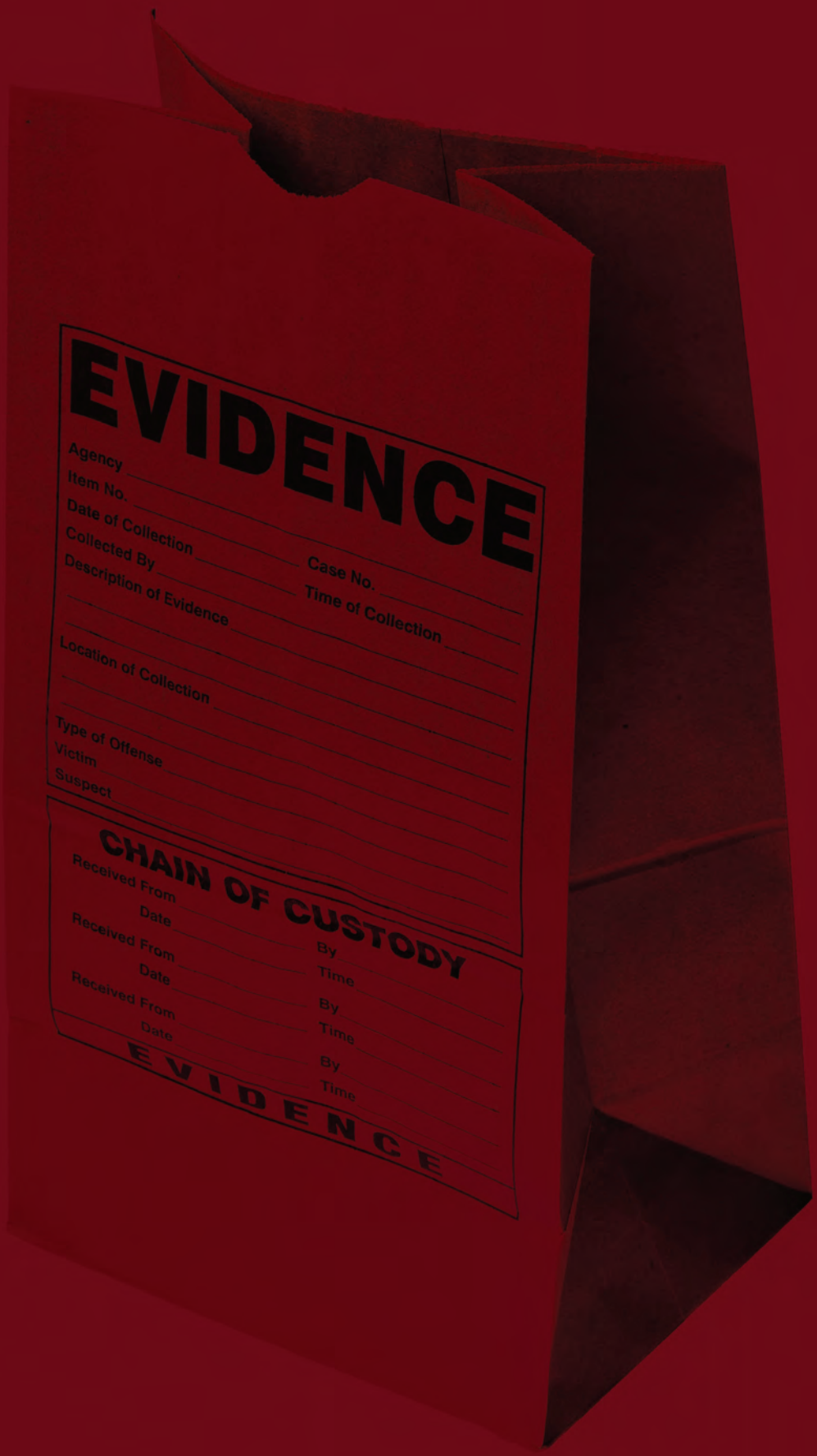
EVIDENCE
Agency
Item No.
Date of Collection
Case No.
Collected By
Time of Collection
Description of Evidence
Location of Collection
Type of Offense
Victim
Suspect
CHAIN OF CUSTODY
Received From
Date
By
Time
Received From
Date
By
Time
Received From
Date
By
Time
EVIDENCE

FOCUSING ON A SUBPOENAED ITEM'S *POTENTIAL EVIDENTIARY USE* (AS *NIXON* INTENDED) WILL PERMIT RULE 17(c) SUBPOENAS TO PROMOTE FAIR TRIALS

