Washington and Lee Law Review

Volume 38 | Issue 3 Article 15

Summer 6-1-1981

Parallel Proceedings: The Impact of SEC v. Dresser Industries, Inc.

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Administrative Law Commons, Criminal Procedure Commons, and the Securities Law Commons

Recommended Citation

Parallel Proceedings: The Impact of SEC v. Dresser Industries, Inc., 38 Wash. & Lee L. Rev. 1075 (1981).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol38/iss3/15

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

PARALLEL PROCEEDINGS: THE IMPACT OF *SEC V. DRESSER INDUSTRIES, INC.*

Many federal agencies, including the Securities and Exchange Commission, possess the power to issue subpoenas or summonses to aid the agency in carrying out regulatory functions.[1] Courts and commentators have often equated the broad subpoena power of administrative agencies such as the SEC with that of a grand jury.[2] In justifying the breadth of the SEC's subpoena power, courts note that the SEC must be able to conduct investigations reasonable free from judicial interference in order to protect the investing public and to insure the integrity of the financial markets.[3] The SEC's freedom to investigate, however, is not absolute,

---

[1] *See, e.g.*, 15 U.S.C. § 49 (1976) (subpoena power of FTC); I.R.C. §§ 7602(2), 7604 (summons power of IRS); 29 U.S.C. § 161(1) (1976) (subpoena power of NLRB); 29 U.S.C. § 657(b) (1976) (subpoena power of OSHA); 47 U.S.C. § 409(e) (1976) (subpoena power of FCC); 49 U.S.C. § 12(1)(a) (1976) (subpoena power of ICC); 49 U.S.C. § 1354(c) (1976) (subpoena power of FAA); 49 U.S.C. § 1484 (1976) (subpoena power of CAB).

Both the Securities Act of 1933 ('33 Act) and the Securities Exchange Act of 1934 ('34 Act) permit the Securities and Exchange Commission (SEC) to issue subpoenas or subpoenas *duces tecum* when the SEC conducts any investigations into past, present or future violations of the '33 Act and the '34 Act or the rules and regulations promulgated under the '33 Act and the '34 Act. 15 U.S.C. §§ 77s(b), 77t(a), 78u(a), 78u(b) (1976). Both statutes also allow the SEC to bring an action in federal district court to enjoin any violation uncovered by the investigation and to disclose evidence gathered by the SEC subpoena to the Attorney General for criminal investigation. *Id.* §§ 77t(b), 78u(d).

Even though the SEC has the power to issue subpoenas neither the '33 Act nor the '34 Act gives the SEC the power to enforce subpoenas. When the subpoenaed party fails to comply with the subpoena, the SEC must apply for an enforcement order in a federal court. *See* 15 U.S.C. §§ 77v(b), 78u(c) (1976). *See generally* 3 H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 1.12[1] (1980 ed.) [hereinafter cited as BLOOMENTHAL].

[2] *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (analogizing subpoena power of FTC to that of grand jury); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216 (1946) (analogizing subpoena power of Administrator of Wage and Hour Division to that of grand jury); *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1312 (1979) [hereinafter cited as *Corporate Crime*] (comparing subpoena power of administrative agencies to that of grant jury). Administrative agencies, like grand juries, have broad subpoena power and can issue an enforceable subpoena based on nothing more than mere suspicion or "official curiosity." *See* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (FTC subpoena); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (SEC subpoena). Thus, neither administrative agencies nor grand juries require an actual case or controversy before issuing a subpoena. The analogy between administrative agencies and grand juries is not perfect, however, because administrative agencies are subject to more procedural limitations than grand jury supoenas. *See generally* Wilson & Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 AM. CRIM. L. REV. 651, 654-78 (1977) [hereinafter cited as Wilson]; *Corporate Crime*, *supra* at 1320-33. *See also* text accompanying notes 6-17, 99 & 128-30 *infra*.

[3] *See, e.g.*, SEC v. Arthur Young & Co., 584 F.2d 1018, 1023-24 (D.C. Cir. 1978), *cert.*

and the SEC's subpoena power is subject to various limitations.[4] A federal appeals court recently examined possible limitations on SEC subpoenas when a criminal investigation stemming from the same conduct is proceeding concurrently with the SEC investigation.[5]

The Supreme Court outlined broad limitations surrounding administrative subpoenas in *United States v. Powell.*[6] Under *Powell,* an administrative subpoena need not meet any specific standard or probable cause but must be sufficiently specific, limited, and relevant party from unreasonable searches and seizures.[7] The *Powell* limitations aply to all

---

denied, 439 U.S. 1021 (1979); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052-53 (2d Cir. 1973), *cert. denied,* 415 U.S. 915 (1974).

[4] *See* Wilson, *supra* note 2, at 655-70; text accompanying notes 6-17 *infra.*

[5] *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir.), *cert. denied,* 101 S. Ct. 529 (1980); text accompanying notes 64-106 *infra.*

[6] 379 U.S. 48 (1964). In United States v. Powell, 379 U.S. 48 (1964), the Court outlined four requirements that an administrative subpoena must meet before a court will enforce the subpoena. First, the agency must show that the investigation to which the subpoena applies has a legitimate purpose. *Id.* at 57. The legitimate purpose restriction is not onerous. An SEC investigation has a legitimate purpose if the SEC considers the investigation necessary to enforce the securities laws, rules or regulations. *See* SEC v. Arthur Young & Co., 584 F.2d 1018, 1022-24 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979); SEC v. Brigadon Scotch Distrib. Co., 480 F.2d 1047, 1052-54 (2d Cir. 1973), *cert. denied,* 415 U.S. 915 (1974); SEC v. Meek, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,105, at 96,133-34 (W.D. Okla. 1979), *aff'd,* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,323 (10th Cir. 1980). The second requirement in *Powell* is that an agency must show that the subject matter of the subpoena is relevant to the legitimate purpose of the investigation. 379 U.S. at 57. The relevancy requirement is not strict. The Supreme Court has noted that an administrative subpoena is enforceable if the material sought is related to the matter under investigation. United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950). The third *Powell* requirement is that the agency must prove that it does not already possess the information sought by the subpoena. 379 U.S. at 57-58. Finally, the agency must follow the applicable administrative procedure in issuing the subpoena. *Id.* at 58. Under SEC regulations, a member of the Commission, or any other officer designated by the Commission, may issue an SEC subpoena. 17 C.F.R. § 201.14(b)(1) (1980). The issuing officer may require the person seeking the subpoena to explain the relevancy of the subpoena. *Id.* The issuing officer may refuse to issue the subpoena if he finds the subpoena overbroad or burdensome. *Id.* The regulations require personal service of the subpoena. *Id.* § 201.14(b)(3). The method of service is flexible, and any method that supplies the subpoenaed party with actual notice prior to the return date of the subpoena is sufficient. *Id.*

[7] *See* United States v. Powell, 379 U.S. 48, 57 (1964). *See also* See v. City of Seattle, 387 U.S. 541, 544 (1967); United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946); SEC v. Arthur Young & Co., 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979). The Supreme Court has suggested that the fourth amendment's ban against unreasonable searches and seizures applies to a subpoena that compels the production of testimony or documents. *See* Hale v. Henkel, 201 U.S. 43, 76 (1906) (order for production of papers and books may be unreasonable seizure under fourth amendment); Boyd v. United States, 116 U.S. 616, 634-35 (1886) (compulsory production of books and papers may constitute unreasonable search and seizure under fourth amendment). The Supreme Court, however, has also held that the fourth amendment does not apply to subpoenas *duces tecum* issued to corporations to the same extent the amendment applies to actual searches and seizures. *See*

agencies, including the SEC, that possess the power to issue subpoenas.[8] Thus, under the *Powell* standards, an SEC subpoena is valid and enforceable if the subpoena is not overbroad and if the subject matter of the subpoena is relevant to the enforcement of the federal securities laws, rules and regulations.[9]

Other constitutional and judicially recognized privileges also limit the subpoena power of the SEC and other administrative agencies. The fifth amendment privilege against self-incrimination applies to administrative subpoenas.[10] The privilege, however, is a personal privilege that prevents an individual from being compelled to incriminate himself.[11] Because of the personal nature of the privilege, a corporation may not assert the privilege to prevent an administrative agency from

---

United States v. Morton Salt Co., 338 U.S. at 652-53 (corporation's right to privacy not equivalent to individual's right to privacy); Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 205 (corporations not entitled to same protection as individuals). As applied to administrative subpoenas *duces tecum*, the fourth amendment protects a corporation only against subpoenas that are overbroad or irrelevant. Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 202. The subpoenaed party has the burden of proving that the subpoena is overbroad or irrelevant and thus unreasonable under the fourth amendment. *See* United States v. Powell, 379 U.S. at 58 (IRS summons); SEC v. Brigadon Scotch Distrib. Co., 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (SEC subpoena). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.05-.06 (1958).

