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Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process

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Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process

Graham Hughes[*]

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I. INTRODUCTION

Litigation depends on information. In the last few decades, discovery in civil cases has been dramatically extended in order to move toward a position in which litigants' files are open to other parties with very few restrictions.[1] This movement in civil cases has been relatively smooth, for its merits in terms of economy and efficiency can be fortified by pointing to its even-handed mutuality and reciprocity. In criminal cases, by contrast, courts at one time thought that any considerable expansion in discovery must be rejected because the constraints of the Fifth Amendment's self-incrimination clause would bar the exercise of compulsion against the defendant,[2] while the unilateral imposition of greater discovery duties on the government would upset the adversarial equipoise. A narrower understanding of the protections afforded by the Fifth Amendment has dulled this objection, and discovery in criminal cases consequently has been substantially broadened.[3] The scope of civil discovery

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1. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The Federal Rules of Civil Procedure now permit extensive discovery in civil cases. Rule 26(b) provides that discovery must encompass "any matter not privileged, which is relevant to the subject matter . . . if the information sought appears reasonably calculated to lead te the discovery of admissible evidence." F.R.C.P. 26(b)(1). This exchange of information is effected by means of interrogatories, depositions, and the compelled production of documents. For example, under F.R.C.P. 34(a), a party "may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, any designated documents." F.R.C.P. 34(a).

2. Critics perceived a Fifth Amendment problem in that the defendant would be compelled to divulge objects, documents, or reports that might be incriminating or lead to incriminating material, or might indirectly disclose a potential defense, the scrutiny and investigation of which might lead the prosecution to incriminating material. The development of the law on this issue is discussed fully with references to the literature and analysis of the leading cases in Wayne R. LaFave and Jerold H. Israel, 2 *Criminal Procedure* § 19.3-19.4 at 474-531 (West, 2d ed. 1984).

3. The turning point was *Williams v. Florida*, 399 U.S. 78 (1970), in which the Court held that a Florida rule requiring a defendant to give notice of an alibi defense in advance of trial was not constitutionally objectionable. Rule 16 of the Federal Rules of Criminal Procedure now occupies a centrist position as to pretrial discovery in criminal cases; the rule is more advanced than some states' rules but not as advanced as others. The Rule allows pretrial discovery by the defense of statements made by the defendant under certain circumstances; the defendant's prior criminal record; and documents, objects, and reports of examinations and tests that are material to the preparation of the defense or will be used by the government as evidence at trial. F.R.Cr.P. 16(a). Statements by and the identity of witnesses generally are not subject to disclosure. The government generally has a reciprocal right to the same categories of pretrial discovery, which is triggered by a demand for that discovery by the defendant. An exception provides that, with respect to documents, objects, and reports of examinations and tests, the government may not compel defense disclosure solely on the ground that the objects would be material to the preparation of the prosecution's case, but only when the defense intends to introduce the material in its case in chief. F.R.Cr.P. 16(b).

remains considerably wider than discovery in criminal cases, but the gap has been narrowed.[4]

Discovery is the acquisition of information by one party from another after an issue has been joined in litigation. Discovery rules govern the flow of information between parties formally defined as adversaries and represented by counsel. But access to information is also vital in pre-litigation settings.[5] In the criminal context, the government may suspect that a crime has been or continues to be committed; outside the criminal area, government may suspect that regulations are being violated in a way that could lead to a civil penalty or some other administrative sanction. Or government simply may wish to probe a regulated activity in order te review the propriety of operations in that area. What powers should government have to investigate a suspicion or merely to probe at random before litigation is launched or an administrative sanction imposed? Is there or should there be a counterpart in this context to the civil-criminal dichotomy that has long dominated and still influences the discovery process?

If the initial scent is a criminal one, government may follow two classical paths. The first possibility, procuring a search warrant, is restricted by the Fourth Amendment's requirement of showing probable cause before a magistrate.[6] A search warrant thus is unsuitable in cases of mere suspicion. Furthermore, by its nature, a warrant is confined to the seizure of goods, effects, and papers and cannot be used to compel testimony.[7] In addition, a search warrant may seem too harsh and intrusive a means of obtaining information from third parties (not themselves targets of the investigation) who may be willing to surrender documents or objects on demand.

4. The difference in scope between criminal and civil discovery remains a source of tension and difficulty when the government contemplates or brings parallel civil and criminal proceedings against a party. The sharpness of this contrast 15 years ago is brought out in Robert B. Mitchell, Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 Tul. L. Rev. 769 (1978). While criminal discovery has broadened in the last two decades, problems still remain in parallel proceedings. For a useful overview of these special problems, including a bibliography, see 6 BNA Crim. Prac. Man. 801 (1992).

5. See Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* 14-18 (Yale U., 1985) (presenting the struggle to obtain and control information as the principal factor in the preparation of complex white-cellar criminal cases).

6. Warrantless searches are proper when made as an incident to a valid arrest, *United States v. Robinson*, 414 U.S. 218, 235 (1973), or in exigent situations, *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979). The latter exception covers a number of vehicle searches. *Sanders*, 442 U.S. at 760 n.7, 761. Even so, police must have probable cause. However, when the state plans an investigatory search for evidence, it generally must obtain a warrant from a magistrate.

7. However, the special warrant procedure for electronic surveillance, 18 U.S.C. §§ 2510-2521 (1988), may yield crucial evidence including admissions from a party who turns out to be the defendant in a criminal case.

In federal criminal cases, these problems with search warrants are somewhat alleviated by the presence of an alternative procedure—the use of a grand jury subpoena to compel either testimony or the production of documents. Grand jury subpoenas need not be supported by probable cause;[8] they may be used to compel testimony as well as the production of documents;[9] and they present a polite and discreet way of obtaining documents from third parties. In the federal jurisdiction in particular, the grand jury has become an indispensable engine of information-gathering and case-building in complex criminal cases.

However, the grand jury has always been somewhat embarrassingly at odds with the often-proclaimed self-image of American criminal procedure as an adversarial system. With its direction of compulsory process to the citizen who, unassisted by counsel,[10] faces a conviction for contempt if she does not answer questions under oath in an inquisitorial setting, the grand jury stands out as the "peculiar institution" of American criminal procedure.[11] Perhaps because of sensitivity about this unabashedly inquisitorial aspect, the grand jury has always been treated with strong ambivalence. On the one hand, its historical freedom to begin an inquiry based on mere hearsay, rumor, or even whim has been stoutly

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8. This rule is based on the Supreme Court's refusal to equate grand jury subpoenas and their consequences with the searches and seizures that are the subject of the Fourth Amendment. See *United States v. Dionisio*, 410 U.S. 1 (1973), in which the grand jury had subpoenaed 20 persons, seeking to cempel them to give voice samples that could be compared with a recording. The state could not show probable cause with respect to the individuals subpoenaed. Reversing the Court of Appeals for the Seventh Circuit, the Supreme Court found no impropriety in the subpoenas, holding that compulsion to respond to a grand jury subpoena does not amount to a Fourth Amendment "seizure." ld. at 9. The Court observed, "Since neither the summons to appear before the grand jury, nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of 'reasonableness' imposed by the Court of Appeals." Id. at 15.

9. The subpoena for testimony is called a *subpoena ad testificandum*, while the subpoena to produce documents is termed a *subpoena duces tecum*.

10. "A witness 'before a grand jury cannot insist, as a mattor of censtitutional right, on being represented by his counsel'. . . . Under settled principles the witness may not insist upon the presence of his attorney in the grand jury room." *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (citation omitted). The federal practice, followed in some states, permits the witness to have counsel in an anteroom and to leave the grand jury room to consult with counsel. Id, Some states permit certain witnesses to have counsel present in the grand jury room. See LaFave and Israel, 1 *Criminal Procedure* § 8.13 at 705 (citod in note 2).

11. "Peculiar institution" was the euphemistic tern used te describe slavery in the antebellum South. The term's exact origin is uncertain, although John C. Calhoun referred to the "peculiar domestick institution" in 1830. See 5 *Dictionary of American History* 241 (Scribner's Sons, 1976).

defended and upheld in modern cases.[12] In the same vein, successful challenges to its jurisdiction or to the evidence it may receive are extremely rare.[13]

In compensation, however, the sweeping nature of grand jury powers has led to two crucial limitations. First, the breadth of the grand jury's range of inquiry and powers of compulsion has been viewed as justifiable only in the context of a criminal investigation. Consequently, the grand jury may not initiate compulsory process for any purpose other than to pursue an investigation into criminal conduct. It must not be used as a pre-litigation discovery engine for civil matters.[14]

The second, and related, limitation stems from the traditional insistence on secrecy with respect to grand jury proceedings. The fruits of the grand jury's subpoenas (whether documents or testimony) are not automatically open for inspection by all government officers or agencies. Both because they are records of the court[15] and because the grand jury's proper function is narrowly perceived as the investigation of criminality, a presumption of secrecy applies. Thus, inspection of grand jury materials by other government officers is hedged about

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12. "The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." *Dionisio*, 410 U.S. at 15.

13. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." Id. at 16. In *United States v. Calandra*, 414 U.S. 338 (1974), the respondent refused to answer grand jury questions on the ground that they were based on the fruits of an illegal search and seizure. The Court held that this objection could not be interposed by a grand jury witness. A witness "'is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise for this is no concern of his.'" Id. at 345 (quoting *Blair v. United States*, 250 U.S. 273, 281 (1919)). This approach applies even when the witness's objection has a constitutional basis, as with the objection in *Calandra*, which rested on the Fourth Amendment exclusionary rule. While the grand jury itself may not violate a witness's constitutional rights, it need not conduct an exclusionary rule inquiry into the possibility of a prior violation. *Calandra*, 414 U.S. at 347-54.

14. The Supreme Court expressed this principle in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), in which the Court stated that use of the grand jury's subpoena power for the purpose of adducing evidence to be used in civil litigation would amount to "flouting the policy of the law." Id. at 683. This policy, among others, underlies the detailed rules about grand jury secrecy contained in F.R.Cr.P. 6(e), which is discussed at length in notes 148-49 and accompanying text.

15. In *Procter & Gamble*, Justice Whittaker in his concurrence stated:

> The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigaters, nor are they entitled to possession of them in such a case. Instead those documents are records of the court. And it seems clear that . . . their secrecy, which the law wisely provides, may be as fully violated by disclosure to and use by the government counsel, agents and investigators as by the defendants' counsel in such a civil suit.

Procter & Gamble, 356 U.S. at 684-85 (Whittaker, J., concurring).

with restrictions and may only be obtained on application to the court.[16]

These historical developments created a doctrine that, but for the particular course of Anglo-American legal history, might appear curious and paradoxical. Before litigation was initiated, criminal investigators had available in the grand jury a virtually untrammeled compulsory process, whereas in civil mattors, even those in which the government would be the plaintiff, compulsory process for investigatory purposes did not exist at common law. By contrast, once litigation was joined, civil discovery procedures were comparatively broad while criminal discovery was quite narrow.

If left with no other avenues of investigation, this restriction of compulsory process to the grand jury as a special tool of criminal investigation would have intolerably inhibited modern regulatory government. Particularly in the federal sphere, departments, agencies, and commissions have proliferated, each charged with regulating and supervising large and vital sectors of commercial life. The legislation that creates or supports the administrative state increasingly defines numerous specific breaches of regulations (or any breach of regulations)[17] as a criminal offense or, in the alternative or incrementally, imposes a civil penalty or administrative sanction for breach.[18] In this way the historic rule-making function of administrative agencies has been supplemented by a penalty-setting law-enforcement function, which in turn has led to a massive strengthening of these agencies' investigative role and capacity.

If all breaches of regulation were viewed strictly in criminal terms, it would be impossible for United States Attorneys, working with limited resources through the cumbersome mechanism of grand

16. F.R.Cr.P. 6(e). See notes 148-49 and accompanying text.

17. "It has become the common statutory pattern in the United States for a statute establishing an administrative agency to provide that any willful violation of the rules adopted by the agency constitutes a federal felony." John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal Law Models—And What Can Be Done About It*, 101 Yale L. J. 1875, 1880 (1992). Professor Coffee cites as examples the Securities Exchange Act of 1934, § 32(a), 15 U.S.C. § 78ff (1988); the Securities Act of 1933, § 24, 15 U.S.C. § 77x (1988); the Investment Company Act of 1940, § 49, 15 U.S.C. § 80a-48 (1988); and the Investment Advisers Act of 1940, § 217, 15 U.S.C. § 80b-17 (1988).

18. For a valuable discussion of this phenomenon, and the concomitant blurring of the distinctions between criminal and civil proceedings, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795 (1992). For a list of federal statutes and regulations that impose criminal as well as civil penalties for violation of regulatory provisions, see Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 Va. L. Rev. 1251, 1278 n.145 (1990).

juries, to make substantial inroads into the mountain of referrals they might receive from agencies. Even if grand jury investigation were made possible by a very large increase in the number of prosecutors and operating grand juries, such a path would often be inexpedient, because pursuing a criminal prosecution may not be the preferable course of action, even in the case of a technical violation that amounts to a crime. The statutory alternative of a civil penalty often will be more attractive. The civil suit or administrative procedure may afford a sanction virtually identical to the criminal penalty; in addition, in civil or administrative proceedings the burden of proof is less onerous, discovery rules are more favorable, and the party may submit to the penalty rather than contest it, as is likely in a criminal prosecution.[19]

If civil penalties have become the preferred sanction in many regulatory cases, these penalties now play an important deterrent and perhaps punitive role that, in earlier times, was the exclusive province of the criminal law.[20] Their invocation and their impact often may be hard to distinguish from the imposition of a criminal sanction.[21] But once we recognize this high degree of fungibility between civil and criminal penalties, the reservation of the grand jury's compulsory process for purely criminal investigations becomes difficult to justify. If no other process were provided, the stark severity of this restriction would leave a large area of regulatory and punitive authority deprived of necessary access to information indispensable for investigation.

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19. Kenneth Mann suggests that:

> [p]unitive civil sanctions are replacing a significant part of the criminal law in critical areas of law enforcement, particularly in white-collar and drug prosecutions, because they carry tremendous punitive power. Furthermore, since they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions. As a result, the jurisprudence of sanctions is experiencing a dramatic shift.

Mann, 101 Yale L. J. at 1798 (cited in note 18).

20. The punitive nature of many civil penalties may lead to the conclusion that at least some of the guarantees for defendants associated with the criminal process must be observed. In *United States v. Halper*, 490 U.S. 435 (1989), the Court held that the double jeopardy clause must be applied to a civil proceeding under the False Claims Act, 31 U.S.C. § 3729(a) (1988), which resulted in a large, punitive fine and was brought after a previous criminal conviction based on the same conduct. See Mann, 101 Yale L. J. at 1840-43 (cited in note 18); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 Hastings L. J. 1325 (1991); Glickman, Note, 76 Va. L. Rev. 1251 (cited in note 18); Elizabeth S. Jahncke, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. Rev. 112 (1991).

21. For example, under the Financial Institutions Reform, Recovery and Enforcement Act (FIRRE) of 1989, the civil penalty for violation of certain sections of the banking laws can be as much as one million dollars, and continuing violations are punishable by fines as much as one million dollars a day, with a maximum fine of five million dollars. The penalty may be higher if any person derives pecuniary gain from the violation or imposes pecuniary loss on another. 12 U.S.C. § 1833a(b) (1988). The penalty is enforced by a civil action brought by the Attorney General, who has full administrative subpoena power in connection with investigations in this area. 12 U.S.C. § 1833a(d), (f).

The law abhors such a vacuum. Over the last few decades, the response has been to fill this gap by statute, through the repeated creation of powers, conferred on agencies and departments, to make a civil investigative demand—in effect the vesting of subpoena power for civil investigatory purposes in administrative officials.[22]

As a result, the grand jury is no longer a unique body vested virtually exclusively with the awesome power of the investigatory subpoena. Compulsory process powers are now rife in many agencies of government. This dramatic development gives rise to important questions about the relationship between this burgeoning field of civil process and the traditional grand jury subpoena for the investigation of crime. Most fundamentally, it directs us to ask what, generally, justifies the use of compulsory process by government. When is such process appropriate outside the classical case of a criminal investigation?

