NOTES

HOW CAN I PROVE THAT "I AM NOT A CROOK"?: REVISITING THE *NIXON* STANDARD TO REVITALIZE RULE 17(C)

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Rule 17(c) of the Federal Rules of Criminal Procedure governs the ability of parties in a federal criminal case to discover material from one another and from nonparties prior to or during trial. The language of Rule 17(c) itself is broad and allows for any subpoenas to be issued so long as they are not "unreasonable or oppressive." Yet, the Supreme Court, in two cases, Bowman Dairy Co. v. United States *and* United States v. Nixon*, substantially narrowed the applicability of the Rule, such that—absent affirmative showings of admissibility, relevance, and specificity for all material sought—parties are not entitled to discovery. While this high bar for discovery does not create major issues for the prosecution, which has already conducted sweeping discovery during the grand jury process, the defense is left at the mercy of the* Nixon *standard and its requisite, near-insurmountable showings to obtain subpoenas. While some have critiqued the current system of federal criminal discovery, few have focused on the best way to reform that system, without overturning any Supreme Court precedent. And the literature that has proposed reforms to the criminal discovery system has concentrated on altering the text of Rule 17 itself. This Note instead advocates for a court-driven approach to reform and, in doing so, argues that this solution is preferable to Rule reform when one weighs speed and clarity. This Note proposes a novel approach to Rule 17(c) jurisprudence and the defense discovery system by providing historical context for* Nixon *and elucidating the due process and compulsory process concerns with this legal regime, ultimately recommending that courts use different standards of evaluation depending on the target of the subpoena—be it an opposing party, a nonparty, or the President of the United States.*

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Introduction

One of the most powerful weapons in the federal prosecutor's arsenal is the grand jury subpoena, a request for documents or testimony—which is almost never quashed—that gives prosecutors sweeping access to anything even remotely relevant to building a case against a defendant. Because defendants are not permitted to participate in the grand jury process, they lack access to this investigative tool. Instead, the Federal Rules of Criminal Procedure provide two mechanisms for defendants to obtain evidence: Rule 16, which governs the obligations of the prosecutor to turn over discovery following indictment, and Rule 17, which governs the defendant's ability to subpoena witnesses and documents.[1] Defendants may issue Rule 17(c) subpoenas to the prosecution or to nonparties[2] to request documents in preparation for or during trial.[3]

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[1] Fed. R. Crim. P. 16; Fed. R. Crim. P. 17.

[2] This Note will refer to subpoenas from the defense to the prosecution, or vice versa, as "party subpoenas." Subpoenas issued to nonparties are sometimes referred to as "third party subpoenas" in the literature.

[3] While prosecutors may also make use of Rules 16 and 17(c) after the grand jury process concludes, the argument of this Note emanates from the unique power of prosecutors to employ grand jury subpoenas. Meanwhile, defendants are left only with Rules 16 and 17(c) for discovery.

In practice, however, if grand jury subpoenas are prosecutors' finely sharpened swords, Rule 17(c) subpoenas are dull butter knives. Lower courts have read the Supreme Court cases interpreting Rule 17(c) effectively to neuter the Rule by setting such a high bar for these subpoenas to issue that Rule 17(c) has become "rarely useful"[4] or even "a nullity,"[5] particularly in white collar cases where massive stacks of documents and troves of data are key components of both the government's and the defense's case.[6] Criminal defendants therefore lack the ability to gather evidence from nonparties which could be critical to preparing their defense. While identifying the existence of a prosecutorial advantage in trial preparation is not new, little scholarship has focused on the ways in which Rule 17(c) and its current legal standard impact the informational disparity between the prosecution and defense.[7] As many states have begun reforming their own criminal discovery processes to broaden the discovery rights of defendants,[8] this Note argues that the federal criminal discovery system be scrutinized in the same manner. In light of recent calls by major organizations like the New York City Bar Association to reform Rule 17(c),[9] this Note will

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[4] 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) ("[C]ourts have interpreted 17(c) so narrowly that it is rarely useful to criminal defendants, and instead serves as an additional tool for the prosecution.").

[5] Kenneth M. Miller, *Focusing on a Subpoenaed Item's* Potential Evidentiary Use *(as* Nixon *Intended) Will Permit Rule 17(c) Subpoenas to Promote Fair Trials*, 2018 Fed. Law. at 24, 26.

[6] *See* Peter J. Henning, *Defense Discovery in White Collar Prosecutions*, 15 Ga. St. U. L. Rev. 601, 602 (1999) ("[A] defendant in a white collar prosecution usually does not know exactly what documents exist, or how they will affect the case.").

[7] While Miller, *supra* note 5, at 25, and Henning, *supra* note 6, at 640, as well as some lower court cases, *see infra* Section II.C.2 (discussing e.g., United States v. Nachamie, 91 F. Supp. 2d 552 (S.D.N.Y. 2000)), have questioned whether the *Nixon* standard should apply to defense subpoenas of third parties, none have conducted the historical, procedural, or Fifth Amendment constitutional analyses that I do in this Note. Additionally, the solution this Note offers is novel in its advocacy that the *Nixon* standard should be narrowed to apply only to prosecutorial subpoenas of the President.

[8] *See, e.g.*, *Criminal Discovery*, Tex. Appleseed, https://www.texasappleseed.org/criminal-discovery [https://perma.cc/DZ7K-SAZM] (describing Texas's criminal discovery reform); Howard Dimmig, *Deposition Reform: Is the Cure Worse Than the Problem?*, 71 Fla. Bar J. 52 (1997) (describing the same in Florida); Krystal Rodriguez, Data Collaborative for Just., Discovery Reform in New York: Major Legislative Provisions (2022) (describing the same in New York).

[9] N.Y.C. Bar Ass'n, Modernizing Rule 17 of the Federal Rules of Criminal Procedure: Proposed Amendment (2022), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/modernizing-rule-17-of-the-federal-rules-of-criminal-procedure [https://perma.cc/9X73-2EVB] [hereinafter Modernizing Rule 17] (proposing that the Rule be revised to allow both parties the ability to obtain anything "relevant and material to the preparation of the prosecution or defense" and to authorize parties to subpoena impeachment material).

argue that reform of the Rule, in fact, is unnecessary. Rather, I argue that reexamining the interpretive framework that led to the current Rule 17(c) jurisprudence and reconstructing its legal standard and application based on a correct understanding of that framework is a viable, even preferable, alternative to reforming the Rule itself.

This Note will proceed in four parts. Part I summarizes the current system of discovery that exists in federal criminal law and explores the impact of the system on criminal defendants and trials. Part II explicates the legal standards governing judicial review of Rule 17(c) subpoenas and discusses how these standards shape the current landscape of criminal discovery. It directs courts to consider—when assigning precedential value to the Supreme Court cases dealing with Rule 17(c)—the oft overlooked, yet vital, Footnote 12 in *United States v. Nixon*,[10] in which the Court attempted to limit the application of its own legal reasoning outside the context of the immediate case. Part III examines the problems with the current construction of the criminal discovery system. In doing so, it will argue that *Nixon*, one of the two major Supreme Court cases interpreting Rule 17(c), wrongly applied the standard of *Bowman Dairy v. United States*,[11] and that the reasons for this misapplication are apparent from the context in which *Nixon* arose. It will also question the constitutionality of the federal criminal discovery system under the Fifth Amendment's Due Process Clause, the Sixth Amendment's Compulsory Process Clause, and the right to a complete defense. Finally, Part IV explores different avenues for reform of the criminal discovery system and proposes a path forward which treats Rule 17(c) subpoenas of nonparties as distinct—and therefore subject to a different legal standard—from subpoenas of parties in criminal cases. I will seek to return to the original understanding of Rule 17(c) and its purpose, arguing that the standard for trial subpoenas of nonparties should be lowered to the standard contained in the text—that the subpoena should be quashed or modified only if its issuance would be "unreasonable or oppressive." Further, I argue that *Nixon* should be read as applicable only in the narrow circumstances of a prosecutorial subpoena of the President. This Note will contribute to the literature by identifying new critiques of the current federal criminal discovery jurisprudence—historical, procedural, and constitutional—and by offering a novel solution. This change in the law would not only correct lower courts' misapplication of Rule 17(c); it would result in

[10] 418 U.S. 683, 699 n.12 (1974) ("We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter . . . .").

[11] 341 U.S. 214 (1951).

the expansion of the defendant's right to discovery in federal criminal proceedings and avoid constitutional concerns that exist under the current regime.

I
Discovery and the Adversarial System

Discovery is an essential component of the American legal systems because "no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial."[12] Open and robust discovery in the *civil* legal system has been embraced by judges and legal scholars as a key mechanism to ensure that cases are decided "on the merits without surprise."[13] In an adversarial justice system like that of the United States, which pits one party against another to seek truth, open discovery should be a high priority because "[f]alse and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial."[14]

While discovery has evolved into a critical component of civil litigation, criminal discovery has lagged behind.[15] Whereas the mechanics and scope of civil discovery are governed by Rules 26–37 of the Federal Rules of Civil Procedure[16]—with rules dedicated individually to document discovery, depositions, interrogatories, and e-discovery—criminal discovery, by contrast, is entirely captured in two

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12 Edson R. Sunderland, *Foreword* to George Ragland, Jr., Discovery Before Trial at iii (1932).

13 My first year of law school, my Civil Procedure professor, Dean Troy McKenzie, emphasized repeatedly, using this language, that this notion was the primary purpose of discovery and the essence of our legal system. *See also, e.g.*, Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 Wake Forest L. Rev. 71, 72 (2012) (noting that discovery "reduc[es] surprises and gamesmanship at trial" and "allows both sides to more fully assess the strengths and weaknesses of claims and defenses"); Sunderland, *supra* note 12.

14 Sunderland, *supra* note 12.

15 *See* Katharine Taylor Larson, *Discovery: Criminal and Civil? There's 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/8P5K-S9J9] (describing criminal discovery as "more restricted" than civil discovery); *Criminal Rules vs. Civil Rules of Discovery*, Nat'l Inst. of Just., https://nij.ojp.gov/nij-hosted-online-training-courses/law-101-legal-guide-forensic-expert/discovery/criminal-rules-vs-civil-rules-discovery [https://perma.cc/MV9N-NSZB] (noting that civil discovery is "generally more extensive" than criminal discovery).

16 Fed. R. Civ. P. 26–37 (rules of disclosure and discovery).

brief rules of the Federal Rules of Criminal Procedure: Rules 16 and 17.[17] Courts have aptly pointed out the irony "that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents 'reasonably calculated to lead to the discovery of admissible evidence,' while a defendant on trial for his life or liberty does not even have the right to obtain documents 'material to his defense' from those same third-parties."[18] Why is it that when more is at stake—a person's life or freedom—discovery is treated as less important? This Part will probe this question while explaining the discovery mechanisms available in the federal criminal justice system in the United States.