KEN MILLER

A Rule 17(c) subpoena[1] is a federal criminal defendant's only means of compelling the production of evidence from anyone other than the prosecutor. It implements the defendant's Sixth Amendment right to compulsory process. Rule 17(c) authorizes the district court to order the production of evidence prior to trial so a defendant has sufficient time to review it and decide whether to use it. This is an important tool in white-collar cases because such cases are so document intensive. *United States v. Nixon* is the U.S. Supreme Court's last word on when a party can compel pre-trial production under Rule 17(c). *Nixon* distilled lower-court authority and identified "specificity," "relevancy," and "admissibility" as the "three hurdles" to pre-trial production (the so-called "Nixon Standard").[2]

Nixon left the meaning of "admissibility" open when Rule 17(c) subpoenas are directed to third parties (i.e., third-party subpoenas), but discussed it in terms of a subpoenaed item's "potential evidentiary use." Rather than focus on potential evidentiary use, most federal circuits require a defendant to establish that the item sought will actually be admissible into evidence at trial before a court will enforce a Rule 17(c) subpoena—the "Strict Admissibility Standard."

The Strict Admissibility Standard presents a number of problems. First, the standard may be impossible to meet since the defendant may have never seen the evidence sought nor seen the government's case. As a result, the defendant may not be able to explain how the subpoenaed evidence is admissible. Second, the standard denies the defendant access to likely inadmissible evidence that is necessary to obtaining other admissible and exculpatory evidence (e.g. an inadmissible address book that contains the location of a key defense witness). Thus, the Strict Admissibility Standard may deny the defendant a fair trial.

As explained below, the Strict Admissibility Standard is inconsistent with long-standing federal practice and is the product of the uncritical acceptance of poorly reasoned authority. The Third and Fifth Circuits simply assumed that *Nixon* required the Strict Admissibility Standard and improperly concluded that there were no compelling reasons for easing the admissibility hurdle for third-party subpoenas.

Their poorly reasoned approach was then uncritically followed by the Eighth and Ninth Circuits.

As outlined in the "criticisms" section herein, application of the *Nixon* Standard to third-party subpoenas has been widely criticized by courts, practitioners, and academics. Such critics lament that the *Nixon* Standard is inconsistent with Rule 17(c)'s drafters' intent and makes Rule 17(c) subpoenas "rarely useful" or even "a nullity." Unfortunately, the Supreme Court has shown no sign of abandoning the *Nixon* Standard in this context. Most of the problems with the *Nixon* Standard can be remedied by simply jettisoning the legally infirm Strict Admissibility Standard and instead focusing on a subpoenaed item's potential evidentiary use.

A Potential Evidentiary Use Standard would remedy both problems identified above. First, it would allow a defendant to subpoena relevant material of the type that is often admitted into evidence (e.g., business records) even when a defendant cannot be sure the government's case will open the door to their admission or that a defendant can lay an adequate foundation for admission. This practical approach was first explained by Chief Justice John Marshall. It is consistent with both federal practice prior to *Nixon* and *Nixon* itself. And it is supported by case law in a substantial minority of federal circuits.

As outlined in the "criticisms" section herein, application of the *Nixon* Standard to third-party subpoenas has been widely criticized by courts, practitioners, and academics. Such critics lament that the *Nixon* Standard is inconsistent with Rule 17(c)'s drafters' intent and makes Rule 17(c) subpoenas "rarely useful" or even "a nullity."

Second, items that must be obtained before a defendant can reach other exculpatory evidence will be put to a potential evidentiary use and, therefore, should clear the admissibility hurdle. Inadmissible evidence is still evidence and it is often submitted to the district court to obtain a ruling essential to a fair trial. For example, a defendant might subpoena an address book to obtain the location of a witness who can offer exculpatory testimony and evidence at trial. Finally, and just as important, interpreting Rule 17(c) to permit a defendant to reach exculpatory (but inadmissible) evidence is necessary to ensure that Rule 17(c) subpoenas can effectuate a defendant's Sixth Amendment right to compulsory process.

The meaning of *Nixon's* admissibility hurdle has not been settled by the Supreme Court. Advocating for a definition that remedies the worst problems with the *Nixon* Standard offers the best chance for relief.

