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Discovery and Inspection in Federal Criminal Procedure

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VII. Discovery Under Rule 17(c) as Interpreted by the Courts.

Rule 17(c) makes provision for discovery before trial when it provides that the court may direct that the 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." No such provision appears in the corresponding Federal Civil Rule 45(c). A motion for inspection during the trial does not come within the scope of Rule 17(c).

Rule 17(c) has been said to be a statutory implementation of the sixth amendment which provides: "In all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor." Chief Justice Marshall, sitting as a circuit justice, states that the defendant has the right to compulsory process "as soon as he is brought into court" even before indictment. A state court has recently stated: "There is no privilege which puts beyond the reach of compulsory process evidence in the possession of police or prosecuting authorities bearing upon the truth of the fact in issue in a criminal case. The suppression by this means of evidence upon which the innocence of the accused might depend would infringe his constitutional rights.

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202 It seems to the author of this article that discovery occurs under Rule 17(c) and a broader discovery than under Rule 16. However, many will differ. See for example Note, 67 Harv. L. Rev. 492, 494-498 (1954), which refers to "attempted discovery" under Rule 17(c).


205 United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955). It has been pointed out that the case law on the right to compulsory process has been "extremely meager". Rotschaefer, Constitutional Law 797 (1939).

and offend against the plainest principles of justice and policy."  

So fundamental is the right of the defendant to compulsory process that a treaty impairing the right would seem to be invalid.

Rule 17(c) may be used by the government as well as the defendant for production of documentary evidence and objects, whereas Rule 16 provides only for discovery in favor of the defendant. Thus Rule 17(c) may be resorted to by the government in grand jury investigations. The subpoena may be issued against a corporation or individual before any specific charge is made by the government against the corporation or individual. A subpoena to a corporation in such a case does not violate the incrimination provision of the fifth amendment. But if the subpoena is unreasonable and oppressive it violates the fourth amendment providing against unreasonable searches and seizures. Documents called for by the subpoena must be specified with reasonable particularity and the period covered must be reasonably limited. The subpoena need not designate each particular paper desired. A wider range of inquiry as to documents is permitted in grand jury investigations than in other stages of criminal proceedings. A subpoena too broad in some of its demands may be valid if the good demands may be separated from the bad. The subpoena will not be applied to documents containing any military or naval information under security classification. In passing on the subpoena the court may look at the fact of the subpoena and other proper

207 State v. Cooper, 2 N.J. 540, 67 A.2d 298, 305 (1949), 41 J. Crim. L. & Criminology 64 (1950). The case held that the defendant could subpoena the results of fingerprint tests on an alleged murder weapon.

208 Wright, Treaties as Law in National Courts, 32 Ind. L.J. 1, 3 (1956); 4 Hackworth, Digest of International Law 759-760 (1942); 2 Hyde, International Law 1844 (2d ed. 1945). In United States v. Trumbull, 48 Fed. 94, 98 (S.D. Cal. 1891), it was held that the government could not have compulsory process, but the court distinguished and did not pass on the defendant's right. Compare In re Dillon, 7 Sawy. 561, 7 Fed. Cas. 710 (N.D. Cal. 1854).


211 Application of Certain Chinese Family B. & D. Ass'n, 19 F.R.D. 97, 99 (N.D. Cal. 1956). A subpoena requiring all records for 25 years was too broad. The court stated that research did not disclose any subpoena upheld for a period of more than 27 years. Id. at 100.
sources such as prior proceedings in the case.\textsuperscript{212} It has been thought that Rule 17(c) permitting quashing of the subpoena applies only after an information or indictment has been returned, but that this is inconsequential as an attack could be made under the fourth amendment.\textsuperscript{213} A subpoena served on a foreign sovereign may be quashed.\textsuperscript{214}

When the government issues a subpoena under Rule 17(c) to a defendant its only purpose must be for production in evidence at the trial and not for pre-trial discovery.\textsuperscript{215} It is the grand jury which has the primary role as the agency of compulsory disclosure.\textsuperscript{216} But subpoenas may be issued on application of the government to others than defendants under Rule 17(c) for inspection before trial.\textsuperscript{217}

A corporate defendant is subject to subpoena under Rule 17(c). An individual defendant could plead self-incrimination.\textsuperscript{218} The Antitrust Division of the Department of Justice had used such procedure against corporate defendants.\textsuperscript{219}

When the government issues a subpoena under Rule 17(c) it is the United States attorney who issues it. A statute authorizing agents of the Bureau of Internal Revenue to subpoena documents pertinent to a taxpayer's liability does not authorize the agent to issue a subpoena merely to aid a prosecution by the Department of Justice.\textsuperscript{220} Administrative subpoenas may not be used as a

\textsuperscript{216} \textit{Id.} at 251. See comment on this case in 34 Neb. L. REV. 645, 659 (1955).
\textsuperscript{219} See Rice, \textit{Trial Technique in Antitrust Cases}, 7 LAW & CONTEMP. PROB. 138, 141 (1940); Note, 51 YALE L.J. 687, 689 (1942).
device for compulsory disclosure of testimony to be used in presentments of criminal cases. Hence an application for a judicial subpoena to implement an administrative subpoena will be denied.

Where the government secures a subpoena under Rule 17(c) disobedience constitutes contempt of court. Reliance on the advice of counsel or belief that the subpoena is invalid will not excuse; nor will the filing of a motion to quash. Furthermore, as Rule 17(c) provides, the motion to quash must be made promptly.

