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DEFENSE DISCOVERY IN WHITE COLLAR
CRIMINAL PROSECUTIONS

Peter J. Henning†

INTRODUCTION

Can a defendant in a criminal prosecution subpoena the President of the United States to produce documents that might cast doubt on the credibility of the Government's principal witness? While one might think the question did not arise until the investigations of Presidents Nixon, Reagan, or Clinton; in fact, it was Chief Justice Marshall who first considered that issue in 1807 in United States v. Burr. In that case, the Chief Justice, sitting as a district court judge, enforced a subpoena duces tecum from Aaron Burr, the former Vice President during Thomas Jefferson's administration. The subpoena sought to compel the President to turn over correspondence he received from General Wilkinson about Burr's conduct. Rejecting the Government's argument that a court could not enforce a subpoena directed to the President, Chief Justice Marshall stated:

A subpoena duces tecum, then, may issue to any person to whom an ordinary subpoena may issue, directing him to bring any paper of which the party praying it has a right to avail himself as testimony; if, indeed, that be the necessary process for obtaining the view of such a paper.

The trial of Aaron Burr for treason was perhaps the first high-profile white collar criminal prosecution by the federal government. Like most such cases, the issue of discovery of documents played a pivotal role.

† Associate Professor, Wayne State University Law School. The Author appreciates the helpful comments of Professor Ellen Podgor of the Georgia State University College of Law. This Article is dedicated to the memory of my father, who feigned interest in my work and always encouraged me to do better.

1. 25 F. Cas. 30 (C.C. Va. 1807).
2. See id.
3. See id. at 32.
4. Id. at 34-35.
Allegations of white collar crime generally involve economic transactions that ostensibly appear to be ordinary business events. In most cases, the crucial question is not whether the defendant engaged in the conduct at issue—that is usually conceded—but whether the conduct rises to the level of being criminal. To establish a white collar case, government agents often pore over voluminous documents to determine whether the transactions show a pattern of criminality from which a jury can infer the requisite knowledge and intent on the part of the defendant. For example, a health care fraud investigation can involve hundreds or even thousands of separate procedures on a large number of patients, with a high volume of billings to an insurance company or claims for reimbursement under Medicare. White collar prosecutions are "paper cases," in the sense that the Government's principle proof of criminality comes from comparing what a document discloses with witness statements and other records. Without the paper, it is unlikely that the Government could establish the elements of many white collar crimes, especially those involving fraud, bribery, or conflicts of interest. Unlike a street crime, there is no real physical evidence of the white collar criminal's violation, much less a scene of the crime.

If the Government must rely on the paper trail to establish its case, then certainly a defendant needs access to the documents related to the transactions to mount a defense. The elegant simplicity of Chief Justice Marshall's statement in *Burr* regarding a defendant's right to obtain documents is not, however, reflected in the federal rules for discovery. Unlike the Wilkinson correspondence at issue in *Burr*, whose existence President Jefferson disclosed in a statement to Congress, a defendant in a white collar prosecution usually does not know exactly what documents exist, or how they will affect the case. The defendant's lack of knowledge can make the discovery of documents a complicated dance because the burden is on the defendant to establish the prosecutor's "possession" of the documents and their "materiality" to a defense before gaining access to them. The federal approach to discovery can be a "heads I win, tails you lose" situation because the defendant

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5. *See id. at 31.*
must show what is in the records before being permitted to review them.

In a white collar case, the "smoking gun" document—a statement in writing that shows clearly the defendant's criminal state of mind—rarely exists. The government's case is often circumstantial, while the defense must try to show through the records that a crime did not take place, or at least that the defendant did not intend that criminal conduct occur. Unlike typical evidence in a street crime prosecution to which the defendant routinely seeks access, such as a witness's criminal record or tests on contraband, the documents required to defend a white collar case can be almost any type of business record. The documents are often quite ordinary, reflecting common business transactions that may not appear to have any appreciable impact on a case. Indeed, it is that very ordinariness that may help to show a defendant's lack of knowledge or intent in the transactions at issue. Identifying what it is the defendant is looking for as "material" to a defense is often a difficult, if not impossible, task without an opportunity to review the records. Complicating discovery is the fact that some documents a defendant needs may not be in the prosecutor's possession, and indeed the government may not even know of their existence. Yet, access to documents held by third parties is unnecessarily curtailed in federal prosecutions because the courts have misunderstood a defendant's authority to subpoena records from a third party.

This Article considers the issue of document discovery in the context of a federal white collar crime prosecution. Part I reviews the potential sources of documents in such a proceeding, discussing the various venues in which defendants might find relevant documents, and Part II provides a general overview of the issues related to discovery in a federal criminal case. Part III analyzes discovery of documents from the prosecutor's office under Federal Rule of Criminal Procedure 16(a)(1)(C) by considering the meaning of the terms "possession" and "material" as they affect the defendant's effort to obtain documents. Part IV deals with the issue of subpoenas to third parties for records under Rule 17(c), arguing that the Supreme Court's analysis of the scope of the authority to compel the production of records misconstrues the nature of the Rule and the contrasting positions of the criminal defendant and the
The extent of economic regulation by federal and state governments has undergone an enormous expansion, especially since the 1970s. Prosecutors now give much greater attention to white collar crime, and investigations take place over a broad range of activity, from bank and securities fraud to public corruption to abuses of the health care system. The expanding jurisdiction of regulatory agencies to monitor markets and investigate possible abuses, with the concomitant increase in the staff needed to conduct extensive regulatory oversight, has created the well-known problem of the so-called "parallel proceeding." A number of federal statutes have both a civil and a criminal component, raising the possibility of concurrent investigations of the same conduct by different arms of the government. At the federal level, only the Department of Justice has the authority to bring criminal charges. The regulatory agencies are limited to civil enforcement of their statutes, and those proceedings usually entail an extensive investigation by the agency staff before the institution of proceedings. While the civil regulatory agencies cannot bring criminal charges, they are empowered to compel individuals and organizations to produce documents and appear for testimony under oath.

6. See John F. Walsh, Practical Considerations in Federal Grand Jury Practice, in Federal Criminal Litigation 1, 2 (Barbara A. Reeves et al. eds., 1994) ("Over the past twenty years, the increasing emphasis of the United States Department of Justice on the investigation and prosecution of white-collar crime has caused grand jury practice in the federal courts to expand exponentially.").

7. See 28 U.S. C. § 515 (1998); United States v. Singleton, 165 F.3d 1297, 1299 (10th Cir. 1999) ("Only officers of the Department of Justice or the United States Attorney can represent the United States in the prosecution of a criminal case.").

8. See, e.g., 15 U.S.C. § 78u(b) (1994) (authorizing the Securities and Exchange Commission to "subpoena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other
The dual nature of many regulatory provisions means that a course of conduct may be subject to investigation by both the civil and criminal authorities. It is quite common for the regulatory agency to conduct a preliminary investigation of the conduct because it has greater expertise in the area and will often receive the information from regulated entities regarding possible wrongdoing at an early stage. In the course of that investigation, the agency staff can refer the matter to the criminal authorities if it appears that there is a possible criminal violation. At that point, the civil agency's investigation need not stop, and the two cases can proceed in tandem, hence a parallel proceeding. These types of parallel investigations are particularly common in cases involving banking, securities and commodities trading, antitrust, and environmental violations.

The possibility of parallel civil and criminal investigations by different arms of the federal government does not exhaust the possibilities of multiple proceedings involving the same underlying conduct. There may be state license revocation proceedings for professionals, shareholder suits for public corporations, disbarment from federal programs, and, the current vogue, *qui tam* and whistleblower actions.9 The combinations are almost endless, so that an individual or organization may be dragged into a number of different venues and called upon to defend itself.10

The effect of these *proliferating* proceedings is that documents relevant to the criminal prosecution may be housed in a number of locations and held by self-regulatory organizations or agencies at different levels of government. In many instances, a regulatory agency or executive department develops evidence of possible criminal conduct that it refers to the prosecutor to determine whether criminal charges should be filed. But even without a formal referral, prosecutors can seek

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9. See F. Whitten Peters, *Parallel Proceedings, in Federal Criminal Litigation* 149 (Barbara A. Reeves et al. eds., 1994) ("A company may be simultaneously threatened, for example, with a congressional investigation, criminal charges, suspension from federal or state contracting, civil fraud, *qui tam* or false claims actions, and shareholders' derivative suits.").

10. This Article does not deal with the issue of the Fifth Amendment privilege against self-incrimination in parallel proceedings, which is thoroughly discussed elsewhere. See generally Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 Vand. L. Rev. 573 (1994).
information from other arms of the government to assess whether to pursue the criminal case, relying on the expertise of an agency's staff to ascertain the nature and effect of conduct. While the regulators provide valuable information and expertise, a prosecutor may not be aware of all the documents held by agencies and other regulatory organizations that relate to the potential criminal activity.

It is not just other offices of the government that may have relevant materials. White collar crimes often involve economic transactions that involve third parties, such as banks, brokerage firms, suppliers, and insurance companies. Misconduct by an employee may be investigated by the organization first to determine the scope of the activity and the company's potential criminal and civil exposure.11 The federal Sentencing Guidelines create a powerful incentive for organizations to cooperate with the government by alerting it to misconduct by employees. Whether or not the organization is involved in the conduct, it can have valuable information regarding the defendant's activities.

II. DISCOVERY IN A CRIMINAL PROSECUTION

The Government's principal means of gathering evidence in a white collar crime investigation is the grand jury.12 Under the direction of the prosecutor, the grand jury can subpoena records and compel individuals to testify in a proceeding in which the witness may not have an attorney present. The grand jury's authority in federal cases is quite broad, being entitled to "every

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11. See In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (ordering disclosure internal audit for the prosecution of former employee for fraud based on allegedly false invoices submitted for reimbursement).

12. The government can also obtain a warrant to search for and seize records, a tactic that has been used with greater frequency of late. The problem with the search warrant, as opposed to a grand jury subpoena, is that the prosecutor must make a preliminary showing of the need for the documents before the warrant issues. See Peter J. Henning, Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?, 54 U. PIT. L. REV. 405, 414 (1993) ("Search warrants are generally a less appealing means to obtain documents because of the greater burden placed on the prosecution, although when there is a threat that documents may be destroyed or tampered with, the warrant is an effective means of seizing evidence before it loses its probative value.").
man's evidence," and it may investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Once the prosecutor decides to proceed with the case, the grand jury must find that there is probable cause to believe the defendant committed the crime to hand up an indictment. At that point, the Government will, in all likelihood, have the evidence required to go forward, with little need for additional discovery of documents. Moreover, if the Government learns of additional criminal activity by the defendant, even conduct that may be arguably related to the underlying charges, it may continue to use the grand jury to investigate the newly discovered criminal conduct. The grand jury is a powerful engine of discovery for the Government, with no comparable method for gathering evidence available to the defendant.

