# NO MORE *NIXON*: A PROPOSED CHANGE TO RULE 17(C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

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*Today, the standard for subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure, espoused in* United States v. Nixon*, provides for limited, almost useless, pretrial subpoena power for criminal defendants. When subpoenaing a third party, a defendant must show (1) relevancy, (2) admissibility, and (3) specificity for documents that they have not yet gained access to. This narrow scope of Rule 17(c) has long engendered criticism from judges, scholars, and practitioners alike. Yet, Rule 17(c) has not been changed, either by judicial opinion or amendment.*

*Following years of criticism, the Advisory Committee on Criminal Rules ("Advisory Committee") is currently considering whether and how pretrial subpoena power under Rule 17 should be expanded. This Note examines how the Advisory Committee should change Rule 17(c). In light of a recent change to government policy that recommends that prosecutors collect less information during pretrial investigations, this Note argues that Rule 17(c) should be expanded to allow parties to subpoena documents and other items that are material and relevant to preparing the prosecution or defense and that requested documents need not be admissible. Further, this Note recommends settling existing jurisdictional splits and amending Rule 17 to explicitly require parties to file a motion with the court for issuance of a subpoena but allow ex parte proceedings upon a showing of good cause.*



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## INTRODUCTION

In 2022, the U.S. Department of Justice (DOJ) implemented a sweeping change to criminal investigations.[1] In light of continued challenges in culling through vast amounts of electronically stored information (ESI), the Government is now employing a "smart collection" approach.[2] In other words, prosecutors are simply collecting less evidence.[3] What may seem like a "smart" solution, however, will likely lead to new issues within the current structure of criminal investigations and discovery.

Criminal discovery is generally limited and, in some ways, lopsided to favor the prosecution.[4] The prosecution, through various tools of governmental investigation—such as the grand jury, cooperation agreements, witness immunity, and search warrants—can access a wide range of case documents before trial.[5] The Government must then turn over certain materials to fulfill their prosecutorial obligations.[6] But if the Government chooses not to collect evidence from sources that the defense deems important, the defense has limited options. In fact, the defense is usually left with only one option: issuing a subpoena to a third party under Rule 17(c) of the Federal Rules of Criminal Procedure.[7] For example, in 2021, in advance of a trial for wire fraud and money laundering, defendants Hernan Lopez and Carlos Martinez wanted access to documents that the Government chose not to collect—the cooperating witness's cellphone devices.[8] Because the Government chose not to collect these cellphones, and given the defense's limited tools of discovery, the defense moved for

1. *See* Ben Penn, *Prosecutors Drowning in Data Urged to Collect Less Evidence*, BLOOMBERG L. (June 15, 2022, 4:45 AM), https://www.bloomberglaw.com/bloomberglawnews/litigation/XAT2AG000000?bna_news_filter=litigation#jcite [https://perma.cc/Y2FH-NUSP].

2. *See id.*

3. *See id.*; *see also* Email from Joshua Stueve, Dep't of Just. Senior Commc'ns Advisor, to author (Sept. 8, 2023, 8:27 AM) (on file with author) (confirming accuracy of general framing of *Bloomberg Law* article).

4. *See infra* Part I.A.

5. *See infra* Part I.A.

6. *See infra* Part I.A.

7. *See* FED. R. CRIM. P. 17(c).

8. *See* Defendants Hernan Lopez & Carlos Martinez's Application for Pretrial Subpoena Pursuant to Fed. R. Crim. P. 17 & Letter Rogatory, United States v. Lopez, No. 15-CR-252, 2021 WL 4033886 (E.D.N.Y. Sept. 3, 2021), ECF No. 1599.

issuance of a Rule 17(c) subpoena to the law firm representing the cooperating witness.[9]

Rule 17(c), however, as interpreted by the U.S. Supreme Court in *United States v. Nixon*,[10] requires the following: "(1) relevancy; (2) admissibility; (3) specificity."[11] For defendants' third-party subpoenas, as in *United States v. Lopez*,[12] the issue often turns on the last prong of the *Nixon* standard—specificity.[13] As interpreted, this prong essentially requires the party seeking the subpoena to know the contents of the documents before requesting them.[14] When this standard is not met, the subpoena is quashed.[15] In Lopez and Martinez's case, despite noting that it was "curious" that the Government had not obtained the requested devices,[16] the court quashed the subpoena for want of requisite specificity.[17] In an already lopsided system, it does not make sense for defendants to describe in detail what it is they expect to find in documents they have not yet gained access to.

In 2022, following criticism of how Rule 17 has been interpreted and applied,[18] the Advisory Committee on Criminal Rules ("Advisory Committee") tasked a subcommittee with determining what, if any, changes should be made to the rule.[19] A year later, the Advisory Committee tentatively agreed that Rule 17 should change to expand pretrial subpoena authority.[20] The Advisory Committee, however, has not determined what standard should apply to pretrial subpoenas issued to third parties.[21] This Note addresses that question.

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9. *See* United States v. Lopez, No. 15-CR-252, 2021 WL 4033886, at *1 (E.D.N.Y. Sept. 3, 2021).

10. 418 U.S. 683 (1974).

11. *Id.* at 700.

12. No. 15-CR-252, 2021 WL 4033886 (E.D.N.Y. Sept. 3, 2021).

13. *See Lopez*, 2021 WL 4033886, at *2 (finding that the subpoena was not sufficiently specific).

14. *See* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 643 (1999).

15. *See, e.g.*, United States v. Richardson, 607 F.3d 357, 368–69 (4th Cir. 2010).

16. *Lopez*, 2021 WL 4033886, at *2 n.4.

17. *See id.* at *2.

18. *See* Letter from Marshall L. Miller, Chair, White Collar Crime Comm., to Hon. Raymond M. Kethledge, Chair, Advisory Comm. on Crim. Rules (Feb. 17, 2022), https://s3.amazonaws.com/documents.nycbar.org/files/2022979-ModernizeRule17FedRulesCriminalProcedure.pdf [https://perma.cc/6293-W8F3].

19. *See* Memorandum from Professors Sara Sun Beale & Nancy King, Reps. to Crim. Rules Advisory Comm., to Members, Crim. Rules Advisory Comm. (Mar. 27, 2023), *in* AGENDA: MEETING OF THE ADVISORY COMM. ON CRIM. RULES APR. 20, 2023, at 124, 124–30 (2023), https://www.uscourts.gov/sites/default/files/2023-04_criminal_rules_agenda_book_final_0.pdf [https://perma.cc/HQR9-2ULP].

20. Memorandum from Professors Sara Sun Beale & Nancy King, Reps. to Crim. Rules Advisory Comm., to Members, Crim. Rules Advisory Comm. (Sept. 25, 2023), *in* AGENDA: MEETING OF THE ADVISORY COMM. ON CRIM. RULES OCT. 26, 2023, at 127, 127 (2023), https://www.uscourts.gov/sites/default/files/2023-10_criminal_rules_committee_agenda_book_final_10-5_0.pdf [https://perma.cc/D9N9-5JGZ].

21. *See id.*

Although Rule 17(c) has engendered criticism for years,[22] the DOJ's shift to collecting less information necessitates an immediate change. Given the Government's narrowed scope of investigations, Rule 17(c) subpoenas will provide the only opportunity for defendants to collect evidence from sources that the defense deems important. As the standard is now interpreted, defendants will be unable to effectively exercise this subpoena power. This threatens a defendant's constitutional right to present a defense.[23]

Accordingly, this Note examines how Rule 17(c) should be changed for issuance of third-party subpoenas. Part I provides necessary background on criminal discovery, Rule 17, appellate review of decisions to quash subpoenas, recent changes to discovery, and the status of the Advisory Committee's considerations. Part II addresses the arguments in favor of maintaining the current standard, arguments for changing Rule 17(c), the Advisory Committee's proposals, and existing suggestions for changing the rule. Finally, Part III concludes that Rule 17(c)(1) should be amended to read as follows: a subpoena may order the witness to produce any books, papers, documents, data, or other objects that are *material and relevant to preparing the prosecution or defense. Requested documents need not be admissible in evidence*.[24] Further, the rule should explicitly require judicial involvement and allow ex parte subpoena applications.

## I. CRIMINAL DISCOVERY AND FEDERAL RULE OF CRIMINAL PROCEDURE 17

This part will provide relevant background. First, Part I.A will detail general rules of discovery in criminal cases. Second, Part I.B will explain Rule 17 of the Federal Rules of Criminal Procedure and subsequent judicial interpretations. Third, Part I.C will highlight recent changes to criminal investigations and discovery. Fourth, and finally, Part I.D will detail the status of potential changes to Rule 17(c).

### *A. Discovery in Criminal Law*

Civil and criminal cases generally have different processes. Most notably, civil and criminal cases require different standards of proof—preponderance of the evidence[25] and beyond a reasonable doubt,[26] respectively. But the

22. *See infra* Part II.B.

23. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

24. Suggested changes to the current rule are italicized.

25. *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]he jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.").

26. *Beyond a Reasonable Doubt*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt [https://perma.cc/8KRE-R5PG] (last visited Feb. 9, 2024) ("Beyond a reasonable doubt . . . means that the prosecution must convince the jury that there is no other reasonable explanation that can come from the evidence presented at trial. In other words, the jury must be virtually certain of the defendant's guilt in order to render a guilty verdict.").

differences do not end there; in fact, there are fundamental distinctions between discovery in civil and criminal cases.[27]

For instance, the scope of civil discovery is broad,[28] but criminal discovery is much more limited.[29] Civil litigants can gain access to all relevant and nonprivileged materials through the use of requests for production,[30] requests for admission,[31] depositions,[32] and interrogatories.[33] Further, information within the scope of civil discovery does not need to be admissible to be discoverable.[34] Parties in criminal cases, however, lack comparable mechanisms.

Defendants do, however, have a constitutional right to compulsory process.[35] As the Supreme Court established in *Washington v. Texas*,[36] the Sixth Amendment's Compulsory Process Clause is fundamental to a fair trial.[37] The right to offer testimony of witnesses and compel their attendance "is in plain terms the right to present a defense, [and] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."[38] In practice, however, the ability to exercise this right often hinges on what materials are obtained through discovery.[39]

In all criminal cases, the Government has broad investigation and discovery capabilities, including grand jury investigations,[40] pre-indictment

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27. Katharine Taylor Larson, *Discovery: Criminal and Civil?: Theres a Difference*, AM. BAR. ASS'N (Apr. 1, 2020), https://www.americanbar.org/groups/young_lawyers/resources/tyl/practice-areas/discovery-criminal-and-civil-theres-difference/ [https://perma.cc/B8JE-FR29].

28. *See* FED. R. CIV. P. 26(b)(1). The Rules define the scope of discovery to include:

> any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

*Id.*

29. Larson, *supra* note 27.

30. FED. R. CIV. P. 34.

31. *Id.* r. 36.

32. *Id.* r. 30.

33. *Id.* r. 33.

34. *Id.* r. 26(b)(1).

35. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

36. 388 U.S. 14 (1967).

37. *Id.* at 17–19.

38. *Id.* at 19.

39. *See* 2 CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 271 (4th ed. 2009).

40. *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2147 (2000) (detailing the ways in which federal prosecutors can broadly question witnesses during grand jury proceedings).

subpoenas,[41] witness immunity,[42] search warrants,[43] and other investigative means.[44] Further, in the context of white-collar litigation, the prosecution can incentivize corporate cooperation through deferred prosecution agreements and non-prosecution agreements.[45] Such agreements offer companies a greater incentive to provide evidence and assist the Government, thus ensuring the Government's access to a breadth of important materials.[46]

After the collection of documents, the prosecution is constitutionally obligated to turn over all exculpatory materials, commonly referred to as "*Brady* material,"[47] as well as materials that can be used for impeachment.[48] Rule 16 of the Federal Rules of Criminal Procedure further provides that, if requested, the prosecution must turn over: (1) the defendant's statements; (2) any prior criminal record; and (3) any items that are material to the defense or that the Government intends to use in their case-in-chief, if they are in the Government's possession, custody, or control.[49] Notably, courts are split as to whether documents in possession of cooperating entities are considered under the Government's "control" and thus subject to disclosure under Rule 16.[50] Apart from required disclosures, criminal defendants lack many other discovery tools and instead are forced to play a passive role and

41. There are two types of subpoenas: subpoenas ad testificandum, which require the recipient to testify, and subpoenas duces tecum, which order production of documents. 1 PETER J. HENNING, CYNTHIA E. JONES, ELLEN S. PODGOR, KAREN MCDONALD HENNING & SANJAY K. CHHABLANI, MASTERING CRIMINAL PROCEDURE 106 (3d ed. 2020). During grand jury proceedings, the prosecution can issue both types of subpoenas. *Id.*

42. *See generally id.* at 517–26.

43. *Id.* at 280.

44. *See* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237, 264 (2019); 1 HENNING ET AL., *supra* note 41, at 124–29.

45. *See* 1 HENNING ET AL., *supra* note 41, at 310; *see, e.g.*, Kenneth A. Polite, Assistant Att'y Gen., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law [https://perma.cc/2DE8-KGGJ] (announcing the DOJ's recent change to the Corporate Government Policy adopting a presumption of a declination to prosecute cooperating corporations).

46. *See* Ellen Podgor, *Revisions to Corporate Crime Policy - Will the New Carrot Incentivize Companies to Cooperate?*, WHITE COLLAR CRIME PROF BLOG (Jan. 19, 2023), https://lawprofessors.typepad.com/whitecollarcrime_blog/2023/01/revisions-to-corporate-crime-policy-will-the-new-carrot-incentivize-companies-to-cooperate.html [https://perma.cc/A4NW-8HW5].

47. 373 U.S. 83 (1963).

48. *See id.* at 87–88 (establishing duty for prosecution to turn over all exculpatory evidence); Giglio v. United States, 405 U.S. 150, 154 (1972) (holding that the prosecution must provide impeachment material to the defense).

