COMMENTS

PARALLEL PROCEEDINGS: THE GOVERNMENT'S DOUBLE-TEAM APPROACH AND THE DEGRADATION OF CONSTITUTIONAL PROTECTIONS

by
Christian Babich[*]

This Comment discusses how the United States Department of Justice is abusing cooperation between itself and the Securities and Exchange Commission to obtain information and advantage in corporate criminal fraud investigations, in violation of individual constitutional rights. The early advantages of such parallel proceedings have been outweighed by the government's ability to use these proceedings as an end run around a defendant's Fifth Amendment right against self-incrimination. The U.S. Supreme Court's answer to the narrow question posed in the seminal decision of United States v. Kordel *has been used by the Department of Justice to expand the scope and reach of parallel proceedings beyond anything contemplated by the Court. The Court's refusal to clarify* Kordel *has allowed the Department of Justice to take advantage of confusion among lower courts. Many lower court decisions allow the government to employ subterfuge or to outright lie to defendants in order to secure their cooperation. This Comment takes the position that in using this "double-team approach," the government incurs, in the very least, a duty not to lie.*

[*] Christian Babich earned her J.D. in 2007 from Lewis and Clark Law School and her B.A. in 1995 from the University of Portland. The author would like to thank Professor Jennifer Johnson and the staff of the Lewis & Clark Law Review.

I. INTRODUCTION

The Securities and Exchange Commission (SEC) and the United Stated Department of Justice (DOJ) have legitimately run parallel investigations for decades. In 2002, President George W. Bush created the Corporate Fraud Task Force, in response to increasing incidents of large-scale corporate scandals. The Task Force stepped up coordination between criminal and civil federal agencies in corporate fraud investigations.[1] This recent crackdown on corporate crime has led to charges that government agents have abused parallel proceedings to create an unfair advantage for prosecutors and a concomitant disadvantage to criminal suspects.[2] This double-team approach, which has been justified as both necessary to enforcement and as an economical use of investigative resources, has resulted in a perceived degradation of constitutional protections for the individual caught up in a corporate scandal. Specifically, government agents who may not constitutionally use a civil investigation to obtain discovery in a criminal case should not be permitted to secretly delay opening a criminal investigation in order to achieve the same result.

It has become common practice in corporate fraud investigations for the SEC to induce "full cooperation" by implicitly or explicitly promising to mitigate civil and criminal liability. The government has interpreted "full cooperation" to include the voluntary waiver of once-sacrosanct constitutional rights and privileges, most notably, the Fifth Amendment protection against self-incrimination. When the SEC is aware that federal prosecutors have identified an individual for potential criminal prosecution and keeps that information from the individual when inducing a voluntary waiver of constitutional privileges, the SEC engages in a form of deception that infringes upon the fundamental right to due process of law. According to prosecutors, such deception is justified because the government has not yet "officially" indicted the individual or convened a grand jury investigation. But when a branch of the government induces a citizen to waive constitutional protections

[1] Peter Lattman & Kara Scannell, *Slapping Down a Dynamic Duo*, WALL ST. J., Jan. 25, 2006, at C1.

[2] *Id.*

during the course of an investigation, the inducement should not be based on deception.

Typically, a corporate transaction is attributable to numerous corporate actors,[3] and as a result, each individual actor may sincerely believe he or she lacks the requisite intent to be culpable under a criminal statute. Individual employees are more likely to testify before the SEC in an administrative proceeding when they believe that they have done nothing illegal. Indeed, the government encourages this mindset by using "cooperation" in the civil inquiry as a primary factor in determining whether or not there will even be a criminal referral or investigation.[4] When the government has already made a determination to pursue criminal charges against a specific individual, however, and withholds that information long enough to allow them to fully cooperate in the administrative investigation, the government acts contrary to the standards of good faith and fundamental fairness.[5]

Section II of this Comment reviews the historic approach to the constitutionality of parallel proceedings, which largely developed as a result of the intersection between civil and criminal tax fraud investigations conducted by the Internal Revenue Service. Section III discusses the recent and controversial case of *United States v. Stringer*, wherein government abuses of investigative power specifically resulted in a district court's dismissal of criminal indictments against three corporate executives accused of corporate fraud. Section IV examines the Hobson's choice created by government investigators' use of parallel proceedings, as well as an analysis of Supreme Court precedent which suggests that, while the government has no duty to aid an individual in avoiding the dilemma described, there exists a duty to disclose the instigation of a criminal investigation in this particular context. Sections V and VI explore permissible and impermissible government deception during investigation, and the difficulty defendants face in demonstrating when the government has crossed the line of fundamental fairness. Concluding remarks suggest that the SEC has an affirmative duty to disclose to individual targets of a civil investigation when a criminal referral has already been initiated. In cases where no such disclosure has been made, the government should be required to disclose all communications between the two agencies that have given rise to

[3] David U. Gourevitch, *Between a Rock and a Hard Place: Parallel Proceedings in the Post-Enron Era*, 1383 PLI/Corp 503, 507 (2003) ("[T]he line between regulatory and criminal conduct is hazy and evolving."). Gourevitch found that "most of the accounting frauds investigated during the late 1990s" resulted in regulatory sanctions whereas similar frauds today result in criminal indictment and multi-year prison sentences. He asserts that the changing standards make it difficult to determine when cooperation is in the best interest of a corporate principal. *Id.*

[4] Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memo].

[5] JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 980 (2d ed. 2003) (stating that the most important source of government coercion is the threat of indictment; "This is the source of pressure that results in cooperation agreements, 'no[n] pros letters' and other such arrangements that promise leniency").

the criminal indictment. Such procedures provide a judicial check and balance on parallel proceedings and more adequately safeguard a defendant's rights.

II. THE HISTORICAL CONSTITUTIONALITY OF PARALLEL PROCEEDINGS

Parallel proceedings are simultaneous or successive criminal and regulatory proceedings. In the context of SEC administrative actions, the regulatory proceedings are typically concurrent with criminal investigations.[6] Parallel investigations logically allow the flow of information between government entities; however, they are subject to abuse by the government when the broad range of civil discovery is made available to criminal prosecutors.[7] The Supreme Court has long endorsed the constitutionality of parallel proceedings, holding that forcing the government to choose between civil and criminal proceedings would "stultify enforcement of federal law."[8] In *United States v. Kordel*, the Court noted a strong public interest in protecting consumers from misbranded drugs, requiring prompt action by the administrative agency responsible for enforcing relevant laws, in this particular case, the Food and Drug Administration (FDA). "But," they observed, "a rational decision whether to proceed criminally" may require more careful consideration of a fuller record than that which is before the agency at the time of the civil enforcement.[9] Thus, the government in *Kordel* did not act in bad faith by instituting a criminal investigation or indictment during the course of a civil action.

The D.C. Circuit relied on the public policy concerns supporting parallel investigations iterated in *Kordel* in the seminal securities case *SEC v. Dresser Industries, Inc.*[10] In *Dresser*, the D.C. Circuit reasoned: "[T]he SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to . . . undertake civil enforcement actions even after Justice has begun a criminal investigation."[11]

The *Dresser* court determined that the overlap of the two proceedings did not violate Dresser's individual constitutional rights. During the investigation of Dresser Industries, the SEC assigned two of its agents to the U.S. Attorney's Office (USAO) for the District of Oregon to assist in the criminal investigation as securities experts, and simultaneously turned over all documents and testimony it obtained during the course of the civil investigation.[12] Dresser moved to quash an SEC document subpoena on the grounds that the SEC was likely to turn the documents over to the DOJ; Dresser argued that the

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[6] Gourevitch, *supra* note 3, at 508.

[7] *Id.*

[8] United States v. Kordel, 397 U.S. 1, 11 (1970).

[9] *Id.*

[10] 628 F.2d 1368 (D.C. Cir. 1980) (en banc).

[11] *Id.* at 1380.

