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Ex Parte Pre-Trial Discovery: The Real Vice Of Parallel Investigations

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EX PARTE PRE-TRIAL DISCOVERY: THE REAL VICE OF PARALLEL INVESTIGATIONS

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The recent trend toward more frequent imposition of criminal penalties for violations of the federal revenue and securities laws has generated a rash of litigation defining the proper relationship between civil and criminal investigations of the same subject matter. The questions presented by such cases are the inexorable consequences of a system that accords subpoena power to administrative agencies for civil law enforcement purposes, but assigns the grand jury an exclusive role in the criminal process.[1]

A violation of the Securities Exchange Act of 1934 (Exchange Act) gives rise to both civil and criminal penalties.[2] The Securities and Exchange Commission (SEC) has statutory authority to conduct investigations to determine whether the laws it administers are being violated,[3] and has the power to compel testimony and the production of documents in the course of such investigations.[4] The SEC may bring a civil enforcement action to restrain conduct that violates the securities laws.[5] Nevertheless, the fifth amendment provides that only a grand jury may institute a felony prosecution for violation of federal law.[6] Thus, although the SEC may recommend

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[1] *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978); text accompanying notes 79-88 *infra*. This article discusses the proper relationship between civil administrative investigations and criminal investigations of the same conduct in the context of Securities and Exchange Commission (SEC) and Internal Revenue Service (IRS) procedures. Both agencies enforce statutes that have civil and criminal implications. *See* text accompanying notes 2-9 *infra*.

[2] Securities Exchange Act of 1934 ('34 Act) §§ 21(d), 32, 15 U.S.C. §§ 78u(d), 78ff (1976).

[3] Section 21(a) of the '34 Act provides in part:

> The [SEC] may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter [or] the rules or regulations thereunder . . . .

15 U.S.C. § 78u(a) (1976).

[4] For the purpose of an investigation authorized by § 21(a) of the '34 Act, *see* note 3 *supra*, the SEC, its members and its designated officers may:

> administer oaths and affirmations, subpena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the [SEC] deems relevant or material to the inquiry.

15 U.S.C. § 78u(b) (1976).

[5] SEC civil enforcement actions are brought as injunctive proceedings pursuant to § 21(d) of the '34 Act, which also authorizes the SEC to

> transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of [the '34 Act] or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under [the '34 Act].

15 U.S.C. § 78u(d) (1976).

[6] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

to the Attorney General that criminal proceedings be instituted,[7] the Department of Justice has exclusive jurisdiction over such proceedings.[8] Similarly, responsibility for enforcement of the federal tax laws is split between the Internal Revenue Service (IRS) and the Department of Justice.[9] These divisions of responsibility result in simultaneous or "parallel" civil and criminal investigations of the same conduct, and present difficult questions as to the proper relationship between the two investigations.

One of the most hotly litigated issues in the context of these parallel investigations concerns the propriety of using agency employees as assistants to a United States Attorney to aid in preparing a case or presenting it to a grand jury. The bitterness of the dissenter's language in *In re April 1977 Grand Jury Subpoenas (General Motors Corp. v. United States)*[10] and the frequency with which the issue is being faced by circuit and district courts,[11] are sure signs of the conviction with which divergent viewpoints on this issue are espoused.

The issue presented to the Sixth Circuit by the *General Motors* case is but one aspect of the broader question of the extent to which the "separateness" of parallel civil and criminal investigations of the same conduct must be maintained. The underlying question is whether information developed by the use of compulsory process[12] in a criminal investigation may be used for civil enforcement purposes, and vice versa. Instances of such exchanges of information in addition to that considered in the *General Motors* case include, for example, the use of information devel-

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forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

[7] 15 U.S.C. § 78u(d) (1976); *see* note 5 *supra.*

[8] 5 U.S.C. § 551(1)(e) (1976).

[9] Internal Revenue Code § 7602 authorizes the Secretary of the Treasury or his delegate to require persons to produce documents and give testimony under oath. Under I.R.C. § 7401, the Secretary or his delegate must authorize the institution of a civil action to collect taxes, and the Attorney General or his delegate must direct that the action be commenced. Criminal actions for violation of the federal tax laws are commenced on the recommendation of Regional Counsel and approved by the Tax Division of the Department of Justice. G. CROWLEY & R. MANNING, CRIMINAL TAX FRAUD - REPRESENTING THE TAXPAYER BEFORE TRIAL 53-56 (1976).

[10] 584 F.2d 1366 (6th Cir.), *cert. denied,* 99 S.Ct. 1277 (1978) (vacating on rehearing en banc, 573 F.2d 936 (6th Cir. 1978).

[11] *See, e.g., In re* Paul Perlin, 589 F.2d 260 (7th Cir. 1978); *In re* Grand Jury Subpoenas, 581 F.2d 1103 (4th Cir. 1978); *In re* J.R. Simplot Co. 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1976), *withdrawn as moot on other grounds,* 77-2 U.S.T.C. ¶ 9511 (9th Cir. 1977); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978); SEC v. Dresser Indus., Inc., [Current] FED. SEC. L. REP. (CCH) ¶ 97,172 (D.C. Cir. 1979).

[12] Although informal methods of obtaining evidence exist, the limitations on the government's use of compulsory process suggested in this article do not apply to them. The Second Circuit has described the differences between formal and informal SEC investigations. *See* United States v. Fields, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,552 (2d Cir. 1978). Only the formal investigation involves "issuance of processes or compulsion of testimony." *Id.* at 94,277. Moreover, informal investigative materials may be disclosed to the United States Attorney without the SEC authorization required for disclosure of formal investigative materials. *Id.* at 94,276-77; *see* note 5 *supra.*

oped in the course of a grand jury investigation to assert a civil obligation to pay taxes, and the conduct of an SEC administrative investigation during the pendency of an indictment with respect to the same subject matter.

Although the courts are being flooded with litigation challenging such exchanges of information and assistance, there has been little effort to develop a coherent framework within which these issues can be analyzed. The traditional approach to this subject begins and ends with the proposition that the powers of a grand jury may not be used to develop evidence to benefit a civil investigation because the extraordinary powers of the grand jury are granted to it only for the purpose of investigating criminal conduct. It is argued that the "massive intrusions on freedom and privacy" occasioned by the exercise of such powers are not justified in a civil case.[13]

The powers of the grand jury are, in fact, extraordinary. They significantly exceed those accorded to administrative agencies in two fundamental respects. First, whereas witnesses being examined by the SEC and the IRS normally are permitted to be advised by counsel,[14] the grand jury witness is not permitted to have counsel with him in the grand jury room.[15] Second, there is a much greater opportunity for judicial review of an administrative subpoena than of a subpoena issued by a grand jury. Whereas failure to comply with a grand jury subpoena is punishable as a contempt of court, an agency subpoena is not self-enforcing.[16] The agency must bring a civil proceeding seeking a judicial order of enforcement.[17] The defendant in such an action can assert defenses,[18] seek discovery into the agency's compliance with its own rules and its motivation for bringing the action,[19] and obtain appellate review of an adverse determination.[20]

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[13] See *In re* J. R. Simplot Co., 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1976), *withdrawn as moot on other grounds*, 77-2 U.S. Tax Cas., ¶ 9511 (9th Cir. 1977); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1908 (E.D. Pa. 1976); United States v. Doe, 341 F. Supp. 1350 (S.D.N.Y. 1972); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162, 177-78 (1975). *See generally* Pickholz & Pickholz, *Balancing Effective Prosecution of White Collar Crime and Traditional Safeguards: Administrative Agencies and Jury Secrecy*, 36 WASH. & LEE LAW REV. 1027 (1979).

[14] 5 U.S.C. § 555(b) (1976); *see, e.g.*, 17 C.F.R. § 11.6(c)(1979).

[15] United States v. Mandujano, 425 U.S. 564, 581 (1976).

[16] *Compare* FED. R. CRIM. P. 17(g) (failure without adequate excuse to obey court's subpoena may be deemed a contempt of court) *with* Reisman v. Caplin, 375 U.S. 440, 445-46 (1964) (I.R.C. § 7402(b), granting United States District Courts jurisdiction to compel, by appropriate process, compliance with IRS summons, is the only manner in which Secretary of Treasury may enforce its summonses).

[17] 375 U.S. at 445-46.