49. FED. R. CRIM. P. 16(a)(1)(E). Rule 16 has been significantly amended since introduced in 1966. *See* 2 WRIGHT & HENNING, *supra* note 39, § 251 (providing an overview of changes to Rule 16).

50. *Compare* United States v. Stein, 488 F. Supp. 2d 350, 360–64 (S.D.N.Y. 2007) (adopting a broad definition of the word "control" and thus applying Rule 16), *with* United States v. Graham, 484 F.3d 413, 416–18 (6th Cir. 2007) (concluding that the Government did not operate effective control over the evidence possessed by a cooperating witness).

simply review the documents that the prosecution collects and turns over.[51] The main way in which defendants can acquire materials in advance of trial other than through Rule 16 is through the use of Rule 17 subpoenas.[52]

### *B. Rule 17 of the Federal Rules of Criminal Procedure*

Rule 17—specifically Rule 17(c)—currently provides both the prosecution and defense with the power to issue a subpoena duces tecum.[53] Thus, for defendants, Rule 17 effectively implements the constitutional guarantee of compulsory process.[54] In relevant part, Rule 17(c) reads as follows: "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."[55]

In many instances, the party seeking the materials files a motion with the district court moving for an issuance of a subpoena.[56] In other circumstances, some courts allow ex parte applications for subpoenas.[57] However, courts are split as to whether ex parte subpoenas should be permitted under Rule 17(c).[58] If permitted under Rule 17, an ex parte application allows the

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51. *See* Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 699 (2017).

52. *See* FED. R. CRIM. P. 17; *see also* Turner, *supra* note 44, at 293.

53. FED. R. CRIM. P. 17. Rule 17(a) and (b) read as follows:

> (a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.
>
> (b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

*Id.* r. 17(a)–(b). Rules 17(d) and (e) detail service of the subpoena. *Id.* r. 17(d)–(e). Rule 17(f) discusses issuance of a deposition subpoena. *Id.* r. 17(f). Rule 17(g) highlights how the court may hold a noncompliant witness in contempt. *Id.* r. 17(g). Rule 17(h) explains that parties cannot subpoena statements of witnesses under this rule, instead directing parties to Rule 26.2. *Id.* r. 17(h).

54. 2 WRIGHT & HENNING, *supra* note 39, § 271.

55. FED. R. CRIM. P. 17(c)(1).

56. *See, e.g.*, Defendants Hernan Lopez & Carlos Martinez's Application for Pretrial Subpoena Pursuant to Fed. R. Crim. P. 17 & Letter Rogatory, *supra* note 8, at 3.

57. *See, e.g.*, United States v. Khaimov, No. 18-462, 2023 WL 2744062, at *1 (D.N.J. Mar. 31, 2023) (holding that an "exceptional circumstance" justified the defendant's ex parte application (quoting United States v. Fulton, No. 13-261, 2013 WL 4609502, at *2 (D.N.J. Aug. 29, 2013))). Ex parte is defined as: "A motion made to the court without notice to the adverse party; a motion that a court considers and rules on without hearing from all sides." *Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

58. *Compare* United States v. Urlacher, 136 F.R.D. 550, 555–58 (W.D.N.Y. 1991) (holding that ex parte applications to the court for issuance of subpoenas are impermissible due to the text of the rule and the public's First Amendment right of access to criminal proceedings), *and* United States v. Hankton, No. 12-1, 2014 WL 3385126, at *1–2 (E.D. La.

movant to request a subpoena without disclosing their supporting documents to the opposing side.[59] After the subpoena is issued, Rule 17(c) further provides that, on motion, "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."[60]

Since its adoption in 1944, Rule 17(c) has not undergone significant change, only being modified for general restyling in 2002[61] and to provide additional protection for victims' privacy in 2008.[62] In light of the general limits of criminal discovery, Rule 17(c) often functions as a defendant's only option for collecting documents not in the Government's possession while preparing a defense before trial.[63]

### 1. Supreme Court Interpretations of Rule 17(c)

The Supreme Court has twice opined on Rule 17(c).[64] Through these cases, the Court developed the test that lower courts apply today.[65]

First, in *Bowman Dairy Co. v. United States*,[66] the defendants were indicted for violating the Sherman Antitrust Act.[67] In advance of trial, the defense filed a motion under Rule 16 for an order mandating the United States to produce "all books, papers, documents, or objects obtained from petitioners and obtained by seizure or process from others" for inspection.[68] The Government complied.[69] The defense also moved for an order for a Rule 17(c) subpoena duces tecum to be served on the Government.[70] The Rule 17(c) subpoena requested inspection of materials that the Government obtained voluntarily, thus exempting the materials from disclosure under

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July 9, 2014) (emphasizing that Rule 17(c) does not provide for the defendant to proceed ex parte), *with* United States v. Beckford, 964 F. Supp. 1010, 1026–30 (E.D. Va. 1997) (finding that Rule 17(c) allows ex parte applications in exceptional circumstances such as when disclosure of the application would divulge trial strategy or undermine the defendant's constitutional interests), *and* United States v. Sleugh, 896 F.3d 1007, 1010–15 (9th Cir. 2018) (holding that the First Amendment right to public access does not presumptively override a defendant's ability to file an application for a Rule 17(c) subpoena ex parte and under seal).

59. *See Beckford*, 964 F. Supp. at 1027.

60. FED. R. CRIM. P. 17(c)(2). A motion to "quash" is a request to the court to find the subpoena invalid. *Motion to Quash*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/motion_to_quash [https://perma.cc/7LVK-E6VH] (last visited Feb. 9, 2024).

61. FED. R. CRIM. P. 17 advisory committee's note to 2002 amendment. As part of the general restyling, the advisory committee added "data" to the list of materials that can be subpoenaed. *Id.*

62. *Id.* r. 17(c)(3) advisory committee's note to 2008 amendment. This amendment implemented the Scott Campbell, Stephanie Roper, Wendy Preston, Lourna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (codified as amended in scattered sections of the U.S.C.), which provided protections for when the defense issues a third-party subpoena for personal or confidential information about a victim. *Id.*

63. *See* Turner, *supra* note 44, at 293.

64. *See* United States v. Nixon, 418 U.S. 683 (1974); Bowman Dairy Co. v. United States, 341 U.S. 214 (1951).

65. *See infra* note 101 and accompanying text.

66. 341 U.S. 214 (1951).

67. 15 U.S.C. § 1; *Bowman Dairy*, 341 U.S. at 215.

68. *Bowman Dairy*, 341 U.S. at 215–16.

69. *Id.* at 216.

70. *See id.* at 216–17.

Rule 16 at the time.[71] The trial court instructed the Government to comply with the subpoena.[72] However, the Government moved to quash, arguing that a defendant's access to materials in the Government's possession was limited to what Rule 16 permitted.[73] Although the district court denied the motion to quash, the Government still refused to comply.[74] As a result, the court held one of the Government's attorneys in contempt.[75] The U.S. Court of Appeals for the Seventh Circuit reversed the district court's ruling, and the Supreme Court ultimately granted certiorari to address the scope of Rule 17(c).[76]

On review, the Supreme Court recognized that documents not subject to Rule 16 could be obtained with a Rule 17(c) subpoena as long as the seeking party makes a "good-faith effort" to obtain evidence.[77] This would be assessed through the court's ruling on a motion to quash or modify a Rule 17(c) subpoena.[78] However, the Court then explained that Rule 17 was not meant to render Rule 16 redundant or provide an additional means of discovery.[79] Instead, "[Rule 17's] chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."[80] But given the language of Rule 17(c), evidentiary materials not obtained by the Government through seizure or process were subject to subpoena.[81] The Court thus enforced the subpoena for some of the Government's documents, only invalidating an overbroad, catch-all request.[82]

Later, in *United States v. Nixon*, the Court further defined the standard for Rule 17(c) subpoenas.[83] Unlike in *Bowman Dairy*, *Nixon* involved the prosecution's use of Rule 17(c).[84] Here, the special prosecutor issued a subpoena duces tecum under Rule 17(c) directing the defendant, President Richard Nixon, to produce the infamous White House tapes and related documents.[85] The President filed a motion to quash the subpoena under Rule

71. *See id.* Rule 16 at the time provided that the court could order the Government to produce materials belonging to the defendant or others that were obtained through official process if the defense showed that the items were material to the defense and the request was reasonable. *Id.* at 215 n.2.

72. *See id.* at 217.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 217–18.

77. *Id.* at 219–20.

78. *See id.* at 220.

79. *See id.*

80. *Id.*

81. *See id.* at 221.

82. *See id.* The Court found that the provision, which requested materials that were "'relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants,'" was a "fishing expedition." *Id.*

83. *See* United States v. Nixon, 418 U.S. 683 (1974).

84. *See id.* at 687–88.

85. *See id.* at 688–89.

17(c), which the district court denied.[86] On review, the Supreme Court addressed whether the special prosecutor satisfied the standards of Rule 17(c).[87] The Court began by reiterating two tenets of *Bowman Dairy*: first, Rule 17(c) was not intended to provide a means of discovery in criminal cases; second, the rule's chief innovation was to expedite the trial.[88] The Court then delineated the proper standard to determine whether production would be unreasonable or oppressive and thus impermissible under Rule 17.[89] The four-prong test requires the moving party to show the following:

> (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."[90]

The Court thus required the special prosecutor to demonstrate three things: (1) relevancy, (2) admissibility, and (3) specificity.[91] In *Nixon*, the Government met these hurdles.[92] Notably, however, the Court explicitly left open whether courts should apply a lower standard when parties try to use Rule 17(c) to issue subpoenas to third parties.[93] The Court has not since addressed Rule 17.[94]

### 2. Lower Court Applications of Rule 17(c) and the *Nixon* Standard

Despite the cases from which the Rule 17(c) standard stems, which involved subpoenas to and by the Government,[95] in practice, defendants often use Rule 17(c) to subpoena third parties.[96] Per the text of Rule 17(c), after such a subpoena is issued, the court may quash or modify the subpoena

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86. *Id.* at 688.
87. *Id.* at 697–98.
88. *Id.* at 698–99.
89. *Id.*
90. *Id.* at 699–700 (footnote omitted). The Court adopted this test from *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). *Id.* at 699.
91. *Id.* at 700.
92. *Id.* at 700–02.
93. *Id.* at 699 n.12 ("We need not decide whether a lower standard exists [when the subpoena is issued to third parties] because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.").
94. Additionally, in a recent case, the petitioner asked the Supreme Court to address the following: "Whether a criminal defendant seeking pretrial production of documents from a third party by subpoena under Federal Rule of Criminal Procedure 17(c) must satisfy the heightened [*Nixon*] standard . . . ." Petition for Writ of Certiorari, Rand v. United States, 580 U.S. 1001 (2016) (No. 16-526). The petition for review was denied. *Rand*, 580 U.S. 1001.
95. *See supra* Part I.B.1.
96. *See, e.g.*, Defendants Hernan Lopez & Carlos Martinez's Application for Pretrial Subpoena Pursuant to Fed. R. Crim. P. 17 & Letter Rogatory, *supra* note 8.

"if compliance would be unreasonable or oppressive."[97] Upon issuance, the third-party recipient of the subpoena may individually move to quash,[98] the trial court may invoke independent authority to ensure that the subpoena is appropriate,[99] or, in some courts, the Government can file a motion to quash a third-party subpoena.[100] Although neither *Bowman Dairy* nor *Nixon* involved a defendant's third-party subpoenas, lower courts reviewing these subpoenas almost unanimously apply the three-prong *Nixon* standard.[101]

To evaluate the first prong—relevancy—courts use the standard set forth in Rule 401 of the Federal Rules of Evidence.[102] Thus, the court must determine whether the documents sought have any tendency to make any fact of consequence more or less probable than it would be without the evidence.[103]

Next, the court considers additional Federal Rules of Evidence to determine whether the requested materials meet the second prong: admissibility.[104] However, courts are split as to what admissibility requires.[105] Some courts believe that *Nixon* necessitates only a showing that the requested items would be potentially admissible.[106] For example, in

97. FED. R. CRIM. P. 17(c)(2).

98. *See, e.g.*, United States v. Rodriguez, No. 11-0296, 2016 WL 6217063 (E.D. Cal. Oct. 24, 2016) (granting nonparty's motion to quash subpoena).

99. *See, e.g.*, United States v. Vasquez, 258 F.R.D. 68, 72 (E.D.N.Y. 2009) ("[R]egardless of the parties' standing, the Court has an independent duty to review the propriety of the subpoena—a duty in this case that requires the Court to consider whether the documents sought are privileged and whether the subpoena itself comports with the requirements of Rule 17.").

100. *See, e.g.*, United States v. Cole, No. 19-CR-869, 2021 WL 912425, at *2 (S.D.N.Y. Mar. 10, 2021) (finding that the Government had standing to quash a subpoena because it was acting to assert its own legitimate interests in the length of the trial, timing of disclosures, and perception of witness testimony).

101. *See, e.g.*, United States v. Skelos, 988 F.3d 645, 661 (2d Cir. 2021); United States v. Sleugh, 896 F.3d 1007, 1011 (9th Cir. 2018); United States v. Rand, 835 F.3d 451, 462–63 (4th Cir. 2016); United States v. Stevenson, 727 F.3d 826, 828 (8th Cir. 2013); United States v. Vassar, 346 F. App'x 17, 24 (6th Cir. 2009); United States v. Henry, 482 F.3d 27, 30–31 (1st Cir. 2007); United States v. Morris, 287 F.3d 985, 991 (10th Cir. 2002); United States v. Tokash, 282 F.3d 962, 971 (7th Cir. 2002); United States v. Arditti, 955 F.2d 331, 345–46 (5th Cir. 1992); United States v. Brooks, 966 F.2d 1500, 1505 (D.C. Cir. 1992); United States v. Silverman, 745 F.2d 1386, 1397 (11th Cir. 1984); United States v. Cuthbertson, 651 F.2d 189, 194–95 (3d Cir. 1981). Existing judicial criticism of the *Nixon* standard is discussed below. *See infra* Part II.B.2.