[8] Although *Powell* concerned the enforceability of an IRS summons, courts have applied similar standards to SEC subpoenas. *See, e.g.*, SEC v. Arthur Young & Co., 584 F.2d 1018, 1023-24 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (SEC subpoena must be specific, relevant to the SEC investigation, and limited in scope); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1053-56 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (SEC subpoena must be reasonable, relevant to SEC investigation, within the SEC's statutory authority, and not unreasonably burdensome); SEC v. Wall Transcript Corp., 422 F.2d 1371, 1375 (2d Cir. 1970) (SEC must comply with requirements in *Powell*).

[9] *See* SEC v. Arthur Young & Co., 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974).

[10] *See* United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (fifth amendment privilege against self-incrimination applicable to administrative subpoena); McMann v. SEC, 87 F.2d 377, 378-79 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937) (fifth amendment privilege applicable to SEC subpoenas). Although the actual language of the fifth amendment refers only to criminal cases, the Supreme Court has extended the amendment's applicability to numerous other proceedings. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring) (amendment applicable to all types of proceedings). *See also* Quinn v. United States, 349 U.S. 155, 162 (1955) (amendment applicable to congressional investigation); McCarthy v. Arnstein, 266 U.S. 34, 40 (1924) (amendment applicable to civil proceeding). The fifth amendment privilege applies to an SEC investigation or proceeding, but the subpoenaed party must assert the privilege. If the subpoenaed party testifies or relinquishes documents, courts will consider the privilege waived. *See* United States v. Buck, 356 F. Supp. 370, 379 (S.D. Tex.), *cert. denied*, 414 U.S. 1097 (1973) (compliance with SEC subpoena precludes right to assert fifth amendment privilege as to the documents relinquished).

[11] *See* Fisher v. United States, 425 U.S. 391, 398-99 (1976); United States v. Couch, 409 U.S. 322, 327-29 (1972).

procuring the corporation's records.[12] The personal nature of the privilege also prevents a person from asserting the privilege when the incriminating evidence is in the hands of a third party.[13] Finally, if a statute or regulation requires the keeping of books or records, the fifth amendment privilege will not protect the records from an agency subpoena even if the records are personal in nature.[14]

Another important privilege that restricts the enforceability of an administrative subpoena is the attorney-client privilege. Unlike the privilege against self-incrimination, both corporations and individuals may assert the attorney-client privilege.[15] The scope of the attorney-client privilege in the corporate context is still unclear although the Supreme Court has recently decided that the scope extends further than some federal courts had previously held.[16] In holding that courts should decide

---

[12] Courts do not consider a corporation to be a "person" within the meaning of the fifth amendment. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946) (fifth amendment self-incrimination privilege does not protect corporation or its officers); United States v. White, 322 U.S. 694, 699-701 (1944) (fifth amendment privilege applies only to private property in the possession of a natural person). *See generally* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4671 (rev. perm. ed. 1976); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 128 (2d ed. 1972).

[13] In Couch v. United States, 409 U.S. 322 (1973), the Supreme Court held that the fifth amendment privilege against self-incrimination did apply to an IRS summons that sought records that were in the possession of the taxpayer's accountant. *Id.* at 329. Relying on the notion that the fifth amendment privilege is a personal privilege, the *Couch* Court stressed that because the important element of personal compulsion was lacking, the taxpayer could not assert the privilege. *Id.* The Court, however, refused to make a per se rule against application of the fifth amendment privilege in cases in which a third party possesses the subpoenaed information. *Id.* at 333. The Supreme Court in Fisher v. United States, 425 U.S. 391 (1976), extended the *Couch* rationale to a situation where the subpoenaed information was in the possession of the taxpayer's attorney. *Id.* at 398-99. The *Fisher* Court reasoned that because the taxpayer had transferred the documents to his attorney, there was no personal compulsion on the taxpayer. *Id.* Thus, the taxpayer could not assert the fifth amendment privilege against self-incrimination. *Id. See generally* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 3.07 (1976).

[14] *See* Shapiro v. United States, 335 U.S. 1, 32-35 (1948) (fifth amendment privilege not applicable to records kept pursuant to administrative regulation).

[15] *See* Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 608 (6th Cir. 1978) (en banc) (noting that privilege applies to corporations); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963) (holding attorney-client privilege applicable to corporations).

[16] *See* Upjohn Co. v. United States, 449 U.S. 383 (1981). Before *Upjohn*, some federal courts decided the scope of the corporate attorney-client privilege on the basis of the "control group" test, which restricted the privilege to statements made by corporate employees in a position to control the corporation's actions. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962), *cert. denied*, 372 U.S. 943 (1963). Other courts decided the scope of the privilege on the basis of the "subject matter" test, which extends the privilege to all employee statements made at the request of corporate superiors provided the subject matter of the statement is within the employee's scope of employment. *See* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971). *See also* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)[04] (1980). The *Upjohn* Court attempted to resolve this conflict in

the scope of the corporate attorney-client privilege on a case-by-case basis, the Supreme Court failed to establish any specific parameters for the corporate attorney-client privilege.[17]

Despite these protections afforded a person served with an administrative subpoena, problems arise when an agency such as the SEC issues subpoenas during parallel proceedings. Parallel proceedings occur when an administrative agency continues to pursue a civil investigation while the Department of Justice conccurrently pursues a criminal investigation based upon the same conduct.[18] The problems that accompany parallel proceedings result from the different procedural rules and constitutional protections governing civil and criminal investigations.[19] In situations involving parallel proceedings, problems concerning differences between civil and criminal discovery and the application of the fifth amendment have caused the greatest amount of litigation.[20]

Civil discovery rules are broader than the criminal rules.[21] In situa-

---

the federal courts by holding that the "control group" test is not the appropriate test for determining the scope of the corporate attorney-client privilege. 449 U.S. at 392-397. The Court found the "control group" test overly restrictive and incompatible with the notion of open communication between a corporation and its attorneys. *Id.* at 392-93. While the *Upjohn* Court rejected the "control group" test, the Court did not fully embrace the "subject matter" test as the definitive test for determining the applicability of the attorney-client privilege in the corporate context. *Id.* at 401-02.

[17] 449 U.S. at 401-02.

[18] *See* Mathews, *Criminal Prosecution Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 GEO. WASH. L. REV. 901, 964 (1971) [hereinafter cited as Mathews]; Wilson, *supra* note 2, at 701-02; *Corporate Crime*, *supra* note 2, at 1311-12. The increased concern over white collar crime has resulted in an increased number of criminal prosecutions stemming from investigations by administrative agencies such as the SEC. *See generally* Bennett, *Representing a Defendant in Simultaneous Criminal and Administrative Proceedings: A Practical Approach*, 27 AM. U. L. REV. 381 (1978) [hereinafter cited as Bennett].

[19] *See* Bennett, *supra* note 18, at 381-82, 395-98; Wilson, *supra* note 2, at 702.

[20] *See* Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277, 1277-78 (1967) [hereinafter cited as *Concurrent Proceedings*].

[21] The Supreme Court has indicated that federal courts should liberally construe the discovery rules of the Federal Rules of Civil Procedure to allow broad discovery of civil litigants. *See* Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (rules must allow parties to obtain full knowledge of issues and facts). *See generally* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.02 (2d ed. 1980) [hereinafter cited as MOORE]. Courts favor expansive civil discovery in order to promote judicial economy through pre-trial settlements, to prevent unfair surprise at trial, to prevent perjury, and to preserve crucial testimony for trial. *See* 4 MOORE, *supra*, at ¶ 26.02[2]. The scope of permissible civil discovery is very liberal, allowing for discovery of all evidence that is not privileged. FED. R. CIV. P. 26(b)(1). The civil discovery rules allow parties to take depositions without the permission of the court. *Id.* 26(a), 27. In addition, evidence inadmissible at trial is discoverable provided that evidence may lead to the discovery of admissible evidence. *Id.* Any document that contains material within the scope of Rule 26(b) is freely discoverable. *Id.* 34(a). *See generally* 4 MOORE, *supra*, at ¶ 26.55-.61; *Concurrent Proceedings*, *supra* note 20, at 1279-80.

In contrast to the civil discovery rules, the discovery rules in the Federal Rules of Criminal Procedure are restrictive. *See generally* 8 MOORE, *supra*, at ¶ 16.02. The criminal rules allow for depositions only in exceptional circumstances and then only with the permis-

tions involving SEC parallel proceedings, the Justice Department will often attempt to circumvent and expand criminal discovery by using the fruits of an SEC civil subpoena.[22] Both the Securities Act of 1933 ('33 Act) and the Securities Exchange Act of 1934 ('34 Act) increase the potential for expanding criminal discovery by expressly providing that the SEC can turn over any evidence to the Department of Justice for possible criminal prosecution.[23] Thus, a person who voluntarily complies with an SEC subpoena risks the use of the information by the Justice Department in a concurrent or subsequent criminal investigation or trial. Although using civil discovery to expand allowable criminal discovery could benefit the defendant if the parallel civil proceeding is judicial, in cases where the parallel civil proceeding is administrative, the Government is the party more likely to benefit.[24] The danger of wrongful expansion of the rules of criminal discovery through an SEC subpoena, however, does not arise until a grand jury indicts the defendant because the criminal discovery rules do not apply until after indictment.[25]

Using an SEC subpoena to expand criminal discovery is vulnerable to attack on due process grounds.[26] Allowing the Justice Department to obtain evidence through an SEC subpoena would put the defendant at a strategic disadvantage in at least two ways. A defendant's compliance with an SEC subpoena may expose possible theories and strategies of defense to the parallel criminal charge, thus allowing the Justice Depart-

---

sion of the court. FED. R. CRIM. P. 15(a). In addition, the Government cannot depose the defendant without the defendant's consent. *Id.* 15(d). The defendant may discover any documents or tangible objects within the control of the Government, provided the documents are material to the defendant's defense, are for use by the Government in its case in chief, or were obtained from or belong to the defendant. *Id.* 16(a)(1)(C). The Government may obtain discovery of documents or tangible objects in the possession of the defendant only if the defendant had previously requested discovery of documents in the possession of the Government. *Id.* 16(b)(1)(A). Rule 17 restricts the discovery of documents in the possession of third parties. *Id.* 17. *See generally* 8 MOORE, *supra*, at ¶¶ 16.03, 17.02; *Concurrent Proceedings, supra* note 20, at 1280.