Evolution of Rule 17(c) and the *Nixon* Standard

Rule 17(c)(1) provides:

- **In General**. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
- **Quashing or Modifying the Subpoena.** On a motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

A Rule 17(c) subpoena is a traditional subpoena *duces tecum* for the production of items at trial. It also permits items to be "brought into court in advance … so that they may then be inspected in advance, for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it."[3]

The Prosecutions of Vice President Burr

The opinions of Chief Justice Marshall, who sat as trial judge for the trials of former Vice President Aaron Burr, describe the federal courts' traditional understanding of the pre-trial reach of subpoenas *duces tecum*. President Thomas Jefferson accused Burr of raising an army to instigate war with Spain. Burr was charged and acquitted of treason.[4] He was then charged and acquitted of a misdemeanor for the same conduct.[5]

Prior to the treason trial, Burr sought a subpoena *duces tecum* to obtain a letter that President Jefferson claimed showed Burr's guilt.[6] In response, government counsel offered to produce a partial copy of the letter that omitted passages he claimed were irrelevant and inadmissible. Burr demanded the whole letter because it *could* be material to his defense.[7] In granting the subpoena, Judge Marshall observed that the right to a subpoena "to prepare" a defense was required by "the uniform practice of this country," federal statute, and the defendant's constitutional right to compulsory process. The issue was mooted when Burr was acquitted of treason.[8]

Prior to the misdemeanor trial, Burr subpoenaed a second, similar letter.[9] Again, Marshall overruled the president's objections. First, he wrote "it is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?" A person who does not have something and may not "precisely know[] its contents" should not be required to give a "statement of its contents or applicability." Second, a defendant may not be able to fully explain the importance of the subpoenaed evidence because that depends upon events at trial. Judge Marshall ordered that the entire letter be produced to the defense.[10]

Bowman Dairy v. United States: Subpoena Served on U.S. Government

The seminal Supreme Court authority on the reach of a Rule 17(c) subpoena is *Bowman Dairy v. United States.*[11] Bowman Dairy Co. was indicted for antitrust violations. At the time, Rule 16 of the Federal Rules of Criminal Procedure, which governs discovery in federal criminal cases, only required the government to produce material that it had obtained through official process and items belonging to the defendant. Because Rule 16 did not require production of all evidence it needed, Bowman Dairy served the government with a Rule 17(c) subpoena. The subpoena included specific document demands and a "catch-all" demand for all documents relevant to any allegation in the indictment. The district court ordered production, but government counsel refused and was held in contempt.[12]

On *certiorari*, the Court observed that Rule 16 provides the only means for a defendant to "inform himself" about what documents are in the government's possession. Rule 17(c) subpoenas cannot be used "as an additional means of discovery." But if the defendant knows the government possesses items that he wants for trial and the government is unwilling to produce them, then a defendant can use a Rule 17(c) subpoena to obtain them. "That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence." However, the subpoena's catch-all demand was not enforceable because it was a "fishing expedition."[13] The Court was plainly concerned with making sure Rule 17(c) subpoenas were not used to circumvent Rule 16.

United States v. Nixon: Subpoena From Government to Sitting U.S. President

The Watergate Special Prosecutor sought to enforce a Rule 17(c) subpoena for President Richard Nixon's recordings of conversations with various aides and advisers, some of whom were charged with conspiracy and obstruction of justice. Nixon moved to quash the subpoena citing his general need for confidentiality (i.e., "executive privilege"). The district court denied the motion and ordered the tapes produced for *in camera* review.[14]

After both parties sought review, the Supreme Court observed that traditional subpoenas *duces tecum* were for obtaining evidence for trial; they could not be used for discovery. Rule 17(c) simply incorporated this existing law while adding a means for pre-trial review of the subpoenaed material.[15] The Court recognized that most lower courts followed Judge Weinfeld's formulation in *United States v. Iozia*,[16] in deciding whether pre-trial production was appropriate. Under *Iozia,* the subpoenaing party must establish: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'"[17] The Court distilled these requirements into the three hurdles of the *Nixon* Standard. Applying that standard, the Court held:

1. **Specificity:** The subpoena specifically sought "certain tapes, memoranda, papers, transcripts or other writings relating to certain precisely identified meetings between the president and others."[18] This easily cleared the specificity hurdle and the Court did not discuss it further.
2. **Relevance:** The Court stated "of course, the contents of the subpoenaed tapes could not at that stage be described fully by the special prosecutor, but there was a *sufficient likelihood* that each of the tapes contains conversations relevant to the offenses charged in the indictment." Some of the conspirators (who were then cooperating with the special prosecutor's investigation) had described what was on some of the tapes. As to other tapes, the "total context [including the identity of the participants and the time and place of the conversations] permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment."[19]
3. **Admissibility:** There was "a sufficient preliminary showing" of "valid *potential evidentiary uses*" for the subpoenaed material. They were likely admissible as admissions—either admissions by the speaker himself or "admissions" by a co-conspirator that could be used against a defendant. The taped statements would also be useful for impeachment, although "generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."[20]

The Court noted that Nixon was technically a third party, and the admissibility hurdle might not apply with "equal vigor" to third-party subpoenas.[21] In its briefs, the government asserted that there should be *no admissibility requirement* for third-party subpoenas.

