Dionisio*, the Court held that the Fourth Amendment's protection against unreasonable search and seizure does not protect a recipient from an irrelevant grand jury subpoena.[34] Therefore, the government is not required to make a preliminary showing of relevancy.[35] In reaching its decision in *Dionisio*, the Court reasoned that "any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[36]

In *United States v. Calandra*[37] the Court held that the Fourth Amendment exclusionary rule[38] does not apply to grand jury proceedings.[39] Respondent, subpoenaed to appear before a grand jury, refused to testify about business records that federal agents seized in violation of the Fourth Amendment.[40] The Court rejected this claim explaining that "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings."[41] The Court reasoned that due to the grand jury's broad investigatory power, "its operation is generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials."[42]

In the previous cases the Court set standards for challenges to

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[31] *Id.* at 8 (In *Dionisio* the recipient argued that the Fourth Amendment protection against unreasonable search and seizure required a preliminary showing of reasonableness before a grand jury witness could be forced to furnish a voice exemplar).

[32] *Id.*

[33] 410 U.S. 19 (1973).

[34] *Id.* at 21 (in *Mara* the recipient contended that the government must make a preliminary showing of reasonableness before a subpoena requiring the production of a handwriting exemplar can be enforced).

[35] *Id.* at 22.

[36] *Dionisio*, 410 U.S. at 17.

[37] 414 U.S. 338 (1974).

[38] This rule commands that where evidence has been obtained in violation of the search and seizure protections guaranteed by the Fourth Amendment, *see supra* note 14, the illegally obtained evidence cannot be used at the trial of the defendant.

[39] *Calandra*, 414 U.S. at 351 (the Court distinguished the exclusionary rule as a rule of evidence which does not apply to a grand jury subpoena, as opposed to a constitutional provision which may apply).

[40] *Id.* at 341.

[41] *Id.* at 349.

[42] *Id.* at 343.

grand jury subpoenas. In *United States v. Nixon*,[43] however, the Government encountered a reasonableness objection to a trial subpoena. In *Nixon*, the Court required the Government to make a preliminary showing of reasonableness.[44] The Court held that the Government must show the relevancy, admissibility, and specificity of the subpoenaed materials before a court will enforce a subpoena duces tecum pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure.[45] In the absence of such a showing the subpoena will be considered "unreasonable or oppressive."[46] Nixon argued that due to his executive privilege the subpoena failed to meet Rule 17(c)'s reasonableness requirement.[47] The Court found that the prosecutor had made a sufficient showing to justify the subpoena.[48]

B. STANDARDS EMPLOYED BY LOWER COURTS

1. Reasonableness Requirement

In determining whether a grand jury subpoena duces tecum is reasonable pursuant to *Dionisio*,[49] lower courts have used a three component test:[50]

(1) the subpoena may command only the production of things relevant to the investigation being pursued;
(2) specification of things to be produced must be made with reasonable particularity; and
(3) production of records covering only a reasonable period of time may be required.

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[43] 418 U.S. 683 (1974).

[44] *Id.* at 700.

[45] *Id.* at 699-700. Rule 17 (c) provides as follows:

> For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. *The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.* The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(emphasis added) FED. R. CRIM. P. 17 (c).

[46] *Nixon*, 418 U.S. at 698. In *Nixon*, after the prosecution indicted certain staff members and supporters of the President, the prosecutor subpoenaed under Rule 17(c), for production at trial, certain tapes and documents relating to precisely identified conversations between the President and others. *Id.* at 686.

[47] *Id.*

[48] *Id.*

[49] 410 U.S. 1 (1973). *See supra* notes 28-36 and accompanying text.

[50] United States v. Gurule, 437 F.2d 239 (10th Cir. 1970), *cert denied*, Baker v. United States, 403 U.S. 904 (1971). This test first appeared in *In re* Grand Jury Subpoena Duces Tecum (Provision Salesman), 203 F. Supp. 575 (S.D.N.Y. 1961); *see also*, *In re* Grand Jury Subpoena Duces Tecum (M.G. Allen), 391 F. Supp. 991 (D.R.I. 1975).

To balance the effect of the three part test, courts give the Government considerable deference on the relevancy issue because of the grand jury's exploratory nature.[51] Consequently, the Government has been required to prove the elements of the following three-part test in order to maintain its burden of proving relevancy. "1. That there is a pending grand jury investigation; and 2. The general nature of the subject matter of said grand jury investigation; and 3. That some possible relationship exists between the subpoenaed documents and the subject matter of said investigation."[52]

This three part reasonableness test is distinct from the *Nixon* test[53] in one important way. The *Nixon* test requires the Government to show the admissibility of subpoenaed materials at trial. No such requirement is found in the reasonableness standard for an overly broad grand jury subpoena.