[18] The subject of an SEC investigation can challenge the agency's subpoenas on the ground tht the subpoena did not comply with the usual requirements such as specificity and lack of undue burden. A subpoena also can be challenged on the ground that the SEC has acted arbitrarily and beyond the scope of its authority in issuing the subpoena. Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 288 (10th Cir. 1964).

[19] United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316-17 (1978).

[20] Reisman v. Caplin, 375 U.S. 440, 446-47 (1964).

Unquestionably, the subpoena power of the grand jury is significantly greater than that of the administrative agency. However, there are three objections to accepting the greater power of the grand jury subpoena as the basis for a rationale against the exchange of information between parallel civil and criminal investigattons. First, the notion that the "more intrusive" powers of the grand jury may not be used to benefit a civil investigation is more fiction than fact. As shown in detail below, the fruits of the grand jury investigation are regularly used in civil cases. The only prohibition in reality has become one against the use of a grand jury for the sole purpose of benefiting a civil case. So long as there is a hint of possible criminal prosecution, the grand jury may gather evidence with a view toward its ultimate use for civil purposes.

Second, the greater power of the grand jury subpoena is principally an excess of power against the witness, not the target of the investigation. From the point of view of the potential defendant, the differences between the administrative and grand jury subpoenas are not as significant as the enormous power that is common to both. This is the government's right to use compulsory process to develop a case against the target in a proceeding at which he is not allowed to be present or to cross-examine the witnesses against him.[21] The potential defendant can be damaged every bit as severely by an IRS or SEC investigation as by a grand jury inquiry.

Third, a rationale for separating parallel investigations that rests on the greater strength of the grand jury subpoena provides no basis for prohibiting the use of an administrative agency's civil powers to benefit a criminal investigation. Nonetheless, the most recent Supreme Court pronouncement in this area precludes just that.[22] Thus, the logic of the traditional rationale against civil and criminal investigations sharing information is plainly incomplete.

Each of these three objections to the traditional theory is discussed separately below. In each case there emerges a different principle that ought to be taken into account in analyzing the proper relationship between parallel grand jury and administrative investigations. Finally, these principles are applied to the problem considered in the *General Motors* case.

This analysis demonstrates that the real unfairness to the potential defendant derives not from the interchange of information between the two parallel arms of the investigation. Rather, the basic unfairness of parallel investigations stems from the underlying fact that the government is using

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[21] The government can use compulsory process to develop a case against a potential defendant in two ways. Process can be addressed to the potential defendant or to third parties. This article addresses only the government's use of compulsory process addressed to third parties for purposes of developing a case against the potential defendant. The Supreme Court has been faced with the separate question of overlapping civil and criminal subpoenas addressed to the target of the investigation. *See* United States v. Kordel, 397 U.S. 1 (1970).

[22] United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978); *see* text accompanying notes 79-87 *infra*.

compulsory process to develop its case against the defendant at proceedings from which he is excluded. This unfairness is common to both the agency and grand jury arms of the investigation and would exist even if there were no parallel investigations or interchanges of information between them. The fact of parallel investigations merely accentuates the underlying unfairness.

There are three reasons why the unfairness is more readily perceived in the case of parallel investigations of complex economic crimes than in the case of the traditional grand jury investigations of crimes of violence. First, the sheer magnitude of the investigative effort in complex economic cases makes clear that the enterprise in which the government is engaged has progressed far beyond the mere framing of charges against a defendant, and has become a process from which the defendant ought not, in fairness, be excluded. Second, the point at which the administrative agency sees fit to recommend that particular criminal charges be lodged against an identified defendant provides a clear point of demarcation beyond which further use of compulsory process to prove those charges ought to be confined to proceedings at which the defendant is accorded the right of cross-examination. Third, there is more likely to be significant related civil litigation in the case of economic crime than in the case of crimes of violence. As discussed in more detail below,[23] transcripts of testimony given in *ex parte* agency or grand jury investigations are used in various ways in the related civil litigation. Since in the more civilized setting of civil litigation *ex parte* discovery is not normally tolerated, introduction of the fruits of agency or grand jury testimony there accentuates the underlying unfairness of gathering the testimony for that purpose. The sharp contrast between the powers accorded to the government investigators and the procedures normally applied in civil litigation punctures the myth that the target of a government investigation is given every advantage. On the contrary, it becomes clear that he is the victim of procedures not tolerated in civil litigation.

Civil Use of Grand Jury Secrets

The argument that the broad power of the grand jury should not be used to benefit a civil case overlooks the fact that grand jury materials are regularly made available for the government's civil use pursuant to Federal Rule of Criminal Procedure 6(e). The evidence assembled by a grand jury frequently contains material that would be highly beneficial to the government in civil proceedings brought by the SEC, or the Civil Division of the Department of Justice. Not surprisingly, neither Congress nor the courts are inclined to say that information so well calculated to aid the agency in carrying out its statutory functions should remain forever beyond the pale. Nor is there substantial sentiment favoring the proposition that the

[23] *See* text accompanying notes 60-61 *infra.*

prosecutor and grand jury must operate in a vacuum devoid of the investigative and analytical assistance of the agency charged with enforcing statutes regulating the conduct under investigation. Accordingly, in 1977 Congress amended Federal Rule of Criminal Procedure 6(e), which had previously permitted disclosure of grand jury information only to "attorneys for the government." Whereas that phrase has been defined to exclude agency personnel,[24] the amendment permits disclosure both to "an attorney for the government" and "to such governmental personnel as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law."[25]

The Senate Report on the amendment makes clear that its purpose is to enable federal prosecutors in grand jury proceedings to benefit from the expertise of agency personnel.[26] Noting that federal crimes are investigated and evaluated by agency personnel, the Senate found "no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws."[27]

The SEC or IRS personnel to whom grand jury information is disclosed are unlikely to forget such information when they return to their civil duties. Indeed, the Senate Report explicitly states that there is "no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes."[28] Such use is authorized, in effect, by Federal Rule of Criminal Procedure 6(e)(C)(i) which permits disclosure of matters occurring before the grand jury "when so directed by a court preliminary to or in connection with a judicial proceeding." One court of appeals has aptly characterized the 1977 amendments to Rule 6(e) as congressional authorization of "judicially supervised discovery of grand jury materials to government agency personnel for civil law enforcement purposes."[29]

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[24] *See In re* Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962); *In re* Grand Jury Investigation, 414 F. Supp. 74, 76 (S.D.N.Y. 1976); FED. R. CRIM. P. 54(c) (defining "Attorney for the government" as the attorney general and his authorized assistant, a United States attorney and his authorized assistant and in some circumstances the Attorney General or other authorized officer of Guam).

[25] FED. R. CRIM. P. 6(e) (as amended, Act of July 30, 1977, P.L. No. 95-78, §§ 1, 2(a), 91 Stat. 319, eff. Oct. 1, 1977); *see* Act of July 8, 1976, Pub. L. No. 94-349, 90 Stat. 822 (1976).

[26] S. REP. No. 354, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

[27] [1977] U.S. CODE CONG. & AD. NEWS 527, 530.

[28] *Id.* at 532.

[29] *In re* Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978). *See also* United States v. Saks & Co., 426 F. Supp. 812 (S.D.N.Y. 1976); *In re* Grand Jury Investigation 414 F. Supp. 74 (S.D.N.Y. 1976) (SEC denied access to grand jury materials for use in civil proceeding on ground that agency failed to show a particularized need for the materials); Capitol Indem. Corp. v. First Minn. Constr. Co., 405 F. Supp. 929, 934 (D. Mass. 1975) ("The U.S. Attorney may not permit his assistants to use grand jury material in connection with this civil case while the grand jury is conducting its investigation"). For an analysis of Rule 6(e) applications after the 1977 amendments to the rule, see *In re* 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978) (disclosure of grand jury material to IRS permitted if grand jury was legitimately for criminal investigation).