> The "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to ensure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial discovery embodied in Rule 16.… By contrast … the government seeks material from what is in effect … a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum*.[22]

The Court did not decide whether a lower admissibility standard exists for third-party subpoenas because the subpoena met the undiluted *Nixon* Standard.[23]

The Court then weighed President Nixon's executive privilege claim against the government's need to compel production, and found that the needs of the criminal justice system outweighed President Nixon's general right to confidentiality.[24] Since *Nixon*, the Court has not offered further instruction on the requirements for a pre-trial Rule 17(c) subpoena.

Down the Rabbit Hole—Evolution of the Strict Admissibility Hurdle

After *Nixon*, a minority of circuits recognized that all that was required to clear the admissibility hurdle was that the Rule 17(c) subpoena sought *potentially* admissible evidence.[25] That approach is consistent with prior federal practice, supported by the reasoning of Chief Justice Marshall in the *Burr* cases, supported by the government's argument in *Nixon* that the *Nixon* Standard did not even apply to third-party subpoenas, and supported by the *Nixon* Court's focus on a "sufficient preliminary showing" of "potential evidentiary uses." It is also consistent with the result in *Nixon.*

Nonetheless, a majority of circuits require that a defendant establish that the items he or she seeks are actually admissible into evidence at trial before a Rule 17(c) subpoena will be enforced (i.e., the Strict Admissibility Standard). A critical evaluation of the *Nixon* Standard's early evolution in these circuits reveals that that interpretation is based on two unexamined and incorrect premises. First, those courts incorrectly concluded that *Nixon* held that third-party subpoenas must seek evidence that is actually admissible (it did not). Second, those courts incorrectly conclude that there is no reason to relax the admissibility requirement for third-party subpoenas (there is).

The Fifth Circuit

In *Thor v. United States,*[26] Thor was charged with lying on a federal firearms application to purchase a gun. Thor claimed someone else purchased the gun using his identification and attempted to subpoena witnesses who would support his defense. The district court denied the subpoena because Thor did not have an address. Thor claimed there was an address book that would provide their addresses and tried to subpoena that, too. But the district court concluded "that the address in the book would probably not be current." On appeal after conviction, the Fifth Circuit held Thor "was not entitled to subpoena the address book pursuant to Rule 17(c) … because it was not evidentiary."[27]

The court interpreted "evidentiary" to mean admissible in evidence at trial. Otherwise, it would have recognized that Thor could have presented the address book to the district court to support issuance of a subpoena for that witness; an evidentiary use. It may have even served other purposes at trial, such as proving an address. Assuming there really was an address book with the location of a person Thor could have subpoenaed to establish his innocence, then to deny him access to that address book was to deny him a fair trial.

Another influential Fifth Circuit opinion is *United States v. Arditti.*[28] Arditti was a lawyer who, along with a securities broker, was under investigation by the IRS for laundering drug money. After indictment, Arditti claimed he was (1) entrapped and (2) subjected to outrageous government conduct. Both defenses focus on whether the government crossed ethical lines in its criminal investigation. Before and at trial, Arditti subpoenaed IRS documents including those showing the "nature, goals, and targets of its operation." Arditti argued they were relevant to his lack of predisposition to commit the crime (which is critical to an entrapment defense). The district court quashed the subpoena as an improper fishing expedition.[29]

The Fifth Circuit affirmed, stating that the "specificity and relevance elements [of the *Nixon* Standard] require more than the title of a document and conjecture as to its contents." Further, Arditti "failed to establish with sufficient specificity the evidentiary nature of the requested materials." The subpoena was directed to the IRS, the federal agency involved in the investigation, so Rule 16 controlled the government's discovery obligations for the sought-after evidence.[30] Because *Arditti* did not even involve a third-party subpoena, it does not directly support a Strict Admissibility Standard in that context. Nonetheless, the opinion has been carelessly used by other circuits to support the Strict Admissibility Standard for third-party subpoenas.

The Third Circuit

The Third Circuit's two *Cuthbertson* decisions endorsed a Strict Admissibility Standard and convinced other circuits to follow suit. In *Cuthbertson I*,[31] the defendant was charged with a crime that had been the subject of a "60 Minutes" episode. The defendant issued two subpoenas to CBS for material related to the episode. The district court modified the subpoenas and ordered production of responsive items for *in camera* inspection. CBS refused to comply, was held in contempt, and appealed.[32] The Third Circuit held that *Bowman Dairy* limits Rule 17(c) to items that are "admissible as evidence." So it upheld the production of material that appeared admissible and quashed production of the rest. After remand, the district court reviewed the subpoenaed material submitted *in camera*, found that it was actually inadmissible, but still held that it had to be turned over to the defendant because it was exculpatory and the Due Process Clause required its production.[33] CBS appealed again.