2. *Relevancy Objections*

The lower courts apply conflicting standards when reviewing relevancy objections to grand jury subpoenas. The courts are also in disagreement as to whether the Government or the subpoena recipient bears the burden of proof. Some courts require a preliminary showing of relevancy by the government.[54] Other courts place a strong burden on the recipient to prove that the subpoenaed materials are irrelevant.[55] Yet a third group of courts place a lesser burden on the recipient.[56]

In *In re Grand Jury Subpoena (Battle)*[57] the Sixth Circuit held that when a recipient challenges a grand jury subpoena on relevancy

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51 Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956), *cert denied*, 352 U.S. 833 (1956).

52 *Allen*, 391 F. Supp. at 998.

53 *See supra* notes 43-48 and accompanying text.

54 *In re* Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); *In re* Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975); *In re* Grand Jury Matter (Gronowicz), 764 F.2d 983, 986 (3d Cir. 1985) (en banc) *cert. denied*, 474 U.S. 1055 (1986); *In re* Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, 697 F.2d 277, 281 (10th Cir. 1983).

55 *In re* Grand Jury Subpoena (Battle), 748 F.2d 327, 329 (6th Cir. 1984); *In re* Grand Jury Proceedings, John Doe (Weiner), 754 F.2d 154, 155-156 (6th Cir. 1985); *In re* Liberatore, 574 F.2d 78 (2d Cir. 1978); *In re* Grand Jury Subpoena Served Upon Doe (Roe), 781 F.2d 238, 248 (2d Cir. 1986) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *In re* Grand Jury Subpoena Served Upon Horowitz, 482 F.2d 72, 80 (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973).

56 *In re* Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982) *cert. denied*, 642 U.S. 1119 (1983); *In re* Grand Jury Proceeding (Schofield), 721 F.2d 1221 (9th Cir. 1983); *In re* Grand Jury Proceedings (Hergenroeder), 555 F.2d 686 (9th Cir. 1977).

57 748 F.2d 327 (6th Cir. 1984).

grounds, "the burden is on the party seeking to quash the subpoena to show 'that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury.' "[58] Similarly, in *In re Liberatore*,[59] the Second Circuit employed the same "no conceivable relevance" standard to a grand jury subpoena recipient's relevancy objection.[60] The court held that the "[G]overnment does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of subpoena."[61]

In contrast to the "no conceivable relevance" standard, the Third and Tenth Circuits have required the Government to make a preliminary showing of relevance.[62] In *Schofield I*[63] the Third Circuit held that the "Government [would] be required to make some preliminary showing by affidavit that each item [sought] is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose."[64] The Third Circuit has since softened the Government's affidavit burden by only requiring the Government to show that the documents requested are reasonably related to the subject of the grand jury's investigation.[65]

Forging a middle ground, the Eleventh and Ninth circuits do not require a preliminary showing of relevance by the Government and do not hold the recipient to the stringent "no conceivable relevance" standard.[66] In *In re grand Jury Proceedings (Bank of Nova Scotia)*[67] the Eleventh Circuit refused to require the Government to show that the documents sought were relevant to the grand jury investigation, "absent some showing of harassment or prosecutorial misuse of the system."[68]

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58 *Id.* at 330 (quoting *In re Libertore*, 574 F.2d at 83). The recipient, a former union official, sought to quash a subpoena seeking all books, papers, records, and data relating to certain discretionary bank accounts controlled by him. The court of appeals rejected the official's contention that the Government should have the burden of demonstrating the relevance of the requested materials.

59 574 F.2d 78 (2d Cir. 1978).

60 *Id.* The recipient of a grand jury subpoena seeking handwriting exemplars contended that the Government should be required to show relevance and necessity of the information to the grand jury's investigation.

61 *Id.* at 83.

62 *See supra* note 54.

63 486 F.2d 85 (3d Cir. 1973).

64 *Id.* at 93.

65 *See e.g.*, *In re* Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211 (3d Cir. 1981).

66 *See supra* note 56.

67 691 F.2d 1384 (11th Cir. 1982).

68 *Id.* at 1387.