[12] *Id.* at 1372–73.

limitations placed on criminal discovery were improperly broadened by the SEC's practice.[13] The en banc panel held that the practice was not improper because the limits on criminal discovery did not apply until after an indictment had been issued.[14] Specifically, the court stated:

> Until then there is no danger that Justice might broaden its discovery rights, because the subpoena power of the grand jury is as broad as—perhaps broader than—that of the SEC. Justice can procure from Dresser directly whatever materials it might procure indirectly through the SEC. In fact, a party investigated under SEC rules instead of grand jury procedures is accorded far greater procedural protection, and has no cause to complain.[15]

Yet, the *Dresser* court dealt with an action where the defendant had notice of the concurrent criminal proceeding; indeed, Dresser had already been subpoenaed by the grand jury at the time he was served with civil interrogatories.[16] Likewise, the Supreme Court in *Kordel* dealt with an action where the defendant had been notified that a criminal proceeding was contemplated, although in *Kordel*, the notice issued was pursuant to a statutory obligation.[17] Nevertheless, similar to defense arguments in *Dresser*, the defendants in *Kordel* argued that answering interrogatories served by the FDA in furtherance of the civil investigation would "work a grave injustice" and "enable the Government to have pretrial discovery of the respondents' defenses to future criminal charges."[18]

The Supreme Court pointed out that the defendants could have invoked their Fifth Amendment privilege, finding that a failure to do so did not amount to a violation of due process or a departure from proper standards in the administration of justice.[19] The Court went on to state, "We do not deal here with a case where the Government has brought a civil action *solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution*."[20] Moreover, the Court noted that the defendant was not without counsel, nor reasonably fearful of "prejudice from adverse pretrial publicity or other unfair injury;" nor were

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[13] Gourevitch, *supra* note 3, at 509.

[14] *Dresser*, 628 F.2d at 1381.

[15] *Id.* (footnote omitted).

[16] *Id.* at 1373.

[17] United States v. Kordel, 397 U.S. 1, 5 (1970). In footnote 5, the court cites the statutory notice provision, 21 U.S.C. § 335:

> Before any violation of [the Act] . . . is reported by the Secretary [of the Department of Health, Education, and Welfare] to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

Id. at 4.

[18] *Id.* at 5.

[19] *Id.* at 11.

[20] *Id.* at 11–12 (footnote omitted) (emphasis added).

there "any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution."[21]

III. *UNITED STATES V. STRINGER*

It is specifically the issue of failing to advise a defendant in a civil proceeding that the government is contemplating criminal charges that warrants further contemplation in light of the government's recent behavior in *United States v. Stringer*.[22] In *Stringer*, the SEC issued a formal order directing a securities fraud investigation of FLIR Systems, Inc. in Portland, Oregon, after just two days of interviewing a disgruntled ex-Vice President of Engineering about alleged accounting irregularities and perceived improper revenue recognition practices.[23] Within two weeks, the SEC initiated contact with the USAO.[24] Three days later, the USAO informed the SEC that after consultation with the Federal Bureau of Investigation (FBI), the USAO had decided to pursue the matter further, and identified both the Chief Executive Officer and the Chief Financial Officer of the company as specific subjects of investigation.[25] On June 26, 2000, less than three weeks into an investigation that would continue for the next three years, the USAO formally requested and received access to investigative and other non-public SEC files pertaining to the ongoing investigation; the FBI requested such access on July 8, 2000, and received it within two weeks.[26] Over the next three years, the SEC subpoenaed hundreds of thousands of documents, conducted formal and informal interviews of over 100 witnesses, and routinely provided evidence directly to the USAO for use in preparing the criminal case—all without ever informing the defendants that a concurrent criminal investigation had been commenced.[27]

The CEO of FLIR Systems, Ken Stringer, in an attempt to cooperate fully with the civil investigation, agreed to be interviewed by the SEC, effectually waiving his Fifth Amendment privilege against self-incrimination. Acknowledging the government's stated policy of weighing corporate cooperation in determining whether to pursue criminal indictment,[28] Mr. Stringer provided nine days of testimony to the SEC. The decision to proceed in this manner was indeed a delicate one, reached only after careful deliberation

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[21] *Id.* at 12.

[22] 408 F. Supp. 2d 1083 (D. Or. 2006).

[23] Request For Oral Argument: Memorandum in Support of Defendant Stringer's Motion to Dismiss Indictment Or, In The Alternative, To Suppress SEC Interview Statements, United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006) (CR 03-432 (HA)).

[24] *Id.* at 3.

[25] *See* Letter from Charles Gorder, Assistant U.S. Attorney, to Diana Tani, SEC Assistant Regional Dir. (June 26, 2000) (attached to Defendant's Request for Oral Argument).

[26] Request for Oral Argument, *supra* note 23, at 3–7.

[27] *Id.*

[28] Thompson Memo, *supra* note 4.

with expert legal counsel.[29] Importantly, Stringer's attorney specifically asked the SEC, immediately prior to his client's testimony, whether there was an ongoing parallel criminal investigation in the case. The SEC essentially sidestepped the question, deliberately misleading Mr. Stringer and his attorney about the USAO's involvement in the investigation at that time.[30] This deception would become the cornerstone of the federal district court judge's order to dismiss the fifty-count indictment against Mr. Stringer and his co-defendants, Mark Samper and William N. Martin.[31]

In seeking dismissal of the indictment, defendants asserted that their due process rights had been violated because they were not advised that the USAO and the FBI were using the SEC to gather evidence for a criminal prosecution.[32] They argued that this deception resulted in prejudice against them because they would have made different decisions, specifically regarding the waiver of their Fifth Amendment right not to be compelled to testify, had they been operating with full knowledge that the likelihood of their criminal indictment had already been contemplated, if not determined.[33] Moreover, defendants argued that they lost the opportunity to cooperate with the prosecution or to seek immunity, and they lost the opportunity to seek a stay of the civil proceedings. In the absence of a stay, defendants asserted that "the prosecutor and FBI were granted more discovery than they would have been entitled to under the Federal Rules of Criminal Procedure."[34]

The government countered "that the USAO and the SEC were conducting parallel proceedings, which is an acceptable approach for civil and criminal authorities investigating the same matter."[35] Judge Ancer L. Haggerty concluded, however, that these were not parallel investigations because the "USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation."[36] More pointedly, the court found that not only did the USAO fail to inform the defendants of the open criminal investigation, the USAO deliberately concealed information pertaining to its very existence, knowing that the civil discovery would end if the USAO's involvement were revealed. [37]

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[29] Stringer was represented in the civil proceeding by William (Rick) F. Martson, Tonkon Torp, LLP. Request for Oral Argument, *supra* note 23, at 6.

[30] United States v. Stringer, 408 F. Supp. 2d 1083, 1089 (D. Or. 2006).

[31] *Id.* at 1092.

[32] *Id.* at 1087.

[33] *Id.* at 1088 ("From the beginning, the USAO consistently held the position that a criminal prosecution was likely.").

[34] *Id.* at 1087.

[35] *Id.* (citing United States v. Kordel, 397 U.S. 1, 11 (1970)).

[36] *Stringer*, 408 F. Supp. 2d at 1087.

[37] *Id.* at 1088. Judge Haggerty found that the SEC and USAO improperly agreed to hide the USAO involvement from the defendants by making sure that the court reporters would not tell the defendants' attorneys about the USAO's presence. The SEC attorney also requested that the Assistant U.S. Attorney (AUSA) stay away from the SEC interviews

In *Stringer*, Judge Haggerty specifically found that the government's motivation for concealing the commencement of the criminal investigation was concern that civil discovery would be halted because witnesses would be more likely to invoke their constitutional rights and the rules of criminal discovery would come into play.[38] The court went on to state that the delay in indictment was not for the purpose of making an informed decision about whether the case warranted prosecution; rather, the USAO decided early on to prosecute the case and asserted that plan several times during the two years before it finally revealed its involvement.[39] The court found that in so doing, "[T]he government engaged in deceit and trickery to keep the criminal investigation concealed" and thus violated the defendants' Fifth Amendment rights.[40] Quoting *United States v. Rand*, the court affirmed that because the defendants were deceived about the involvement of the USAO, it is "unrealistic to suppose that defendant[s] [would] be on guard against incriminating [themselves]."[41]

IV. THE FIFTH AMENDMENT DILEMMA

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[42] The privilege protects a person from being forced to give information that might provide a direct link in a chain of evidence leading to his conviction, and is said to reflect "our preference for an accusatorial rather than an inquisitorial system of criminal justice."[43] Although meant to protect an individual in the context of criminal liability, the privilege is not limited to criminal proceedings and may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[44] Importantly, the Fifth Amendment is not available only to protect the guilty. On the contrary, as the Supreme Court has specifically stated:

> [O]ne of the Fifth Amendment's "basic functions . . . is to protect *innocent* men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" [We have] recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth.[45]

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because the defendants' attorneys would know that there was a criminal investigation. *Id.* at 1089.

[38] *Id.* at 1087–88.

[39] *Id.* at 1088.

[40] *Id.* at 1089.

[41] *Id.* at 1089–90 (quoting United States v. Rand, 308 F. Supp. 1231, 1237 (N.D. Ohio 1970)).