The exceptions to Rule 6(e)'s mandate of grand jury secrecy have sufficient breadth to swallow the rule of secrecy and make a hollow platitude of the principle that the powerful grand jury subpoena may not properly be used for civil law enforcement purposes. The traditionally recognized sop to the principle of non-use of the grand jury to aid a civil investigation has been the dictum in *United States v. Procter & Gamble Co.*[30] that the government's use of "criminal procedures to elicit evidence in a civil case . . . would [flout] the policy of the law."[31] By suggesting a test in terms of the government's purpose in invoking the grand jury's process, the Court implicitly sanctioned incidental benefits to a civil case from an investigation commenced for a criminal purpose, and left open the question of the propriety of *initiating* a grand jury investigation for combined criminal and civil purposes.[32]

In a carefully considered opinion in *United States v. Doe,*[33] Judge Frankel sought to close the door on the dual purpose grand jury, holding "that the grand jury's role is properly confined, and amply respected, when it is held empowered to conduct investigations that are *in their inception exclusively criminal.*"[34] Of course, as Judge Frankel recognized, even this formulation would permit eventual use in civil cases of information developed by a grand jury that was at its inception exclusively criminal in purpose.[35] Moreover, recent decisions have sanctioned grand jury investigations that plainly had both civil and criminal purposes. Such combined purposes are apparent in the case of *In re April, 25 1978 Grand Jury Subpoena Duces Tecum.*[36] There, IRS agents were investigating an electric supply company and its principal officers in connection with alleged irregularities in the company's corporate income tax return for 1973. Evidence indicated possible criminal violations of the Internal Revenue Code. When the agents encountered what they regarded as a lack of cooperation by the targets of the investigation, the IRS Regional Counsel recommended to the Assistant Attorney General in charge of the Tax Division

> that a grand jury investigation be conducted to provide evidence of criminal violations of the Internal Revenue Code of 1954, § 7201 . . . with a view toward the return of indictments against Gerald Gruberg and Jacob Gruberg for attempting to evade and defeat the corporate income tax liabilities of [their company] for the year 1973.[37]

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[30] 356 U.S. 677 (1958).

[31] *Id.* at 683.

[32] Justice Harlan, dissenting in *Procter & Gamble,* read the majority opinion to preclude only a grand jury investigation *"instituted* solely in aid of a civil suit - that is without any thought of obtaining an indictment." *Id.* at 689 (Harlan, J., dissenting).

[33] 341 F. Supp. 1350 (S.D.N.Y. 1972).

[34] *Id.* at 1352 (emphasis in original).

[35] *Id.; see In re* 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978).

[36] 453 F. Supp. 1225 (S.D.N.Y. 1978).

[37] *Id.* at 1228.

The Regional Counsel also requested that any data the grand jury generated be submitted to the IRS at the conclusion of the grand jury proceeding, and subsequent to a Rule 6(e) order. Along with "other information," the grand jury materials would then be 'process[ed] through the normal service channels.'[38] In seeking the institution of a grand jury investigation for combined civil and criminal purposes, the IRS apparently was seeking the "open-ended grand jury inquiry" that the Internal Revenue Manual had condoned for circumstances in which IRS investigations were ineffectual.[39]

The letter request of the IRS for a grand jury investigation had made explicit the grand jury's combined civil and criminal purposes. One of the targets of the investigation moved for an order quashing a subpoena and terminating the grand jury investigation. Although Judge Frankel's opinion in the *Doe* case appears to have called for the grant of the motion on the basis that the grand jury was not "at its inception exclusively criminal," Judge Haight denied the motion. He distinguished *Doe* from the case before him on the ground that, in the latter case, there was "no explicit statement that the grand jury investigation is intended, from its inception, to assist IRS in the development of a civil tax case."[40]

In view of the explicit statements by the IRS of such combined purpose, Judge Haight seemed to fashion a rule that gives exclusive weight to the avowed purpose of the prosecutor, and ignores entirely the purpose of the administrative agency. Given the fact that the prosecutor and the IRS employees are agents of a single government, there is little merit in this distinction.

Nonetheless, this same approach was applied with a vengeance in a recent Fourth Circuit case[41] scrutinizing a grand jury investigation. The grand jury commenced at or about the time the taxpayer had successfully resisted judicial enforcement of several IRS administrative summonses.[42] Five IRS agents who had been involved in the administrative investigation were assigned to assist the grand jury.[43] The grand jury subpoenas sought

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[38] *Id.*

[39] At the time United States v. Doe was decided, the Internal Revenue Manual provided, in part, that when

> investigations into areas of noncomplaince are stymied by a series of reluctant witnesses, and it is not possible to determine the precise limits of the tax violations in terms of defendants and taxable periods . . . and it appears that an open-ended grand jury inquiry would probably develop information which would result in prosecution recommendation(s), the special agent should submit a complete report to the Chief . . . .

Internal Revenue Manual § 9267.4(1) (withdrawn Nov. 21, 1977), *quoted in In re* Gruberg, 453 F. Supp. 1225, 1229 n.7.

[40] 453 F. Supp. at 1232.

[41] *In re* Grand Jury Subpoenas, April, 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978).

[42] *Id.* at 1106. The grand jury was not commenced until after the IRS had decided to discontinue its own criminal investigation into the target's tax returns for 1971-1975. *Id.* at 105-06.

[43] *Id.* at 1106. One of the IRS agents assigned to assist the grand jury had been connected

the same material the IRS previously had tried unsuccessfully to obtain.

The Court of Appeals denied the taxpayer's petition for a writ of mandamus that would have directed the district court to hold an evidentiary hearing on the allegation that the government had abused the grand jury process. The court agreed with the district court that an affidavit of one of the Justice Department attorneys conducting the investigation, which stated that the government was using the grand jury in good faith, was sufficient to meet the taxpayer's allegations.[44] As in the *Gruberg* case, the court ignored any possible motivation of the IRS for prompting the grand jury investigation. The issue as to the proper bounds of the interrelationship between two arms of the government was resolved by ignoring one of the arms.

Both decisions probably are best understood in terms of the extreme judicial reluctance to intrude on the conduct of an on-going grand jury investigation.[45] For present purposes, it is enough to recognize that the "intrusive" powers of the grand jury are frequently used with the effect of benefiting civil cases, either because such effect is the incidental result of a purely criminal inquiry, or because the grand jury is accepted as a legitimate means for initiating a "combined purpose" inquiry. Any rationale for the proper relationship between parallel civil and criminal investigations that is based upon an assumed "barrier of secrecy" between the two is not dealing with reality.

Indeed, the Fifth Circuit has recently held that all Justice Department attorneys are "attorneys for the government" within Federal Rules of Criminal Procedure 6 and 54, and that, therefore, all Justice Department attorneys may routinely have access to grand jury information, without court order, for the express purpose of using it in a civil case.[46] The traditional secrecy justifications for structuring the relationship between parallel investigations no longer prevent disclosure of grand jury materials to administrative civil investigators. Clearly then, the rule of grand jury secrecy is frequently nothing more than a justification for perpetuating the advantage obtained by the government's use of the grand jury to conduct *ex parte* discovery proceedings. However, none of the usual reasons for the secrecy of grand jury proceedings legitimately supports a refusal to give the defendant access to transcripts of such proceedings after the grand jury has completed its deliberations.

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with prior civil audits of the target in addition to the administrative criminal investigation. *Id.*

[44] *Id.* at 1108. The Department of Justice attorneys had sworn that "[t]he grand jury is engaged solely in the investigation of criminal matters and is not gathering evidence for the purpose of using such evidence in any ongoing or contemplated civil proceeding of any kind whatever." *Id.* at 1106 n.5.

[45] Judicial reluctance to play an active role in on-going grand jury proceedings stems from the perception of the grand jury as an institution unattached to either the executive or legislative branches of the federal government. *See* United States v. Chanen, 549 F.2d 1306, 1312-13 (9th Cir. 1977).

[46] *In re* Grand Jury, Miscellaneous No. 979, 583 F.2d 128 (5th Cir. 1978).

The five traditional reasons for the policy of secrecy are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.[47]

The first two reasons have no application at all after the grand jury has already returned an indictment; the same is true of the fifth. As to the third reason, any grand jury witnesses scheduled to testify at trial already will have testified to the grand jury by the time the secrecy rules are invoked, and will ultimately be identified at trial. The third reason for grand jury secrecy thus boils down to little more than a desire to keep secret the identity of the government's witnesses. The fourth reason is a wholly unworthy one. Any witness who is to be of any use in the case must be willing to testify publicly at trial. There is no justification for giving any special protection to a malicious informant who would bring about an indictment through secret testimony but be unwilling to assist in proving the allegations of the indictment at trial.

Nonetheless, the defendant has no right of access to grand jury minutes, and can obtain them only upon a showing of "a particularized need."[48] Given the fact that the government has full access to the minutes of the grand jury, there appears to be no legitimate justification for keeping the defendant in the dark. Indeed, the Supreme Court has recognized that "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact."[49] There is no reason, then, why the defendant should not be entitled to a transcript of the grand jury proceedings.