102. *See, e.g.*, United States v. Libby, 432 F. Supp. 2d 26, 31 (D.D.C. 2006) (detailing how to apply the first prong of the *Nixon* standard).

103. *Id.* Rule 401 of the Federal Rules of Evidence is considered a low bar. United States v. McVeigh, 153 F.3d 1166, 1190 (10th Cir. 1998).

104. *See, e.g.*, *Libby*, 432 F. Supp. 2d at 31 (explaining how to apply the second prong of the *Nixon* standard).

105. For an extensive examination of the split between circuits regarding what "admissibility" under *Nixon* requires, see Kenneth M. Miller, Nixon *May Have Been Wrong, but It Is Definitely Misunderstood (or, a Federal Criminal Defendant's Pretrial Subpoenas Duces Tecum Properly Reaches* Potentially *Admissible Evidence)*, 51 WILLAMETTE L. REV. 319 (2015). Miller ultimately argued that the proper standard should be "*potentially* admissible at trial." *Id.* at 363.

106. *Id.* at 321.

*United States v. LaRouche Campaign*,[107] the U.S. Court of Appeals for the First Circuit noted that *Nixon* only required a "sufficient preliminary showing" that the subpoenaed materials contained admissible evidence.[108] In contrast, other courts require a showing of actual admissibility.[109] In *United States v. Cuthbertson*,[110] the U.S. Court of Appeals for the Third Circuit held that because potential impeachment material is not admissible in advance of trial, a Rule 17(c) subpoena cannot be used to obtain the impeachment materials until after the relevant witness testifies.[111]

Finally, the subpoena must detail with sufficient specificity the documents that the defendant seeks to access.[112] Although *Nixon* recognized that it may be difficult to "describe[] fully" the requested materials,[113] whether the subpoena is quashed often turns on this third prong.[114] For example, in *United States v. Arditti*,[115] in affirming the district court's decision to quash the defendant's subpoena, the U.S. Court of Appeals for the Fifth Circuit explained, "[t]he[] specificity and relevance elements require more than the title of a document and conjecture as to its contents."[116] Thus, the court found that the defendant's request lacked the requisite specificity: "He has demonstrated why he wants to look into the material, but he has not set forth what the subpoena's materials contain, forcing the court to speculate as to the specific nature of their contents and its relevance."[117]

After reviewing these factors, if a district court grants a motion to quash a subpoena, the decision is not immediately appealable.[118] Instead, an appeal would only be possible in limited circumstances.[119] Further, when appealed, the appellate court reviews the district court's ruling with significant

107. 841 F.2d 1176 (1st Cir. 1988).

108. *Id.* at 1179 (quoting United States v. Nixon, 418 U.S. 683, 700 (1974)).

109. Miller, *supra* note 105, at 346–47.

110. 651 F.2d 189 (3d Cir. 1981).

111. *Id.* at 195. *Nixon* similarly stated that Rule 17(c) generally does not provide for pretrial production of evidence needed to impeach witnesses. *Nixon*, 418 U.S. at 701.

112. *See, e.g.*, United States v. Libby, 432 F. Supp. 2d 26, 31 (D.D.C. 2006) (explaining how to apply the third prong of the *Nixon* standard).

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

114. *See, e.g.*, United States v. Stevenson, 727 F.3d 826, 828 (8th Cir. 2013) (affirming order to quash Rule 17(c) subpoena because party "offer[ed] only conjecture about what such a [requested] document might contain"); United States v. Richardson, 607 F.3d 357, 368 (4th Cir. 2010) (finding that the district court properly quashed a Rule 17 subpoena duces tecum because the lack of specificity provided indicated an intent to misuse the subpoena as a discovery device).

115. 955 F.2d 331 (5th Cir. 1992).

116. *Id.* at 345.

117. *Id.* at 346.

118. 2 WRIGHT & HENNING, *supra* note 39, § 275.

119. Benjamin E. Rosenberg & Robert W. Topp, *The By-Ways and Contours of Federal Rule of Criminal Procedure 17(c): A Guide Through Uncharted Territory*, 45 CRIM. L. BULL. 195, 233 (2009). The decision to quash could only be appealed as a collateral order or with a writ of mandamus. *Id.* In fact, the only reason the Government in *Bowman Dairy* could appeal in the midst of litigation was because it had refused to comply and was held in contempt. Bowman Dairy Co. v. United States, 341 U.S. 214, 217 (1951).

deference, applying an abuse of discretion standard.[120] If the *Nixon* standard is applied, absent a finding of prejudice or harm on appeal, the lower court's decision will be affirmed.[121] Accordingly, there are limited appellate decisions discussing or critiquing the application of Rule 17(c) to third-party subpoenas.[122]

### *C. Recent Changes Impacting Criminal Investigations and Discovery*

Next, this section will discuss recent changes to discovery and government policy. Specifically, this section will highlight the modern increase in ESI and the Government's recent changes to collecting materials during investigations.

Today, almost every daily activity creates digital data, from personal communications—such as emails, calls, and texts—to general surveillance—such as security cameras, cell sites, and license plate readers.[123] This increase in data presents issues in all types of criminal cases, as attorneys are left sifting through terabytes of ESI.[124] Further, attorneys face unique challenges in storing, reviewing, and formatting the ESI, as well as ultimately paying for related additional discovery costs.[125]

This has created unique issues for criminal parties.[126] As for defendants, in some cases with large amounts of ESI, courts have allowed "discovery dumps" in which the prosecution simply turns over all evidence to the defense.[127] In most instances, courts do not require prosecutors to identify *Brady* material within this "dump"; instead, the prosecutorial *Brady* responsibility is shifted to the defense.[128] As a result, defendants are left to sort through vast amounts of potentially irrelevant material.[129] With respect to the Government, large amounts of ESI create challenges when identifying *Brady* material in the first place.[130] Such challenges have even led to the

120. Rosenberg & Topp, *supra* note 119, at 234; *see, e.g.*, United States v. Nixon, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues."); United States v. Henry, 482 F.3d 27, 30 (1st Cir. 2007) ("The court has power to quash a subpoena that is unreasonable or oppressive . . . and review on appeal is for abuse of discretion.").

121. *See* Rosenberg & Topp, *supra* note 119, at 235; *see, e.g.*, *Henry*, 482 F.3d at 30–31 (finding no prejudice and affirming the district court's decision to quash a Rule 17 subpoena).

122. *See* Rosenberg & Topp, *supra* note 119, at 233.

123. *See* Turner, *supra* note 44, at 244–46.

124. *See id.* at 249; *see* Penn, *supra* note 1 (discussing the significant increase in the amount of ESI federal prosecutors are storing).

125. *See* Turner, *supra* note 44, at 250–53.

126. *See id.* at 249–58.

127. *Id.* at 256.

128. *See id.* at 257; *see, e.g.*, United States v. Warshak, 631 F.3d 266, 297 (6th Cir. 2010) (rejecting the defendants' argument that the prosecution shirked their *Brady* responsibility by simply turning over millions of pages of documents and requiring the defense to locate exculpatory information).

129. *See* Turner, *supra* note 44, at 256.

130. *See id.* at 258.

dismissal of cases when prosecutors were unable to handle insurmountable quantities of ESI.[131]

In light of the increase in ESI, prosecutors are changing their approach.[132] In 2022, the DOJ implemented new mandatory training that instructs federal prosecutors to collect less evidence.[133] This new "smart collection" method will result in seizure of fewer physical electronic devices and a limited collection of information on the devices that are seized.[134]

### *D. Potential Changes to Rule 17*

Apart from adding the word "data" to Rule 17(c)(1) in 2002,[135] Rule 17(c) has not been changed to address the influx of ESI.[136] Further, scholars and judges have long criticized Rule 17's application to defendants' third-party subpoenas.[137] Despite such challenges and criticism, Rule 17 has not been substantively changed either through judicial opinion or an official amendment. This section will discuss the potential avenues for change and recent developments.

First, Supreme Court review is unlikely due to the deferential standard of appellate review of motions to quash.[138] Further, when this question was presented to the Supreme Court in 2016, the Court denied review.[139] Although the composition of the Court has significantly changed since 2016, it is unlikely that Rule 17(c) will change by judicial opinion.

Alternatively, the standard amendment process for the Federal Rules of Criminal Procedure could be used to change Rule 17.[140] This process entails various levels of review—including Congress, the federal judiciary, the Judicial Conference of the United States, and additional subcommittees—and takes approximately two to three years for a suggested change to be

131. *See, e.g.*, Kirk Siegler, *Federal Appeals Court Upholds Dismissal of Cliven Bundy Case*, NPR (Aug. 6, 2020), https://www.npr.org/2020/08/06/899886777/federal-appeals-court-upholds-dismissal-of-cliven-bundy-case [https://perma.cc/6T3A-2Q28] (explaining how appellate court upheld trial court's decision to dismiss the case after prosecutors failed to turn over and disclose ESI).

132. *See* Penn, *supra* note 1.

133. *Id.*; Email from Joshua Stueve, *supra* note 3.

134. Penn, *supra* note 1.

135. *See supra* note 61 and accompanying text. The Advisory Committee believed adding the word "data" would signal that pertinent materials may be found in electronic form. *See supra* note 61 and accompanying text.

136. FED. R. CRIM. P. 17. By comparison, in 2019, the Advisory Committee added Rule 16.1 of the Federal Rules of Criminal Procedure to address this increase. *See id.* r. 16.1 advisory committee's note to 2019 amendment. Rule 16.1 now mandates that parties meet and confer regarding discovery soon after arraignment, with a particular emphasis on cases with large amounts of ESI. *Id.*

137. *See infra* Part II.B.2.

138. *See supra* Part I.B.2.

139. *See supra* note 94 and accompanying text.

140. *See* 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 2 (5th ed. 2022).

implemented.[141] Any interested party can suggest changes to the rules, after which the Advisory Committee will review them.[142]

In fact, the Advisory Committee is currently considering changing Rule 17.[143] In response to a change recommended by the White Collar Crime Committee of the New York City Bar Association,[144] the chair of the Advisory Committee created a subcommittee to consider potential changes.[145] The subcommittee identified a number of questions for consideration, including the following: (1) "What showing (other than *Nixon*) would be appropriate to require for issuing a subpoena?";[146] and (2) "When can parties seek subpoenas ex parte?"[147] Ultimately, following an extensive fact-gathering and interviewing process, the subcommittee tentatively determined that Rule 17 *should* be amended.[148] However, the subcommittee did not decide *what* standard should apply.[149] For years before the subcommittee reached this tentative conclusion, however, scholars and practitioners sought answers to the same questions.

## II. AMENDING RULE 17: POSSIBLE CHANGES AND THEIR DRAWBACKS AND BENEFITS

This part examines the historical debate around Rule 17(c). Part II.A discusses arguments in favor of keeping the *Nixon* standard as is and not changing Rule 17(c). Part II.B explores the arguments supporting changing the *Nixon* standard, specifically for defendants' third-party subpoenas. Part II.C presents the Advisory Committee's recent tentative decisions regarding changes to Rule 17, and it includes arguments for and against judicial approval for subpoenas and ex parte applications. Finally, Part II.D highlights existing proposals for changing Rule 17(c).

### *A. Arguments in Favor of Maintaining the* Nixon *Standard*

This section discusses why proponents support maintaining the *Nixon* standard, beginning first with historical arguments in favor of limited

141. *Id.* The website for the Federal Judiciary also provides a comprehensive overview of how the Federal Rules of Criminal Procedure are changed. *About the Rulemaking Process*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process [https://perma.cc/4V5D-KJ69] (last visited Feb. 9, 2024).

142. 1 WRIGHT & LEIPOLD, *supra* note 140, § 2.

143. *See* Memorandum from Hon. James C. Dever III, Chair, Advisory Comm. on Crim. Rules, to Hon. John D. Bates, Chair, Comm. on Rules of Prac. & Proc. (Dec. 9, 2022), https://www.uscourts.gov/sites/default/files/advisory_committee_on_criminal_rules_december_2022_0.pdf [https://perma.cc/26SX-74CC].

144. *See* Letter from Marshall L. Miller, *supra* note 18.

145. Memorandum from Hon. Raymond M. Kethledge, Chair, Advisory Comm. on Crim. Rules, to Hon. John D. Bates, Chair, Comm. on the Rules of Prac. & Proc. 2–3 (May 12, 2022), https://www.uscourts.gov/sites/default/files/criminal_rules_report_-_may_2022_0.pdf [https://perma.cc/2AJD-ZHD2].

146. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 19, at 129.

147. *Id.*

148. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 20, at 127–32.

149. *Id.* at 131.

discovery in criminal cases. As discussed above, discovery is more limited in criminal cases than in civil cases.[150] Traditionally, advocates believed that discovery needed to be limited in criminal cases for three reasons: first, because of the defendant's right against self-incrimination;[151] second, to prevent perjury;[152] and third, to protect witnesses from intimidation.[153]

Given the historical concerns regarding criminal discovery, Rule 16, as originally adopted in 1946, provided a very limited right of discovery.[154] Such limitations were based on fears of "fishing expeditions."[155] *Bowman Dairy* was decided soon after, in 1951, and reiterated the "limited right of discovery" that Rule 16 created.[156] However, Rule 16 was later overhauled in 1966, providing for broader criminal discovery.[157]

Although modern trends point toward a more liberal scope of criminal discovery,[158] those who argue in favor of the *Nixon* standard believe that the Supreme Court's interpretation of Rule 17(c) ensures that the rule functions as intended—to expedite trials—within the necessarily limited scope of discovery in criminal cases. For example, in *United States v. Ferguson*,[159] Judge Christopher F. Droney, then-judge for the U.S. District Court for the District of Connecticut, explained that applying a less stringent standard "would eviscerate Rule 17's limitations on criminal discovery, a result for which there is no support in *Nixon*."[160] Other lower courts have similarly cited *Bowman Dairy* when rejecting defendants' arguments to apply a more relaxed standard to defendants' third-party subpoenas.[161] Similar concerns

150. *See supra* Part I.A.