We must also ask whether any justifiable principles or policies lead to the conclusion that the fruits of criminal investigations generally should not be available for the pursuit of civil remedies, or conversely that the fruits of a civil investigation should not be available for criminal prosecutions. Are we or should we be moving toward a more integrated theory of compulsory process, in which information is shared freely between government agencies, whether their interest ultimately may be in criminal prosecution or civil or administrative sanctions? Is there any danger of abuse or oppression when criminal and civil investigations become mixed? More particularly, can we perceive any abuses that rise to the level of constitutional violations? This Article will discuss some of these questions.

II. JUSTIFICATIONS OF COMPULSORY PROCESS

Civil penalties are, for the most part, directed against corporations or other commercial entities in the context of regulation by a government agency. The sanction usually consists of a financial penalty, an order to desist from certain activity, or a barring of the entity from dealings with government. Because a commercial entity cannot be imprisoned, and because these civil sanctions are sometimes very damaging and even destructive, they often appear at least as

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22. See Part V.

punitive as any sanction that could be imposed on the entity through a criminal prosecution.[23] As noted above, this development surprisingly has not been accompanied by the rapid growth of compulsory process in civil and administrative proceedings, creating an uneasy juxtaposition with the traditional criminal investigation subpoena issued by the grand jury. Resolution of the tension depends on the development of a general theory of compulsory process and persuasive rationales for justifying or curbing its use.

Subjection to compulsory process is without doubt a substantial intrusion into privacy and autonomy. It demands the disgorging of papers or the revelation of information that the subject otherwise would often choose not to disclose. To be generally free from such compulsion is surely one of the marks of a liberal and humane society. Just as surely, public necessity can displace this liberty. The grand jury subpoena provides the classic example.

The exercise of compulsory process by the grand jury is justifiable in two ways. First and foremost, society has a great interest in the investigation and prosecution of crime. We can certainly imagine a society that operates without compulsory process even in criminal investigation. In England and Wales, much inquiry into criminal activity must proceed without the powerful aids of a grand jury and a general, criminal-investigation subpoena power vested in magistrates or prosecutors.[24] Perhaps the volume of crime, the high degree of mobility, and a greater reluctance by citizens to cooperate with the police make the use of compulsory process in the investigation of serious crimes a more urgent need in the United States than in England. For whatever reason, the grand jury subpoena, modified by the constitutionally mandated privilege against self-incrimination, has become deeply entrenched in our criminal procedure.[25]

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23. Civil and criminal actions may be brought consecutively or concurrently. Such "parallel proceedings" force the defendant to make a complex series of tactical decisions that have been likened to "playing multiple games of chess at the same time." Brand, *Problems and Strategies for Handling Parallel Proceedings*, in *Handling Complex Cases* 453, 469 (Georgetown U. L. Ctr., 1990).

24. England and Wales finally eliminated the grand jury in 1948; the jury had been little used except in a purely formal capacity since 1933. Even when the jury was used to indict, it does not appear that it was ever employed as an elaborate mechanism of investigation. See Alfred M. Nittle and Martin H. Belsky, *Grand Jury Indictments and Investigation—The British Experience*, reprinted in *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary*, H.R. Rep. No. 94, 95th Cong., 1st Sess. 1575 (1977).

25. This is not to say that there is any lack of criticism of the grand jury. Many states do not use grand juries for charging purposes or for investigation. Jerold H. Israel, *Grand Jury*, in Sanford H. Kadish, ed., 2 *Encyclopedia of Crime and Justice* 810, 814-15 (Free Press, 1983). However, in the federal system, in which investigation into highly complex crimes predominates,

A second justification resides in the traditional perception of the grand jury as a citizen corps in which, as with the trial jury, peerage and communal participation are positive virtues that endow the process with a special legitimacy.[26] However much critics repeat that the grand jury is largely a creature of the prosecutor, that it in effect issues her subpoenas, listens to her witnesses, receives her explanation of the law, and most often is responsive to her tacit urging of an indictment,[27] nevertheless the grand jury occasionally asserts its independence and does not appear to have exhausted its store of good will as a democratic institution.

Neither of these justifying attributes applies to the civil investigative demand, especially when it encompasses compelled testimony and so is virtually coextensive with the historic powers of the grand jury. In the civil context, the same large sweep of power exists but, at least at the outset, the urgent necessity of an obviously criminal investigation and the participatory democratic aspect of the grand jury are lacking. Civil compulsory process thus calls for a somewhat different justification.

That justification stems largely from the concept of a special relationship with government. For example, those who engage in licensed activities receive a privilege from the state that is properly hedged with conditions that entail important waivers. Thus, enforcing the socially necessary system of licensing the drivers of motor vehicles would be impossible unless drivers must produce their licenses and registration papers on demand, assuming that the initial stop by the police is a legal one.[28] Modern perceptions of the dangers

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the investigative grand jury retains a conspicuous role. One critical survey of the grand jury concludes that it should be reformed rather than abolished and that, in any event, its subpoena power is indispensable for investigation and would have to be exercised by another organ (such as a prosecutor or a magistrate) if the grand jury were abolished. Marvin E. Frankel and Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 119 (Hill & Wang, 1977).

26. See *In re Groban*, 352 U.S. 330, 347 (1957) (Black, J., dissenting) (stating that the grand jury has "no axes to grind and [is] not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer. . . . It would be very difficult for officers of the stato seriously to abuse or deceive a witness in the presence of the grand jury.").

27. On these matters, see generally Frankel and Naftalis, *The Grand Jury* (cited in note 25); Israel, *Grand Jury*, in Kadish, ed., 2 *Encyclopedia of Crime and Justice* at 810 (cited in note 25).

28. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court held that a random vehicle stop, for no reason other than a desire to examine the driver's license and registration, violates the Fourth Amendment, since it is not based on any articulable suspicion and involves a suspicious reliance on police discretion. However, dicta in *Prouse* suggest that, when the initial step is based on articulable suspicion of some traffic violation or other offense, the police may ask to see the driver's license and registration. Id. at 661-63. Dicta in the case also suggest that a roadblock

of vehicular traffic require further waivers of customary rights and privileges, so that the state has the power to set up drunk-driving roadblocks[29] and, at least when based on articulable suspicion, to require submission to a blood-alcohol test with a refusal usually triggering the severe sanction of losing one's driver's license.[30] In this situation, of course, the purpose is avowedly to identify criminal behavior or the possibility of criminal behavior. However, even when criminal conduct is not as likely to be involved, as in the investigation of routine traffic accidents, reporting duties that could be viewed as extinguishing the privilege against self-incrimination nevertheless are validly imposed.[31]

Likewise, parties engaged in especially dangerous or socially sensitive activities (such as liquor retailers or operators of mines, gun shops, or automobile repair shops) may be subjected to administrative inspections or searches without probable cause and without warning.[32] The common thread in this context is that, by way of implicit contract, a citizen waives her privacy when she embarks on a closely regulated commercial activity.

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method, which eliminates reliance on police discretion, would be proper for license inspection even in the absence of articulable suspicion with respect to any particular vehicle. Id. at 663.

29. The Supreme Court approved this practice in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), provided that the method utilized has safeguards to minimize intrusiveness and to eliminate police discretion. Several scholars have found the case for allowing drunk-driving roadblocks unpersuasive. See James B. Jacobs and Nadine Stroessen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595 (1985).

30. The penalty of license suspension annexed to a refusal to take the test is constitutionally unobjectionable. *Mackey v. Montrym*, 443 U.S. 1 (1979). Indeed, the refusal to submit to a blood-alcohol test, after the police have articulable suspicion of drunkenness, may be admitted into evidence at a trial for drunk driving. In *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court held that such a practice does not violate the Fifth Amendment's privilege against self-incrimination since (1) under *Schmerber v. California*, 384 U.S. 757 (1966), a blood test does not amount to taking "testimony," and (2) the refusal to take the test is not compelled by the state. The Court further held that the Constitution does not require that the motorist be warned specifically of the adverse consequences of a refusal to submit to the test. Id. at 564-66.

31. In *California v. Byers*, 402 U.S. 424 (1971), the Court upheld, against a self-incrimination challenge, a California statute that required motorists involved in accidents to stop and provide their names and addresses. Commenting on *Byers*, the Court remarked in a later case that "the ability te invoke the privilege [against self-incrimination] may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatery requirement." *Baltimore City Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549, 557 (1990).

32. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor dealers); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mining companies); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers); *New York v. Burger*, 482 U.S. 691 (1987) (automobile junkyards). The government may inspect a "closely regulated" business without a warrant if the regulatory scheme is in aid of a substantial public interest, the warrantless inspections are necessary to further the regulatory aims, and the ordinance or statute authorizing the inspection provides reasonable restrictions on arbitrary action. *Burger*, 482 U.S. at 708-12.

This theme applies to many commercial activities that are conducted under governing statutes and codes of regulations that require the keeping of certain records. Such "required records," which are kept at the state's direction and for the state's regulatory purposes, can be subpoenaed routinely without even the possibility of asserting a privilege against self-incrimination.[33]

This body of law applying to licensed activities and to the keeping of required records provides a foundation for a wider principle of compulsory process applicable to all those who engage in regulated commercial activity. A decision to enter into a field of commercial activity that is validly regulated by government entails an implicit contract in which the private party agrees to observe standards and practices imposed by government. This arrangement would be hollow and unworkable if government could not effectively probe into questions of compliance and breach. One necessary corollary of the relationship is, therefore, that those who engage in these activities have implicitly contracted to open their books to the government and also have agreed to be examined as to the conduct of these activities, at least when government has some basis for conducting an inquiry.

In recent years, the need to enforce regulations has led to further contractions of privacy rights and the imposition of reporting obligations, not only on those engaged in special areas of commerce, but on members of the public generally. Such developments have been notable, for example, in the effort to trace the laundering of money received from illegal activities.[34] All these developments are linked by a common theme—the inability of government to enforce its regulatory or fiscal policies (often closely related to crime control) without wide powers to gather information from those whose activities it seeks to regulate and, indeed, at times even from the general public.

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33. *Shapiro v. United States*, 335 U.S. 1 (1948), held that a statute could properly require certain businesses to maintain records and make them available for inspection on request. The doctrine is discussed in Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. Chi. L. Rev. 6 (1986). The narrow required-records doctrine most importantly operates to nullify the privilege against self-incrimination; it also reveals a broader justification for a wide field of subpoena power in the nature of civil investigative demands, namely, public necessity. The self-incrimination privilege may be retained in other contexts, also justified by public necessity, in which compulsory process is exercised.

34. One of the earliest pieces of legislation, the Bank Secrecy Act of 1970, imposed an obligation on financial institutions to file Currency Transaction Reports with tho Internal Revenue Service on all cash transactions of more than $10,000. 31 U.S.C. § 5313 (1988). This provision later was strengthened to require, in addition, that all persons engaged in a trade or business who receive more than $10,000 in cash in a single transaction or related transactions must file a form with the IRS within 15 days. 26 U.S.C. § 6050I (1988).

To achieve governmental regulatory aims to the fullest extent, even extensive requirements of recordkeeping (backed by the subpoena duces tecum) or requirements to report certain transactions have become inadequate. Crucial information with respect to regulatory violations (which, as noted above, very often also may amount to criminal offenses) may be in the hands or minds of those who are not the custodians of required records and who do not have any *sua sponte* reporting duties. Unlocking the storehouse of information held by these third parties, perhaps the employees of a commercial entity that is being investigated, may be the only way to uncover serious irregularities. In this context, the strongest form of civil compulsory process—the power to compel testimony—is needed and has often been granted by statute.

This case most closely resembles the traditional grand jury subpoena for testimony, for it cannot be justified by pointing to any special relationship between the witness and the government. Here, as with the grand jury, the only special characteristic of the witness is that she may have pertinent information that would be helpful to government in its inquiries. But if the inquiring agency is a civil one, and no criminal prosecution is contemplated initially, what can be the justifications for stretching the subpoena power so far?

As with the grand jury subpoena in a criminal investigation, the justifications must rest on the strength of the public interest involved. First, the administrative, regulatory nature of moderu government serves goals that are often as urgent as the traditional special importance perceived in criminal investigations. Health, environmental pollution, commercial probity, and protection of the public from abuse of contractual relations with the government are examples of areas in which the public interest is scarcely any less potent than in those sectors protected by traditional criminal law prohibitions. Second, the increasing attachment of criminal liability for conduct that breaches administrative regulations makes a criminal prosecution at least conceivable in most cases. Third, civil and administrative penalties in themselves, even in the absence of express criminal offenses, often are so punitive and so deterrent in their aim and impact that any differentiation between civil and criminal sanctions, and the accompanying investigatory processes, becomes less and less convincing.

When the breach of administrative regulation is made a criminal offense, the offense often will be governed by strict liability, in which traditional criminal concepts of mens rea have been largely discarded. In this way conduct not only often constitutes both a civil

violation and a criminal offense, but the elements of proof that would establish civil or administrative liability usually amount to the same case that would prove criminality.

The result is that, in many cases, the distinction between civil and criminal proceedings has less and less to do with distinctive social goals or even with the elements that must be proved, and more and more to do with the procedural forms that must be followed. As noted, breaches of regulatory schemes are for these reasons increasingly likely to lead to a cluster of parallel civil and criminal investigations and legal processes.[35] This striking development has called into question the restriction of constitutional guarantees to procedures that are initiated by traditional criminal forms of charging, which depend on statutory classifications that appear increasingly more formal and less functional.[36]

For the same reasons, these developments also call for scrutiny of traditional shibboleths about abuse of process. Whether people are abused by misuse of process is a question that should be decided in light of modern realities and not by appeal to historically rooted slogans and forms. If a strong case can be made for the propriety of compulsory process in the civil investigation of regulatory violations and the frequency of overlap between such civil investigations and the potential criminal prosecution, then the historical assertion of the distinctness of grand jury process as well as the concomitant secrecy provisions attached to grand jury proceedings are placed seriously in doubt.

35. One example arises from the investigation of the failure of the Lincoln Savings and Loan Association. This event led to the following proceedings: (1) numerous civil lawsuits brought by bondholders of the parent company, (2) a federal civil fraud action brought by investors, (3) two civil actions brought by the stato of California, (4) a federal civil suit brought by the Resolution Trust Corporation, (5) a cease and desist action brought by the Office of Thrift Supervision, (6) a California state criminal prosecution, (7) a federal criminal investigation, (8) a Securities and Exchange Commission investigation, and (9) various congressional investigations. 6 BNA Crim. Prac. Man. at 801 (citation omitted) (cited in ncte 4).

36. In a decision of far-reaching significance, the Supreme Court in *United States v. Halper*, 490 U.S. 435 (1989), held that the penalty sought in a civil suit that followed a criminal prosecution for the same conduct violated the Double Jeopardy Clause when the civil penalty would be grossly in excess of any loss sustained by the government or any collection expense incurred by the government and thus could only be seen as a purely punitive and deterrent penalty. Id. at 440-46. In *Halper*, a case arising out of Medicare fraud, the government lost $585; the defendant was first sentenced to two years imprisonment in a criminal prosecution. Id. at 437. The government later sought $130,000 as a fine in a civil false claims suit. See generally Glickman, Note, 76 Va. L. Rev. 1251 (cited in note 18).

One federal appeals court has held that *Halper* has no application in cases of civil forfeiture preceded by a criminal conviction. *United States v. Cullen*, 979 F.2d 992, 995 (4th Cir. 1992).

III. CIVIL INVESTIGATIVE DEMANDS

Subpoena power vested in civil agencies has accumulated in recent decades and is now widespread.[37] In recent years, the law pertaining to judicial scrutiny of these civil investigative demands[38] has been patterned on older principles applicable to the grand jury and, indeed, now almost exactly mirrors the standards for challenging a grand jury subpoena. This development attests to the already considerable assimilation of civil and criminal compulsory process.

By contrast, the early cases on administrative subpoenas displayed judicial reluctance to grant broad enforcement.[39] In *FTC v. American Tobacco Co.*,[40] the Court in 1924 held that agencies could not demand documents merely to inspect operations in a regulated field. With references to the relevance of the Fourth Amendment, the Court condemned "fishing expeditions" by agencies and appeared to require something akin to a showing of probable cause to believe that some breach of regulation had been committed.[41] The Court took the same narrow view in *Jones v. SEC*,[42] a 1936 case in which the Court declined to enforce an SEC subpoena for books and records with respect to the accuracy of a registration statement. Because the corporate entity, when faced with the subpoena, had withdrawn the statement, the Court held that the SEC could no longer show a proper purpose for the inquiry.