The Ninth Circuit, in *In re Grand Jury Proceeding (Schofield)*[69], also refused to impose on the Government the burden to make a threshold showing of relevance. In *Schofield* the grand jury issued a subpoena to the former attorney of a target, requesting documents relating to the previous representation. The district court quashed the subpoena explaining that the Government must first establish by affidavit, the "legitimate need and relevance" of the requested materials.[70] The court of appeals reversed, holding that "[n]o affidavit of relevance and need must be introduced" because the presumption is that the Government obeys the law.[71]

III. Facts and Procedural History

In 1986, a federal grand jury sitting in the Eastern District of Virginia began investigating allegations of interstate transportation of obscene materials.[72] In early 1988, the grand jury issued subpoenas duces tecum to three New York companies owned in whole by Martin Rothstein: Model Magazine Distributors, Inc. (Model), R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[73] Model distributed sexually oriented paperback books, magazines, and videotapes and R. Enterprises distributed adult materials.[74] MFR is an adult bookstore in New York City.[75] The subpoenas sought an assortment of corporate books and business records from all three companies.[76] An additional subpoena sought copies of 193 identified videotapes that Model had shipped into the Eastern District of Virginia.[77]

The parties[78] moved to quash the subpoenas on grounds that the subpoenas requested materials irrelevant to the grand jury's investigation and that enforcement of the subpoenas violated their

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69 721 F.2d 1221 (9th Cir. 1983).

70 *Id.* at 1222.

71 *Id.* at 1223.

72 United States v. R. Enterprises, 111 S. Ct. 722, 724 (1991).

73 *Id.* Model had been investigated for interstate transportation of obscene materials when it was found to have shipped adult videotapes into the Eastern District of Virginia. Even though there was no evidence that R. Enterprises or MFR had shipped obscene materials into Virginia they were also owned by Martin Rothstein and also sold adult materials from New York.

74 *Id.*

75 *Id.* MFR is a small retail bookstore in Brooklyn that sold sexually explicit materials to local customers.

76 *Id.*

77 *Id.*

78 In the proceedings before the District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, Model was also a party. But on appeal to the Supreme Court, Model was not a party since the Government chose only to challenge those subpoenas quashed by the Court of Appeals.

First Amendment rights.[79] The parties maintained that R. Enterprises and MFR sold only to local customers and never conducted business in Virginia.[80] Therefore, their records were irrelevant to an investigation pertaining to the shipment of obscene materials into Virginia.

Additionally, the parties maintained that the burden on these small companies to comply with the subpoenas would severely impact the distribution of books in violation of the First Amendment.[81] Even though corporate records and not magazines were subpoenaed, the First Amendment still afforded protection.[82] Accordingly, the parties argued that the Government must show a compelling state need for the business records sought and that the records were substantially related to the grand jury's investigation.[83] The petitioner admitted that this heightened standard is limited to cases where the challenged subpoena arguably violates the First Amendment. The compelling interest standard leaves substantial discretion with the district court to balance the competing interests of the First Amendment and the Government's right to investigate potential crimes. The parties argued that because the subpoenaed materials were irrelevant to the investigation, the interest of the First Amendment greatly outweighed the Government's right to investigate. Therefore, because the subpoenas violated the First Amendment and were irrelevant to the investigation, they were unreasonable under Rule 17(c) of the Federal Rules of Criminal Procedure.[84]

The District Court for the Eastern District of Virginia denied the petitioner's motion to quash the subpoenas.[85] Additionally, the district court held that production of the videotapes did not consti-

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79 *R. Enterprises*, 111 S. Ct. at 725.

80 Brief for Respondents at 1, United States v. R. Enterprises, 111 S. Ct. 722 (1991) (No. 89-1436). [hereinafter Brief for Respondents].

81 *Id.* at 1. Under the First Amendment the Government cannot investigate obscenity charges in a manner that will impermissibly chill the exercise of free speech rights, even if the same investigative strategies would be acceptable in other routine criminal cases. *See* Bantam Books Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

82 Brief for Respondents, *supra* note 80, at 25. *See also* Star Distributors, Ltd. v. Hogan, 337 F. Supp. 1362 (S.D.N.Y. 1972) (in concluding that taking the corporate records of magazine distributors with a search warrant constituted a prior restraint, the district court reasoned that business records intertwined with First Amendment materials are just as much protected by the First Amendment as books and videotapes themselves).

83 Brief for Respondents, *supra* note 80, at 17. The parties based this standard on Branzburg v. Hayes, 408 U.S. 665 (1972); *see supra* notes 21-26 and accompanying text.