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[47] United States v. Procter & Gamble, 356 U.S. 677, 681 n.6 (1958).

[48] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). Not only is a defendant's right to grand jury minutes contingent upon a particularized need, but that need must also be weighed against the policy of grand jury secrecy. *Id.* at 400, 403 (Brennan, J., dissenting). The Court rejected the *Pittsburgh Plate* defendants' claim that a right to grand jury transcripts arose when the grand jury investigation addressed the general issues covered at a subsequent trial. *Id.* at 400.

[49] Dennis v. United States, 384 U.S. 855, 873 (1966). In *Dennis*, the court affirmed the defendant's right to have access to a transcript of the prosecution's trial witnesses' grand jury testimony while the witnesses are available for cross-examination upon a showing of "particularized need" for the testimony and where the importance of maintaining grand jury secrecy is "minimal" *Id.* at 868-75.

THE UNFAIRNESS OF EX PARTE DISCOVERY

Analysis of the civil and criminal subpoena in terms of their differing effect on a witness overlooks the important fact, common to both civil and criminal investigations, that the potential defendant is not given an opportunity to confront and cross-examine the witnesses who are making the case against him in the parallel investigation. It is difficult to overstate the advantage given to one party to a dispute when that party is empowered to issue compulsory process to require testimony under oath outside the presence of the other party. The Anglo-American legal system rests upon the proposition tht cross-examination "is beyond doubt the greatest legal engine ever invented for the discovery of truth."[50] It is just this vehicle that is studiously excluded from both the administrative investigation and the grand jury inquiry.

The traditional justification for not extending cross-examination rights to investigative hearings, even those investigative hearings conducted on the record and under oath, has been that "the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings."[51] The constitutional struggle over the circumstances in which due process requires the right of cross-examination has been fought largely in terms of whether the result of a particular proceeding may be said to be "an adjudication." Although due process requires that a defendant in a criminal[52] or civil[53] case be accorded the right of cross-examination, denial of this right during a grand jury or administrative investigation has been justified on the ground that such "general fact-finding" proceedings are "non-adjudicative."[54] A sound argument can be

[50] 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974). The value of cross-examination stems from the fact that it "permits disclosure of contradictions, inconsistencies, unsupported conclusions, bizarre descriptions of events, favoritism in testimony, motive, bias, slanting of facts, absence of proof, and in some cases even perjury." Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435, 440 n.5 (1978) (quoting WERCHICK, CALIFORNIA PREPARATION AND TRIAL 727 (2d ed. 1974)).

[51] Hannah v. Larche, 363 U.S. 420, 443 (1960).

[52] *In re* Oliver, 333 U.S. 257, 264-67 (1948) (conviction for contempt of court invalid when accused not afforded a "public" hearing, even though alleged contempt occurred in connection with special secret judicial investigation).

[53] Greene v. McElroy, 360 U.S. 474 (1959).

[54] Hannah v. Larche, 363 U.S. 420, 445-49 (1960). The *Hannah* Court held that three factors must be considered to determine whether certain rights are constitutionally guaranteed in a particular proceeding. In addition to the nature of the proceeding as adjudicative or investigative, the Court assessed the "nature of the alleged right involved, . . . and the possible burden on [the] proceeding . . . ." *Id.* at 442. *Hannah* involved the validity of procedural rules prescribed by an Executive Commission on Civil Rights for the conduct of its investigations. The Court held that the rules, which denied witnesses at the Commission's hearings the rights of cross examination to confront their accusers, and to be apprised of any specific charges that are being investigated, *id.* at 441-42, did not violate the requirements of due process. Id. at 451. In discussing the nature of the Commission's hearings as non-adjudicative, the Court noted that the Commission did not "hold trials or determine . . . liability . . . issue orders . . ., indict, punish, or impose any legal sanctions. It [did] not make determinations depriving anyone of his life, liberty, or property." *Id.* at 441.

made that the significance of the determination to indict mandates that, if compulsory process is to be used by the government in connection with that decision, the potential defendant should be allowed a reciprocal right of cross-examination and the correlative right to use compulsory process to present his own case.[55]

An outline of such an argument is set forth in Justice Douglas's concurring opinion in *Donaldson v. United States*.[56] The Court affirmed the denial of a taxpayer's motion to intervene in a proceeding to enforce an IRS summons directed to a third party witness. Justice Douglas agreed that the taxpayer could not prevent the summons from issuing. Nevertheless he argued that the taxpayer would have a right to be present at the proceedings conducted pursuant to the IRS summons and "to confront and cross-examine witnesses and inspect evidence against him."[57] Justice Douglas based this conclusion on the ground that the IRS clearly had begun a criminal investigation of the taxpayer.[58] He espoused the view that when a determination to bring criminal charges is made in a proceeding other than the constitutionally sanctioned grand jury, "such a proceeding may not be held without affording the taxpayer an opportunity to attend, to cross-examine, and to rebut."[59] This argument has not found favor with the Court. The expedient argument against disruption has prevailed, its victory expressed in the conclusion that the investigative process is not an adjudication.[60]

However, the traditional analysis in terms of the nature of the determination ignores the entirely separate question of the harm done to the potential defendant, not by the decision to proceed further against him, but by the *ex parte* use of compulsory process to build the case that will ultimately be presented at the further proceedings. At trial, be it civil or criminal, the defendant will have the rights of confrontation and cross-examination. Yet the witnesses to be cross-examined already will have committed themselves to a given version of events in the course of sworn, recorded testimony before a grand jury or administrative investigator outside the presence of the defendant.

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[55] *See* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[56] 400 U.S. 517, 536 (1971) (Douglas, J., concurring).

[57] *Id.* at 538.

[58] *Id.* at 531.

[59] *Id.* at 541. Justice Douglas distinguished between the rghts of targets of administrative investigations and grand jury proceedings. In the grand jury context, there is no right to counsel or confrontation, but the presence of the grand jurors serves to protect against governmental officials abusing witnesses or subsequently misrepresenting their testimony. *Id.* at 538-39 (quoting *In re* Groban, 352 U.S. 330, 346-47 (1951) (Black, J., dissenting)). Although Justice Douglas's view was influenced by the criminal nature of the IRS investigation, *see* text accompanying note 58 *supra*, he indicated that his resolution of the issues would not be altered by the fact that an investigation had criminal and civil aspects. 400 U.S. at 537 n.1. In either case, the administrative investigation would be used as an accusatorial arm of the federal government, requiring procedural due process safeguards. *Id.* at 540 (quoting Hannah v. Larche, 363 U.S. 420, 499 (1960) (Douglas, J., dissenting)).

[60] *See* note 54 *supra*.

Experience teaches that the leading questions that abound in *ex parte* examination can suggest their own answers which, once given, are later adhered to as the true version of events that have since faded into oblivion. The importance of the power to conduct such *ex parte* examination is particularly great where the alleged offense involves complex economic activity. In such cases, there is usually little doubt as to what took place. The critical questions concern subtle shadings in the meaning of ambiguous conversations, fine distinctions as to the time at which knowledge of significant facts was acquired, and the higher abstractions of the intent that motivated particular conduct. These kinds of issues are particularly susceptible to the abuse of leading questions tilted toward a predisposed view of events.

Testimony elicted at such *ex parte* proceedings can determine the outcome of a subsequent trial that appears to comport with due process. A trial witness who has previously committed himself to a particular version of events probably will be given the opportunity to review a transcript of his testimony prior to trial. This "review" merely increases the likelihood that the witness will abide by his first recitation of events elicted by the helpful *ex parte* examination of the prosecutor or agency attorney. If his subsequent testimony departs from the earlier version, the prior testimony nonetheless makes highly effective cross-examination material, either for impeachment purposes or admission into evidence as a prior inconsistent statement.[61] Moreover, if the witness is an alleged "co-conspirator," portions of his prior testimony may be admissible as part of the government's case in chief under the rubric of admissions of the defendant.[62] Despite ostensible adherence to due process at trial, the defendant can be convicted as a result of testimony elicited at earlier proceedings from which he was excluded.