A dramatic change appeared by 1943, the date of the next Supreme Court decision in this field, perhaps explicable by reference to a new perception of the central, social importance of administrative agencies engendered by experience with the New Deal and World War II. This 1943 decision, *Endicott Johnson v. Perkins*,[43] which has become the foundational case for the modern approach, evinced a growing recognition of the absolute necessity to provide agencies with

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37. The first major conferral of civil administrative subpoena power was found in the Interstate Commerce Act of 1887. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (1887), codified at 49 U.S.C. §§ 10101-11901 (1988). The power to issue a subpoena sometimes is contained in the parent statute (see the examples in the text accompanying notes 80-115) and sometimes in regulations promulgated by the agencies themselves. See, for example, 14 C.F.R. § 305.7(a) (1981).

38. Administrative subpoenas of course are not self-enforcing. The issuing party must have recourse to the district court. *Wearly v. FTC*, 616 F.2d 662, 665 (3d Cir. 1980).

39. The development of the law in this area is traced in Steve R. Johnson, Note, *Reasonable Relation Reassessed: The Examination of Private Documents by Federal Regulatory Agencies*, 56 N.Y.U. L. Rev. 742 (1981).

40. 264 U.S. 298 (1924).

41. Id. at 305-06.

42. 298 U.S. 1 (1936).

43. 317 U.S. 501 (1943).

broad access to information. A civil subpoena, the Court declared, will be enforced if the "evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose."[44] The subpoena in *Endicott Johnson* was issued by the Secretary of Labor in administrative proceedings. Shortly thereafter, in the context of a subpoena issued in the course of an investigation under the Fair Labor Standards Act, the Court set out three conditions for the validity of an administrative subpoena.[45] The administrative subpoena must be sought for a "lawfully authorized purpose," documents requested must be "relevant to the inquiry," and adequate specification of those documents must be provided.[46] While *Endicott Johnson* stated that an agency may not act arbitrarily or in excess of its statutory authority, it also emphasized, relying significantly on language in an old grand jury case, that "this does not mean that [the] inquiry must be 'limited . . . by forecasts of the probable result of the investigation.'"[47]

The Court again reviewed the question of the proper scope of an inquiry into the validity of an administrative subpoena in *United States v. Morton Salt Co.*,[48] in which the Court refused to scrutinize a subpoena under any strict standard of relevance. *Morton Salt* upheld broad powers of administrative inquiry, expressly likening the proper scope of an administrative subpoena to the traditional wide powers of inquiry enjoyed by the grand jury. Repudiating the earlier cases, the Court announced the propriety of "fishing expeditions" intended only to seek assurance that regulations are not being breached.[49] In a

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44. Id. at 509. See *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-73 (D.C. Cir. 1977) (en banc) (tracing the development of this doctrine).

45. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). The subpoena was issued under the Fair Labor Standards Act § 9, 15 U.S.C. §§ 49-50 (1934).

46. *Oklahoma Press*, 327 U.S. at 209. The third requirement—sufficient particularity in description—applies also to grand jury subpoenas. "Legality," in the context of administrative subpoenas, requires a minimal showing of statutery power in the area under investigation and compliance with the administrative requirements of the statute or regulations, while "relevance" also requires no more than a minimal showing that the material sought could have a conceivable bearing on a subject inte which the agency is authorized te investigate. See text accompanying notes 48-51.

47. *Oklahoma Press*, 327 U.S. at 216 (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)).

48. 338 U.S. 632 (1950).

49. *Morton Salt* dealt with the investigatory powers of the Federal Trade Commission. In a crucial passage, the Court stated that:

> [t]he only power . . . involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. *It*

major affirmation of this position, the Court in *United States v. Powell* stated that an agency (like the grand jury) need not show probable cause but only must demonstrate that its purpose is legitimate under statute, that the inquiry is relevant to that purpose, and that the required administrative steps have been duly followed.[50] As with grand jury subpoenas, an unreasonably broad or burdensome administrative demand may be quashed or modified, but the party challenging the demand bears the burden of proof.[51]

Thus, with respect to standards of judicial scrutiny, the Court in recent decades has virtually assimilated the grand jury subpoena and the civil investigative demand.

IV. ABUSE OF PROCESS

The Supreme Court has stated, rather cryptically, that a party or witness may challenge an administrative subpoena "on any appropriate ground."[52] The privilege against self-incrimination is clearly one of those grounds;[53] other grounds include the attorney-client privilege,[54] the free exercise of religion,[55] freedom of

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> *is more analogous to the Grand Jury*, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, *or even just because it wants assurance that it is not.* When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

338 U.S. at 642-43 (emphasis added). These statoments may need slight modification in light of the Supreme Court's latest pronouncements on the scrutiny of grand jury subpoenas in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *R. Enterprises*, the Court censidered Rule 17(c) of the Federal Rules of Criminal Procedure, which provides that a court may quash or modify a subpoena if "compliance would be unreasonable or oppressive," and interpreted this language to impose some relevancy requirement. A court should uphold the subpoena "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." Id. at 301. Since this burden would be very difficult for the moving party to discharge, the Court added that a court may be justified in "requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." Id. at 302. The Court also stated that grand juries "are not licensed to engage in arbitrary fishing expeditions . . . ." Id. at 299. It seems probable that the same standard will be applied te administrative subpoenas; however, this standard likely will not make a practical difference of any great consequence.

50. 379 U.S. 48 (1964) (involving an IRS summons). The rule that a summons need only bear a reasonable relation to a statutery purpose is now codified in the Administrative Procedure Act, which provides that a subpoena must contain a "showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. §555(d) (1988).

51. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

52. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

53. *Couch v. United States*, 409 U.S. 322 (1973); *Boyd v. United States*, 116 U.S. 616 (1886).

54. *Reisman*, 375 U.S. at 449.

55. *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980).

association,[56] and Fourth Amendment issues.[57] With the exception of the Fourth Amendment ground, no significant difference appears between this list and the grounds for attacking a grand jury subpoena.[58]

In a warning familiar also in grand jury cases, *Powell* cautioned against the abuse of process that may exist, in the Court's examples, if a purpose to harass or to pressure settlement of a collateral matter could be shown.[59] Abuse of process in the context of administrative subpoenas, however, may demand a somewhat wider inquiry than in the grand jury area. The grand jury carries cultural and social connotations that link it firmly in the public mind with the prospect of criminal prosecutions. Thus, even though formal target warnings are probably not constitutionally required for a grand jury witness,[60] the possibility that one is a target and the consequent danger of prosecution will be readily apparent to many recipients of grand jury subpoenas. This awareness is likely to encourage prudence, perhaps leading to consultation with a lawyer and, in the case of oral testimony, reflection on the advisability of asserting the privilege against self-incrimination. These considerations may be less readily apparent to the recipient of a subpoena from a civil agency.

The convergence of criminal and civil process thus raises the question of the obligation to issue suitable warnings to those who are the subjects of civil subpoenas or investigative demands, either to the effect that they are targets or at least that the investigation may result in prosecution. Historically, this issue first arose in IRS cases. These cases hold that the IRS has no general duty to disclose that an investigation may lead to a criminal prosecution, even in cases in which the taxpayer has clearly become a target,[61] but IRS agents must

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56. *United States v. Citizens State Bank*, 612 F.2d 1091, 1093-94 (8th Cir. 1980).

57. *United States v. Bank of Commerce*, 405 F.2d 931, 934-35 (3d Cir. 1969).

58. On the Fourth Amendment question, see the discussion of *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310 (5th Cir. 1981), in the text accompanying notes 65-69.

59. *United States v. Powell*, 379 U.S. 48, 58 (1964). The party contesting the subpoena bears the burden of showing an abuse of process. Id.

60. The Supreme Court left this point open in *United States v. Mandujano*, 425 U.S. 564 (1976), but four of the six Justices who commented on this question took the view that warnings were not required. In *United States v. Washington*, 431 U.S. 181 (1977), the Court held that failure to give a grand jury witness target warnings (as distinguished from *Miranda*-type warnings, which the witness in *Washington* had been given) did not amount to compelled self-incrimination.

61. "[I]t is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead." *United States v. Sclafani*, 265 F.2d 408, 415 (2d Cir. 1959). Thus, an IRS agent need not warn a taxpayer that an investigation may have prosecutorial objectives. See also *United States v. Robson*, 477 F.2d 13

answer truthfully when the taxpayer (or her counsel) makes an express inquiry about this matter.[62]

With respect to administrative subpoenas generally, a requirement of special warnings seems quite inappropriate in a large category of cases. For example, when the documents subject to subpoenas duces tecum or agency requests for production are public records that the entity is required by statute to keep and produce for agency inspection, the agency has an absolute right to the documents. Accordingly, the privilege against self-incrimination simply does not apply. No conceivable warning could be apt in this situation.[63]

When the documents are not clearly public records and the party arguably might be able to assert a Fifth Amendment privilege, courts appear to have followed the same approach developed in the

(9th Cir. 1973); *Truitt v. Lenahan*, 529 F.2d 230 (6th Cir. 1976). This rule applies even if the investigation has revealed that a fraud has been committed. *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965); *United States v. Esser*, 520 F.2d 213 (7th Cir. 1975). *United States v. Light*, 394 F.2d 908 (2d Cir. 1968), accepted the same principle with respect to an SEC investigation; the defendant had complained that records voluntarily surrendered to the SEC were turned over to the United States Attorney improperly.

62. In *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), a taxpayer's accountant asked an IRS agent whether a Special Agent (that is, a criminal investigator) was involved in the inquiry. The agent responded that this was not the case, although he knew that the investigation had been initiated at the request of the Organized Crime and Racketeering Section of the Justice Department. Id. at 299. On the basis of this assurance, the taxpayer disclosed certain documents to the IRS. The court found that the agent's conduct amounted to impermissible deception, characterizing the conduct as a "sneaky deliberate deception by the agent . . . and a flagrant disregard for appellant's rights." Id. at 299. For that reason, the *Tweel* court suppressed the evidence based on its having been seized through an invalid consent search in violation of the Fourth Amendment. Id. at 300. However, it must be noted that *Beckwith v. United States*, 425 U.S. 341 (1976), held than an IRS criminal investigator need not give a taxpayer *Miranda* warnings prior to a non-custodial interview. Taking account of *Beckwith*, the court in *United States v. Irvine*, 699 F.2d 43 (1st Cir. 1983), held that a Special Agent's omission to state that he was a criminal investigator (in a case in which the subject had been given self-incrimination warnings) should not lead to suppression of evidence, even if the omission constituted a breach of IRS regulations. *Irvine* confined *Tweel* to "fairly serious *affirmative* misrepresentations." Id. at 46 (emphasis in original). IRS regulations do require Special Agents to administer a self-incrimination warning that closely resembles *Miranda* warnings. See IRS guidelines promulgated in IRS News Release IR-897, Stand. Fed. Tax Rep. (CCH) ¶ 6832 (1967), and IRS News Release IR-949, Fed. Tax Rep. (CCH) ¶ 6946 (1968). On its facts, *Tweel* may be compared with *United States v. Tonahill*, 430 F.2d 1042 (5th Cir. 1970), in which the court found no impropriety when IRS agents, although already suspecting fraud, responded to an inquiry about the length and focus of the investigation by saying that they were investigating discrepancies to determine whether those discrepancies were the result of innocent errors.

63. Courts have recognized this point. See *United States v. Light*, 394 F.2d 908 (2d Cir. 1968); *United States v. Mahler*, 254 F. Supp. 581 (S.D.N.Y. 1966). These cases involved the Securities and Exchange Commission; the governing statute expressly provides that the documents at issue may be turned over to the Attorney General to enable her to consider whether a criminal prosecution should be initiated. 15 U.S.C. § 78q(a) (1988); 17 C.F.R. § 240.17a-3, a-4 (1993).

IRS context.[64] In *SEC v. ESM Government Securities, Inc.*,[65] the SEC had sent to the appellant's offices agents who, even after the appellant had been identified as a target, pretended to be interested only in acquiring information about the working of that branch of the securities industry. Under this ruse they obtained several documents from the appellant and, on the basis of information gathered during their pretextual visits, later served a subpoena for further records. When the appellant appealed the denial of its motion to quash the subpoena, the government argued that the decision in *United States v. Calandra*,[66] which held that the Fourth Amendment exclusionary rule did not apply to proceedings before a grand jury, should govern the case.

Although the court did not decide this question, it did observe that there were stronger reasons to hope for significant deterrence by applying the exclusionary principle in an administrative setting than in a grand jury setting.[67] The court preferred to approach the case through the concept of abuse of process[68] and remanded for a finding on whether the agents had seriously deceived the appellant and whether the subpoena was the fruit of that deception, indicating that the subpoena should be quashed if that were the case.[69]

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64. In *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc), the court observed that an SEC subpoena issued while a criminal prosecution was pending was valid unless "specific evidence of agency bad faith or malicious governmental tactics" existed. Id. at 1375. In *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989), the respondent argued that "friendly overtures" by agents of the Inspector General of the Department of Health and Human Services and their failure to disclose a formal investigation invalidated the Department's subpoena. The court, citing IRS cases, among others, ruled against the respondent on the ground that he had failed to demonstrate any specific bad faith or malicious tactics. Id. at 1538.

65. 645 F.2d 310 (5th Cir. 1981).

66. 414 U.S. 338 (1974).

67. In *ESM Gov't Sec.*, the SEC itself had committed the violation, unlike the situation in *Calandra*, in which the violation was committed not by an agent of the grand jury but by the police during a prior search. In the administrative setting, there is no division of function akin to that between the police and the grand jury. Further, the administrative agency may resort to a civil rather than a criminal procedure so that questions of the admissibility of evidenco on Fourth Amendment grounds at a later trial stage might be more difficult to raise. The Supreme Court in *United States v. Janis*, 428 U.S. 433 (1976), stated that "the Court never has applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state." Id. at 447. The Court acknowledged, however, that other courts have applied the principle in civil proceedimgs when the officer conducting the illegal search was an agent of the sovereigu that sought to use the evidence. Id. at 455.

68. It should be notod that since the agency must turn to the court to seek judicial enforcement of its subpoenas, the situation not only raises questions of the agency's abuse of its own process but ultimately questions of abuse of the process of the court.

69. The court stated:

> We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably. . . . [T]he individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain

The abuse of process issue thus raises questions about deceptive practices similar to those that may arise from questionable consent to police searches or arguably improper acts by police investigators that give rise to grand jury subpoenas. But the sensitivity of these questions is sharpened in the administrative process because, as in *ESM Government Securities*, the citizen has less reason to be alert to the possibility of incrimination when the government officer has no obvious connection with the criminal process. An appropriate remedy would be a generalized statutory requirement that warnings or cautionary statements be administered once an investigation with a possible prosecutorial outcome is focusing on the party.

V. THE SCOPE OF THE DEMAND

Although administrative subpoena power is sometimes restricted to compelling the production of documents, it increasingly and now typically includes the power to compel testimony under oath. While often attended by some rules as to confidentiality,[70] the power to communicate the product of an administrative investigation to other government agencies generally is a good deal broader than with the results of a grand jury investigation. The growth of this investigative power (and the accompanying growth of investigative departments in agencies to exercise the power) is of the greatest significance.

The investigative power and the civil penalties that may ensue from the investigation must be viewed as an important co-belligerent with the criminal law, carrying punitive and deterrent force that may

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> access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust. When that government agency then invokes the power of a court to gather the fruits of its deception, we hold that there is an abuse of process.

ESM Gov't Sec., 645 F.2d at 316.