84 Brief for Respondents, *supra* note 80, at 17. *See supra* note 43 for the text of Rule 17 (c).

85 United States v. R. Enterprises, 111 S. Ct. 722, 725 (1991).

tute a prior restraint.[86] The district court found that because R. Enterprises, MFR, and Model were owned by the same person, a sufficient connection with Virginia existed to satisfy the subpoenas' relevancy to the grand jury investigation.[87] In response to plaintiffs' arguments that the Government needs to show a substantial relation between the subpoenaed materials and the investigation, the district court felt "inclined to agree" with "the majority of jurisdictions"[88] which do not require the Government to make a "threshold showing" before a grand jury subpoena will be enforced.[89] In sum, the district court characterized the subpoenas as "fairly standard business subpoenas" that "ought to be complied with."[90] The district court struck down the First Amendment issue by finding that business records are not protected by the First Amendment.

The Court of Appeals for the Fourth Circuit upheld the subpoena for Model's business records but remanded the motion to quash the subpoena for Model's videotapes.[91] In addition, the court of appeals overturned the district court's denial of the motion to quash the business records subpoenas issued to R. Enterprises and MFR.[92]

The court of appeals applied the *Nixon* standard without explanation.[93] Possibly, they may have reasoned that since the governing rule for a subpoena duces tecum in both the grand jury and trial context is found in Federal Rule of Criminal Procedure 17(c), the *Nixon* standard should be equally applicable to a grand jury subpoena. Following the *Nixon* standard the court of appeals required the government to "clear three hurdles" before it enforced the grand jury subpoenas: (1) relevancy; (2) admissibility; (3) specificity.[94]

The court of appeals found that the Government met its relevancy burden of proof with Model's business records because of the evidence that Model had shipped obscene materials into the Eastern District of Virginia.[95] Because the Government did not know that

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86 *Id.*

87 *Id.*

88 *Id. See supra* notes 55-56.

89 *R. Enterprises*, 111 S. Ct. at 725.

90 *Id.*

91 *In re* Grand Jury 87-3 Subpoena Duces Tecum, 884 F.2d 772, 776-78 (4th Cir. 1989).

92 *Id.* at 777.

93 *Id.* at 776. *See supra* notes 43-48 and accompanying text for a discussion of the *Nixon* standard.

94 *In re Grand Jury 87-3*, 884 F.2d at 776. *See supra* notes 43-48 and accompanying text.

95 *In re Grand Jury 87-3*, 884 F.2d at 776.

every videotape subpoenaed contained obscene materials, the court of appeals remanded for the district court to determine in camera if the videotapes contain obscene materials.[96] This precaution was necessary because the First Amendment protects from being subpoenaed any videotape that is not obscene. The R. Enterprises and MFR subpoenas failed to meet the *Nixon* standard that required the material to be admissible at trial, because there was no evidence that either company conducted business in the Eastern District of Virginia.[97] The Government's argument that all three companies were owned by the same person was not sufficient to meet the standard of proof.[98] The court of appeals did not rule on the First Amendment issue because the subpoenas did not pass the standard for ordinary subpoenaed materials as set out in Rule 17(c).

The United States appealed the decision quashing R. Enterprises' and MFR's subpoenas to the Supreme Court. The United States argued that the court of appeals applied the wrong standard for a grand jury subpoena and incorrectly placed the initial burden of proof on the government.[99] The Supreme Court granted certiorari because of the conflicting standards employed by the lower courts to determine the reasonableness of a grand jury subpoena.

IV. Supreme Court Opinions

A. THE MAJORITY OPINION

Writing for the Court,[100] Justice O'Connor reversed the decision of the Court of Appeals and remanded the case for judgment on the First Amendment issue.[101] In so holding, the Court greatly expanded the Grand Jury's subpoena power by placing the burden of proof for relevancy objections on the recipient.[102] Specifically, the majority held that when a recipient challenges a grand jury subpoena on relevancy grounds, the recipient bears the burden of showing "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant

96 *Id.* at 778-79. The court of appeals suggested that the Government take an easier route and buy the videotapes to check them for obscene scenes.

97 *Id.* at 776-77.

98 *Id.*

99 United States v. R. Enterprises, 111 S. Ct. 722, 725 (1991).

100 Justice O'Connor delivered the opinion for a unanimous Court with respect to Parts I and II.

101 *R. Enterprises*, 111 S. Ct. at 729.