[22] *See Corporate Crime, supra* note 2, at 1335; *Concurrent Proceedings, supra* note 20, 1282.

[23] *See* 15 U.S.C. §§ 77t(b), 78u(d) (1976). *See also* text accompanying notes 1-2 *supra*.

[24] If the parallel civil proceeding is judicial rather than administrative, the defendant might be able to use the broad civil discovery techniques to obtain information that would not be discoverable under the criminal rules. In this situation, the defendant could benefit from the expansion of criminal discovery. *See* Bennett, *supra* note 18, at 397; *Concurrent Proceedings, supra* note 20, 1282. When the parallel civil proceeding is administrative rather than judicial, the Government usually benefits from the expansion of criminal discovery through civil discovery. The defendant does not usually benefit from the expansion in this situation because the defendant's discovery rights in a civil administrative hearing are not as broad as in a civil judicial proceeding. *See* BLOOMENTHAL, *supra* note 1, at § 1.12[4]; *Concurrent Proceedings, supra* note 20, at 1281-82.

[25] *See Corporate Crime, supra* note 2, at 1335 (limitations on criminal discovery do not attach until after indictment). *See also* text accompanying notes 97-100 *infra*.

[26] *See Concurrent Proceedings, supra* note 20, at 1282-84.

ment to prepare its case more convincingly.[27] Compliance with the SEC subpoena would also put the defendant at a disadvantage by allowing the Government access to more information than the criminal discovery rules allow.[28] Such disadvantages may violate the defendant's right to a fair and impartial trial guaranteed by the due process clause of the fifth amendment.

In addition to the possibility of expanding criminal discovery, the use of SEC subpoenas in parallel proceedings may also infringe upon the individual defendant's fifth amendment privilege against self-incrimination.[29] The likelihood of infringing upon a defendant's fifth amendment privilege becomes especially acute if the SEC does not warn the defendant that a criminal prosecution is pending.[30] If the subpoenaed defendant chooses to invoke the privilege in a civil or administrative proceeding, the SEC could draw an adverse inference from the claim of privilege and impose sanctions on the defendant.[31] Thus, pressure exists

[27] *See* Silver v. McCamey, 221 F.2d 873, 874-75 (D.C. Cir. 1955) (suggesting that forced disclosure of a criminal defense may violate due process); United States v. Amrep Corp., 405 F. Supp. 1053, 1057 (S.D.N.Y. 1976) (noting that stay of FTC proceeding until after the parallel criminal proceeding would prevent disclosure of criminal defense). *See also Corporate Crime, supra* note 2, at 1336; *Concurrent Proceedings, supra* note 20, at 1283.

[28] *See Corporate Crime, supra* note 2, at 1335-36; *Concurrent Proceedings, supra* note 20, at 1282-84.

[29] *See Corporate Crime, supra* note 2, at 1333-35; *Concurrent Proceedings, supra* note 20, at 1278-79. The fifth amendment privilege against self-incrimination is a personal privilege that is not available to a corporation. *See* text accompanying notes 11-14 *supra.*

[30] An administrative agency should warn the defendant of the possibility of a parallel criminal prosecution thus allowing the defendant an opportunity to assert the fifth amendment privilege at the administrative investigation. *See Corporate Crime, supra* note 2, at 1337. Some courts have suggested a warning requirement in SEC parallel proceeding cases. *See, e.g.,* United States v. Light, 394 F.2d 908, 914 (2d Cir. 1968) (due process not violated if subpoenaed party made aware of the risks of voluntary disclosure to SEC); United States v. Bloom, 450 F. Supp. 323, 332 (E.D. Pa. 1978) (no violation of fifth amendment if defendant is warned, represented by counsel, and not misled by government misrepresentations); United States v. Rand, 308 F. Supp. 1231, 1233-35 (N.D. Ohio 1970) (violation of fifth amendment if SEC misleads defendant by promising criminal immunity); United States v. Thayer, 214 F. Supp. 929, 932 (D. Colo. 1963) (violation of fifth amendment despite warning if SEC misleads defendant as to the object of the SEC investigation).

[31] In certain circumstances, the Supreme Court has approved the propriety of drawing adverse inferences from a person's claim of fifth amendment privilege. The inference alone must not be sufficient to support a decision against the person claiming the privilege. *See* Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976) (approving the drawing of adverse inference from an inmate's silence at a disciplinary hearing). *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 52272 (McNaughton rev. 1961). No court, however, has specifically held that the SEC may draw an adverse inference from a claim of privilege in an SEC proceeding. *But see* Nees v. SEC, 414 F.2d 211, 216 (9th Cir. 1969) (discussing propriety of adverse inference by trier of fact in SEC proceeding).

SEC sanctions usually cause the defendant some sort of economic or professional harm. Aside from securing injunctions or referring cases for criminal prosecution, the SEC may revoke broker/dealer registrations or revoke an attorney's privilege to practice before the SEC. *See* 15 U.S.C. § 78o(b) (1976) (right to SEC to revoke or suspend a broker or dealer

for the subpoenaed defendant to comply with the subpoena at the administrative hearing. If, however, the subpoenaed defendant complies with the subpoena, the defendant risks revealing incriminating evidence to the SEC, which the Justice Department could use in a parallel criminal investigation or trail.[32] Not only are both alternatives possibly unconstitutional, but also requiring the defendant to make such a choice may itself violate due process.[33]

Another problem that exists when the Justice Department uses SEC subpoenas to develop a parallel criminal proceeding is pre-indictment delay.[34] In SEC parallel proceedings, defendants argue that a delay by the SEC in referring a case to the Justice Department or a delay by the Justice Department in pursuing an indictment violates a defendant's right to due process and right to a speedy trial.[35] Although the Supreme Court has held that the right to a speedy trial does not protect a defendant against pre-indictment delay, defendants may still argue that delay violates due process.[36]

---

registration); 17 C.F.R. § 201.2(e) (right of SEC to suspend or disbar attorney's practice before SEC). *See generally* BLOOMENTHAL, *supra* note 1, at §§ 1.13-.14. *See also* text accompanying notes 59-60 *infra*.

[32] Once a person voluntarily releases records or documents pursuant to an SEC subpoena, the SEC may transmit the records to the Department of Justice. *See* United States v. Light, 394 F.2d 908, 914 (2d Cir. 1968); United States v. Mohler, 254 F. Supp. 581, 584 (S.D.N.Y. 1966); 15 U.S.C. §§ 77t(b), 78u(d) (1976).

[33] Many targets of SEC investigations have claimed that requiring a choice between risking sanctions by invoking the privilege at an SEC proceeding and revealing incriminating evidence by complying with an SEC subpoena violates due process. *See, e.g.*, SEC v. Gilbert, 79 F.R.D. 683, 684 (S.D.N.Y. 1978) (defendant claiming the fifth amendment choice caused by parallel proceedings is unconstitutionally coercive); SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,357, at 98,775 (S.D.N.Y. 1975) (defendant claiming the "Hobson's dilemma" is unconstitutional); SEC v. Vesco, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,777, at 93,386 (S.D.N.Y. 1973) (defendant claiming fifth amendment choice violates due process clause). Most courts have held that such a choice does not violate due process. *See* note 60 *infra*.

[34] *See generally* Mathews, *supra* note 18, at 960-64.

[35] *See, e.g.*, United States v. Rubinson, 543 F.2d 951, 961 (2d Cir.), *cert. denied*, 429 U.S. 850 (1976) (defendant claimed Government intentionally delayed for more than two years in returning indictment); United States v. Churchill, 483 F.2d 268, 271 (1st Cir. 1973) (defendants in parallel proceeding involving Small Business Administration claimed that bringing indictment shortly before expiration of statute of limitations violated due process and speedy trial rights); United States v. Dukow, 453 F.2d 1328, 1330 (3d Cir. 1972) (defendants claimed delay of 55 months violated due process and speedy trial rights); United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) (defendants claimed delay of 22 months between time of SEC referral and indictment violated speedy trial rights). *See also* note 55 *infra*.