70. For example, the Attorney General has power, "prior to the institution of a *civil or criminal* proceeding," te issue a civil investigative demand for documentary materials in connection with a racketeering investigation. 18 U.S.C. § 1968(a) (1988) (emphasis added). The statute requires the Attorney General to designato a racketeering investigator as custodian of the documents and provides that the custodian shall deliver the documents to any attorney designated to appear on behalf of the United States before any court or grand jury in any racketeering case or proceeding. 18 U.S.C. § 1968 (f)(3), (4). Apart from such a release, the custodian shall not reveal documents "without the consent of the person who producod such material." 18 U.S.C. § 1968(f)(3). This provision provides a good example of the intertwining of criminal and civil remedies and criminal and civil compulsory procoss. In effect, the Attorney General in this context has been deemed a one-person grand jury for criminal matters (at least as far as documents are concerned) and compulsory process in the criminal context is deliberately commingled with compulsory process for civil purposes.

be more destructive in their impact on the subject than formal criminal proceedings.[71] Again, the very distinction between criminal and civil proceedings becomes blurred in areas of enforcement of regulatory law. Moreover, the product of investigations carried out by civil agencies by means of civil compulsory process may end up in the hands of a prosecutor and thus provide the underpinnings for a conventional criminal prosecution.[72] In this way, the importance of the grand jury and formal prosecutorial agencies as investigative machines is diminished as more of their work is done by the staffs of civil agencies.

The right to issue a civil investigative demand (that is, an administrative subpoena) exists only by statute, but such powers are now widely distributed among executive agencies of government[73] and generally include both the power to call for documents and the power to compel testimony under oath. A significant exception is the subpoena power conferred on Inspectors General, which is confined to the production of documents and does not extend to compelling testimony.[74] A specific, though not very onerous, restriction is contained in the Right to Financial Privacy Act,[75] which provides that a government authority[76] may have access by subpoena to the financial records of a customer in the possession of a financial institution only when there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry.[77]

As the above discussion reveals, there are no differences likely to be of much practical consequence in the standards employed to scrutinize the enforcement of administrative subpoenas as compared with grand jury subpoenas. The assimilation of the two kinds of

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71. This point is fully developed in Mann, 101 Yale L. J. at 1795 (cited in note 18).

72. The information also may end up in the hands of another civil agency and thus form the basis for civil penalties in another area.

73. The power to issue subpoenas and to compel testimony extends from the broadest to the narrowest field of regulation. For example, subpoena powers exist with respect to the regulation of veterans benefits, 38 U.S.C. § 5711 (Supp. IV 1992); noise control, 42 U.S.C. § 4915(d) (1988); the reporting of energy information, 15 U.S.C. § 796(b)(1) (1988); the protection of endangered species, 16 U.S.C. § 1540(a)(2) (1988); antarctic conservation, 16 U.S.C. § 2407(b) (1988); halibut fishing, 16 U.S.C. § 773i(e),(f) (1988); and honey research, 7 U.S.C. § 4610a(b) (Supp. IV 1992).

74. See the discussion in the text accompanying notes 106-15.

75. 12 U.S.C. §§ 3401-3422 (1988 & Supp. IV 1992).

76. "Government authority" includes the Securities and Exchange Commission. 12 U.S.C. § 3422 (1988).

77. Id. § 3405. A copy of the subpoena must be served on the customer, who must be given the opportunity to move to quash the subpoena. Id. The statute, as amended in 1986, does not preclude any financial institution or officer or employee thereof from notifying a government authority that it possesses information that may be relevant to a violation of any statute or regulation. Id. § 3403(c).

compulsory process in this important context is virtually complete. However, one procedural advantage of substantial importance applies to a party's challenge to an administrative subpoena but is not available when a grand jury subpoena is challenged. The denial of a motion to quash an administrative subpoena may be appealed,[78] whereas no such appeal is available when a motion to quash a grand jury subpoena is denied.[79] This difference may sometimes make the grand jury subpoena procedure more attractive to the government.

VI. SOME EXAMPLES

A. *Antitrust*

A typical and important example of the statutory bestowal of compulsory process may be found in the antitrust area. The Antitrust Civil Process Act,[80] broadened in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, now confers on the Attorney General and the Assistant Attorney General in charge of the Antitrust Division of the Justice Department power to compel the production of documents, to compel written answers to written interrogatories, and to compel oral testimony whenever they believe the person may have information relevant to a civil antitrust investigation.[81]

The demand may be made prior to the institution of any civil or criminal proceeding.[82] The demand must state the nature of the conduct constituting the alleged antitrust violation or the activities that may result in a violation.[83] Any objection that would be a proper ground for refusing to comply with a grand jury subpoena also will serve as a valid ground for refusing to comply with the civil antitrust

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78. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

79. *United States v. Ryan*, 402 U.S. 530, 532 (1971). However, any contempt conviction consequent upon a refusal to comply with the subpoena can be appealed. Id. If appropriate, objection might be made pre-trial in any subsequent criminal prosecution to the introduction at trial of evidence obtained through the subpoena if the moving party can show that the evidenco was tainted, perhaps as the product of illegal electronic surveillance.

80. Pub. L. No. 87-664 (1962), codified at 15 U.S.C. §§ 1312-1313 (1988).

81. Prior to 1976, the Act did not bestow power to compel oral testimony or te compel answers to interrogatories. The 1976 amendments were intended to "increase the effectiveness of antitrust investigations." Hart-Scott-Rodino Antitrust Improvements Act of 1976, H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. 2606 (1976); see S. Rep. No. 94-803, 94th Cong., 2d Sess. 10n (1976).

82. 15 U.S.C. § 1312(a) (1988).

83. Id. § 1312(b).

subpoena.[84] If the subpoena demands oral testimony, the examination is held in private, but, unlike the grand jury situation, the person being examined may be accompanied by counsel[85] and later may obtain a copy of the transcript of her testimony.[86] The statute expressly recognizes the privilege to refuse to answer questions on constitutional grounds, including the privilege against self-incrimination.[87]

In antitrust matters, information obtained under the subpoena power often will be highly sensitive and potentially damaging to the economic or business position of the witness if made widely available. Under the statute the Antitrust Division must designate an investigator as the custodian of material obtained under the subpoena power.[88] Prior to 1976, the statute absolutely prohibited disclosure of material to third parties. The 1976 amendments provide that such material generally shall not be made available to third parties without the consent of the person from whom they were obtained.[89] However, this provision is subject to crucial exceptions: The material may be furnished to any attorney of the Department of Justice who has been designated to appear before any court, grand jury, or federal administrative or regulatory agency in any case or proceeding.[90] Also, officials, employees, or agents of the Justice Department may use such material in connection with the taking of oral testimony under the statute.[91] Further, such material may be delivered to the Federal

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84. Id. § 1312(c)(1)(A). This interesting provision reveals the assimilation of the scope of the grand jury subpoena and the civil investigative demand. However, under the antitrust provisions, as noted, the subpoena must indicate the nature of the alleged or suspected impending violation. Grand jury subpoenas are not required te include any such revelation.

85. Id. § 1312(i)(7).

86. Id. § 1312(i)(6).

87. Id. § 1312(i)(7). As in the grand jury context, an invocation of the privilege against self-incrimination may be countered with an offer of immunity. The provisions of 18 U.S.C. §§ 6002-6004 (1988) provide that, whenever a witness refuses te testify before "an agency of the United States," the agency may grant formal immunity with the approval of the Atterney General when the agency judges that the witness's testimony may be necessary in the public interest. However, immunity, in this context as well as before the grand jury, may leave important interests of the witness unprotected: "There may be unwanted legal consequences, such as disbarment, treble damage civil liability, and tax penalties and interest, because immunity affords no protection against the use of the testimony in any administrative or civil proceeding, state or federal. Immunized witnesses also risk loss of job, economic retaliation, social stigma, and embarrassment." Seymour Glanzer, et al., *Responding to Subpoenas*, in Milten Eisenberg, ed., *Lawyers' Deskbook on White Collar Crime* 27 (Nat'l Legal Ctr. for Pub. Interest, 1991).

88. 15 U.S.C. § 1313(a) (1988).

89. Id. § 1313(c)(3).

90. Id. § 1313(d)(1).

91. Id. § 1313(c)(2). Section 1314(b), which provides that a petition for an order modifying or setting aside a demand can be filed in the district court, may provide some relief. See *Aluminum Co. of America v. United States*, 444 F. Supp. 1343 (D.C.D.C. 1978), in which the

Trade Commission in response to a written request in connection with an investigation under the Commission's jurisdiction.[92] These 1976 provisions allow substantially more liberal disclosure than do the rules with respect to materials obtained by the grand jury.[93]

The Antitrust Division of the Department of Justice itself may initiate prosecutions[94] so that, in this instance, civil and criminal investigatory, remedial, and punitive powers converge dramatically.[95] Indeed, the power to issue civil subpoenas in the antitrust context has been challenged for this very reason. The rejection of the challenge[96] demonstrates the legal system's acceptance of a high degree of integration of criminal and civil compulsory process; the antitrust provisions perhaps point to a future model of convergence and cooperation between civil and criminal authorities.

B. SEC

The Securities and Exchange Commission (SEC) has broad powers to investigate any possible violation or impending violation of securities laws, with a view to either civil or criminal law enforcement. The Commission may require any person to file a statement under

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petitioner had provided thousands of pages of documents containing sensitive and confidential business information in compliance with a civil investigative demand. The court held that the case was controlled by 15 U.S.C. § 1312(c), which provides, inter alia, that no demand may require material that would be protected from disclosure under the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of these standards is consistent with the provisions and purposes of the statute. *Aluminum Co. of America*, 444 F. Supp. at 1346. Relying on this provision, the court issued a protective order to the effect that the petitioner must receive notice of the disclosure of certain sensitive categories of material and be given an opportunity to object. Id. at 1343.

92. 15 U.S.C. § 1313(d)(2) (1988).

93. See the discussion in notes 227-57 and accompanying text.

94. 28 C.F.R. § 0.40 (1993). For fuller discussion, see 3 Trade Reg. Rep. (CCH) ¶ 8522 (1988).

95. Another vivid example of a union of civil and criminal investigatory power is found in the operations of the Drug Enforcement Administration (DEA), which has both criminal investigatory and civil regulatory powers. The DEA, acting through the Attorney General, has power to issue a civil investigatory demand, including the power to compel the testimony of witnesses. 21 U.S.C. § 876 (1988). Critics have alleged that the DEA uses subpoenas aggressively to conduct large-scale fishing expeditions against generally legitimate businesses, such as nursery and gardening enterprises, whose services may be used by those engaged in marijuana cultivation. See the report in 5 BNA Crim. Prac. Man. at 555 (cited in note 4).

96. In *Hyster Co. v. United States*, 338 F.2d 183 (9th Cir. 1964), the court held that the civil subpoena power was not rendered unconstitutional by the fact that civil subpoena power is conferred on the Attorney General, who also has the power to prosecuto. Id. at 186. Indeed, courts have recognized that the policy underlying the statute is to permit the Antitrust Division to conduct antitrust investigations effectively without being required to commit themselves to litigation, which often would be necessary if they enjoyed only the discovery powers that attach when litigation commences. *Associated Container Transp. (Australia) Ltd. v. United States*, 705 F.2d 53, 58 (2d Cir. 1983).

oath[97] and may also subpoena witnesses and require the production of books and documents.[98] The Commission has broad authority to share the information it obtains with other governmental agencies. First, the Commission may transmit its findings to the Justice Department.[99] Concurrent investigations by the SEC and the Justice Department are not in any way improper.[100] More generally, the Commission may furnish information in its investigative files to other agencies, even if a violation of law does not appear.[101] While information gathered initially is protected by a presumption of confidentiality, the Commission may authorize a disclosure if it finds that disclosure is not contrary to the public interest.[102] The SEC's Rules of Practice and Investigations authorize certain officers to engage in discussion as to investigations with representatives of domestic and foreign governmental authorities.[103] Finally, the Commission may, without notice under the Financial Privacy Act of 1978, transfer financial records that it has obtained to any state securities agency or to the Department of Justice.[104] These provisions contrast dramatically with the severe restrictions on divulging information obtained by a grand jury.[105]

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97. 15 U.S.C. § 78u(a)(1) (1988).
98. Id. § 78u(b).
99. Id. § 78u(a); id. § 78u(d) (Supp. IV 1992).
100. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) (en banc).
101. 17 C.F.R. § 202.5(b) (1993).
102. Id. § 240.0-4.
103. Id. § 203.2. One commentator has summarized these provisions:

> Today any Assistant Director of the Division of Enforcement (a second level supervisor) can authorize discussions with a prosecutor concerning any SEC investigations. 17 C.F.R. § 203.2. Full access to SEC files is routinely granted by the Director of the Division of Enforcement without any review by the Commission. 17 C.F.R. § 200.30-4(a)(7). The practical consequence is that criminal prosecutors have immediato and completo access to any SEC investigation that the Staff wants to show them.

Romatowski, *Basics of SEC Investigations: What Every Criminal Lawyer Should Know, White Collar Crime 1992* at 349, 353-54 (ABA, 1992) (quoted in 6 BNA Crim. Prac. Man. at 814 (cited in note 4)). This development has met with judicial approval. Approving the SEC's contacts with the Justice Department early in an investigation, one court recognized that:

> [a]llowing early participation in the case by the United States Attorney minimizes statute of limitation problems. The more time a United States Attorney has, the easier it is for him to become familiar with the complex facts of a securities fraud case, to prepare the case, and to present it to a grand jury before expiration of the applicable statute of limitations. Earlier initiation of criminal proceedings moreover is consistent with a defendant's right to a speedy trial. We decline . . . te interfere with this commendable example of intor-agency cooperation.

United States v. Fields, 592 F.2d 638, 646 (2d Cir. 1978).
104. 15 U.S.C. § 78u(h)(9)(B) (1988).
105. See the discussion in text accompanying notes 227-57.

C. Inspectors General

In the field of administrative investigation and compulsory process, a crucial development over the last fifty years has been the creation of offices of Inspector General in major government departments to combat fraud, waste, and abuse.[106] The Inspector's office centralizes audit and investigative functions.[107] The subpoena powers of Inspectors General are set out in the Inspector General Act[108] and extend to all documentary material "necessary in the performance of the functions assigned by this . . . Act."[109] But the subpoena power does not extend to compelling testimony. This controversial restriction might be thought anomalous, for, while the secretary of the government department generally will have civil subpoena power that extends to compelling oral testimony with respect to the general mission of the department, the Inspector General in her special investigatory and monitoring role lacks this power.[110]

Despite this restriction, the investigatery role of Inspectors General has become very substantial and the Department of Justice has encouraged use of the Inspector's office for investigating purposes, in part to avoid problems that may arise from grand jury secrecy rules.[111] This situation provides a striking instance of the rapid

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106. Congress passed the Inspector General Act of 1978 in response to revelations of substantial waste and corruption in the operations of the federal government. Inspector General Act of 1978, S. Rep. No. 95-1071, 95th Cong., 2d Sess. 2679 (1978).

107. 5 U.S.C. app. §§ 2-3, 9 (1988) (Inspecter General Act of 1978).

108. The Act of 1978 generalizes the powers of new Inspector General offices created under the statute. Earlier statutes exist as to Inspector Generals in certain departments but the powers of subpoena conferred by those statutes are virtually identical with those conferred in the 1978 statute.

109. 5 U.S.C. app. § 6(a)(4).

110. See *United States v. Iannone*, 610 F.2d 943 (D.C.Cir. 1979) (holding that the Department of Energy Inspector General may not compel the attendance of witnesses). In *Iannone*, the Inspector General had subpoenaed oral testimony and argued that this request was a proper exercise of the Secretary's subpoena powers delegated to the Inspector General. Id. at 944. The court of appeals, affirming the district court, held that the office of Inspecter General is not departmental (the Inspector is appointed directly by the President) and that the Inspector's powers are limited to those expressly conferred by the statute and cannot be enlarged by a delegation from the Secretary. Id. at 946. The Department of Justice has expressed the view that *Iannone* may be confined to the Department of Energy, since the case was decided under a particular statute related to that Department rather than under the Inspector General Act. *Inspector General Subpoenas* 26 (U.S. Dep't of Justice, Crim. & Civil Div., 1987). This position is not persuasive; no cases recognize that an Inspector General may acquire by delegation the power to compel testimony.