There are two phases of discovery in federal criminal procedure: pre-indictment and post-indictment. Pre-indictment discovery happens through the grand jury, a mechanism exclusively available to and utilized by prosecutors. The grand jury is a process by which prosecutors issue subpoenas to compel documents, testimony, or communication records in an effort to determine if there exists sufficient probable cause to indict a defendant. These subpoenas are nearly impossible to quash after *United States v. R. Enterprises*,[19] in which the Supreme Court set a minimal threshold for obtaining a grand jury subpoena.[20] The Court held that motions to quash grand jury subpoenas should be granted only if the district court finds that there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation.[21] In other words, if a prosecutor can show that a subpoena is even tenuously relevant to the grand jury's investigation, any motion to quash will be denied. As a result, "in practice most requests to quash a [grand jury] subpoena are unsuccessful."[22] Thus, functionally, prosecutors have wide latitude in pre-indictment discovery with the power to seek evidence that will help prove their theory of criminality and to avoid evidence

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17 Fed. R. Crim. P. 16 (governing prosecution discovery of defense materials and vice versa); Fed. R. Crim. P. 17 (establishing the rules for subpoenas in criminal cases). Note also that there are constitutional rules that implicate criminal discovery. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that prosecutors must, upon request, turn over evidence material to guilt or punishment that is favorable to defendants to avoid violating due process); Giglio v. United States, 405 U.S. 150, 154–56 (1972) (extending *Brady* to cover impeachment evidence).

18 United States v. Rajaratnam, 753 F. Supp. 2d 317, 320 n.1 (S.D.N.Y. 2011) (internal citations omitted).

19 498 U.S. 292 (1991).

20 *Id.* at 301.

21 *Id.*

22 Eric J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 536 (2005).

that might undermine it.[23] Meanwhile, "the defense is effectively restricted to information the government gathers in the scope of its investigation."[24]

Federal defendants are limited to seeking discovery post-indictment. Such discovery is governed primarily by Rules 16 and 17 of the Federal Rules of Criminal Procedure.[25] Both the prosecution and defense can use these Rules to obtain post-indictment subpoenas. Rule 16 controls what I will refer to as "party discovery"—what the prosecution can obtain from the defense in preparation for trial and vice versa.[26] Rule 17 controls discovery by either the defense or the prosecution not addressed elsewhere in the Rules, including discovery from nonparties. Rule 17(c) states a subpoena "may order the witness to produce any books, papers, documents, data, or any other objects the subpoena designates," and a judge must order a subpoena to be issued.[27] However, per Rule 17(c)'s text, the court may refuse to issue or later quash the subpoena if compliance with it would be "unreasonable or oppressive."[28]

Attempting to provide guidance to courts, the drafters of the Federal Rules of Criminal Procedure explicitly analogized Rules 16 and 17 to discovery rules in the Federal Rules of Civil Procedure.[29] Rules 16 and 17(c) therefore respectively correspond to Rules 26 and 45(b) of the Federal Rules of Civil Procedure. Rules 26 through 37 of the Federal

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[23] While the phrase "grand jury subpoena" could be misleading, it is important to understand that these are, in practice, tools of the prosecutor. The prosecutor is in complete control over the subpoena process and is not required to consult the grand jury for permission before issuing any subpoena. Lopez v. Dep't of Just., 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("[T]he term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does. . . . The prosecutor may issue the subpoena without the knowledge of the grand jury . . . .").

[24] Modernizing Rule 17, *supra* note 9.

[25] *See supra* note 1.

[26] Understanding the details of what Rule 16 deems discoverable is not important to the subject matter of this Note.

[27] Fed. R. Crim. P. 17(c)(1). The requirement that Rule 17(c) subpoenas issue from the bench is significant. Grand jury subpoenas, by contrast, have no front-end check and issue immediately from the prosecutor to the target without prior court approval. If there is a challenge to them, it must be brought on the back-end as a motion to quash by the subpoenaed entity after the grand jury issues the subpoena. *See* Robert N. Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 Am. Crim. L. Rev. 95, 95 (1985) ("Although grand jury subpoenas are issued in the name of the district court, a federal prosecutor can subpoena a witness without the prior approval of the court . . . .").

[28] Fed. R. Crim. P. 17(c)(2).

[29] *See* Fed. R. Crim. P. 17(a) advisory committee's note to 1944 adoption ("This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure."); Fed. R. Crim. P. 16 advisory committee's note to 2022 amendment (analogizing Rule 16 to Rule 26 of the Federal Rules of Civil Procedure).

Rules of Civil Procedure deal with discovery between parties.[30] Rule 45(b), on the other hand, "permit[s] parties in a civil action to obtain discovery from nonparties by way of a subpoena."[31] If one takes these textual comparisons as instructive, the rulemakers therefore meant for Rule 16 of the Federal Rules of Criminal Procedure to manage party discovery, and Rule 17(c) to cover nonparty discovery.

Ostensibly, both Rules 16 and 17(c) encourage open discovery, placing few textual limitations on the ability of defendants to obtain material from both the government and nonparties. The only textual limitation from the Federal Rules themselves is that subpoenas are to be quashed if they are "unreasonable or oppressive," both of which are fact-specific inquiries and reserve significant discretion for district courts.[32] Despite the text's apparent endorsement of open discovery, however, the Supreme Court has limited Rule 17(c) to such an extent that it has become "a nullity."[33] Though documenting the statistical frequency with which Rule 17(c) subpoenas are denied would be nearly impossible since parties can apply for these subpoenas ex parte, the practice of denying these subpoenas has become so pervasive that judges,[34] practitioners,[35] and bar associations[36] alike have spoken out against the current legal regime. All have, in practice, found that Rule 17(c) has become "rarely, if ever, useful to criminal defendants," leading

30 *See* Fed. R. Civ. P. 26–37.

31 United States v. Nachamie, 91 F. Supp. 2d 552, 561 (S.D.N.Y. 2000).

32 Fed. R. Crim. P. 17(c)(2).

33 Miller, *supra* note 5, at 26.

34 *See, e.g.*, United States v. Rajaratnam, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011) (describing the uselessness of Rule 17(c) when defendants wish to subpoena third parties); *Nachamie*, 91 F. Supp. 2d at 561–63 (same); United States v. Tomison, 969 F. Supp. 587, 593–94 (E.D. Cal. 1997) (same); United States v. Tucker, 249 F.R.D. 58, 65 (S.D.N.Y. 2008) (same).

35 *See* Robert J. Anello & Richard F. Albert, *Escaping 'Nixon's' Legacy: The Proper Standard for Rule 17(c) Subpoenas*, N.Y.L.J., Apr. 2, 2013 ("For years, commentators have pointed to the unfairness and illogic of strictly applying the *Nixon* test to defendants' third-party subpoenas . . . ."). For examples of practitioners noting the limited utility of Rule 17(c) for defendants after the *Nixon* standard, see, for example, Morvillo, Bohrer & Balter, *supra* note 4; Marci G. LaBranche & Carey Bell, *Using Rule 17(c) to Obtain Materials from Third Parties*, Nat'l Ass'n of Crim. Def. Laws., Sept.–Oct. 2023, at 38, 38 (referring to *Nixon* and *Bowman Dairy* as "seriously limit[ing] Rule 17(c)'s usefulness"); Harry Sandick & Brian J. Fischer, *Recent Decision Expands Use of Rule 17 Subpoena*, N.Y.L.J., Aug. 9, 2007 (describing *Nixon* from the perspective of a former Assistant U.S. Attorney and a current partner at Jenner & Block as "a standard now largely used to refuse defendants pretrial access to documents and materials in the possession of nonparties"); Sara Kropf, *Rule 17(c) Subpoenas – The Unfair Limits on a Defendant's Ability to Prepare a Defense (Part I)*, Kropf Moseley (July 8, 2019), https://kmlawfirm.com/2019/07/08/rule-17c-subpoenas-the-unfair-limits-on-a-defendants-ability-to-prepare-a-defense-part-i [https://perma.cc/57PX-49DA] ("[C]ourts have drastically limited defendants' use of 17(c) subpoenas by imposing a strict standard for what can be requested.").

36 *See, e.g.*, Modernizing Rule 17, *supra* note 9.

to "perverse results."[37] In fact, federal discovery rights for defendants are so limited that thirty-seven states currently have more progressive criminal discovery systems than the federal government.[38] Those voicing objections to the current criminal discovery system aptly point out that the impacts extend beyond defendants whose cases go to trial, for "[w]ithout the ability to subpoena documents from third parties to test the government's allegations or to develop an affirmative defense of which the government was not aware, a defendant may find himself pleading guilty instead of pursuing what could have been a meritorious defense."[39] Part II will explore the legal standard by which courts judge Rule 17(c) subpoenas and how current jurisprudence reads Rule 17(c) to significantly limit discovery, rather than encouraging it like the plain text of the Rule appears to do.

II
Rule 17(c) Jurisprudence

"As an initial matter, the Court should apply the *Nixon* standard in considering the defendants' request for the issuance of the Proposed Subpoenas."[40] Pick up any opposition brief to a defendant's motion for a Rule 17(c) subpoena or brief in support of a motion to quash, and you'll find a directive along these lines.[41] It has long been taken as true by parties and courts alike that *United States v. Nixon* is the governing law for evaluating Rule 17(c) subpoenas of any entity—party to the case[42] or not. This is largely because the Supreme Court has only ever heard two cases involving challenges to Rule 17(c) subpoenas, *Nixon*

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[37] *Id.*

[38] Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 U.D.C. L. Rev. 7, 8 (1998) ("Approximately thirty-seven states currently have discovery statutes that are more progressive than the federal and District of Columbia models."). This Note will not specifically compare state systems of discovery with the current federal system because each state has different sets of rules. Indeed, some don't have rules of criminal procedure at all, instead opting for court-made rules, which would make any wholesale comparison difficult.

[39] Modernizing Rule 17, *supra* note 9.

[40] Gov't's Memorandum of L. in Opposition to Defendants' Motion for the Issuance of Rule 17(c) Subpoenas at 7, United States v. Hwang, No. 1:22-cr-00240 (S.D.N.Y. Sept. 13, 2023), ECF No. 84.

[41] *See, e.g.*, *id.*; Gov't's Opposition Brief to Defendant's Motion for Pre-trial Rule 17(c) Subpoenas at 4, United States v. Trump, No. 1:23-cr-00257 (D.D.C. Oct. 25, 2023), ECF No. 119; United States' Reply in Support of Motion to Quash Rule 17(c) Subpoenas Issued to Drug Enf't Admin., United States v. Fed. Express Corp., 2015 WL 13856691 (N.D. Cal. 2015); Gov't's Motion to Quash Defendant Graham's Fed. R. of Crim. Proc. 17(c) Subpoena, United States v. Ferguson, 2007 WL 2776436 (D. Conn. June 12, 2007).

[42] *Nixon* and *Bowman Dairy* govern party subpoenas that exceed the scope of Rule 16. United States v. Nixon, 418 U.S. 683 (1974); Bowman Dairy Co. v. United States, 341 U.S. 214 (1951).

being the most recent in 1974. Because no further guidance was given to lower courts after *Nixon*, they have interpreted the decision to have a very wide scope, governing not only the type of Rule 17(c) subpoena with which the *Nixon* Court directly dealt—a subpoena issued by a prosecutor to the President of the United States—but also subpoenas issued by defendants to nonparties in everyday criminal trials.[43] This Part will lay out the legal rules established in *Bowman Dairy v. United States* and *United States v. Nixon*, which govern the issuance of Rule 17(c) subpoenas, as well as lower courts' interpretations of the rules.