[36] *See* United States v. Lovasco, 431 U.S. 783, 789 (1977) (courts should decide speedy indictment issue on basis of fifth amendment due process); United States v. Marion, 404 U.S. 307, 313 (1971) (sixth amendment right to speedy trial not applicable in pre-indictment delay cases because right to speedy trial not available until after indictment or formal accusation); note 55 *infra*.

Despite the problems inherent in parallel proceedings, the Supreme Court in *United States v. Kordel*[37] held that parallel proceedings are not per se unconstitutional.[38] In *Kordel*, a case involving Food and Drug Administration parallel proceedings, the Court reasoned that prohibiting all parallel proceedings would unduly restrict the enforcement of federal law.[39] The Court, however, noted that parallel proceedings may be unconstitutional or improper when the Government instigates the civil proceeding solely for the purpose of obtaining evidence for a parallel criminal investigation.[40] The Supreme Court elaborated on the *Kordel* limitation in *United States v. Donaldson*,[41] holding that federal courts would enforce Internal Revenue Service (IRS) summonses issued in good faith and prior to the IRS's recommendation for criminal prosecution.[42]

The *Donaldson* decision caused some confusion in the lower federal courts.[43] The Supreme Court subsequently explained the *Donaldson*

---

[37] 397 U.S. 1 (1970).

[38] *Id.* at 11-13. Congress has implicitly reaffirmed the validity of parallel proceedings. In hearings on the Foreign Corrupt Practices Act of 1977, Congress approved and encouraged full cooperation between the Department of Justice and the SEC in the investigation of economic crimes within the SEC's jurisdiction. *See* S. REP. No. 114, 95th Cong., 1st Sess. 12, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4109; H.R. REP. No. 640, 95th Cong., 1st Sess. 10 (1977). *See also* Pickholtz, *Parallel Proceedings: Guidelines for the Corporate Lawyer*, 7 SEC. REGS. L. REV. 99, 111 (1979); text accompanying note 66 *infra*.

[39] 397 U.S. at 10-13. In *Kordel*, the Justice Department obtained evidence gathered from a nearly simultaneous civil proceeding arising out of alleged violations of the Food and Drug Act. *Id.* at 2-3. The Supreme Court reversed the Sixth Circuit and held that forcing the Food and Drug Administration (FDA) to choose between pursuing a civil or criminal proceeding would unduly restrict enforcement of federal law. *Id.* at 11-13. The *Kordel* Court noted that forcing the FDA to choose between civil and criminal proceedings would not adequately protect the public from the misbranding of drugs. *Id.* at 11. The Court reasoned that to require deferral of a civil proceeding until the outcome of a criminal proceeding was unfair to the public. *Id.* The *Kordel* Court also felt, however, that requiring the FDA to forego the right to make a criminal referral if the FDA decided to pursue a civil proceeding was unfair to the FDA. *Id.*

[40] *Id.* at 11-12. The *Kordel* Court suggested that parallel proceedings might be improper if the defendant would suffer irreparable harm as a result of the parallel proceedings. *Id.* at 12. Further, the Court noted that an agency's failure to warn the defendant of the possibility of a criminal prosecution or to supply the defendant with counsel might render parallel proceedings improper. *Id.* *See* text accompanying note 30 *supra*, notes 56-60 *infra*. The notion in *Kordel* of disallowing an administrative subpoena whose purpose is to obtain discovery for a simultaneous or future proceeding is a restatement of the *Powell* limitation that administrative subpoenas must be relevant to a legitimate administrative investigation. *See* United States v. Powell, 379 U.S. 48, 57 (1967); text accompanying notes 6-9 *supra*.

[41] 400 U.S. 517 (1971). *Donaldson* involved the judicial enforcement of an IRS summons directed at a person who was not the taxpayer under investigation by the IRS. *Id.* at 518-19. Although the IRS had not yet recommended criminal prosecution, the defendant claimed that the IRS issued the summons to obtain criminal evidence. *Id.* at 521, 531-32. *See also* Wilson, *supra* note 2, at 670-78 (discussing *Donaldson* and its ramifications).

[42] 400 U.S. at 536.

[43] After *Donaldson*, lower federal courts had to make two separate determinations before deciding whether to enforce an administrative subpoena in parallel proceeding situa-

holding in *United States v. LaSalle National Bank.*[44] After stressing that the legislative history and the statutory language of the Internal Revenue Code allowed the IRS to use a summons in civil investigations with the potential for criminal prosecution,[45] the *LaSalle* Court held that federal courts would not enforce an IRS summons issued after referral of the case to the Justice Department.[46] The Court also ruled that even if the IRS issued the summons before referral, federal courts would still examine whether the IRS issued the summons in good faith.[47] In conclusion, the Court noted that an IRS summons would satisfy the good faith requirement if the summons complied with the limitations set down in *United States v. Powell*[48] and if the IRS had not abandoned the civil tax suit for the parallel criminal suit.[49] The *LaSalle* Court relied on two

---

tions. The courts first had to decide when the recommendation to prosecute occurred. If the agency issued the subpoena before the recommendation, the courts then had to decide whether the agency issued the subpoena in good faith. Most courts decided that the recommendation to proceed with a criminal prosecution occurred when the administrative agency referred the case to the Justice Department and not when an individual agent recommended referral. *See, e.g.*, United States v. Hodge & Zweig, 548 F.2d 1347, 1351 (9th Cir. 1977); United States v. Billingsley, 469 F.2d 1208, 1210 (10th Cir. 1972). *But see* United States v. Wall Corp., 475 F.2d 893, 896 (D.C. Cir. 1972) (individual agent's determination that case should be referred is evidence of bad faith of subpoena). Courts differed, however, on the interpretation of *Donaldson's* good faith requirement. Some courts used an objective test and held that any summons issued before referral was enforceable without having to examine the good faith issue. *See* United States v. Morgan Guar. Trust Co., 572 F.2d 36, 41-42 (2d Cir.), *cert. denied*, 439 U.S. 822 (1978). Other courts interpreted bad faith to mean that courts should not enforce administrative subpoenas issued prior to referral if the agency issued the subpoena solely to obtain criminal evidence or if an individual agent had already decided to recommend referral to the Justice Department. *See* United States v. Weingarden, 473 F.2d 454, 459-61 (6th Cir. 1973); United States v. Wall Corp., 475 F.2d at 895-96. *See also Corporate Crime*, *supra* note 2, at 1322-23; text accompanying notes 44-52 *infra*.

[44] 437 U.S. 298 (1978).

[45] *Id.* at 308-11.

[46] *Id.* at 311-12.

[47] *Id.* at 313-17.

[48] 379 U.S. 48 (1964). *See* text accompanying notes 6-9 *supra*.

[49] 437 U.S. at 318. The Supreme Court in *LaSalle* specifically rejected the circuit court's position that courts should look to the individual IRS agent's intent to determine if the IRS issued the summons solely to obtain criminal evidence. 437 U.S. at 316. *See* United States v. LaSalle Nat'l Bank, 554 F.2d 302, 308-09 (7th Cir. 1977) (using intent of the IRS agent conducting the investigation to determine bad faith of summons). The Court felt an inquiry into the individual agent's intent would both frustrate the enforcement of tax laws and also unnecessarily prolong summons enforcement suits. 437 U.S. at 316. Instead of looking to the individual agent's intent, the *LaSalle* Court held that the broader intent of the IRS as an agency would determine whether or not the IRS issued the summons for the purpose of obtaining criminal evidence. *Id.* Thus, the proper inquiry is whether the IRS as an agency had decided to refer the case to the Justice Department before issuing the summons. *Id.* at 316-17. The *LaSalle* Court added, however, that an inquiry into the individual agent's motives might still be appropriate to determine if the IRS had issued the summons in accordance with the *Powell* limitations. *Id.* at 316 n.17. The Court concluded by stressing that the burden of proving that the IRS, as an agency, issued the summons solely to obtain criminal evidence was a heavy burden for the defendant to carry. *Id.* at 316. *See Corporate Crime*, *supra* note 2, at 1324-30.

policy interests to justify these strict limitations on IRS summonses in parallel proceedings. The first policy interest was to avoid broadening the criminal discovery rules through IRS summonses.[50] The second was to avoid infringing upon the role of the grand jury as the principal accusatory body in the federal justice system.[51] The Court reasoned that the strict limitations on IRS summonses in parallel proceedings would both preserve these two policy interests and promote cooperation between the IRS and the Justice Department.[52]

Parallel proceeding cases involving SEC subpoenas are more rare than IRS cases. Most SEC parallel proceeding cases involve SEC petitions for enforcement of the subpoena, motions to quash the SEC subpoena, motions for protective orders, or motions to stay civil proceedings and discovery.[53] Most courts approve parallel proceedings and enforce the SEC subpoena unless the defendant can show that the SEC had subpoenaed the defendant in bad faith.[54] The majority of courts do not accept the argument that parallel proceedings prejudice a defendant's rights by causing pre-indictment delay or by infringing upon the fifth amendment right against self-incrimination.[55]

---

[50] 437 U.S. at 312.

[51] *Id.*

[52] *Id.* at 313.

[53] *See* Wilson, *supra* note 2, at 703.