111. As one source has explained:

> The Department [of Justice] endorses and supports the use of Inspector General subpoenas during audits and investigations conductod by the Offices of Inspector General. The Inspectors General are encouraged te investigate matters within their jurisdiction as

increase in the employment of civil subpoenas for investigations that likely may result in criminal prosecution and exemplifies the tendency to unify civil and criminal compulsory process.

The Inspector General's undisputed power to inquire into criminal acts[112] and to issue subpoenas to parties who have no direct relationship with the department or agency facilitates the unification of civil and criminal compulsory process.[113] Once the facial propriety of the subpoena is established as falling within the Inspector General's statutory mandate, a successful attack by the party subpoenaed is unlikely. As noted above, the party subpoenaed would bear the heavy burden of showing abuse of process;[114] attacks upon subpoenas on the ground of abuse of process have been notably unsuccessful.[115]

D. Information Sharing

As the above examples indicate, the government has not articulated a single, uniform position with respect to the sharing of information acquired by civil subpoena with other government agencies. Certainly, nothing compares with the formidable barriers erected to prevent the disclosure of grand jury information, discussed in Part IX. Typical statutory provisions assert a prima facie presumption of confidentiality but provide a large exception to make

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> fully as possible before the initiation of grand jury proceedings, unless doing so will compromise the potential success of the investigation and subsequent criminal prosecution. The use of an Inspector General subpoena for this purpose will provide several benefits. A. It avoids grand jury secrecy problems. B. It avoids "parallel proceeding" problems. C. It insures that the Inspector General's investigative work product can be used to support the full extent of the United States' interest in a given matter. This includes the pursuit of any applicable civil, administrative and contractual remedies as well as criminal prosecution.

Inspector General Subpoenas at 2 (cited in note 110).

112. The Inspector General Act defines the duties of the office, which expressly include the duty "te prevent and detect fraud and abuse," 5 U.S.C. app. § 2(2)B; the Act empowers the Inspector General to coordinate his activities with other agencies, including the Department of Justice. 5 U.S.C. app. § 4(a)(4)(A), (B) (1988). The question is reviewed in *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989), which affirmed the Inspector General's power under the 1978 statute (5 U.S.C. app. 3 §§ 1-11), as amended in 1988, to conduct criminal investigations (citing and relying upon *United States v. Educ. Dev. Network Corp.*, 884 F.2d 737, 740-44 (3d Cir. 1989), and *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987)). Furthermore, it is not improper for the Inspector General to issue a subpoena when a criminal proceeding is likely. Indeed, unlike the Internal Revenue Service (see the discussion in Part VII.A), an Inspector General may refer a case to the Department of Justice for prosecution and yet continue te use her subpoena power for further civil and administrative investigatory purposes. *United States v. Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 886 (D.N.J. 1980).

113. *Art Metal-U.S.A.*, 484 F. Supp. at 887.

114. *United States v. Balanced Financial Mgmt., Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985).

115. See *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164 (3d Cir. 1986).

disclosure in the public interest and without the necessity for a court order.[116]

VII. THE RELATIONSHIP BETWEEN CRIMINAL AND CIVIL COMPULSORY PROCESS

The convergence of criminal and civil sanctions in the context of regulated activities and the growth of civil investigative demands have created tension between the classical grand jury process in the criminal case and the possibly concurrent use of civil process. A dispute over these issues may arise when a party subjected to the government's civil process argues its impropriety on the ground that a criminal prosecution has been initiated, or that a criminal investigation is under way or is likely to be launched. One of the oldest and most frequent contexts (and therefore a useful starting point) is the use of a summons by the Internal Revenue Service.

A. *The IRS Cases*

As early as 1864, the Internal Revenue Service acquired statutory power to issue a summons to investigate a suspected fraudulent return.[117] The Tariff Act of 1913[118] and the Revenue Act of 1918[119] extended this power. The Internal Revenue Code of 1939,[120] from which the current provision is derived, reaffirmed this summons authority, which vested in the Commissioner the power to inquire into any criminal offense connected with the internal revenue laws.[121] The

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116. See, for example, the rule with respect to information gathered in investigations by the Small Business Administration, which provides that the materials obtained shall be deemed confidential but provides generally that the Administration may authorize the disclosure of this information as long as it is not contrary to the public interest. 13 C.F.R. § 110.5 (1993). It is clear that agencies routinely share information with a prosecuting authority when a violation of law is suspected.

117. Act of June 30, 1864, § 14, 13 Stat. 226.

118. Tariff Act of 1913, 38 Stat. 178-79.

119. Revenue Act of 1918, § 1305, 40 Stat. 1142.

120. Internal Revenue Code of 1939, § 3614(a). The 1939 Code "contemplated the use of the summons in an investigation involving suspected criminal conduct as well as behavior that could have been disciplined with a civil penalty." *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 310-11 (1978). In *Couch v. United States*, 409 U.S. 322 (1973), the Court observed that "[i]t is now undisputed that a special agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences." Id. at 326.

121. 26 U.S.C. § 7602 (1988). The present statute confers power to issue a summons "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting such liability," id. § 7602(a), and continues by providing expressly that "the purposes for which the

summons power extends to examining any books, papers, or records and also authorizes summoning persons to give testimony under oath.[122]

The IRS summons vividly demonstrates the difficulties of an attempt to achieve a strict division of compulsory process into separate civil and criminal channels. An IRS inquiry may be wholly civil, either in the sense that, when all the facts are uncovered, no criminal penalty is applicable or in the weaker sense that, as a matter of policy, the IRS does not contemplate a recommendation to prosecute. But the weaker sense leaves at least a theoretical possibility of criminal prosecution and perhaps a practical one if more serious matters should emerge from the investigation. The initiation of an investigation and the issuance of a summons in a purely civil climate of inquiry often will not rule out possible penal consequences.

When, on the other hand, the investigation of a taxpayer has an avowed criminal inclination, in the sense that serious fraud is suspected, the civil and criminal aspects are "inherently intertwined,"[123] since it is unlikely that a taxpayer could commit a tax crime that would not have civil consequences in the assessment of tax and in civil penalties.[124] Cases may arise, however, in which the inquiry appears exclusively criminal in the sense that the IRS already has all the information it needs to establish civil claims, and the investigation could only be intended to build a stronger case for criminal prosecution. Or a case may arise in which a summons is directed to a third party as to whom there is no question of tax liability, and in which the purpose of the summons is to gather evidence for a criminal case against a target as to whom questions of civil tax liability have been settled. Such cases plainly raise the question of the propriety of using a subpoena power outside the traditional channel of the grand jury solely to further a criminal investigation.

In 1964 the Supreme Court stated in dicta that an IRS summons properly could be challenged on the ground that "the material is sought for the improper purpose of obtaining evidence for

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Secretary may [issue a summons] include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." Id. § 7602(b).

122. Id. § 7602(a).

123. *LaSalle*, 437 U.S. at 309.

124. The *LaSalle* Court noted that "[f]or a fraud investigation to be solely criminal in nature would require an extraordinary departure from the normally inseparable goals of examining whether the basis exists for criminal charges and for the assessment of civil penalties." Id. at 314.

use in a criminal prosecution."[125] The Court clouded its position a few years later when it stated that IRS summonses were valid if issued "in good faith and prior to a recommendation for criminal prosecution."[126] This holding left open the central question: whether a summons would always be held to be in good faith if a recommendation for prosecution had not yet been made.

The Court had an opportunity to settle this question in *United States v. LaSalle National Bank*,[127] in which a Special Agent of the IRS Intelligence Division obtained a summons issued in connection with his investigation of possible criminal violations of the Internal Revenue Code. Although the Court earlier had held that "Congress clearly has authorized the use of the summons [by the IRS] in investigating what may prove to be criminal conduct,"[128] in *LaSalle* the United States Court of Appeals for the Seventh Circuit found the summons invalid on the ground that "the use of an administrative summons *solely* for criminal purposes is a quintessential example of bad faith."[129] Reversing the Seventh Circuit, the Court reasoned that an initial determination by the IRS that fraud might be involved and that a criminal prosecution thus was likely fell far short of demonstrating bad faith because the Service always retained its legitimate civil interest in assessing tax and enforcing civil penalties, regardless of the immediate aim of the investigating agent.[130]

The Court clearly stated, however, that a summons is improper and will not be enforced if the Service already has recommended to the Department of Justice the initiation of a criminal prosecution. The Court believed that, at this point, the issuance of an IRS summons would be improper because the IRS has no power to prosecute and accordingly must entrust the criminal aspect of the case to the Department of Justice. The use of an IRS summons impermissibly would enhance the Department's powers of discovery in a criminal case and would infringe on the territory of the grand jury.[131]

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125. *Reisman v. Caplin*, 375 U.S. 440, 449 (1964).

126. *Donaldson v. United States*, 400 U.S. 517, 536 (1971). The Court also had found it "undisputed" that an IRS summons may issue "in aid of a tax investigation with civil and possible criminal consequences." *Couch*, 409 U.S. at 326.

127. 437 U.S. 298 (1978).

128. *Donaldson*, 400 U.S. at 535.

129. 554 F.2d 302, 309 (7th Cir. 1977). The court of appeals took the position that the district court had made a finding of fact that the investigation was conducted "solely for the purpose of unearthing evidence of criminal conduct." Id. at 305.

130. The Court pointed out that the agent had no ultimate authority to recommend a prosecution since his own recommendation would be subject to review within the Service. *LaSalle*, 437 U.S. at 314-15.

131. Id. at 312.

Since the IRS and the Department of Justice almost inevitably would cooperate in the preparation of a criminal case, the Court felt it would be unrealistic to expect that further discovery by means of an IRS summons would not find its way into the hands of the Department.[132]

The Court, perhaps clinging to poorly explicated but strongly traditional views of the separation of criminal and civil process, discussed the further possibility that "bad faith" might be demonstrated in a particular case, even when no recommendation for prosecution had yet been made.[133] The opinion suggested that bad faith could be shown when the Service had made an "institutional commitment" to prosecution but was delaying an actual recommendation because it "merely would like to gather additional evidence for the prosecution."[134] The Court conceded that the burden of showing such a commitment would be a "heavy one" and foresaw that the Service "rarely will be found to have acted in bad faith."[135]

Subsequent to the decision in *LaSalle*, the Internal Revenue Code has given statutory force to the proposition that a summons is not authorized once the IRS has made a referral to the Justice Department.[136] The Code does not go beyond this rule, leaving

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132. Id.

133. Id. at 316-17. The Court remanded for a further inquiry into this question. Id. at 316. *LaSalle* went no further in elucidating "bad faith" than to refer to the elements of good faith set out in *United States v. Powell*, 379 U.S. 48 (1964), which had reasoned that:

> [the Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

Powell, 379 U.S. at 57-58 (quoted in *LaSalle*, 437 U.S. at 313-14). This explanation of the elements of good faith, although not vacuous, seems largely unconnected with the blend of criminal and civil investigatory strands in the exploitation of the summons, unless one takes the extreme view that an exclusive or predominant purpose to inquire into criminality itself would constitute bad faith. Perceiving this dilemma, four members of the Court in *LaSalle* dissented from the remand and concluded that the respondent's demonstration of a predominantly criminal purpose for the summons raised no question of good faith. *LaSalle*, 437 U.S. at 319-21 (Stewart, J., dissenting).

134. *LaSalle*, 437 U.S. at 316-17. Presumably an "institutional commitment" would exist only after higher officials of the Service had approved an agent's recommendation of referral to the Justice Department. The party seeking to quash the summons then must show that the agency had no "valid civil tax determination or collection purpose." Id. at 316.

135. Id.

136. 26 U.S.C. § 7602(c) now provides that the IRS may not issue a summons with respect to any person if a Justice Department referral has occurred—that is, when the Secretary has recommended to the Attorney General a grand jury investigation or a criminal prosecution of that

unsettled the question of whether the *LaSalle* ban on a summons after an "institutional commitment" to prosecution still has force or whether it has been implicitly restricted by the statute to situations in which the Service has made a formal referral to the Justice Department. The question is of some importance since the party summoned clearly will have a somewhat stronger chance of having the summons quashed under the wider language of *LaSalle* than under the more precise and narrower statutory formula.[137]

As a solution to the questions surrounding the points of contact between civil and criminal compulsory process in the IRS context, both the broader and the narrower positions seem less than satisfying. Under the narrower position, which asserts that a summons to inquire into criminal conduct generally is proper and becomes unauthorized only after an actual referral to the Justice Department, the test appears almost purely formal. The IRS, under this approach, can simply postpone its referral in order to exploit its civil process to the fullest.[138]

In terms of institutional commitment to prosecution, the broader *LaSalle* test at first might appear more principled and less susceptible to manipulation, but it is unclear what principles the test

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person, or when the Department of Justice has made a request to the IRS, under 26 U.S.C. § 6103(h)(3)(B) (1988), for any return or return information relating to that person.

137. This issue provoked clear disagreement in an en banc court of the Seventh Circuit in *United States v. Michaud*, 907 F.2d 750 (7th Cir. 1990) (en banc). Seven judges concluded that the broader *LaSalle* test was unimpaired by the statute and that a district court properly could quash a summons even before formal referral if the court found that the Service had made an institutional commitment to prosecution. Id. at 752. This standard could be satisfied by showing that the Service pressed further discovery by way of summons after all questions of tax liability had been exhausted. Id. at 754. Four judges in dissent concluded that the wider test of impropriety in *LaSalle* had been limited by 26 U.S.C. § 7602(b), which states that an IRS summons legitimately may issue for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws. Id. at 755-57. According te this view, a summons would be improper only after the IRS has made a formal referral. The disagreement among the judges was fueled by a statement of the Supreme Court in *United States v. Stuart*, 489 U.S. 353 (1989), to the effect that in enacting 26 U.S.C. § 7602(c), which bans a summons after a referral has been made, Congress "apparently shared our concern [expressed in an earlier decision] about permitting the IRS to encroach upon the rights of potential criminal defendants." Id. at 363. Writing for the dissenters in *Michaud*, Judge Posner remarked that "[p]erhaps it is time the Supreme Court made all this crystal clear, for we are not the only court te have been confused by *Stuart*." *Michaud*, 907 F.2d at 757. Another court has taken the view that the statute now has codified the "bright-line" position of the dissenters in *LaSalle*. See *Moutevelis v. United States*, 727 F.2d 313, 314-15 (3d Cir. 1984); *United States v. Pickel*, 746 F.2d 176, 184 (3d Cir. 1984).

138. Opportunities for manipulation are not unfamiliar in the criminal justice process. The right to counsel attaches only when formal criminal proceedings have been commenced or a critical stage in the process has been reached. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). Thus, it may be possible for the police, perhaps acting in collaboration with a prosecutor, to stave off the right to counsel by delaying the initiation of formal charges.

purports to defend. First, powers of discovery would not necessarily be enhanced if the IRS could issue a summons after a commitment to prosecution or even after a Justice Department referral. The IRS cannot procure anything by way of a summons that a grand jury cannot obtain by use of its subpoena power. Civil summons power simply is not any broader than a grand jury's criminal discovery through compulsory process, which extends to anything of conceivable relevance to the investigation and prosecution of a criminal case.

Do more general due process reasons or specific grounds in the Bill of Rights explain why the IRS should not infringe on the historical role of the grand jury?[139] The citizen does not receive any less protection in the IRS summons context than before a grand jury. After all, the summons is not self-enforcing; it may be challenged in court and can only be enforced by the IRS through a court.[140] At this stage, the same range of challenges and objections can be made to the summons as to a grand jury subpoena.[141] Both the statute and the Supreme Court's opinion in *LaSalle* seem faintly redolent of anxiety for protection of the citizen but fail to explain exactly how the citizen is better protected by being kept exclusively in the hands of the

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139. In *Michaud*, Judge Coffey in a concurring opinion remarked, "If as the dissent asserts, section 7602(b) overturns *LaSalle* and allows for the use of administrative summonses solely for the purpose of criminal investigation, the section's constitutionality is suspect—would this not legislate away the due process guaranteed by the fifth amendment?" *Michaud*, 907 F.2d at 754 n.1 (Coffey, J., concurring). It is not clear what aspect of due process Judge Coffey refers to in this statement. His opinion appears to suggest that due process requires that the investigation of possibly criminal conduct be reserved to certain agencies of government. However, while an agency clearly might exceed its statutory powers by embarking on a criminal investigation, courts should offer a further explanation of how this activity becomes a component of due process. Perhaps with this statement in mind, another federal court explained *Michaud* by citing it for the proposition that "civil proceedings cannot continue after criminal proceedings begin without violating the privilege against self-incrimination." *United States v. Premises Located at Highway 13/5*, 747 F. Supp. 641, 652 (N.D. Ala. 1990), rev'd on other grounds, 976 F.2d 749 (11th Cir. 1991). If the target of criminal proceedings retains at all times his power to assert the Fifth Amendment privilege (and if proper warnings are administered), however, no violation of the privilege appears. Of course, cencurrent or closely consecutive criminal and civil proceedings may create strategic and tactical problems for the defense, but this situation is not equivalent to a constitutional violation.