151. *See* Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 61 (1963) (explaining how the defendant's right against self-incrimination would protect the defendant from the Government's discovery requests, thus rendering criminal discovery a one-way street).

152. *See generally* 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 20.1(b) (4th ed. 2022) (detailing the historical debate regarding discovery in criminal cases). Advocates were concerned that defendants with access to more materials before trial would have a greater opportunity to craft a false defense. *See, e.g.*, State v. Tune, 98 A.2d 881, 884 (N.J. 1953) ("In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus, the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense.").

153. *See generally* 5 LAFAVE ET AL., *supra* note 152, § 20.1(b); *see, e.g.*, *Tune*, 98 A.2d at 884 (arguing that liberal discovery would threaten the safety of witnesses and limit witness cooperation).

154. 2 WRIGHT & HENNING, *supra* note 39, § 251.

155. *Id.*

156. Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951).

157. 2 WRIGHT & HENNING, *supra* note 39, § 251. For a detailed discussion of the history of Rule 16 of the Federal Rules of Criminal Procedure, see *id.*

158. 5 LAFAVE ET AL., *supra* note 152, § 20.1(c).

159. No. 06-CR-137, 2007 WL 2815068 (D. Conn. Sept. 26, 2007).

160. *Id.* at *3; *see also* United States v. Modi, No. 1L01-CR-00050, 2002 WL 188327, at *2 (W.D. Va. Feb. 6, 2002) (articulating the court's responsibility in preventing Rule 17(c)'s use as a discovery device or for a fishing expedition).

161. *See, e.g.*, United States v. Rand, 835 F.3d 451, 463 (4th Cir. 2016).

were expressed at the Advisory Committee meeting in October of 2022.[162] Deputy Assistant Attorney General of the DOJ's Criminal Division, Lisa H. Miller, explained that Rule 17 should not be read or modified to grant discovery rights broader than the Supreme Court originally intended.[163] Instead, Rule 17(c)'s limited role is properly explained by the scope of criminal discovery.[164]

Second, those who favor the *Nixon* standard reject the argument that the structure of criminal investigations significantly benefits the prosecution.[165] For example, because the grand jury's investigative role does not extend past the indictment, the defense and prosecution are on a level playing field after the indictment is filed.[166] As the *Ferguson* court concluded, "the claimed disparity between the power of the government and criminal defendants to obtain documents to prepare for trial" did not justify abandoning the stricter *Nixon* requirements.[167] Thus, even if strict, the standard is fair because it applies equally to both the prosecution and defense.[168] Similarly, advocates argue that existing variation in applications of the *Nixon* standard across jurisdictions does not create unfairness for parties.[169] Instead, district-by-district variation is common across many of the Federal Rules of Criminal Procedure.[170]

Finally, those in favor of the existing *Nixon* standard also believe that Rule 17(c) strikes a necessary balance between third parties' privacy concerns and a defendant's ability to access records.[171] Proponents argue that if Rule 17(c) were to be changed, increased subpoenas would lead to greater costs,[172] delay,[173] and risk of harm and unnecessary burden on third-party subpoena

162. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *in* AGENDA: MEETING OF THE ADVISORY COMM. ON CRIM. RULES APR. 20, 2023, at 14 (2023), https://www.uscourts.gov/sites/default/files/2023-04_criminal_rules_agenda_book_final_0.pdf [https://perma.cc/HQR9-2ULP].

163. *Id.* at 45–46.

164. *Id.* at 46.

165. *See Ferguson*, 2007 WL 2815068, at *3 n.9.

166. *See id.*; (In Chambers) Ord. re Use of Rule 17(b) Subpoenas in This Action at 5, United States v. Layfield, No. 18-CR-124 (N.D. Cal. Mar. 16, 2021), ECF No. 212.

167. *Ferguson*, 2007 WL 2815068, at *3 n.9.

168. *See* United States v. Al-Amin, No. 12-CR-50, 2013 WL 3865079, at *7 n.3 (E.D. Tenn. July 25, 2013) ("One of the problems with th[e] view [that *Nixon* and *Bowman Dairy* do not apply to a defendant's third-party subpoenas] is that it is exceptionally narrow and requires that one ignore that Rule 17(c) does not apply only to the defense but by its very terms applies equally to both sides in a criminal case.").

169. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 67. Deputy Assistant Attorney General Miller argued that such variation mirrors variation in other aspects of criminal law such as the use of Rule 35 motions for sentence reductions rather than Federal Sentencing Guideline 5K1.1 motions for downward departures. *Id.* The reporters for the Advisory Committee noted that these are variations in prosecutorial practice, not judicial practice. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 19, at 127.

170. Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 67.

171. *Id.* at 34.

172. *Id.* at 59.

173. *Id.* at 46.

recipients.[174] Thus, a change to Rule 17(c) would harm rather than help the parties.[175]

### *B. Arguments for Changing Rule 17(c) and the* Nixon *Standard for Defendants' Third-Party Subpoenas*

This section details arguments in favor of changing Rule 17(c) and the *Nixon* standard for defendants' third-party subpoenas.

#### 1. Modern Trend Toward Broader Discovery

Even though early advocates opposed broad discovery in criminal cases,[176] many other scholars dismissed these concerns at the time. For example, those in favor of broad discovery countered concerns about an increase in perjury by means of comparison to discovery in civil cases.[177] Even if the risk of perjury was heightened in criminal cases, another scholar emphasized that allowing this risk to dictate discovery practices would be to assume universal guilt of defendants.[178] The Federal Rules of Criminal Procedure cannot be tailored to rest on an assumption that all defendants are guilty rather than innocent, as it goes against a core tenet of the criminal justice system.[179] Further, scholars noted that there were significant differences among criminal defendants—for example, a defendant accused of fraud versus one accused of violent crimes.[180] If witness intimidation is more likely in the latter, the risk can be ameliorated through sound use of protective orders.[181]

Following this historical back-and-forth, the modern trend now points toward freer pretrial disclosure.[182] Dating back as far as 1966, the Supreme Court noted the "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[183] In response to this trend, some states—including California, Florida, Kansas, Montana, and Vermont—adopted broader approaches to criminal discovery,[184] and others—such as North Carolina—

174. *Id.* at 46–47.
175. *See id.* at 46–47, 59.
176. *See supra* Part II.A.
177. *See* State v. Tune, 98 A.2d 881, 894 (N.J. 1953) (Brennan, J., dissenting); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 291.
178. Barry Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. REV. 437, 445 (1972).
179. *See id.* at 446; H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent?: Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1091 (1991) (arguing that concerns regarding intimidation of witnesses rest on a dangerous assumption of guilt).
180. *See* Nakell, *supra* note 178, at 445; 2 WRIGHT & HENNING, *supra* note 39, § 251.
181. *See* Nakell, *supra* note 178, at 445; 2 WRIGHT & HENNING, *supra* note 39, § 251.
182. 2 WRIGHT & HENNING, *supra* note 39, § 251.
183. Dennis v. United States, 384 U.S. 855, 870 (1966).
184. Nakell, *supra* note 178, at 439 n.15, 449–50.

legislatively enacted "open-file discovery" laws.[185] Similarly, in certain jurisdictions, federal prosecutors adopted open-file policies, thus giving defendants greater access to materials within the prosecution's possession.[186] However, variations between jurisdictions risk unequal treatment of similarly situated defendants.[187] Further, advocates for broader discovery protocol argue that discovery requirements should not be left to the whim of prosecutorial cooperation; instead, the trend of liberal discovery should be codified in the Federal Rules of Criminal Procedure.[188]

### 2. *Nixon* Should Not Apply to Defendants' Third-Party Subpoenas

Advocates for changing the Rule 17(c) standard further argue that the strict *Nixon* standard was never meant to apply to defendants' third-party Rule 17(c) subpoenas.[189] Instead, courts today apply the *Nixon* standard to defendants' third-party subpoenas out of habit more than reason.[190]

In *United States v. Rand*,[191] as discussed above, the defendant argued on appeal to the U.S. Court of Appeals for the Fourth Circuit—and when petitioning the Supreme Court for review—that the text, history, and purposes of Rule 17(c) demonstrate why the strict *Nixon* standard was never meant to apply to defendants' third-party subpoenas.[192] As an initial matter, the text of Rule 17(c) establishes only that a subpoena may be quashed when it is "unreasonable or oppressive."[193] Although the Court ultimately adopted a heightened standard, this standard was based on the unique circumstances of *Bowman Dairy*—specifically, that the Rule 17(c) subpoena was directed to a *party*.[194] There, the heightened standard was necessary to ensure that the defense could not circumvent the procedures of Rule 16, which governs

185. Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, CHAMPION (May 2013), https://www.nacdl.org/Article/May2013-PursuingDiscoveryinCriminalCas [https://perma.cc/6QJ9-VT32]. "Open-file discovery" is defined as: "discovery in which everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material, is provided to defense attorneys." *Id.*

186. 5 LAFAVE ET AL., *supra* note 152, § 20.1(b); *see, e.g.*, Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 46 (referencing open-file policy in the U.S. District Court for the District of Arizona).

187. *See* Brennan, Jr., *supra* note 177, at 282; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 237 (1964).

188. *See* 5 LAFAVE ET AL., *supra* note 152, § 20.1(b).

189. *See, e.g.*, Henning, *supra* note 14, at 637–41.

190. *See* Robert J. Anello & Richard F. Albert, *Escaping 'Nixon's' Legacy*, N.Y. L.J. (Apr. 2, 2013, 12:00 AM), https://www.law.com/newyorklawjournal/almID/1202594344988/ [https://perma.cc/2A7R-FECL].

191. 835 F.3d 451 (4th Cir. 2016).

192. *See* Reply Brief for Defendant-Appellant Michael T. Rand at 19, United States v. Rand, 835 F.3d 451 (4th Cir. 2016) (No. 15-4322); Petition for Writ of Certiorari, *supra* note 94, at 20–24.

193. Petition for Writ of Certiorari, *supra* note 94, at 20–21 (quoting FED. R. CRIM. P. 17(c)(2)).

194. *See* Reply Brief for Defendant-Appellant Michael T. Rand, *supra* note 192, at 14; Petition for Writ of Certiorari, *supra* note 94, at 15.

discovery between the parties.[195] But with subpoenas to third parties, the Court in *Nixon* expressly left open whether a lower standard should apply.[196] As to the purpose of Rule 17(c), this rule implements the defendant's due process rights and provides the opportunity to present a complete defense.[197] Yet, when the strict *Nixon* standard is applied to third-party subpoenas—requiring the seeking party to know precisely what is in the material that they are trying to gain access to—the rule becomes "meaningless."[198] Further, there is a notable inequality in investigative resources between the prosecution and defense.[199] Nevertheless, neither the Fourth Circuit nor the Supreme Court were persuaded by Rand.[200]

Rand's arguments, however, were not new. Over the years, judges and scholars expressed similar skepticism as to whether the heightened *Nixon* standard should apply to third-party subpoenas. In fact, long before Rule 17(c) or even the Federal Rules of Criminal Procedure existed, Chief Justice John Marshall opined on a defendant's ability to subpoena a third party.[201] Here, as in *Nixon*, the third party was the President of the United States—Thomas Jefferson.[202] In advance of Aaron Burr's trial for treason, Burr sought a subpoena duces tecum for a letter in President Jefferson's possession claiming that it could be material to his defense.[203] In response to the President's objections, Chief Justice Marshall reflected on the inanity of requiring a party to specify exactly what they seek: "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?"[204] *Nixon* addressed a similar concern.[205] Today, advocates thus argue that this standard does not make sense as applied to defendants' third-party subpoenas.

For example, in *United States v. Tomison*,[206] upon review of third-party motions to quash the defendant's Rule 17(c) subpoenas, Chief Judge Emeritus Lawrence K. Karlton of the U.S. District Court for the Eastern District of California critiqued the application of the strict *Nixon* standard to

195. Reply Brief for Defendant-Appellant Michael T. Rand, *supra* note 192, at 14.
196. *Id.* at 15; Petition for Writ of Certiorari, *supra* note 94, at 14.
197. Petition for Writ of Certiorari, *supra* note 94, at 22.
198. *Id.* at 22–23; *see also* Henning, *supra* note 14, at 640–41 (explaining that the same standard should not apply to defendants because defendants lack investigative means comparable to the prosecution).
199. *See* Petition for Writ of Certiorari, *supra* note 94, at 25; Henning, *supra* note 14, at 640–41; Brief in Support of Rule 17(c) Investigatory Subpoenas Issued by the Defense & Served on Third Parties to Produce Material Not in the Possession of the Gov't in Advance of Trial at 5, United States v. Al-Amin, No. 12-CR-50 (E.D. Tenn. June 22, 2013), ECF No. 52.
200. *See* Rand v. United States, 580 U.S. 1001 (2016), *denying cert. to* 835 F.3d 451 (4th Cir. 2016); United States v. Rand, 835 F.3d 451 (4th Cir. 2016).
201. *See* United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807).
202. *See id.* at 189.
203. *See id.* at 190.
204. *Id.* at 191.
205. *See* United States v. Nixon, 418 U.S. 683, 700 (1974).
206. 969 F. Supp. 587 (E.D. Cal. 1997).

the defendant's subpoenas.[207] Given the context of the cases in which the *Nixon* standard was promulgated, the rationale of *Nixon* and *Bowman Dairy* only applies to subpoenas seeking information in the Government's possession.[208] Accordingly, Chief Judge Karlton explained—while quoting *Nixon*'s explicit decision to leave this question open—"Rule 17(c) may well be a proper device for discovering documents in the hands of third parties."[209]

Just three years later, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York raised similar criticism in *United States v. Nachamie*[210] on review of the Government's motion to quash the defendant's third-party subpoenas.[211] There, Judge Scheindlin detailed the history of Rule 17(c).[212] When adopted, Rule 17(c) was intended to be the civil counterpart to Rule 45(b) of the Federal Rules of Civil Procedure, which allowed parties to issue subpoenas to nonparties to obtain discovery.[213] This history, Judge Scheindlin noted, indicated that Rule 16 and Rule 17 may have distinct purposes—the former governs discovery from the Government, and the latter governs discovery from nonparties.[214]

Similar concerns about the strict *Nixon* standard as applied to defendants' third-party subpoenas have been expressed by scholars and practitioners.[215] As scholars highlight, this strict standard renders Rule 17(c) essentially useless for criminal defendants, operating instead as an additional tool for the Government.[216] Further, practitioner Kenneth M. Miller took particular issue with one prong of the *Nixon* standard—admissibility.[217] Some circuits, by strictly requiring a showing of actual admissibility, threaten a defendant's

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207. *See id.* at 593–94.