A. Bowman Dairy Co. v. United States

A mere five years after the Federal Rules of Criminal Procedure went into effect in 1946, the Supreme Court in *Bowman Dairy Co. v. United States* first defined the boundaries of Rule 17(c) and its intersection with Rule 16. In *Bowman Dairy*, the defense sought, via subpoena, information the government had received from confidential informants.[44] In deciding whether to uphold the validity of the subpoena, the Court considered the purposes of Rule 16 and Rule 17 in relation to one another.[45] As it was written, Rule 16 was intended to provide a limited right of discovery between parties to a criminal proceeding, governing what defendants could require prosecutors to turn over prior to trial and what prosecutors could request from the defense. Rule 17(c) then, which textually provides a broad right to discovery through subpoena, must be narrowed when one party wishes to subpoena the other, else Rule 16 would be rendered moot. The Court seemed concerned that, without some limitation on the scope of Rule 17(c), parties would use the Rule to circumvent the bounds of Rule 16, claiming that though Rule 16 limits the discovery to which they are entitled, Rule 17(c) grants them broad subpoena rights.[46] The *Bowman Dairy* Court therefore established a standard by which courts should evaluate what is within the reach of parties under Rule 17(c): Parties are entitled to subpoenas for materials that are "evidentiary" in nature.[47] The Court, however, did not elaborate on the meaning of evidentiary, besides noting that this

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[43] Modernizing Rule 17, *supra* note 9 ("[M]ost lower courts have embraced the *Nixon* standard and applied it to defense subpoenas of nonparties." (citing United States v. Wey, 252 F. Supp. 3d 237, 253 (S.D.N.Y. 2017))); United States v. Henry, 482 F.3d 27, 30 (1st Cir. 2007) (affirming lower court's application of *Nixon* standard to a nonparty subpoena); United States v. Stevenson, 727 F.3d 826, 831 (8th Cir. 2013) (noting that courts in the Eighth Circuit have traditionally applied the *Nixon* standard to nonparty subpoenas).

[44] *Bowman Dairy*, 341 U.S. at 216.

[45] *Id.* at 218–20.

[46] *Id.*

[47] *Id.* at 218.

standard does not mean that the materials subpoenaed must actually be used in evidence at trial.

B. United States v. Nixon

For the next twenty-three years, the Supreme Court was silent on Rule 17(c). In the time after *Bowman Dairy*, lower courts accordingly applied the "evidentiary" standard to Rule 17(c) party subpoenas, which sought material beyond the scope of Rule 16.[48] But many lower courts after *Bowman Dairy* declined to extend its evidentiary standard to subpoenas of nonparties, opting instead to judge these subpoenas using the standards contained within Rule 17(c)—denying the subpoenas only if compliance with them would be unreasonable or oppressive.[49] It was not until 1974, in the context of the Watergate scandal, that the Supreme Court granted certiorari in a case involving a Rule 17(c) subpoena of a nonparty, under circumstances that were far from the norm.

In 1972, President Richard Nixon and his administration were implicated in the Watergate scandal when individuals working for his reelection campaign broke into the Democratic National Committee's headquarters to attempt to wiretap phones and gather intelligence in anticipation of the upcoming election. This series of events kicked off a wide-reaching investigation into Nixon and members of his Cabinet, one of whom eventually revealed the existence of White House tapes of meetings between the President and his inner circle. In preparation for trial, the special prosecutor requested a Rule 17(c) subpoena from the district court, seeking the audio tapes of these secret White House rendezvous in President Nixon's possession. President Nixon was an unindicted co-conspirator; as such, he was not a party to the case. The White House challenged the subpoena, and the Supreme Court granted certiorari.

In July of 1974, the Supreme Court issued its decision in *United States v. Nixon*.[50] While the opinion of the Court primarily focused on presidential privilege and immunity, it did spend a few short paragraphs discussing how Rule 17(c) subpoenas should be evaluated. The Court applied the *Bowman Dairy* standard and specified further that, to meet

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48 *See, e.g.*, United States v. Carter, 15 F.R.D. 367, 370 (D.D.C. 1954); United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952); United States v. Malizia, 154 F. Supp. 511, 513–14 (S.D.N.Y. 1957); Swingle v. United States, 389 F.2d 220, 223 (10th Cir. 1968).

49 *See, e.g.*, United States v. Dubrow, 201 F. Supp. 101, 104 (D. Mass. 1962) (quashing Rule 17(c) subpoenas issued to nonparties on the grounds that "they constitute an unreasonable search"); United States v. Camp, 285 F. Supp. 400, 402–03 (N.D. Ga. 1967) (quashing on the grounds that the subpoena would be oppressive and unreasonable "within the clear intent of Rule 17(c)").

50 418 U.S. 683 (1974).

the "evidentiary" requirement imposed by the *Bowman Dairy* Court, the special prosecutor in this case "must clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity."[51] Notably, Chief Justice Burger also remarked that the Court was conducting a particularly diligent appellate review "where a subpoena [was] directed to a President of the United States."[52]

These three checks for a Rule 17(c) subpoena—relevancy, admissibility, and specificity—are the last bit of guidance the Supreme Court has given judges ruling on Rule 17(c) trial subpoenas. They, nevertheless, remain unelucidated. The Supreme Court has since just repeated *Nixon*'s interpretation of Rule 17(c) with no further clarification and has not dealt directly with a challenge to a Rule 17(c) subpoena again.[53] Understandably, a circuit split has developed on how the *Nixon* standard should be applied, and trial courts across the country have debated the circumstances in which this *Nixon* standard should even apply.

*C. Post-*Nixon *Chaos & Confusion*

The confusion around *Nixon* can primarily be sorted into two categories: (1) confusion about the meanings of "admissibility," "specificity," and "relevancy"; and (2) confusion around whether the *Nixon* standard reaches beyond the immediate factual circumstances of Watergate to govern all Rule 17(c) subpoenas of nonparties. Taking these in turn, this section will discuss both ambiguities of the *Nixon* opinion.

1. The Meaning of "Admissible" & Confusion About the Standards

The most controversial hurdle imposed by the *Nixon* Court by far has been the "admissibility" standard. *Nixon* read *Bowman Dairy*'s evidentiary requirement to mean that the admissibility of the evidence sought by a party should be weighed in considering whether to issue a subpoena. *Nixon*, however, offers no specific guidance as to how admissibility should be evaluated. There is a circuit split on whether, for a Rule 17(c) subpoena to be issued, defendants must show that the evidence they seek is either potentially admissible or actually admissible

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[51] *Id.* at 699.

[52] *Id.* at 702.

[53] The last case the Supreme Court heard in which it was asked to rule on a Rule 17(c) subpoena was *United States v. R. Enterprises, Inc.*, where the Court was asked to determine whether the *Nixon* standard was to govern grand jury subpoenas. 498 U.S. 292 (1991). The Court declined to extend the *Nixon* standard to this context, instead imposing a reasonableness requirement. *Id.*

under the Federal Rules of Evidence.[54] The First, Second, Fourth, and Eleventh Circuits have adopted the "potentially admissible" approach,[55] while the Third, Fifth, Sixth, Seventh, Eighth, and Ninth have adopted the "actually admissible" approach.[56] The Tenth Circuit alone is silent on the question of the definition of "admissibility" intended by the *Nixon* Court.

In over half of the circuits, defendants seeking to subpoena evidence from nonparties must show not only that the evidence might be or is likely to be admissible, but also that it will be admissible *before they ever see the evidence*. This high admissibility bar for defendants to obtain documents and testimony prior to trial—paired with the specificity and relevance elements which require that defendants provide "more than the title of a document and conjecture as to its contents" when applying for a subpoena[57]—has resulted in some clearly unfair outcomes for defendants.

One example is *Thor v. United States*.[58] In *Thor*, the defendant wished to subpoena an eyewitness that would help demonstrate his innocence to testify at trial, but the district court denied his subpoena

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54 United States v. Libby, 432 F. Supp. 2d 26, 31 (D.D.C. 2006) ("If the documents are deemed relevant, the Court must then determine whether they would be admissible. This inquiry is largely governed by the Federal Rules of Evidence.").

55 *See* United States v. LaRouche Campaign, 841 F.2d 1176, 1179 (1st Cir. 1988) (stating that *Nixon*'s admissibility requirement only mandates a "sufficient preliminary showing" that the evidence might be admissible); *In re* Irving, 600 F.2d 1027 (2d Cir. 1979) (reading admissible to include admissibility during trial for contingent circumstances like impeachment); *In re* Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (rejecting a requirement that a showing must be made that the documents sought by the subpoena will be admitted into evidence); United States v. Silverman, 745 F.2d 1386, 1397 (11th Cir. 1984) (upholding the validity of a subpoena that sought complaints that "clearly possessed evidentiary potential for impeachment purposes").

56 *See* United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981) (finding that "exculpatory material held by nonparties that does not rise to the dignity of admissible evidence simply is not within the rule" and remanding for a review of admissibility by the district court); United States v. Arditti, 955 F.2d 331 (5th Cir. 1992) (requiring that material subject to subpoena will be admissible as evidence); United States v. Hughes, 895 F.2d 1135 (6th Cir. 1990) (holding that potential admissibility of subpoenaed evidence for impeachment purposes was insufficient to comport with *Nixon* because there was no guarantee that the need for impeachment would arise at trial, making the evidence admissible, and the evidence was not otherwise admissible either); United States v. Ashman, 979 F.2d 469, 495 (7th Cir. 1992) (finding that attorney work product does not meet the *Nixon* requirements, despite the fact that the attorney work product protection can be overcome, implying that potential admissibility is not enough); United States v. Hang, 75 F.3d 1275, 1283 (8th Cir. 1996) (citing *Arditti* and *Cuthbertson* and holding that a subpoena cannot issue on a "mere hope"); United States v. Fields, 663 F.2d 880 (9th Cir. 1981) (reversing the district court's denial of a motion to quash a subpoena because impeachment evidence is conditionally admissible upon the witness testifying and therefore does not meet the *Nixon* standards).

57 *Hang*, 75 F.3d at 1283 (1996).

58 574 F.2d 215, 220 (5th Cir. 1978).

because her address could not be supplied. When Thor then tried to subpoena an address book from the Oregon Police, which he thought would contain the address of the witness, the district court also denied that subpoena, citing *Nixon* to find that the address book was not "evidentiary" under the interpretive framework of *Nixon* because it would not be admissible at trial under the Rules of Evidence.[59]

In *United States v. Avenatti*, the defendant, Michael Avenatti, subpoenaed all text messages and emails between two individuals set to be prosecution witnesses at trial "mentioning or concerning" him for an eleven-month period.[60] The witnesses responded to the subpoena but suspiciously turned over the requested communications from only the first month of the prescribed time period, refusing to turn over any messages sent after March 25, the day Avenatti was arrested.[61] The district court ultimately quashed the subpoena, holding that Avenatti's subpoena failed both the "specificity" prong of *Nixon*—because it was a "fishing expedition" with little further explanation given—and the "admissibility" prong—since Avenatti could only speculate as to the contents of the texts and could not prove there would be impeachment material contained therein.[62] Essentially, the court said that, for Avenatti to obtain text messages to use as impeachment material for his defense, he would already have to know, with credibility, that there would be impeachment material found in those text messages and their exact contents,[63] a nearly impossible task for one to do without access to the text messages.