140. 26 U.S.C. § 7604 (1988).

141. See the discussion in Part VIII. Indeed, the citizen may be somewhat better off in challenging a civil summons or investigative demand than in challenging a grand jury subpoena. In the case of a civil summons, the agency must comply with statutory procedure exactly. See *Henderson v. United States*, 778 F. Supp. 274, 277 (D.S.C. 1991) (holding, under the authority of *United States v. Powell*, 379 U.S. 48 (1964), that an IRS summons would not be enforced since the Service had failed to serve an "attested copy" of the summons as required by 26 U.S.C. § 7603). Compare *United States v. Santucci*, 674 F.2d 624 (7th Cir. 1982) (holding that exclusion of evidence obtained by a grand jury subpoena that had been improperly issued by the prosecutor without grand jury involvement was not an appropriate remedy).

Department of Justice and a grand jury.[142] Indeed, a comparison of the Court's pronouncements in *LaSalle* and in the earlier case of *Procter & Gamble* reveals a curious tension. While *LaSalle* emphasizes that the citizen may be prejudiced when the civil process is applied despite a prosecutorial goal, *Procter & Gamble* asserts that the criminal grand jury process may disadvantage the citizen by gathering evidence for civil purposes.[143]

These positions could be reconciled formally by a simple diktat that the grand jury pertains to criminal matters and civil process to non-criminal matters and never the twain shall meet. But such an enforced separation would make no sense. With the current proliferation of civil investigative demands, the range of civil and criminal subpoena powers often is exactly the same and thus provides no reason to demand segregated investigations. The sole exception occurs when criminal charges have actually been initiated and a formal adversarial relationship has been defined. In this situation, as noted, the government will have a less favorable position with regard to discovery than it would enjoy in a civil case. An attractive argument certainly can be mounted that this limitation should not be subverted, and that the use of civil subpoenas after charging, in order to strengthen a prosecutor's case, would be as improper as the continued use of grand jury subpoenas.[144] However, this persuasive point does not turn on a distinction between civil and criminal investigations but rather on the asserted general impropriety of using *any* compulsory process to fortify a criminal charge after it has been filed.

The history of the IRS summons in this context thus constitutes a paradigm of the fundamental mistake that has crept into the field of compulsory process. With the advent of civil investigative demands, the valid reason for restraining all process once a criminal

142. Indeed, when testifying under compulsion in response to an IRS summons, the subject may be accompanied by counsel, a privilege not applicable when a subject appears before the federal grand jury. On the other hand, the grand jury's proceedings and, to an extent, the documents or testimony it elicits are protected by secrecy provisions that do not apply as clearly to IRS summonses and other civil investigative demands.

143. In a concurring opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1957), Justice Whittaker referred to the need "to eliminate the temptation to conduct grand jury investigations as a means of ex parte procurement of direct or derivative evidence for use in a contemplated civil suit." Id. at 685 (Whittaker, J., concurring).

144. The D.C. Circuit recognized this point in *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), in which the court acknowledged that, after indictment, agency investigation has the potential of "undermin[ing] the party's Fifth Amendment privilege against self-incrimination, expand[ing] rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expos[ing] the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudic[ing] the case." Id. at 1376.

charge was filed was wrongly understood as a reason for shackling civil process just because a criminal investigative purpose concurrently existed. This sloppy assimilation of different cases accounts for the confused and confusing development of the law generally and specifically with respect to IRS summonses.

In the narrow IRS context, a broad view of *LaSalle* seems hard to defend in light of the plain declaration in 26 U.S.C. Section 7602(b) that the purposes for which a summons may be issued "include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws." This statutory declaration typically signals the movement of civil process into the field of criminal investigation. Suppose the IRS wishes to investigate suspected criminality by a tax return preparer. The inquiry may contain no element of civil liability because the Service is not concerned with the preparer's own return and already may have settled the tax liability of taxpayers whose return the subject prepared. Thus, the investigation would have a solely criminal aspect. Such an investigation is clearly proper, however, and dicta in earlier case law that the IRS may not engage in an investigation with a solely criminal purpose is now obsolete and inaccurate.[145] In such a case, a broad reading of *LaSalle* would result in the position that once the Service's suspicions have hardened into the belief that probable cause for prosecution exists, they must desist from further investigation and hand the matter over immediately to the Justice Department. The idea that one agency of government may carry on a criminal investigation up to the stage of finding probable cause but must then step aside and hand the matter over to another agency would serve no constitutional or valid policy interest. Indeed, in *LaSalle* itself the Court acknowledged that "Congress has not categorized tax fraud investigations into civil and criminal components" and confessed that it would be "unrealistic to attempt to build a partial information barrier between the two branches of the executive."[146]

One might make arguments in favor of the *LaSalle* position based on efficiency, economy, and the rational distribution of tasks between different branches of government. Once the Justice

145. On these facts, the Ninth Circuit Court of Appeals decisively concluded that an IRS summons was entirely proper. *United States v. Abrahams*, 905 F.2d 1276 (9th Cir. 1990).

146. *LaSalle*, 437 U.S. at 311, 312. The application of this principle also would involve an extremely difficult inquiry into exactly when the Service arrived at an affirmative decision about probable canse.

Department, the prime federal prosecutorial agency, has launched a grand jury probe, a parallel pursuit of information by the IRS may controvert the Justice Department's strategies and confound its operations. Government should not trip over its own feet. But such arguments have nothing to do with individual rights (other than an arguable right not to be subject to concurrent parallel probes), and little if anything to do with the historic understanding of the grand jury. These arguments raise questions of efficiency and economy that ought to be resolved by statute, regulation, or administrative agreement and are not convincingly addressed by references to the historical distribution of compulsory process. Thus, *LaSalle* lacks a clear rationale; in addition, if the statute has curtailed *LaSalle*, the principled basis for the division of function as to compulsory process hardly appears more rational.

The *LaSalle* decision gives undue deference to the traditional historical role of the grand jury and pays too little attention to the growth of subpoena power in other government agencies in contexts that have strong criminal connections. *LaSalle* also may be explained by reference to the fact that a very large section of the population is vulnerable to the IRS summons, while only those who deal with the government in a regulated context are subject to government subpoena power in other fields. This fact renders IRS cases particularly sensitive. But, as the non-IRS cases show, *LaSalle's* view of the grand jury as the primary organ for developing a criminal investigation and its perception of a consequent need to restrict the inquiries of other government agencies has become increasingly outdated.

B. The Non-IRS Cases

The IRS cases are tethered to a particular statute and to a long-standing acceptance of the proposition (now contained in the statute) that an IRS summons is invalid after the Service has made a recommendation to prosecute. Outside the IRS area, by contrast, courts for some time have found unobjectionable the use of civil process to further an investigation that from the first likely will have a criminal outcome.

This new generation of cases reveals an important, if quiet and little-noticed, institutional development in the practice of federal criminal law: the grand jury has lost a good deal of its importance in modern federal law enforcement in areas involving regulated activities. The center of activity has shifted to regulatory agencies.

This natural shift reveals no obvious impropriety. Specialized and experienced agency staffs can best evaluate the gravity of violations and develop an investigation. Because these investigations frequently, perhaps mostly, involve conduct that may be criminal and that sometimes will result in a criminal prosecution, agency staffs also develop a good deal of expertise in the preparation of a criminal case. Even more importantly, an agency staff often will make the decisive evaluation as to whether violations are serious enough to warrant prosecution. The United States Attorney's Office and the Department of Justice rarely disagree with the agency recommendation. Prosecutorial resources are scarce and, when an agency decides that civil penalties are adequate, a prosecutor or the Department of Justice rarely will overrule this conclusion and press for a criminal proceeding.

Thus, in a substantial proportion of federal crimes, agencies[147] make critical decisions as to whether to prosecute and participate to a great extent in the preparation of criminal cases.[148] Upon instituting a prosecution, the product of the investigation must be handed over for presentation to the grand jury. Even at this stage, agency attorneys and experts likely will assist the prosecutor in his presentation and

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147. The term "agencies" includes such units as the Inspector General's Office in departments of government.

148. One source has noted that "[o]ften agencies themselves instigate grand jury investigations by bringing matters uncovered during agency inquiries to the United States Attorney's attention. Furthermore, United States Attorneys increasingly request agency assistance in presenting a case to grand juries, thereby revealing some information about ongoing investigations." Note, *Facilitating Administrative Agency Access to Grand Jury Materials*, 91 Yale L. J. 1614, 1614 n.2 (1982). F.R.Cr.P. 6(e)(3)(A)(ii) empowers the prosecutor to disclose matters occurring before the grand jury te "such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such atterney's duty to enforce federal criminal law." This provision removes all obstacles to the use of agency personnel in preparing cases for the grand jury. The Advisory Committee Note to this Rule states:

> Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is 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.

F.R.Cr.P. 6 Advisory Committee's Noto (quoting Senate report on 1977 amendments). If this Noto were updatod, it should acknowledge that federal crimes often are investigatod by the staffs of agencies and Inspectors General of federal departments.

testify before the grand jury.[149] Agency attorneys may, indeed, present the case to the grand jury since the Attorney General has statutory authority to designate agency attorneys to assist in conducting proceedings before the grand jury.[150]

This development has rendered the separation between civil and criminal compulsory process more and more artificial,[151] a phenomenon that courts have recognized by largely abandoning the traditional notion that criminal investigations are the sole prerogative

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149. Under F.R.Cr.P. 6(e)(3)(B), any person to whom matters occurring before the grand jury are disclosed "shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." This Rule further provides that the government attorney shall provide the district court with the names of persons to whom disclosure has been made and shall certify that those persons have been advised of their obligation of secrecy.

150. 28 U.S.C. § 515(a) provides, "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Atterney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings. . . ." This power was scrutinized and upheld in *In re Persico*, 522 F.2d 41, 55-61 (2d Cir. 1975), and *United States v. Wrigley*, 520 F.2d 362, 364-67 (8th Cir. 1975). The practice has been challenged on conflict-of-interest grounds, generally without success. See the discussion in *General Motors Corp. v. United States*, 573 F.2d 936, 942-45 (6th Cir. 1978), appeal dismissed en banc, 584 F.2d 1366 (6th Cir. 1978), in which an IRS attorney who had made a criminal referral to the Department of Justice was designated to assist in the presentation of the case to the grand jury. The panel found that he should be disqualified based on a conflict of interest, 573 F.2d at 942-45, but members of the en banc court, which dismissed the appeal on jurisdictional grounds, expressed the opinion that no conflict existed. 584 F.2d at 1371-73 (Edwards, J., and Lively, J., concurring). Both *In Re Perlin*, 589 F.2d 260, 263-68 (7th Cir. 1979), and *United States v. Birdman*, 602 F.2d 547, 561-63 (3d Cir. 1979), adopted this latter view. In a particular case, an agency attorney's involvement in the prosecution may be so great or may have such improper aspects that a court should conclude that a conflict of interest exists. See *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), in which an Environmental Protection Agency attorney acted as a special assistant to the prosecutor, testified himself before the grand jury, and then examined other witnesses. Id. at 1345-52. *Young v. United States*, 481 U.S. 787 (1987), is of some relevance in this context. In *Young*, a plurality of the Court held that counsel for the beneficiary of a court order in a civil suit improperly was appointed to undertake the prosecution for alleged violations of the order. Id. at 809-14. In *FTC v. American Nat'l Cellular*, 868 F.2d 315 (9th Cir. 1989), however, the court stated that *Young* did not intend "to disqualify automatically any FTC attorney as 'interested' simply by virtue of employment with the agency that brought the underlying suit." Id. at 319. The Ninth Circuit concluded that the agency attorney was properly involved in the prosecution because he was not effectively in control of the case. Id. at 319-20. See also *United States v. Hart*, 779 F. Supp. 883, 891-92 (E.D. Mich. 1991).

151. This development is further illustratod by the creation of joint criminal and civil investigative task forces in certain regulatory areas. One source cites the creation in the health care field of a working group that includes representatives from the FBI, the Criminal and Civil Divisions of the Department of Justice, and the Department of Health and Human Services; the source states that in an effort to prevent and detect procurement fraud, the Department of Justice and the Department of Defense have agreed in a joint memorandum to share information. 6 BNA Crim. Prac. Man. at 813 (cited in note 4). See also Becker, et al., *Defending the Health Care Fraud Case: Parallel Proceedings and Collateral Consequences*, in *White Collar Crime 1992* at 433 (ABA, 1992).

of the grand jury.[152] Little appears to be left of the old incantation that pursuit of a criminal violation through civil process would be an illegitimate usurpation of the role of the grand jury. If the governing statute clearly bestows on a regulatory agency or on the investigative arm of government the power to investigate criminal violations, the statute will prevail, since courts have rightly acknowledged that no constitutional right is endangered. At the same time, as the cases discussed below demonstrate, the civil agency often may make its files and the fruit of its compulsory process fully available to a prosecutor, at least until an indictment has been returned. If civil process were more intrusive than grand jury investigation, a sensitive situation would arise, but since the grand jury is the most powerful inquisitorial engine in our system, no problem exists.

This trend first became evident in 1969 with the Supreme Court's decision in the landmark case *United States v. Kordel*.[153] In *Kordel* the defendants were convicted of offenses under the Federal Food, Drug, and Cosmetic Act.[154] Prior to their indictment, the Food and Drug Administration (FDA) had investigated the violations and recommended civil seizure of two of the defendants' products. The United States Attorney instituted a civil in rem action against the products and served civil interrogatories, prepared by the FDA, on the defendants. At the same time, the defendants were served with a statutory notice that the agency contemplated a criminal proceeding against them with regard to the violations that were the subject of the civil action.[155] The defendants moved to stay further proceedings in the civil action or, alternatively, to extend the time in which to answer the interrogatories until after the disposition of the criminal

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152. On the increase in the use of information obtained through administrative subpoenas for the prosecution of criminal cases, see Marvin G. Pickholz, et al., *Guide to White Collar Crime* (BNA, 1986). The Justice Department monograph, *Inspector General Subpoenas* at 1 (cited in note 110), recommends the use of such procedures for the express purpose of avoiding the secrecy requirements imposed on the grand jury. Referring to a memorandum of the Attorney General to United States Attorneys dated July 16, 1986, this monograph reminds government attorneys of the importance of coordinating criminal and civil investigations and quotes the Attorney General's memorandum as recommending that, "where possible, documents should be obtained by methods other than grand jury subpoenas" in order to avoid grand jury secrecy problems. Id. The monograph suggests that Inspector General subpoenas should be used as an alternative: "[D]ocuments obtained by Inspector General subpoenas may be used by both criminal and civil attorneys in evaluating different aspects of the case." Id.

153. 397 U.S. 1 (1970).

154. 52 Stat. 1040 (1938), codified at 21 U.S.C. §§ 301-393 (1988).

155. 21 U.S.C. § 335 requires that "[b]efore any violation of [the Act] is reported . . . to any United States attorney for institution of a criminal proceeding, the person against whom such a proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard te such a contemplated proceeding."

proceeding; they argued that a response to the interrogatories at this stage would "enable the Government to have pretrial discovery of the respondents' defenses to future criminal charges."[156] After the motion was denied, the defendants responded to the interrogatories and, in the later criminal proceeding based on an indictment "prepared in [the FDA] office,"[157] were convicted.