In *Coleman v. Alabama*,[63] the Supreme Court recognized the fact that the government's *ex parte* examination of witnesses can affect the fairness of a subsequent trial. In holding that a defendant is entitled to counsel at a preliminary hearing, the Court listed ways in which "the guiding hand of counsel" at the preliminary hearing is essential:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testi-

[61] *See* FED. R. EVID. 613 (method of examining witness regarding prior inconsistent statements, and use of extrinsic evidence of the prior inconsistent statement), 801(d)(1)(A) (prior statement of trial witness not hearsay if he is subject to cross examination and statement was given under oath subject to penalty for perjury).

[62] FED. R. EVID. 801(d)(2)(E).

[63] 399 U.S. 1 (1970).

> mony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.[64]

The court's second and third examples illustrate the way in which exclusion of counsel from proceedings at which the government can compel testimony detracts from the fairness of a subsequent trial. Both an understanding of the state's case, and preparation for future testimony "materially affect an accused's ability to present an effective defense at trial."[65] Neither prerequisite for an effective defense is possible when the state has the advantage of what is, in effect, *ex parte* discovery.

The clearest judicial recognition of the continuing harm inflicted on a defendant as a result of the government's power to develop an *ex parte* record is found in the decision of the California Supreme Court in *Hawkins v. Superior Court.*[66] In California, a felony prosecution may be initiated either by the prosecutor filing an information or by the grand jury returning an indictment. The defendant accused by information is entitled to a preliminary hearing before a magistrate and may be represented by counsel who has the right to cross-examine hostile witnesses and present exculpatory evidence.[67] Although a defendant charged by indictment is entitled to judicial review of the grand jury's probable cause determination, he has no right to confront and cross examine witnesses or object to evidence prior to trial.[68]

The *Hawkins* court held that persons prosecuted by indictment and thus deprived of the preliminary hearing and its concomitant rights, are

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[64] *Id.* at 9. In *Coleman,* the Court held that the preliminary hearing in Alabama was a "critical stage" in the prosecution of the defendant. *Id.* at 9-10. The Court stated that characterizing a proceeding as a critical stage depends on 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' *Id.* at 9 (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).

[65] *See* Adams v. Illinois, 405 U.S. 278, 282 (1972). In *Adams,* the Court refused to apply its holding in *Coleman v. Alabama,* 400 U.S. 517 (1971), retroactively. 405 U.S. at 284-85. One factor the Court examined was the impact that the right to counsel at a preliminary hearing would have on the "integrity of the factfinding process." *Id.* at 281-82. The Court held that the presence of counsel at the hearing would not significantly contribute to the fact finding process because the limited utility of the hearing for impeachment or discovery purposes rendered the presence of counsel less significant to the accused's presentation of an effective defense. *Id.* at 282.

The *Adams* Court's analysis, however, begs the question in the context of parallel investigations. The basic unfairness of parallel investigations stems from the fact that they may be used by the government to develop a criminal case against the target of an administrative investigation, outside the confines of the grand jury process. The argument that counsel is less necessary in an administrative hearing because such a proceeding presents fewer opportunities for discovery and gathering impeachment evidence ignores the fact that the government may be using the hearing precisely for those purposes.

[66] 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

[67] *Id.* at 587, 586 P.2d at 917-18, 150 Cal. Rptr. at 436-37.

[68] *Id.* at 587-88, 586 P.2d at 918, 150 Cal. Rptr. at 437.

denied equal protection of the laws within the meaning of the California Constitution.[69] Viewing the indicted defendant's right to challenge the existence of probable cause based upon a transcript of the grand jury proceedings as an inadequate substitute for the right to confront and cross-examine prosecution witnesses, the court said "[s]uch a transcript will invariably reflect only what the prosecuting attorney permits it to reflect; it is certainly no substitute for the possibility of developing further evidence through a probing cross-examination of prosecution witnesses - a possibility foreclosed with the denial of an adversarial proceeding."[70] The court perceived the harm done to the potential defendant through the *ex parte* development of an evidentiary record to be that "the defense has no opportunity to conduct the searching cross-examination necessary to reveal flaws in the testimony of prosecution witnesses or to expose dubious eye witness identification."[71]

Transcripts of the SEC private investigation into the acquisition of the assets of Air West, Inc. illustrate the *Hawkins* court's fears in the context of parallel Federal investigations. Specifically, the transcripts portray the virtually unlimited power of the questioner to suggest answers to the witness during *ex parte* examination. One of the witnesses examined had been a member of the faction of the Air West board that opposed the then proposed sale of the company's assets, and sought to delay a stockholder vote on the sale. He testified that his faction hired a Washington law firm to approach the SEC with respect to the proxy statement to aid the group in "doing everything we could to impede the progress of getting this thing [proxy statement] out, or getting as many changes in it as we could that would help us at some point."[72] Such efforts by the so-called dissident directors were important to the potential defendants. The SEC examiner, proceeding *ex parte,* followed up this way:

> Q. Without putting words in your mouth, may I say then that when you say "help us," you meant yourself along with the other directors, and you also meant to help the stockholders you represented?
> A. That's right . . . .
> Q. Was this also the function of the law firm . . ., to attempt to change the Proxy [sic] in an attempt to make the information in it more objective so the stockholders [sic] could form a more adequate conclusion on the basis of the offer?
> A. I believe that that's what they were to do . . . .[73]

Another witness testified that he had resisted being discharged from the

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[69] *Id.* at 592-93, 586 P.2d at 921-22, 150 Cal. Rptr. at 440-41.

[70] *Id.* at 589, 586 P.2d at 919, 150 Cal. Rptr. at 438.

[71] *Id.* at 591, 586 P.2d at 920-21, 150 Cal. Rptr. at 439-40 (footnote omitted).

[72] *In re* Air West, Inc., Tr. of Joseph Martin, Jr., (Dec. 13, 1972 at 200) (SEC File No. HO-596).

[73] *Id.*

employ of one of the targets of the investigation by telling his employer that "when I am threatened, I get a little mean."[74] The SEC examiner, ardent for the pursuit of truth, clarified by asking, "[w]hen you say 'mean,' you mean you may tell the truth about something that would hurt someone else?"[75]

To be sure, these are extreme examples. They are, however, by no means unique, or even rare. Rather, they are the inevitable result of the temptation presented when the examining party with a particular target in mind is given *ex parte* power of subpoena. These excesses would not occur at a trial or in civil pretrial discovery where the presence of opposing counsel and the right of cross-examination would prevent them. They flourish in the *ex parte* investigation. Any analysis of such investigations must take into account the enormous potential for unfairness that resides in the power to subpoena witnesses to an *ex parte* examination. Admittedly, the expediency argument of *Hannah v. Larche* may justify tolerating this unfairness at the initial stages of an investigation where a broad latitude of inquiry into a generalized subject matter is properly the rule. Nevertheless, once the government focuses its investigation on particular violations by identified individuals, fundamental fairness requires that those individuals be given a right of cross-examination at any proceeding in which the government uses compulsory process to develop evidence to prove the charges.

The distinction between a generalized investigation for the purpose of framing a charge and a proceeding to develop evidence to prove particular charges against identified individuals does no more than import the rationale of *Escobedo v. Illinois*[76] into the context of a more formalized governmental investigation into more sophisticated economic crime. In *Escobedo,* the Court held that the right to counsel may not be delayed, as the dissent argued, until the time of indictment, but must be accorded when "the investigation has begun to focus on a particular suspect rather than continue as a general inquiry into an unsolved crime.[77]

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[74] *Id.*, Tr. of Paul Stoddard, (Oct. 18, 1973 at 9).

[75] *Id.* Both Martin and Stoddart testified before the SEC as to facts they had learned from the SEC examiner during off-the-record conversations with him. *Id.*, Tr. of Paul Stoddard, (Dec. 11, 1973 at 28); Tr. of Joseph Martin, Jr., (Dec. 11, 1973 at 123). This fact is a classic example of one of the abuses of *ex parte* witness examination outside the grand jury that Justice Douglas referred to in his concurring opinion in Donaldson v. United States, 400 U.S. 517, 538-39 (1971) (Douglas, J., concurring). *See* note 59 *supra.* Moreover, these abuses are not necessarily restricted to administrative proceedings. They may also arise in the grand jury context despite the protections inherent in the composition and procedures of the grand jury. *See* note 59 *supra.* In United States v. Boberg, 565 F.2d 1059 (8th Cir. 1977), the court noted that the prosecutor's interrogation of the defendant as a grand jury witness consisted "almost entirely of leading questions" and the defendant's "cryptic responses" thereto. *Id.* at 1062-63. The court expressly recognized that "[t]his kind of interrogation always creates the risk that the witness will misunderstand the questions or that the prosecutor will put words in the witness' mouth." *Id.* at 1063.