In *Cuthbertson II,* the Third Circuit again noted that under *Bowman Dairy*, Rule 17(c) was limited to material "admissible as evidence" and then wrongly concluded that the *Nixon* "Court extended the admissibility requirement of Rule 17(c) to materials held by third parties."[34] The Third Circuit then concluded that "naked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within the rule."[35]

Contrary to the Third Circuit's reasoning, *Nixon* did not extend the Strict Admissibility Standard to third-party subpoenas; the Court refused to decide the issue. The Third Circuit's statement that exculpatory evidence did not rise to the "dignity" of evidence reachable with a Rule 17(c) subpoena demonstrates the problems with a Strict Admissibility Standard. By definition, "exculpatory" evidence is evidence that when suppressed undermines confidence in the verdict. The Supreme Court has even recognized that the inability to subpoena exculpatory evidence in the hands of third parties may violate a defendant's Sixth Amendment right to compulsory process.[36] Courts should be extremely troubled by an interpretation of Rule 17(c) that renders it unequal to the task of effectuating a defendant's constitutional rights and undermines the search for the truth.

The Ninth Circuit

The Ninth Circuit initially permitted Rule 17(c) subpoenas to reach potentially admissible evidence.[37] However, following *Cuthbertson II,* it adopted the Strict Admissibility Standard. In *United States v. Fields,*[38] the district court refused to quash a subpoena for pre-trial production of impeachment material. The Ninth Circuit reversed because it usually cannot be determined if impeachment evidence is actually admissible until after the witness testifies, stating that: "We see no basis for using a lesser evidentiary standard merely because production is sought from a third party rather than from the United States."[39] The court simply cited to (the poorly reasoned) *Cuthbertson II* decision to explain why there was "no reason" for a lesser admissibility requirement for third-party subpoenas.

The Eighth Circuit

The Eighth Circuit also used to permit Rule 17(c) subpoenas to reach potentially admissible evidence.[40] But it changed course after the *Arditti* and *Cuthbertson* decisions. In *United States v. Hang*,[41] an employee of a public housing authority (Hang) was charged with accepting bribes in exchange for finding poor immigrants eligible for federal housing assistance. Prior to trial, Hang sought various Rule 17(c) subpoenas, including one for the hospital records of a victim-witness who spent four weeks in a hospital for an unspecified mental illness. The district court denied the subpoena and the Eighth

Circuit affirmed quoting the inapposite *Arditti* decision, stating: "These specificity and relevance elements require more than the title of a document and conjecture as to its contents." Quoting *Cuthbertson I,* the court added that "a Rule 17(c) subpoena cannot properly be issued upon a 'mere hope.'"[42]

The subpoena sought medical records for a specific patient and covered a discreet period of time, so it was specific enough to identify responsive documents. The subpoena was an effort to obtain impeachment information of a known government witness, so it sought relevant items. Hospital records of a government witness were potentially admissible,[43] but *Hang* could not meet the Strict Admissibility Standard.[44]

The Ninth Circuit initially permitted Rule 17(c) subpoenas to reach potentially admissible evidence. However, following *Cuthbertson II*, it adopted the Strict Admissibility Standard. In *United States v. Fields*, the district court refused to quash a subpoena for pre-trial production of impeachment material.

Criticisms of the *Nixon* Standard Are Falling on Deaf Ears

District Court Criticism

District courts have criticized the application of the *Nixon* Standard to third-party subpoenas. In *United States v. Tomison,*[45] Chief Judge Emeritus Lawrence K. Karlton of the Eastern District of California found defendants' third-party subpoena cleared the *Nixon* Standard, but the government still objected that the defendants sought "discovery." The court observed that "Rule 17(c) may well be a proper device for discovering documents in the hands of third parties." He reasoned that Rule 16's control of discovery could not prohibit the use of Rule 17(c) as a discovery device where the defendant sought information that was not in the government's control.[46]

Likewise, in *United States v. Nachamie*,[47] Judge Shira Scheindlin of the Southern District of New York noted that Rule 17(c)'s drafters believed its reach was the same as Rule 45(b) of the Federal Rules of *Civil* Procedure, which permits "discovery" from third parties. Because *Bowman Dairy* did not involve a third-party subpoena, and *Nixon* involved a *government* subpoena, neither prohibited a defendant from using a Rule 17(c) subpoena for discovery. The district court then adopted its own standard. A Rule 17(c) subpoena would be enforced where it is: "(1) reasonable, construed using the general discovery notion of 'material to the defense;' and (2) not unduly oppressive for the producing party to respond." Ultimately, the district court found that the subpoena met both the *Nixon* Standard and its own.[48]