Unlike the Government's authority to conduct a "grand inquest," the Supreme Court has stated quite clearly that criminal defendants have no constitutional right to discovery. Aside from what defendants can gather through their own efforts, until the Government files charges, there is no means for defendants to compel the production of evidence or information. Once charged with a crime, the Supreme Court recognized in *Brady v. Maryland* that due process requires the Government to disclose *exculpatory* evidence to a criminal defendant, so long as the information is *material* to guilt or punishment. Although *Brady* is not technically a discovery case, the effect of the Court's decision compels prosecutors to turn over evidence that they might not have disclosed otherwise under statutory provisions providing limited discovery rights to

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15. See *United States v. Sasso*, 59 F.3d 341, 351-52 (2d Cir. 1995) (holding that prosecution may use evidence obtained by a post-indictment grand jury subpoena if the dominant purpose for the grand jury subpoena was investigating crimes other than those indicted); *United States v. Breitkreutz*, 977 F.2d 214, 217 (6th Cir. 1992) (finding that a grand jury may hear incriminating testimony after indictment if defendant cannot show that dominant purpose of the grand jury was not to gather evidence for use in the prosecution).
19. See *id.* at 87.
defendants. The combination of constitutional and statutory discovery rights provides a defendant with four means of obtaining evidence from the prosecutor: (1) Brady requests for exculpatory evidence; (2) Production of witness statements after the person testifies, pursuant to the requirements of the Jencks Act; (3) Rule 16 of the Federal Rules of Criminal Procedure governing disclosure of information by the Government and defendants; and (4) The Freedom of Information Act. In addition, a defendant can also seek information regarding the charges by moving for a bill of particulars, but courts often deny such motions when their purpose is to gain discovery outside of the avenues provided by the Federal Rules of Criminal Procedure.

The starting point for all discovery in a criminal case is with the prosecutor's office. To the extent the Government has documents it intends to use at trial, it must afford the defendant complete access to those records. The harder issue is whether the discovery rules permit a defendant to gain access to documents that the prosecutor does not intend to use to establish the defendant's guilt, and whether a defendant can obtain documents outside the direct control of the prosecutor. Documents in the latter category may be in the hands of another agency of the government, or held by third parties. Defending a white collar case requires access to more than just what the prosecutor gathers in an investigation and decides to use at trial, because what may be relevant to the grand jury's probable cause determination and proof of guilt may not encompass the documents needed to mount a credible defense.

The government is not necessarily the sole repository of relevant documents, so the scope of permissible discovery should extend beyond just documents in the prosecutor's office. For example, a state licensing agency's investigation of the

22. See FED. R. CRIM. P. 7(f).
23. See, e.g., United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993) (explaining that to establish reversible error from "denial of a motion for a bill of particulars, defendant must show that he was actually surprised at trial"); United States v. Perkins, 994 F.2d 1184, 1190-91 (6th Cir. 1993).
defendant may involve a large volume of documents that might be relevant to a criminal prosecution by federal authorities arising from the same conduct. Similarly, civil litigation or a bankruptcy proceeding might generate a large cache of records and, equally important, statements by the defendant and other witnesses. Financial records held by banks, claims for reimbursement submitted to insurance companies, and audit reports by accountants often provide crucial evidence for a defendant regarding the flow of funds and a course of performance. Third parties may have records about which the prosecutor is completely unaware or that the Government reviewed but did not consider relevant to its investigation. The records may shed light on whether a defendant's conduct conformed to industry standards, or otherwise was not unusual or questionable. Unlike a street crime investigation, in which forensic issues regarding the physical evidence and the witnesses' statements to investigators are the primary evidence, in a white collar case there may be documents potentially relevant to the case that the prosecutor may not possess or even know exist.

The defendant's discovery of documents in a white collar case entails a two-step process. The first is ascertaining what records the Government gathered in its investigation to determine whether they are relevant to the defense. The principle vehicle for this type of discovery is Federal Rule of Criminal Procedure 16(a)(1)(C), which gives each side access to documents and tangible objects in the possession of the other party if the documents meet certain requirements. The second step is gathering information from third parties, which may include government agencies that would not come within the discovery

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26. See Henning, supra note 12, at 408 (explaining that "[t]he investigations [of a white collar crime] require access to documents that detail the conduct of the transactions, especially the flow of funds and timing of decisions, and the statements of participants, both innocent and suspect, about the process of events").

27. See FED. R. CRIM. P. 16(g)(1)(C).
requirements of Rule 16(a)(1)(C). The manner for gathering evidence from this source is a subpoena *duces tecum* issued by the defendant under Federal Rule of Criminal Procedure 17(c).  

At this point, the weakness of the federal rules in providing adequate discovery of documents in a white collar case becomes apparent. The Supreme Court stated in *Bowman Dairy Co. v. United States*, and reiterated in *United States v. Nixon*, that Rule 17(c) is not a discovery rule that supplants the limitations of Rule 16(a)(1)(C) by giving defendants some broad right to subpoena documents. Lower courts applying the Supreme Court's overly broad statements regarding the scope of Rule 17(c) virtually eliminate defense subpoenas as a means to gather documents. The problem is that the courts misunderstand the context in which *Bowman Dairy* and *Nixon* construed Rule 17(c). Properly understood, Rule 17(c) furnishes an important adjunct to the more familiar discovery procedure in Rule 16(a)(1)(C) that should permit defendants to obtain records from third parties, including government agencies, if defendants can show a sufficient need for them.

### III. Discovery of Documents from the Government: Rule 16(a)(1)(C)

The starting point for any consideration of discovery in a criminal case is the Supreme Court's admonition that there is no *constitutional* mandate that the Government provide discovery to the defendant. While the Court required disclosure of material exculpatory evidence under *Brady*, and condemned the introduction of false evidence as a violation of due process, it has not recognized an independent right to demand that the Government produce evidence or information

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28. *See id.* at 17(c).
33. *See Napue v. Illinois*, 360 U.S. 284 (1959) (reversing conviction when prosecutor did not correct key witness's false testimony that government had not made any promise of leniency in exchange for testimony); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (holding that due process would be violated "through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured").
that it gathered in its investigation. Moreover, the Court reads
the Sixth Amendment rights to compulsory process and
confrontation narrowly, rejecting an interpretation of those
provisions as requiring the Government to provide discovery to
the defendant.\textsuperscript{34}

Absent any constitutional mandate, discovery rights depend
on what the legislature is willing to provide. In 1944, the
Supreme Court adopted the Federal Rules of Criminal
Procedure, which, for the first time in the federal system,
provided concrete discovery guidelines outlining what the
Government must afford a criminal defendant.\textsuperscript{35} Rule 16
provides defendants with discovery of any statements they
made, copies of their criminal record, the results of
examinations or tests, and a summary of the testimony of any
expert the Government intends to call at trial.\textsuperscript{36} In addition, the
current form of Rule 16(a)(1)(C) provides for discovery of three
categories of documents in the "possession, custody or control
of the government": (1) records intended for use in the
prosecution's case in chief;\textsuperscript{38} (2) items obtained from
or belonging to the defendant;\textsuperscript{39} and (3) documents that are
"material to the preparation of the defendant's defense."\textsuperscript{40}

\textsuperscript{34} In \textit{Pennsylvania v. Ritchie}, 480 U.S. 39 (1987), the Court held that a defendant's
confrontation right could not be read to require the government to produce evidence
with which a witness could be effectively cross-examined because "the effect would be
to transform the Confrontation Clause into a constitutionally compelled rule of pretrial
The court in \textit{Ritchie} found that the analysis of the Compulsory Process Clause was
"unsettled," and opted to apply the \textit{Brady} due process analysis to a claim regarding the
government's failure to produce records. \textit{Id.} at 56.

\textsuperscript{35} Prior to the adoption of the Federal Rules of Criminal Procedure, some lower
courts took a restrictive approach, using language that cast doubt on whether there was
any discovery right in a criminal case. \textit{See United States v. Rosenfeld}, 57 F.2d 74 (2d Cir.

\textsuperscript{36} \textit{FED. R. CRIM. P. 16(a)(1).}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{See id.}

\textsuperscript{39} \textit{See id.}

\textsuperscript{40} \textit{Id.; see id. at 16(a)(1)(C).}

Upon request of the defendant, the government shall permit the defendant
to inspect and copy or photograph books, papers, documents, photographs,
tangible objects, buildings or places, or copies or portions thereof, which are
within the possession, custody or control of the government, which are
within the possession, custody, or control of the government, and which are
material to the preparation of the defendant's defense or are intended for
use by the government as evidence in chief at the trial, or were obtained for
A. Possession, Custody, and Control of the Government

"Discovery" for the purposes of a criminal prosecution is much more limited than in a civil proceeding. Discovery of documents under Rule 16(a)(1)(C) does not reach documents held by nonparties except insofar as the Government might have gathered material from them for use in its investigation. On the other hand, under Federal Rule of Civil Procedure 34, "A person not a party to the action may be compelled to produce documents and things or to submit to an inspection..." In a criminal case, the only source of documents explicitly referred to in the Rule is the government, so that a defendant must look to the prosecutor as the first source of documents in evaluating the case and building a defense.

Although Rule 16(a)(1)(C) imposes the disclosure duty only on the parties to the proceeding, it does not explain what is comprehended within the term "government"; i.e., what offices are subject to the discovery requirements. With a burgeoning bureaucracy that includes agencies with overlapping jurisdiction and different layers of government with the authority to regulate the same conduct, it should not be surprising that officials sometimes compete for cases rather than cooperate in an investigation and adjudication. The government is not one big, happy family, even though the different departments may be arms of the same sovereign. Moreover, to the extent that an administrative agency cooperates with a prosecutor, the prosecutor may review only a
portion of the information gathered by the regulatory body, selecting what is most appealing or apparently criminal. Even assuming one agency has all the relevant documents, the prosecutor need not take actual possession of the records, nor be aware of their contents.

Is the “government” equivalent to just the prosecutor’s office? The answer is no, but it is not clear which other offices are subject to Rule 16(a)(1)(C). Determining what constitutes the government under the Rule is complicated by the disclosure duty imposed under Brady, which has a similar requirement that exculpatory information in the possession of the government be disclosed to the defendant. Brady and Rule 16 deal with different phases of a criminal proceeding: Brady is a post-trial assessment of whether the prosecutor’s suppression of evidence resulted in prejudice to the defendant, while Rule 16 regulates the pre-trial production of evidence without judicial involvement in triggering the duty to disclose evidence. Yet, defendants often make a single motion before trial for the production of records under both Rule 16 and Brady. Possession by the government is a condition for both requirements, so courts often follow the defendant’s lead by treating the issues identically in determining whether the prosecutor must disclose evidence because it is either exculpatory information or subject to discovery.