[42] U.S. CONST. amend. V.

[43] Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

[44] Kastigar v. United States, 406 U.S. 441, 444 (1972).

[45] Ohio v. Reiner, 532 U.S. 17, 21 (2001) (quoting Grunewald v. United States, 353 U.S. 391, 421–22 (1957) (quoting Slochower v. Bd. of Higher Educ. of New York City, 350 U.S. 551, 557–58 (1956)) (emphasis in original)). Note that in this case it was an innocent

In the context of an SEC investigation where criminal indictment is often a real possibility, the decision of a corporate agent to invoke the Fifth Amendment privilege is a difficult one. When individuals are subpoenaed to testify by the SEC, they must carefully weigh "the likelihood of an indictment against the costs of invoking the Fifth Amendment in a regulatory investigation."[46] While an adverse inference cannot be drawn against an individual asserting the privilege in a criminal case,[47] it is widely accepted that such an inference can be drawn in a civil or administrative proceeding.[48] Further, the defendant must be wary of providing the prosecution with a "roadmap" to any future defense case and be conscious that providing sworn statements to the SEC will lock the individual into testimony, providing material for cross-examination and potential perjury charges, should any elements of that testimony change even subtly over the course of time.[49] It is not surprising then that *innocent* people choose to invoke the Fifth Amendment for the very reason recognized by the Supreme Court: "[T]hat truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."[50] In sum, when the defendant is aware of the possibility of a criminal proceeding, "he is caught in the horns of a dilemma. He may either testify against himself in the civil proceedings or be held in contempt."[51] To be sure, as the court

party who asserted the Fifth Amendment privilege during a criminal trial. The defendant was the babysitter in a shaken-baby investigation, an obvious immediate suspect, since she had spent a great deal of time with the infant. The baby's father was ultimately convicted of involuntary manslaughter, and on appeal argued that the babysitter's invocation of the Fifth Amendment was inconsistent with her claim of innocence, an argument accepted by the Ohio Supreme Court. The United States Supreme Court disagreed, holding that the babysitter could assert her Fifth Amendment privilege despite a claim of innocence, since she had reasonable cause to apprehend danger from her answers at trial because the defense theory of the case was that the babysitter had inflicted the injuries to the child.

[46] Gourevitch, *supra* note 3, at 513. Note also that willful violations of the securities laws constitute both regulatory and criminal violations. 15 U.S.C. § 77x (2000); 15 U.S.C. § 78ff (2000). The government has the choice of pursuing either type of violation.

[47] Carter v. Kentucky, 450 U.S. 288, 300 (1981); Mitchell v. United States, 526 U.S. 314, 328 (1999).

[48] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). But note that an adverse inference may not be drawn from silence alone. *See* Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977) ("Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted . . . ."). *Baxter* has been academically interpreted to stand for the proposition that an adverse inference should *not* be drawn from the taking of the Fifth Amendment during an SEC investigation, as opposed to taking the Fifth Amendment in the context of a filed SEC civil case. *See* Carl H. Loewenson, Jr. & Daniel W. Levy, *Taking the Fifth During SEC Probe*, N.Y.L.J., July 16, 2001, at 9.

[49] Carl H. Loewenson, Jr., *Parallel Proceedings*, *in* D&O LIABILITY & INSURANCE 2004: DIRECTORS & OFFICERS UNDER FIRE 641, 649 (Carl H. Loewenson, Jr. & Randy Paar eds., 2004).

[50] *Reiner*, 532 U.S. at 21.

[51] United States v. Rand, 308 F. Supp. 1231, 1237 (N.D. Ohio 1970) (citing United States v. Detroit Vital Foods Inc., 407 F.2d 570 (6th Cir. 1969)).

recognized, "The danger is even greater in a situation where the defendant is unaware of pending criminal action."[52]

A. Incentives to Waive Privilege in a Civil Investigation

Despite the pitfalls and red flags, there are powerful incentives to waive the privilege and testify for the SEC when the agency so demands. First and foremost is the desire to avoid civil and criminal charges altogether—both against the corporate entity and against the individual actor. Astutely aware of this fact, the SEC and DOJ have placed enormous pressure on businesses to require officers and employees to cooperate with investigations.[53] A decision to assert the privilege during the SEC investigation could negatively impact the decision-making process of government investigators.[54] Specifically, the SEC regards a refusal to testify as a "significant factor in determining whether to bring charges."[55] Likewise, the DOJ, in the much-debated Thompson Memo,[56] lists "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" as one of the nine factors considered in whether or not to prosecute a business organization.[57] Moreover, the DOJ gives a corporation credit for prosecuting individuals "responsible for the corporation's malfeasance."[58] This criterion results in considerable pressure on corporate boards to identify and sanction "wrongdoers" as early as possible. Of course, corporate officers are the first to be investigated. If the corporation can credibly implicate one or more of its officers or executives, then the entity (and the Board of Directors) can more or less avoid liability. To this end, many corporations will in fact terminate employees and officers who invoke the privilege during the course of a civil inquiry; some corporations go so far as to specify this practice in the corporate compliance policy itself.[59]

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[52] *Id.*

[53] Gourevitch, *supra* note 3, at 516.

[54] Loewenson, *supra* note 49, at 653.

[55] *Id.*; Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Divisions, Exchange Act Release No. 44,969, 76 S.E.C. Docket 220 (Oct. 23, 2001) (listing corporate cooperation and voluntary disclosure as factors affecting the Agency's charging decision).

[56] Thompson Memo, *supra* note 4.

[57] *Id.* The provision goes on to state, "including, if necessary, the waiver of corporate attorney-client and work product protection." *Id.* Government pressure on defendants to waive attorney-client privilege is a hotly debated topic but outside of the scope of this paper. Author would like to note, however, that the issue was also argued in *Stringer* and provided an additional basis for the dismissal of the indictment against CFO Mark Samper.

[58] *Id.*

[59] Gourevitch, *supra* note 3, at 516.

B. Private Entities Do Not Have to Respect Constitutional Privileges

The practice of terminating employees who invoke the Fifth Amendment is nowhere more severe than in broker-dealer investigations, where the National Association of Securities Dealers (NASD) and New York Stock Exchange (NYSE) bar members invoke the privilege in response to a civil request for examination on-the-record.[60] Courts have upheld this practice, consistently ruling that while *government* agencies may not constitutionally terminate employees based on their invocation of privilege, a private organization is within its rights to create and enforce such a policy.[61] Thus, brokers who claim the privilege during an SEC investigation will not only lose their employment; they will lose their careers. The Second Circuit explicitly affirmed this practice in *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*[62] In *D.L. Cromwell Investments*, the NASD and the U.S. Attorney's Office in the Eastern District of New York conducted "virtually simultaneous" investigations of the brokerage firm D.L. Cromwell.[63] During the investigation, the NASD regularly provided information directly to both the USAO and the FBI, and helped prepare a third party grand jury subpoena for D.L. Cromwell-related documents. As evidence of the enmeshment between the investigatory agencies, the documents produced pursuant to the grand jury subpoena were sent directly from the third party to the Criminal Prosecution Assistance Unit at the NASD.[64] D.L. Cromwell contested the subpoenas as well as the NASD

[60] *Id.* at 507.

[61] *See* Garrity v. New Jersey, 385 U.S. 493, 494, 497–98 (1967) (holding that where police officers were questioned regarding alleged fixing of traffic tickets, it was unconstitutional to give the officers the choice between self-incrimination and forfeiture of their jobs); Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977) (holding state statute unconstitutional where attorney was divested of state political party offices and barred for five years from holding public office because he refused to waive immunity from prosecution when appearing before a grand jury); Arrington v. County of Dallas, 970 F.2d 1441, 1445–46 (5th Cir. 1992) (holding that firing deputy constables for refusing to answer questions that could lead to criminal charges was a violation of their Fifth Amendment rights). But, there is still some argument over the definition of a private actor. *Compare* United States v. Solomon, 509 F.2d 863 (2d Cir. 1975) (holding that NYSE is a private actor), *and* Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999) (holding that NASD is a private actor and not a state actor), *with* Intercontinental Indus., Inc. v. Am. Stock Exch., 452 F.2d 935, 941 (5th Cir. 1971) (holding that "contrary to numerous court decisions," the American Stock Exchange's "intimate involvement" with the SEC "brings it within the purview of the Fifth Amendment controls over governmental due process"), *and* Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers., Inc., 159 F.3d 1209, 1215 (9th Cir. 1998) (holding that NASD's performance of regulatory functions akin to government agency functions renders it immune from suit), *and* Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 59 (2d Cir. 1996) (according absolute immunity from suit for damages arising out of alleged unlawful conduct during disciplinary proceeding to NYSE because it performs regulatory functions that would otherwise by performed by a government agency).