102 It is unclear from the Court's opinion if this standard is applicable for every grand jury subpoena challenged under Rule 17(c) or limited to those challenged on relevancy grounds. *See infra* notes 146-47 and accompanying text for further discussion.

to the general subject of the grand jury's investigation."[103] Under this standard the burden of proof lies solely with the subpoena recipient and the Government is under no obligation to make a threshold showing of relevance.[104] In reaching its standard the Court criticized the court of appeals' adoption of the *Nixon* standard and held that the *Nixon* standard does not apply to grand jury subpoenas.[105] Finally, the Court found that Respondents had not met their burden of proof in showing that the subpoenaed business records were irrelevant to the grand jury investigation.[106]

1. Application of Court's Standard to the Facts

Applying this standard to the case at bar, the Court required the Respondents to show that there was "no reasonable possibility" that their subpoenaed business records would produce "any relevant information" to the grand jury's investigation into allegations that obscene materials were shipped into the Eastern District of Virginia.[107] Respondents maintained that neither of their companies had any connection with Virginia.[108] According to the Court, however, a blanket denial did not fulfill Respondent's burden of proof.[109] It was already known that Model had shipped obscene materials into Virginia.[110] Because Respondents conduct the same business in the same area and are owned by the same person as Model, there existed a reasonable possibility that the business records were relevant.[111] Therefore, the Court ruled that on its relevancy challenge, the Respondents had not fulfilled their burden to quash the subpoenas.[112]

The Court did not consider the First Amendment issue in the application of its standard to the facts of the case. According to the Court, "[t]he Court of Appeals determined that the subpoenas did not satisfy Rule 17(c) and thus did not pass on the First Amendment issue. We express no view on this issue and leave it to be resolved by the Court of Appeals."[113]

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103 *R. Enterprises*, 111 S. Ct. at 728.
104 *Id.*
105 *Id.* at 726-27.
106 *Id.* at 729.
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*

2. *Rationale for Rejecting the* Nixon *Standard*

The Court declined to extend the *Nixon* standard for reviewing the reasonableness of a trial subpoena to a grand jury subpoena.[114] In *Nixon*[115] the Court found a trial subpoena was unreasonable under Rule 17(c) if the prosecutor did not show the relevancy, admissibility, and specificity of the subpoenaed materials to the trial.[116] In addition, *Nixon* placed the standard of proof on the government to show that the subpoena is reasonable.[117] In rejecting the *Nixon* standard, two propositions were made. First, the nature of a grand jury investigation is unique and distinct from that of a criminal trial.[118] Second, restrictions such as the *Nixon* standard, that would delay a grand jury investigation, are not applicable.[119]

In support of the first proposition, the Court emphasized that the grand jury operates in a distinct fashion from a trial court.[120] First, while a court is limited to a specific case and charge, a grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[121] Furthermore, in performing the necessary function of gathering all information that might possibly concern the investigation, a grand jury must paint with a broad brush. A grand jury needs to investigate every clue to determine whether a crime has been committed.[122] Finally, at a criminal trial the specific offense and defendant are known at the outset, while in a grand jury investigation, if there be an offense and defendant, they are not developed until the investigation's conclusion.[123]

Turning to the second proposition, the Court stressed that restrictions which apply to a trial do not apply to a grand jury investigation. For instance, evidentiary restrictions which lead to accurate findings at a criminal trial, do not apply to a grand jury investigation, primarily to guard against delay. In *Costello v. United States*[124]

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114 *Id.* at 727.

115 418 U.S. 683 (1974).

116 *Id.* at 700. *See supra* notes 43-48 and accompanying text.

117 *Nixon*, 418 U.S. at 700.

118 *R. Enterprises*, 111 S. Ct. at 726.

119 *Id.*

120 *Id.*

121 *Id.* (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-643 (1950)) (in *Morton* the Court was ruling on an order of the Federal Trade Commission when they compared the FTC's power to that of a grand jury in contrast to a court's power).

122 *Id. See also* Branzburg v. Hayes, 408 U.S. 665, 701 (1972) (in *Branzburg* the Court required newspersons to testify before a grand jury regarding confidential sources); *see supra* notes 21-27 and accompanying text.

123 *R. Enterprises*, 11 S. Ct. at 726.

124 350 U.S. 359 (1956), *reh. denied*, 351 U.S. 904 (1956) (petitioner, convicted of in-

the Court refused to apply the rule against hearsay to a grand jury investigation. The Court stated probable delay in the grand jury process as a rationale for their decision.[125] In addition, the Court held in *United States v. Calandra*[126] that the Fourth Amendment exclusionary rule did not apply to grand jury proceedings: "A grand jury 'may compel the production of evidence or testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.' "[127]

In furtherance of its contention that the *Nixon* standards were not appropriate for a grand jury, the Court cited to its statement in *United States v. Dionisio,*[128] that, "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[129] Therefore, because the *Nixon* standard "would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena,"[130] it is inapplicable in the grand jury context.