208. *See id.* at 593 n.14. Other judges have similarly criticized applying the *Nixon* standard to third-party subpoenas. *See, e.g.*, United States v. Tucker, 249 F.R.D. 58, 65 (S.D.N.Y. 2008) (reiterating how the *Nixon* standard should apply only to documents in the Government's possession because otherwise the Government could prevent defendants from obtaining material simply by not obtaining it themselves); United States v. Stein, 488 F. Supp. 2d 350, 365 (S.D.N.Y. 2007) ("[I]t is vitally important never to let the frequent repetition of a familiar principle obscure its origins and thus lead to mindless application in circumstances to which the principle never was intended to apply. . . . *Nixon* should not so readily be divorced from the concerns that produced it.").

209. *Tomison*, 969 F. Supp. at 593 n.14. Other courts have written this off as mere dicta. *See, e.g.*, United States v. Reyes, 239 F.R.D. 591, 597 n.1 (N.D. Cal. 2006).

210. 91 F. Supp. 2d 552 (S.D.N.Y. 2000).

211. *Id.* at 554.

212. *See id.* at 561–63.

213. *Id.* at 561; *see also* FED. R. CRIM. P. 17 advisory committee's note to 1944 adoption.

214. *Nachamie*, 91 F. Supp. 2d at 561.

215. *See, e.g.*, Henning, *supra* note 14, at 602, 640–41 (explaining how lower courts' misunderstanding of the context that produced the *Nixon* standard is especially problematic in "paper cases" in which the Government and defense need to review voluminous records for proof of criminality); Rosenberg & Topp, *supra* note 119, at 208–09 ("[B]oth *Bowman Dairy* and *Nixon* enunciated [the evidentiary] standard, but those cases were in particular circumstances that should limit their precedential value.").

216. *See* 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 (2005).

217. *See* Miller, *supra* note 105.

compulsory process right to subpoena exculpatory evidence from third parties.[218] Instead, Miller argued, courts should interpret *Nixon* to require only potential admissibility, thus avoiding the aforementioned constitutional concerns.[219]

Further, advocates argue that applying the *Nixon* standard to defendants' third-party subpoenas creates issues for parties. During the Advisory Committee meeting in October of 2022, practitioners mentioned the costs imposed—both in terms of time and finances—of briefing whether the *Nixon* standard is met and whether the subpoena should be quashed.[220] For example, in *Rand*, the defendant originally sought a Rule 17(c) subpoena on January 17, 2014.[221] However, the litigation regarding Rand's requested subpoena continued until November 28, 2016, when the Supreme Court ultimately denied certiorari.[222] Such extensive briefing creates additional financial burdens for defendants.[223] Awareness of these burdens thus discourages defense counsel from even attempting to issue third-party subpoenas.[224] Further, the extensive briefing required can lead to congested dockets, thus affecting both the court and the prosecution.[225]

Additionally, this strict standard presents a risk of wrongful conviction. Because Rule 17(c) subpoenas can be used in the pre-plea stage of criminal litigation, absent an opportunity to subpoena materials from third parties, defendants may be deprived of the opportunity to fully explore the strength of the case against them.[226] Without the ability to pursue a meaningful defense, defendants may instead plead guilty.[227]

Despite such criticism, the *Nixon* standard has been applied almost unanimously.[228] As discussed in the next section, application of this strict standard is now in question.

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218. *See id.* at 356. Miller did not take issue with the two other prongs—relevance and specificity. *Id.*

219. *Id.*

220. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 49–51.

221. *See* Motion for Early Issuance of Rule 17(c) Subpoena: Alston & Bird Interview Memorandum, United States v. Rand, No. 10-CR-182 (W.D.N.C. Jan. 17, 2014), ECF No. 212.

222. Rand v. United States, 580 U.S. 1001 (2016), *denying cert. to* 835 F.3d 451 (4th Cir. 2016).

223. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 31.

224. Henning, *supra* note 14, at 642 ("The Supreme Court's restrictive interpretation of Rule 17(c) can make a subpoena for records hardly worth the effort, or at least an avenue that only the most hardy defense counsel will travel when the chance for success seems so remote."); *see* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 29, 41, 46, 51, 55–56, 71.

225. *See* Sarokin & Zuckerman, *supra* note 179, at 1099.

226. *See* Letter from Marshall L. Miller, *supra* note 18, at 7.

227. *See id.*

228. *See supra* note 101 and accompanying text.

### *C. Advisory Committee's Proposals*

Following years of robust debate, the Advisory Committee recently made a tentative decision to change Rule 17 to allow for broader pretrial subpoena authority.[229] In announcing this decision, the Advisory Committee came to the following preliminary conclusions: (1) pretrial subpoena authority should be expanded; (2) judicial approval should be required before issuance of a third-party subpoena; (3) the rule should set a higher standard for a subpoena seeking protected material than for a subpoena seeking unprotected material and should use the phrase "personal or confidential information" to define which subpoenas require the latter; and (4) the rule should provide for ex parte subpoenas upon a showing of "good cause."[230] These tentative decisions remain subject to change and are not likely to be implemented for another year or so.[231] Additionally, the Advisory Committee has not yet determined what the standard should be for issuance of third-party subpoenas.[232] As for two of the conclusions—judicial approval and ex parte proceedings—the Advisory Committee seeks to settle existing debates.

#### 1. Judicial Approval for Third-Party Subpoena Practice

The text of Rule 17 itself does not explicitly require a party seeking a Rule 17(c) subpoena to file a motion with the court for that subpoena.[233] Accordingly, courts have come out on different sides—some require a motion,[234] others do not.[235] At its extreme, this split led one district court to impose sanctions on an attorney who, absent clarity as to whether Rule 17(c) required judicial approval for the issuance of third-party subpoenas, filled in a blank subpoena form and issued it directly to a third party.[236] Although the U.S. Court of Appeals for the Sixth Circuit ultimately dismissed the sanctions against the defense attorney,[237] the court declined to hold that Rule 17(c) defined a preferred practice, finding instead that the rule was "capacious enough to accommodate differing levels of oversight that district courts deem desirable to impose."[238] Meanwhile, some jurisdictions have provided local guidance for practitioners so as to avoid confusion.[239] Throughout years of interpreting Rule 17, arguments in favor of and against requiring a motion with the court have developed. This section discusses these arguments.

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229. *See* Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 20.
230. *Id.* at 1–5.
231. *See* 1 WRIGHT & LEIPOLD, *supra* note 140, § 2.
232. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 20, at 128, 131.
233. *See* Rosenberg & Topp, *supra* note 119, at 222–23.
234. *See, e.g.*, United States v. Beckford, 964 F. Supp. 1010, 1025 (E.D. Va. 1997).
235. *See, e.g.*, United States v. Urlacher, 136 F.R.D. 550, 555 (W.D.N.Y. 1991).
236. *See* United States v. Llanez-Garcia, 735 F.3d 483, 486–91 (6th Cir. 2013).
237. *See id.* at 499–500.
238. *Id.* at 500.
239. *See, e.g.*, N.D. CAL. CRIM. R. 17-2 ("No subpoena in a criminal case may require the production of . . . documents . . . in advance of the trial, hearing or proceeding at which these items are to be offered in evidence, unless the Court has entered an order pursuant to Rule 17(c) of the Federal Rules . . . .").

### *a. Arguments in Favor of Requiring Judicial Approval Before Issuing a Subpoena Under Rule 17(c)*

As discussed above, some attorneys are concerned about abusive subpoena practice under Rule 17(c).[240] Requiring applications to the court for third-party subpoenas can assuage these concerns and protect the privacy interests of subpoena recipients and victims.[241]

In *United States v. Beckford*,[242] Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia emphasized the necessity of judicial involvement.[243] As Judge Payne explained, requiring judicial involvement ensures that Rule 17(c) is applied as intended under *Bowman Dairy* and *Nixon*.[244] Accordingly, to allow a court to exercise its necessary function, Rule 17(c) must require the seeking party to file a motion explaining why the court should issue the requested subpoena.[245] Absent required judicial approval, the court would only be able to exercise control when motions to quash or modify are filed.[246]

Judge Payne noted, however, that the filing of such motions is not guaranteed because the opposing party may lack standing to challenge a third-party subpoena or because the actual third party receiving the subpoena might not have the ability or interest to challenge the subpoena.[247] For example, in *United States v. Noriega*,[248] the Government issued a subpoena directly to the corrections facility in which the defendant was detained.[249] There, the court noted: "it is wishful thinking to expect that prison officials will either oppose a government-requested subpoena which implicates an incarcerated defendant's interests or else enable the defendant to file his own motion to quash by notifying him that such subpoenas have been issued."[250] Instead, "the coinciding interests of prosecutors and prison authorities in law enforcement renders these subpoenas mere formalities and all but guarantees that prosecutorial overreaching such as that present here will go unchecked."[251] Based on this risk, Judge Payne concluded that parties seeking pretrial subpoenas under Rule 17(c) must first file a motion with the

240. *See supra* note 174 and accompanying text.

241. *See* Rosenberg & Topp, *supra* note 119, at 222–26 (arguing that requiring leave of court before a pretrial Rule 17(c) subpoena is issued can prevent subpoena abuse); Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 48 (discussing importance of judicial oversight).

242. 964 F. Supp. 1010 (E.D. Va. 1997).

243. *See id.* at 1020–25.

244. *See id.* at 1022.

245. *See id.* at 1023.

246. *See id.*

247. *See id.* at 1023–24; *see also* State v. DiPrete, 698 A.2d 223, 226 (R.I. 1997) ("[T]he court's ability to review the use of Rule 17(c) subpoenas . . . would rest solely upon the potential filing of a motion to quash or modify by a third party to the case, who may have no interest or incentive to file such a motion.").

248. 764 F. Supp. 1480 (S.D. Fla. 1991).

249. *See id.* at 1482–83.

250. *Id.* at 1493.

251. *Id.*

court.[252] Otherwise, if no motion to quash or modify the subpoena is filed, the judge has no opportunity to assess the propriety of the request.[253] Although such a requirement may inevitably place an additional burden on trial courts, Judge Payne believed the task was manageable.[254]

Further, requiring judicial approval will provide for sound use of protective orders.[255] Per Rule 16(d) of the Federal Rules of Criminal Procedure, courts have broad discretion to issue protective and modifying orders.[256] Thus, judicial oversight will afford the trial court ample opportunity to exercise this authority and to ensure that subpoenas are being properly used.[257]

#### *b. Arguments Against Requiring Judicial Approval Before Issuing a Subpoena Under Rule 17(c)*

In contrast, others believe that a motion for issuance of a third-party subpoena is not necessary. To begin, some emphasize that the text of Rule 17(c) does not mandate a motion for issuance of a third-party subpoena,[258] nor should the rule require judicial approval.[259] Instead, the court can sufficiently exercise its judicial supervision through a motion to quash, which is explicitly provided for by the text of the rule,[260] or through subsequent evidentiary rulings regarding materials obtained via subpoena.[261] Therefore, there should be no limit on the issuance of pretrial subpoenas; instead, the court should only assess the propriety of a request if the recipient believes that it is unduly burdensome and moves to quash.[262]

Further, requiring parties to file a motion with the court prior to issuance of a Rule 17(c) subpoena threatens an effective defense.[263] As the White Collar Crime Committee of the New York City Bar Association emphasized, unless parties can persuade the court to allow the party to proceed ex parte, they will be forced to reveal proprietary trial strategy.[264] Accordingly, advocates argue that Rule 17(c) does not and should not require parties to file a motion with the court.[265]

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252. *See Beckford*, 964 F. Supp. at 1024–25.
253. *See id.*
254. *Id.* at 1025 n.15.
255. *See* 2 WRIGHT & HENNING, *supra* note 39, § 251.
256. FED. R. CRIM. P. 16(d).
257. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 48.
258. *See, e.g.*, United States v. Urlacher, 136 F.R.D. 550, 555 (W.D.N.Y. 1991) ("[T]he motion for issuance is appropriate, though not strictly necessary.").
259. Letter from Marshall L. Miller, *supra* note 18, at 8.
260. United States v. Ventola, No. 15-10356, 2017 WL 2468777, at *2 (D. Mass. June 7, 2017).
261. Letter from Marshall L. Miller, *supra* note 18, at 8.
262. Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 34.
263. *See id.* at 22.
264. Letter from Marshall L. Miller, *supra* note 18, at 8.
265. *See id.* (proposing that court orders should only be required when personal or confidential information is subpoenaed).

After weighing the above considerations, the subcommittee of the Advisory Committee tentatively concluded that all third-party subpoenas should be subject to judicial oversight.[266] Accordingly, a new rule would explicitly require that the seeking party first file a motion with the court.[267]

### 2. Ex Parte Applications for Subpoenas Under Rule 17(c)

The text of Rule 17 is not clear as to whether ex parte subpoena submissions are permitted under Rule 17(c).[268] Courts thus differ in their approach to permitting parties to proceed ex parte[269] with some district courts providing their own guidance on how to issue pretrial subpoenas under Rule 17(c).[270] For example, the U.S. District Court for the District of Minnesota requires that all subpoenas duces tecum issued on behalf of a defendant be filed under seal.[271] In contrast, the U.S. District Courts for the Northern and Southern Districts of California allow pretrial subpoenas to be issued ex parte upon a showing of "good cause."[272]

#### *a. Arguments in Favor of Allowing Parties to Make Ex Parte Applications*

Advocates and judges have long argued in favor of allowing ex parte motions for subpoena requests under Rule 17(c) in certain circumstances and have provided a variety of reasons for support.[273]

For example, in *Tomison*, absent clarity as to what the text of Rule 17 requires, Judge Karlton looked to the purpose of Rule 17—expediting the trial.[274] As Judge Karlton noted, however, requiring the defendant to request

266. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 20, at 128–29.