[62] 279 F.3d 155, 157, 162 (2d Cir. 2002).

[63] Gourevitch, *supra* note 3, at 510.

[64] *D.L. Cromwell Investments*, 279 F.3d at 158.

Enforcement request that principals testify under oath with the implicit threat that they would be barred from the securities industry if they refused.[65]

The court refused to enjoin the NASD from insisting on taking testimony until after the completion of the criminal investigation. D.L. Cromwell argued that the NASD "had worked so closely [with the Eastern District USAO] that the NASD had become an agent of the Eastern District."[66] The firm contended that the NASD, in investigating the brokers, acted as a "quasi-governmental agency" and therefore should not be permitted to induce testimony by threatening to sanction individuals who invoke their Fifth Amendment privilege.[67] The court specifically found that the NASD's request for testimony was in furtherance of its own investigation and not as a government agent.[68] Thus, unless the USAO had directed NASD to interview certain principals from the brokerage firm, there was no due process violation just because the testimony might be provided directly to prosecutors, if it was obtained for the purpose of civil investigation. Additionally, the Second Circuit stated that because the NASD is a private entity, it was completely within its right to suspend or bar members for invoking the Fifth Amendment during civil testimony.[69]

C. Government Exploitation of Parallel Investigations Can Result in Prejudice

The government can exert strong incentives to procure testimony from individuals in a corporate investigation, even though a USAO acting on its own does not have the power to force individuals to testify in front of a grand jury when doing so might incriminate them in a future criminal action. When a broker is faced with the Hobson's choice described above, it is crucial that the individual have accurate information regarding whether a parallel criminal investigation has commenced. In *United States v. Parrott*,[70] the court said: "[T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending

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[65] *Id.*

[66] Gourevitch, *supra* note 3, at 511.

[67] *Id.* at 512.

[68] *D.L. Cromwell Investments*, 279 F.3d at 162. *See also* D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248, 252 (S.D.N.Y. 2001), *aff'd*, 279 F.3d 155 (2d Cir. 2002).

[69] *D.L. Cromwell Investments*, 279 F.3d at 161. *See also In re* Markowski, 51 S.E.C. 553, 554, 559 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994) (affirming NASD bar of registered representative for failure to cooperate with NASD investigation); *In re* Zubkis, Exchange Act Release No. 40,409, 67 S.E.C. Docket 2893, 2895 n.2 (Sept. 8, 1998) ("It is well established . . . that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government."); *In re* Adams, 47 S.E.C. 919, 921 (1983) (holding that an invocation of the Fifth Amendment privilege would not affect the right of the NASD to sanction the respondent for his refusal to provide information since the NASD is "not a part of the government"); United States v. Solomon, 509 F.2d 863, 867 (2d Cir. 1975) (holding that New York Stock Exchange is a private actor).

[70] 248 F. Supp. 196 (D.D.C. 1965).

criminal charge."[71] In this situation, the defendant is "placed in a trap."[72] As such, it is a violation of due process for the government, either as an administrative agency or as the prosecution, to induce testimony when criminal liability is concurrently contemplated outside of an individual's knowledge.[73]

At the furthest extreme, it violates fundamental fairness to induce prospective defendants to testify with the explicit promise of aiding the defendants in avoiding criminal charges, while simultaneously assisting in their criminal referral.[74] In *United States v. Rodman*, the SEC obtained the cooperation and testimony of the defendant by promising to recommend to the USAO that he not be criminally indicted.[75] Not only did the SEC agent not make the recommendation, but during the time of the defendant's cooperation he "was actively contemplating the preparation of a criminal reference report which would have included the defendant."[76] The First Circuit affirmed the district court's dismissal of the indictment.[77] Where an individual waives the Fifth Amendment privilege on the basis of a false representation by a government agent, that individual cannot be said to have voluntarily, knowingly, and intelligently waived the Fifth Amendment privilege.[78] To hold otherwise is to expand the prosecution's power of discovery beyond that which is wielded by the grand jury in any other type of criminal investigation and indictment. It is this result that poses the greatest risk to individual constitutional protections and thus challenges the constitutional propriety of parallel investigations.

V. WHEN THE GOVERNMENT FAILS TO ADVISE A DEFENDANT IN A CIVIL PROCEEDING THAT IT CONTEMPLATES HIS CRIMINAL PROSECUTION

In upholding the constitutionality of parallel proceedings, the Supreme Court in *Kordel* cited three cases in support of the caveat that the Court was not then dealing with a case where the government had failed to inform the defendant in a civil proceeding that it was contemplating his criminal prosecution.[79] Each case involved a joint investigation by the IRS and the DOJ, during which the defendant voluntarily provided the government with the

[71] *Id.* at 200.

[72] United States v. Rand, 308 F. Supp. 1231, 1237 (N.D. Ohio 1970) (citing McNabb v. United States, 318 U.S. 332 (1943)).

[73] *Id.* at 1237 ("In such a situation, it is unfair in the extreme to penalize defendant Rand for failure to invoke his privilege against self-incrimination.").

[74] United States v. Rodman, 519 F.2d 1058, 1059–60 (1st Cir. 1975).

[75] *Id.* at 1059.

[76] *Id.*

[77] *Id.* at 1060.

[78] *See* Miranda v. Arizona, 384 U.S. 436, 444, 475 (1966).

[79] United States v. Kordel, 397 U.S. 1, 12 n.24. (1970) (citing Smith v. Katzenbach, 351 F.2d 810, 811–13 (D.C. Cir. 1965); United States v. Lipshitz 132 F. Supp. 519, 523 (E.D.N.Y. 1955); United States v. Guerrina, 112 F. Supp. 126, 128 (E.D. Pa. 1953)). Note that because *Lipshitz* cites to *Guerrina*, these two cases are discussed here in reverse order.

information at issue, unaware that the government agent requesting and receiving that information was acting in pursuit of criminal, as opposed to purely civil, charges.[80] In each case, the court suppressed the illegally obtained evidence because the defendants' constitutional rights were violated by the government's deception.[81]

A. Smith v. Katzenbach

In *Smith v. Katzenbach*, the defendant thought he was talking to government revenue agents who were civilly investigating alleged tax evasion, when in fact the interviewer was a special agent from the Internal Revenue Bureau who was "a skilled interrogator in the field of criminal tax evasion" investigating the defendant's potential criminal liability.[82] The court found that the defendant's constitutional rights had been violated, even though the agent introduced himself as "Special Agent," because the phrase had no significant meaning to the defendant.[83] Further, the defendant affirmatively told the special agent in the middle of the interview that he was unaware of his rights and had answered questions that he did not want to answer, yet the agent continued with the interview and proceeded to collect books and records without advising the defendant that he did not have to provide them.[84] It was both the defendant's lack of knowledge regarding the existence of a criminal investigation and the special agent's deception and apparent exploitation of the defendant's error that were troublesome to the court.

B. United States v. Guerrina

The *Kordel* Court next cited *United States v. Guerrina*.[85] In *Guerrina*, the defendant, who was accused of tax evasion, submitted to a civil investigation by consenting to examination of his books and records. While the revenue agent was in the defendant's office reviewing materials, a special agent of the Intelligence Unit of the Internal Revenue Bureau arrived and joined the review without advising the defendant that he was there in pursuit of a criminal investigation.[86] The court took notice that the defendant was neither advised of his constitutional rights nor warned that the information he was providing could

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[80] *Katzenbach*, 351 F.2d at 811–13; *Lipshitz*, 132 F. Supp. at 523; *Guerrina*, 112 F. Supp. at 127–28.

[81] *Katzenbach*, 351 F.2d at 810–12; *Lipshitz*, 132 F. Supp. at 522–23; *Guerrina*, 112 F. Supp. at 129. But note that in *Smith v. Katzenbach*, although the court stated that Defendant's constitutional rights had been violated, the complaint was dismissed without determination of the merits for lack of equity jurisdiction. *Katzenbach*, 351 F.2d at 810.

[82] 351 F.2d at 812.

[83] *Id.* at 811.

[84] *Id.* at 812.

[85] 112 F. Supp. 126 (E.D. Pa. 1953).

[86] *Id.* at 127–28.

be used in a criminal case against him.[87] As far as the defendant was concerned, he was cooperating with a civil auditor in the context of a routine audit.