The Court of Appeals for the Sixth Circuit reversed the convictions on the ground that the defendants had been compelled to incriminate themselves under the threat of forfeiture of their property, which inevitably would have followed from their refusal to answer the interrogatories. The Court of Appeals was impressed by the intensity of what they perceived as the defendants' trilemma. The defendants could have refused to answer and faced forfeiture, could have lied and risked a perjury prosecution, or could have answered truthfully and thus helped the government build a criminal case against them. They chose the latter course, which the Court of Appeals concluded was "a 'compelling' which is prohibited by the Fifth Amendment."[158]

Although the Court of Appeals did not condemn in general terms the practice of a government agency's pursuit of a civil remedy on grounds that also might involve a possible criminal prosecution,[159] it is clear that the court's holding, if left undisturbed, would have powerfully chilled such a practice. If disclosure, either through general rules of discovery or through civil compulsory process, were defined as "compelled" in a Fifth Amendment context because of the likelihood of a civil sanction being imposed, with the consequence that its fruits would be excluded from a subsequent criminal prosecution, then government itself would encounter an acute dilemma. A criminal prosecution would have to precede disclosure through civil process or the successful prosecution of the criminal case otherwise might be imperiled.[160] Prompt pursuit of the civil remedies, however, might be urgently necessary for the public interest.

No doubt perceiving this significant threat to the enforcement of administrative regulations and the concurrent pursuit of civil and

156. *Kordel*, 397 U.S. at 5.

157. The opinion of the court of appeals, *United States v. Detroit Vital Foods*, 407 F.2d 570, 573 (6th Cir. 1969), brought out this point.

158. Id. at 573.

159. Id. at 575.

160. According to the court of appeals, presumably a taint hearing would be required in many cases, under the principle established in *Kastigar v. United States*, 406 U.S. 441 (1972), to decide whether evidence the government proposed to offer in a criminal case was derived directly or indirectly from information the defendant had been compelled to produce or testify to in the civil proceeding.

criminal penalties, the Supreme Court reversed the Court of Appeals and reinstated the convictions.[161] The Court of Appeals, the Court said, erred in finding a Fifth Amendment violation since, at all times, the defendant could have asserted his Fifth Amendment privilege but failed to do so. This analysis verges on the disingenuous because the court of appeals had based its holding precisely on the ground that the assertion of the Fifth Amendment privilege would have had such disadvantageous consequences for the defendant in the civil proceeding that he was in effect coerced into waiving the privilege. Indeed, the Supreme Court itself had used this line of reasoning some years earlier in *Garrity v. New Jersey*,[162] in which the Court found a violation of the Fifth Amendment when policemen were questioned after being warned that refusal to answer would result in the loss of their jobs.[163]

Why did the Court reach a different result in *Kordel* than in *Garrity*? What differentiates the substantial economic loss resulting from failure to respond to a civil discovery demand from the substantial economic loss threatened for failing to answer a public employer's questions? The cases can be distinguished on the ground

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161. *Kordel*, 397 U.S. at 12-13.

162. 385 U.S. 493 (1967). In *Garrity*, police officers were questioned in a state investigation concerning alleged fixing of traffic tickets. The state warned the officors that anything they said might be used against them in a criminal prosecution but also were told that refusal to answer would result in dismissal. Their answers were used against them, over objection, in subsequent prosecutions. Id. at 494-95. The Court held that the threat of dismissal from a public office rendered the statements "compelled" under the Fifth Amendment's self-incrimination privilege and therefore inadmissible in criminal procoedings. Id. at 500.

163. Id. The implications of *Garrity* still are not entirely clear. State action taken as a consequence of a person's invocation of the self-incrimination privilege sometimes has been condemned as unconstitutional. See *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 558-59 (1956) (preventing a city from dismissing a college teacher in response to his assertion of the privilege before a congressional committee); *Uniformed Sanitation Men Ass'n v. Commissioner*, 392 U.S. 280 (1968) (holding unconstitutional the discharge of sanitation workers for invoking the privilege when questioned by a commissioner of investigation); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (finding unconstitutional the discharge of a police officer for refusal to waive immunity and tostify before a grand jury).

However, the Court also has stated that public employees "subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish constitutional rights." *Sanitation Men*, 392 U.S. at 285. One court has noted that, as a result, "[t]he fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right." *Asherman v. Meachum*, 957 F.2d 978, 982 (2d Cir. 1992) (en banc). In this case, a divided Second Circuit Court of Appeals, sitting en banc and proceeding on this abstruse distinction, held that it was not improper to revoke a convicted defendant's supervised home release because he refused to answer a program supervisor's questions on Fifth Amendment grounds when his original conviction was still being challenged by way of federal habeas corpus. Id. at 982-83.

that the compulsion stems more clearly from state action in *Garrity*, in which the state threatened loss of employment if the defendants failed to answer. This distinction would be strained, however, since in *Kordel* the sanction for failure to answer would have been a judicially imposed disadvantageous inference in a suit brought by the government, in which judgment against the defendants would have resulted in loss of property. The different outcome in large part results from the overwhelming public interest in allowing government-initiated civil litigation to proceed in order to enforce a regulatory scheme, in tandem with the public interest in not inhibiting a criminal prosecution. To hold open both possibilities requires a certain sacrifice of traditional understandings of the Fifth Amendment. Indeed, this message emerged strongly in the Court's opinion as a policy justification for its holding, which was not encumbered with much Fifth Amendment analysis.[164]

Kordel illustrates the difficulties defendants face on the rugged terrain of "parallel proceedings."[165] The term "parallel proceedings" indicates civil and criminal proceedings brought concurrently, overlapping each other, or brought sequentially.[166] As *Kordel*

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164. The Supreme Court explained:

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

Kordel, 397 U.S. at 11. In response te the court of appeals's reasoning, the Supreme Court flatly stated that, while it agreed that government may not use evidence that it coerced under threat of a penalty of forfeiture in a criminal case, "on this record there was no such violation of the Constitution." Id. at 13. Compare *Lefkowitz v. Turley*, 414 U.S. 70 (1973), in which the Court voided a statute that prohibited any person who refused to waive immunity before a grand jury from obtaining public contracts for a period of five years. The Court did suggest, however, that the statute might have been valid if it provided immunity for the party who raised the Fifth Amendment privilege. Id. at 84.

165. On parallel proceedings, see Marvin G. Pickholz, *The Expanding World of Parallel Proceedings*, 53 Temple L. Q. 1100 (1980); Joseph M. Hassett, *Ex Parte Pre-Trial Discovery: The Real Vice of Parallel Investigations*, 36 Wash. & Lee L. Rev. 1049 (1979); *Parallel Grand Jury and Administrative Agency Proceedings* (ABA, 1981); Craig H. Zimmerman, *Parallel Criminal and Civil Proceedings*, 25 Am. Crim. L. Rev. 522 (1988); Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1989).

166. A governmental policy may influence the likelihood of parallel proceedings being brought concurrently. For example, *Department of Justice Guidelines, Directive No. 5-87* (Land and Nat. Res. Div., Oct. 13, 1987) provides that criminal proceedings generally should be brought first, when both civil and criminal actions are possible, although the Guidelines list exceptions for cases, intor alia, in which civil violations are ongoing and of great concorn to the public health or environment, in which assets may be dissipated, or in which a statute of limitations deadline

demonstrates, such a configuration, now very common, can pose daunting strategic and tactical problems for a defendant. Aware of these problems, the Court in *Kordel* did suggest that when the subject of civil discovery (and presumably a subpoenee) could point to a real and appreciable risk of self-incrimination,[167] a court might afford relief by entering a protective order under Rule 26(c) of the Federal Rules of Civil Procedure[168] or an order granting a stay of the discovery or of the civil proceeding for a fixed time or until the termination of the criminal proceeding or investigation.[169] Although the Court did not

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looms for the civil suit. See also *U.S.E.P.A. Policy and Procedure on Parallel Proceedings at the Environmental Protection Agency* (EPA, Jan. 23, 1984). On this topic, see 6 BNA Crim. Prac. Man. at 802-04 (cited in note 4).

167. F.R.C.P. 36(b) also affords some protection as to admissions of facts in civil actions; the Rule provides that "[a]ny admission made by a party pursuant to [a] request [for admission of facts] is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding." F.R.C.P. 36(b). Nevertheless, "that does not prevent the use of facts set forth in the admission by the criminal prosecutor as a confirmation that facilitates the preparation of the criminal case, or perhaps as a lead to other evidence, which is part of the protection of the constitutional privilege [against self-incrimination]." *Gordon v. FDIC*, 427 F.2d 578, 581 (D.C. Cir. 1970). In *Gordon*, Circuit Judge Leventhal noted that "[t]here may be cases where the requirement that a criminal defendant participate in a civil action, at peril of being denied some portion of his worldly goods, violates concepts of elementary fairness in view of the defendant's position in an inter-related criminal prosecution. On the other hand, the fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter." Id. at 580.

168. The circuits disagree as to the impact of a protective order on materials produced in response to civil discovery requests (or presumably in response to administrative subpoenas). In *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir. 1988), the court held that when a protective order has been granted as to a deposition in a civil case, the grand jury nevertheless may obtain the deposition by subpoena. The court reasoned that the deponent could have invoked the protection of the Fifth Amendment and cannot indirectly procure so large a protection through a court order. Id. at 1473-76. Refusing to accept this position, the Second Circuit in *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221 (2d Cir. 1991), following its earlier decision in *Martindell v. Int'l Tel. and Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), held that a grand jury subpoena in such circumstances should not be enforced absent a showing that the protective order was granted improvidently. *In re Grand Jury Subpoena*, 945 F.2d at 1226. These issues are discussed in Robert Heidt, *The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases*, 91 Yale L. J. 1062 (1982).

169. *Kordel*, 397 U.S. at 9. The district court has discretion to grant such a stay "when the interests of justice seem to require such action." Id. at 12 n.27. Such a stay would benefit the party in a number of ways. For example, government discovery would be curtailed and the defendant would escape dilemmas as to the exercise of her self-incrimination privilege. See Cheh, 42 Hastings L. J. at 1391 (cited in note 20). In *SEC v Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc) (discussed in text accompanying notes 170-87), the court stated that parallel investigations should not be blocked unless "'special circumstances' demonstrably [prejudiced] substantial rights of the parties or of the government." Id. at 1377. See Pollack, 129 F.R.D. at 203 (cited in note 165) (suggesting that the best case for a stay usually occurs after criminal proceedings actually have been commenced, since this situation raises problems of self-incrimination most sharply, while the delay need not be protracted since the criminal case is under way). Courts usually apply a balancing test that weighs harm to the government or the public against harm to the moving party. See *In re Mid-Atlantic Toyota Antitrust Litigation*, 92 F.R.D. 358, 359 (D. Md. 1981); *United States v. McKenzie*, 697 F.2d 1225, 1226 (5th Cir. 1983). For

rule out such measures of relief, it was clearly intent on repudiating the notion that compulsory process (or its substantial equivalent in civil discovery) could in itself and without more constitute a violation of the Fifth Amendment, even when the product of the process is likely to confer considerable advantages on the prosecutor in the preparation of a criminal case.

In *Kordel* a government agency, using civil process, prepared and carried to its conclusion an entire criminal investigation. The prosecutor simply presented the neat package to the grand jury for its endorsement by way of indictment. The Court's validation of this process and its demonstrated commitment to allowing the government to pursue concurrent civil and criminal sanctions without major obstacles make *Kordel* a crucial building block in the modern phenomenon of breaking down the barriers between civil and criminal compulsory process.

Later decisions of lower federal courts carry this development forward. An important case decided by an en banc federal court of appeals is *SEC v. Dresser Industries, Inc.*,[170] in which the Securities Exchange Commission (SEC) had issued a formal order of investigation into alleged illegal payments by United States corporations to foreign government agents. Concurrently, the Department of Justice was investigating the same allegations and had issued a grand jury subpoena for documents. The SEC, which had earlier forwarded its file to Justice,[171] then proceeded to issue its own

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a review of the law in this field, see *United States v. A Certain Parcel of Land, Moultonboro*, 781 F. Supp. 830 (D.N.H. 1992) (granting a stay of civil discovery). A movant may make an application for a stay of discovery more attractive by offering to set aside documents in a court-supervised depository pending the expiration of the stay. See 4 BNA Crim. Prac. Man. at 588 (cited in note 4).

The ABA Criminal Justice Section Committee on Whito Collar Crime has drafted a proposed amendment to the Federal Rules of Criminal Procedure that would empower a judge in a criminal case to request a stay of parallel civil proceedings and would direct that efforts should be made to this end unless the stay would have "an adverse impact on the overall administration of justice." See Weingarten and Barr, *The Hazards of Parallel Proceedings in the Securities Context*, in *White Collar Crime 1992* at 369, 386 n.10 (cited in noto 151). Sometimes the government may move for a stay of parallel civil proceedings in order to prevent the defendant from employing the civil rules of discovery to uncover the government's criminal case. See *Campbell v. Eastland*, 307 F.2d 478, 483 (5th Cir. 1962); *United States v. Phillips*, 580 F. Supp. 517, 518 (N.D. Ill. 1984). For example, when civil litigation and a grand jury investigation are proceeding concurrently, a defendant in the civil case may notice for deposition witnesses who have testified before the grand jury. In this situation the government likely would move to intervene in the civil case and stay discovery to avoid adverse impact on the criminal investigation. See the remarks of an attorney in the Justice Department's Public Integrity Section, reported in 4 BNA Crim. Prac. Man. at 587 (cited in noto 4).

170. 628 F.2d 1368 (D.C. Cir. 1980) (en banc).

171. Two SEC attorneys had participated in the Department of Justice taskforce investigating the illegal payments. Id. at 1372.

administrative subpoena demanding documents that included those already requested by the grand jury. The subpoenaed party, relying in large part on the authority of *LaSalle,* moved to quash the SEC's subpoena on the grounds that it abused the civil process for the purpose of criminal discovery and infringed the role of the grand jury.

In a wide-ranging opinion, the circuit court rejected all the subpoenaed party's contentions. The court distinguished *LaSalle* because of the special nature of the statute governing the IRS, which confined the IRS power of investigation to narrow purposes,[172] and because of the administrative practice of the IRS, according to which the IRS halts its civil investigation until a pending criminal investigation and prosecution has been completed.[173] Outside the IRS statutory setting, parallel criminal and civil investigations and proceedings mounted by the government with respect to the same conduct generally are not objectionable.[174] The terms of the regulatory statute are decisive with respect to the proper use of civil subpoena power.[175] In the case of the SEC, these powers are widely drawn.[176]

As in many areas of regulation, the court declared, public policy requires that neither civil nor criminal process should await the other in an SEC matter. If the civil process is delayed, the public may

172. The *LaSalle* Court stated, "In § 7602 Congress has bestowed upon the Service the authority to summon production for four purposes only: for 'ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability.'" *LaSalle,* 437 U.S. at 317 n.18.

173. *Dresser,* 628 F.2d at 1379.

174. This point was, indeed, made by the Supreme Court as early as 1912 in *Standard Sanitary Mfg. Co. v. United States,* 226 U.S. 20 (1912), in which the Court stated that the government could bring civil and criminal proceedings under the Sherman Act either "simultaneously or successively." Id. at 52.

175. The validity of summonses or subpoenas "depend[s] ultimately on whether they were among those authorized by Congress." *LaSalle,* 437 U.S. at 307.