Avenatti also highlights another distinct, yet related, issue with the *Nixon* standard, which is that the three factors, undefined by the *Nixon* Court, tend to collapse in practice, blending into one conglomerated assessment of admissibility, as courts have a difficult time applying the factors in isolation from one another.[64] When the three factors blend into one another, and there is confusion as to what each means, it creates, in practice, a large amalgam of reasons that courts can utilize to deny Rule 17(c) subpoenas. This combined analysis of the factors is often the death knell of nonparty subpoenas.

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[59] *Id.*

[60] (S1) 19 Cr. 373 (PGG), 2020 WL 508682, at *1 (S.D.N.Y. Jan. 31, 2020).

[61] *Id.* at *5.

[62] *Id.* at *6.

[63] *Id.*

[64] *See, e.g.*, *id.* at *5, *6 (blending the specificity and relevance inquiries); United States v. Trump, No. 1:23-cr-00257-TSC (D.D.C. Nov. 27, 2023) (collapsing the specificity and relevance inquiries into a broader determination of whether the subpoenas constituted a "fishing expedition"); United States v. Libby, 432 F. Supp. 2d 26, 33–35 (D.D.C. May 26, 2006) (comingling the specificity, relevance, and admissibility inquiries).

2. *Applicability of* Nixon *to Defense Subpoenas of Nonparties*

Another question that has arisen post-*Nixon* is how, if at all, courts should apply the *Nixon* and *Bowman Dairy* standards to subpoenas issued by defendants to nonparties. *Bowman Dairy* dealt with a Rule 17(c) subpoena from the defense to the prosecution, and accordingly, the Court read Rule 17(c) narrowly to avoid collision with Rule 16, which is meant to govern party subpoenas. Then, the *Nixon* Court dealt with a subpoena issued by a prosecutor to a nonparty, but the nonparty was the President of the United States. The *Bowman Dairy* Court did not discuss whether its narrow reading of Rule 17(c) in the context of a party subpoena applied when subpoenaing a nonparty. In Footnote 12, the *Nixon* Court discussed the possibility that the bar for Rule 17(c) subpoenas of nonparties might be lower than the *Bowman Dairy* "evidentiary" standard when the subpoena is issued to a nonparty, rather than to a party:

> The Special Prosecutor suggests that the evidentiary requirement of Bowman Dairy Co. and Iozia does not apply in its full vigor when the subpoena duces tecum is issued to nonparties rather than to government prosecutors. We need not decide whether a lower standard exists 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.[65]

While the *Nixon* Court indicated in this footnote that it was not deciding whether or not its interpretation of the *Bowman Dairy* standard should apply to non-presidential nonparties, courts around the country have nonetheless embraced the *Nixon* standard for subpoenas of parties and nonparties alike, barring a few exceptional judges.[66] Then-Judge Shira Scheindlin[67] highlighted this confusion in *United States v. Nachamie*.[68] In *Nachamie*, defendants charged with Medicare fraud

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65 United States v. Nixon, 418 U.S. 683, 699 n.12 (1974).

66 For further discussion of how lower courts have embraced *Nixon* and the few counterexamples of judges who have pushed back on the application of the *Nixon* standard to nonparties, see 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., no. 2, 2009, at 17.

67 The Honorable Shira A. Scheindlin served as a United States District Judge for the Southern District of New York from 1994–2011. She has since retired and works in private practice.

68 91 F. Supp. 2d 552, 561 (S.D.N.Y. 2000). While Judge Scheindlin did discuss the issue of applying *Nixon* to subpoenas of nonparties, she did not analyze the *Nixon* case via any constitutional or historical analyses, nor did she advocate that *Nixon* be narrowed to only apply to Presidents. She ultimately declined to quash the subpoena.

subpoenaed doctors for records, and one of the doctors challenged the subpoena.[69] While Judge Scheindlin followed Second Circuit precedent in applying the *Nixon* standard to the subpoenas, her opinion suggested the *Nixon* tripartite test might not apply to defendant subpoenas of nonparties. She cited the *Nixon* Court's reliance on *Bowman Dairy*, which addressed only subpoenas that sit at the intersection of Rules 16 and 17. She also advocated adherence to the plain text of Rule 17(c): that subpoenas merely be (1) reasonable and (2) unoppressive.[70] This Note will build on the arguments Judge Scheindlin made in *Nachamie*.[71]

III
The Problems with the Current Standard

Setting aside the ambiguities as to the meanings of the terms "relevancy," "specificity," and "admissibility," and the lack of clarity as to the Rule's applicability to nonparties, the standard promulgated in *Nixon* has a host of other problems. The three problems highlighted in this Part underscore the importance of the solution that this Note ultimately proposes—the narrowing of the *Nixon* standard to apply only to prosecutorial subpoenas of the President. Each on its own would be sufficient to warrant the narrowing of the *Nixon* standard, but taken together, the three problems create a pressing need for reform.

A. Critique of the Law

Because the Supreme Court relied exclusively on *Bowman Dairy* and cases interpreting it in crafting its standard for evaluating Rule 17(c) subpoenas, determining whether the *Nixon* Court's reading of *Bowman Dairy* was correct is of utmost importance. Chief Justice Burger relied on two key phrases from *Bowman Dairy*: that Rule 17(c) was "not intended to provide a means of discovery for criminal cases" and that "its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials."[72] Notably, the *Nixon* Court's quotes of *Bowman Dairy* omitted one key word: "additional." In *Bowman Dairy*, the quote actually reads "Rule 17(c) was not intended to provide an *additional* means of discovery."[73] The omission of this single word highlights exactly how and why the

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69 *Id.* at 557.

70 *Id.* at 562.

71 *See infra* Part IV.

72 United States v. Nixon, 418 U.S. 683, 698–99 (1974) (citing Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951)).

73 *Bowman Dairy*, 341 U.S. at 220 (emphasis added).

Nixon Court misunderstood the decision of the *Bowman Dairy* Court to limit the scope of Rule 17(c).

The deliberate use of the word "additional" in that sentence is key to understanding the context in which the *Bowman Dairy* Court stated that Rule 17(c) is not meant to provide a right to discovery in criminal cases. The paragraph that contains the quote used by the *Nixon* Court begins with and ends with analyses of party subpoenas, making no mention of how Rule 17(c) might apply to nonparties. The entire *Bowman Dairy* analysis turned on the fact that party discovery is already explicitly governed by Rule 16, so it would not make sense to allow significantly broader party discovery using Rule 17(c). If the rulemakers had wanted broader party discovery, they would have baked it into Rule 16. The *Bowman Dairy* Court therefore finds that Rule 17(c) is not meant to provide an *additional* means of discovery—"additional" implying discovery between parties beyond what is already covered in Rule 16. The sentence immediately following the quote cited by the *Nixon* Court even states: "However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production . . . of materials . . . ."[74] The *Nixon* Court did not pay any attention to the nuance of this argument or consider in any substantial way whether it should not have applied the *Bowman Dairy* analysis to a nonparty subpoena. Rather, they misquoted *Bowman Dairy* as establishing that Rule 17(c) broadly doesn't provide a means of discovery. In fact, the *Bowman Dairy* Court's statement should be read as: "Rule 17(c) was not intended to provide an additional means of discovery *against the Government of documents already subject to Rule 16*."[75]

The misapplication of prior precedent alone is a reason the Court has used in the past to overturn cases,[76] but the problems with *Nixon* do not stop there. Understanding how and why the Supreme Court not only misquoted itself but also failed to consider that the *Bowman Dairy* decision might belong to an entirely distinct line of cases—cases determining the bounds of party discovery in criminal cases—requires

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[74] *Id.*

[75] Henning, *supra* note 6, at 635 (describing the *Bowman Dairy* Court's misleading phraseology given that (1) the opinion was meant to limit Rule 17(c) in the context of its intersection with Rule 16 and (2) that after cases like *Brady* and revisions to the criminal rules, all of the information sought by defendants in *Bowman Dairy* would now not require a Rule 17(c) subpoena).

[76] *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1716 (2013) (citing Arizona v. Gant, 556 U.S. 332 (2009)) (explaining that the Supreme Court has overturned cases upon a finding that their predecessors "misapplied that governing precedent").

the contextualization of the case and the circumstances under which it was decided.

B. Critique of the Process

The context of the case and decisionmaking process of the Justices should also be factors when deciding whether to read *Nixon* narrowly, as these influenced much of the legal reasoning contained therein. This Section will discuss both.

While the Supreme Court is not a democratically accountable institution, the Justices of the Court are far from immune to the influence of public opinion. *Nixon* is illustrative of the critique that the Court makes decisions at the behest of the American public, rather than deciding cases based on the true meaning of the Constitution or statutes. To understand the public pressure at play in the *Nixon* case, it is important to understand the historical context.

After the Watergate scandal was exposed, the public and governmental institutions alike wanted heads to roll.[77] They wanted to know who was involved, what happened, and specifically, whether the corruption in the administration originated at the top, with President Nixon himself.[78] The actions of the Nixon Administration shocked the conscience of the public—the man entrusted to run the nation had shown a distinct lack of judgment and betrayed the trust of those who elected him. In May 1973, the Senate formed a committee to investigate Watergate and began to televise nationally the hearings held by the committee.[79]

Then came the biggest pressure point: impeachment. A House Committee was formed to determine whether there were grounds for impeachment of the President.[80] Meanwhile, a special prosecutor indicted seven Nixon Administration officials in connection with Watergate and subpoenaed the White House for tape recordings of the Oval Office.[81] After the prosecutor requested these subpoenas, the House began "consideration of whether articles of impeachment were warranted."[82] Concerned about his image in light of the pending impeachment hearings, Nixon moved to quash the subpoenas issued by the special prosecutor for the tapes, claiming that they were improper under

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77 *Watergate Scandal*, Encyclopedia Britannica, https://www.britannica.com/event/Watergate-Scandal [perma.cc/6XWB-7WCR].

78 *Id.*

79 *Id.*

80 Lackland H. Bloom, Do Great Cases Make Bad Law? 325 (2014).

81 *Id.* at 325.