[54] *See* United States v. Simon, 373 F.2d 649, 652 (2d Cir.), *dismissed as moot sub nom.* Simon v. Wharton, 389 U.S. 425 (1967) (subpoena enforceable unless defendant can show Government initiated parallel proceeding to wrongfully expand criminal discovery or to infringe upon the defendant's constitutional rights); SEC v. Drucker, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,821, at 95,281 (S.D.N.Y. 1979) (subpoena enforceable unless defendant can show that SEC and Department of Justice were acting in concert or that SEC issued subpoena solely to obtain criminal evidence); United States v. Handler, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,519, at 94,026 (C.D. Cal. 1978) (defendants failed to prove SEC conducted investigation solely to obtain criminal evidence); SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,357, at 98,775 (S.D.N.Y. 1975) (denying motion to quash SEC subpoena *duces tecum* since SEC did not bring suit merely to obtain criminal evidence).

[55] In denying pre-indictment delay claims, most courts usually rely on two important Supreme Court cases. In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court held that the sixth amendment speedy trial protection applies only to delay between indictment and trial. *Id.* at 324-25. The Court acknowledged that the due process clause supplemented the statute of limitations in protecting against prejudice caused by pre-indictment delay. *Id.* at 324. The Court noted, however, that a successful due process claim would require a defendant to show that the delay caused substantial prejudice to the right to a fair trial or that the delay was an intentional delay used to give the Government a tactical advantage over the defendant. *Id.* In a later case, the Supreme Court held that pre-indictment delay for legitimate investigatory purposes does not violate due process even if the delay impairs the defendant's ability to present a defense. United States v. Lovasco, 431 U.S. 783, 796 (1977). Since the Supreme Court's decisions in *Marion* and *Lovasco*, courts have rarely dismissed indictments in SEC proceedings because of pre-indictment delay. *See, e.g.*, United States v. King, 560 F.2d 122, 130-31 (2d Cir. 1977) (delay not intended to give Justice Department tactical advantage and defendant's claim of prejudice too speculative to amount to substantial prejudice); United States v. Rubinson, 543 F.2d 951, 961 (2d Cir. 1976) (defendants did not demonstrate improper delay or substantial prejudice); United States v.

When an individual defendant raises a fifth amendment claim in parallel proceedings involving the SEC, some courts first consider whether the SEC warned the defendant that a parallel criminal prosecution was possible.[56] Courts then consider whether the defendant invoked the privilege in response to the SEC subpoena.[57] If the SEC warned the defendant and the defendant did not invoke the fifth amendment in response to the subpoena, courts deny the defendant's motion for a stay of the civil proceeding or for a protective order.[58] Courts therefore force defendants in SEC parallel proceedings either to invoke the privilege against self-incrimination at the SEC proceeding or to comply with the subpoena and risk the introduction of incriminating evidence at a concurrent or subsequent criminal proceeding.[59] The majority of courts, however, hold that forcing a defendant to choose between invoking the privilege and complying with the subpoena does not violate due process unless the defendant can show irreparable harm as a result of making the choice.[60] Thus, in order to obtain a stay of the civil proceedings or a

---

Finkelstein, 526 F.2d 517, 525-26 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976) (even if defendants could prove substantial prejudice, delay of over four years was a proper investigative delay); United States v. Handler, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,519, at 94,022-23 (C.D. Cal. 1978) (defendants' failure to prove substantial prejudice and improper delay defeats fifth amendment claim). *But see* United States v. Parrott, 248 F. Supp. 196, 199-206 (D.D.C. 1965) (pre-*Marion* case dismissing indictment because Justice Department's unexplained negligence in pursuing indictment caused substantial prejudice to defendants).

[56] *See, e.g.*, SEC v. Gilbert, 79 F.R.D. 683, 684 (S.D.N.Y. 1978) (U.S. Attorney notified defendant that he was target of a criminal investigation); Gellis v. Casey, 338 F. Supp. 651, 652 (S.D.N.Y. 1972) (SEC notified defendant that Attorney General knew of defendant's case). *See also* note 30 *supra*.

[57] *See, e.g.*, United States v. Parrott, 425 F.2d 972, 976 (2d Cir. 1970), *cert. denied*, 401 U.S. 979 (1971) (noting that civil proceeding did not cause defendants to incriminate themselves at subsequent criminal proceeding since defendants could have asserted fifth amendment right at civil proceeding); United States v. Simon, 373 F.2d 649, 652 (2d Cir. 1967), *dismissed as moot sub nom.* Simon v. Warton, 389 U.S. 425 (1967) (defendants' fifth amendment rights in parallel proceedings unimpaired because defendants chose not to assert privilege at civil proceeding).

[58] *See, e.g.*, United States v. Light, 394 F.2d 908, 914 (2d Cir. 1968) (denying motion to suppress evidence gathered by SEC when defendant was aware of the risks inherent in disclosure); United States v. Bloom, 450 F. Supp. 323, 332 (E.D. Pa. 1978) (denying motion to suppress testimony given to SEC when defendant adequately warned and represented by counsel); United States v. Simon, 373 F.2d 649, 654 (2d Cir. 1967), *dismissed as moot sub nom.* Simon v. Warton, 389 U.S. 425 (1967) (denying motion to stay discovery in parallel civil proceeding after defendant failed to assert fifth amendment privilege).

[59] *See* notes 31 & 33 *supra*.

[60] *See, e.g.*, SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,357, at 98,776 (S.D.N.Y. 1975) (defendant not entitled to avoid making choice between testifying and invoking the fifth amendment privilege); Gellis v. Casey, 338 F. Supp. 651, 652-53 (S.D.N.Y. 1972) (holding no violation of due process where a defendant must choose between testifying and invoking the fifth amendment). In SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978), the defendant claimed that asserting the fifth amendment privilege would cause the trier of fact to make an adverse inference. *Id.* at 684. The defendant feared the adverse inference would lead to civil sanctions that would prevent the defendant from

protective order, the defendant must show either that the SEC instigated the civil proceeding solely to obtain evidence for a criminal proceeding[61] or that the parallel proceeding would cause irreparable harm to the defendant.

An unresolved issue concerning SEC parallel proceedings is the applicability of the decision in *United States v. LaSalle National Bank* to SEC proceedings.[62] Several courts have suggested that *LaSalle* applies to parallel proceedings involving the SEC,[63] but the issue is far from resolved. The United States Court of Appeals for the District of Columbia Circuit recently addressed the applicability of *LaSalle* to SEC cases in *SEC v. Dresser Industries, Inc.*[64]

Dresser arose out of an SEC investigation into several questionable foreign payments made by Dresser Industries, Inc. (Dresser).[65] Because Dresser had made the payments prior to the passage of the Foreign Corrupt Practices Act of 1977 (the Act),[66] the specific provisions and

---

practicing his profession. *Id.* The court acknowledged the cases that have held that conditioning the exercise of the fifth amendment on the loss of economic interests was unconstitutional. *Id.* at 685. *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801, 805-08 (1977) (unconstitutional to force defendant either to waive privilege or leave public office); Garrity v. New Jersey, 385 U.S. 493, 497-98 (1967) (unconstitutionally coercive to condition exercise of privilege on the loss of substantial economic interests). The *Gilbert* court held, however, that having to choose between asserting the privilege and testifying is not unconstitutional unless the loss of economic interests flows automatically from the exercise of the privilege. 79 F.R.D. at 685. In SEC v. Vesco, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,777 (S.D.N.Y. 1973), the court held that forcing a defendant to choose between testifying and asserting the privilege did violate due process. *Id.* at 93,387. The court, therefore, allowed civil discovery to continue only if the defendants had immunity under 18 U.S.C. § 6002. *Id.* The court noted that defendants had made a clear showing that irreparable harm would result from making the choice. *Id.*

[61] *See* text accompanying notes 37-42 *supra.*

[62] *See* text accompanying notes 44-52 *supra.*

[63] *See* SEC v. OKC Corp., 474 F. Supp. 1031, 1038 (N.D. Tex. 1979) (suggesting that *LaSalle's* notion of cooperation between Justice Department and IRS applies to SEC and Justice Department); United States v. Handler, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,519, at 94,026 (C.D. Cal. 1978) (applying *LaSalle's* notion of bad faith to SEC subpoenas in parallel proceedings). *But see Corporate Crime, supra* note 2, at 1329 (suggesting *LaSalle* inapplicable to SEC parallel proceedings because of real differences in statutory authority of SEC and IRS).

[64] 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 101 S. Ct. 529 (1980).

[65] *Id.* at 1371-72.

[66] 15 U.S.C. §§ 78m, dd-1, dd-2 (Supp. II 1978). Congress adopted the Foreign Corrupt Practices Act of 1977 in response to the increased frequency of large corporate payments to officials of foreign governments. H.R. REP. No. 95-640, 95th Cong., 1st Sess. 4-5 (1977); S. REP. NO. 114, 95th Cong., 1st Sess. 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4101. Both houses of Congress expressed concern that many of the corporate payments were actually bribes that threatened to erode the public's confidence in the integrity of the free market. *Id.* Congress also thought that corporate bribery had an adverse impact on American foreign policy by reinforcing foreign suspicions that American corporations sought to infiltrate and corrupt foreign markets. H.R. REP. No. 95-640, 95th Cong., 1st Sess. 5 (1977).