Thus far the right of the government to subpoena under Rule 17(c) has been considered. It has been seen that the government when it issues a subpoena to a defendant can do so only for production at the trial and not for pretrial discovery. Furthermore an individual defendant may be able to plead self-incrimination. Thus the rights of the government to subpoena are strictly limited. But what about the right of the defendant to subpoena under Rule 17(c)? May the defendant secure inspection of his own statements by subpoena to the government? This has been a favorite subject for decision beginning as late as 1953. In the first case on the subject the Court of Appeals of the District of Columbia declined to reverse a denial of inspection as the denial was not prejudicial on the facts. There was no prejudice as the government introduced the defendant's statement at the trial five days before the defendant's psychiatrist took the stand and the psychiatrist testified that the defendant was of unsound mind at the time of the crime. Nevertheless the court regarded the defendant's written statement as a "paper" or "document" within the scope of Rule 17(c). And the statement, which was introduced in evidence at the trial was regarded as evidentiary under the Bowman case. In a second case a subpoena for all written statements or transcripts of testimony and alleged confessions of the

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221 Taylor v. United States, 221 F.2d 809, 810 (6th Cir. 1955). The penalty was five months imprisonment.
Likewise the government attorney may be in contempt where he refuses to obey a valid subpoena obtained by the defendant. Bowman Dairy v. United States, 341 U.S. 214 (1951).
223 ROTTSCHAEFER, CONSTITUTIONAL LAW 801-802, 805 (1939).
224 In United States v. Bondy, 171 F.2d 642 (2d Cir. 1948), it was not clear from the opinion of the court whether the defendant sought inspection of his own statement or statements of others.
226 207 F.2d 138.
defendant was denied as the defendant failed to show that they were not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence.227 Thus there was no assertion that discovery would not lie in a proper case. In fact the court stated that "it is essential that each have an opportunity to examine before trial documents which may be introduced against him but which he has never before seen."228 In the District of Columbia a defendant was permitted inspection of his written and signed statement.229 District Judge Goddard of the southern district of New York denied inspection as the defendant had not shown good cause.230 The elapsed time had been short so that the defendant's memory should not have been dimmed. The defendant might be able to "doctor" his testimony to fit his statement. Inspection would deprive the trial of a certain spontaneity which is helpful in arriving at the truth. The court did not deny that the defendant might have inspection if he showed good cause. Judge Edward P. Murphy of the northern district of California granted inspection of the defendant's written statement in a case transferred from the District of Columbia where inspection had been granted.231 He did not base his decision on the fact that the case had been transferred, and pointed out that the statement was evidentiary.

Judge Thomas F. Murphy of the southern district of New York denied inspection of the defendant's statement under Rule 17(c) and also under Rule 16 although admitting that there was contrary precedent in the southern district of New York and in the District of Columbia.232 In his view the Bowman case formulated the rule to aid defendants in securing documents to introduce in evidence at the trial; but in the case before him no such intention existed. If the statement supported his testimony at the trial it would be surplusage; if it impeached him, he would not use it

227 United States v. Cohen, 15 F.R.D. 269, 272-273 (S.D.N.Y. 1953). The court pointed out that availability of a copy is sufficient unless comparison with the original is desirable. Opinion was by Dimock, J.

228 Ibid.


at the trial. Moreover good cause was not shown. Judge Leo F. Rayfiel of the eastern district of New York allowed inspection of the testimony of the defendant before the Superintendent of Banks of New York. Such testimony was like the testimony of a defendant before a grand jury which may be disclosed to the defendant where the ends of justice require it. Judge Irving R. Kaufman of the southern district of New York denied discovery of defendant's statements made to government agents shortly after his arrest. One statement was signed and another unsigned. The statements would not be usable in evidence. If they supported the defendant's testimony at the trial, they were surplusage; if they impeached, they would not be used. Delay at the trial would not ensue as the statements were short. Moreover the statements were available to the defendant in a transcript of a prior trial in the hands of defendant's counsel. In a decision of the same date by Judge Kaufman inspection was denied of the transcript of an unsigned question and answer statement given by the defendant to an agent of the Bureau of Internal Revenue. It was doubtful whether the defendant would use such statement as evidence; and the trial would not be unduly delayed by inspection during trial. Judge William B. Herlands denied inspection of the defendant's unsigned oral statement to an assistant United States attorney transcribed by a government stenographer. Inspection is not warranted simply because the defendant wishes to make sure that the story he tells at the trial is not impeached by any prior inconsistent statements he made to the government. Rule 17(c) should not be construed so as to make Rule 16 meaningless. It should be construed as providing for the traditional type of trial subpoena although it may be made returnable before the actual date of the trial.

The Court of Appeals of the District of Columbia held that defendants could properly request inspection of recordings of conversations between the defendants and police officers. The recordings were evidentiary under the Bowman case. But the trial court did not err when in its discretion it denied such request inasmuch as the defendants had already been accorded an op-

portunity by the government to inspect the recordings. The government would not have to allow inspection of the original recordings where they were too fragile and where accuracy of the reproduction was shown. In a prosecution of a corporation and its officers for misstatement of corporate federal taxes in annual reports filed with a stock exchange it was held that they were entitled to inspect their own statements and that of another co-conspirator who was chief accountant of the corporation made in the course of a Securities and Exchange Commission investigation. But no inspection was allowed as to statements made to the Internal Revenue Service and the F.B.I. The latest decision of the Court of Appeals for the Second Circuit calls for a liberal construction of Rule 17(c).

To summarize there have been decisions upholding the possibility of using Rule 17(c) to secure inspection of the defendant's statements by the Court of Appeals of the District of Columbia and by Judge Holtzoff of the District Court of the District of Columbia, Judge Sylvester Ryan of the Southern District of New York, Judge Rayfield of the Eastern District of New York, and Judge Edward P. Murphy of the Northern District of California. On the other hand District Judges Goddard, Thomas F. Murphy, Irving Kaufman, and Herlands have opposed such discovery.

It has been seen that there have been several decisions permitting discovery of the defendant's own statement under Rule 17(c), although there are also several opposing decisions.