82 *Id.*

Rule 17(c) and invoking presidential privilege.[83] Nixon's press secretary then held a press conference claiming that the President would only turn over the tapes if there was a "definitive" ruling by the Supreme Court, which the Justices interpreted to mean that they should strive to issue a unanimous opinion, giving the President no choice but to comply.[84] This prompted the prosecutors to petition the Supreme Court for certiorari, bypassing the Court of Appeals—a near unprecedented move by prosecutors.[85] The Supreme Court, finding "itself in the middle of a political crisis quite unlike anything it had ever before experienced,"[86] was then forced to decide whether they would grant certiorari and allow prosecutors to bypass the Court of Appeals, assuming that Nixon would not turn over the tapes absent a unanimous ruling.[87] Justice Brennan convinced the Justices to vote in favor of granting certiorari by stressing "the history of the Court at critical moments in American history, such as when it headed off Truman's seizure of American steel mills and when it stepped into . . . the struggle to integrate the schools in Little Rock."[88] The Justices ultimately split 6-2 in favor of the bypass.[89] Critics have likened the Justices in *Nixon* to "compulsive gamblers unable to resist a piece of the action" for this decision.[90]

The abnormalities of *Nixon* didn't stop there. While most cases take years to make their way up to the Supreme Court, *Nixon* took three months from the date that the district court issued its decision to the date that the Supreme Court issued its own. The Supreme Court granted certiorari on June 15, oral argument took place July 8, and by July 25, the Supreme Court's decision in *Nixon* was released. It is typical for the task of drafting an opinion to take months, with multiple drafts circulating and tons of conferences of the justices,[91] but in the case of

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[83] *Id.*

[84] *Id.* at 336 ("Unanimity was important not necessarily to avoid outright defiance but instead to aid in convincing the president and his remaining supporters that there was little point in continuing to fight on.").

[85] *See* Del Dickson, The Supreme Court in Conference (1940–1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 182 (2001) (establishing that parties had only successfully bypassed courts of appeals in cases six times prior to *Nixon*).

[86] Bloom, *supra* note 80, at 334.

[87] *See id.* at 326 ("[T]he justices were convinced that as with *Brown v. Board of Education*, it was essential that they produce a unanimous opinion.").

[88] Dickson, *supra* note 85, at 184–85 n.36.

[89] *Id.* at 184.

[90] Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. Rev. 30, 33 (1974).

[91] *See* Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 3 (1979) ("It can be months before these opinions—a majority, dissent, or concurrence—are sent out or circulated to the other Justices. In some cases, the majority opinion goes through dozens of drafts . . . .").

Nixon, no such time was taken. The reason for this expedited timeline was simple: With the Court's Term ending in July and not resuming until October, the Supreme Court Justices knew that their opinion had to be handed down immediately because the House might want to use the tapes in any impending impeachment investigations.[92] They were correct. Two days after the *Nixon* decision was issued, on July 27, the House Judiciary Committee recommended an Article of Impeachment be brought against President Nixon for his involvement in Watergate.[93]

Finally, the Court was not only on a rushed timeline, but the need for unanimity created a very odd decision-making dynamic. As was the case with *Brown v. Board of Education*,[94] the Justices went into *Nixon* with the mindset that it was "essential that they produce a unanimous opinion" to ensure that President Nixon had no choice but to comply with the subpoenas.[95] Unanimity was achievable, but the judicial decision-writing process was affected because the need for unanimity "increased the leverage of any justice who might [have] threaten[ed] to concur or dissent."[96] Originally, Chief Justice Burger assigned himself the opinion, but several of the Justices were not pleased with his initial drafts, so they began to write their own versions of the opinions.[97] Typically, the Chief Justice, if he is in the majority, assigns the opinion to himself or someone else to draft in its entirety.[98] In the case of *Nixon*, however, the compromise the Justices reached was for each different section to be written by a different Justice, eventually subject to review by the Chief Justice: Justice Blackmun would write the facts, Justice White would write the section on Rule 17(c), Justice Brennan would write the section on standing, Chief Justice Burger would write the section on presidential privilege, and Justice Stewart would write the section on appealability.[99] The applicability of Rule 17(c) to subpoenas

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92 *See* Bloom *supra* note 80, at 330 ("Given that the Court's term was about to end, the case would not have been heard prior to October.").

93 *Id.* at 329.

94 347 U.S. 483 (1954) (also decided in a very politically charged environment at the onset of the civil rights movement).

95 Bloom, *supra* note 80, at 326.

96 *Id.*

97 *See generally* Woodward & Armstrong, *supra* note 91, at 310–25 (describing the Justices' dissatisfaction with Chief Justice Burger's early drafts and their collective effort to rewrite the opinion).

98 *See Visitor's Guide to Oral Argument*, Sup. Ct. of the U.S., https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx [https://perma.cc/5YWD-QHXD] (explaining the selection, briefing, argument, and case decision assignment process).

99 *See* Woodward & Armstrong, *supra* note 91, at 326. *See generally id.* at 310–35 (detailing the discussions and quarrels of the Justices in drafting the final opinion).

issued to the President was the most hotly contested section.[100] While Justice Powell thought that Rule 17(c) should not apply at all and an entirely different standard should apply when a subpoena is issued to the White House, Justices White and Stewart thought that the President should be subject to the same subpoena rules as the common criminal defendant.[101] Justice Brennan took the middle ground by supporting a standard of review that would be a heightened or stricter version of Rule 17(c) when applied to the President.[102] Ultimately, the Justices struck a deal out of necessity, primarily adopting Justice White's version of things but adding in a sentence from Justice Brennan's original draft, the sentence about a subpoena directed to the President requiring particular meticulousness.[103] The Justices themselves seemed to realize that the ad hoc construction of this portion of the opinion could spell trouble down the line, thus using Footnote 12 as a convenient way to limit the reach of their analysis. *Nixon* was ultimately a case study in having "too many cooks in the kitchen"—but these cooks were Justices of the highest court in the land.

The Court's methodology in drafting its final opinion and the public pressure present in the case were atypical and, in hindsight, should affect the precedential value of the case.[104] What instills any given case with the force of precedent is the idea that a panel of Justices expressed agreement as to the entirety of the opinion, else they would have dissented or written a concurrence explaining their departure in reasoning from the majority.[105] In *Nixon*, however, the Justices knew that concurring was not an option—anything but a unanimous majority opinion would give President Nixon the space to question the legitimacy of the decision and resist turning over his tapes.[106] This raises

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100 *See generally id.* at 290–335 (discussing the debates of the Justices over what their stance on Rule 17(c) would be).

101 *Id.*

102 *Id.*

103 *Id.* at 324.

104 *See* Anne Y. Shields, *The Supreme Court Under Pressure: A Comparative Analysis of* United States v. Nixon *and* Nixon v. Fitzgerald, 57 St. John's L. Rev. 750, 760 (1983) (critiquing *Nixon* on its lack of constitutional analysis, yet sweeping claims, which "present[] a real danger with respect to its precedential ramifications"). *See also, e.g.*, Charles L. Barzun, *Impeaching Precedent*, 80 U. Chi. L. Rev. 1625, 1626–27 (2013) (arguing that *NFIB v. Sebelius* should be afforded less precedential weight if Chief Justice Roberts "switched his vote . . . largely for political or institutional reasons").

105 *See generally* Melissa M. Berry, Donald J. Kochan & Matthew Parlow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After* Rapanos, 15 Va. J. Soc. Pol'y & L. 299 (2008) (describing how the precedential value of fractured opinions is undermined).

106 Justice Powell later commented in an interview that the Court was keenly aware of the possibility of defiance if any of the Justices had written separately given that the Court was armed with forty or fifty security officers, whereas the President's backup was

the question: What precedential force does a decision deserve when the underlying requirement for an opinion to constitute precedent—that it truly represents the opinion of all the Justices signed on—is not satisfied? Cases cannot be afforded precedential value without due consideration of the circumstances under which they were decided.[107] It is deeply disturbing that we currently apply the logic of an opinion this poorly written, internally contested, and political to everyday criminal defendants to limit substantially their right to discovery. *Nixon* is a Frankenstein opinion, drafted "by committee,"[108] the precedential value of which should be cabined to the case's factual circumstances—a Rule 17(c) subpoena issued from a prosecutor to the President.

C. Unconstitutional Outcomes

The issues with the *Nixon* standard don't end with its misguided reliance on caselaw or the suspect circumstances surrounding the case. As the *Nixon* Court acknowledged, the Fifth and Sixth Amendment work in tandem to guarantee defendants a right to discovery prior to trial.[109] These two amendments, taken together, also ensure that criminal defendants may present a "complete defense" at trial.[110] This "complete defense" right is born from the intersection of the Due Process Clause and the Compulsory Process Clause,[111] and to protect that right, the Court has created an "area of constitutionally guaranteed

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the "first infantry division." Bill Moyers, *In Search of the Constitution, Justice Lewis Powell, Jr.* (June 25, 1987), https://billmoyers.com/content/justice-lewis-f-powell [https://perma.cc/X3ZB-HN3W].

107 For a holistic argument on the importance of considering historical evidence and political motivations when determining whether an opinion should be afforded precedential weight, see generally Barzun, *supra* note 104, at 1672 ("[H]istorical evidence that impeaches a past decision—that is, evidence that bears on whether the decision was motivated by 'extralegal' considerations—is relevant to a court's analysis of precedent.").

108 Bloom, *supra* note 80, at 335.

109 United States v. Nixon, 418 U.S. 683, 711 (1974) ("The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers . . . the right . . . 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that 'no person shall be deprived of . . . due process of law.'").

110 California v. Trombetta, 467 U.S. 479, 485 (1984) ("We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.").

111 Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (internal citations omitted)); Washington v. Texas, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

access to evidence."[112] The Court has also intimated that "the Federal Government might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial."[113] Current Rule 17(c) jurisprudence contradicts the "complete defense" principle inherent in the Fifth and Sixth Amendments, shaping a system of criminal discovery rife with constitutional defects.[114]

It is generally very difficult to persuade appellate courts to overturn lower court rulings on Rule 17(c) subpoenas on a factual basis because the enforcement of pretrial subpoenas is "committed to the sound discretion of the trial court."[115] Thus, in determining whether the district court erred in quashing a subpoena or refusing to issue one, circuit courts must find the judge acted in a way that was "clearly arbitrary or without support in the record."[116] This standard is higher than the "clearly erroneous" standard. Even if a subpoena meets the technical requirements of *Nixon*, and the court nonetheless denies the subpoena, the circuit can still "defer" to the district court to support its finding as an extension of their discretion.[117] Thus, the next option for defendants seeking to overturn a district court's ruling on a Rule 17(c) subpoena may be a constitutional challenge to the current system of defense discovery, rather than a challenge to a ruling itself. The following subparts outline the constitutional provisions that can be invoked to challenge the *Nixon* standard.

1. Fifth Amendment Due Process Clause

When the United States seeks to send an individual to prison or otherwise deprive her of liberty, constitutional guardrails exist to balance the procedural rights of defendants with the obligation of the state to enforce federal criminal law. The Fifth Amendment guarantees defendants the right to due process of law before the deprivation of their liberty.[118] This is a broad right, and many parts of the criminal

112 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

113 *Trombetta*, 467 U.S. at 485.

114 *Crane*, 476 U.S. at 690; *Trombetta*, 467 U.S. at 485 (describing the complete defense principle).

115 United States v. Nixon, 418 U.S. 683, 702 (1974).

116 United States v. Hughes, 895 F.2d 1135, 1145 (6th Cir. 1990) (citing *Nixon*, 418 U.S. at 702).

117 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, 362 (2015).