Brady and Rule 16 are not, however, identical, so it is not clear that their use of similar terms should result in the same analysis. As the Supreme Court points out with some regularity, Brady is not a rule of discovery, but one of fairness. Under Brady, the Government’s failure to disclose exculpatory

47. FED. R. CRIM. P. 16.
evidence is a due process violation if the defendant is unaware of the evidence until after trial.\textsuperscript{50} If the Government discloses exculpatory information in time for the defendant to use it at trial, then there is no constitutional violation.\textsuperscript{51} Rule 16, on the other hand, is designed to be a rule of discovery—hence the title—so the more restrictive interpretation of the requirements for a due process violation should not necessarily carry over to interpreting the same terms in the discovery rule.\textsuperscript{52}

In \textit{United States v. Bryan},\textsuperscript{53} the Government argued that its disclosure obligation only reached documents within the possession of the prosecutor in the district in which it prosecuted the defendant and did not cover documents in the possession of other agencies that were not physically present in the district.\textsuperscript{54} The Ninth Circuit rejected such a narrow reading of “government,” holding that “[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant.”\textsuperscript{55} On the other hand, prosecutors do not “have constructive knowledge of every fact or piece of information known to any other part of the federal or state government.”\textsuperscript{56} In \textit{United States v. Morris},\textsuperscript{57} the Seventh Circuit held that information held by other government agencies that are not part of the prosecution “team” was not in the possession of the prosecutor for \textit{Brady} purposes.\textsuperscript{58}

\begin{footnotes}
50. \textit{See Brady}, 373 U.S. at 83.
51. \textit{Cf. id.} at 84-85.
52. \textit{FED. R. CRIM. P. 16}.
53. 868 F.2d 1032 (9th Cir. 1989).
54. \textit{See id.} at 1034-35.
55. \textit{Id.} at 1036. The defendant sought records related to a broad investigation of his activities by the Internal Revenue Service to support his defense that he acted in good faith. \textit{See id.} at 1033-34. While the Ninth Circuit's statement ostensibly defined “government” under Rule 16(a)(1)(C), the court then considered whether the documents were material under \textit{Brady}. \textit{See id.} at 1036-38. \textit{Bryan}'s approach is typical of many courts and practitioners who treat \textit{Brady} and Rule 16 as interchangeable means to engage in pre-trial discovery.
57. 80 F.3d 1151 (7th Cir. 1996).
58. \textit{See id.} at 1169 (“Because none of those agencies were part of the team that investigated this case or participated in its prosecution, the district court would not impute their knowledge of potentially exculpatory information to the present prosecutors.”).
\end{footnotes}
“consulted” by the prosecutor are part of the government under *Brady.*

In reality, courts undertaking the *Brady* analysis engage in a fact-specific analysis that asks whether the prosecutor’s ignorance is both plausible and an acceptable result in light of a sprawling government that cannot always be considered a unitary entity, lest every case involve a government-wide search for evidence favorable to the accused. The courts occasionally rely on mixed metaphors in characterizing the prosecutor’s ignorance as unacceptable, noting for example that “[t]he government cannot with its right hand say it has nothing while its left hand holds what is of value,” or that the “failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure.” Pithy phrases aside, the functional approach adopted by courts makes it imperative that defendants first try to define “government” expansively, thereby triggering the *Brady* protection beyond just the prosecutor’s office. In this regard, courts have found in federal prosecutions that the “government” includes local law enforcement offices, the Federal Bureau of Investigation (FBI) and the National Crime Information Center, the United States Postal Service, the Internal Revenue Service, the Food and Drug Administration, and a state environmental testing laboratory. Similarly, a state court found that the local

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59. *See* United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (“[U]nder *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.”).
60. *Id.* at 737 (citing United States v Endicott, 869 F.2d 452, 455 (9th Cir. 1989)).
62. *See id.* (relating to Washington, D.C., metropolitan police records); United States v. Perdomo, 929 F.2d 967, 970-71 (3d Cir. 1991) (relating to local Virgin Islands criminal records).
63. *See* United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980).
66. *See* United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995).
67. United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 474-75 (E.D. Ca. 1994). Agencies that courts found were not, under the circumstances of the particular cases, sufficiently affiliated with the prosecution to impose the *Brady* disclosure requirement include the Federal Communications Commission in United States v. NYNEX Corp., 781 F. Supp. 19, 25 (D.D.C. 1991), and the Office of Thrift Supervision, Securities &
prosecutor needed to at least attempt to secure exculpatory information from the FBI.68

Does "government" mean the same thing under Brady and Rule 16(a)(1)(C)? The answer should be no, despite the fact that defendants and courts sometimes treat them as equivalent means to the same end, and, therefore, subject to the same interpretation. As the Sixth Circuit noted in considering a defendant's Brady claim, "the disclosure required by Rule 16 is much broader than that required by the due process standards of Brady."69 One reason is that Brady's concern is with suppression of evidence by the prosecutor, so it is logical to focus on what the prosecutor knows or should know that might impact on the fairness of the trial. Rule 16 permits discovery, so its use of the term "government" should not follow slavishly the analysis of Brady cases. The Advisory Committee Notes to the 1974 amendments to the Federal Rules of Criminal Procedure refer to the Committee's decision not to codify Brady in Rule 16(a)(1)(C), which indicates that the Rule is broader than the due process requirement imposed on prosecutors and not the entire government.70

Some courts view of the obligation to produce documents under Rule 16(a)(1)(C) as broader than the Brady disclosure duty. In United States v. Skeddle,71 a district court ordered the Government to try to obtain documents from a corporation that had provided them pursuant to a grand jury subpoena and to whom the Government returned the records.72 The court held that Rule 16(a)(1)(C) is designed to assure adequate discovery to the defendant, including records that the Government can reasonably obtain from a third party.73 In United States v. Kilroy,74 the district court stated that "it is not unreasonable to treat the records as being within the Government's control at least to the extent of requiring the Government to request the

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70. See Fed. R. Crim. P. 16 advisory committee notes to 1974 Amendment.
72. See id. at 259.
73. See id. at 262.
records on the defendant's behalf and to include them in its files for the defendant's review . . . "75 The Ninth Circuit, however, took a more narrow approach in United States v. Gatto,76 holding that "the triggering requirement under rule 16(a)(1)(C) is that the papers, documents, and tangible objects be in the actual possession, custody, or control of the government. Here, they were not."77

The rationale for limiting Brady's disclosure requirement to the prosecutor's office and those closely allied with the investigation is that imposing a broad search duty on other government agencies would be disruptive to their operations without much benefit to ensuring the fairness of the trial. What is subject to Brady, however, is any type of exculpatory information, not just documents or other tangible items described in Rule 16(a)(1)(C). Brady material can be anything from a formal memorandum to a conversation never memorialized in writing. Compelling a search for any type of exculpatory information may impose an unfair burden on the Government, but requiring a search for documents that the defendant must describe in sufficient detail to demonstrate their materiality would impose a lesser burden on the Government. "Government" under Rule 16 should entail more than just the prosecutor's office and those closely allied with the criminal investigation. It is no significant burden to require agencies that hold documents relevant to the case to determine whether they must be produced under Rule 16(a)(1)(C) because the defendant must provide a clear description of them in the request for discovery of material information that will guide the agency's search; a defendant cannot simply demand all "exculpatory evidence" or "all documents relating to the investigation." Moreover, because Rule 16(a)(1)(C) places the burden on the defendant to describe the items sought and

75. Id. at 215.
76. 763 F.2d 1040 (9th Cir. 1985).
77. Id. at 1049. The documents at issue were held by state investigators, and the prosecutor was unaware of their existence until shortly before trial. See id. at 1047. In dissent, Circuit Judge Schroeder argued that Rule 16(a)(1)(C) "is not limited to documents physically resting in federal agency file folders and should reach at least far enough to encompass these documents, which were at the prosecutors' fingertips." Id. at 1051 (Schroeder, C.J., dissenting); see also United States v. Chavez-Vernaza, 844 F.2d 1368, 1375 (9th Cir. 1987) ("[T]he federal government had no duty to obtain from state officials documents of which it was aware but over which it had no actual control.").
demonstrate their materiality, it is unlikely that the type of broad "fishing expedition" that courts abhor would be permissible under an expanded definition of government. The operative threshold showing for discovery remains unaltered.

At a minimum, Rule 16(a)(1)(C) cannot be read to mean that only the prosecution's office must comply with a discovery request. To the extent a prosecutor should have to review the information held by another arm of the government under Brady, so too would Rule 16(a)(1)(C) apply to any documents held by that agency. But, Rule 16(a)(1)(C) should not be understood as merely adopting Brady as applied to document discovery before trial. There is no basis in the language of the Rule to find that it only implements Brady's due process requirements. Rule 16 is a mandate to provide discovery, which Brady surely is not. The more limited scope of what is subject to discovery under Rule 16(a)(1)(C), i.e. documents and tangible objects, argues in favor of a broader reading of "government" because there is much less danger that government offices will have to conduct burdensome searches of their records to find an elusive piece of ill-defined evidence that may be exculpatory. Rule 16 mandates discovery, so it is counterintuitive to adopt a narrow construction of government in Rule 16(a)(1)(C) to thereby limit discovery on the ground that a broader definition would impose a burden on the Government. The Rule is designed to require the Government to search its files.

B. Material to the Defense

Rule 16(a)(1)(C) permits discovery of documents that are "material to the preparation of the defendant's defense" even if the prosecution does not intend to use them in its case in chief. The rationale for allowing discovery of this category of records tracks the constitutional analysis of Brady, that a defendant be accorded the opportunity to put on a defense to the Government's charges by using the product of the Government's investigation if it is helpful to rebutting the

78. But see Gatto, 763 F.2d at 1048 ("Because we find no due diligence language in rule 16(a)(1)(C) at all, nor any special reason to deviate from its plain language, we conclude that it triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control.").
79. FED. R. CRIM. P. 16(a)(1)(C).
charges.\textsuperscript{80} Brady and Rule 16(a)(1)(C) use the identical term “material” to describe one attribute of the evidence that the Government must disclose to the defendant, raising a similar question: Does “material” mean the same thing under both requirements to produce information to the defendant?

The answer this time is even more emphatically that they are not, because the difference between the post-trial due process analysis and the Rule’s requirement of adequate disclosure before trial make the standard for what is “material” significantly different. While Brady requires a hindsight review of whether the failure to disclose evidence prejudiced the defendant,\textsuperscript{81} Rule 16(a)(1)(C) mandates disclosure of items helpful to the defense while the defendant prepares for trial.\textsuperscript{82} Yet, some courts do not appreciate the difference between the two, applying the stricter due process analysis to discovery claims under Rule 16(a)(1)(C), thereby imposing an unnecessarily high standard that thwarts the Rule rather than comports with the goal of enhancing the fairness of the proceeding through discovery.\textsuperscript{83}

This result is not surprising, given the tendency of defense counsel to mix the distinct analyses together by submitting pretrial motions treating them as two sides of the same discovery coin. Applying a “pasta theory” of discovery, \textit{i.e.}, throwing out to the court as many potential grounds for discovery as possible to see what will stick, clouds rather than clarifies the discovery issue. Brady and Rule 16(a)(1)(C) are quite different, and treating them as essentially identical methods of discovery opens the way for courts to adopt the more stringent Brady analysis of materiality as the proper standard for judging a Rule 16(a)(1)(C) request for documents.