267. *Id.*

268. *See* FED. R. CRIM. P. 17; Rosenberg & Topp, *supra* note 119, at 226–31.

269. *See supra* note 58 and accompanying text. These arguments often hinge on whether the Government has standing to move to quash a subpoena requesting materials from a third party—an issue on which courts have reached opposite conclusions. Rosenberg & Topp, *supra* note 119, at 218. Although the scope of this Note does not cover this debate, for a comprehensive discussion of existing arguments, see *id.* at 218–22. The authors ultimately concluded that the Government should not have standing because: "A party should be able to move to quash only if it has a protectable interest in the materials being subpoenaed, and the government will not often have such an interest in materials held by a non-party." *Id.* at 218–19.

270. *See* Yakov Malkiel, Michael Kendall & Lauren Papenhausen, *Ex Parte Defense Subpoena Practice in Criminal Cases*, BLOOMBERG L. (Apr. 2021), https://www.bloomberglaw.com/external/document/XC7BII44000000/litigation-professional-perspective-ex-parte-defense-subpoena-pr [https://perma.cc/J8C3-TM2C] (navigate to the graphic using the hyperlink entitled "GRAPHIC: Available Guidance on Pretrial Defense Subpoenas in Federal Local Rules").

271. D. MINN. R. 49.1.

272. Malkiel et al., *supra* note 270; *see, e.g.*, N.D. CAL. CRIM. R. 17-2 ("An order permitting issuance of a Rule 17(c) subpoena may be obtained by filing either a noticed motion . . . or, for good cause, an ex parte motion without advance notice to the opposing party. An ex parte motion and order thereon may be filed under seal for good cause.").

273. *See, e.g.*, Malkiel et al., *supra* note 270.

274. United States v. Tomison, 969 F. Supp. 587, 592 (E.D. Cal. 1997).

third-party subpoenas by noticed motions would discourage requests for pretrial subpoenas because it would force the defendant to disclose their case theory.[275] Thus, if the defendant waits until trial to seek production in a document-heavy case, the primary purpose of Rule 17(c) would be undermined.[276]

Further, Judge Karlton emphasized the role that Rule 17(c) plays in effectuating a defendant's right to obtain evidence bearing on both guilt and punishment.[277] To protect this right, defendants must have an option to request pretrial production without disclosing their case theory to the opposing party.[278] Judge Karlton found that such considerations outweighed concerns regarding maintaining the limited scope of Rule 17(c) and ensuring public access to the courts.[279] Accordingly, the court in *Tomison* interpreted the rule to provide for ex parte applications if the defendant seeking a pretrial subpoena could not do so without disclosing trial strategy.[280] Likewise, in *Beckford*, the Eastern District of Virginia reached a similar conclusion and detailed the rare circumstances in which ex parte proceedings should be allowed: "where mere disclosure of the application for a pre-trial subpoena would: (i) divulge trial strategy, witness lists or attorney work-product; (ii) imperil the source or integrity of subpoenaed evidence; or (iii) undermine a fundamental privacy or constitutional interest of the defendant . . . ."[281]

Additionally, Yakov Malkiel, Michael Kendall, and Lauren Papenhouse of White & Case LLP shared an example of how ex parte proceedings won them a case, further highlighting why some advocate for ex parte subpoenas.[282] In *United States v. Diamont*,[283] Malkiel, Kendall, and Papenhouse represented a businessman facing tax fraud charges.[284] The Government had a cooperating witness who formerly worked with the defendant.[285] The attorneys filed a public motion for Rule 17(c) subpoenas to the cooperator's bank and requested leave to provide supporting materials ex parte.[286] The presiding judge, over the Government's objection, allowed the defense to present supporting materials ex parte and then approved issuance of the subpoenas.[287] Ultimately, the subpoena returns undermined both the Government's evidence and the testimony of their cooperating witness.[288]

275. *Id.*
276. *Id.* at 592–93.
277. *Id.* at 593.
278. *Id.* at 593–94; *see also* United States v. Beckford, 964 F. Supp. 1010, 1027 (E.D. Va. 1997) (detailing the constitutional justification for allowing ex parte applications).
279. *Tomison*, 969 F. Supp. at 594–95.
280. *Id.* at 593–95.
281. *Beckford*, 964 F. Supp. at 1030.
282. Malkiel et al., *supra* note 270.
283. No. 05-CR-10154 (D. Mass. Mar. 30, 2007).
284. Malkiel et al., *supra* note 270.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*

The Government later dismissed the charges against Diamont, and the cooperating witness pled guilty to perjury.[289]

Some other courts have recognized the value in ex parte subpoenas and have thus permitted them in certain circumstances.[290] Twelve districts provide guidance as to when pretrial subpoena applications may be made ex parte.[291] For example, the U.S. District Court for the District of Rhode Island provides that a motion requesting a Rule 17(c) subpoena must be served on all parties, unless the court, upon a showing of "good cause," permits the subpoena to be issued ex parte.[292] The local rules define good cause as requiring, "among other things, a showing that the documents sought are relevant to the proceeding in question and that disclosure of the subpoena (or of the documents sought) could unfairly harm the party's case."[293]

Beyond allowing ex parte motions in certain circumstances—such as on a showing of good cause—some, including practitioners Benjamin E. Rosenberg and Robert W. Topp, took it a step further.[294] Rosenberg and Topp believed that even if the motion is filed ex parte, the opposing side should not be given notice that the motion is being made, nor should the requesting party be required to share the materials with the opposing party.[295] As they argued, providing the opposing party with notice of the subpoena itself undermines the purpose behind allowing ex parte motions in the first place.[296] If the opposing party is notified of the fact of the subpoena, the identities of the recipients, and the requested materials, then the opposing party will necessarily be notified of the requesting party's trial strategy.[297] Further, the entity with the ability to file a motion to quash is most often the third party.[298] Accordingly, there is no corresponding benefit to risking disclosure of trial strategy by notifying the opposing party who likely cannot themselves file a motion to quash.[299]

Overall, based on variation in practice between courts and the benefits of ex parte applications in certain circumstances, some advocates thus argue that Rule 17 should uniformly permit ex parte practice.[300]

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289. *Id.*
290. *Id.*
291. *Id.*
292. D.R.I. R. 17.
293. *Id.*
294. *See* Rosenberg & Topp, *supra* note 119, at 231–33.
295. *Id.* at 232.
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* Rosenberg and Topp also argued that the party requesting the materials ex parte should not be required to share the materials they receive with the opposing party. *Id.* at 232–33.
300. *See, e.g.*, Malkiel et al., *supra* note 270.

### *b. Arguments Against Allowing Parties to Make Ex Parte Applications*

In contrast, others argue that Rule 17(c) should not be changed to explicitly allow ex parte applications for subpoenas. For example, in *United States v. Urlacher*,[301] the U.S. District Court for the Western District of New York provided a thorough analysis of why Rule 17(c) does not and should not allow for ex parte subpoena requests.[302] Beginning first with the text of Rule 17(c), the court pointed out that the rule does not explicitly establish or mention a defendant's right to an ex parte subpoena duces tecum application.[303] By comparison, Rule 17(b) allows indigent defendants to apply ex parte for subpoenas ad testificandum.[304] The structure of Rule 17 thus suggests that Congress intended to allow ex parte procedures for subpoenas of witnesses but not for subpoenas of documents.[305] Further, the rule provides that both the parties and attorneys are permitted to inspect the subpoenaed documents.[306] Therefore, even though a request for a subpoena alone may result in disclosure of trial strategy, the strategy will ultimately be disclosed when the opposing party inspects the requested documents anyway.[307] Outside of textual bases, the *Urlacher* court also emphasized the difficulty of a court hearing and deciding a motion to quash or modify without the knowledge of all parties.[308] Finally, the court discussed the presumption in favor of a First Amendment right to access pretrial criminal proceedings.[309] Although the court did not decide whether the qualified right of access to criminal proceedings would be outweighed by the defendant's interests, the court did emphasize that ex parte applications would undermine the presumption in favor of the right to access.[310] Accordingly, the court denied the defendant's ex parte motion for issuance of a Rule 17(c) subpoena.[311]

In addition to the clear language of Rule 17(c), advocates emphasize that notification to the opposing party is essential for protecting the privacy interests of subpoena recipients and victims.[312] Thus, Rule 17(c) should not be interpreted or changed to allow for ex parte applications to be made absent notification to the opposing side.[313]

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301. 136 F.R.D. 550 (W.D.N.Y. 1991).
302. *Id.* at 555–57; *see also* United States v. Hart, 826 F. Supp. 380 (D. Colo. 1993).
303. *Urlacher*, 136 F.R.D. at 555.
304. *Id.* at 553–54.
305. *Id.* at 555.
306. *Id.* at 555–56.
307. *Id.* at 557.
308. *Id.* at 555–56.
309. *Id.* at 556–57.
310. *See id.*
311. *Id.* at 558.
312. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 58–62.
313. *See id.* at 35.

For example, in *United States v. Coleman*,[314] the defendant was on trial for a kidnapping that resulted in death.[315] In advance of trial, the defendant tried to subpoena the decedent's mental health records.[316] The court litigated the issuance of a subpoena under seal, and the defense obtained the requested records over the Government's objection.[317] Ultimately, the Government notified the victim's family at the time of trial, and the defense only used a small portion of the documents in redacted form.[318] Had the defense been able to proceed ex parte without notifying the prosecution, the Government may not have been aware of the issuance of the subpoena and would not have been able to oppose the request or notify the victim's family.[319]

Deputy Assistant Attorney General Miller noted this concern at the Advisory Committee meeting in October of 2022.[320] Specifically, Miller explained that a system in which the burden is on the recipient to litigate the propriety of the subpoena will create challenges for third parties and victims.[321] For example, the recipient may lack the resources to move to quash or modify the subpoena or may be unaware that they can do so, and they may instead turn over sensitive documents without question.[322] In jurisdictions in which the Government has standing to oppose a subpoena to a third party, notification to the prosecution thus provides necessary protections for the privacy and confidentiality of third-party recipients of subpoenas and the information sought.[323]

After considering these arguments, the Advisory Committee tentatively proposed in its recent memorandum that parties should be able to file ex parte motions upon a showing of "good cause."[324]

### *D. Existing Proposals for the Standard for Third-Party Subpoenas Under Rule 17(c)*

Although the Advisory Committee came to tentative conclusions about judicial approval and ex parte subpoenas, the committee left open the question of what standard should apply for subpoenas issued under Rule 17(c).[325] This section details existing proposals.

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314. No. 19-CR-10113 (D. Mass. Oct. 11, 2022).

315. *See* Press Release, U.S. Att'y's Off., Dist. of Mass., Louis Coleman III Sentenced to Life in Prison for Kidnapping Resulting in Death (Oct. 11, 2022), https://www.justice.gov/usao-ma/pr/louis-coleman-iii-sentenced-life-prison-kidnapping-resulting-death [https://perma.cc/LC4M-X7KX].

316. Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 61.

317. *Id.*

318. *Id.*

319. *See id.*

320. *Id.*

321. *See id.* at 46.

322. *See id.* at 35, 46, 54.

323. *See id.* at 34, 46, 48.

324. Memorandum from Professors Sara Sun Beale & Nancy King, *supra* note 20, at 130–31.

325. *Id.* at 131.

Professor Peter J. Henning argued that a different standard should apply only for defendants' third-party subpoenas.[326] Contrary to the reasoning in *Bowman Dairy* and *Nixon*, Professor Henning posited that Rule 17(c) should be considered a counterpart to Rule 16 and should allow defendants a more expansive right to discovery.[327] Accordingly, Professor Henning proposed that Rule 17(c) should provide an avenue for defendants to subpoena documents from third parties that are "material" to the defense, as the term was used in then-Rule 16(a)(1)(C) (now 16(a)(1)(E)).[328] Professor Henning argued that "materiality" would allow courts to assess the reasonableness of the subpoena, only allowing pretrial subpoenas if the defendant showed that the requested materials were "significantly helpful" to their defense.[329] Additionally, having a standard lower than *Nixon* would better reflect the defendant's limited pretrial investigative resources, yet it would still prevent broad fishing expeditions.[330]

In *Nachamie*, Judge Scheindlin agreed and added another element, stating that the proper test for obtaining documents from third parties should be "whether the subpoena was: (1) reasonable, construed using the general discovery notion of 'material to the defense;' and (2) not unduly oppressive for the producing party to respond."[331] In *United States v. Tucker*,[332] Judge Scheindlin again opined on the proper standard for Rule 17(c).[333] Judge Scheindlin stated that the *Nixon* standard "is inappropriate where production is requested by (A) a criminal defendant; (B) on the eve of trial; (C) from a non-party; (D) where the defendant has an articulable suspicion that the documents may be material to his defense."[334] Instead, Judge Scheindlin reiterated her argument that a defendant in this situation should only be required to show that their request is reasonable (interpreted as material to the defense) and that production would not be unduly oppressive.[335] This standard, Judge Scheindlin explained, would not allow Rule 17(c) subpoenas to operate as broad discovery devices.[336] Rather, such subpoenas would need to be "reasonably targeted to ensure the production of material evidence."[337] Applying this standard, Judge Scheindlin declined to quash the defendant's subpoena, instead finding that the requested recordings might be material to

326. Henning, *supra* note 14, at 647.
327. *Id.*
328. *Id.*
329. *Id.* at 645.
330. *Id.* Practitioners Harry Sandick and Brian Fisher suggested a similar standard. *See* Harry Sandick & Brian J. Fischer, *Recent Decision Expands Use of Rule 17 Subpoena*, N.Y. L.J. (Aug. 9, 2007, 12:00 AM), https://www.law.com/newyorklawjournal/almID/900005488199/ [https://perma.cc/8LRN-FAEJ]. Sandick and Fisher mentioned that imposing the same standard for both Rule 16 and Rule 17 could limit concerns of the former conflicting with the latter. *See id.*
331. United States v. Nachamie, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000).
332. 249 F.R.D. 58 (S.D.N.Y. 2008).
333. *See id.* at 65–67.
334. *Id.* at 66.
335. *Id.*
336. *Id.*
337. *Id.*

the defense and that production would not be unreasonably onerous for the third party.[338]

Judges have both critiqued and expressed approval of Judge Scheindlin's proposed standard.[339] For example, in *United States v. Rajaratnam*,[340] although Judge Richard J. Holwell of the Southern District of New York concluded that the defendant's subpoenas met the *Nixon* standard,[341] he noted support for Judge Scheindlin's "material to the defense" proposal.[342] Judge Holwell explained that this standard, mirroring that of Rule 16(a)(1)(E), would provide defendants with "a right to obtain evidentiary material from a third party that is no broader—but also no narrower—than the defendant's right to obtain such material from the government."[343] This standard, Judge Holwell highlighted, would also address the irony that defendants in a civil case can "compel third-parties to produce any documents 'reasonably calculated to lead to the discovery of admissible evidence,'" but defendants in criminal cases, "on trial for [their] life or liberty do[] not even have the right to obtain documents 'material to [their] defense' from those same third-parties."[344] Given that Rule 17(c) subpoenas are available to the prosecution as well, Judge Holwell emphasized that this change would greatly benefit defendants at little cost to others.[345] Similarly, Judge Edmond E. Chang of the U.S. District Court for the Northern District of Illinois expressed approval for materiality as proposed in *Tucker*.[346] Judge Chang believed that materiality would be "a useful and well-known way to assess probative force."[347] However, Judge Chang emphasized the importance of balancing the likelihood that a request will lead to important

338. *Id.* On review in another case, the U.S. Court of Appeals for the Second Circuit declined to say whether *Nixon* or *Tucker* controlled. United States v. Bergstein, 788 F. App'x 742, 746 (2d Cir. 2019).