118 U.S. Const. amend. V.

justice system fall within the bounds of this rule. The right of criminal defendants to discovery is no exception.[119]

Despite this, the *Nixon* Court did not analyze any constitutional rights owed to defendants, as the Rule 17(c) subpoena was requested by prosecutors, and the Justices were concerned with expediency.[120] Despite the distinct lack of constitutional analysis in *Nixon*, courts have nonetheless adopted the *Nixon* approach as to subpoenas requested by both prosecutors *and* defendants. The Supreme Court has never addressed the question of whether the *Nixon* standard is constitutional as applied to criminal defendants. However, other opinions of the Court in the realm of defense discovery in criminal cases offer some guidance regarding the constitutional soundness of the *Nixon* standard. In *Brady v. Maryland*[121] and *Giglio v. United States*,[122] the Supreme Court famously applied the Due Process Clause to protect a defendant's right to compel evidence from prosecutors that is exculpatory or could be used to impeach a government witness. Both cases relied heavily on the notion that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of . . . good faith . . . ."[123] While *Brady* was limited to evidence in the possession or control of the prosecution, it is not a stretch to apply the constitutional principles it outlines to the *Nixon* standard. Underlying *Brady* was the notion that the government should not deny defendants that they seek to imprison the right to potentially exculpatory evidence that the government controls. In a way, via Rule 17(c), the government (albeit, not the prosecution) holds the keys to evidence from third parties as well. If the Constitution is meant to balance the rights of individuals against the power of the government, I see little compelling reason why a Rule from the judicial branch or a Supreme Court decision should be treated as constitutionally distinct from government action via the prosecution. Indeed, the Fifth Amendment guarantees the defendant the right to due process of law and does not specify a governmental actor. The *Nixon* standard and Rule 17(c) are both creations of the

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119 *See generally* Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111 (1978) (discussing the breadth of the Due Process Clause).

120 *See supra* Section III.A.

121 373 U.S. 83, 87 (1963) (holding that the suppression of exculpatory evidence by prosecutors was a violation of due process).

122 405 U.S. 150, 154 (1972) (holding that government's failure to disclose that they had signed a non-cooperation agreement with a witness testifying against the defendant was a violation of due process).

123 *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 153 (citing *id.*).

United States government and operate in a governmental system used to imprison defendants. This being the case, one could feasibly extend the principles of *Brady* to say that the government ought not deny, via Rule of Procedure or court ruling, defendants the right to exculpatory evidence from any source.

Applying the *Brady* logic to the *Nixon* standard raises some concerns. If a subpoena fails any part of the *Nixon* tripartite test, the court must deny it. It is therefore possible that the defendant seeks evidence that is both material to proving his innocence and admissible but is nevertheless denied the subpoena because he does not ask for it specifically enough.[124] Say, for example, a defendant is on trial for murder, and the only eyewitness is his elderly neighbor. The defendant recalls having a conversation with her at some point regarding her vision problems, but he can't recall exactly what her affliction is. So, the defendant subpoenas the witness's optometrist for any records relating to the patient's vision. While certainly relevant and potentially exculpatory if the witness truly has awful vision, the court, depending on the circuit, could deny this subpoena on admissibility grounds, deeming it impeachment evidence which is only conditionally admissible at trial. Otherwise, they could deny it on specificity grounds, requiring that the defendant request records for a specific condition, surgery, or procedure.[125] The principle outlined in *Brady* directly conflicts with this potential outcome. Defendants can be denied evidence that is potentially material to proving their innocence on technical grounds under the current construction of Rule 17(c). The prosecution denying the defense access to their files and the Court telling defendants they may not seek exculpatory evidence from third parties are different sides of the same coin, and the impact on the defendant is the same in both scenarios: The defendant cannot organize the complete defense to which they are constitutionally entitled because of some governmental action.

Deprivation of access to potentially exculpatory evidence is not the only due process concern that the *Nixon* standard raises. When ruling on the constitutionality of state criminal discovery systems, the Supreme Court has held states to a bar that its own system would not meet. The Supreme Court has held that, to guarantee a defendant

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[124] *See, e.g.*, United States v. Morris, 287 F.3d 985, 991 (2002) (finding that "while the information [the defendant] sought through his Rule 17(c) subpoena appears highly relevant and is arguably admissible, his request does not meet the specificity requirement set forth in *Nixon*").

[125] This hypothetical is notwithstanding any rules on doctor-patient confidentiality or statutory bars to discovery of this type of information and is more so meant to illustrate problems with the system in an easily digestible way.

his due process rights, state rules that affect access to discovery must be relatively equal between the defendant and prosecutors.[126] When evaluating state rules of discovery for constitutionality under the Due Process Clause of the Fourteenth Amendment, the Court's analysis turns on "whether the defendant enjoys reciprocal discovery against the state."[127] While reciprocity was used in the context of *Wardius* to prescribe what parties were entitled to discover from one another, the constitutional idea of reciprocity seems to come from some notion of balance—that prosecutors and defendants should have access to the same amounts of information.[128] Federal criminal discovery, however, is not similarly balanced, as prosecutors have unfettered access to testimonial and document discovery during the grand jury process, while defendants are left with Rule 17(c) as their only mechanism to obtain pretrial discovery from nonparties.[129] While prosecutors may also seek Rule 17(c) subpoenas after the grand jury phase, few prosecutors need to resort to 17(c) to conduct additional discovery on the eve of trial. Prosecutors, at that point, have had the opportunity to sweep as far and as wide as possible using grand jury subpoenas, as well as other investigative tools available exclusively to them, with the knowledge that any subpoenas filed after the grand jury process will be subject to a much higher standard of scrutiny.

When reviewing state discovery laws, the Supreme Court has identified certain due process principles that defendants can raise when challenging the constitutionality of *Nixon*. In *Wardius v. Oregon*, for example, the Supreme Court struck down an Oregon rule that required defendants to provide the state with notice that they planned to present an alibi because the Due Process Clause "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."[130] While the Due Process Clause does not speak specifically to the amount of discovery that each party is entitled to, it "does speak to the balance of forces between the accused and his accuser."[131] While the *Nixon* standard for Rule 17(c) does not place an affirmative burden of action on defendants, it does burden them in a different way when

126 *See* Wardius v. Oregon, 412 U.S. 470, 475 (1973) (noting that a strong showing of state interest is required to overcome the presumption that both prosecution and defense are entitled to discovery).

127 Williams v. Florida, 399 U.S. 78, 87 n.20 (1970) (finding that a notice-of-alibi rule was not a deprivation of due process because Florida allows very liberal discovery by the defendant against the state, making the rule just reciprocal).

128 *See Wardius*, 412 U.S. at 474 (stating that the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser").

129 *See supra* Part I.

130 *Wardius*, 412 U.S. at 472.

131 *Id.* at 474.

one considers their relative lack of opportunity to investigate their case using subpoenas. If this is a rule that burdens the defendants' discovery process, the question then is whether they receive relatively equal discovery to prosecutors, or whether the current discovery system balances the forces of the prosecution and defense because "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street."[132] The standard contained in the text of Rule 17(c) is still not as low as the bar for prosecutors to get grand jury subpoenas, but it is certainly a step closer to government-defendant reciprocity than is the *Nixon* standard. This standard would also give judges ample discretion to balance efficiency with due process concerns on a case-by-case basis.

Significantly, *Wardius* was decided by an almost identical Court as *Nixon*, only one year before in 1973. In the year prior to *Nixon*, the Supreme Court reiterated the importance of balanced discovery for ensuring due process, and *Nixon*, by its terms, didn't purport to overturn or limit *Wardius*. One could argue, using the constitutional language of *Wardius*, that any rule that creates an unreasonably imbalanced system of discovery power is unconstitutional. Therefore, if the *Nixon* Court's construction of Rule 17(c) has led to a gross power imbalance between the defendant and the prosecution in the context of discovery, then the *Nixon* standard is arguably unconstitutional when applied to criminal defendants.

2. Sixth Amendment Compulsory Process

Although the Compulsory Process Clause of the Sixth Amendment is likely the first thing that comes to mind when one is evaluating a defendant's discovery rights, it is actually an area of law that the Supreme Court has generally avoided.[133] Because the distinction between the Compulsory Process Clause and the Due Process Clause is murky, the Supreme Court has traditionally resorted to citing the Due Process Clause even in criminal discovery cases where the Compulsory Process Clause could be invoked.[134] This Note will explore the Sixth Amendment as an avenue for constitutional redress anyway because it is possible that a court reviewing the constitutionality of the *Nixon* standard would at least give it some weight. In fact, a court might even opt to lean more heavily on the Sixth Amendment than prior courts

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132 *See id.* at 475.

133 *See* Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987) ("[T]he Compulsory Process Clause was rarely a factor in this Court's decisions during the next 160 years.").

134 *See id.* ("Instead, the Court traditionally has evaluated claims . . . under the broader protections of the Due Process Clause . . . .").

have because the Compulsory Process Clause deals more specifically with discovery than the Due Process Clause.

The first analysis of the Compulsory Process Clause arose in 1807 in two cases with facts very similar to the circumstances of *Nixon*. During the treason and misdemeanor trials of Aaron Burr, Chief Justice John Marshall, presiding as a trial judge, wrote an opinion addressing the application of the Compulsory Process Clause to Burr's subpoena of President Thomas Jefferson.[135] Much like in *Nixon*, President Jefferson, the target of the subpoena, was not a party to the case, and because he was still the President, the subpoena was served on the White House.[136] The primary difference between the *Burr* cases and *Nixon*, however, was that in the former, the defendant sought the subpoena, rather than the prosecution, which meant Chief Justice Marshall had to determine whether the subpoena was a constitutional entitlement of the defendant.[137]

The *Burr* cases are crucial to understand the Framers' vision of criminal discovery, as courts often look to caselaw from Chief Justice Marshall and the Marshall Court around the time of the founding and ratification of the constitutional amendments to derive original meaning and intent.[138] Chief Justice Marshall described the practice of permitting criminal defendants to obtain the process of the court to aid in their defense "as convenient and as consonant to justice as it is to humanity."[139] He rebuked the notion that defendants should have to jump through significant hoops to gain discovery, and specifically noted that the defendants themselves should be the ones that determine the materiality of the documents they seek, as it is their liberty on the line.[140] While *Nixon* later imposed strict relevancy and admissibility requirements because of its reading of Rule 17(c), Chief Justice Marshall had written in *Burr II*[141] that it would make little

135 United States v. Burr (*Burr I*), 25 F. Cas. 30, 32 (No. 14,692d) (Cir. Ct. D. Va. 1807); United States v. Burr (*Burr II*), 25 F. Cas. 187, 190–91 (Cir. Ct. D. Va. 1807) (No. 14,694).

136 *Burr I*, 25 F. Cas. at 34; *Burr II*, 25 F. Cas. at 190–91.

137 *Burr I*, 25 F. Cas. at 33; *Burr II*, 25 F. Cas. at 193.

138 *See* Gordon Lloyd, *Marshall v Madison: The Supreme Court and Original Intent, 1803–1835* (Pepp. Sch. Pub. Pol., Working Paper No. 16, 2003) ("The originalists see *Marbury*, and the decisions of the Marshall Court, as a reaffirmation of the principles of the American Founding . . . ."); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 Minn. L. Rev. 612, 614–15 (2006) (describing the tremendous influence of Supreme Court cases from the first decade of the new republic).

139 *Burr I*, 25 F. Cas. at 32.

140 *Id.* at 35 ("[I]t would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material.").