What about discovery of the statements of witnesses? In the first case on the subject it was held that a defendant charged with conspiracy was not entitled to have produced a statement made by a codefendant to a grand jury. Thus Rule 17(c) was not available to obtain statements of witnesses. But in the next case on the subject discovery was granted as to statements volunteered to the

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239 United States v. O'Connor, 23 F.2d 466, 476 (2d Cir. 1929). Discovery was also upheld in United States v. Bondy, 171 F.2d 642 (2d Cir. 1948). It is not clear from the statement of the court in either case whether defendant sought discovery of his own statement or those of others.

government by witnesses relating to the case. The written statements of witnesses are “papers” and “documents” under Rule 17(c). Such statements are evidentiary when they might have been introduced for impeachment purposes. But the statements of “third persons” not otherwise identified are not prima facie evidentiary; and the burden is on the defendant to show that they are evidentiary. In another case discovery was denied as to all written statements of witnesses relative to the indictment, as the defendant had failed to show that they were not otherwise procurable by due diligence. The court did not deny that discovery would have lain if due diligence had been shown. District Judge Holtzoff ruled that inspection should be denied as to statements of potential adverse witnesses. The court asserted that statements of witnesses are not admissible in evidence, nor may they be used for impeachment purposes unless the witness is actually called by the government. Some potential witnesses are not called by the government at the trial. The defendant may be adequately protected by making available to defense counsel prior to cross-examination any written statement of a witness called at the trial. The court asserted that a prior decision of the Court of Appeals for the District of Columbia was not controlling as it involved a capital case in which a list of witnesses is required to be furnished under statute. Moreover the decision was by a three judge court, and was divided two to one; and even in civil cases discovery was granted only on a showing of good cause. To permit inspection might lead to “fabrication of countervailing testimony, to intimidation of witnesses, to bribery of witnesses, and other similar consequences.”

Inspection of income tax returns and books and records of third parties in the possession of the government has been de-

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242 207 F.2d 136-137.

243 On the meaning of evidentiary materials see Note, 67 HARV. L. REV. 492, 495-496 (1954);


246 15 F.R.D. 369 (D.C. Cir. 1953).

247 Id. at 371.

248 Id. at 372. The case was Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953).
The privilege of the statute against disclosure of confidential information on such returns would prevail in the absence of anything indicating that such persons would be called to testify at the trial and because further application could be made, if necessary, upon introduction of such evidence at the trial. The doctrines of cases such as United States v. Andolschek as to privileged matters applies only to the trial and not to the situation before trial. In the particular case the documents were not relevant as yet. For the same reasons statements made by third parties were not subject to inspection either. But the court did order production of books and records of trucking companies reflecting payments to corporate defendants, pointing out that Rule 17(c) was designed on good cause shown to permit examination of voluminous records before trial to prepare the defense; and that the indictment and bill of particulars was not fully informative.

Edward P. Murphy of the Northern District of California denied inspection of statements of witnesses signed or prepared by them, and rejected the view of the Court of Appeals of the District of Columbia, citing an unreported case of his own district. It made no difference that the case had been transferred from the District of Columbia where inspection had been granted. Edward Weinfeld, District Judge of the Southern District of New York denied inspection of a statement of a codefendant as good cause had not been shown. William J. Campbell, District Judge of the Northern District of Illinois denied inspection of the written statements of the government’s prospective witnesses. While

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250 142 F.2d 503 (2d Cir. 1944).
251 United States v. Ward, 120 F. Supp. 57, 59-60 (S.D.N.Y. 1954). The court pointed out that in United States v. Krulewitch, 145 F.2d 76, 78, 156 A.L.R. 337 (2d Cir. 1944), it was held that different rules may apply to pre-trial production.
252 United States v. Ward, 120 F. Supp. 57, 60 (S.D.N.Y. 1954). The decision in Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953), was thought not to require inspection in all such cases, and to leave discretion to the trial judge.
such a statement is a "document", it is not evidentiary as the potential witness may not always be called at the trial. The Court of Appeals of the Seventh Circuit denied inspection of written statements of a postmaster, who was a witness for the defendant at the trial, but not a witness for the government. The statement had no evidentiary value. Judge Thomas F. Murphy of the Southern District of New York denied inspection of witnesses' statements. Such statements were not admissible in evidence as required by the Bowman case. If they supported his testimony at the trial they would be surplusage; if they impeached him, he would not use them at the trial. Moreover good cause was not shown. District Judge Leo F. Rayfiel of the Eastern District of New York denied discovery of testimony of a codefendant and other before the Superintendent of Banks of the State of New York. The court pointed out that the transcripts were not evidentiary, were not shown to be material to the preparation of the defense, and would give the defendant access to the names and testimony of possible government witnesses. It would be enough that the transcripts were made available at the trial. In a prosecution of a corporation and its officers for misstatement of corporate federal taxes in annual reports filed with the stock exchange it was held by Judge Sylvester Ryan of the Southern District of New York that the defendants could not inspect statements made to the Internal Revenue Service and the F.B.I. by thirteen coconspirators. There was no indication that such coconspirators would testify at the trial. If they did there might be inspection at the trial.

To summarize, the courts have rejected the right of the defendant to secure inspection of the statements of witnesses under Rule 17(c). Only the Court of Appeals of the District of Columbia has permitted such inspection and District Judge Holtzoff has given its interpretation a narrow meaning.

Draft violators claiming to be conscientious objectors have sought discovery under Rule 17(c). In one case it was asserted that when the validity of administrative procedure in a particular case is under review in a criminal trial, the defendant's right to a

256 United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955).
257 United States v. Kiamie, 18 F.R.D. 421, 424 (S.D.N.Y. 1955). In this case defendant sought the statement of his own witness. Most of the cases involve statements of the government's witnesses, aside from the present case and United States v. Echeles, 222 F.2d 144 (7th Cir. 1955).
subpoena under Rule 17(c) may not be circumscribed. The government must either disclose its information or in effect abandon prosecution on the pending indictment. In a second case it was held that the defendant would be granted a subpoena directed at an F.B.I. report on which the Department of Justice based its recommendation that the claim be rejected, so as to determine whether there was such adverse information in the report as to entitle the defendant to a resume of such report, but such report having been made confidential by the attorney general's order, the names and addresses of the informants would be deleted from the report. In another case it was held that the defendant might inspect and copy minutes of a hearing which he claimed would disclose that he was not given a fair resume of adverse evidence contained in the F.B.I. report used by the hearing officer, but would not be permitted to inspect the F.B.I. report itself. If the defendant wishes a summary of any adverse evidence contained in the F.B.I. report he must request it seasonably. In close cases the F.B.I. report should be produced at the trial to determine whether the resume furnished the registrant is fair; but otherwise it need not be produced even at the trial.