The starting point for understanding what documents a defendant can obtain through discovery requires determining

\textsuperscript{80} See FED. R. CRIM. P. 16 advisory committee notes to 1974 Amendment (“[T]he requirement that the government disclose documents and tangible objects ‘material to the preparation of his defense’ underscores the importance of disclosure of evidence favorable to the defendant.”).

\textsuperscript{81} Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999) (“[S]trictly speaking, there is never a real ‘Brady violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”).

\textsuperscript{82} FED. R. CRIM. P. 16(a)(1)(C).

\textsuperscript{83} See, \textit{e.g.}, United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975); see also infra notes 85-101 and accompanying text.
what constitutes a “defense” for the purposes of Rule 16(a)(1)(C). In United States v. Armstrong, the Court stated that Rule 16(a)(1)(C) limits discovery to documents related to defenses to the Government’s case in chief. The Court distinguished defenses that are a “‘sword,’ challenging the prosecution’s conduct of the case,” such as the selective prosecution claim at issue in Armstrong, from a “shield” that responds to the Government’s proof of a violation. Rule 16(a)(1)(C) provides for automatic disclosure of documents the Government will use in its case in chief, so a demand for additional records will require that the defendant identify the defense to which the discovery relates. The burden is on the defendant, therefore, to make a sufficient showing that the discovery will assist their defense.

At this point, the meaning of “material” under the Rule becomes crucial because that will define how great a showing the defendant must make to establish a right to discovery of documents beyond those the Government intends to use to establish guilt. The higher the threshold, the more the defendant will have to reveal about the expected defense, and the greater the difficulty in establishing the need for the documents. Requiring increased disclosure about the defense to ensure it is a “shield” gives the Government a preview of the defendant’s strategy, raising the ante for a defendant deciding whether to pursue discovery of other records held by the Government. Rule 16(a)(1)(C) does not define materiality, so its use of the same term as Brady to delineate the Government’s disclosure obligation engenders the same type of confusion encountered in determining what constitutes the government.

85. See id. at 482.
86. Id. at 550-54. The Court did not explain what other defenses constitute a “sword” rather than a “shield.” For example, an entrapment defense concedes the elements of the crime, including intent, but asserts that the defendant was not predisposed to commit the crime absent the government’s enticement. See Jacobson v. United States, 503 U.S. 540, 548-59 (1992). Entrapment could be viewed as a “sword” attacking the government’s conduct in investigating the case, or a “shield” that disputes whether the defendant had the requisite intent to be held responsible for the criminal conduct. See id. The Court may be distinguishing between defenses that are decided by the court and not the jury, in which case entrapment would be a shield because it is an issue for the jury. Defenses that focus on the conduct and motives of the prosecutor or investigator, such as a vindictive prosecution claim or that the government violated the defendant’s due process rights by its outrageous conduct, are decided by the judge and more likely to be viewed as swords in the hands of a defendant.
The effect of transporting the *Brady* analysis of materiality to Rule 16 has an even great detrimental effect on the scope of discovery.

In *United States v. Bagley*, the Supreme Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The *Brady* standard is quite high, requiring a defendant to show that, due to the suppression of exculpatory evidence, the result of the trial is open to sufficient doubt that the verdict was not reliable, thereby denying the essential requirement of due process that a defendant only be convicted after a fair proceeding. The Court has chosen a high threshold for a *Brady* violation requiring a defendant to show that the withheld evidence would have had a significant impact on the outcome, rather than an easier standard that asks whether the suppressed evidence "could have" affected the outcome.

The procedural posture of a *Brady* claim is crucial to understanding why the Court hews to a high standard for assessing a due process claim arising from the Government’s suppression of exculpatory evidence. The due process claim involves *post-trial* review of a guilty verdict, so the entire body of evidence is available for a court to assess, including the evidence withheld by the prosecutor. The court can weigh the effect of a piece of evidence on the entire process, and consider at the same time the cost of requiring a new trial when the evidence was unlikely to have a significant effect on the proceeding. *Brady* is a balancing test, factoring in whether undisclosed evidence raises enough of a question that, on the whole, there is sufficient doubt about the validity of the guilty

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88. *Id.* at 682. The Court defined a reasonable probability as “‘a probability sufficient to undermine confidence in the outcome.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).
90. *See id.* at 1954. In *Strickler*, the Court found that the State's suppression of information that would have impeached a prosecution witness did not violate *Brady* because the weight of the prosecution's other evidence demonstrated that the trial resulted in a reliable verdict of guilt. *See id.*
verdict to require a new trial. Under Brady, a reviewing court does not ask whether suppressed evidence would be helpful or important to the defendant; it assumes that it was. Rather, the due process analysis entails a review of the entire trial. As the Third Circuit noted, “To constitute a Brady violation, the nondisclosure must do more than impede the defendant’s ability to prepare for trial; it must adversely affect the court’s ability to reach a just conclusion, to the prejudice of the defendant.”

Discovery is fundamentally different from determining whether exculpatory evidence was material to the outcome of a trial because discovery is a pre-trial procedure designed to secure items that will assist the defendant in crafting a defense. While Brady deals with the effect of a suppression of evidence on the outcome of the proceeding, a trial court considering a discovery request under Rule 16(a)(1)(C) should look at whether the records will be helpful to the defendant. Viewed in context, the materiality requirement should not require the same high threshold for a discovery request as required to prove a due process violation. Perhaps the most fundamental “shield” a defendant can assert is disputing whether the Government proved its case beyond a reasonable doubt, the basic requirement for all criminal trials. In order to contest the Government’s case, a defendant needs to assess the strength of the evidence against him or her and whether other evidence the Government does not intend to introduce negates its proof of the elements of the crime. Discovery can aid in raising that defense to the charges, yet transporting Brady’s materiality

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91. See Bagley, 473 U.S. at 682; Brady v. Maryland, 373 U.S. 83 (1963).
92. United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984) (citing United States v. Campagnolo, 592 F.2d 852, 861-62 (5th Cir. 1979)). An important difference between Brady and Rule 16 is the sanction available for a violation. The discovery rule permits the court to, inter alia, restrict the use of evidence or prohibit a party from introducing it, while a due process violation requires a new trial and not a lesser remedial sanction. See United States v. Presser, 844 F.2d 1275, 1288 (6th Cir. 1988) (“[T]he remedy for a Brady violation is a new trial and that . . . remedy is available to a defendant only after a first trial has ended in a conviction . . . . We find no support in any decision construing the Brady doctrine for the proposition that a trial judge can threaten to refuse to let a government witness testify in order to sanction noncompliance with the Brady doctrine which comes to light before or during trial.”).
93. See Brady, 373 U.S. at 83.
94. FED. R. CRIM. P. 16(a)(1)(C).
standard to the pre-trial stage would make discovery contingent on showing that the defendant will come close to winning the case. At the discovery phase of a case, the defendant does not have the evidence but is seeking access to it, so a court cannot make the kind of post-hoc assessment of the discovery motion that it does in reviewing a Brady claim.

Given the distinct procedural contexts of Brady and Rule 16(a)(1)(C), courts should not easily confuse the standards for materiality. Yet, the similarities between Brady and discovery can overwhelm the differences, so that some courts apply what is essentially the due process standard of materiality to assessment of a defendant’s request for discovery under Rule 16(a)(1)(C). The Fifth Circuit, in United States v. Ross,\(^9\) appears to be the first court to adopt a high threshold that parallels the Brady standard for determining whether the defendant demonstrated the materiality of documents to trigger the discovery right.\(^9\) In Ross, the court stated: “Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.”\(^7\) Ross did not cite any precedent for its assertion, and the language is similar to Brady’s requirement that the defendant demonstrate that the suppressed evidence affected the fairness of the proceeding.\(^8\) The problem with the Ross standard is that it bears no relation to the concept of pre-trial discovery. Documents in the Government’s possession that would significantly alter the quantum of proof in a defendant’s favor are most likely Brady material, yet Rule 16(a)(1)(C) is not simply the embodiment of the due process standard.\(^9\)

The Fifth Circuit’s description of the materiality standard under Rule 16(a)(1)(C) might be understandable if it were limited to the post-trial review of a defendant’s claim that the

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95. 511 F.2d 757 (5th Cir. 1975).
96. See id. at 763.
97. Id. at 762-63 (emphasis added).
98. See id.
99. See United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994) (upholding denial of documents under Rule 16(a)(1)(C) and Brady due to lack of materiality without distinguishing the two approaches).
erroneous denial of discovery requires a new trial. In that context, a court must apply the harmless error rule in Federal Rule of Criminal Procedure 52(a) to determine whether to grant a remedy, so that asking whether the withheld evidence would have impacted significantly the outcome at trial is another way of determining whether the error was harmless. Courts citing *Ross*, however, have neither confined it to that particular procedural context, nor noted that it is a type of harmless error analysis. Moreover, trial courts have relied erroneously on *Ross*' formulation of the materiality standard to deny *pre-trial* motions for discovery under Rule 16(a)(1)(C).

The proper analysis of materiality requires that the court remain cognizant of the pre-trial context in which discovery takes place. Rule 16(a)(1)(C) provides an important aid to the defendant's preparation for trial. The Rule is not a means to protect the Government from having to review files for documents that the prosecutor considers so unimportant that they were not included in the Government's case in chief. In *United States v. Liquid Sugars, Inc.* a district court suggested a lower threshold for establishing materiality under the Rule "as that information, not otherwise provided for or precluded by discovery rules, which is *significantly helpful* to an understanding of important inculpatory or exculpatory evidence." The court noted that "[d]efendants have a right to analyze and prepare for facially damning evidence," and lamented that "there is entirely too much 'hide-the-ball' in criminal discovery with respect to easily producible documents."