Judge Richard J. Holwell of Southern District of New York took up this argument in *United States v. Rajaratnam.*[49] After noting that Rajaratnam's subpoena met the *Nixon* Standard, the court explained why the "material to the defense" standard made sense. While *Nixon* cited *Bowman Dairy* for the proposition that Rule 17(c) subpoenas should not be used for discovery, *Bowman Dairy* was actually concerned about "distinguishing Rule 17 from Rule 16."[50] Further, *Bowman Dairy* quoted a statement from Rule 17's Advisory Notes:

> [Under Rule 17] the court may, in the proper case, direct that [documents] be brought into court in advance of the time that they are offered in evidence, so that they may then be inspected in advance for the purpose of enabling the party to see whether he can use it or whether he wants to use it.[51]

Judge Holwell was most troubled by the *Nixon* Standard's "specificity" hurdle. "Requiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity." The Supreme Court found that the "material to the defense" standard would address this issue. Finally, applying the "material to the defense standard" would solve the "puzzle" of why a civil litigant in a breach of contract action can use a subpoena to obtain documents that are beyond the reach of a criminal defendant who is fighting for his freedom.[52]

Rajaratnam, *Nachamie,* and *Tomison* all involved subpoenas that met the *Nixon* Standard, so their criticisms are *dicta*. An appeal of their decisions would not have required a reviewing court to address the correctness of their assertions that the *Nixon* Standard did not even apply.

Academic Criticism

Commentators have observed that the *Nixon* Standard prevents defendants from obtaining evidence that is necessary to their defense. Some lament that it so restrictive that Rule 17(c) subpoenas are "rarely useful" to defendants.[53] Professor Peter J. Henning persuasively argues that *Nixon* should be limited to its facts; that is, the *Nixon* Standard only applies where a *prosecutor* seeks a pre-trial Rule 17(c) subpoena for evidence he could have obtained with a grand jury subpoena.[54] Henning notes that the only "express" limit on a Rule 17(c) subpoena is that it not be "unreasonable or oppressive." Like the district courts in *Nachamie, Tucker,* and *Rajaratnam,* he proposed that Rule 17(c) subpoenas are reasonable so long as they seek items that are "material to the defense." Henning wrote, "Imposing a materiality requirement similar to Rule 16(a)(1)(C) for evaluating defense subpoenas to third parties is another form of the reasonableness analysis, allowing the court to compel pre-trial production only after the defendant shows that the information is significantly helpful to a defense to the charges at trial."[55]

Deaf Ears

The above judicial and academic criticisms of the *Nixon* Standard are sound. But the Supreme Court does not appear inclined to totally reject the *Nixon* Standard in this context. Conversely, it has expressly left the meaning of the admissibility hurdle open and discussed it in terms of a potential evidentiary use.

Tellingly, the Fourth Circuit recently and explicitly rejected challenges to the *Nixon* Standard's application to third-party subpoenas. In *United States v. Rand*,[56] Rand's Rule 17(c) subpoena for voluminous accounting records, which he claimed were vital to his defense,

Rule 17(c) is fine as written, but the Strict Admissibility Standard undermines its usefulness. This is unacceptable because the Strict Admissibility Standard is not the result of sound reasoning and faithful adherence to Supreme Court authority.

was quashed for failing to meet the *Nixon* Standard. On appeal, Rand argued "the *Nixon* test applies only to subpoenas issued to the prosecution not to those issued to third parties. Instead, Rand contends that the standard explicit in the rule itself—unreasonable or oppressive—is the proper standard." The Court rejected this argument because: (1) Rule 17(c) subpoenas are not for discovery; (2) the *Nixon* Court did not limit application of the *Nixon* Standard to subpoenas directed to the government; and, (3) the *Nixon* Standard "map[s] quite well" with the unreasonable or oppressive standard that is explicit in Rule 17(c). The Supreme Court denied a *cert.* petition submitted by former U.S. Solicitor General Seth Waxman on Rand's behalf. The *Nixon* Standard's application to third-party subpoenas appears secure, but the meaning of the admissibility hurdle is open.

Requiring Only Potential Admissibility Remedies Most Problems With the *Nixon* Standard

Interpreting the admissibility hurdle to permit a Rule 17(c) subpoena to reach evidence that is potentially admissible at trial would end the absurd practice of requiring a defendant to prove that evidence he or she has never seen will be admissible at a trial before he or she has even seen the government's case. As Chief Justice Marshall explained in the *Burr* cases, requiring only potential admissibility is consistent with prior federal practice. It is also consistent with *Nixon* itself and is supported by a substantial minority of federal circuit court authority.