A subpoena for inspection of all documents which the government had obtained from any person who is not party to the proceeding will be denied. The court pointed out that the defendant sought all but the "work product" of the government. Likewise a subpoena for all documents obtained by the government other than by seizure or process (1) in the course of the grand jury investigation and (2) in the course of the government's preparation for trial if (a) they were presented to the grand jury, or (b) they are to be offered as evidence, was denied. This

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amounted to an attempt to rummage around in the files of the government. If the defendant proceeds with catch-all descriptions he must at least list the evidentiary documents that are available to him elsewhere and exclude them from those demanded of the government.\textsuperscript{267}

A motion for production of all paper presented to the grand jury has been denied.\textsuperscript{268} Secrecy of the grand jury may not be violated either directly through inspection of the grand jury minutes or indirectly by disclosure of the documentary evidence presented to it.

Rule 17(c) does not permit discovery of the names of the witnesses who appeared before the grand jury.\textsuperscript{269} Nor does it permit discovery as to the names of witnesses who will appear at the trial for the government.\textsuperscript{270} Nor does it permit an order directing the government to aid the defendant in identifying the handwriting or authorship of documents and papers properly subpoenaed.\textsuperscript{271}

Rule 17(c) has been said to provide "a much narrower investigatory scope than Rules 45(b) and 34 of the Federal Rules of Civil Procedure."\textsuperscript{272} Nor may rule 17(c) be applied to secure the relief allowed under Civil Rule 26 providing for taking depositions of the opposite party, or under Civil Rule 83 providing for interrogatories to the opposite party.\textsuperscript{273}

Suppose the defendant is one of a group of defendants, all of whom have been previously tried for the same offense. Should this increase the right to discovery? In a prosecution under the Smith Act a defendant who had been a fugitive was allowed wide discovery.\textsuperscript{274} The district court directed the government to advise counsel for the defendant which of the papers in evidence at a

\textsuperscript{269} United States v. Mesaros, 13 F.R.D. 180, 184 (W.D. Pa. 1952).
previous trial of the other defendants it is the present intention to introduce at the trial of this defendant as part of its direct case. Furthermore if subsequently before trial the government determines to introduce other like material, the government is to advise counsel for the defendant of such data and furnish it to him.

Suppose the defendant seeks documents to be used by the prosecution for rebuttal or impeachment purposes. Inspection has been denied as this would not aid the preparation of defendant's case except in a negative way. Furthermore the prosecution cannot determine until the defendant has introduced evidence what if any rebuttal or impeachment will be called for. Surprise here is unavoidable and keeps both sides within the confines of the truth.

Suppose the defendant seeks documents containing confidential matter protected by executive orders and regulations? One case referred to the problem and pointed out that the instant case did not involve such a situation. In another case the government raised the issue by way of defense to a motion, but the court ruled for the government on other grounds. In a subsequent case the court denied inspection, distinguishing pre-trial procedure from procedure at the trial.

An application for a subpoena as to papers which were the property of federal departments and appeared to be of a confidential nature and which related to a witness whom the defendant anticipated would be a witness in behalf of the government was denied as premature where the records might not be relevant.

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279 United States v. Ward, 120 F. Supp. 57, 59-60 (S.D.N.Y. 1954). In several cases it had been held that if inspection is refused even at the trial, the prosecution must be dismissed. United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944); United States v. Beckman, 155 F.2d 550, 554 (2d Cir. 1946); United States v. Grayson, 166 F.2d 862, 870 (2d Cir. 1948); Christoffel v. United States, 200 F.2d 734, 738 (D.C. Cir. 1952). See Note, 56 Yale L.J. 983 (1949).
upon the trial or the use thereof might become academic in view
of action taken by the trial court. 280

Suppose the defendant seeks documents which identify con-
fidential informers. It has been held that inspection will not be
permitted. 281 The court pointed out that under 18 U.S.C. section
3482 only persons charged with treason or other capital offenses
are entitled to names of witnesses who will be produced at the
trial. 282 Hence in noncapital cases even if informers are certain
to be produced at the trial, inspection will be denied as the gov-
ernment might elect not to use the documents rather than reveal
the identity of the informers. But disclosure may be allowed where
identity of the informer appears essential to the defense. Denial
of inspection would not preclude further application for inspection
during the trial. Even if such documents had been presented to
the grand jury, no inspection would be permitted because of the
additional public policy favoring secrecy of grand jury proceed-
ings. 283 The documents withheld by the trial court from inspec-
tion and not offered in evidence at the trial may be sealed by the
government and filed with the clerk to remain secret pending
further order. 284 If the defendant appeals they may be made part
of the record on appeal for inspection by the court of appeal to
enable it to determine whether inspection was wrongly denied.
A subsequent case also denied inspection which would identify
informers. 285

The first decision construing Rules 17 and 17(c) together
stated that Rule 17(c) is simply complementary to Rule 16 in pro-
viding for subpoena addressed to the party having possession of

had been issued to the Commissioner of Immigration and Naturalization Service.
The government's motion to quash was granted.
The decision pointed out that Judge Bondy had previously denied the
government's motion to quash a subpoena to the State Department for papers
concerning Whittaker Chambers who was definitely to be a witness at the trial.
Chief Justice Marshall suggested that "state reasons" might warrant denial of
(C.C.D. Va. 1807).