The court decided the case by examining whether the defendant's consent to provide information in the civil case amounted to consent to provide the information in the criminal one.[88] The distinction is interesting because the civil investigator could legally turn the information over to the criminal agent pursuant to the joint investigation. Nevertheless, there is a difference between an inter-agency government referral of a criminal complaint and the government's act of deceptively inducing an individual to waive constitutional protections in the face of criminal liability, even if the individual has voluntarily waived privilege in the civil proceeding. The court found that the deception in this case amounted to an illegal search and seizure. Notably, Judge Thomas J. Clary wrote:

> I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes. Whether the arrangement to have Agent Coram make the appointment with the defendant was by design to obtain entrance for Special Agent Pearson, or whether it was done innocently, the effect in so far as the defendant was concerned was the same. He was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes.[89]

The government's deception, whether purposeful or not, ultimately defeats the voluntary nature of the defendant's waiver of his constitutional rights. The impact of deception on the validity of waiver is particularly important in the enforcement environment in which a civil government agency seeks to induce cooperation from corporate employees with explicit or implicit promises that they can escape criminal referral. When a criminal referral is already underway, such deceptive behavior negates the voluntariness of the defendant's waiver of privilege in the civil investigation.[90]

C. United States v. Lipshitz

Finally, the Supreme Court in *Kordel* cited *United States v. Lipshitz*.[91] In *Lipshitz*, the defendant was also engaged in a tax audit and had been cooperating with a revenue agent from the Internal Revenue Service (IRS).[92] During the course of the civil audit, a special agent from the Intelligence Unit of the IRS was assigned to work the case as a joint investigation, which by

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[87] *Id.* at 128.
[88] *Id.*
[89] *Id.* at 129.
[90] *Id.* at 128–29.
[91] 132 F. Supp. 519 (E.D.N.Y. 1955).
[92] *Id.* at 521. Previously, the Bureau of Internal Revenue.

definition "contemplates an investigation in preparation for criminal prosecution."[93] Here, the special agent did not personally interview the defendant; rather, he directed the civil discovery from behind the scenes.[94] At the request of the special agent, the lead civil investigator made numerous copies of books, records, and accounts identified by the special agent as pertinent to the criminal investigation. The court specifically noted that the information obtained was far more extensive than what was required for the civil audit.[95] Yet, the determining factor in the case was again the defendant's lack of knowledge regarding the criminal referral. The judge found that both agents were engaged in "preparation of the case for the criminal prosecution of the defendant, and that they did not inform him, nor did he know, that they were so engaged."[96] The court then examined the voluntary aspect of the defendant's disclosure, refusing to find that a voluntary disclosure in a civil proceeding could amount to a voluntary disclosure in a criminal context when the defendant was unaware of the active criminal investigation. Thus, for the government "to obtain, without the Defendant's knowledge and consent, extensive information . . . far in excess of [what was] required for the customary routine audit . . . cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge."[97]

Both in *Katzenbach* and in *Guerrina*, the special agent had direct contact with the defendant without advising the defendant that there was an open criminal investigation. In *Lipshitz*, there was no direct contact, but the criminal investigator actively directed the civil discovery. In both situations, the courts prohibited the government from securing defendants' cooperation in active criminal investigations of which they were unaware.[98] The government cannot fail to give notice of a criminal investigation where that failure constitutes deception by the government. Further, Judge Clary held that the determination of what constitutes deception should be examined from the perspective of the defendant.[99] If so, then what is the difference, from the defendant's point of view, between a criminal investigator walking into the defendant's office and participating in the physical search of records alongside a civil auditor, and the criminal investigator waiting outside the door for the information to avoid being seen by the defendant? Arguably none, if the government conceals the criminal investigation in both situations. From this perspective, *Kordel* and the line of cases it approved imply that civil auditors have a duty to disclose an open criminal investigation when they request and receive voluntary compliance with civil discovery, whether or not the criminal agent is present, and whether or not the defendant asks the agent directly if there is a concurrent

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[93] *Id.*

[94] *Id.*

[95] *Id.* at 522 (citing MANUAL OF INSTRUCTIONS FOR REVENUE AGENTS para. 678).

[96] *Id.* at 523.

[97] *Id.*

[98] *Katzenbach*, 351 F.2d at 810–12; *Lipshitz*, 132 F. Supp. at 522–23; *Guerrina*, 112 F. Supp. at 129.

[99] *Guerrina*, 112 F. Supp. at 128-29.

or parallel criminal investigation. This interpretation corresponds with the rulings by all three district courts that the target of a criminal investigation does not voluntarily consent to provide information to criminal investigators by consenting to provide information to civil auditors when the defendant is wholly unaware of the criminal inquiry.

D. "Known" Government Agents Cannot Misrepresent Their Purpose

As in *Guerrina*, a duty to disclose investigative purpose certainly arises when the criminal investigator gains entrance onto the defendant's property alongside a civil agent. More recently, the Ninth Circuit upheld the rule that when a government agent seeks entry for purposes of a consent search, a "known" government agent cannot passively misrepresent the purpose for seeking entry.[100] In *United States v. Bosse*, the Ninth Circuit pointed out the difference between situations in which a criminal investigator who accompanies a civil agent on a search deceives the individual about his identity as a government agent, and situations in which the criminal investigator deceives the individual only about the purpose for seeking entry.[101] Criminal investigators are permitted to conceal their identity as government agents to gain access to a suspect's home,[102] but known government agents cannot misrepresent their purpose for seeking entry or participating in the search.[103]

In reaffirming the rule originally articulated in *United States v. Little*,[104] the Ninth Circuit stated the "rule for this Circuit clearly prohibit[s] deliberate misrepresentation of the purpose of a government investigation."[105] Notably, there is no mention of a requirement that defendants specifically ask agents if they are criminal investigators or if there is a criminal investigation; rather, in *Bosse*, the "[criminal agent's] silence amounted to a deliberate representation that his purpose was that announced by [the civil agent], and a deliberate misrepresentation of his true purpose."[106] In determining that the search was

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[100] United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990).

[101] *Id.* at 116.

[102] *See* Lewis v. United States, 385 U.S. 206, 206–07 (1966); United States v. Glassel, 488 F.2d 143, 145 (9th Cir. 1973) (authorizing undercover agents posing as drug purchasers to enter a suspected drug seller's home when invited to complete a drug transaction).

[103] *Bosse*, 898 F.2d at 116.

[104] United States v. Little, 753 F.2d 1420 (9th Cir. 1985). "[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation." *Bosse*, 898 F.2d at 115 (citing *Little*, 753 F.2d at 1438).

[105] *Bosse*, 898 F.2d at 116.

[106] *Id.* at 115. Note however that Judge Frank H. Easterbrook in the Seventh Circuit has trouble with this rule. Specifically, Judge Easterbrook wrote in his concurring opinion to *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998) that:

> If dissimulation so successful that the suspect does not know that he is talking to an agent is compatible with voluntariness, how could there be a rule that misdirection by a known agent always spoils consent? Professor LaFave is rightly puzzled by courts' greater willingness to suppress evidence when agents who reveal their status give

illegal as a result of the misrepresentation, the court adopted the rationale expressed by the Fifth Circuit Court of Appeals, quoting:

> When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.[107]

Yet, before praising the Fifth Circuit for setting such a high standard of trust for the government, notice that even a misunderstood disclosure can suffice to meet the government's burden. In *United States v. Prudden*, cited affirmatively by the court in *Robson*,[108] the defendant accused of tax evasion had selectively cooperated with the audit investigation for several months before a referral was made to the Intelligence Division and a criminal investigation opened.[109] The defendant was not advised when the criminal investigation commenced and later moved to suppress evidence obtained as a result of the alleged government deception.[110] The court pointed out that the special agent who interviewed him alongside the civil auditor had identified himself as a special agent and showed the defendant his credentials. The defendant asserted that the difference between a "special agent" and a "revenue agent" had no meaning for him and that the agents only stated that they were there to audit his tax returns and the returns of his sons.[111] The government asserted that the defendant was a law school graduate and a businessman, implying that he must have known the significance of the IRS designation.[112]

The Fifth Circuit found no deception on the part of the government agents. The court noted that "[the special agent] could not have affirmatively mislead [sic] Prudden as to the function of the Intelligence Division or as to the duties of a special agent, since neither of these subjects were ever discussed."[113] This rationale implies that the agent was not required to verify the defendant's understanding of the agent's role in the investigation. Further, since the agent was not obliged to make sure the defendant understood that "special agent" in IRS terminology is a criminal fraud investigator, the court essentially held that under certain circumstances, a defendant has some duty to inquire. There is no

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> deceptive answers to inquiries about the purpose of the investigation than when agents lie about their status *as* agents.