Further, interpreting the admissibility hurdle to allow Rule 17(c) subpoenas to reach exculpatory (though likely inadmissible) items is supported by the *Nixon* Court's focus on "potential evidentiary uses." After all, submitting subpoenaed items to the district court in support of a subpoena for other admissible evidence (or in support of funds for an expert or investigator) is itself an "evidentiary use." The evidence is being presented to the court to support issuance of an order. The item becomes part of the trial court record. The item may even be offered as evidence at trial (likely becoming inadmissible *evidence*).

Even more important (at least to defendants), the Potential Evidentiary Use Standard advocated here is necessary to comply with the Supreme Court's observation that the Compulsory Process Clause may entitle a defendant to reach exculpatory evidence in the hands of third parties. Most circuits agree that evidence need not be admissible to be exculpatory.[57] If a Rule 17(c) subpoena cannot reach exculpatory (but inadmissible) evidence, then it may not be up to the task of protecting a defendant's Sixth Amendment right to compulsory process. Rule 17(c) should not be so interpreted.

For example, in *Thor* the defendant was denied a subpoena for an address book that could potentially establish the whereabouts of a key defense witness, because the address book itself would not be admissible at trial. But that address book could have been submitted to the court with an application for a subpoena for that key witness. Thus, Thor was denied access to exculpatory evidence that could be put to an evidentiary use. In the process, he may have also been denied his right to compulsory process.

Granted, the Potential Evidentiary Use Standard would not cure all problems with the *Nixon* Standard. Some courts have criticized the specificity hurdle. Others have rightly argued that a defendant needs (and Rule 17(c)'s drafters envisioned it would provide) discovery from third parties. The Potential Evidentiary Use Standard advocated here would not meet that need if the defendant does not have enough information to specify what he or she wants. (Although, if the defendant does not have enough information about what he or she wants to permit the subpoenaed party to identify responsive material, then the subpoena would probably be quashed as burdensome under the plain language of Rule 17(c).) Regardless, the Supreme Court has shown no signs of abandoning the *Nixon* Standard for third-party subpoenas. Those interested in ensuring fair trials should not let the perfect be the enemy of the good. The Potential Evidentiary Use Standard is consistent with existing Supreme Court authority and it will definitely promote fairer trials.

Conclusion

Rule 17(c) is fine as written, but the Strict Admissibility Standard undermines its usefulness. This is unacceptable because the Strict Admissibility Standard is not the result of sound reasoning and faithful adherence to Supreme Court authority. Instead, it is the result of the "frequent repetition of a familiar principle [that has] obscure[d] its origins and thus [led] to mindless application in circumstances to which the principle never was intended to apply."[58] The better (and more legally defensible) rule is that a defendant need only establish that an identified item has a potential evidentiary use to justify a third-party subpoena. The government acknowledged this in *Nixon*, Judge Marshall stated this in *Burr*, and it makes sense if the goal

is a fair trial and the effectuation of a defendant's right to compulsory process. Once this element of the *Nixon* Standard is correctly understood and applied, then Rule 17(c) subpoenas will actually promote fair trials. ⊙

Ken Miller is a partner with Bienert, Miller & Katzman PLC in San Clemente, Calif. The firm focuses on white collar criminal defense and appellate and complex/high-stakes civil litigation.