Unlike *Brady*'s materiality requirement for a due process violation, the language of Rule 16(a)(1)(C) should not be read to

100. See, e.g., United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991); United States v. Reeves, 892 F.2d 1223, 1226 (5th Cir. 1990).
102. See United States v. McVeigh, 954 F. Supp. 1441, 1450 (D. Colo. 1997) ("The government has objected to some of Mr. McVeigh's requests as 'burdensome.' That is not a proper objection.").
103. 158 F.R.D. 466 (E.D. Cal. 1994).
104. Id. at 471 (emphasis added).
105. Id. at 471 n.4.
impose a high standard.\textsuperscript{106} Some courts recognize that in the context of discovery, materiality should be more broadly construed to require production of documents when there is a strong indication that they will play an important role in "uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal."\textsuperscript{107} In \textit{United States v. Lloyd},\textsuperscript{108} the District of Columbia Circuit disagreed with the trial court's assessment that the defendant had "a very heavy burden" to establish the materiality of documents.\textsuperscript{109} The circuit court found that certain records may have assisted the defendant in mounting a defense that he did not have the requisite \textit{mens rea} for the crime and remanded the case to consider whether the improper denial of discovery required granting a new trial.\textsuperscript{110}

The failure to produce such evidence might not violate \textit{Brady}, but Rule 16(a)(1)(C) is not concerned with the effect of the Government's suppression of evidence on the fairness of the proceeding.\textsuperscript{111} Instead, the Rule demands that the Government permit the defendant to prepare a "defense," defined by the Supreme Court as a "shield" from the Government. While Rule 16(a)(1)(C) does not make discovery a sword, neither is the right afforded defendants subject to a high standard of materiality that permits the Government to withhold evidence that provides significant aid to the defendant in preparing for a criminal trial—which is, perhaps, the most important proceeding in that person's life.

Even with a lower materiality standard for Rule 16(a)(1)(C), defendants do not have a license to compel the Government to produce any document they believe might conceivably help the defense. The Rule puts the initial burden on the defendant to establish the materiality and possession of the documents, and

\begin{itemize}
  \item \textsuperscript{107} \textit{United States v. Gaddis}, 877 F.2d 605, 611 (7th Cir. 1989) (citing \textit{United States v. Felt}, 491 F. Supp. 179, 186 (D.D.C. 1979)).
  \item \textsuperscript{108} 992 F.2d 348 (D.C. Cir. 1983).
  \item \textsuperscript{109} \textit{Id.} at 351.
  \item \textsuperscript{110} \textit{See id.} at 351-53.
  \item \textsuperscript{111} See \textit{United States v. Conder}, 423 F.2d 904, 911 (8th Cir. 1970) ("[T]he disclosure required by Rule 16 is much broader than that required by the due process standards of \textit{Brady}.").
\end{itemize}
courts describe that threshold as a "prima facie showing." The Ninth Circuit stated, "Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense." In particular, courts are suspicious of broadly-worded discovery requests that appear to be little more than a scattershot attempt to have the Government search its files for items it believes might be useful to a defendant, especially material that will impeach government witnesses. Sometimes labeled "fishing expeditions," vaguely worded demands for expansive categories of records only elicit rebukes from courts because Rule 16(a)(1)(C) is not akin to the broad discovery available in a civil case.

Defendants face the chicken-and-egg problem of establishing the materiality of documents with enough specificity when they have not reviewed them to know whether and how they are helpful to a defense. The key step is identifying one or more defenses that may be raised at trial, and then determining what types of documents relate to that potential defense. In *United States v. Lloyd,* the Government charged the defendant with aiding and abetting the preparation of false income tax returns. The defendant sought copies of previous tax returns filed by the clients who he was accused of assisting in hiding income, arguing that the clients had misled him and, therefore, he did not have the requisite intent to aid in the filing of false tax returns. The District of Columbia Circuit found sufficient

112. See *United States v. Cadet,* 727 F.2d 1453, 1468 (9th Cir. 1984).
113. *United States v. Mandel,* 914 F.2d 1215, 1219 (9th Cir. 1990).
114. See, e.g. *Cadet,* 727 F.2d at 1468 ("A general description of the materials sought or a conclusory argument as to their materiality is insufficient to satisfy the requirements of Rule 16(a)(1)(C)."), *United States v. Anderson,* 31 F. Supp. 2d 933, 941 (D. Kan. 1998) ("The fact that the defendants only believe that the documents may show lack of criminal intent indicates ... that they in any event are likely on a fishing expedition. The defendants' request is simply not very specific ...") (emphasis in original); *United States v. Liquid Sugars, Inc.,* 158 F.R.D. 466, 472 (E.D. Cal. 1994) ("[R]equests which are designed to generally cast for impeachment material, and which are not directly pertinent ... are not material. Such requests are simply speculative inquiries without basis in fact to believe that the information acquired will be significantly helpful.").
115. 992 F.2d 348 (D.C. Cir. 1993).
116. See *id.* at 349.
117. See *id.* at 349-50.
indicis of the materiality of the requested records under Rule 16(a)(1)(C), even though the defendant was ignorant of their contents and could not show that they would in fact be material to the defense. The concept of helpfulness for determining materiality refers to whether documents may assist in preparing the defense, not that the defendant demonstrate they actually provide a defense, because that showing is virtually impossible without access to the records.

Revealing a defense in order to gain access to documents gives the Government an advantage by requiring a defendant to reveal before trial how he will respond to the Government's case. That is a strategic issue the defendant will have to decide, weighing the benefits of reviewing documents that may not aid a defense with the burden of giving the Government a preview of the defense. The burden may not be that great in many cases, however, because in white collar cases, at least, the defendants rarely dispute their involvement in the underlying activity or statements that may be contained in documents. The key issues are whether the statute covers the alleged misconduct and, if so, whether the defendant had the requisite intent to commit the crime. It is unlikely that the Government will learn much that is useful if, in seeking discovery of documents under Rule 16(a)(1)(C), the defendant discloses that he did not know all that took place or did not intend to cause a particular harm. Moreover, the materiality threshold under the Rule should not be a high one, so a district court should not compel a defendant to disclose much more than how the requested documents relate to the broad outlines of the potential defenses. Discovery in a white collar case proceeds from ignorance, not knowledge, so requiring a defendant to show how a document will establish a defense or significantly alter the quantum of proof at trial ignores the mandate of Rule 16(a)(1)(C)—to provide defendants access to items that will assist in their defense. To require more turns the Rule into a shield for the Government, certainly a result not contemplated in adopting a provision that purportedly expands the right to discovery.

118. See id. at 351-52.
C. Conclusion

Rule 16(a)(1)(C) provides an important means for defendants to prepare for trial by ensuring that discovery is not limited to the largesse of the prosecutor or willingness of a busy court to rule favorably on a motion to compel the production of records. Defendants who can identify documents that can provide significant help in formulating a defense must be allowed to review more than what the Government decides it will use at trial or documents that the defendant already furnished during the investigation. The concepts of possession and materiality require a measure of flexibility that should reflect the fact that adoption of the discovery rule was not to burden the prosecutor with an irrelevant task but a means to ensure a fair proceeding.

Production of records must also be viewed as the product of a developing understanding of the need to provide adequate discovery in a criminal prosecution. Prior to its amendment in 1966, Rule 16 was limited to documents and other tangible items seized or obtained by process, and then only upon a “showing of materiality to the preparation of his defense and that the request is reasonable.” In 1966, the Advisory Committee revised the Rule “to expand the scope of pretrial discovery.” In 1974, when Rule 16(a)(1)(C) took its present form, the Advisory Committee again sought to expand discovery for both sides by, inter alia, requiring the Government to disclose evidence it intends to use in its case in chief and items obtained from the defendant. No longer did a defendant have to demonstrate the materiality of these items. The Rule retained the materiality requirement for documents that did not fall within the parameters of the required production, making clear that the discovery right reaches beyond just what the Government considers important to a case.

The question remains, however, whether Rule 16 defines the entirety of discovery in a federal criminal prosecution. If Rule 16 were the sole means by which a defendant could use the machinery of the government to gather evidence, then a broad category of potentially relevant evidence could only be obtained

119. FED. R. CRIM. P. 16 advisory committee notes to 1974 Amendment.
120. FED. R. CRIM. P. 16 advisory committee notes to 1966 Amendment.
121. See FED. R. CRIM. P. 16(a)(1)(C); FED. R. CRIM. P. 16 advisory committee notes to 1974 Amendment.
by the defendant’s own devices and powers of persuasion. Documents that are not in the hands of the “government” are not subject to discovery because Rule 16(a)(1)(C) only reaches those offices that fall within the definitional scope of the Rule. If a regulatory agency does not come within the ambit of the “government” for the purposes of Rule 16(a)(1)(C), or if a private party holds the records, then a discovery order will not compel the government to obtain and disclose those records.

Is a defendant completely bereft of any means to require a third party to produce records? Rule 17(c) permits a defendant to issue a subpoena *duces tecum* to require the recipient to produce records at trial. The Rule even provides that a court can compel the subpoenaed party to produce the documents before trial, thereby permitting the parties to examine them without interrupting the proceeding. Rule 17(c) apparently provides a grant of authority to defendants to use the power of the government to obtain documents that fall outside the scope of Rule 16(a)(1)(C). The defendant’s ability to use a subpoena has been severely, and by my reading improperly, restricted to only those items the defendant can establish will be admissible at trial. Courts support a narrow reading of the provision by repeating a mantra that Rule 17(c) is not a discovery rule, which is only permissible under Rule 16. That mantra is traceable to two decisions by the Supreme Court that, while correct, used overly broad language that created an unfortunate perception of Rule 17(c) as a provision that provides only the most constrained right of a defendant to gather evidence to prepare for trial. Understood in context, the Court’s decisions do not support the broad dictum that Rule 17(c) cannot be used as a means to secure at least some discovery of documents from third parties.

122. *See Fed. R. Crim. P. 17(c).*
123. *See id.*
124. *See Bowman Dairy Co. v. United States, 341 U.S. 241 (1951).*
IV. RULE 17(c): THE SUBPOENA DUCES TECUM AS A MEANS OF DEFENSE DISCOVERY

A. The Development of Rule 17(c)

Rule 17 governs the issuance of subpoenas in criminal cases, covering both the grand jury investigation and the trial of criminal charges.\(^2\) Rule 17 authorizes subpoenas to obtain documents, subject to certain limitations:

(c) For production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.\(^7\)

The Rule appears to provide a broad mandate to both sides to use the compulsory process of the courts to gather evidence for use at trial, including a mechanism for the pre-trial production of the items. Rule 17(c) remains unchanged since the adoption of the Federal Rules of Criminal Procedure in 1944. The original Advisory Committee Notes on the provision convey a similarly broad understanding of the authority to issue subpoenas, stating in its entirety: "This rule is substantially the same as rule 45(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix."\(^7\)

Federal Rule of Civil Procedure 45(b), referred to in the Advisory Committee Notes as the analogue for Rule 17(c), authorized issuance of a subpoena compelling a non-party to produce documents at a deposition.\(^9\) Rule 45(b) was part of a

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127. \textit{See id.}
129. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents, designated therein. \textit{See} Fed. R. Civ. P. 45(a)(1)(C). The 1948 amendment added "tangible things" to the items subject to a subpoena. \textit{See} CHARLES
liberal civil discovery regime providing that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 130

What did the Advisory Committee mean when it asserted that Rule 17(c) is "substantially the same as rule 45(b)?" Rule 17(c) is not limited only to subpoenas to nonparties, and while the language of the provisions is similar, it is not identical. 131 For example, Rule 45(b) permitted the recipient to move to quash the subpoena if compliance would be "unreasonable and oppressive," while Rule 17(c) authorizes a motion to quash or modify the subpoena "if compliance would be unreasonable or oppressive." 132 More importantly, the policy supporting the broad right to discovery in civil cases is radically different from the limited discovery available under Rule 16, which originally limited discovery to those documents the Government "obtained from others by seizure or by process upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." 133 Unlike civil discovery, the Federal Rules of Criminal Procedure begin with the presumption that discovery for a criminal defendant is a limited right. The broad subpoena authority set forth in Rule 17(c), not limited to just non-parties to the prosecution, would essentially swallow the more modest provision for discovery granted in Rule 16 if interpreted along the lines of Federal Rule of Civil Procedure 45(b). Rule 17(c) is an enigma because it cannot be interpreted as authorizing an alternative form of discovery through the issuance of a subpoena duces tecum despite the unadorned language of the provision apparently granting such a right.