141 *Burr II*, 25 F. Cas. at 191 ("Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor.").

sense to enforce such requirements stringently on defendants because relevancy or admissibility might not become clear until the prosecutor has developed his case and the supporting evidence is presented to the defense and jury.[142] Ultimately, in both *Burr* cases, the court emphasized the importance of "treat[ing] the defence with as much liberality and tenderness as the case will admit," a mantra which the *Nixon* opinion has since retired.[143] Notably, *Nixon* did not consider either *Burr* case. Thus, *Nixon*'s subsequent use by lower courts has ignored the vision of defense discovery outlined by Chief Justice Marshall.

One hundred and six years passed before the Court again addressed the Compulsory Process Clause in *Pennsylvania v. Ritchie*.[144] *Ritchie* cursorily mapped the relationship between due process and compulsory process. Compulsory process, at a minimum, guarantees criminal defendants the assistance of the state in compelling favorable evidence and testimony that might influence the jury's determination of guilt.[145] And at most, compulsory process provides the same protections provided by due process: Defendants "have the right to compel production of all material items."[146]

The Court generally places a premium on the ability of the defense to discover evidence that might be material to proving the defendant's innocence. This belief is reflected in *Nixon* itself, which stated that:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . .[147]

This section of *Nixon* is seldom cited by lower courts but may provide guidance on more accurately applying the standard endorsed by the *Nixon* Court. The importance of this common theme of open discovery in each of these Supreme Court opinions should not be disregarded by lower courts. Since the *Nixon* Court did not conduct

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142 *Id.* at 196 (stating that "the testimony of Mr. Neale . . . is at present inadmissible" and that, of the counts against Burr "[a]ny legal testimony which applies to any one of these counts is relevant").

143 *Id.* at 191.

144 480 U.S. 39 (1987).

145 *Id.* at 56.

146 Miller, *supra* note 117, at 348–49; *see also Ritchie*, 480 U.S. at 56 (concluding that the Compulsory Process Clause "provides no greater protections in this area than those afforded by due process").

147 United States v. Nixon, 418 U.S. 683, 709 (1974).

a constitutional analysis and considered only a situation where the government had requested a subpoena of a President, one must look to its general statements about criminal discovery to attempt to glean *Nixon*'s applicability to criminal defendants and their subpoenas of nonparties. These statements read as extremely supportive of defense discovery, consistent with caselaw prior to and after *Nixon*. They can, therefore, perhaps inform our understanding of *Nixon*'s applicability—or lack thereof—to defendants. Because the current *Nixon* construction of Rule 17(c) prevents defendants from using the process of the court to compel material that would materially aid in their defense, it is likely unconstitutional under the Sixth Amendment Compulsory Process Clause when applied to defendants.

IV
Rethinking the *Nixon* Standard

A. Court-Driven Reform as an Alternative to Rule Reform

There are two conceivable ways to repair the broken system of criminal discovery. The first, advocated for by this Note, is a court-driven reform movement. Under such an approach, district courts would follow the lead of Judge Scheindlin and other judges who have declined to apply the *Nixon* standard to nonparties[148] and urge circuit courts to reconsider whether their application of the *Nixon* standard to defense subpoenas of nonparties has been "out of habit more than reason."[149] It advises criminal defendants to argue that district courts should step outside of the framework of *Nixon*, requesting that they evaluate nonparty subpoenas using a different standard. And if the subpoenas are nonetheless denied, this approach counsels defendants to challenge the denial of requested 17(c) subpoenas on due process or compulsory process grounds.

The second possible solution is amending the text of Rule 17(c) explicitly to include a new standard, which would functionally overturn *Nixon*. Advocates of this approach put forth the proposal that the Rule be revised to "grant both parties to a criminal proceeding the ability

[148] *See, e.g.*, United States v. Stein, 488 F. Supp. 2d 350, 365 (S.D.N.Y. 2007); Nachamie v. United States, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000) (noting the limitations of the *Nixon* test while still engaging in a full analysis under its standard); United States v. Tucker, 249 F.R.D. 58, 66 (S.D.N.Y. 2008); United States v. Tomison, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997).

[149] Norah Senftleber, Note, *No More* Nixon*: A Proposed Change to Rule 17(c) of the Federal Rules of Criminal Procedure*, 92 Fordham L. Rev. 1697, 1716 (2024).

to marshal documents and information, so long as they are '*relevant and material to the preparation of the prosecution or defense.*'"[150] This language change would alter the Rule from ordering that subpoenas be quashed if compliance would be "unreasonable or oppressive" to requiring that the court issue these subpoenas so long as they seek documents that are "relevant and material."[151] This idea has received recent scholarly attention, yet none have compared it to a court-driven approach.[152] This Section compares court-driven reform to Rule reform and will ultimately conclude that a litigant-centered and court-driven reform route is preferable for two reasons: timing and clarity.

When dealing with the defense discovery problem, there is certainly a need for speed. With nearly 80,000 federal criminal defendants per year,[153] and the number of federal arrests increasing,[154] the longer it takes to repair the system, the more defendants will be left at the mercy of the current *Nixon* standard. It is therefore critical that one considers both reform approaches with an eye for rapidity.

Though it would certainly take time for a full-scale, nationwide adoption of the legal regime that this Note recommends in Section IV.B, this approach is immediately actionable. District court judges in districts with high-profile cases have already begun espousing discontent with the current system,[155] and if this practice became widespread enough, circuit courts would be forced to reckon with this issue. Though the Supreme Court denied certiorari on the issue of whether *Nixon* applies to nonparty subpoenas eight years ago,[156] if a circuit split were to develop on the applicability of *Nixon* to nonparty subpoenas or on whether the current system as applied to defendants is unconstitutional,[157] it is significantly more likely that the Supreme

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150 MODERNIZING RULE 17, *supra* note 9 (emphasis added).

151 *Id.*

152 *See, e.g.*, Senftleber, *supra* note 149, at 1701; MODERNIZING RULE 17, *supra* note 9.

153 John Gramlich, *Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty [https://perma.cc/NW5G-W5B8] ("[N]early 80,000 people were defendants in federal criminal cases in fiscal 2018 . . . .").

154 MARK MOTIVANS, U.S. DEPT. JUST., FEDERAL JUSTICE STATISTICS, 2022 1 (2024), https://bjs.ojp.gov/document/fjs22.pdf [https://perma.cc/2CXA-5WP9].

155 *See supra* note 148 and accompanying text.

156 Rand v. United States, 580 U.S. 1001 (2016) (denying *cert.*); Petition for Writ of Certiorari, Rand v. United States, 580 U.S. 1001 (No. 16-526).

157 The existing circuit split discussed *supra* Section II.C.1 is not a circuit split on the applicability of the *Nixon* standard to subpoenas of nonparties or on the constitutionality of the current system. Rather, it is a circuit split on the interpretation of the "admissibility" requirement of the *Nixon* standard. I argue that a circuit split on a more substantive question like applicability of *Nixon* to subpoenas of nonparties or the constitutionality of the system when applied to defendants—rather than a definitional debate—heightens the

Court would grant certiorari.[158] There is nothing stopping circuit courts from implementing the system of defense discovery this Note recommends because "unstated assumptions on non-litigated issues are not precedential."[159] The *Nixon* Court expressly left the question open of whether this heightened standard applies to defense subpoenas of nonparties in Footnote 12, leaving circuit courts free to reconsider whether *Nixon* applies to defense subpoenas of third parties and whether this system is constitutionally sound.[160]

By contrast, the textual revision approach involves a very long timeline. The Rule amendment process is governed by the Rules Enabling Act and other statutes, which require lengthy procedures before any rule can be amended.[161] For any amendment to the Federal Rules of Criminal Procedure, the process is therefore extensive and fraught with obstacles.[162] Currently, while the Advisory Committee has been asked to consider expanding defense discovery under Rule 17, the process is still in its earliest stages.[163] Once the initial consideration by the Advisory Committee has concluded, if it decides that the rule

certworthiness of a claim because the pretrial discovery rights of defendants would vary vastly depending on the circuit in which they were being charged.

158 *See* Kevin Russell, *Writing A Convincing Cert. Petition When There Is No Direct Circuit Split*, SCOTUSblog: Commentary (May 17, 2007), https://www.scotusblog.com/2007/05/commentary-writing-a-convincing-cert-petition-when-there-is-no-direct-circuit-split [https://perma.cc/WH5M-HBQM] ("Petitions unable to assert clear circuit split are hard to get granted, even by very good Supreme Court counsel."); Tejas N. Narechania, *Certiorari in Important Cases*, 122 Colum. L. Rev. 923, 925 (citing H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 246 (1991)) ("The Supreme Court is most likely to grant review where there is a split in authority among, say, the federal courts of appeals."); H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

159 Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985). *See also* Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents."); Brecht v. Abrahamson, 507 U.S. 619, 630–31 (1993) (noting that stare decisis does not attach unless the issue was "squarely addressed" in a previous case); Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F.2d 103, 113 (2d Cir. 1988) ("[A] *sub silentio* holding is 'not binding precedent.'"); Fernandez v. Keisler, 502 F.3d 337, 344 n.2 (2007) ("We are bound by holdings, not unwritten assumptions.").

160 *See* United States v. Nixon, 418 U.S. 683, 699 n.12 (1974).

161 28 U.S.C. §§ 331, 2071–77 (1988).

162 *Overview for the Bench, Bar, and Public*, U.S. Courts, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/92MA-Y45R] ("The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review.").

163 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/AU3D-S33L] (describing that a subcommittee was convened to determine certain questions about Rule 17).

change is meritorious, it asks the Reporter to draft the amendment and an explanatory note.[164] Next, once the Advisory Committee has voted to amend a rule, it seeks the approval of the Standing Committee to release the proposal to the public for comment.[165] The comment period typically lasts for six months.[166] The Reporter then summarizes the comments for the reference of the Advisory Committee.[167] If it votes to approve the amendment again, the Advisory Committee then sends it back to the Standing Committee which may approve, modify, or kill the rule change altogether.[168] If the change is substantial, the Rule must go back to the Advisory Committee. Then, once it clears the Standing Committee, the amendment is sent to the Judicial Conference for approval, which meets once a year, and if it greenlights the amendment, the amendment is then sent to the Supreme Court for their approval.[169] The Supreme Court then has seven months to review the amendment and send it for Congressional approval.[170] Finally, Congress has seven months to reject or modify the amendment before it takes effect.[171] All told, the process typically takes around three years and can take much longer if the amendment runs into resistance at any point during the process.[172]

The timeline isn't the only problem with the Rule reform approach. While the proposed amendment to Rule 17(c) might sound like it would avoid the interpretation problem of the current standard, "the by-product of codification, however, is interpretation."[173] A new standard subjecting anything "relevant and material to the preparation of the prosecution or defense" to subpoena would begin yet another interpretation problem.[174] What does relevant mean? What does material mean? Are they separate inquiries or are they the same? In fact, "relevant and material" seems like a higher bar for defendants to clear than the current "reasonable and unoppressive." The current standard could, in practice, require a mere showing that the subpoena is

164 Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1672–73.

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 1666.

173 Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 Loy. L.A. L. Rev. 1283, 1283 (1995) (discussing how each amendment and draft of the rules can make things more confusing for interpreting courts).