Endnotes

[1]Fed. R. Crim. P. 17(c).
[2]*United States v. Nixon*, 418 U.S. 683, 699 (1974).
[3]*Bowman Dairy v. United States*, 341 U.S. 214, 219-220, 220 n.5 (1951) (citations omitted).
[4]*United States v. Burr,* 25 F. Cas. 187 (1807).
[5]*Id.* at 201.
[6]Paul A. Freund, *Forward: On Presidential Privilege*, 88 Harv. L. Rev. 13, 24 (1974).
[7]*Burr*, 25 F. Cas. at 190-91.
[8]Freund, *supra* note 6, at 26-27.
[9]*Id.*
[10]*Burr,* 25 F. Cas. at 191-92.
[11]*Bowman,* 341 U.S. 214.
[12]*Id.* at 215-18.
[13]*Id.* at 219-21.
[14]*Nixon*, 418 U.S. at 687-88.
[15]*Id.* at 698-699.
[16]13 F.R.D. 335, 338 (S.D.N.Y. 1952).
[17]*Nixon,* 418 U.S. at 699-700.
[18]*Id.* at 688.
[19]*Id.* at 700 (emphasis added).
[20]*Id*. at 701-702 (citations omitted and emphasis added).
[21]*Id.* at 700 n.12 (internal citations omitted).
[22]Brief for Petitioner-Appellant at 128-129, *United States v. Nixon*, 418 U.S. 683 (1974) (No. 73-1766).
[23]*Nixon*, 418 U.S. at 700 n.12. Additionally, pre-trial production was justified because "the subpoenaed materials [were] not available from any other source, and their examination and processing should not await trial in the circumstances shown." *Id*. at 703 (citations omitted).
[24]*Id.* at 709-13.
[25]*See In Re Irving,* 600 F.2d 1027 (2d Cir. 1979); *United States v. Silverman,* 745 F.2d 1386 (11th Cir. 1984); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1998). The Fourth Circuit initially appeared to reject the Strict Admissibility Standard. *See In re Martin Marietta Corp.,* 856 F.2d 619, 620 (4th Cir. 1988). *See also* Kenneth Miller, *Nixon May Have Been Wrong But It Is Definitely Misunderstood,* 51 Willamette L. Rev. 319, 334-46 (2015). *But cf. United States v. Rand,* 835 F.3d 451, 463 (4th Cir. 2016).
[26]*Thor v. United States,* 574 F.2d 215 (5th Cir. 1978).
[27]*Id.* at 217-20 (citing *Nixon*, 418 U.S. at 699). The court did go on to state that the "better course would have been to subpoena the book if only to determine to a certainty whether the witnesses who had relevant testimony … could be located despite their nomadic predilections. But considering the slight likelihood that they could have been located, the failure to subpoena the book does not constitute an abuse of discretion." *Id.* at 221.
[28]*United States v. Arditti,* 955 F.2d 331 (5th Cir. 1992).
[29]*Id.* at 333-36, 345.
[30]*Id.* at 345-46. *See also United States v. Bryan,* 868 F.2d 1032 (9th Cir. 1989) (Rule 16 applies to documents in IRS's possession where prosecutor has knowledge of them and access to them).
[31]*United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (*Cuthbertson I*).
[32]*Id.* at 143.
[33]*United States v. Cuthbertson*, 651 F.2d 189, 192 (3d Cir. 1981) (*Cuthbertson II*).
[34]*Id.* at 195 (citing *Nixon*, 418 U.S. at 699-700 n. 12).
[35]*Id*.
[36]*Ritchie v. Pennsylvania*, 480 U.S. 39, 56 (1987).
[37]*See United States v. MacKay,* 647 F.2d 898 (9th Cir. 1981).
[38]*United States v. Fields*, 663 F.2d 880 (9th Cir. 1981).
[39]*Id.* at 881 (citing *Cuthbertson II*, 651 F.2d at 195).
[40]*See United States v. McGrady,* 508 F.2d 13 (8th Cir. 1974).
[41]*United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996).
[42]*Id.* at 1277-83.
[43]This case is similar to *Ritchie v. Pennsylvania*, 480 U.S. 39 (1987), in which the Supreme Court found a Due Process and possibly a Compulsory Process Clause violation because Ritchie was denied a subpoena for a victim's psychiatric records.
[44]The Sixth and Seventh Circuits have also interpreted the *Nixon* Standard strictly. *See United States v. Hughes,* 895 F.2d 1135 (6th Cir. 1990); *United States v. Ashman,* 979 F.2d 469 (7th Cir. 1992). *See also* Miller, *Supra (italics) note 25,* at 343-44.
[45]969 F. Supp. 587 (E.D. Cal. 1997).
[46]*Id.* at 593 n.14.
[47]*United States v. Tomison,* 91 F. Supp. 2d 552, 557 (S.D.N.Y. 2000).
[48]*Id.* at 561-63. The same judge again applied its standard in *United States v. Tucker*, 249 F.R.D. 58 (S.D.N.Y. 2008). A magistrate judge from the Northern District of California subsequently applied this "material to the defense" and "not overly oppressive" standard in granting, in part, a motion for a Rule 17(c) subpoena. *See United States v. Nosal,* 291 F.R.D. 403 (N.D. Cal. 2013).
[49]*United States v. Rajaratnam*, 753 F.Supp.2d 317 (S.D.N.Y. 2011).
[50]*Id.* at 321 n.1.
[51]*Id.* (quoting *Bowman Dairy,* 341 U.S. at 220 n.5) (emphasis in original).
[52]*Id.* (citing Robert G. Morvillo, Barry A. Bohrer & Barbara L. Balter, *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation,* 42 Am. Crim. L. Rev. 157, 160 n.12 (Spring 2005)).
[53]Robert Morvillo et al., *Motion Denied,* 42 Am. Crim.L.Rev. at 160 n.12.
[54]*See* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions,* 15 Ga. St. U. L. Rev. 601 (Spring 1999).
[55]*Id.* at 645.
[56]*United States v. Rand,* 835 F.3d 451 (4th Cir. 2016).
[57]*See Johnson v. Folino,* 705 F.3d 117, 130 (3d Cir. 2013) ("[W]e believe, as do a majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence").
[58]*United States v. Stein,* 488 F. Supp. 2d 350, 365 (S.D.N.Y. 2007).