The Advisory Committee's reference to Rule 45(a) is enlightening, however, by putting in context the grant of authority for subpoenas for records in criminal cases. Until

130. FED. R. CIV. P. 26(b)(1).
131. See id. at 17(c).
132. See id. (emphasis added); FED. R. CIV. P. 45 (emphasis added).
Federal Rule of Civil Procedure 45 was amended in 1991, a civil litigant's demand for documents from a nonparty could only be made through a subpoena directing the witness to produce the documents at a deposition. On the other hand, a litigant could compel another party to produce records by a request under Rule 34(a). The Federal Rules of Civil Procedure provided different means for gathering documents, depending on the document holder's relation to the underlying proceeding. Rule 16, limited as it is, is the effective counterpart to Federal Rule of Civil Procedure 34—governing the discovery rights between the parties without reference to obtaining records from a third party. Using the limited scope of Rule 45(a) as a guide, Rule 17(c) should be understood to provide authority to subpoena third parties to produce records and not as a potential means to supplant the limited discovery right of Rule 16, which governs the discovery duty owed to the other party. The Federal Rules of Criminal Procedure only provided for depositions in "exceptional circumstances," so the provision in Rule 17(c) calling for pretrial production of records to the court is more in the nature of a substitute for the civil deposition than a substantive limitation on the right to compel a third party to produce documents.

The failure to identify clearly that Rule 17(c) only authorizes subpoenas for records to non-parties opened an avenue for defendants to bypass the more limited discovery right provided in Rule 16. They took advantage of the Rule's broad language by issuing subpoenas to the government for documents that the prosecutor did not have to produce otherwise because the records fell outside the bounds of Rule 16. Rather than treat Rule 16 as the exclusive means of discovery from the opposing party in the case, courts considered whether Rule 17(c) granted a broader discovery right that effectively supplanted Rule 16. Early cases analyzed whether, for example, defendants could compel production of their statements, statements of other

135. Id. at 15(a).
witnesses, impeachment evidence, and all documents obtained during the course of an investigation. The Supreme Court entered the fray by reviewing a defense subpoena to the prosecutors in *Bowman Dairy Co. v. United States* and changed the balance between the discovery right of Rule 16 and the subpoena authority of Rule 17(c).

**B. Bowman Dairy: The Confusion Begins**

In *Bowman Dairy*, the grand jury indicted the defendants for an antitrust violation, and before trial, they subpoenaed the prosecutors to produce all documents gathered in the investigation, including documents the Government intended to introduce at trial. The documents at issue included materials voluntarily supplied by third parties for the Government's use in the grand jury investigation. The Government moved to quash the subpoena on the ground that "the access of a defendant in a criminal proceeding to materials in custody of Government attorneys is limited to rights granted by Rule 16 . . ." The Supreme Court noted that due to the limited scope of Rule 16, only those records "obtained from others by seizure or by process" were subject to disclosure. The Court held that, to the extent records held by the Government were not subject to Rule 16, "no good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary." The Court never


138. *Compare Fryer*, 207 F.2d at 137 (ruling that documents for impeachment are evidentiary under Rule 17(c)), with *United States v. Schneiderman*, 104 F. Supp. 405, 410 (S.D. Cal. 1952) (denying inspection of documents for rebuttal or impeachment as they would not aid in preparation of a defense).


140. 341 U.S. 214 (1951).

141. *See id.* at 218-21.

142. *See id.* at 215-16.

143. *See id.* at 217.

144. *Id.*

145. *Id.* at 219.

146. *Id.* The subpoena had to reflect a "good faith effort . . . to obtain evidence." *Id.* at
explained why it read Rule 17(c) as reaching documents that were not subject to disclosure according to a clearly described, albeit quite limited, discovery provision.

Having recognized the broad applicability of Rule 17(c), the Court in *Bowman Dairy* had to keep it from swallowing Rule 16. The Court asserted, "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. ... Rule 17(c) was not intended to provide an additional means of discovery."147 The Court somehow asserted this despite enforcing the subpoena for some of the Government's documents, thereby granting discovery through the auspices of Rule 17(c). If Rule 17(c) only pertained to a subpoena issued to the opposing party, then the Court's statement might be a defensible reading of the provision. Rule 17(c), however, makes no mention of any limitation regarding who can be subpoenaed for records, so the Court's holding, that the defendants could compel the Government to turn over documents not subject to the discovery provision, was unsupportable. If the Court's concern was that Rule 16 was too narrow, precluding a defendant from reaching important materials, the answer was to change the Rule that it approved just a few years earlier. The problem, of course, was that in the case before it, important documents the Government planned to use to prove the defendant's guilt had been turned over to the Government voluntarily and, therefore, were exempt from discovery because they were neither seized nor obtained by process. The Court apparently found Rule 16 unduly restrictive of the defendant's ability to prepare for trial because the Rule rendered important evidence unavailable until the Government chose to introduce it at trial.

While enforcing the subpoena to the prosecutor in *Bowman Dairy* solved the immediate problem of disclosure of relevant documents by the Government, the Court's broad assertion that Rule 17(c) was not a means of discovery was wrong. Understood in the context of the too-narrow grant of discovery under Rule 16, the Court permitted a novel use of Rule 17(c), authorizing a subpoena *duces tecum* to the prosecutor that effectively created a new discovery right. As Rule 16(a)(1)(C) now reads, the

147. *Id.* (emphasis added).
defendants in *Bowman Dairy* would receive all of the Government's exhibits, including those drawn from voluntarily supplied documents, plus any other records that they could show were "material to preparation of the defendant's defense." It is unlikely that today someone in the position of the *Bowman Dairy* defendants would need to issue a subpoena for the types of documents at issue in the case, and if one were issued, it would likely be quashed. In light of the changes in the discovery rule, the Court's limited reading of the scope of Rule 17(c) in *Bowman Dairy* should be rewritten as follows: Rule 17(c) was not intended to provide an additional means of discovery against the Government of documents already subject to Rule 16.

Although it acquiesced in a defendant subpoenaing the prosecutor, the Court limited its enforcement of the subpoena to items that were "admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons . . . ." Rule 17(c) permits the production of items

149. See CHARLES ALAN WRIGHT, 2 FEDERAL PRACTICE & PROCEDURE (CRIMINAL) § 274, at 158 (2d ed. 1982) ("The distortion of Rule 17(c) that resulted from the desire to use it for discovery purposes should be ended with the 1966 amendments of Rule 16. Any document that might previously have been obtained by defendant through use of a subpoena duces tecum may now be obtained by discovery.").
150. The only authority that Rule 17(c) does not provide a means for discovery cited by the Supreme Court was *United States v. Maryland & Virginia Milk Producers Ass'n*, 9 F.R.D. 509 (D.D.C. 1949), a similar antitrust prosecution involving dairy products in which the defendants sought all documents obtained by the government, just as the defendants subpoenaed in *Bowman Dairy*. Judge Holtzoff, the secretary to the Advisory Committee on the Federal Rules of Criminal Procedure, was the trial judge in *Maryland & Virginia Milk Producers Ass'n*. He rejected the broad subpoena duces tecum on that ground that Rule 17(c)'s sole purpose "is merely to shorten the trial. It is not intended as a discovery provision." Id. at 510. The court's one-page opinion did not cite any support for that proposition, nor is there an analysis of the structure or history of the Rule to explain why the authority to compel the production of records from any person is not a means of discovery. While it may have been Judge Holtzoff's view as a participant in the drafting of the Rule, his *ipse dixit* proclamation of the meaning of Rule 17(c) certainly is not consistent with either the broad language of Rule 17(c) or its analogue in the Federal Rules of Civil Procedure that permitted subpoenas to non-parties for documents. The Rule does not provide a means to avoid the limitations of Rule 16 on discovery from the government, but that does not mean it cannot be used as a means for discovery outside that context. For a history of Rule 17(c) and discussion of Judge Holtzoff's role, see Lester B. Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 312, 326-27 (1957).
pursuant to a subpoena "prior to the time they are to be offered in evidence." This evidentiary limitation on the scope of a Rule 17(c) subpoena allowed the Court to require the Government to produce documents it intended to use at trial, because those items were evidence by definition, without at the same time granting defendants the right to pursue a broad range of documents from the Government that might not be part of its case in chief. In order to keep this new disclosure obligation as narrow as possible, the Court converted the timing notion in Rule 17(c) to strictly limit what would be subject to the subpoena under Bowman Dairy's interpretation of the Rule: only those records or objects that the defendant demonstrated would be admissible at trial could be obtained at the time of the subpoena's issuance. In this manner, the Court rejected the defendant's expansive request for all documents gathered in the investigation "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." Mixing in an aquatic metaphor that is oft-repeated in this area, the Court assailed the defendants' catch-all demand as "merely a fishing expedition to see what may turn up."

Bowman Dairy essentially created a discovery right against the Government broader than that provided in Rule 16. The Supreme Court's simultaneous effort to limit the scope of this new right ensured confusion when read with the Court's blanket assertion that Rule 17(c) is not a means for defendants to engage in discovery. The Court adopted the concept that the subpoena could only compel the production of evidence and strictly defined that term so that a defendant would have to meet a high threshold before the subpoena could be enforced against the prosecutor. What the Court failed to consider was the effect of its analysis on what appears to be the original purpose of Rule 17(c), recognized by the Advisory Committee, that defendants

152. Fed. R. Crim. P. 17(c).
153. See Bowman Dairy, 341 U.S. at 221.
154. Id.
155. Id. It is not clear whether a recreational excursion such as a fishing trip "turns up" much of anything beyond tall tales, but that was the extent of the Court's analysis of why a broadly written subpoena was unsatisfactory under Rule 17(c). See id.
156. See id.
could obtain documents from third parties prior to trial by a subpoena *duces tecum*.