[76] 378 U.S. 478 (1964).

[77] *Id.* at 490. In *Escobedo,* the petitioner had requested to see his attorney who was

Determining the point at which an investigation into a complex economic crime has focused on a "particular suspect" may not always be simple.[78] However, it is no more difficult than many other fact issues necessary to the application of any legal principle. Standards for determining when the right discussed herein becomes applicable are discussed below. For the moment, it should be noted only that the right, being a right based upon a power that is common both to grand juries and administrative investigations, is one that applies without regard to whether the investigation is being conducted by an administrative agency or a grand jury.

EQUAL PRE-TRIAL DISCOVERY

The fact that the grand jury subpoena has "more intrusive" powers than does the typical agency subpoena fails to provide a rationale for a prohibition against exchanges between parallel civil and criminal investigations because it fails to explain the prohibition against the use of the "weaker" agency powers to benefit a criminal prosecution. An examination of the basis for the prohibition against this "upstream" flow of information points the way to a more comprehensive understanding of the proper relationship between parallel civil and criminal investigations.

In *United States v. LaSalle National Bank,*[79] the Supreme Court held that the IRS may not properly issue a summons after the IRS has recommended a criminal prosecution relating to the subject matter of the summons. Under the traditional rationale, there would have been no objection to such use of the weaker administrative powers to aid the stronger grand jury. Nonetheless, the Supreme Court concluded that this "prophylactic restraint" was necessary because of the "likelihood" that use of the IRS summons after a criminal reference would "broaden the Justice Department's right of criminal litigation discovery" or "infringe on the role of the grand jury as a principal tool of criminal accusation."[80]

The concern for maintaining the primacy of the grand jury as an accusatorial body, however laudable in the abstract, is unrealistic in light of the fact that the IRS and SEC already are empowered statutorily to initiate the process of criminal accusation in their areas of responsibility.[81] Moreover, Congress and the courts have repeatedly recognized the desirability, if not the necessity, of assigning agency personnel to assist prosecutors and grand juries investigating complex economic crimes.[82] The con-

refused access to his client during a police interrogation. *Id.* at 481-82.

[78] The *Escobedo* Court characterized the point at which the sixth amendment's guarantee of assistance of counsel adheres in general terms. The Court held that when a police investigation "shifts from investigatory to accusatory - when its focus is on the accused and its purpose is to illicit a confession - our adversary system beings to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Id.* at 492.

[79] 437 U.S. 298 (1978).

[80] *Id.* at 312.

[81] *See* text accompanying notes 7-9 *supra.*

[82] *See* text accompanying notes 24-29 *supra.*

cern that "criminal litigation discovery" not be broadened makes sense only as applied to the use of an IRS summons after the return of an indictment. After a criminal reference, but prior to indictment, the grand jury's own subpoena power provides the broadest possible discovery.[83]

After an indictment has been returned the government's rights of pretrial discovery are severely circumscribed. Primarily, the Federal Rules of Criminal Procedure limit the prosecution's right to notice of an alibi or mental condition defense,[84] and its right to discovery of certain other items unless the defendant obtains discovery of similar items from the government.[85] The government may not circumvent these limitations on discovery in a criminal case by using a grand jury "for the sole or dominating purpose of preparing an already pending indictment for trial."[86] This principle is one application of the more fundamental proposition, discussed above, that it is unfair to use compulsory process to develop a case against a potential defendant at an *ex parte* hearing, once the potential defendant and the charge have been identified. The point at which an indictment is filed provides a clear line of demarcation, beyond which further use of compulsory process to develop evidence *ex parte* for the purpose of proving the charges already identified in the indictment is not permissible.

To the extent that *LaSalle* applies the same prohibition to use of agency process after indictment, it is simply a logical application of existing principles. The court's holding in that case, however, is more far reaching. It precludes the use of agency process in the period after the agency recommends the institution of criminal proceedings, but before the return of an indictment. However indirectly, the Supreme Court thus has reemphasized the unfairness of permitting the goverment to use compulsory

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[83] The government has at its disposal one of the most effective discovery mechanisms yet devised - the grand jury. This body may call witnesses under compulsory process and examine them in secret under oath, unhampered by the rules of evidence or an adversary counsel's cross-examination, or in the case of a 'prospective defendant' by Fifth Amendment immunity.

8 MOORE'S FEDERAL PRACTICE ¶ 16.08[1] (2d ed. Sept. 1979 rev.) (footnotes omitted).

[84] FED. R. CRIM. P. 12.1, 12.2. Rule 12.1(a) requires a defendant to give notice, upon the attorney for the government's demand, of his intention to assert a defense of alibi. The attorney for the government, however, must give notice to the defendant or his attorney of the names and addresses of any witnesses the government will rely on to establish the defendant's presence at the scene of the alleged offense and to rebut the testimony of the defendant's alibi witnesses.

Under Rule 12.2, the defendant must give notice of his intention to rely on an insanity defense and to introduce expert witnesses to testify as to his mental state.

[85] The government's absolute right to discovery of documents, tangible objects, or examination and test reports in the defendant's possession adheres only if the defendant has requested to inspect similar items that the government has. FED. R. CRIM. P. 16(b). *But see* United States v. Nobles, 422 U.S. 225, 231 (1975) (prosecution may invoke the federal judiciary's inherent power to require production of witness statements that facilitate full disclosure of all relevant facts).

[86] United States v. Dardi, 330 F.2d 316, 336 (2d Cir.), *cert. denied* 379 U.S. 845 (1964); *see* 8 MOORE'S FEDERAL PRACTICE ¶ 16.08 (2d ed., Sept. 1979 rev.).

process to obtain *ex parte* discovery after the responsible government agency has sufficiently identified the violation and the violator to permit it to make a criminal reference.

The agency's recommendation that criminal proceedings be brought is a significant and objective milestone. It is a line of demarcation at which the government officially frames charges against identified individuals.[87] Further development of the case through compulsory process after such identification is properly stamped as the development of evidence to prove such charges at trial. Permitting the government to use compulsory process for this purpose circumvents the Federal Rules of Criminal Procedure. The decision in *LaSalle* rightly prohibits the use of agency process after a criminal reference.

Significantly, the Court also warns:

> We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service *merely would like to gather additional evidence for the prosecution.* Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the government to expand its criminal discovery rights.[88]

The quoted passage is potentially very significant for two reasons. First, it makes clear that courts must be prepared to determine when an administrative investigation has strayed beyond generalized fact gathering and become a process of developing evidence to prove a case. Second, it implicitly authorizes the discovery that a defendant will need in order to show that an investigation has exceeded its proper bounds. Circuit courts construing *LaSalle* indicate that discovery will be permitted upon a preliminary showing of an unexplained delay of a tax investigation coupled with communications between the IRS agents and the FBI or other Justice Department representatives.[89] To make the showing of delay referred to in

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[87] Courts recognize the SEC's distinction between formal and informal references and the fact that informal investigative materials may be disclosed to the United States Attorney without official authorization. *See* United States v. Fields, 592 F.2d 638 (2d Cir. 1978). The SEC recently has taken steps to blur the line separating the government's investigatory and accusatory functions in the area of parallel administrative and criminal investigations. *See* Securities Act Release No. 6111, (Aug. 23, 1979) *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,191 (announcing SEC amendments to its regulations which, among other things, permit SEC officials to "discuss non-public investigations with officials of other governmental agencies and self-regulatory organizations."). *See also* 17 C.F.R. § 202.5(b) (1979).

[88] 437 U.S. at 316-17 (emphasis added).