174 Modernizing Rule 17, *supra* note 9.

"(1) reasonable, construed using the general discovery notion of 'material to the defense;' and (2) not unduly oppressive for the producing party to respond."[175] New isn't always better. While the current system is certainly rife with ambiguities, any new language would introduce new interpretive ambiguities. The difference is that, with the current system, the requirements for subpoenas contained in the rule itself are less stringent, and courts have already begun exploring the possible interpretations of "unreasonable and oppressive,"[176] meaning courts wouldn't be starting from scratch. Court-driven reform, therefore, is a preferable solution to Rule reform. The next Section will propose a system of interpretation as a starting point for courts to consider.

B. A New Tripartite Approach

Since the New York City Bar wrote the Advisory Committee on the Federal Rules of Criminal Procedure almost two years ago, nothing has changed.[177] This Note thus advances the argument that it is incumbent upon federal courts to do the heavy lifting. Given the precedential and constitutional weaknesses of *Nixon*, this Section will propagate an alternative to rule reform—a new standard for the evaluation of Rule 17(c) subpoenas—which calls upon the courts to act, rather than the Advisory Committee. This solution will factor in the requirements outlined in this Note arising from the Due Process Clause, Compulsory Process Clause, and, by extension, the right to present a complete defense. It will also attempt to operate without overturning or substantially altering the holdings in *Bowman Dairy* and *Nixon* to comport with the Court's doctrine of stare decisis. Balancing all of these factors, I propose the following tripartite approach to criminal discovery.

Criminal discovery can be separated into four camps: (1) Pre-indictment grand jury subpoenas, (2) Post-indictment prosecutorial subpoenas to nonparties, (3) Post-indictment defense subpoenas to nonparties, and (4) Post-indictment party subpoenas (defense to prosecution or prosecution to defense). The first camp—pre-indictment grand jury subpoenas—has already been handled by the Supreme Court in *R. Enterprises* and is outside the scope of this Note.[178] The last three categories of Rule 17(c) subpoenas, however, are currently all treated the same after *Bowman Dairy* and *Nixon*—with courts typically applying the *Nixon* "relevancy, specificity, and admissibility" standard

175 United States v. Nachamie, 91 F. Supp. 2d 552, 562 (S.D.N.Y. 2000).
176 *See, e.g.*, *id.*
177 Modernizing Rule 17, *supra* note 9.
178 United States v. R. Enters., Inc., 498 U.S. 292, 299–300 (1991).

to all three in one brush stroke. I propose that these should all be treated as distinct categories, with *Nixon* read as a narrow exception.

Beginning with post-indictment party subpoenas, the fourth category, the Supreme Court in *Bowman Dairy* spoke clearly as to the standard that should apply when one party seeks material to the other beyond what is guaranteed by Rule 16. There is nothing about the *Bowman Dairy* decision that this Note argues is unconstitutional, especially given the rule expansions of Rule 16 and opinions like *Brady* and *Giglio*. The appropriate rule for the governance of party subpoenas is Rule 16, but when either party wishes to go beyond Rule 16 by seeking material via a Rule 17(c) subpoena, *Bowman Dairy* dictates that the material must be "evidentiary" in nature.[179]

The second and third categories—prosecution and defense post-indictment Rule 17(c) subpoenas of nonparties, the primary subject of this Note—should no longer be evaluated using the *Nixon* standard. Instead, as Judge Scheindlin suggested in *Nachamie*, the Court should consider Rule 17(c) subpoenas of nonparties using the standard contained in the rule itself: For a subpoena to be issued, it simply must not be unreasonable or oppressive.[180] While technically subject to the same standard, defense and prosecution subpoenas might be treated differently under this framework. When considering what is reasonable to request, courts should have the discretion to consider any number of factors. One of the factors for courts to consider when analyzing Rule 17(c) subpoenas issued by the prosecution to a nonparty is the prosecution's ability to subpoena the same material during the grand jury process.[181] The implication of this analysis would be that courts could be stricter about which prosecutorial subpoenas they grant after indictment, deeming them as "reasonable" only if the prosecutor would not have reasonably known to ask for the material they now seek at the grand jury phase. What is "reasonable" for a defendant's subpoena of a nonparty should be broader, however. This instance is the first time the defense has had to do any type of discovery, and they are working to catch up with prosecutors who have had months to investigate the case and develop their trial strategy. What is "reasonable" for defendants should also be read more broadly because of their due process and compulsory process rights. If there is a chance that the defendant might

179 *Id.* at 299–300. Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951); Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

180 *See* Nachamie, 91 F. Supp. 2d at 562 ("The Rule itself provides no other basis to quash a subpoena.").

181 *See id.* at 562–63 (considering that "[u]nlike the Government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena" when applying the "unreasonable and oppressive" standard to a Rule 17(c) subpoena).

discover evidence that can aid in or is material to their defense, their requests for subpoenas should be granted.

This approach would eliminate the parts of the *Nixon* test that raise the most serious issues—the admissibility and specificity requirements, which force defendants to name specifically what it is they seek in the documents and why it will be admissible at trial—without ever seeing the documents. These requirements "in the context of a subpoena to a nonparty to whom Rule 16 does not apply, [that] requir[e] the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity."[182] Additionally, the approach I propose does not require overturning any Supreme Court cases in violation of the principle of stare decisis. In its inclusion of Footnote 12, the *Nixon* Court indicated that it was not deciding whether the *Bowman Dairy* "evidentiary" requirement and, by extension, its "relevancy, specificity, admissibility" test should apply to subpoenas of nonparties.[183] Thus, a legal rule governing nonparty subpoenas based in the text of Rule 17(c) itself would not technically require *Nixon* to be overturned.

So then, what to do with *Nixon*? This Note contends that *Nixon* should henceforth be considered a very narrow holding by lower courts. The concept of "narrowing"[184] is not new; in fact, there are a plethora of fields of law in which the Supreme Court has narrowed past precedent without overturning it.[185] A great example of the Court employing "narrowing" because of the unique context of a prior case is *United States v. Mendoza-Lopez*.[186] In *Mendoza-Lopez*, the question before the Court was whether a defendant was entitled to a collateral challenge in a federal district court to a deportation order and hearing. The Court, in its opinion, narrowed a prior decision, *United States v. Yakus*,[187] which dealt with a similar collateral challenge to an administrative criminal enforcement action because it was "motivated by the exigencies of

182 United States v. Rajaratnam, 753 F. Supp. 2d 317, 320–22 n.1 (S.D.N.Y. 2011).

183 United States v. Nixon, 418 U.S. 683, 699–700 (1974); Bowman Dairy Co. v. United States, 341 U.S. 214 (1951).

184 Narrowing is defined as "not applying a precedent, even though the precedent is best read to apply." Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum. L. Rev. 1861, 1869 (2014).

185 *Id.* at 1863–64. (identifying "abortion, campaign finance, standing, affirmative action, the Second Amendment, the exclusionary rule, and *Miranda* rights" as areas of law where case precedent has been substantially narrowed).

186 481 U.S. 828 (1987).

187 321 U.S. 414, 429–30 (1944) (holding that the district court could not review the outcome of a criminal enforcement action of the Price Administration brought under the Emergency Price Control Act).

wartime."[188] When considering whether "narrowing" is a suitable approach given the circumstances, one can look to the field of judicial decisionmaking. Judicial decisionmaking literature examining past attempts of the Court at narrowing indicates that "narrowing along the fault line of a prior case's ambiguity is likely to yield a sensible rule."[189] In *Nixon*, the Court's inclusion of Footnote 12 created a significant ambiguity in the case in which it indicated that the Justices were undecided on whether the standard they crafted should apply to nonparty subpoenas broadly, though in the case in front of them, they were applying the standard to a nonparty (the President).

Following this logic, it would be a sensible rule for *Nixon*'s applicability to nonparties to be read as narrowly as possible to cover only the factual circumstances at play in *Nixon*: a Rule 17(c) subpoena issued by prosecutors to the President of the United States. Because *Nixon* does not conduct a constitutional analysis to see whether this test would be acceptable to apply to defendants, and because *Nixon* as applied to defendants is likely unconstitutional (as laid out in this Note), *Nixon* should only apply to prosecutorial subpoenas. Further still, *Nixon* should be narrowed to cover only prosecutorial subpoenas of the President. The *Nixon* Court made it clear that it was conducting a particularly stringent analysis of what was "evidentiary" under the *Bowman Dairy* standard because the subpoena in question was served on the President. Regardless, the Court erred in applying *Bowman Dairy* in the first place.[190] Not only would this new rule square with the *Nixon* Court's own statement that subpoenas of the President be handled with more care due to presidential privilege, there have already been signs in recent cases that the current Supreme Court might be solicitous to an argument that the *Nixon* standard be cabined to prosecutorial subpoenas of the President, with Justice Kavanaugh writing in his concurrence in *Trump v. Vance* that

> [t]he *Nixon* standard ensures that a prosecutor's interest in subpoenaed information is sufficiently important to justify an intrusion on the Article II interests of the Presidency. The *Nixon* standard also reduces the risk of subjecting a President to unwarranted burdens, because it provides that a prosecutor may obtain a President's information *only in certain defined circumstances*.[191]

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188 *Id.* at 838 n.15.

189 Re, *supra* note 184, at 1879.

190 *See supra* Section III.A.

191 Trump v. Vance, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring) (emphasis added).

It is seemingly apparent to the Justices currently on the Court that the *Nixon* standard is a high bar, which was designed with the subject of the subpoena in mind, the President of the United States.[192] It would not, therefore, be much of a reach for courts to begin reading *Nixon* as narrowed to this exact context, as this Note proposes.

The approach I recommend in this Note is therefore that: (1) Party subpoenas are governed by Rule 16 and the *Bowman Dairy* "evidentiary" standard for any subpoenas sought which exceed the reach of Rule 16; (2) Nonparty subpoenas by both the prosecution and defense should be subject only to the "unreasonable or oppressive" language contained in Rule 17(c) itself; and (3) *Nixon* should be read as a narrow exception of the general nonparty rule, which applies only to prosecutorial subpoenas of the President. This approach would broaden the discovery rights of criminal defendants such that they are sufficiently balanced against the discovery ability of prosecutors so as to not trigger due process or compulsory process concerns. It would provide criminal juries with more material information which they could use to inform their decisions to convict or acquit. And, most importantly, it would allow defendants to make a case for their innocence or negotiate pleas with all the material facts on the table.

Conclusion

It is high time to scrap the *Nixon* standard in favor of a new system of criminal discovery. This Note has reasoned that *Nixon* should be accorded minimal precedential value due to the circumstances under which it was decided and its confused and incorrect readings of prior caselaw. *Nixon* further established a system of criminal discovery that is cause for constitutional concern under the Fifth and Sixth Amendments, which means that a restructuring of the system isn't just prudent, it is also necessary. This Note then set out to suggest a new approach to Rule 17(c) subpoenas, which distinguishes party subpoenas from nonparty subpoenas, carving out *Nixon* as a narrow exception. In a system where defendants are supposed to be "innocent until proven guilty," it is of the utmost importance that we do not leave defendants impotent in maintaining this innocence. This Note suggests a reform to the criminal discovery system as a crucial step towards reorienting the scales of justice back to balance.

192 *Id.*