*Bowman Dairy* shifted the focus of the Rule to determining what constitutes "evidence" that may be subject to a subpoena for production before trial. The Court addressed that issue again in a little-noticed aspect of one of its most famous cases, *United States v. Nixon*, in which resolution of the Rule 17(c) issue was the pivotal first step in the process of deciding one of the most important separation of powers cases in the Court's history.

**C. Nixon: Don't Forget Who Was Asking**

The prosecution at issue in *Nixon* involved the former Attorney General and six high-ranking aides to President Richard Nixon charged by the Special Prosecutor with, among other things, conspiracy and obstruction of justice. After indicting the defendants, the Special Prosecutor issued a subpoena *duces tecum* to President Nixon for pretrial production of tapes "relating to certain precisely identified meetings between the President and others." The President asserted executive privilege regarding the tapes, and further sought to quash the subpoena on the ground that the Special Prosecutor had not met the requirements of Rule 17(c) for pretrial production.

The Court began its analysis by noting that the only ground for quashing a subpoena provided by the Rule was if the production would be "unreasonable or oppressive." The Court then cited its decision in *Bowman Dairy* as the "leading case" on this standard, despite the fact that the earlier opinion never referred to the "unreasonable or oppressive" language as a basis for its decision. In fact, *Bowman Dairy* focused on whether the items were "evidentiary" in order to determine whether to

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158. *See id.* at 687.
159. *Id.* at 688. "The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him." *Id.* Presumably, the Special Prosecutor obtained the information that allowed him to detail exactly which tapes were sought had been obtained through a grand jury subpoena *duces tecum*.
160. *See id.* at 688, 697.
161. *See id.* at 698.
162. *See id.*
permit a defendant to gain discovery from the Government beyond the confines of Rule 16. Nixon then adopted District Judge Weinfeld’s four-part test announced in United States v. Iozia for what constitutes “evidentiary” material that a party may seek through a subpoena duces tecum under Rule 17(c) for pretrial production:

Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general “fishing expedition.”

The Nixon Court then boiled the test down into a simple three-part requirement a party must meet for enforcement of a subpoena: “(1) relevancy; (2) admissibility; [and] (3) specificity.”

Looking at the Special Prosecutor’s subpoena for the tapes, the Court had no trouble finding that the three elements for a subpoena were met. Regarding specificity, the Special Prosecutor identified the dates, times, and participants in the recorded meetings, and through cooperating witnesses, could even offer a description of the subjects discussed. For the purely evidentiary issues of relevancy and admissibility, the defendants participated in some of the conversations, so the conspiracy charge meant that the statements of coconspirators would be admissible against each conspirator under the hearsay rule. The Special Prosecutor had already amassed powerful evidence of group criminality, and the tapes proved to be the coup de grâce for the Nixon presidency. The Court adopted a

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166. Id. at 700.
167. See id. (“With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time.”).
168. See id. at 700-01.
high standard for enforcement of the subpoena because it was mindful of the sensitive issues it faced, noting that "[i]n a case such as this . . . where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied."169

*Nixon*'s tripartite requirement of relevancy, admissibility, and specificity for enforcement of a subpoena under Rule 17(c) has the virtue of being plain and direct in addressing the significant issues facing the Court. Despite the weighty matters of constitutional law it grappled with, the Court took only sixteen days after the oral argument to issue its unanimous opinion.170 The Rule 17(c) issue, while an important prelude, was unlikely to generate much controversy given the strength of the Special Prosecutor's evidence supporting the subpoena. Therefore, it is understandable that the Court adopted a high standard because, first, it would be met by the Special Prosecutor and, second, it demonstrated the care the Court took in reviewing an order compelling the President to turn over the tapes. Yet, in establishing the standard for enforcement of a subpoena under Rule 17(c), the Court never considered the context in which the case arose. *Nixon* apparently adopted a single standard for judging the propriety of every subpoena seeking pretrial production of records.171

Unlike *Bowman Dairy*, however, *Nixon* involved a prosecutor, not a defendant, seeking items after an indictment. The existence of the tapes was known to the Special Prosecutor before the grand jury handed up its indictment, having been revealed the prior year in the Senate Watergate hearings, so a grand jury subpoena could have been used to obtain the tapes from the President prior to the indictment of the President's former aides. While the President could have raised the same privilege claim at that point in the investigation, the Special Prosecutor had at his disposal the broad authority of the grand jury, which is entitled to "every man's evidence," yet chose to

169. *Id.* at 702.
170. *See id.* at 683.
171. *See id.* at 699-700.
forego that option for obtaining the information. A prosecutor has a powerful means of gathering evidence before filing charges, unlike a defendant, so the choice of using a subpoena *duces tecum* to obtain evidence after an indictment should be subject to a higher standard.

The Court recognized in *United States v. R. Enterprises, Inc.* that grand jury subpoenas are different from trial subpoenas under Rule 17(c). The Court held that "the *Nixon* standard does not apply in the context of grand jury proceedings," and that a grand jury subpoena is enforceable "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." The question is whether *Nixon's* high standard should also apply to defendants issuing subpoenas who did not, and could not, use a grand jury to gather evidence to aid their defense. *R. Enterprises* makes clear that the "unreasonable or oppressive" standard for quashing a subpoena differs depending on whether the Government issues the subpoena during a grand jury investigation or after filing charges. Rule 17(c) does not impose a unitary standard of reasonableness, so there does not appear to be an *a priori* reason why a court cannot use a different standard than *Nixon's* in deciding whether to enforce a defense subpoena for records from a third party than it would apply to the Government.

*Nixon* is a reasonable standard to apply to prosecutors who seek additional evidence to bolster their case, having already gathered sufficient information to decide to seek an indictment and commence the process leading to a criminal trial. The Government has the advantage of the grand jury because of the

172. *See id.* at 687.
175. *Id.* at 300.
176. *Id.* at 301. The lower court applied *Nixon's* three-part test to determine the enforcability of a grand jury subpoena for videotapes related to an obscenity investigation. Consistent with other decisions regarding what evidence a grand jury can consider, the Court adopted a low standard for determining what evidence the grand jury can gather as part of its investigation. *See id.*; *United States v. Williams*, 504 U.S. 36, 52-54 (1992) (finding no authority for a district court to require prosecutor to present exculpatory evidence to grand jury); *United States v. Dionisio*, 410 U.S. 1, 9-18 (1973) (holding that the Fourth Amendment does not apply to grand jury subpoena).
burden it bears in establishing guilt at trial beyond a reasonable
doubt. Applying the identical standard for Rule 17(c) subpoenas
to defendants is wrong because they have none of the
investigatory advantages of the Government, nor the means to
compel the production of items about which they may not have
a significant amount of information. Treating defendants and
prosecutors identically under Rule 17(c) ignores the important
distinctions between them. Nixon imposed a high standard, but
not because the language of Rule 17(c) either demands or
implies that every party using a subpoena for pretrial
production establish relevancy, admissibility, and specificity to
compel the production of documents. The Rule is silent on what
is required before a court can require pretrial production, and
Bowman Dairy and Nixon do not provide the only, or even the
best, interpretation of the defendant's right to subpoena a third
party to produce records.

D. Defense Subpoenas Under Rule 17(c): Changing the
Perceived Wisdom

Professor Wright's treatise on federal practice summarized
quite starkly an unreflective view of the effect of Bowman Dairy
and Nixon on subpoenas by defendants: "The availability of
Rule 16 should now make it impossible to show good cause for
use of Rule 17(c) as a discovery device."177 Courts have relied on
these two Supreme Court opinions to assail discovery requests
under Rule 17(c) as "more in the nature of a 'treasure hunt,' "178
or as a "pure total fishing expedition."179 In United States v.
Najarian,180 the district court asserted that "if the restrictions
of Rule 17(c), upon full-bodied discovery in criminal proceedings,
should appear to be unduly constraining, then the answer would
seem to lie in its amendment so as to provide for a more
expansive exploration into the documentary evidence of third-
persons."181 The district court's statement exemplifies a
misapprehension, because Rule 17(c) should provide defendants
the means to gather documents from third parties that

177. WRIGHT, supra note 149, § 274, at 158.
179. United States v. Hang, 75 F.3d 1275, 1283-84 (8th Cir. 1996).
181. Id. at 488 n.3.
supplement the discovery provided by Rule 16, but do not supplant it.

The problem with the high threshold set by Nixon is that it can discourage defense counsel from even attempting to gather documents from third parties. Courts considering requests for pretrial production of documents under Rule 17(c) require the defendant to demonstrate the contents of the documents, to meet the specificity element, and to describe how the item will be admissible and relevant evidence that will establish a defense. As one district court described the burden on the defendant, "The moving party must specify why the materials are wanted, what information is contained in the documents, and why those documents would be relevant and admissible at trial."182 The Nixon standard is not easily met because "the documents sought cannot be potentially relevant or admissible, they must meet the test of relevancy and admissibility at the time they are sought."183 The problem encountered under Rule 16 for determining what is material is exacerbated when the defendant must demonstrate both the content of the document and its evidentiary use at trial before being allowed to examine it to prepare for trial. The Supreme Court's restrictive interpretation of Rule 17(c) can make a subpoena for records hardly worth the effort, or at least an avenue that only the most hardy defense counsel will travel when the chance for success seems so remote.

I do not mean to imply that defendants never succeed in obtaining pretrial discovery of documents held by third parties under the restrictive analysis of Bowman Dairy and Nixon. In In re Martin Marietta Corp.,184 the trial court ordered production to the defendant before trial of the internal audit work papers of his former employer in a mail fraud prosecution based on alleged falsified travel records submitted by the defendant to the government for reimbursement.185 The trial court found the defendant satisfied Nixon's requirement of relevance, admissibility, and specificity by disclosing how the documents

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184. 856 F.2d 619 (4th Cir. 1988).
185. See id. at 622.
related to his defense, "that he was made a scapegoat" for overbilling by his corporate employer, even though the subpoena only described the general category of documents sought. Similarly, in United States v. Caruso, the district court refused to quash a subpoena ducès tecum issued to the defendant's former employer for documents related to the organization's internal policies and procedures. The court found that the records met the Nixon test because of the relationship to the defendant's assertion that they would assist him in establishing that he did not have the requisite intent to defraud the employer.

In each case, the defendants' success in gaining access to documents before trial was dependent on the fact that the defendants already knew, based on their employment, which types of documents the former employer held. Requiring that a defendant essentially know the contents of documents before they can be subpoenaed puts defense counsel in an almost untenable situation. So long as courts repeat the mantra of Bowman Dairy and Nixon that Rule 17(c) is not a means of discovery for a defendant, then the requirement that defendants show the content of records to which they may not have had access will deter adequate pretrial preparation.