281 United States v. Schneiderman, 104 F. Supp. 405 (S.D. Cal. 1952),
7 MIAMI L.Q. 118 (1952). Here the government's motion to modify the sub-
poena was granted.

283 Id. at 410.
284 Id. at 410-411.

court will sit in camera to consider the issue.

the documents, to produce them. The court determined that under neither rule could a defendant have discovery of a statement made by a codefendant to the grand jury.

The courts early made it clear that precedents should not be set "whereby defendants could promiscuously seek subpoenas under Rule 17(c) . . . which the clerk issues without question, and ex parte orders for the production and inspection of confidential records, which either might not be relevant upon the trial or the use of which might become academic in view of action taken by the trial court." In 1949 Judge Holtzoff stated that the purpose of Rule 17(c) is a "limited one." It is "to make it possible to require the production before the trial of documents subpoenaed for use at the trial." Its purpose is "merely to shorten the trial" as the documents are examined before trial. And it is "not intended as a discovery provision." Criminal procedure does not permit the broad discovery allowed in civil actions.

In a case which later went up to the Supreme Court the Court of Appeals of the Seventh Circuit held that Rule 17(c) was not intended to authorize discovery and inspection expressly prohibited by Rule 16. The federal district court had denied the motion of the government to quash the subpoena. The court of appeals reversed this denial. The subpoena had been directed to the chief of the midwest office of the Anti-Trust Division of the Department of Justice. He had declined to comply under the advice and instruction of the Attorney General. The district court found him guilty of contempt of court and committed him to the custody of the Attorney General. The court felt that the drafters of the rule did not intend to authorize discovery under Rule 17(c) "expressly prohibited by Rule 16." It did not make sense "to create in Rule 17(c) an almost unlimited right of discovery by

288 United States v. Maryland & Virginia Milk Producers Ass'n, 9 F.R.D. 509, 510 (D.D.C. 1949). The court pointed out that the subpoena in the instant case was "not intended to secure evidence to be introduced at the trial," which the court implied would be a proper purpose.
289 United States v. Bowman Dairy Co., 185 F.2d 159 (7th Cir. 1950). The case was noted in 64 HARV. L. REV. 1011 (1951).
290 185 F.2d 163. But it is not accurate to say that Rule 16 "expressly prohibited" other discovery. It was simply silent as to other discovery.
use of the subpoena provisions." The court referred to a prior decision which seemed to authorize a subpoena broad in scope, but construed this decision as simply holding that a court of appeals would not grant mandamus against the district court. 291 Chief Judge Major in a concurring opinion stated that Rule 17(c) imposed no obligation on either the defendant or the government or their attorneys. 292 The word "person" in Rule 17(c) referred to one subpoenaed as a witness, and not to the parties. 293 Rule 17(c) unlike Rule 16 did not use the language "attorney for the government." A wide construction of Rule 17(c) would render Rule 16 meaningless. "Why bother to go into court and obtain an order directing the government to make the limited production required under Rule 16 when much more can be obtained merely by filling in the blank space of a subpoena as provided for in Rule 17?" 294 Circuit Judge Lindley dissented on the ground that the majority of the court had read Rule 17(c) out of the books and completely deleted it. 295 Rule 17(c) adds the innovation that the documents subpoenaed may be produced prior to trial for inspection. It should make no difference that the person who has the documents is an attorney, whether a government attorney or even the defendant's attorney. 296 But he recognized that relief under Rule 17(c) is discretionary with the trial court. Since the appellant did not contend that the discretion had been abused, there was no issue before the court of appeals.

On certiorari the United States Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court. 297 The Supreme Court held that under Rule 17(c) any document or other material which had been obtained by the

291 Id. at 164. The prior decision was United States v. Bondy, 171 F.2d 642 (2d Cir. 1948).
292 185 F.2d 164.
293 Id. at 165.
294 Id. at 166. But this overlooks the right of the government to move to quash the subpoena.
295 Id. at 167.
296 When this case went to the Supreme Court Rule 17(c) was construed as applying to all persons including the parties and their attorneys. Civil Rule 45(b) has been similarly construed. Note, 67 Harv. L. Rev. 492, 495 n.19 (1954).
government by solicitation, or voluntarily from third persons, and which is admissible in evidence, is subject to subpoena. The materials thus subpoenaed need not actually be used in evidence if a good-faith effort is made to obtain evidence; and the court may control the use of Rule 17(c) to that end by its power to rule on a motion to quash or modify. The court should be solicitous to protect against disclosures of the identity of informants and the methods, manner and circumstances of the government acquisition of the materials. Since one clause of the subpoena was too broad, the government attorney could not be held in contempt for refusal to comply with the subpoena. Justice Minton, speaking for the court stated:

"It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c). There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

"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. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed documents. . . . However, the plain words of the Rule may not be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of the materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena."298

The Bowman case may be thought not to be a strong holding as it might have been decided on the narrow basis of defect in the subpoena.299 But a number of writers have construed the case as

sanctioning the use of Rule 17(c) as a discovery provision. With this latter approach the author of this article concurs.

Following the Bowman case it became quite common for a defendant to move under both Rules 16 and 17(c). Out of abundant caution defendants have adopted a “dragnet practice.” In some cases the defendant moves under these two rules and also for a bill of particulars under Rule 7(f). Although these three rules “have different functions and applications, they serve a related purpose: to enable the accused to meet the charges presented against him. They should be liberally interpreted to carry out their purpose.”

The Bowman case was thought to contain “somewhat conflicting statements” by the Court of Appeals for the District of Columbia. The latter court preferred to follow that part of the Bowman view “which leads to the fullest presentation of facts and away from the notion of a trial as a game of combat by surprise.” Hence the written statements of the defendant and of witnesses fall within its scope. The words “papers” and “documents” in Rule 17(c) embrace such written statements. A statement of the defendant which was introduced in evidence and statements by witnesses which might have been introduced for impeachment purposes are “evidentiary” as required by the Bowman Case; but this is not true as to statements of “third persons” who are not otherwise identified.