Peters, 153 F.3d at 464. Judge Easterbrook would reject the rule and hold that "lack of candor about the purpose of investigation is no more fatal to a consent search than it is to a confession." *Id.*

[107] *Bosse*, 898 F.2d at 115 (quoting SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. Unit B 1981)).

[108] United States v. Robson, 477 F.2d 13 (9th Cir. 1973).

[109] United States v. Prudden, 424 F.2d 1021, 1023–24 (5th Cir. 1970).

[110] *Id.* at 1021, 1024–25.

[111] *Id.* at 1025.

[112] *Id.* at 1028.

[113] *Id.* at 1032.

doubt that had the defendant asked, the agent would have had an affirmative duty to answer truthfully.

In *Prudden*, the special agent's self-identification was basically equivalent to notice of a criminal investigation, and the agent was under no obligation to further spell out to the defendant that he had joined the investigation in pursuit of potential criminal charges.[114] This outcome puts the Fifth Circuit at odds with the D.C. Circuit's decision in *Katzenback*, decided just five years earlier. *Katzenbach* held that the introduction of a criminal tax investigator as "special agent" did not constitute disclosure of the existence of a criminal investigation because the phrase had no particular meaning to the defendant; *Prudden* in effect reached the opposite conclusion, holding that, at least when accompanied by a showing of credentials to a sophisticated individual, the introduction as "special agent" sufficed to overcome the allegation of government deception.[115]

VI. THE GOVERNMENT'S "DUTY NOT TO LIE"

Thirty-six years after *Kordel*, the crux of the debate concerning the constitutionality of parallel investigations still centers on what constitutes deceptive practices on the part of the government. The earlier cases define deception as including the failure to inform a defendant of the criminal aspect of the investigation; the *Kordel* Court specifically envisioned the situation as one in which the government "has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution."[116] Yet the government in *Stringer* specifically argued that "[t]he government is under no duty to notify anyone that they are being investigated unless they are asked directly."[117] The government posited that there are two types of cases or conduct that equate government deception to the degree that dismissal of an indictment or suppression of evidence is warranted.[118] In particular, the government claimed:

> Dismissal or suppression is appropriate only when the testimony or other evidence in the civil proceedings was procured through fraud—either defendants in civil proceedings were lied to about the possibility of a criminal action or the civil action was simply a front for a criminal investigation that was not disclosed.[119]

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[114] *Id.* at 1033.

[115] *Id. See also* Smith v. Katzenbach, 351 F.2d 810, 811 n.1 (D.C. Cir. 1965), *and* SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 318 n.9 (5th Cir. Unit B 1981) (discussing that the result in *Prudden* allows the sophistication of defendants to be relevant in determining whether or not they were in fact deceived).

[116] United States v. Kordel, 397 U.S. 1, 12 (1970).

[117] Government's Motion For An Offer Of Proof Prior To Evidentiary Hearings On Defendants' Motions To Dismiss Or Suppress at 8, United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006) (CR 03-432 (HA)) (citing United States v. Robson, 477 F.2d 13, 18 (9th Cir. 1973)).

[118] *Id.* at 9–10.

[119] *Id.* at 10.

A similar argument was advanced just a few months earlier in *United States v. Scrushy*, where the United States Attorney's Office in the Northern District of Alabama asserted that the government did not act in "bad faith because it did not outright lie to Mr. Scrushy about the existence of the criminal investigation."[120] That the government's interpretation of its duty to disclose a parallel criminal investigation boils down to a "duty not to lie" is not only disturbing; it is misguided.

The government in *Stringer* cited the Ninth Circuit decision in *United States v. Robson* for the proposition that "silence as to the criminal potential of an investigation was not affirmative misrepresentation and agent was under no duty to mention possible criminal consequences of audit."[121] However, the facts of *Robson* do not render the opinion quite as favorable as the government posits. To begin, in *Robson*, the Ninth Circuit found that the investigation was completely and truly parallel, such that there was no overlap of criminal and civil investigations at the time the defendant cooperated with the tax audit.[122] Specifically, the IRS received a tip that Robson was engaged in tax fraud. All tips are processed through the Intelligence Division, which determined that there was not enough information to warrant the initiation of a criminal investigation.[123] There was, however, enough information to warrant a civil audit. The court took notice that the auditor "had no instructions from the Intelligence Division, had no interim conferences with its representatives, and was under no obligation to report to it unless his audit uncovered an indication of fraud."[124] Robson's subsequent cooperation with the audit did not occur when an open criminal investigation was being kept from him; rather, there really was no open criminal investigation at that time.

In evaluating the government's duty of disclosure, the court reaffirmed its 1965 holding in *Kohatsu v. United States*,[125] which held that the agents of the Intelligence Division had no affirmative duty to advise the taxpayer of either his Fifth Amendment rights or of the criminal nature of the investigation where they "*had properly identified themselves and disclosed their purpose to audit tax returns.*"[126] Specifically, the court stated that the government was under no obligation to give a "*Miranda* type warning" absent a custodial interrogation "in the conventional sense."[127] The issue of *Miranda* and the obligation to advise defendants of their Fifth Amendment rights, however, is separate from the government's obligation not to engage in deception about the existence of a criminal investigation, even if the same constitutional right is implicated.

Certainly, in the absence of an open criminal investigation, the government is under no obligation to advise an individual that a civil

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120 United States v. Scrushy, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005).

121 Government's Motion, *supra* note 117, at 8.

122 *Robson*, 477 F.2d at 17.

123 *Id.*

124 *Id.*

125 351 F.2d 898 (9th Cir. 1965).

126 *Robson*, 477 F.2d at 16 (summarizing *Kohatsu*) (emphasis added).

127 *Id.* (quoting Simon v. United States, 421 F.2d 667, 668 (9th Cir. 1970)).

investigation potentially has criminal ramifications.[128] However, in such a situation, "the IRS agent must not affirmatively mislead the taxpayer into believing that the investigation is exclusively civil in nature and will not lead to criminal charges."[129] The court found that the agent in *Robson* made no such affirmative misrepresentation; stated another way, the agent did not lead the individual to believe that there would *not* be any criminal consequences flowing from the civil audit of his tax records.[130] This is a different situation than that of the agent's silence concerning potential criminal consequences *when a criminal investigation has already been opened*, unbeknownst to the individual consenting to a civil audit.

In fact, the *Robson* court did acknowledge that "[s]ilence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading," then proceeded to explain that there was no duty to mention possible criminal consequences when the agent was not directly asked about it *and when the agent was not working in conjunction with a criminal investigation.*[131] Thus, what the government in *Stringer* failed to acknowledge is that "a legal or moral duty to speak" arises, according to *Robson*, when the criminal investigation has been opened, as opposed to when there is only the potential for a future criminal investigation. The only time that the government's duty to disclose is reduced to a "duty not to lie" is in the latter circumstance.

To be fair, the Seventh Circuit in *United States v. Peters*[132] provided some basis for the formulation of the "duty not to lie" argument. Articulating the burden of proof that a defendant must meet in order to prevail on a motion to suppress evidence, the Seventh Circuit stated that the defendant first had to demonstrate that the government agent affirmatively misled him about the true nature of the investigation.[133] The court went on to specify that:

> Simple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agents' failure to respond was intended to mislead.[134]

The holding that a defendant has to inquire about the nature of the investigation before the government response can be deemed deceitful gives the government much more latitude than either *Robson* or *Scrushy* contemplated.

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[128] *Id.* at 17–18. (citing Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969)); Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965); *accord* United States v. Bland, 458 F.2d 1, 8 (5th Cir. 1972); United States v. Stamp, 458 F.2d 759 (D.C. Cir. 1971); United States v. Stribling, 437 F.2d 765 (6th Cir. 1971); United States v. Jaskiewicz, 433 F.2d 415 (3d Cir. 1970); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970); Cohen v. United States, 405 F.2d 34, 36 (8th Cir. 1968).

[129] *Robson*, 477 F.2d at 18.

[130] *Id.* at 18.

[131] *Id.* (quoting *Prudden*, 424 F.2d at 1032).

[132] 153 F.3d 445 (7th Cir. 1998).

[133] *Id.* at 451 (citing United States v. Serlin, 707 F.2d 953, 956 (7th Cir. 1983)).

[134] *Id.* (quoting *Serlin*, 707 F.2d at 956).