If Rule 17(c) is viewed as an adjunct to the discovery provided by Rule 16, at least giving defendants a means to review documents held by third parties, then a more balanced approach can be formulated. Even Professor Wright now acknowledges the utility of subpoenas to third parties, stating that "Rule 16 does not apply to documents in the hands of third persons and Rule 17(c) may still be useful to obtain such documents." In United States v. Tomison, the district court

186. Id.
187. See id. at 622. The court even required disclosure of the corporation's administrative settlements with the government relating to the overbilling on the ground that defendant's request was "at least a good faith effort to acquire evidence ... for a defense that Martin Marietta hung him out to dry while protecting its own interest." Id.
189. See id. at 397.
190. See id. ("The documents are relevant to establishing the defendant's state of mind at the time of the offense, and as such would be admissible at trial.").
stated that "[t]he notion that because Rule 16 provides for
discovery, Rule 17(c) has no role in the discovery of documents
can, of course, only apply to documents in the government's
hands; accordingly, Rule 17(c) may well be a proper device for
discovering documents in the hands of third parties."\textsuperscript{193}

If Rule 17(c) provides a means for defendants to discover
documents held by third parties, then the requirements for
obtaining pretrial disclosure need not mimic those adopted in
\textit{Nixon}, which should only apply to Government subpoenas for
evidence that could have been obtained by a grand jury
subpoena prior to indictment. Understanding Rule 17(c) as a
limited discovery device does not mean that defendants can use
it to bypass the limitations of Rule 16(a)(1)(C). Instead, it would
be fair to look to Rule 16 as a guide for the scope of the
defendant's Rule 17(c) right to obtain documents from third
parties. The initial point is that the documents subject to a
subpoena cannot already be discoverable under Rule 16,
precluding a defendant from using Rule 17(c) to avoid the
strictures of Rule 16. The teaching of \textit{Bowman Dairy} at least
requires respect for the structure of discovery adopted by
Congress by not having one rule supplant another.

Assuming the Government, as defined by Rule 16(a)(1)(C), did
not have possession of the records, then the defendant's
subpoena would seek items that the Government did not
consider important enough to gather during its own
investigation, or about which it was unaware. In either case, the
documents did not come from the defendant and the
prosecution did not intend to use them in the Government's
case in chief. A Rule 17(c) subpoena to a third party seeking
production of documents, therefore, would be analogous to a
Rule 16(a)(1)(C) discovery request for items that are material to
a defendant's defense.\textsuperscript{194} Evaluation of the defendant's right to
subpoena a third party should track the materiality analysis for
discovery because in each case the right to discovery requires
an initial showing by the defendant of good cause for production
of the documents. The judicial abhorrence of "fishing
expeditions" in Rule 17(c) cases would remain intact, even
under a lower standard for defense subpoenas to third parties,

\textsuperscript{193} \textit{Id.} at 583 n.14.
\textsuperscript{194} \textit{See FED. R. CRIM. P.} 16(a)(1)(C).
because the defendant would still have to establish the need for the document and its relation to a defense at trial. Moreover, limiting discovery to items which the Government did not obtain in its investigation blocks defendants who try to bypass the limitations on disclosure of witness statements under the Jencks Act because Rule 16 discovery does not permit disclosure of those items before trial.

Rule 17(c) contains only one express ground on which to challenge a subpoena, that it is "unreasonable or oppressive." The Supreme Court's interpretation of that standard in Nixon and R. Enterprises demonstrates that reasonableness under the Rule is contingent on the circumstances in which the subpoena arose. Imposing a materiality requirement similar to Rule 16(a)(1)(C) for evaluating defense subpoenas to third parties is another form of the reasonableness analysis, allowing the court to compel pretrial production only after the defendant shows that the information is significantly helpful to a defense to the charges at trial. This adaptation of the materiality requirement as a determination of the subpoena's reasonableness permits courts to police subpoenas to nonparties to ensure that defendants do not cast a wide net seeking anything that might be of some slight interest in the hope of landing a helpful item. Yet, a reasonableness requirement lower than that of Nixon better reflects the defendant's position as a person without the investigatory authority or resources of the Government. While a defendant must have more than a mere inking about the contents of a third party's documents, the standard would permit discovery even though the defendant cannot describe the documents with sufficient clarity to meet the three Nixon requirements of admissibility, relevance, and specificity. As one district court pointed out, "Of course one person's fishing expedition is another's exhaustive investigation." A discovery right limited to only the Government's documents, and those

196. See Fed. R. Crim. P. 16(a)(2) ("Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.").
197. See id. at 17(c).
few instances in which a defendant can meet the *Nixon*
requirements, makes adequate preparation, especially in a
white collar prosecution, far from meaningful.

In *United States v. Arditti*, Circuit Judge Goldberg stated in
a concurring opinion, "Rule 16, which severely restricts
discovery in criminal cases, does not define the outer limits of
materials available under a Rule 17(c) subpoena . . . ." The
analysis that I propose of defense subpoenas to third parties
under Rule 17(c) reflects the necessity of defending a white
collar criminal prosecution. The documents are the key to the
case, and adequate preparation requires access to more than
just what the prosecutor saw fit to gather in the investigation. A
government agency that has documents related to the case, but
is not sufficiently close to the prosecutor to fit under Rule
16(a)(1)(C)'s definition of "government," would be a non-party
subject to a defense subpoena under the proposed
interpretation of Rule 17(c). If the defendant can establish the
materiality of the documents, it is illogical to permit the
prosecutor to oppose discovery of records under Rule 16(a)(1)(C)
on the ground that they are not in the government's possession,
and then oppose a subpoena under Rule 17(c) for the same
records by arguing that the defendant cannot establish the
requisite evidentiary foundation for them. Applying two
standards to the defendant's discovery undermines the goal of
a fair proceeding through a hypertechnical application of the
Rules that allows the prosecutor to thwart disclosure of material
documents.

White collar crimes involve common occurrences that become
criminal through the manipulation of business acts and the
intent of the participants to engage in criminal conduct. The
transfer of money for a product can change from being ordinary
to criminal because of what takes place beneath the surface.
Unlike a street crime, white collar crimes are common acts
made criminal, and it is the documents reflecting the conduct
that are crucial to establishing whether or not a crime occurred.
Denying a defendant access to documents held by third parties,
including agencies unaffiliated with the prosecutor, simply
because the Supreme Court tried to mask what it did in

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200. 955 F.2d 331 (5th Cir. 1992).
201. *Id.* at 346-47 (Goldberg, J., concurring).
Bowman Dairy by asserting that Rule 17(c) is not a discovery device elevates an obfuscation into a meaningful legal doctrine. Bowman Dairy and Nixon stand for the untenable principle that the Federal Rules of Criminal Procedure exclude a critical area from defense discovery except in those few situations when the defendant can show that he knows what is there before even seeing the documents. There is nothing in the Rules that reflects such a restrictive view of the defendant’s right to discovery, and indeed the language of Rule 17(c) points in the opposite direction.

Bowman Dairy and Nixon do not forestall completely a defendant’s efforts to secure documents before trial from third parties, but make it unnecessarily difficult by imposing a high threshold for invoking Rule 17(c) that focuses on the evidentiary nature of the requested documents without reference to the defense at trial. The important limitation on discovery since the adoption of the Federal Rules of Criminal Procedure has been materiality to the defense, not whether the document subject to disclosure meets the prerequisites for admission into evidence at trial. Rule 17(c) should be understood as a counterpart to Rule 16, providing a limited avenue of defense discovery of documents held by third parties that are material to a defense against the government charges. The perceived wisdom derived from Bowman Diary and Nixon goes too far, and the higher standard they prescribe for defense subpoenas to non-parties for documents misapplies the Rules and denigrates the concept of a fair criminal trial.

CONCLUSION

In a white collar criminal prosecution, the need to gather documents is not a pleasant task. Upon indictment, the Government may dump a small mountain of documents on the defense and invite the opposing lawyer to dive in. At the outset, there may appear to be more than enough to defend the case. The question then arises, however, “Do I trust the Government?” If you do, then what the Government provides will be enough to defend the case. If not, then the defense lawyer must try to gather more documents. At that point, the defense has to navigate through Rule 16(a)(1)(C) and determine whether the Government has any other documents helpful to
prepare the defense; quite often, the Government has more than it turns over at the start of the case. If the defense obtains additional documents from the prosecution, the nagging question still remains, "Do I trust the Government?" Now, the issue is whether other agencies have documents relevant to the case, and whether third parties have records that the prosecution did not seek in its investigation or may not have known exist. The small mountain can quickly grow to overwhelm the defense. Yet, to adequately prepare to defend a white collar criminal prosecution, the task of gathering documents cannot be avoided.

Discovery under the Federal Rules of Criminal Procedure is an odd dance that requires defense counsel to make some rather fine distinctions in the rush to prepare for trial. Attorneys who simply ask the court to grant discovery of everything imaginable, without paying attention to the different standards and means for gathering evidence before trial, invite problems in preparing their case. That scattershot approach is especially harmful when the Government brings a white collar prosecution because securing the documents is the key to adequate preparation. This Article argues that the barriers to defense discovery of documents should be lowered in a manner consistent with the language of the Rules, although not to such a degree as to give the defendant unimpeded discovery. The defense of a white collar criminal case demands that there be avenues of discovery available upon a reasonable showing of need by the defendant. The Article's analysis focuses on the language of the Rules and how they should be understood as providing a regulated means of compelling the production of documents that does not give either side an unfettered right to acquire information, unlike the approach in civil cases.

Simply repeating the mantra that there is no right to discovery in a criminal case cannot justify reading the discovery provisions narrowly at every turn. The right to discovery granted in the Federal Rules of Criminal Procedure is important, especially in a white collar case in which access to documents is so crucial. The Rules need to be understood in the context of a congressional decision to permit meaningful discovery. Similarly, the Supreme Court's analysis of Rule 17(c) needs to be considered against the backdrop of the type of discovery claim being asserted and who was seeking discovery.
The Court's broad language has been misunderstood as adopting a narrow interpretation of the Rule that is not consistent with its language or role in the provision of discovery rights.

In *United States v. Burr*, Chief Justice Marshall reflected on the role of discovery in the criminal prosecution of Aaron Burr for treason:

> The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence... If it be apparent that the papers are irrelelative to the case, or that for stated reasons they cannot be introduced into the defence, the subpoena *duces tecum* would be useless. But, if this be not apparent, if they may be important in the defence, if they may be safely read at the trial, would it not be a blot in the page which records the judicial proceedings of this country, if, in a case of such serious import as this, the accused should be denied the use of them?

Discovery is not a game, or a series of hurdles thrown in front of a defendant to see how hard the defense is willing to work to gather the information. Discovery is a means to ensure a fair trial, one in which each side has a chance to put on its case. The goal should be to apply the Rules so that there are no blots on the page of justice.

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202. 25 F.Cas. 30 (C.C. Va. 1807).
203. *Id.* at 35.