[89] *See, e.g.*, United States v. Chase Manhattan Bank, 598 F.2d 321 (2d Cir. 1979); United States v. Genser, 595 F.2d 146 (3d Cir. 1979). *Cf.* United States v. Genser, 602 F.2d 69 (3d Cir. 1979) (IRS "institutional commitment to recommend proscution" does not invalidate IRS summons where summon had legitimate civil purpose); United States v. Chemical Bank, 593 F.2d 451 (2d Cir. 1979) (validity of IRS summons upheld where recommendation of

LaSalle, a defendant should have a right to examine through discovery a full transcript of all of the testimony compelled by subpoena during the agency investigation.[90] Relevant agency personnel should be subject to deposition if the transcript suggests a basis for believing that there may have been impermissible delay.[91] Relief for a demonstrated misuse of the agency investigatory powers should include suppression of the evidence it generates.[92]

The *LaSalle* Court's recognition of the unfairness of using the agency investigation for pre-trial discovery leads to the inescapable conclusion that the same one-sided discovery ought not be sanctioned in the guise of a grand jury investigation. The harm to the defendant is the same in each case. The potential defendant to a charge being considered by a grand jury needs the same kind of effective cross-examination by his counsel as did the accused at the preliminary hearing in *Coleman v. Alabama.*[93] The First Circuit recognizes that a grand jury ought not be "decoyed into serving primarily as a discovery device for the government's trial preparation." In *United States v. Doe,*[94] Daniel Ellsberg contended that the government was using a grand jury sitting in the District of Massachusetts to gather evidence for the trial on an indictment returned against Ellsberg in the Central District of California. The First Circuit suggested that the California court's *in camera* review of transcripts of the Massachusetts proceeding might lead to a proscription against "the calling of a witness [at trial] whose testimony in Boston appeared to have been elicited chiefly for its contribution to the trial in California."[95]

The First Circuit's decision is significant because it evinces a judicial willingness, however tentative, to apply to a grand jury the kind of analysis developed by implication from *LaSalle* with respect to an administrative

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prosecution not delayed, civil purpose exists, and IRS participation in Justice Department coordinated "Task Force" does not alter civil character of IRS audit).

[90] Materials subpoenaed of the SEC for its investigation were made available to the defendants in a subsequent criminal proceeding stemming from that investigation in *In re* Nat'l Student Mktg. Litigation, [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,609 (D.D.C. 1974). Clearly, preventing abuse of the *ex parte* power of subpoena requires that a transcript be maintained of all testimony compelled by an agency or grand jury. There is normally a transcript of testimony compelled during SEC private investigations. *See* 17 C.F.R. § 203.6 (1979). Testimony compelled by IRS summons is not always transcribed. *See* 5 INTERNAL REVENUE MANUAL (CCH) § 9353(5). Federal Rule of Criminal Procedure 6(e) was amended, effective August 1, 1979, to require that all grand jury proceedings except the jurors' deliberations and vote, be recorded stenographically or by an electronic recording device. 47 U.S.L.W. 4488 (May 1, 1979).

[91] *See, e.g.,* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 316 n.17 (1978).

[92] United States v. Doe, 455 F.2d 1270, 1276 (1st Cir. 1972). *See also In re* Grand Jury Subpoenas, 581 F.2d 1103 (4th Cir. 1978); *In re* J.R. Simplot Co., 77-1 U.S. Tax Cas. (CCH) ¶ 9146 (9th Cir. 1976), *withdrawn as moot on other grounds,* 77-2 U.S. Tax Cas. ¶ 9511 (9th Cir. 1977).

[93] 399 U.S. 1 (1969); *see* text accompanying notes 63-65 *supra.*

[94] United States v. Doe, 455 F.2d 1270, 1276 (1st Cir. 1972).

[95] *Id.*

agency. A slightly less gingerly approach than the First Circuit adopted would make grand jury transcripts available to the defendant as a matter of right.[96] More defendants then would have a basis for attempting to show that the grand jury was used for pre-trial discovery.

Nevertheless, courts remain extremely reluctant to interfere with the grand jury and, like the *LaSalle* Court, permit the grand jury to engage in precisely the same discovery process denied to administrative agencies. The traditional basis for permitting a grand jury to do what an agency may not is the assertion that the grand jury consists of an independent body of citizens who serve as a buffer between the citizen and a baseless accusation. Yet this traditional model has been shown to be a fiction,[97] particularly in the case of complex economic crimes. The new rules governing the exchange of information between a grand jury and agency investigators actually are based upon the principle that there should be no barriers between them. Moreover, practice under Rule 6(e) is designed to insure that the lay grand jury's investigation of complex economic transactions is assisted by the investigation and analysis of agency employees. Finally, agencies frequently make the critical decision to press the government to bring a criminal case. In these circumstances, there is simply no justification for permitting the use of the grand jury as a vehicle to give the government free rein to engage in discovery of evidence to prove the charges already framed by the agency. Indeed, the fundamental unfairness to the identified defendant of permitting the government to engage in such *ex parte* discovery should preclude the use of such tactics.

Cross-examination in the grand jury room undoubtedly would be disruptive and time consuming. Multiple defendants could mean multiple lawyers. Objections to questions or lines of inquiry would require judicial resolution. Even accepting these contentions, however, do they justify permitting the government under the present system to ask objectionable questions, and denying the defendant the right of cross-examination? Mere disruption or consumption of time are inadequate answers. The Supreme Court has expressly rejected such considerations of expediency by according the target of a criminal investigation the right to counsel even though the target's exercise of his rights could impede the efficiency of the investigation.[98] Of course, the *Escobedo* Court dealt with the identified target of an investigation. Similarly, the instant proposal of a right to cross-examination is addressed to persons the government has identified as potential defendants to specific charges. Since the Supreme Court's recognition in *LaSalle* that courts will determine the point at which an investigation crosses the line between generalized inquiry and proof of particular

[96] The nature of the government's advantage in grand jury proceedings demands nothing less than permitting the target access to the government's discovery.

[97] *See* Hawkins v. Superior Court, 22 Cal.3d 584, 590, 586 P.2d 916, 919, 150 Cal. Rptr. 435, 438-39 (1978).

[98] Escobedo v. Illinois, 378 U.S. 478 (1964).

charges, there is no reason why that line should not be drawn to prevent misuse of the grand jury "as a discovery device for the government's trial preparation."[99]

The principles advanced herein are more conservative than they may initially seem. For one thing, they fall short of adopting the increasingly espoused proposal that the grand jury be abolished.[100] On the contrary, the grand jury should continue to be available to the prosecutor. Moreover, the foregoing proposals recognize the validity of *ex parte* testimony pursuant to subpoena when the grand jury is truly involved in a generalized investigation before the government identifies a charge against a particular defendant. Finally, the prosecution retains the power to conduct as much investigation in secret as it wishes, so long as it does not resort to the use of compulsory process. Once the government has identified the defendant, and wishes to use compulsory process, the principles set forth herein deprive the government of no more than the opportunity of proving its case behind the defendant's back.

The recent decision in *SEC v. Dresser Industries, Inc.*[101] illustrates the confusion that can be created by overlooking the fact that the real vice of parallel investigations lies in the harm done to the potential defendant when evidence to prove the charges against him is compelled by subpoena at proceedings from which he is excluded. The court held that the SEC could properly issue subpoenas to advance its investigation even though criminal charges on the same matter were already pending against the target of the SEC investigation. The court then went on, however, to hold that "the SEC may not provide the Justice Department with the fruits of its civil discovery gathered after the decision to prosecute."[102]

The court advanced two reasons for failing to follow the rule of *LaSalle*. First, the court said that the SEC and the Justice Department are not so "inherently intertwined" as the IRS and the Justice Department. This fanciful distinction ignores the fact that the SEC and the Justice Department are arms of a single government that have common objectives in the enforcement of the federal securities laws. The supposed barrier the court purported to find between the SEC and the Justice Department was no more than a justification for the fiction it was about to create by holding that the SEC could not provide the fruits of its discovery to the Justice Department. That barrier seems a fragile one, at best, since the fruits of the SEC's investigation become available to the world as soon as the SEC chooses to make them public.

The court's second ground for departing from *LaSalle* was the assertion that, while there is little public prejudice from delaying a civil tax proceed-

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[99] United States v. Doe, 455 F.2d 1270, 1276 (1st Cir. 1972).

[100] *See* Campbell, *Grand Jury Reform: Is it Possible?*, 4 LITIGATION 5 (1978).

[101] [Current] FED. SEC. L. REP. (CCH) ¶ 97,172 (D.C. Cir. 1979).

[102] *Id.* at 96,476. Although not necessary to the result, the *Dresser* court appeared to impose the limitation on providing the Justice Department with the information gathered by subpoenas addressed to third parties, as well as to the target.

ing until the conclusion of the criminal matter, there is a substantial public interest in swiftly remedying securities law violations. This distinction overlooks several facts. First, there is no need to halt the SEC investigation in order to protect the target's legitimate interests. Moreover, there is no public interest in any unnecessary delay since a needless proliferation of separate proceedings with separate limitations on the use of the evidence thereby obtained does nothing but create further litigation with respect to these artificial limitations.