The Foreign Corrupt Practices Act of 1977 provides that corporate payments of money or anything of value to foreign government officials or foreign political parties or candidates

penalties of the Act did not apply. Instead, the SEC investigated Dresser through the SEC's Voluntary Disclosure Program.[67] The SEC instituted the Voluntary Disclosure Program to help curb the increasing number of illegal payments by corporations to foreign officials.[68] The Voluntary Disclosure Program allowed corporations to conduct internal investigations concerning the questionable payments and to disclose the results to the public and the SEC without the direct involvement of the SEC.[69] To encourage corporate participation in the program, the SEC stated that participation greatly diminished the possibility of the SEC's bringing an enforcement action against the corporation.[70]

Dresser involved parallel proceedings in which a federal grand jury and the SEC simultaneously investigated the questionable foreign payments by Dresser.[71] Dresser appealed the trial court's denial of a mo-

---

are illegal if made for the purpose of influencing official actions of the foreign government. 15 U.S.C. §§ 78dd-1, -2 (Supp. II 1978). The Act also requires that corporations keep detailed records and accounting files to prevent the concealment of questionable payments. *Id.* § 78m. The Act provides criminal and civil sanctions against violators of the Act. *Id.* §§ 78dd-2(b), -2(c), 78ff(c). *See generally* Sprow & Benedict, *The Foreign Corrupt Practices Act of 1977: Some Practical Problems and Suggested Procedures*, 1 CORP. L. REV. 357 (1978).

[67] 628 F.2d 1372.

[68] Prior to passage of the Foreign Corrupt Practices Act, the SEC had attacked the problem of questionable foreign payments in two ways. To protect investors, the SEC utilized an enforcement program that entailed bringing injunctive actions against the corporations making the bribes. *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practice*, submitted to the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 3-6 (Comm. Print 1976), *reprinted in* FED. SEC. L. REP. (CCH) No. 642 (May 19, 1976) [hereinafter cited as *SEC Report.*] The SEC injunctive actions charged the corporations with violations of the proxy solicitation and the antifraud provisions of the '34 Act. *Id.* The corporations usually consented to the judgment of a permanent injunction against all future questionable payments. *Id.* The consent decrees also required that the corporations set up internal review committees to police against future questionable payments. *Id.* The SEC soon discovered, however, that the enforcement actions were not sufficient to disclose all the questionable foreign payments to the investing public. *Id.* at 6. The SEC, therefore, instigated the Voluntary Disclosure Program to help expose more of the questionable payments. *Id.* at 7. *See also* Note, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848, 1850-53 (1976); text accompanying notes 69-70 *infra*.

[69] The Voluntary Disclosure Program provided that the corporation undertake a thorough investigation by disinterested persons of the facts relating to the questionable payments and report the interim findings to the members of the board of directors who were not involved with the questionable payments. *See SEC Report, supra* note 68, at 8-9. At the end of the investigation, the investigative team reported to the full board of directors who ideally would declare a prohibition against further questionable payments and fraudulent bookkeeping. *Id.* at 10. Finally, the corporation filed a final report with the SEC. *Id.* The most important provision of the program required that the corporation make available to the SEC all the interim reports and documents. *Id* at 9 n.8.

[70] *Id.* at 8 n.7.

[71] Both the SEC and the Justice Department investigated Dresser Industries, Inc. (Dresser) for possible questionable payments made to officials of foreign governments. 628 F.2d at 1371. Dresser participated in the SEC's Voluntary Disclosure Program but refused to grant the SEC staff access to corporate files *Id.* at 1372. *See also* text accompanying

tion to quash an SEC subpoena *duces tecum*.[72] Dresser sought protection from the SEC subpoena, claiming that compliance with the subpoena would wrongfully expand criminal discovery.[73] A panel of the District of Columbia Circuit affirmed the district court's decision with certain modifications. The panel court modified the district court's enforcement of the SEC subpoena by prohibiting the SEC from disclosing information to the Justice Department once the Department impanelled a grand jury.[74] At a rehearing en banc, the court vacated the panel decision and affirmed the district court's decision without modification.[75]

The District of Columbia Circuit sitting en banc noted initially that parallel proceedings are not per se unconstitutional,[76] but recognized

---

notes 68-70 *supra*. The SEC consequently issued an order of investigation. 628 F.2d at 1372. The Justice Department, meanwhile, requested and received files from the SEC and subsequently presented Dresser's case to a grand jury in the District of Columbia. *Id.* at 1373.

Dresser filed suit in the Southern District of Texas to enjoin any further proceedings by either the SEC or the Department of Justice. *Id.* While this suit was pending, both the District of Columbia grand jury and the SEC subpoenaed relevant documents and materials from Dresser. 628 F.2d at 1373. After the Texas court dismissed Dresser's suit for an injunction without opinion, the SEC sought enforcement of the SEC subpoena in the United States District Court for the District of Columbia. *Id.* Dresser appealed the Texas court's dismissal to the Fifth Circuit and subsequently filed a motion to quash the grand jury subpoena in the district court in the District of Columbia. *Id.* The District of Columbia court denied Dresser's motion to quash the grand jury subpoena in an unreported order. *Id.*

The U.S. District Court for the District of Columbia then ordered Dresser to appear and show cause why the court should not enforce the SEC subpoena. *Id.* at 1374. Dresser appeared and moved to quash the SEC subpoena and to obtain discovery from the SEC in order to show the SEC's bad faith in issuing the subpoena. *Id.* The District of Columbia court denied Dresser's motion to obtain discovery. *Id.* The court also denied Dresser's motion to quash the subpoena and entered a final order requiring Dresser to comply with the subpoena. SEC v. Dresser Indus., Inc., 453 F. Supp. 573, 577 (D.D.C. 1978). After the district court denied Dresser's application for rehearing, Dresser appealed the decision. 628 F.2d at 1374. *See* SEC v. Dresser Indus., Inc., [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,172 (D.C. Cir. 1980); note 75 *infra*. While the appeal in the District of Columbia Circuit was pending, the Fifth Circuit considered Dresser's appeal of the Texas court's dismissal of the suits against the SEC and the Justice Department. The Fifth Circuit affirmed the Texas court's dismissal on the basis that the issues were not ripe. Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1235-36 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

[72] 628 F.2d at 1374. The district court in *Dresser* applied *LaSalle* to determine that the SEC subpoena was enforceable. 453 F. Supp. at 575-77.

[73] 628 F.2d at 1370. *See also* text accompanying notes 21-25 *supra*.

[74] SEC v. Dresser Indus., Inc. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,172, at 96,476 (D.C. Cir. 1980). The panel court refused to apply *LaSalle's* strict restrictions to the *Dresser* facts. *Id.* at 96,474. In justifying the refusal to apply *LaSalle*, the panel noted that the SEC was more independent than the IRS and that the public interest required swift civil and criminal enforcement of the securities laws. *Id.* at 96,474-75,

[75] 628 F.2d at 1387. *See also* text accompanying notes 102-06 *infra*.

[76] 628 F.2d at 1374-75. The District of Columbia Circuit relied on the Supreme Court decision in United States v. Kordel, 397 U.S. 1 (1970), in deciding that parallel proceedings were not per se unconstitutional. *Id.* *See also* text accompanying notes 37-40 *supra*. The *Dresser* court, however, noted that federal courts should follow a case by case approach in deciding whether parallel proceedings violated due process. 628 F.2d at 1375-76. *See also* text accompanying notes 21-28 *supra*, 77-83 *infra*.

that circumstances exist when a court should either defer the civil or administrative proceedings, postpone civil discovery, or impose protective orders in order to protect the rights of the defendant.[77] The court noted that due process rights are endangered when an indicted defendant faces a civil or administrative proceeding based on the same conduct.[78] Because the danger exists, the *Dresser* court realized that deferral of the civil proceeding is appropriate when there is potential for infringing upon the indicted defendant's fifth amendment privilege, expanding criminal discovery, or forcing the indicted defendant to expose a criminal defense.[79] The D.C. Circuit, however, emphasized that the circumstances of *Dresser* did not require deferral of the SEC proceeding.[80] The court reasoned that enforcing the SEC subpoena would not infringe upon any substantial rights of Dresser. Because the grand jury had not yet indicted Dresser, the court reasoned that the criminal discovery rules were not in effect, and therefore, compliance with the subpoena could not wrongfully expand the criminal rules.[81] The court also found that Dresser's fifth amendment privilege against self-incrimination was not in jeopardy.[82] Finally, the court ruled that Dresser would not necessarily reveal its criminal defense by complying with the SEC subpoena.[83]

After holding that deferral of the SEC proceeding was not appropriate in *Dresser*, the court focused on Dresser's argument that the subpoena was unenforceable based on the decision of the Supreme Court in *LaSalle*.[84] The *Dresser* court refused to extend the specific *LaSalle* restrictions to the SEC subpoena power.[85] Focusing on language in *LaSalle* stating that the validity of an administrative subpoena depends upon whether the subpoena is within the issuing agency's statutory authority,[86] the *Dresser* court stressed a major difference between the statutory authority of the SEC and of the IRS.[87] In contrast to the

---

[77] 628 F.2d at 1375-76.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 1376.