339. Practitioners have also expressed support for the *Tucker* standard. *See, e.g.*, Alan Silber & Lin Solomon, *A Creative Approach for Obtaining Documentary Evidence from Third Parties*, CHAMPION (May 2017), https://www.pashmanstein.com/assets/htmldocuments/News/Champion-A-Creative-Approach-for-Obtaining-Documentary-Evidence-From-Third-Parties-1.pdf [https://perma.cc/552M-Q3A2]; Rosenberg & Topp, *supra* note 119, at 213.

340. 753 F. Supp. 2d 317 (S.D.N.Y. 2011).

341. *Id.* at 325.

342. *Id.* at 320 n.1; *see also* United States v. Weigand, 520 F. Supp. 3d 609, 612–13 (S.D.N.Y. 2021) (emphasizing that a more liberal standard, such as *Tucker*, would be "more consistent with [both] modern principles of liberal discovery . . . . [and] the text of Rule 17(c)"); United States v. Akhavan, No. 20-CR-188-2, 2021 WL 1251893 (S.D.N.Y. Apr. 2, 2021) (applying *Tucker*).

343. *Rajaratnam*, 753 F. Supp. 2d at 320 n.1.

344. *Id.* (quoting FED. R. CIV. P. 26(b)(1)). At the time, the Federal Rules of Civil Procedure described the scope of civil discovery as follows: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1) (amended 2015). This language was later replaced with "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* r. 26(b)(1) advisory committee's note to 2015 amendment.

345. *Rajaratnam*, 753 F. Supp. 2d at 320 n.1.

346. United States v. Smith, No. 19-CR-00669, 2020 WL 4934990, at *4 (N.D. Ill. Aug. 23, 2020).

347. *Id.*

evidence with the burden of compliance.[348] Accordingly, Judge Chang suggested that "reasonable specificity" remain a requirement so as to prevent fishing expeditions.[349]

At the same time, parties and scholars have proposed alternative changes. For example, the petitioner in *Rand* argued that only the plain text of Rule 17(c) should govern third-party subpoenas—it should be issued unless "unreasonable or oppressive."[350] As Rand explained, this interpretation would better align with the text, history, and purposes of Rule 17(c).[351]

Kenneth M. Miller[352] suggested that Rule 17(c) should be interpreted to require only "potential evidentiary use" instead of requiring absolute admissibility.[353] Although some courts require absolute admissibility, this interpretation threatens a defendant's constitutional right to subpoena exculpatory material from third parties because exculpatory evidence is not always admissible.[354]

Similarly, practitioners Rosenberg and Topp contended that the evidentiary standard of *Nixon* should not apply to defendant's third-party subpoenas.[355] They argued that the text of Rule 17(c) and the line of cases leading to the current standard do not support this limitation.[356] However, Rosenberg and Topp argued that the strict *Nixon* standard should remain for Rule 17(c) subpoenas issued by the Government.[357]

Additionally, the White Collar Crime Committee of the New York City Bar Association proposed the following standard: "relevant and material to the preparation of the prosecution or defense, including for the impeachment of a potential witness."[358] Upon review following a motion to quash, the subpoena could be quashed if compliance was unreasonable or oppressive, as the rule now states, or if the documents sought were "otherwise procurable by exercise of due diligence."[359]

Finally, others proposed alternative standards at the Advisory Committee meeting in October of 2022. For example, Donna Elm—the Criminal Justice Act panel attorney for appeals and habeas cases for the U.S. District Courts for the District of Arizona and the Middle District of Florida, as well as for the U.S. Courts of Appeals for the Ninth and Eleventh Circuits—proposed

348. *Id.*
349. *Id.*
350. Petition for Writ of Certiorari, *supra* note 94, at 20 (quoting FED. R. CRIM. P. 17(c)(2)).
351. *Id.*
352. *See also supra* notes 217–19 and accompanying text.
353. Miller, *supra* note 105, at 355–56.
354. *Id.*
355. Rosenberg & Topp, *supra* note 119, at 209.
356. *See id.* at 209–12.
357. *Id.* at 214. The authors also argued that the Government should not have standing to file a motion to quash a defendant's third-party subpoena. *Id.* at 218–22.
358. Letter from Marshall L. Miller, *supra* note 18, at exhibit B.
359. *Id.* Robert Cary, an attorney at Williams & Connolly LLP, expressed support for the "material and relevant" standard when speaking at the panel hosted by the Advisory Committee; yet, Cary did not believe that the proposed standard sufficiently addressed the burden imposed by a third-party subpoena. Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 34.

changing the *Nixon* standard to allow subpoenas for material that "might" have or "has some potential of producing relevant admissible evidence."[360] Alternatively, Elm proposed adopting the civil standard for discovery.[361] Additionally, she suggested mentioning fishing expeditions in the committee note but interpreting them narrowly so as not to include requests in which the party cannot articulate what is in the document.[362]

## III. REPLACING *NIXON*: THE PROPER STANDARD FOR THIRD-PARTY SUBPOENAS

In light of the changing scope of criminal investigations, the Advisory Committee needs to change Rule 17(c) to allow for parties to effectively issue pretrial subpoenas to third parties. Although there are a number of remaining questions, this Note proposes a solution to three issues.

Part III.A proposes that parties should be able to use Rule 17(c) to request documents that are material and relevant to preparing the prosecution or defense and that requested documents need not be admissible in evidence. Part III.B argues that judicial involvement should be required for issuance of a subpoena. Further, Part III.B recommends factors for courts to consider when assessing whether a third-party subpoena should be quashed. Finally, Part III.C addresses why ex parte proceedings should be allowed in certain circumstances.

### *A. The Proper Standard for All Third-Party Subpoenas*

As many have long opined, the *Nixon* standard effectively renders Rule 17(c) useless for defendants because they are unable to articulate the requisite relevancy, admissibility, and specificity without first seeing the requested documents.[363] The *Nixon* standard thus threatens a defendant's constitutional right to present an effective defense, causing scholars and judges alike to criticize the standard.[364] In recent years, the modern trend points toward broader discovery—evidenced through liberal state discovery laws and legislatively enacted open-file systems—which gives defendants greater pretrial access to materials within the prosecution's possession.[365] However, this liberal trend does not address the fundamental issue: the defense has limited means to access materials that the prosecution does not collect. The Government's recent shift to narrow the scope of investigations[366] will only exacerbate this issue. If the Government actively

360. Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 56.

361. *Id.* However, Elm suggested adopting the phrase "could lead to discovery of other admissible evidence," which seems to no longer be the operative language in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 26.

362. *See* Advisory Committee on Criminal Rules Draft Minutes October 27, 2022, *supra* note 162, at 56–57.

363. *See supra* Part II.B.2.

364. *See supra* Part II.B.2.

365. *See supra* Part II.B.1.

366. *See* Penn, *supra* note 1.

collects less information, it is inevitable that the Government will collect less of what the defense deems important.[367]

Given this change, third-party subpoenas should no longer be limited by the old adage that "Rule 17(c) should not be employed as a discovery device."[368] Instead, as prosecutors narrow the scope of investigations,[369] defendants need to be able to use Rule 17 for discovery. As the Advisory Committee said in 1974 in implementing an amendment to Rule 16:

> broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.[370]

To effectuate these important goals, the Advisory Committee needs to change Rule 17(c) to allow defendants more than just nominal pretrial subpoena power. At the same time, Rule 17(c) must provide protection for third-party interests. The proposed standard strikes the necessary balance.

This section advocates for changing the standard for all third-party subpoenas, issued by both the prosecution and the defense,[371] to allow parties to request documents that are material and relevant to preparing the prosecution or defense. Further, settling the split as to whether parties need to show actual admissibility of the requested documents,[372] this Note suggests that requested documents need not be admissible in evidence to be requested.[373]

### 1. Materiality and Relevance

The proposed standard's first prong—materiality—is appropriate for two reasons. First, judges and parties are familiar with the term and its

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367. *See id.*

368. *See* United States v. Tomison, 969 F. Supp. 587, 594 (E.D. Cal. 1997). This Note does not opine on whether, given the change, it makes more sense for the subpoena power to be in Rule 16.

369. *See* Penn, *supra* note 1.

370. FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

371. Although the impetus for changing Rule 17(c) stems from challenges that the rule creates for defendants, this Note proposes that the standard be uniformly changed for both the prosecution and defense. Given the Government's alternative investigative powers and recent desire to narrow the scope of investigations, it is unlikely that broader third-party subpoena power for the Government will significantly alter criminal investigations. Therefore, as a matter of fairness and simplicity, the standard should be the same for both parties.

372. *See supra* notes 105–11 and accompanying text.

373. Although the Advisory Committee tentatively proposed implementing a bifurcated standard for subpoenas seeking private and protected materials and those not seeking such materials, this Note proposes that one standard is appropriate. Judicial approval will provide adequate protections for personal and confidential information, and judges will have the necessary opportunity to assess whether the requested materials are subject to privileges or should be protected. *See infra* Part III.B. Further, providing one standard will simplify the process, as parties will not need to argue over which standard should apply. In the alternative, should the Advisory Committee proceed with a bifurcated standard, this proposed standard can be considered for materials sought that are not personal or confidential.

application because materiality is also used in Rule 16.[374] Under Rule 16, defendants often face the same challenge inherent in application of the *Nixon* standard: they are unable to fully detail the materiality of documents and objects they have not yet seen.[375] However, in practice, materiality is not a heavy burden.[376] The standard is less strict than that of *Nixon*, and it will thus provide parties with a reasonable opportunity to articulate what is being requested and access important materials in advance of trial.

In application, courts have provided varying definitions of materiality. For example, the Fourth Circuit found that for the defendant to articulate materiality under Rule 16, "[t]here must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor."[377] Courts also state that documents are material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[378] Similarly, as the Advisory Committee mentioned in the notes to the 1974 amendment to Rule 16, requiring disclosure of material documents and objects "underscores the importance of disclosure of evidence favorable to the defendant," thus suggesting that "material" means "favorable to the defendant."[379]

Furthermore, materiality depends on the substantive law at issue, and it thus relies on a case-specific judicial assessment.[380] By using a familiar and flexible term, this standard will provide judges with discretion in granting third-party subpoenas. Considering the facts of each case, judges will have the flexibility to weigh the importance of the defendant's request. Thus, as needed, judges will be able to ensure that defendants gain access to documents material to their case that are not in the Government's possession.

Second, as Judge Holwell noted, couching Rule 17's limits in the language of Rule 16 will prevent absorption of the latter by the former.[381] Rule 16 reflects a thorough assessment of what materials must be disclosed between the prosecution and defense.[382] If the Rule 17 standard is broader than that of Rule 16, Rule 17 could technically be used to subpoena an opposing party

374. FED. R. CRIM. P. 16(a)(1)(E).

375. *See* 2 WRIGHT & HENNING, *supra* note 39, § 254; FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment ("Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is.").

376. *See* United States v. Abdalla, 317 F. Supp. 3d 786, 791 (S.D.N.Y. 2018).

377. United States v. Caro, 597 F.3d 608, 621 n.15 (4th Cir. 2010) (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975)); *see also id.* (collecting cases).

378. United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* United States v. Stein, 488 F. Supp. 2d 350, 356–57 (S.D.N.Y. 2007) (describing evidence as material if "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." (quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993))).

379. FED. R. CRIM. P. 16 advisory committee's note to 1974 amendment.

380. *See, e.g.*, United States v. Pirosko, 787 F.3d 358, 369 (6th Cir. 2015).

381. *See* United States v. Rajaratnam, 753 F. Supp. 2d 317, 320 n.1 (S.D.N.Y. 2011).

382. *See* FED. R. CRIM. P. 16.

for documents not provided for in Rule 16.[383] Rule 17 should not allow a party to request more than what disclosure mandates. Instead, given the newly narrowed scope of governmental investigations,[384] Rule 17(c) should only be expanded so far as to allow defendants access to material that they would otherwise receive had the Government collected it.