3. New Rule 17(c) Reasonableness Standard for Grand Jury Subpoenas

With respect to future cases, the Court clarified the standard to evaluate reasonableness under Rule 17(c) and where to place the burden, thus resolving the split in the circuits.[131] First, because the Court presumed a grand jury acts within its scope of authority, the Court placed the burden of showing unreasonableness on the subpoena recipient.[132] Second, the Court concluded that when a recipient challenges a subpoena on relevancy grounds,[133] "the motion to

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come tax evasion, contended that his indictment by the grand jury relied on hearsay evidence).

125 *Id.* at 364.

126 414 U.S. 338 (1974) (witness summoned to appear and testify before a grand jury refused to answer questions that were based on evidence obtained from unlawful search and seizure; Court held that witness must answer questions because Fourth Amendment exclusionary rule does not apply to grand jury proceedings). *See supra* notes 37-42 and accompanying text.

127 *R. Enterprises*, 111 S.Ct. at 726 (quoting *Calandra*, 414 U.S. at 343).

128 410 U.S. 1 (1973).

129 *R. Enterprises*, 111 S. Ct. at 727 (quoting United States v. Dionisio, 410 U.S. at 17) (in *Dionisio* the Court held that compelled production of voice exemplars by a grand jury, to be used for identification, did not violate the Fifth Amendment privilege against compulsory self-incrimination). *See supra* notes 28-32 and accompanying text.

130 *R. Enterprises*, 111 S. Ct. at 727.

131 *Id.* at 727-28.

132 *Id.* at 728.

133 I am puzzled at why the Court set out at the beginning of this section to define the

quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."[134] The Court expressed concern for those subpoena recipients who have no knowledge of the grand jury investigation but left it to the district courts to fashion appropriate procedures.[135]

B. CONCURRING OPINION

Justice Stevens disagreed with the reasonableness standard set by the Court. He faulted the Court's standard for only focusing on the relevance side of the balance while ignoring the burden a subpoena places on a recipient.[136] According to Justice Stevens, the moving party has the initial burden of demonstrating to the court some valid objection to compliance.[137] This objection may be made not on relevancy grounds but on various other grounds such as invasion of privacy.[138] After the moving party has made this initial showing, the trial court would then inquire into the relevance of the subpoenaed materials. In this inquiry, "the degree of need sufficient to justify denial of the motion to quash will vary to some extent with the burden of producing the requested information."[139]

Applying this standard to the present case, the Respondents fulfilled their burden of demonstrating a valid objection by arguing the First Amendment implications involved with compliance.[140] The trial court then should inquire into the relevancy of Respondents' business records, taking into account the First Amendment implications.[141] In addition, Justice Stevens would have the district court consider the history of this particular grand jury investigation.[142] In the present case, the district court would, thus consider the numerous subpoenas received by Model before the present subpoena.[143] Justice Stevens did not indicate how he would hold in the

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reasonableness limitation imposed on grand jury subpoenas by Rule 17(c), and then, without explanation, seemingly limited the definition to challenges on relevancy grounds; *See infra* text accompanying notes 146-47 for further discussion.

134 *R. Enterprises*, 111 S. Ct. at 728.

135 *Id.*

136 *Id.* at 730 (Stevens, J., concurring).

137 *Id.* (Stevens, J., concurring).

138 One reason for this could be the near impossibility for a recipient to adequately prove irrelevancy at the initial objection.

139 *R. Enterprises*, 111 S. Ct. at 730 (Stevens J., concurring).

140 *Id.* (Stevens, J., concurring).

141 *Id.* at 731 (Stevens, J., concurring).

142 *Id.* (Stevens J., concurring).

143 Brief for Respondents, *supra* note 80, at 3.

present case under this analysis. Presumably, the lower court needs to undertake additional fact finding before a decision can be reached.

V. ANALYSIS

In *R. Enterprises*, the Supreme Court expanded the Court's deferential treatment of the grand jury by placing on the recipient of a subpoena duces tecum the burden of showing that the subpoena is unreasonable.[144] In fashioning a new definition of Rule 17(c)'s "unreasonable or oppressive" language, the Court was unclear as to the new standard's scope. It clearly applies to relevancy objections under Rule 17(c), yet it is unclear whether it applies to all objections under Rule 17(c). Additionally, support exists for the proposition that a grand jury acts as an arm of the executive and consequently, courts should not expand a grand jury's power.[145] As a result of these considerations, this Note predicts that lower courts may look to Justice Stevens' standard as a guide for reviewing objections to grand jury subpoenas.