[81] *Id.* *See* text accompanying note 25 *supra.*

[82] 628 F.2d at 1376. A corporation may not assert the privilege against self-incrimination because a corporation is not "a person" within the meaning of the fifth amendment. *See* text accompanying note 12 *supra.*

[83] 628 F.2d at 1376. *See* text accompanying notes 26-27 *supra.*

[84] 628 F.2d at 1377-78. Dresser argued that the SEC referred the case to the Justice Department when the SEC gave the Justice Department Dresser's files and that *LaSalle* prohibits enforcement of administrative subpoenas issued after referral. *Id.* at 1378. *See also* text accompanying notes 44-52 *supra.* Dresser also argued that even if the transferring of files were not a referral under *LaSalle*, initiating a grand jury investigation precluded enforcement of the subpoena. 628 F.2d at 1378. The *Dresser* court did not reach the merits of Dresser's arguments because the court found that the strict *LaSalle* rule did not apply to SEC cases. *Id.* at 1378-80. *See* text accompanying notes 85-90 *infra.*

[85] 628 F.2d at 1380. *See* text accompanying notes 44-52 *supra.*

[86] 628 F.2d at 1379-80. *See* text accompanying notes 45-46 *supra.*

[87] 628 F.2d at 1379-80. *See* text accompanying note 89 *infra.*

LaSalle Court's suggestion that the subpoena power of the IRS ceased while the parallel criminal case was proceeding,[88] the *Dresser* court noted that the federal laws authorized the SEC to continue investigations concurrently with criminal investigations.[89] Because of the statutory difference between IRS and SEC authority, the *Dresser* court held that enforcement of the SEC subpoena was within the general rule of *LaSalle* and thus refused to apply the specific *LaSalle* restrictions to the SEC.[90]

Dresser further argued that the court should apply the policy interests underlying the *LaSalle* decision and refuse to enforce the SEC subpoena.[91] Dresser argued that the policy interests discussed in *LaSalle* applied to SEC parallel proceedings to the same extent the interests applied to IRS parallel proceedings.[92] Rejecting this argument, the *Dresser* court reasoned that the *LaSalle* Court discussed policy interests solely to explain the Court's specific restrictions on IRS summonses.[93] Since the *Dresser* court had determined that the specific *LaSalle* restrictions did not apply to the facts of *Dresser*,[94] the court saw no reason to discuss the policy interests that justify the restrictions.[95] The court also noted that the circumstances giving rise to the *LaSalle* policy interests were not present in *Dresser*.[96] In addressing the policy expressed in *LaSalle* of avoiding the broadening of the criminal discovery rules, the court noted that the criminal discovery rules do not apply until indictment.[97] Because the grand jury had not yet indicted Dresser, the D.C. Circuit found that there was no danger that the Justice Department could expand the criminal discovery rules through the use of an SEC subpoena.[98] The court noted further that there was no danger of expanding criminal discovery because the Justice Department could lawfully use a grand

---

[88] 628 F.2d at 1379. The *Dresser* court noted that the IRS could issue summonses only for the purposes of checking the correctness of a return, making a return for a taxpayer, determining tax liabilities, and collecting taxes. *Id.* at 1378. *See also* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 n.18 (1978); I.R.C. § 7602.

[89] 628 F.2d at 1379-80. The Dresser court reasoned that because of the breadth of the SEC's statutory subpoena power, there was virtually no possibility that the SEC could issue a subpoena exceeding the statutory authority. *Id.* *See also* note 1 *supra.*

[90] 628 F.2d at 1378. In further support of the decision not to apply the strict *LaSalle* rule, the *Dresser* court noted that the SEC must be free to pursue civil enforcement proceedings even after the Justice Department has begun a criminal investigation. *Id.* at 1380. The court found that the investing public and the financial market would suffer great harm if the courts required the SEC to defer civil proceedings until the completion of the parallel criminal proceeding. *Id.*

[91] *Id.* at 1379. *See* text accompanying notes 50-52 *supra,* 93-100 *infra.*

[92] 628 F.2d at 1380-81.

[93] *Id.*

[94] *See* text accompanying notes 85-90 *supra.*

[95] 628 F.2d at 1380-81.

[96] *Id.* at 1381-84.

[97] *Id.* at 1381. *See also* text accompanying notes 25 & 81 *supra,* 99 *infra.*

[98] 628 F.2d at 1381.

jury subpoena to obtain the same information that the Justice Department could obtain from an SEC subpoena.[99] The court concluded by determining that the interest expressed in *LaSalle* of avoiding infringement on the role of the grand jury did not apply to the facts of *Dresser*.[100]

---

[99] *Id.* Even though many courts and commentators have analogized administrative subpoenas to the grand jury subpoena, grand jury subpoenas are broader than administrative subpoenas. *See* United States v. Calandra, 414 U.S. 338, 343 (1974) (grand jury may subpoena any documents or testimony the grand jury feels will assist in investigation); Branzburg v. United States, 408 U.S. 665, 688 (1972) (grand jury investigative power limited only by a judge or a claim or privilege); Blair v. United States, 250 U.S. 273, 283 (1919) (grand jury investigative powers are not limited by probable outcome of investigation); text accompanying notes 2 *supra*, 128-30 *infra*.

In In re Grand Jury Subpoena Duces Tecum Dated Jan. 17, 1980, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,562, at 97,947 (D. Conn. 1980), the court approved the notion that the Justice Department could use a grand jury subpoena to obtain the same information obtained by an earlier SEC subpoena. Although the case involved sequential and unrelated investigations by the FBI and the SEC rather than parallel investigations, the defendants in *In re Grand Jury [Jan. 17]* made arguments similar to the arguments advanced in *Dresser*. General Dynamics Corp. (GDC) challenged the authority of the SEC to allow the FBI or the grand jury to make use of material that the SEC had subpoenaed. *Id.* at 97,945-46. GDC argued that the subpoena power of the SEC was only for use in enforcing the securities laws and that allowing the FBI and a grand jury to use material gathered by an SEC subpoena was beyond the SEC's statutory subpoena power. *Id.* GDC also argued that case law prohibited the SEC from transmitting evidence to a grand jury once a grand jury investigation begins. *Id.* at 97,946. GDC relied primarily on *LaSalle* to support this argument. *Id.* *See* text accompanying notes 44-52 *supra*.

The United States District Court for the District of Connecticut rejected GDC's statutory argument. *Id.* at 97,946. The court held that the statute giving the SEC subpoena power plainly provides a mechanism for criminal prosecution of cases initiated by the SEC and explicitly encourages cooperation between the SEC and the Justice Department. *Id.* *See also* 15 U.S.C. §§ 77t(b), 78u(d); notes 1 *supra*, 101-06 *infra*. The court also rejected GDC's interpretation of the case law and instead read the applicable case law as supporting cooperation between the SEC and the Justice Department. [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,562, at 97,946. The court, citing *LaSalle*, stated that inter-agency cooperation is beneficial as long as an agency does not exceed its statutory authority or otherwise exhibit bad faith. *Id.* Because GDC did not show that the SEC issued the subpoena in bad faith or without statutory authority, the court reasoned that the cooperation between the SEC and the Justice Department was proper and that the grand jury could properly subpoena materials that the SEC had subpoenaed in an unrelated investigation. *Id.* at 97,946-47.

[100] 628 F.2d at 1381-84. Because the SEC subpoena requested material already received by the grand jury, Dresser argued that enforcing the SEC subpoena would effectively violate grand jury secrecy under Rule 6(e) of the Federal Rules of Criminal Procedure. *Id.* at 1382. *See* FED. R. CRIM. P. 6(e)(2) (providing that all matters occurring before grand jury should remain secret). *See also* United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (enumerating various reasons for preserving grand jury secrecy). Dresser also argued that enforcing the SEC subpoena would infringe on grand jury independence. Because the SEC could selectively disclose material to the grand jury, Dresser argued that the SEC could prejudice the grand jury against Dresser and thus infringe on the grand jury's independence. 628 F.2d at 1383.

The *Dresser* court rejected both of Dresser's arguments. *Id.* at 1384. In deciding that enforcing the subpoena would not violate Rule 6(e), the court reasoned that complying with the SEC subpoena would merely disclose the details of Dresser's foreign transactions and

In closing the discussion on the subpoena's validity, the *Dresser* court emphasized that Congress has always supported full cooperation between the SEC and the Justice Department.[101] The court relied on the congressional desire for cooperation as further support for refusing to quash the SEC subpoena.[102] The notion of inter-agency cooperation was also important in the *Dresser* court's decision to reject the panel court's modification prohibiting the SEC from disclosing information to the Justice Department once the Department impanelled a grand jury.[103] The court found that the panel's restriction was contrary to both Congress' desire for inter-agency cooperation and the express language of the '33 Act and '34 Act.[104] The D.C. Circuit also rejected the panel's modification as not supported by case law.[105] Noting that the applicable case law held that an administrative subpoena is fully enforceable if the agency acts in good faith in issuing the subpoena, the court held that since the SEC had a legitimate non-criminal purpose in conducting the SEC investigation, the panel's restriction was unnecessary.[106]

The *Dresser* court's refusal to apply the specific restrictions of *LaSalle*[107] to SEC subpoenas arguably limits the rights of defendants who face parallel proceedings involving the SEC and the Justice Department. The D.C. Circuit's position that the policy interests of *LaSalle* do not apply to unindicted defendants[108] further limits the rights of defendants in SEC parallel proceedings. The court's decision severely limits the unindicted defendant's ability to prevent the Justice Department

---

would not reveal matters that occurred before the grand jury. *Id.* at 1383. The court also found that Dresser's fear that selective disclosure by the SEC would infringe on grand jury independence was too speculative to justify denying enforcement of the subpoena. *Id.* at 1384.