General Motors REVISITED

The foregoing analysis provides a background for understanding and evaluating the *General Motors* case.[103] The Sixth Circuit *en banc* ultimately reversed a panel decision to terminate an allegedly improper grand jury investigation by holding that the order of the district court denying the requested relief was not appealable. Nevertheless, the facts of the much discussed *General Motors* case warrant particular attention both because of the intrinsic importance of the point the court considered, and because the concrete factual setting illustrates the practical interplay of the various factors discussed above.

During the course of a regular audit of General Motors' tax returns, the IRS questioned the accuracy of an inventory, undertaken by the company at the IRS's request, of so-called "expense items," meaning production materials, such as spare parts for machinery, that do not become a part of the finished product. General Motors contended that IRS agents used abusive tactics in dealing with its employees during visits to its plants to test the accuracy of the inventory.[104]

The IRS stopped its regular audit and brought in Revenue Service intelligence agents to determine whether General Motors employees had falsified the inventory. After the company objected to certain IRS requests for the production of documents, Meno Piliaris, an IRS regional staff attorney, prepared a recommendation that a grand jury investigation be instituted. The recommendation, which was forwarded to the Department of Justice by the Regional Counsel, stated that, at an appropriate time, the IRS would seek an order authorizing disclosure to the Revenue Service of the information developed by the grand jury. Piliaris participated in developing the IRS's plan for handling the General Motors matter in coordination with the grand jury proceedings.[105] Mr. Piliaris was designated by the Department of Justice as a Special Attorney for the United States empowered to assist in conducting grand jury proceedings.[106] The grand jury then

[103] *In re* April 1977 Grand Jury Subpoenas (General Motors Corp. v. United States), 584 F.2d 1366 (6th Cir. 1978) (vacating on rehearing *en banc* 573 F.2d 936 (6th Cir. 1978)).

[104] 573 F.2d at 938.

[105] *Id.*

[106] *See* 28 U.S.C. § 515(a) (1976) (authorizing the appointment of special Attorneys for the United States).

served subpoenas on the company and its employees.

General Motors moved for an order disqualifying Piliaris from participating in grand jury proceedings or scrutinizing grand jury materials. The district court denied the motion, but certified its denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). An administrative panel of the Sixth Circuit Court of Appeals granted leave to appeal.[107]

Judge Weick wrote an opinion for the majority of the panel to which the appeal was assigned, and cited *Wood v. Georgia*[108] for the traditional principle that the grand jury serves as a buffer of citizens who act as security against hasty, malicious and oppressive prosecutions. The panel majority held that Piliaris' interest in obtaining an indictment, evidenced by his prior participation in the IRS investigation, was at odds with the principles enunciated in *Woods v. Georgia* and tainted his connection with the grand jury proceedings with the appearance of a conflict of interest. Accordingly, the court reversed the denial of the motion to disqualify and remanded with instructions to terminate the grand jury investigation as invalid.[109]

On rehearing *en banc* the court of appeals held that the denial of the motion to disqualify was not reviewable under section 1292(b) because the proceedings below were not a "civil action" within the meaning of that statute.[110] Judge Weick filed a heated dissent, calling the matter "one of the most important cases ever to be presented to an appellate court for review," and reiterating his view that Mr. Piliaris was disqualified by reason of a conflict of interest.

Finding a conflict of interest might have made sense if Mr. Piliaris had been assigned to serve as a grand juror with at last a theoretical duty to act as a citizen buffer against a zealous prosecutor. Yet Mr. Piliaris was appointed to be a prosecutor, not a grand juror; an attorney presenting the government's case, and not a judge of it. His client was the United States, as it was when he recommended on behalf of the Internal Revenue Service that the grand jury proceedings be instituted. As noted above, a realistic analysis must take into account the fact that employees of an administrative agency and prosecutors are all agents of the United States. Judge Meritt's dissent from the panel decision aptly observed that "[t]here is no conflict of interest between the Department of Justice and the Internal

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[107] The administrative panel's action was necessary because a notice of appeal from a final order had been dismissed.

[108] 370 U.S. 375 (1962).

[109] Judge Merrit dissented in the *General Motors* case, believing that no conflict of interest arose when an administrative agent participates in a criminal investigation stemming from his prior work. 573 F.2d at 945-49.

[110] In addition to asserting that the denial of the motion to disqualify was reviewable under 18 U.S.C. § 1292(b), petitioner in *General Motors* had sought mandamus to disqualify Piliaris on the basis of conflict of interest. Judges Edwards and Lively, concurring in the court's *en banc* judgment, also noted that mandamus was inappropriate since there existed no conflict of interest. *See* 573 F.2d at 947 (Merritt, J., dissenting).

Revenue Service."[111] Mr. Piliaris had no greater conflict than any prosecutor who participates in grand jury proceedings he instituted, or who tries a case that he presented to a grand jury.

The disqualification theory is an unsound basis for quarreling with the use of agency employees to assist the grand jury.[112] None of the many opinions in *General Motors* considered whether the real vice in the conduct of grand jury proceedings with the aid of agency personnel is not the presence of the agency personnel but the exclusion of the defendant. Once the agency develops its case sufficiently to permit a bona fide criminal reference, the proceedings of the grand jury should be presumptively regarded as discovery designed to gather proof.[113] The harm to the defendant is not that the discovery process is aided by the agency. Agencies often perform that assistance function, pursuant to statutory and administrative authority.[114] What harms the defendant is the conduct, in his absence, of a mini-trial of the agency recommendation. It is submitted that, for the reasons stated herein, such harm constitutes a denial of due process of law.

CONCLUSION

The basis for the traditional objection to exchanges of information between parallel civil and criminal investigations of the same conduct is an assumption that knowledge possessed by one part of the government should be kept secret from another part. Congress and the courts have been unwilling to adhere to that assumption in the case of complex economic crimes that are often investigated by agency personnel with particular expertise in the area under investigation. In these circumstances, Congress and the courts have permitted a broad latitude of interchange of information between the grand jury and agency investigations. There is nothing inherently improper in such exchanges.

What has been overlooked, however, is that investigations into complex economic conduct have themselves become more complex. These extended investigations have strayed beyond the mere formulation of a charge against the defendant and become, in effect, pre-trial discovery of evidence

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[111] 573 F.2d at 947.

[112] A number of courts recently have held that the use of agency personnel to assist a grand jury cannot be attacked on a disqualification theory. *See* United States v. Wencke, No. 78-2346 (9th Cir. Aug. 31, 1979), United States v. Birdman, 602 F.2d 547 (3d Cir. 1979); *In re* Perlin, 589 F.2d 260 (7th Cir. 1978); United States v. Dondich, 460 F. Supp. 849 (N.D. Cal. 1978), *appeals docketed,* No. 79-1360 (9th Cir. May 25, 1979), No. 79-1399 (9th Cir. June 12, 1979).

[113] An agency's bad faith recommendation that criminal proceedings be instituted raises serious issues of vindictive or retaliatory prosecution. *See* Blackledge v. Perry, 417 U.S. 21 (1974). In *Blackledge* the authorities charged a criminal defendant with a more serious offense, after the accused had exercised his right to request a trial *de novo* in a court of general jurisdiction following a misdemeanor conviction. The Court held the official practice unconstitutional, noting that the opportunity presented for official vindictiveness might deter a defendant from exercising his rights.

[114] *See* text accompanying notes 24-46 *supra.*

to prove those charges. According to the argument developed herein, due process of law requires that once the defendant has been indentified, he be permitted to participate in further proceedings at which compulsory process is used to develop evidence against him.

This principle is the same whether the proceeding at issue is the traditional grand jury investigation of violent crime or a set of parallel administrative and grand jury investigations into a complex economic crime. However, since it appears likely that the misuse of *ex parte* subpoena power is more aggravated in the case of investigations into complex economic crimes, and since the record created by those investigations provides a clearer basis for demonstrating the abuse, judicial decisions in this general area are more likely to arise in the context of a parallel investigation of economic crime. Rightly or wrongly, the Supreme Court's decision in *LaSalle* suggests that the Court will be more sympathetic to limitations on the use of any agency's subpoena power than to limitations on the subpoena power of the grand jury. Failure to alleviate the unfairness described in this article is likely to weaken the ability of the grand jury to survive a period of increasing attacks on its procedures.