Yet, a response "intended to mislead" is somewhat of a different standard than a "duty not to lie."[135]

At the same time, the court also found that once a civil auditor finds "firm indications of fraud," the civil investigation should stop, lest the government engage in "a covert criminal investigation" under the guise of a civil audit.[136] The Seventh Circuit distinguished its test from that of the Eighth Circuit, stating that while the Eighth Circuit used the "firm indications of fraud" test as an element in the burden of proof, the Seventh Circuit prefers to use the "firm indications" rule as a tool for assessing whether an affirmative representation by the government has in fact occurred.[137] As such, when a civil auditor continues the investigation after finding "firm indications of fraud" the Seventh Circuit "may justifiably conclude that the agent was in fact conducting a criminal investigation under the auspices of a civil audit," in which case inquiry by the defendant as to the existence of a criminal investigation is irrelevant.[138]

The argument that absent an outright lie, the government did not act in bad faith was also recently struck down in *United States v. Scrushy*.[139] In *Scrushy*, the USAO manipulated the SEC deposition of HealthSouth CEO Richard Scrushy, ultimately resulting in the suppression of his deposition testimony and dismissal of the perjury counts contained in the indictment.[140] During the SEC investigation of HealthSouth, the USAO contacted the SEC and covertly arranged for Scrushy's deposition to be moved from Atlanta, Georgia to Birmingham, Alabama. The motivation for the move, unbeknownst to the defendant, was so the USAO could have a particular expert participate in the questioning of Mr. Scrushy. Moreover, the court determined that certain questions asked during the deposition did not aid the civil investigation, but were only relevant to the criminal investigation, of which Mr. Scrushy was entirely unaware.[141] The USAO also endeavored to set up perjury charges, stating, "if [Mr. Scrushy] lies, then he will be lying in our district."[142]

The district court found that the civil and criminal investigations improperly merged at the point the USAO contacted the SEC and expressed its "preferences" with regard to the location and content of the deposition.[143] Further, the court determined that the government's actions both improperly deceived the defendant and endeavored to improperly direct civil discovery. There was no discussion as to whether Mr. Scrushy or his lawyer asked the government about the existence of a criminal investigation. Rather the court simply stated that, at the deposition, the Senior Accountant with the SEC

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[135] Note that the facts in *Stringer* would satisfy the Seventh Circuit's standard.

[136] *Peters*, 153 F.3d at 452, 454.

[137] *Id.* at 452 n.10. The Eighth Circuit test is articulated in *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993).

[138] *Peters*, 153 F.3d at 452.

[139] 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

[140] *Id.* at 1140.

[141] *Id.* at 1137.

[142] *Id.* at 1136.

[143] *Id.* at 1137.

Department of Enforcement failed to advise Mr. Scrushy or his attorneys of the open criminal investigation.[144] The court indicated that it would have been inclined to grant only the motion to suppress, but in light of the additional misconduct determined that it was more appropriate to dismiss the indicted charges that were based on the ill-gotten testimony.[145]

Notably, the government argued that it could not be accused of bad faith because "it did not outright lie to Mr. Scrushy about the existence of the criminal investigation."[146] The court, however, refused to "take such a limited view of bad faith."[147] Instead, the court cited the earlier opinion of Judge Johnson in *SEC v. HealthSouth Corp.*,[148] which stated that:

> Because this is a case where the government has . . . manipulated simultaneous criminal and civil proceedings, both of which it controls, "there is a special danger that the government can effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means. In that special situation the risk to individuals' constitutional rights is arguably magnified."[149]

The Fifth Circuit similarly refused to grant the government its "duty not to lie" argument in *United States v. Tweel*.[150] In *Tweel*, the defendant specifically asked the civil auditor, before cooperating with the civil audit, whether there was a "special agent" involved in the investigation. The auditor correctly replied that there was not a special agent involved, but failed to disclose that the Organized Crime and Racketeering Section of the Justice Department had specifically initiated the audit.[151] The court found that the defendant had been "grossly deceived" by the auditor's response.[152] The court acknowledged that the auditor's statement was "on the face of it true"; however, the failure to advise the defendant of the criminal nature of the investigation was "a sneaky deliberate deception by the agent" and "a flagrant disregard for appellant's rights."[153] The court found that the defendant's question was obviously designed to inquire whether there was a criminal audit; thus any answer to the contrary, whether technically true or not, is an act of deception on the part of the government.[154] In granting the defendant's motion to dismiss, the court stated, "We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should

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144 *Id.*

145 *Id.* at 1139–40 (discussing United States v. Parrott, 248 F. Supp. 196, 200 (D.D.C. 1965)).

146 *Id.* at 1140.

147 *Id.*

148 261 F. Supp. 2d 1298 (N.D. Ala. 2003).

149 *Id.* at 1326 (quoting Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 579 (S.D.N.Y. 2001)).

150 550 F.2d 297 (5th Cir. 1977).

151 *Id.* at 298.

152 *Id.*

153 *Id.* at 299.

154 *Id.*

be able to expect the same from the government in its enforcement and collection activities."[155]

The situation in *Tweel* harkens back to that in *Stringer*, where the defendant's attorney specifically asked whether the SEC was "working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice."[156] The SEC referred defendant to the "routine use of" section of Form 1662, which advises that information obtained in the civil investigation can be used in a criminal prosecution.[157] While technically true, this response did not answer the attorney's question. The SEC attorney further stated that it was "the agency's policy not to respond to questions like that, but instead, to direct [a defendant] to the other agencies . . . mentioned."[158] The defense attorney then specifically asked which U.S. Attorney's office he should contact for that information and was told that it was "a matter up to [his] discretion."[159] This conversation took place on the record, immediately prior to the commencement of Mr. Stringer's testimony before the SEC. Had the SEC advised Mr. Stringer's attorney that his client was indeed a named target in an open criminal investigation, Stringer would likely have elected to invoke his Fifth Amendment privilege upon advice of counsel. The district court thus concluded that the government was deliberately hiding the criminal investigation in order to continue the successful discovery being obtained by the SEC.[160] Similar to the SEC in *Stringer*, which claimed "agency policy" as a valid reason to sidestep direct questions from a defendant, the government in *Tweel* argued that the behavior of the IRS special agent in response to the defendant's question was "routine." The *Tweel* court responded, and *ESM Government Securities* later quoted, "If that is the case we hope our message is clear. This sort of deception will not be tolerated and if this is the 'routine' it should be corrected immediately."[161]

VII. THE DEFENDANT'S BURDEN OF PROOF

The *Scrushy* court complained about the paucity of cases distinguishing a legitimate parallel investigation from an improper one;[162] similarly, few rulings discuss when a criminal investigation actually "commences" in the context of a parallel investigation, and then only in very fact-specific terms which are difficult to generalize into governing principles. In *Stringer*, the court

[155] *Id.* at 300.

[156] United States v. Stringer, 408 F. Supp. 2d 1083, 1087 (D. Or. 2006).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 1087–88. The court also refers to a telephone conversation between the SEC attorney and the AUSA memorialized in writing where the AUSA explained that "once there is an indictment, 'discovery is over. Criminal is totally 1 sided' and that [the AUSA] would then give everything and get nothing." *Id.* at 1088.

[161] SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 318 (5th Cir. Unit B May 1981) (quoting United States v. Tweel, 550 F.2d 297, 300 n.9 (5th Cir. 1977)).

[162] United States v. Scrushy, 366 F. Supp. 2d 1134, 1137 (N.D. Ala. 2005).

determined that the criminal investigation commenced when the USAO communicated the high potential for prosecution to the SEC and identified specific targets of investigation.[163] However, *Dresser* looked specifically at the point of indictment and the convening of a grand jury.[164] But if there is difficulty in identifying when the criminal investigation actually began, it is greatly outweighed by the difficulty in *proving* it.