It was thought that under the decision of the Supreme Court in the Bowman case the trial court should uphold a subpoena for “all books, documents, paper, materials and objects which (a) have been presented to the grand jury, or (b) are to be offered as evidence.”

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303 United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956).
304 Id. at 476.
306 The court pointed out that in Gordon v. United States, 344 U.S. 414, 418 (1953), the Supreme Court included written statements by a prosecution witness within the ordinary meaning of the word “document.”
evidence at the trial”, if the motion represented a good faith effort to obtain evidence.307

The Bowman Case was construed by District Judge Dimock as holding that Rule 17(c) provides for the production of material which because neither obtained from or belonging to the defendant nor obtained from other by seizure or by process may not be obtained from the government under Rule 16.308 This leaves for the subject of Rule 17(c) material obtained by the government by solicitation or voluntarily from third persons, as stated in the Bowman case; and “material which has been in the government’s possession from the time of its origin.”

What were the views of the Advisory Committee on Rule 17(c) as a means of discovery? Most of the committee have not expressed themselves in print. Chief Justice Vanderbilt, a chairman of the Advisory Committee, in construing a New Jersey rule similar to Rule 17(c) upheld the principle that discovery of a confession was addressed to the sound discretion of the trial court.309 Judge Holtzoff, secretary of the Advisory Committee, did not regard Rule 17(c) as a means of discovery.310 Rather it is limited to requiring production before trial of documents subpoenaed for use at the trial in the interest of time. The late Professor George H. Desson has stated that Rule 17(c) was to provide a “subpoena practice which permits for a sifting in advance of trial of the documents actually to be offered in evidence.”311 Professor Lester B. Orfield has stated a similar view.312 G. Aaron Youngquist has left the question open.313

While Rule 17(c) unlike Rule 16 contains no language calling for a showing by the defendant of materiality and reasonable-


313 NEW YORK UNIV. SCHOOL OF LAW; INSTITUTE PROCEEDINGS 167-168 (1946).
To show good cause the defendant must show four things: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; (3) that defendant cannot properly prepare for trial and that trial may be delayed unless there is inspection; and (4) that the application is made in good faith.

Suppose the defendant fails to specify the paper with sufficient particularity, but the government fails to move the quash. It has been held that then the government must produce the papers at the hearing for such use as the court may deem proper.315

In some cases the government in response to a subpoena has agreed to furnish the papers and objects sought to the defendant.316 Defendant is then given an opportunity to cull out the particular items he wishes to inspect. If the government then objects to inspection of particular items and the parties cannot agree, the court will hear the parties and issue an appropriate order.

When accountants representing persons accused of income tax evasion had been given free access to records in the possession of the government prior to filing of indictment, the district court in its discretion might refuse inspection under Rule 17(c).317 Inspection has been denied when the defendant already has the information sought and seeks only its confirmation or to be able to meet any disparity.318

A trial court does not commit reversible error in refusing to enforce a subpoena for the minutes book of a congressional committee when it appears that the minutes denied were not in the book sought by the subpoena.319

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Thus there may be difference between pre-trial and a trial subpoena. Note, 67 Harv. L. Rev. 492, 496-497 (1954).


317 Remmer v. United States, 205 F.2d 277, 284 (9th Cir. 1953).


319 Christoffel v. United States, 200 F.2d 734, 739 (D.C. Cir. 1952).
If the subpoena is good in part and bad in part, the government attorney may not be held in contempt for refusal to comply with it.\textsuperscript{320} It is not for the person facing punishment to call the good from the bad.\textsuperscript{321}

Where the subpoena is addressed to the United States attorney the district court has no authority to issue an order to the Department of Agriculture to obey such subpoena even though the United States attorney disclaims possession of the documents sought.\textsuperscript{322}

Whether the trial court should grant relief under Rule 17(c) has been said to be discretionary.\textsuperscript{323} The rule uses the word "may" not "shall".\textsuperscript{324} Furthermore, the court may quash where compliance is unreasonable or oppressive.\textsuperscript{325}

In a case decided by the Municipal Court of Appeals of the District of Columbia it was pointed out that under Rule 17 a party is entitled to receive from the clerk of court a subpoena duces tecum signed and sealed, but otherwise blank, and permitted to fill it in without submission to or permission from the court.\textsuperscript{326} Then on timely motion the subpoena may be quashed if compliance would be unreasonable or oppressive.\textsuperscript{327} This method is employed because of the inherent difficulty of determining the relevancy or competency of evidence in advance of actual production in court.\textsuperscript{328}

At what time may the defendant move for a subpoena under Rule 17(c)? It was held in one case that the motion is premature where the sufficiency of the indictment has not been tested by a

\textsuperscript{320} Bowman Dairy Co. v. United States, 341 U.S. 214, 221 (1951).
\textsuperscript{324} Kelly v. United States, 73 A.2d 232, 234 (1950). This would be done under Rule 17(a).
\textsuperscript{325} This would be done under Rule 17(c).
motion to dismiss. The motion should be filed and entertained only when the case is ready or has already been set for trial. In another case it was held that a motion for discovery under Rule 17(c) was premature in view of the defendant’s motion for a bill of particulars under Rule 7(f) and for discovery under Rule 16; but the motion should remain on the calendar until ruling on the other motions.

At what time may the government move to quash or modify a subpoena? One opinion was asserted that it may be made only after an information or indictment has been returned. It will be recalled that a defendant seeking discovery under Rule 16 may do so only after filing of the indictment or information. It has been pointed out that the motion to quash under Rule 17(c) must be “made promptly.”

Suppose a district court grants defendant’s motion under Rule 17(c). May the government secure a writ of mandamus from the court of appeals? It was held that it may not as the order is interlocutory and not directly appealable.