A. AMBIGUITY IN JUSTICE O'CONNOR'S OPINION

The Court was unclear as to whether its standard applies for all objections to a grand jury subpoena duces tecum under Rule 17(c) or is limited to relevancy objections. In setting out its reasonableness standard, the Court stated that, "[t]o the extent that Rule 17(c) imposes some reasonableness limitation on grand jury subpoenas, however, our task is to define it."[146] One then would expect the Court to create a standard that applies generally to unreasonable subpoenas. However, before announcing the standard, the Court stated, ". . . we conclude that where, as here, a subpoena is challenged on relevancy grounds . . . ,"[147] thus leaving lower courts unsure as to whether this new standard applies to all subpoena challenges under Rule 17(c), or only to relevancy objections. This Note therefore predicts that district courts will use Justice Stevens' standard when a burden to comply with the subpoena exists independent of the subpoena's relevance.

Additionally, Justice O'Connor's standard does not allow lower courts to consider the unique circumstances of each case because it requires the recipient to prove the complete irrelevancy of every

144 *See supra* text accompanying notes 131-35.
145 *See infra* text accompanying notes 150-62.
146 *R. Enterprises*, 111 S. Ct. at 727.
147 *Id.* at 728.

item in the subpoena. Using this standard, lower courts cannot consider prosecutorial abuse of the subpoena power. To show the complete irrelevancy of a subpoena a recipient must know all the prosecution's theories. It is practically impossible for the recipient to know every angle of the investigation and courts will not make the Government reveal this information because that would destroy the secrecy of the investigation. Therefore, lower courts will need to employ a different standard when they are confronted with a valid objection to compliance with a grand jury subpoena.

If relevancy is the only objection, courts will use Justice O'Connor's standard due to the grand jury's exploratory nature. When other factors are involved, courts will give less deference to the grand jury and will want to use a standard that considers all the implications involved. Justice Stevens' standard gives district courts guidelines to consider all the factors. To determine if a subpoena is unreasonable courts should ". . . take into account the entire history of this grand jury investigation, including the series of subpoenas that have been issued to the same corporations and their affiliates during the past several years . . . ."[148]

It is difficult to forecast a unified standard by which all courts will judge the reasonableness of a grand jury subpoena duces tecum. *R. Enterprises* has made clear that district courts will no longer place the burden on the government to make a preliminary showing of reasonableness. This holding is correct since the burden of proof lies on the party asserting the affirmative of a proposition.[149] In addition, a unanimous Court rejected the Fourth Circuit's analysis that the reasonableness standard for a grand jury subpoena is the same as the standard used for a trial subpoena.

B. HAS THE GRAND JURY'S INVESTIGATIVE ROLE CHANGED?

Critics of the grand jury system may argue that Justice O'Connor gave too much importance to the historical investigatory powers of the grand jury.[150] The grand jury no longer acts as a

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148 *Id.* at 731. (Stevens. J., concurring).

149 *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

150 *See e.g.*, United States v. Mara, 410 U.S. 19, 23-24 (1973) (Douglas J., dissenting); United States v. Martino, 825 F.2d 754, 760-61 (3d Cir. 1987); United States v. Smith, 687 F.2d 147, 149 (6th Cir. 1983) *cert. denied* 459 U.S. 1116 (1983); *In re* Grand Jury Proceedings (Mills), 686 F.2d 135, 144 (3d Cir. 1982) *cert. denied*, 103 S. Ct. 386 (1982); United States v. Hilton, 534 F.2d 556, 565 (3d Cir. 1976) *cert. denied* 429 U.S. 828 (1976); *In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 89-90 (3d Cir. 1973); *In re* Grand Jury Proceedings, 497 F. Supp. 979, 985 (E.D.P.A. 1980); Application of Credit Information Corp. of New York, 457 F. Supp. 969 (S.D.N.Y. 1978). For a discussion of argu-

"guardian of the people."[151] Dissenting in *Mara*, Justice Douglas criticized those who argue that the grand jury is an independent investigatory power by asserting that the prosecutor, ". . . can indict anybody at any time for almost anything before any grand jury."[152] He further contended that witnesses summoned to testify before a grand jury are essentially brought to the prosecutor's room.[153]

In re Grand Jury Proceedings (Schofield)[154], the Third Circuit Court of Appeals described the grand jury as an investigative and prosecutorial arm of the government's executive branch.[155] The prosecutor yields most of the power vis a vis the grand jury. The investigatory powers granted to the grand jury are used by the prosecutor in building the case for the government. The prosecutor together with the police decides which witnesses to call. The prosecutor examines the witnesses and by his or her actions persuades the grand jury what to decide.[156] It is natural that part time grand jurors will look to the "professional" prosecutor for guidance.[157]