Next, this Note proposes that the items sought are "relevant to preparing the prosecution or defense." Similar to materiality, relevance is used in Rule 16.[385] Further, relevance is used in Rule 26 of the Federal Rules of Civil Procedure and under the current *Nixon* standard.[386] Courts frequently encounter both Criminal Rule 16 and Civil Rule 26 during discovery. This term is thus familiar to courts and criminal parties, which can provide for consistency in application and interpretation.

Further, as seen following *Nixon*, application of the *Nixon* standard does not often turn on relevance; instead, this prong limits overbroad requests.[387] Because Rule 17(c) subpoenas necessarily impose a burden on a third party, parties should not be able to request materials that are not relevant to the crimes charged or defenses. Thus, this proposal would grant defendants broader pretrial subpoena power than is currently accessible while mitigating opponents' concerns regarding burdensome "fishing expeditions."[388]

### 2. Admissibility Is Not Required

Finally, this Note proposes the following addition to Rule 17(c): requested documents need not be admissible in evidence.[389] Although some courts today require a showing of actual admissibility,[390] *Nixon* itself left open whether the evidentiary requirement should apply when a subpoena duces tecum is issued to a third party.[391] The Advisory Committee should answer this question in the negative. As Kenneth M. Miller explained, a strict requirement of actual admissibility limits a defendant's access to exculpatory evidence and poses a potential threat to a defendant's right to compulsory process because much of the material may not actually be admissible.[392] By comparison, this suggested scope will ensure that defendants can access both

383. *See* Bowman Dairy Co. v. United States, 341 U.S. 214, 219–20 (1951).

384. *See* Penn, *supra* note 1.

385. *See, e.g.*, FED. R. CRIM. P. 16(a)(1)(A) ("Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant . . . .").

386. *See supra* notes 28, 90–91 and accompanying text.

387. *See, e.g.*, United States v. Libby, 432 F. Supp. 2d 26, 33 (D.D.C. 2006) (finding that requested documents were not relevant).

388. *See* United States v. Weigand, 520 F. Supp. 3d 609, 613 (S.D.N.Y. 2021) (noting that requested documents can be relevant without being unreasonable or oppressive).

389. This language is inspired by Federal Rule of Civil Procedure 26, which states, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1).

390. *See supra* notes 105–11 and accompanying text.

391. *See supra* note 93 and accompanying text.

392. *See* Miller, *supra* note 105, at 321–22, 363.

exculpatory and impeachment materials in the hands of third parties before trial.[393]

Criminal law has long recognized the value of providing defendants with access to exculpatory and impeachment materials.[394] For this reason, the defense is constitutionally entitled to both exculpatory and impeachment materials in the Government's possession.[395] However, there are likely to be such materials in the possession of third parties. The defense's access to exculpatory and impeachment materials should not be limited by the Government's investigation. Instead, if the Government is going to collect less information,[396] it is imperative that the defense can obtain what they would otherwise have access to had the Government collected it.

Overall, this proposed change to Rule 17(c) will allow parties to exercise pretrial subpoena power in a fairer, less arbitrary manner and with greater uniformity across jurisdictions. This change will settle the irony that civil litigants have broad subpoena powers whereas criminal defendants are unable to actively collect important materials in the hands of third parties.[397] Finally, although this proposed change stems from concerns regarding a defendant's ability to access exculpatory information, a new rule will also limit the burden of collection currently placed on the Government. By granting defendants the ability to collect information, the Government can effectively implement their "smart collection" approach knowing that defendants have more control over investigations. This will lessen the burdens imposed by increases in ESI.[398] Further, by retaining the ability for third parties to move to quash the subpoena, discussed below, this rule will limit the likelihood for overbroad or abusive requests.

### *B. Parties Should Be Required to File a Motion with the Court for Issuance of a Rule 17(c) Subpoena*

Rule 17(c) should be amended to resolve the existing conflict among courts as to whether a party needs to file a motion with the court for issuance of a subpoena.[399] As the Sixth Circuit noted, the current language of Rule 17(c) is "capacious enough" to allow for different interpretations.[400] This broad language needs to be clarified to provide adequate guidance for parties. This section explains that the proper solution is to require parties to file a motion with the court to issue a third-party subpoena.

Although Rule 17(c) effectuates a defendant's right to compulsory process,[401] judicial oversight is important to maintain a balance between the

393. Although the rationale applies primarily to defendants, for an explanation of why this Note proposes a uniform change for both the prosecution and the defense, see *supra* note 371.
394. *See supra* Part I.A.
395. *See supra* notes 47–48 and accompanying text.
396. *See* Penn, *supra* note 1.
397. *See supra* note 344 and accompanying text.
398. *See supra* Part I.C.
399. *See supra* Part II.C.1.
400. *See supra* notes 236–38 and accompanying text.
401. *See supra* note 54 and accompanying text.

rights of third parties and defendants. Judicial involvement should thus be explicitly required under Rule 17(c), not contingent on when or whether a motion to quash or modify is filed.

Beginning first with third parties, judicial oversight will provide protection against overreaching subpoenas. Currently, in jurisdictions in which a motion is not required, a subpoena may be issued directly to the third party, leaving it up to the third party to file a motion to quash or modify.[402] As Judge Payne explained in *Beckford*, however, there are various reasons why a third party may not file a motion to quash or modify a subpoena.[403] For example, the third party may not have the ability or interest to do so.[404] Accordingly, if the opposing party or third-party recipient does not file a motion to quash or modify with the court, there is no opportunity for the trial court to assess whether the subpoena is an appropriate use of Rule 17(c).[405] Further, if parties are required to file a motion with the court, courts will have the opportunity to issue a protective order when a party requests sensitive material.[406] For instance, in *Coleman*, as discussed above,[407] the judge was able to take necessary measures to protect the requested mental health records of the victim.[408] Although concerns about witness safety are seemingly overstated,[409] requiring judicial oversight will ensure that judges can exercise reasoned protective measures and strike the requisite balance between both defendants' and third parties' rights.

As discussed above, this Note proposes that the standard for issuance of third-party subpoenas should be more liberal.[410] If a more liberal standard is imposed, judicial oversight will be essential to preventing abusive subpoena practices. However, even if the Advisory Committee does not modify the standard to be more liberal, the rule should still be amended to explicitly require judicial involvement. Guaranteed oversight will prevent abusive subpoena practices regardless of what standard applies, like it did in *Noriega*.[411] In addition to providing protection for the recipients of subpoenas, settling the existing split between jurisdictions will provide greater clarity, uniformity, and equality for litigants.[412]

Further, the recipient of the subpoena or a party whose interests are at stake should remain able to oppose the issuance of the subpoena or, as is currently

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402. *See supra* Part II.C.1.

403. United States v. Beckford, 964 F. Supp. 1010, 1023–24 (E.D. Va. 1997); *see also supra* Part II.C.1.a.

404. *See Beckford*, 964 F. Supp. at 1023–24; *supra* Part II.C.1.a.

405. *See supra* Part II.C.1.a.

406. *See supra* notes 255–57 and accompanying text.

407. *See supra* Part II.C.2.b.

408. *See supra* notes 314–19 and accompanying text.

409. *See supra* Part II.B.1.

410. *See supra* Part III.A.

411. *See supra* notes 248–51 and accompanying text.

412. *Cf.* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1886 (2019) ("[W]hen a conflict [in the application of a rule] is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, it is a drafting committee's responsibility to resolve the impasse.").

provided in Rule 17(c)(2), file a motion to quash if compliance with the subpoena is unreasonable or oppressive.[413] Although the amended rule will apply to both prosecutors and defendants, the court will be able to consider the party making the request when assessing reasonableness.[414] For example, because the Government has other investigative resources, the reasonableness assessment may be applied more rigorously to the Government than to the defense.[415] In assessing the propriety of a subpoena, this Note recommends that courts be directed to consider the following: whether the documents or other items sought are otherwise procurable by an exercise of due diligence,[416] whether the subpoena requires the production of personal or confidential information,[417] and whether the third party has already produced documents or other items to a party in the case.

The first two considerations will ensure that subpoenas are not unduly burdensome on the third party and will provide adequate protections for materials that are private or protected. As to the third recommendation, courts should consider whether the third party has produced materials to another party in the case, such as by means of a corporation's cooperation agreement with the Government. Courts are split as to whether a cooperating party's documents are within the Government's possession for purposes of discovery under Rule 16 and *Brady*.[418] Although cooperating entities may not legally be agents of the Government, the Government has ample access to corporations' materials.[419] If the Government chooses not to collect certain materials, defendants should have the opportunity to do so by way of a third-party subpoena under Rule 17(c). Given that corporations are already producing materials to another party in the case, the burden of additional production is reduced. Courts should thus consider this when assessing whether a third-party subpoena is unreasonable or oppressive.

Required judicial involvement, of course, must be balanced with a party's right to present an effective defense.[420] Accordingly, as discussed below, this Note proposes that Rule 17(c) should allow parties to proceed ex parte upon a showing of good cause.[421]

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413. FED. R. CRIM. P. 17(c)(2).
414. *See* Rosenberg & Topp, *supra* note 119, at 215.
415. *See id.*
416. This language is inspired by one of the prongs of the original *Nixon* test. *See supra* notes 89–90 and accompanying text.
417. This language is inspired by the Advisory Committee's tentative decision to set a higher standard for subpoenas seeking "personal or confidential information." *See supra* note 230 and accompanying text.
418. *See supra* note 50 and accompanying text.
419. *See supra* notes 40–46 and accompanying text.
420. *See supra* Part II.C.1.b.
421. *See infra* Part III.C.

### *C. Ex Parte Proceedings Should Be Allowed, but Only in Certain Circumstances*

Rule 17(c) should also be amended to clarify another point of conflict among circuits: whether parties are able to file ex parte motions for Rule 17(c) subpoenas.[422] This section suggests that and explains why the amended Rule 17(c) should be amended to provide as follows: notice of the required motion for a third-party subpoena will be given to opposing counsel unless the requesting party shows good cause for filing supporting materials ex parte.

As Judge Karlton explained in *Tomison*, discussed above,[423] ex parte proceedings ensure that defendants are effectively able to exercise their subpoena power.[424] Absent the opportunity to proceed ex parte, defendants may be forced to disclose their case theory and strategy to the opposing party.[425] In such instances, parties will thus need to choose between requesting a subpoena and disclosing case strategy.[426] Because many defendants will likely choose to forego the subpoena rather than disclose their strategy, this choice would effectively undermine the subpoena power that Rule 17(c) should allow.

Similarly, notice of the subpoena should not be provided to the opposing party. As Rosenberg and Topp highlighted, providing notice would undermine the rationale behind allowing for ex parte subpoena requests in the first place because it would necessarily inform the opposing party of the fact of the subpoena, the intended recipient, and the requested materials.[427] Again, this would result in the defendant disclosing their case strategy.

Further, lack of notice of the opposing party will not undermine privacy interests of subpoena recipients and victims. As discussed above, judicial involvement will be required under this proposed standard.[428] Accordingly, the judge will be well-positioned to assess the propriety of a subpoena even if requested ex parte. If the recipient does lack the resources to litigate the propriety of the subpoena, the court, absent involvement of the opposing party, can still limit the scope of the subpoena or implement protective measures as necessary.[429]

Finally, despite the lack of clarity in Rule 17(c) as it stands today, courts have routinely allowed defendants to proceed ex parte upon a showing of good cause.[430] This proposed change has been applied successfully in federal courts across the country and will therefore be consistent with local

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422. *See supra* Part II.C.2.
423. *See supra* Part II.C.2.a.
424. *See supra* notes 274–81 and accompanying text.
425. *See supra* note 275 and accompanying text.
426. *See supra* note 278 and accompanying text.
427. *See supra* notes 295–97 and accompanying text. Although this Note does not address how the subpoena returns should be handled, this same rationale arguably applies. *See* Rosenberg & Topp, *supra* note 119, at 232–33.
428. *See supra* Part III.B.
429. *See supra* notes 255–57 and accompanying text.
430. *See supra* note 272 and accompanying text.

practice.[431] Further, the term "good cause" need not be defined. Courts are familiar with the standard, as it is consistently used across other rules of procedure.[432] Courts are thus prepared to determine what constitutes good cause in a given case. As recommended above,[433] in considering whether the party has demonstrated good cause, courts can consider the following: whether proceeding normally would require disclosure of trial strategy, imperil the source or integrity of the requested information, or threaten a defendant's constitutional or privacy interests.[434] Further, when needed, the court can make a case-by-case determination as to whether the defendant's interest in proceeding ex parte is outweighed by the First Amendment right to access criminal proceedings.[435]

## CONCLUSION

The Supreme Court's narrow interpretation of Rule 17(c)—espoused in the context of subpoenas to and by the Government in *Bowman Dairy* and *Nixon*, respectively—threatens a defendant's ability to present an effective defense at trial.[436] Unlike the Government, defendants lack myriad tools to collect information in the hands of third parties.[437] Although this rule has long been criticized,[438] the Advisory Committee needs to change Rule 17(c) to allow parties to issue third-party subpoenas effectively, particularly in light of the Government's recent decision to narrow the scope of criminal investigations.[439] Rule 17(c) should permit parties to request documents and other items that are material and relevant to preparing the prosecution or defense, and requested documents need not be admissible in evidence. Further, Rule 17 should explicitly require parties to file a motion with the court for issuance of a subpoena, but ex parte proceedings should be allowed upon a showing of good cause. This proposal strikes a necessary balance between protecting third parties and providing defendants with the ability to access potentially exculpatory information in the hands of nonparties.[440] Access to more materials during pretrial investigations will provide both the prosecution and defense with a greater sense of the truth.

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431. *See supra* notes 291–93 and accompanying text.
432. *See, e.g.*, FED. R. CRIM. P. 12(d) ("The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling.").
433. *See supra* Part II.C.2.a.
434. *See supra* note 281 and accompanying text.
435. *See supra* notes 58, 309–10 and accompanying text.
436. *See supra* Part II.B.2.
437. *See supra* Part I.A.
438. *See supra* Part II.B.
439. *See supra* Part III.
440. *See supra* Part III.