What about an immediate appeal from a denial by the trial court of inspection under Rule 17(c)? In New Jersey where there is a similar rule appeal was denied on the ground that the order of the trial court was interlocutory. There are no decisions permitting immediate relief by mandamus from the court of appeals to the district court.

Suppose the court of appeals finds that the denial of discovery was prejudicial. Is this a ground for reversal? In one case the

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328 In re Investigation of World Arrangements, etc., 13 F.R.D. 280, 283 (D.D.C. 1952). Here it was the government which applied for the subpoena, and the corporation investigated moved to quash or modify.

329 Taylor v. United States, 221 F.2d 809, 810 (6th Cir. 1955). In this case the government applied for a subpoena in a grand jury investigation.

330 United States v. Bondy, 171 F.2d 642 (2d Cir. 1948). The court cited Cogen v. United States, 278 U.S. 221, 224 (1929), in which the Court stated that an order on an application for a subpoena duces tecum is interlocutory. But see United States v. United States District Court, 238 F.2d 713 (4th Cir. 1956.)


court of appeals directed that the defendant be given discovery and a right to move for new trial, the district court then to grant a new trial if prejudice was shown. If the district court then denied a new trial, the court of appeals would then reverse only for abuse of discretion.

VIII. Discovery Not Specifically Authorized by Rules 16 and 17(c).

Suppose it be assumed that discovery under Rules 16 and 17(c) is rather narrow in scope. Does that preclude the federal courts from granting discovery in cases not covered by Rule 16 and 17(c)? In the opinion of the author it does not. Five impressive arguments may be advanced in favor of liberal discovery.

In the first place a court has inherent power to order discovery. As early as 1928 it was asserted that only a minority of the state courts deny judicial power to order discovery. Twenty-five years later it was pointed out that the "majority of states, although without statute or rule of court on the subject, allow discovery in criminal cases at the discretion of the trial court." Many state courts have expressly relied on the doctrine of inherent power, and occasionally on constitutional rights of the defendant. The doctrine of inherent power was applied in a decision of the Court of Appeals of the Eighth Circuit. The Supreme Court has relied on the doctrine of inherent power in a case where the United States attorney was unwilling to return books and papers acquired by illegal search and seizure. An order for physical examination of the prosecuting witness in a rape case has been

335 Note, 53 Colum. L. Rev. 1161 (1953).
336 State ex rel. Wagner v. Circuit Court, 60 S.D. 244 N.W. 100, 101 (1932); People v. Rogas, 158 Misc. 567, 287 N.Y. Supp. 1005, 1007-1008 (King's County Ct. 1936); People v. Skoyec, 183 Misc. 764, 50 N.Y.S.2d 438, 440 (Sup. Ct. 1944); State v. Superior Court of Santa Cruz County, 302 P.2d 263, 265 (Ariz. 1956). The Arizona case is very significant as Arizona had a rule of court modeled on Federal Rule 16, yet relief was given on the theory of inherent power.
337 Discovery was held allowable on the basis of the presumption of innocence and the right to a fair trial under the state and federal constitutions. State v. Dorsey, 207 La. 928, 22 So. 2d 273, 285 (1945), favorably noted in 20 Tul. L. Rev. 139 (1945). The right to compulsory process was stressed in State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687, 690 (1933).
supported on the theory of inherent power. An order for an autopsy has been supported on that ground. Although the Supreme Court rejected a rule on pre-trial conference, it has been asserted that such procedure may be used in criminal cases. The doctrine of inherent power is supported by writers such as Wigmore. The considerable discovery allowed before the adoption of the federal criminal rules doubtless was based on inherent power.

In the second place the courts have supervisory powers over public officers. As early as 1928 it was suggested that "an adequate basis for the sustaining of such a power could always be found in the supervisory control that courts exercise over public officers." This conclusion was based on the statement of Chief Justice Cardozo of the New York Court of Appeals in 1927. "The power frequently asserted to compel the return of property illegally impounded is based upon the assumption of a supervisory jurisdiction over the acts of public prosecutors. . . . There may be something of kinship here to the power to compel inspection in furtherance of justice." Under Federal Criminal Rule 41(c) a


342 Notes, 26 N.C.L. Rev. 398, 399 n.10 (1948); 23 Ind. L.J. 333, 335 n.15 (1948).

343 Barton, in 6 New York University School of Law Institute Proceedings 292-299 (1946); CLARK, CODE PLEADING 574 n.276 (1947); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 323-324 (1947); Lederle, Progress in Judicial Administration, 37 J. AM. JUD. SOC. 82, 85 (1953).

This analogy is very important as pre-trial procedure is closely related to discovery.

344 6 Wigmore, Evidence 395 (1940).

345 67 Harv. L. Rev. 492, 493 (1954). There are numerous other examples of inherent power. A federal trial court has inherent power to order the taking of a deposition on behalf of the defendant, United States v. Dockery, 50 F. Supp. 410 (E.D.N.Y. 1945); to appoint a master, referee or auditor, Ex parte Peterson, 253 U.S. 300, 312 (1923); to grant change of venue to a criminal defendant, Crocker v. Justice of Superior Court, 208 Mass. 162, 175, 94 N.E. 369 (1911); to vacate a conviction at any time upon constitutional grounds, State v. Magrum, 76 N.D. 527, 54 N.W.2d 353 (1949).

346 Note, 41 Harv. L. Rev. 519, 520 (1928).

defendant may move before trial to compel return of property obtained by an illegal search and seizure.