If the grand jury acts much as the prosecutor's puppets, their broad investigatory powers in fact are granted directly to the prosecutor.[158] This may be a good idea since the prosecutor is more knowledgeable in how to run a criminal investigation. But the prosecutor's power which is an extension of police power, should then be subject to supervision and restrictions imposed by the courts. *R. Enterprises* continued in the line of Supreme Court cases that still view the grand jury in its historical independent role. Thus, the Court still refused to recognize that they are in essence increasing the prosecutor's powers when they protect the grand jury's broad investigatory powers. This misconception by the Court is unfortunate since the prosecutor's power should be subject to Fourth Amendment and other supervisory restrictions.

Considering the practical changes in how the grand jury operates, the Court's standard of reasonableness places too great a burden on the subpoena recipient while overemphasizing the

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ments against the grand jury see, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, 351-52 (Student ed., 1985).

151 *Mara*, 410 U.S. at 23 (Douglas, J., dissenting).

152 *Id.* (Douglas J., dissenting).

153 *Id.* at 24 (Douglas, J., dissenting).

154 486 F.2d 85.

155 *Id.* at 90.

156 LAFAVE & ISRAEL, *supra* note 150, at 351.

157 *Id.*

158 *Id.*

Government's interest.[159] The Court stressed the grand jury's independent investigative authority as a basis for showing deference. The previous argument would seriously question placing much emphasis on this factor. The Court listed the government's interests as "affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy."[160] The Court admitted that a subpoenaed party that does not know the general subject matter of the grand jury investigation will not be able to prove the Court's standard.[161] The Court was confident that district courts would fashion a solution to this problem.[162] But this standard would still be impossible to prove unless the entire investigation was explained to the recipient. Understandably courts would never require this. Therefore, a more balanced standard is necessary.

C. JUSTICE STEVENS' STANDARD IS MORE BALANCED

Justice Stevens' standard balances both sides' interests while considering the grand jury's present nature. In his standard "the degree of need sufficient to justify the denial of the motion to quash will vary to some extent with the burden of producing the requested information."[163] This inquiry into the relevancy of the subpoenaed materials would only be made after the recipient had first demonstrated to the court some valid objection to compliance.[164] Such an objection may be that compliance has First Amendment implications. In this manner the government's interests of avoiding minitrials on peripheral matters and preserving a necessary level of secrecy would be protected since an inquiry would only be made after a recipient has already shown a valid objection. In addition, the recipient can seek a remedy for prosecutorial misuse of the subpoena power. The final governmental interest of affording grand juries wide latitude would be taken into account by the district court when ruling on relevancy.

Unlike the Court's standard which appeared so highly deferential that a recipient would never be able to show irrelevancy, Justice Stevens' standard would also consider the intrusiveness of the sub-

159 The Court concluded that a subpoena is reasonable unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." United States v. R. Enterprises, Inc., 111 S. Ct. 722, 728 (1991).

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.* at 730. (Stevens, J., concurring).

164 *Id.* (Stevens, J., concurring).

poena. This is in part due to occasional prosecutorial misuse. In applying this standard, Justice Stevens suggested that the district court should consider the history of the specific grand jury investigation including past subpoenas. While most grand jury subpoenas will still be upheld because of deference given by the courts, this standard will allow those subpoenas that are intrusive and irrelevant to be quashed. This standard protects a recipient from an overzealous prosecutor. In sum, Justice Stevens' standard safeguards against prosecutorial misuse of the grand jury system while allowing the government to efficiently and fairly investigate possible crimes.

VI. Conclusion

The Court's decision rejecting the use of the *Nixon* standard when reviewing a grand jury subpoena duces tecum expanded the deference given to the grand jury. In reaching its decision the Court relied on case law supporting the independent investigatory powers of the grand jury.

The Court, in reaching a new definition of reasonableness, correctly placed the burden of proving unreasonableness on the subpoena recipient. By doing this, the Court rejected the practice of circuit courts that require a preliminary showing of relevancy by the Government. This holding agrees with the principle that the moving party bears the burden of proof.

The Court was unclear as to which objections its standard of reasonableness should be applied. If it was only meant for relevancy objections then the standard would achieve the Court's goal of quickly setting aside frivolous claims. If the standard was meant to apply to all objections under Rule 17(c) then it places an unfair burden on a recipient who may have a legitimate objection to compliance. Because of this ambiguity lower courts may alternate between employing the Court's standard and Justice Stevens' standard depending upon the particular objection to compliance.

Daniel E. Chefitz