A review of the procedural history of the *Stringer* case illustrates some of the inherent problems a defendant faces in this situation.[165] To begin, defense counsel for Mr. Stringer accused the government, in particular the SEC, of playing a "shell game" in order to "subvert[] the fact-finding process" in the case.[166] The allegation appears to have been well-founded. When the joint defendants in the case began to suspect that there had been improper coordination between the USAO and the SEC, they subpoenaed documents pertaining to the early and ongoing communications between the two agencies. The SEC first attempted to quash the subpoena, then tacitly denied the existence of the documents sought by the defense. During pre-trial motions, defendants were finally able to confirm on the record that the SEC attorneys had in fact taken notes during their early meetings with the US Attorney's Office and that those notes had not been destroyed. They had not been produced in response to the defense subpoena either. Rather, the SEC agents had turned them over to the SEC. Thus, because the defendants subpoenaed the individual witnesses that participated in the meetings, and not the SEC's "custodian of records," the SEC did not produce the documents to the defense. After the key SEC witnesses testified before the court, defendants were able to press the issue and obtain the documents, but again, the SEC failed to produce all of them.[167]

The SEC had in its control twenty boxes of internal investigation materials that it had purportedly reviewed for exculpatory information as required by *Brady* (*Brady* material).[168] Indeed, the SEC had represented that there was no exculpatory information in those boxes, and the court was at least initially willing to take this representation at face value. Following the SEC's less than

[163] *See Stringer*, 408 F. Supp. 2d at 1087–88. Even though the court found that "[t]he USAO identified potential criminal liability and a few targets in the beginning of the investigation [in 2000], and elected to gather information through the SEC instead of conducting its own investigation," *Id.* at 1087, the government maintained that "the investigation did not begin in earnest until early 2003 when it began interviewing witnesses and exploring possible criminal charges." Government's Motion, *supra* note 117, at 2.

[164] SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980) (en banc).

[165] Defendant Stringer's Supplemental Memorandum In Support Of Motion To Dismiss Indictment 39–40, United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006) (CR 03-432 (HA)). Other information presented here is based on author's personal knowledge acquired as a law clerk for lead counsel, Janet Hoffman, of Hoffman and Angeli, LLP, in Portland, Oregon, over a two-year period during the *Stringer* case.

[166] *Id.* at 40.

[167] *Id.*

[168] *Id*. The term "*Brady* material" refers to the government's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), which provide that the prosecutors may not suppress materially exculpatory evidence in the government's possession.

forthright behavior in producing the meeting notes, defendants asked the court to have the AUSA personally review the documents for *Brady* material, as opposed to relying solely on the representation of the SEC. Defendants further asked the AUSA to check the boxes for any materials responsive to the earlier subpoena. It was only as a result of this persistence that some of the most important documents were actually provided to the defense; indeed, at the proverbial "eleventh hour."[169] If left up to the SEC, defendants would never have received a significant amount of evidence to which they were entitled.[170]

Assuming that a defendant is able to gain access to government documentation of the early investigation—which also assumes that such documentation exists in the first place—defendants still face a difficult burden of proof in order to obtain the suppression of evidence or dismissal of the indictment which fundamental fairness demands in a case where the government has engaged in an improper investigation. As an example, the Eighth Circuit articulated the following standard for suppression in a tax fraud case where the defendant was not apprised of the nature of the investigation and waived his Fourth and Fifth Amendment privileges:

> Evidence . . . may be suppressed only if the defendant establishes that: 1) the IRS had firm indications of fraud by the defendant, 2) there is clear and convincing evidence that the IRS affirmatively and intentionally misled the defendant, and 3) the IRS's conduct resulted in prejudice to defendant's constitutional rights.[171]

Citing to the *Grunewald* test, the *Peters* court discussed that the "firm indications of fraud" standard was difficult for courts to apply because "it is inherently vague and depends, in large part, on the good faith and professional judgment of the revenue agents conducting the investigation."[172] Nevertheless, the Seventh Circuit in *Peters* adopted a modified version of the *Grunewald* standard and incorporated the "firm indications of fraud" rule as a basis for

[169] Defendants received the SEC documents by courier at 5:00 pm on the Friday evening before oral arguments for the motion to dismiss began the following Monday morning.

[170] Defendant Stringer's Supplemental Memorandum, *supra* note 165, at 39–40. It is no wonder that the SEC did not want to produce the documents: they contained communications that clearly demonstrated the improper merging of the parallel investigations. Among the most egregious examples were documentation that: the SEC asked the USAO to stay away from witness interviews so as not to alert defendants to the USAO involvement; the SEC noted the need to make sure the court reporters would not tell the FLIR attorneys about the USAO's involvement; the USAO documented the tactical decision to abate the criminal investigation in order to continue receiving statements from defendants—in particular the CEO Ken Stringer; the USAO documented its strategy to "passively observe the results of the SEC's work" at "little cost" to them; the USAO spelled out the criteria for false testimony cases which the SEC disseminated to all SEC investigators, noting their desire to catch "these jokers" committing perjury so that the USAO could prosecute them. *See generally* Request for Oral Argument, *supra* note 23; Defendant Stringer's Supplemental Memorandum, *supra* note 165.

[171] United States v. Grunewald, 987 F.2d 531, 534 (8th Cir. 1993).

[172] United States v. Peters, 153 F.3d 445, 452–53 (7th Cir. 1998).

assessing whether the IRS had affirmatively misrepresented the nature of the investigation.[173]

In addition to such "inherently vague" standards, defendants in the Tenth Circuit must demonstrate a "reasonable reliance." In *United States v. Davis*,[174] the court affirmed a conviction where the defendant was interviewed in the civil action two days after the Federal Reserve Board sent a criminal referral to the U.S. Attorney's Office.[175] Information obtained from the defendant's voluntary statement was used to secure the criminal conviction. Even though it was clear that the government deliberately deceived the defendant, in the absence of evidence of "reasonable reliance on th[e] deliberate omission" or "prejudice . . . from such reliance," the court rejected the defendant's due process claim.[176] Finally, some courts refuse to enforce the standard of fundamental fairness upon the government without a showing of widespread and pervasive abuse. Specifically, the Second Circuit opined:

> We have approved [dismissal] only when the pattern of misconduct is widespread or continuous .... There is no contention that SEC employees generally fail to disclose to defense counsel the release of relevant information or a criminal reference to the Department of Justice.[177]

The reluctance to sanction government agencies for deliberate misrepresentations in parallel proceedings only encourages the conduct to continue and to escalate. To be fair, courts are in a difficult position to determine after the fact whether misconduct has occurred. The Seventh Circuit aptly articulated the "two perils" that federal courts face, namely the conflict between "judicial micromanagement of the inner functionings of an administrative agency" and the "judicial abdication of th[e] Article III duty to protect the constitutional rights of criminal defendants."[178] The court said: "This latter peril will be realized if the courts are forced to rely solely on the after-the-fact assessments of revenue agents who may have an incentive to use the discretionary nature of the 'firm indications' rule to shield their actions from judicial scrutiny."[179]

Yet, just because the determination is difficult does not mean that it should be avoided. The main problem with such a difficult burden of proof is that the government uses it to define the outer parameters of acceptable conduct. There is little incentive for prosecutors to act within the bounds of good faith during a

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[173] *Id.* at 452 n.10.

[174] 953 F.2d 1482 (10th Cir. 1992).

[175] *Id.* at 1482, 1497 (citing United States v. Caceres, 440 U.S. 741, 752–53 (1979)).

[176] *Id.*

[177] United States v. Fields, 592 F.2d 638, 648 (2d Cir. 1978) (circuit court reversed dismissal based on SEC misconduct where the SEC concealed the criminal referral during the negotiation of a civil settlement in a case involving the same facts. Defendants had voluntarily disclosed facts constituting violations of securities law and made an accepted settlement offer in the disclosed interest of avoiding a criminal referral).

[178] *Peters*, 153 F.3d at 453.

[179] *Id.*

parallel investigation when they can avoid sanction if the violation did not result in extreme prejudice to the defendant.

VIII. CONCLUSION

In corporate fraud cases, government investigators have at their disposal broad discovery powers and the resources of two distinct and powerful investigative agencies. For these agencies to resort to deceit, trickery, and subterfuge during the course of an investigation offends the well-established notion of fundamental fairness. Given the recent public focus on white-collar crime, it is not surprising that the government is under increased pressure to criminally prosecute individual actors for corporate wrongdoing. But this pressure is insufficient justification for deliberately circumventing constitutional privileges and curtailing the right of every citizen to due process of law. As the incidents of parallel investigation promise to increase, courts must develop standards to hold government actors accountable for abdication of the standards of good faith. In the very least, corporate defendants should have access to communications between investigative agencies when there is a concern that a defendant has been fraudulently lulled into cooperation with a civil proceeding. Furthermore, administrative agencies such as the SEC should be subject to sanctions for deliberate avoidance of court ordered production of such materials.

Should a United States Attorney be permitted to argue that the government's only duty to a citizen during a parallel investigation is a "duty not to lie" when specifically asked about the existence of a criminal investigation? When a constitutional privilege is implicated, the government should have more than a mere "duty not to lie." To hold otherwise is to grant the government even broader discovery while "stultifying" individual constitutional protections. Citizens are entitled to expect that their government will not trick them into giving up their constitutionally guaranteed rights. An adversarial—as opposed to an inquisitive—form of justice system requires as much.