In the third place discovery should be available under Criminal Rule 26 which provides: "The admissibility of evidence and the competency and privilege of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Thus the federal courts are empowered to develop modern progressive rules of evidence.348 Discovery may well be treated under the heading of evidence as well as practice. The leading treatises on evidence all give attention to discovery in criminal cases as well as in civil.349 In a number of states there are statutes which provide that the rules of evidence of civil cases shall, so far as applicable, be applied in criminal cases.350 These statutes have several times been construed as allowing discovery in criminal cases.351 A decision of the Court of Appeals for the Seventh Circuit has seen this possibility in a case involving production and inspection at trial. Circuit Judge Lindley stated: "Rule 17(c) providing for a subpoena duces tecum does not of itself answer any of these inquiries, for it does not in so many words exclude other procedure. Rule 26 admonishes us to proceed in accord with the principles of the common law, in the light of reason and experience."352

In the fourth place discovery may be available under Criminal Rule 57(b) which provides: "If no procedure is specifically provided by rule, the court may proceed in any lawful manner

349 6 Wigmore, Evidence §§ 1845, 1847, 1850-55, 1859(g) and 1863 (1940); 8 id. § 2224; McCormick, Evidence 210; 2 Wharton, Criminal Evidence § 671 (1955).
351 State v. Hall, 55 Mont. 182, 175 Pac. 267 (1918); State v. Jeffries, 117 Kan. 742, 232 Pac. 873, 874 (1925), dissenting opinion of two judges; State v. Fox, 133 Ohio St. 154, 12 N.E.2d 413, 416 (1938); Application of Hughes, 41 N.Y.S.2d 843, 847 (Sup. Ct. King's County 1943); State v. Leland, 140 Ore. 598, 227 P.2d 785, 793 (1951). While leaving the question open, Cardozo, C.J., pointed out that the rules of discovery are closely akin to rules of evidence, as they govern and define the remedies whereby evidence is made available. People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 154 N.E. 84, 86, 52 A.L.R. 200 (1827).
352 United States v. Gordon, 196 F.2d 886, 888 (7th Cir. 1952).
In Ex parte Fisk, 113 U.S. 718, 720-721 (1885), the Supreme Court seems to have regarded a New York discovery statute as laying down a rule of evidence.
not inconsistent with these rules or with any applicable statute." This rule seems to empower the courts to follow common law precedents not written into the rules and to preserve the inherent power of the courts to develop the law. There have been a number of concrete examples of this since the adoption of the rules. The rules are silent as to inspection of documents during the trial. Before the adoption of the rules the courts granted motions for inspection at the trial. After the rules went into effect the Supreme Court held erroneous the denial of a motion for production and inspection at the trial. Rule 20 provides for waiver of venue when the defendant pleads guilty. No rule provides for such waiver when the defendant pleads not guilty. Yet both before and after the adoption of the rules waiver of venue has been allowed even when the defendant pleads not guilty. Rule 29 is silent as to directed verdicts or judgments of acquittal immediately after the opening statement of the United States attorney. Yet both before and after the adoption of the rules such a directed verdict has been permitted.

In the fifth place discovery may be available under the "all writs" section of the Judicial Code, 28 U.S.C. section 1651(a), which provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In 1941 the Court of Appeals for the First Circuit relied on this provision with respect to pre-trial discovery. It was under this section that it was held that the writ of error coram nobis was available in federal criminal cases by the United States Supreme Court.

334 United States v. Krulewitch, 145 F.2d 76, 78 (2d Cir. 1944).
336 Orfield, Venue of Federal Criminal Cases, 17 U. Prrt. L. Rev. 375, 389-393 (1956). Moreover the prerequisites for waiver under Rule 20 such as a statement in writing by the defendant and the approval of the United States attorney for each district are not insisted on, or even mentioned in the decisions.
338 Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126, 127 (1st Cir. 1941). This theory is supported in a note, Subpoenaed Documents in Federal Criminal Cases, 51 Yale L.J. 687, 690 (1942).
339 United States v. Morgan, 346 U.S. 505 (1954). Yet the only prior opinion relying on this statute was the concurring opinion of Biggs, J., in United States v. Steese, 144 F.2d 438, 442 (3d Cir. 1944).
IX. Discovery Under the Uniform Rules of Criminal Procedure.

The American Law Institute Code of Criminal Procedure contains no provisions on discovery. But the Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws provides for more full discovery than the Federal Rules of Criminal Procedure. Rule 28 entitled "Discovery and Inspection" provides:

"Upon motion of a defendant, at any time after the filing of the indictment or information, and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others, including written statements or confessions made by the defendant or a co-defendant [and written statements of witnesses]. The order shall specify the time, place and manner of making the inspection and of taking copies or photographs and may prescribe such terms and conditions as are just."^360

The annotation pointed out that this rule is modeled on Federal Criminal Rule 16 which does not specifically include statements by the defendant or by others.\(^361\) The federal criminal rule was too narrow. The uniform rule did not adopt a suggestion that the rule should be narrowed by limiting inspection to items admissible in evidence.\(^362\) The annotation pointed out that Maryland Supreme Court Rule 5 allows inspection of statements made by the defendant. It will be noted that the uniform rule states that the court "shall order" discovery whereas Federal Criminal Rule 16 provides that it "may order" discovery. The uniform rule provides for discovery as to objects obtained "from others" without any limitation "by seizure or by process" as in Federal Criminal Rule 16.

Rule 29(c) of the uniform rules, entitled "Inspection of Documentary Evidence and Objects," provides: "The court may order that books, papers, documents or objects designated in the sub-

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poena 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 such books, papers, documents or objects or portions thereof to be inspected and copies thereof to be made by the parties and their attorneys.” This was modeled on the last sentence of Federal Criminal Rule 17(c).

Chief Justice Marshall has stated that if it is not apparent that the papers sought by the defendant are immaterial to the case or involve “state reasons,” “if they may be important in the defense, 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 would be denied the use of them.” He also stated: “Might I be permitted to utter one sentiment, with respect to myself, it would be to deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.”

In the words of Justice Brennan speaking as a member of the New Jersey Supreme Court: “Surely we have come a long way since the day when Mr. Justice Cardozo was able to discern only ‘The beginnings or at least the glimmerings’ of a ‘power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice.’”

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364 Id. at 37.
# APPENDIX

**Law Review Comments on Discovery**

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