[101] 628 F.2d 1384-87. *See* S. REP. NO. 114, 95th Cong., 1st Sess. 12, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4109 (encouraging close cooperation between SEC and the Justice Department); H.R. REP. No. 640, 95th Cong., 1st Sess. 10 (1977) (supporting close relationship between SEC and Justice Department). *See also* note 38 *supra.*

[102] 628 F.2d at 1384-87.

[103] *Id. See also* text accompanying note 74 *supra.*

[104] 628 F.2d at 1385-86. The *Dresser* court reasoned that the panel's modification of the district court decision directly conflicted with the SEC's statutory authority to supply the Justice Department with SEC materials. *Id. See also* 15 U.S.C. §§ 77t(b), 78u(d) (1976); note 1 *supra.*

[105] 628 F.2d at 1387. The *Dresser* court adopted the *LaSalle* definition of good faith and found that the SEC acts in good faith if the SEC has a legitimate non-criminal purpose for the civil investigation. *Id. See* text accompanying notes 50-52 & 54 *supra.*

[106] 628 F.2d at 1387. The *Dresser* court stated that the panel's modification of the district court decision was faulty for several reasons. Since none of the parties to the suit either requested or approved of the modification, the *Dresser* court saw no reason to affirm the modification. *Id.* at 1385. The court also noted that the panel's modification was improper because the modification would interfere with the effective enforcement of the securities laws by the SEC and the Department of Justice. *Id.*

[107] *See* text accompanying notes 44-52 *supra.*

[108] *See* text accompanying notes 91-100 *supra.*

from obtaining the fruits of an SEC subpoena.[109] After *Dresser*, an unindicted defendant may not claim that an SEC subpoena is unenforceable because of the possibility of improperly broadening criminal discovery.[110] Additionally, a defendant in SEC parallel proceedings may not invoke the strict *LaSalle* restrictions on administrative subpoenas.[111] The *Dresser* court presumably would afford more protection to the indicted defendant in SEC parallel proceedings than to the unindicted defendant. In dicta, the court noted that the strongest case for deferring civil proceedings was when an indicted defendant had to defend concurrently a civil or administrative proceeding based on the same conduct.[112] In SEC parallel proceedings where the grand jury has not returned an indictment, the *Dresser* court's decision limits the arguments a defendant can make in response to an SEC subpoena.[113] The unindicted defendant can argue that the SEC issued the subpoena in bad faith,[114] that the parallel proceedings caused prejudicial pre-indictment delay,[115] or that the proceedings violated the individual defendant's fifth amendment privilege against self-incrimination.[116]

The unindicted defendant, however, is not likely to succeed in terminating the parallel proceeding. Under the *LaSalle* standard of bad faith adopted by the *Dresser* court,[117] the defendant must prove that the SEC issued the subpoena for the sole purpose of obtaining criminal evidence and that the SEC had abandoned the civil proceeding for a criminal prosecution.[118] The Supreme Court in *LaSalle* admitted that bad faith by an administrative agency in issuing a subpoena would be difficult for the defendant to prove.[119] An unindicted defendant is also not likely to succeed in proving prejudicial pre-indictment delay. The defendant's best means of succeeding on a pre-indictment delay claim is to show that the Justice Department intentionally delayed submitting the case to a grand jury in order to gain a tactical advantage over the defendant.[120] Very few federal courts, however, dismiss indictments on the

---

[109] *See* Note, *The Protections Afforded Defendant During Parallel Civil and Criminal Proceedings*: SEC v. Dresser Industries, Inc., 32 ALA. L. REV. 231, 246-47 (1980) [hereinafter cited as *Protections*].

[110] 628 F.2d at 1381. *See also* text accompanying notes 97-99 *supra.*

[111] 628 F.2d at 1378. *See also* text accompanying notes 84-90 *supra.*

[112] 628 F.2d at 1376. *See also* text accompanying notes 25 & 80-81 *supra.*

[113] *See Protections, supra* note 109, at 247-48.

[114] *See* text accompanying notes 50-52 *supra.*

[115] *See* text accompanying notes 34-36 & 55 *supra.*

[116] *See* text accompanying notes 10-14 & 29-33 *supra.*

[117] *See* note 105 *supra.*

[118] United States v. LaSalle Nat'l Bank, 437 U.S. 298, 318 (1978). *See* text accompanying notes 50-52 *supra.*

[119] 437 U.S. at 316.

[120] *See* United States v. Marion, 404 U.S. 307, 324 (1971) (noting that delay caused by Government to obtain tactical advantage over defendant violates due process). *See also* note 55 *supra.*

basis of pre-indictment delay.[121] Even if the defendant could prove an intentional delay by the Justice Department, most courts tend to characterize the delay as permissive investigative delay.[122] Finally, a defendant will most likely fail in proving that SEC parallel proceedings infringe upon the fifth amendment privilege against self-incrimination if the SEC had warned the defendant of the pending criminal investigation, the defendant had counsel at the civil proceeding, and the defendant had the opportunity to claim the privilege at the civil proceeding.[123]

Despite the difficulties the *Dresser* decision causes for unindicted defendants in SEC parallel proceedings, the decision of the D.C. Circuit is correct. The *Dresser* court's decision not to apply *LaSalle's* strict limitations to an SEC subpoena is based on real differences between the statutory authority of the SEC and that of the IRS.[124] The SEC's power to issue subpoenas in good faith and the court's authority to enforce SEC subpoenas issued after referral for criminal prosecution but before indictment stem primarily from Congress' grant of wide power to the SEC.[125] The *Dresser* court addressed the real basis of the problem when the court held that obtaining criminal evidence by using the fruits of an SEC subpoena does not prejudice an unindicted defendant.[126] The rationale of the court was that the funneling of evidence from the SEC to the Justice Department cannot prejudice the unindicted defendant if the Justice Department could obtain the same information by using a grand jury subpoena.[127] Grand jury subpoenas are slightly broader in scope than administrative subpoenas because a grand jury subpoena is subject to fewer procedural limitations than an administrative subpoena.[128] A grand jury may subpoena documents or testimony of any witness the grant jury feels will assist them in an investigation.[129] Thus, the logic of an unindicted defendant's argument that the transfer of SEC material to the Justice Department improperly broadens criminal discovery disappears when one considers that the Justice Department could present the

---

[121] *See* text accompanying notes 34-36 & 55 *supra*.

[122] *See* note 55 *supra*.

[123] See *Protections, supra* note 109, at 247-48; text accompanying notes 30 & 56-60 *supra*. The SEC procedures do not require a warning of the possibility of the existence of a parallel criminal proceeding. *See* Mathews, *supra* note 18, at 969; *Protections, supra* note 109, at 240. Federal courts, however, have begun to look for the presence of SEC warnings in deciding whether SEC parallel proceedings infringed upon the defendant's fifth amendment privilege. *See* notes 30 & 56 *supra*. The SEC should warn the defendant to prevent jeopardizing the validity of the parallel criminal proceeding. *See* Mathews, *supra* note 18, at 969.

[124] *See* text accompanying notes 84-90 *supra*.

[125] *See* note 1 *supra*.

[126] 628 F.2d at 1381. *See* text accompanying notes 91-100 *supra*.

[127] 628 F.2d at 1387. *See* text accompanying notes 97-99 *supra*.

[128] *See* text accompanying notes 2 & 98-99 *supra*.

[129] *See* note 99 *supra*.

case to a grand jury, request a subpoena, and obtain the same evidence as the SEC subpoena.

While *Dresser* arguably reduces the unindicted defendant's rights in SEC parallel proceedings, the decision in reality does just the opposite. Because the *Dresser* court realized that the Justice Department could demand the same material through a grand jury subpoena, the decision actually affords the unindicted defendant served with an SEC subpoena slightly more protection than the defendant would have had if served with a grand jury subpoena. The defendant acquires the added protection by virtue of the fact that the SEC's subpoena power is slightly less broad and oppressive than the grand jury's subpoena power.[130]

DOUGLAS J. CHUMBLEY

[130] The *Dresser* court noted that the SEC's subpoena power is not as broad as that of the grand jury. 628 F.2d at 1381. The court also found that the SEC subpoena procedure offered the defendant more protection than the grand jury subpoena procedure. *Id. See also Corporate Crime*, *supra* note 2, at 1312-13; text accompanying notes 2 & 98-99 *supra*.