176. "These statutes explicitly empower the SEC to investigate possible infractions of the securities laws with a view to both civil and criminal enforcement, and to transmit the fruits of its investigations to Justice in the event of potential criminal proceedings." *Dresser,* 628 F.2d at 1376 (referring to 15 U.S.C. § 78(u)(a) (1976)). In some cases the governing statute confers no power on the agency to conduct an investigation into criminal violations. See *United States v. Cahill,* 920 F.2d 421 (7th Cir. 1990), in which the investigation was being conducted by the Federal Home Loan Bank Board (FHLBB), which made a criminal referral to the United States Attorney. On appeal from his conviction, the defendant argued that the fruits of the FHLBB investigation, obtained after the criminal referral, had been improperly presented to the grand jury that indicted him. Id. at 428. The court of appeals held that since the FHLBB itself has no power to investigate criminal cases, the court must presume that the civil process was directed to a proper civil end unless the defendant can show that the investigation's purpose was solely to procure evidence for the prosecutor. If the inquiry is legitimate, the defendant can raise no objection to its fruits being disclosed to the prosecutor. Id. Thus, a defendant hardly seems to be any better off even if the agency lacks power to inquire into criminality, since only in a rare case will the defendant be able to show that no legitimate civil purpose existed.

suffer great harm; if the criminal process is delayed, the statute of limitations may run out.[177] In order to perfect its civil case, the government must be allowed to employ its civil compulsory process even if a criminal investigation also is proceeding. To mitigate the harshness of this rule in some cases, *Dresser* points out that a civil court always retains the discretion to postpone discovery or to stay the civil proceedings. A postponement or stay, however, cannot be asserted as a matter of right.[178]

The *Dresser* court correctly judged that, in any event, the general policy arguments advanced by the appellant contained little substance. The government's right to discovery hardly is broadened by making concurrent use of civil process, since the grand jury has subpoena powers just as broad as the civil agency. Indeed, a party subject to civil investigation has greater protections than one subpoenaed by a grand jury, since in the civil process he is entitled to the assistance of counsel and, with some reservations, to a transcript of his testimony.[179] In the grand jury context, counsel for a witness may not be present in an examination before a federal grand jury. Furthermore, a transcript of the party's testimony is not available unless he becomes a defendant.[180] Thus, civil process can hardly be viewed as more extensive, more intrusive, or more oppressive than grand jury process.

This argument is persuasive on the facts of *Dresser*, in which no indictment had been returned; however, as noted, it becomes harder to defend if civil process continues after the return of an indictment. A jury's continued use of compulsory process to investigate a case after the return of an indictment constitutes an abuse of the grand jury process.[181] The government might overcome

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177. This problem also may arise on the civil side if the civil investigation is delayed in order to await the outcome of criminal proceedings.

178. *Dresser*, 628 F.2d at 1375-76. *Dresser* lists some difficulties that parallel proceedings can bring upon a defendant: "The noncriminal proceeding, if not deferred, might undermine the party's privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." Id at 1376. On the other hand, the government might be impelled to seek postponement of the civil proceeding to prevent the criminal defendant from broadening his rights of civil discovery against the government. Id. at 1376 n.20.

179. The Administrative Procedure Act provides that "a person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel or, if permittod by the agency, by other qualified representative." 5 U.S.C. § 555(b) (1988).

180. Under F.R.Cr.P. 16(a), a defendant is entitled to a copy of his recorded testimony before a grand jury insofar as it relates to the offenses with which he is charged. F.R.Cr.P. 16(a)(1)(A).

181. "[I]t is the universal rule that prosecuters cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation." *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985). See also *United States v. Doe (Ellsberg)*, 455 F.2d 1270, 1275 (1st

this barrier by continuing an investigation after indictment through its civil arm and then making use of the information acquired to strengthen its criminal case, thereby evading the restricted rules of discovery governing a criminal prosecution.[182] Generally, "civil discovery may not be used to subvert limitations on discovery in criminal cases either by the government or by private parties."[183] This improper purpose, however, likely will be clearly demonstrable only when an indictment has been returned, in which case the government's use of the grand jury must cease. In such a case, a court could avoid the impropriety (if it is such)[184] by staying the civil discovery process until the termination of the criminal process or, if urgent public policy needs call for pressing on with the civil process, by

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Cir. 1972); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985). In *Simels*, the defendant's counsel was served with a trial subpoena requesting information as to the source of his fee—an issue relevant to the crime with which his client was charged. Id. at 29-30. The government later withdrew this subpoena and substituted a subpoena requiring the attorney to appear before the grand jury to testify on this question, ostonsibly for the purpose of seeking a superseding indictment against the defendant. Id. The *Simels* court held that this subpoena must be quashed since its predominant purpose was to procure evidence for use at trial. Id. However, this line of attack often does not succeed since courts generally apply a presumption of regularity in grand jury proceedings. See *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976). The government usually can allege with some plausibility that it is inquiring into other crimes or other defendants or has good reason to seek a superseding indictment. The government's "good faith inquiry into other charges [not included in the indictment] . . . is not prohibited even if it uncovers further evidence against an indicted person." *In re Grand Jury Proceedings (Johanson)*, 632 F.2d 1033, 1041 (3d Cir. 1980). At least one court has recognized that, "[a]bsent some clearly indicative sequence of events such as those present in *Simels*, a court will be faced with having to take at face value the government's word that the dominant purpose is proper, even when the subpoena will inevitably produce evidence applicable to prosecuting the existing indictment pending trial." *In re Grand Jury Subpoena Duces Tecum, May 9, 1990*, 741 F. Supp. 1059, 1061 (S.D.N.Y. 1990).

182. This possibility provoked a concurring opinion in *Dresser* from Judge Edwards, who regarded this issue as an unsettled question the resolution of which "must await another day." *Dresser*, 628 F.2d at 1391 (Edwards, J., concurring). The question arose in *PHE, Inc. v. Dep't of Justice*, 139 F.R.D. 249 (D.D.C. 1991), in which the defendants sought a protective order with respect te a government civil discovery motion on the ground, inter alia, that an indictment, which arose out of the same matter, had been returned against them in another federal district. Although it declined to stay the civil proceeding, the court limited government discovery "to the extent that they seek admissions and contentions of the plaintiffs with respect to the material under indictment in Utah." Id. at 253.

183. *McSurely v. McClellan*, 426 F.2d 665, 671-72 (D.C. Cir. 1970).

184. Courts generally do not adopt the position that it is improper to use civil process after a grand jury indictment even if that use might have a tendency to strengthen the case against already-indicted defendants. See *United States v. Harrington*, 761 F.2d 1482 (11th Cir. 1985), in which Drug Enforcement Administration subpoenas had been issued to third parties under 21 U.S.C. § 876 after the defendants were indicted but before trial. The government argued that it was not required to cease its investigation before trial, although it conceded that "it must cease use of the grand jury." Id. at 1485. The court agreed that no impropriety existed: "The subpoenas here were not running to the indicted individuals. They were issued to third parties during a continuing investigation. As such they were entirely legal." Id.

issuing a protective order to the effect that the fruits of the civil subpoena should not be disclosed to the prosecutorial arm.[185]

Dresser is, in general, a resounding validation of two propositions—first, that a civil agency may continue its compulsory process even when a criminal investigation is concurrently proceeding and second, that the fruits of the civil investigation may be transmitted fully to the grand jury, at least up to the point when an indictment has been returned.[186] The *Dresser* court viewed cooperation between the agency and the grand jury with enthusiastic approbation.[187]

One final illustration from the case law confirms the modern position. In *United States v. Educational Development Network Corp.*,[188] the United States Attorney's Office (USAO) had received information pointing to possible fraudulent practices by a contractor with the Department of Defense. The USAO opened a grand jury file

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185. *Dresser* also argued the other side of the proposition—that to enforce the civil subpoena would undermine traditional grand jury secrecy principles since the government in its civil capacity was demanding documents that the grand jury had already received. The court rejected this argument on the ground that such a procedure did not involve the disclosure of grand jury records but was based on the SEC's independent statutory entitlement to the documents, which it was seeking to obtain not from the grand jury but independently through its own legitimate subpoena power. *Dresser*, 628 F.2d at 1382-83.

186. In *Dresser*, the court's panel decision had granted enforcement of the subpoena, subject to a modification that, once a grand jury investigation began, the SEC should not turn over the fruits of its investigation to the Justice Department. Id. at 1385. The en banc court removed this restraint, id.; however, one should note that in some situations, a witness gives civil testimony under a grant of immunity that precludes its use in a criminal prosecution. For example, under the former Bankruptcy Act, a debtor appearing under subpoena before a bankruptcy court received automatic immunity with respect to the use or derivative use of her testimony in any subsequent criminal proceeding. 11 U.S.C. § 25(a)(10) (1976); *United States v. Moss*, 562 F.2d 155, 163 (2d Cir. 1977). After the revision of the bankruptcy law in 1978, a debtor must assert the privilege against self-incrimination, after which he may be compelled to testify only if a federal district court grants him immunity. 11 U.S.C. § 344 (1988).

187. The court referred to the fact that the SEC's general policy granted the Justice Department "continuing access to the entirety of a given investigative file once the Commission formally grants access," and commented that:

> [n]o one would suggest that the grand jurors, unassisted by accountants, lawyers, or others schooled in the arcana of corporate financial accounting, could sift through the masses of Dresser's corporate documents and arrive at a coherent picture. . . . In this area, as in many areas of great complexity, the grand jurors are assisted—guided and influenced, in fact—not only by the United State Attorneys assigued to the investigation, but also by experts provided by the federal regulatory agencies. . . . This expert assistance is permitted under Rule 6(e), and it promotes the efficiency and rationality of the criminal investigative process.

Dresser, 628 F.2d at 1383. For support of this conclusion, the court pointed to the legislative history of the Foreign Corrupt Practices Act of 1977, in which the Senate Committee had stated, "The Committee expects that close cooperation will develop between the SEC and the Justice Department at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale." Id. at 1385-86 (quoting S. Rep. No. 114, 95th Cong., 1st Sess. 12 (1977)).

188. 884 F.2d 737 (3d Cir. 1989).

on the matter; however, before the grand jury began an investigation, the Office of Inspector General (IG) of the Department of Defense (DOD), whom the USAO had kept apprised of the situation, issued civil investigative demands and thus obtained many documents, which it then shared with the USAO. As the opinion noted, "The government candidly admits on appeal that the USAO and DOD agreed to conduct a joint investigation and to use DOD IG subpoenas so that the agencies could share the evidence obtained."[189] Clearly the agencies deliberately used this tactic to avoid the impact of grand jury secrecy provisions, which would have made it cnmbersome and perhaps impossible for the USAO to share with the DOD documents obtained by means of a grand jury subpoena.[190]

The information gathered during the "joint investigation" was then presented to the grand jury. The defendants argued that the USAO had acted in bad faith by using IG subpoenas to gather evidence during what they characterized as a "joint grand jury/criminal/civil/administrative/military investigation."[191] The defendants relied in part on *LaSalle,* and characterized the procedures as an "end run around the constitutional requirement that indictments be secured only through a grand jury."[192] In rejecting this position, the court held that *LaSalle* must be read narrowly as a decision under Section 7602 of the Internal Revenue Code, relevant only to an IRS summons. The court refused to recognize a general rule that administrative subpoenas issued to develop criminal cases are unenforceable.[193] Indeed, the court found that legislative history indicated that Congress expected cooperation between the IG and the Department of Justice in investigating and prosecuting fraud cases.[194]

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189. Id. at 739.

190. The defendants also argued that the procedure followed in that case breached the grand jury secrecy provisions of F.R.Cr.P. 6(e) in that a grand jury file had been opened. The court rejected this argument as well, stating, "we do not believe Rule 6(e) bars the USAO's criminal division from participating in other agencies' investigations before it actually begins presentation of evidence to the grand jury. . . ." *Educational Dev. Network,* 884 F.2d at 740. See the discussion of grand jury secrecy in notos 279-99.

191. *Educational Dev. Network,* 884 F.2d at 739.

192. Id. at 739, 741.

193. Id. at 742 (citing its earlier decision in *Donovan v. Spadea,* 757 F.2d 74, 77 (3d Cir. 1985)).

194. *Educational Dev. Network,* 884 F.2d at 743 n.10 (citation omitted). See also *United States v. Aero Mayflower Transit Co.,* 831 F.2d 1142 (D.C. Cir. 1987), which approved the use of Department of Defense Inspector General subpoenas to pursue a joint Justice Department-Department of Defense criminal investigation. In *Aero Mayflower,* the appellants made colorable allegations that the Inspector General was at times merely rubber stamping subpoenas prepared by the Justice Department while, at other times, the Justice Department modified the content of the Inspector General's subpoenas so that "the Inspector General was not conducting an

C. Digesting the Case Law Developments

The cases support a settled recognition of the propriety of civil investigations of criminal matters with accompanying disclosure to prosecutors. This recognition does not, however, amount to a complete assimilation of civil process into the field of criminal investigation. As noted above, the civil agency must be able to establish a legitimate purpose for its inquiry that falls within its statutory mandate. The recipient of a subpoena may challenge a summons on the ground that no such legitimate purpose is apparent.[195] In such a case a court might view the agency as nothing more than a tool for the prosecutor, who prefers to build a case through the agency and to avoid grand jury secrecy rules. This problem is unlikely to cross over from theory into practice, however, because a criminal violation of a regulatory statute nearly always will also constitute a ground for a civil suit by government or a ground for administrative sanctions. Furthermore, an agency often can base civil subpoena power nakedly on its statutory authority to investigate criminal violations within its bailiwick.

Daunting problems may confront a party who is subject to parallel civil and criminal proceedings. Fifth Amendment dilemmas will present themselves,[196] as will the possibility of government obtaining disclosure through civil discovery that would be unavailable once formal criminal adversarial proceedings commence.[197] Before the

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independent investigation but was serving as a mere conduit for an investigation by the Justice Department's Antitrust Division by lending out the Inspector General's subpoena power." Id. at 1143. The court rejected this argument, noting that the Inspector General had both civil and criminal investigatory powers and that "[s]o long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial." Id. at 1146.

195. See the earlier discussion of *Morton Salt* in the text accompanying notes 48-49. A good discussion of this limitation is found in Note, 91 Yale L. J. at 1614 (cited in noto 148).

196. In a civil case, an adverse inference properly may be drawn from a party's assertion of the Fifth Amendment privilege against self-incrimination. See generally *Baxter v. Palmigiano*, 425 U.S. 308 (1976). Furthermore, in a civil proceeding, the defendant may feel great pressure to cooperate in order te maintain a modicum of good relations with the government agency in question and te stave off significant sanctions. For example, under the regulatery provisions governing Medicare and Medicaid, a health care provider must make records available to federal investigators. Failure "to grant immediate access upon reasonable request" is a ground for barring the provider from both programs. 42 U.S.C. § 1320a-7(b)(12) (1988). Such cooperation might, however, prejudico the possibility of an effective defense if the government brings a subsequent criminal prosecution.

197. A criminal conviction may raise the doctrine of collateral estoppel against the defendant as to particular identical issues at stake in a subsequent civil proceeding. *The Matter of Raiford*, 695 F.2d 521, 523 (11th Cir. 1983). These disadvantageous impacts might be avoided if the court permits the defendant to enter a nolo contendere plea in the criminal matter. See F.R.Cr.P. 11(e)(6)(b). On the other hand, exoneration in a criminal proceeding will not necessarily protect

grand jury has returned an indictment, these problems are prospective (although they still must be confronted); after indictment, they become more consequential because they implicate the established rule that, at this point, government should be restricted to information it obtains through the rules of discovery applicable to criminal cases.[198] The government may manipulate the date of returning an indictment to an extent; thus, the application of the principle is subject somewhat to governmental control. This danger, increasingly persistent as parallel proceedings become common, requires a deliberate review of the possibility of stronger judicial control over the ordering of parallel proceedings and further thought about the conditions that make stays and protective orders appropriate.

More generally, the issues that surface in these cases raise the central question of whether any valid constitutional or policy bases support isolation of the criminal and civil subpoena powers in separate compartments. Any attempt to ground such an effort in the constitutional rights of a criminal suspect or defendant seems unavailing. No due process issue arises because an individual has no due process right to a state grand jury indictment.[199] No danger of chilling the Fifth Amendment privilege against self-incrimination presents itself because an individual may assert the privilege as a basis for refusal to comply with any compulsory process, whether from the grand jury or by way of civil summons or investigative demand. Even if the question is confined to the federal jurisdiction, in which defendants do have a constitutional right to a grand jury indictment, nothing in the tradition of grand jury practice supports the exclusion

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the defendant from a subsequent civil suit in which the burden of proof is lower. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984). Thus, the defendant has much to lose and not much to gain.

198. For example, it is always improper to subpoena a defendant before a grand jury for the purpose of questioning him about a crime for which he is already charged. *United States v. Mandujano*, 425 U.S. 564, 594 (1976) (Brennan, J., concurring). A grand jury subpoena should be quashed if the movant can show that its predominant purpose is to provide information to aid in the preparation of a pending indictment for trial. *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985). If the court does not quash the subpoena, an appropriate remedy would be to prohibit the government from calling the grand jury witness at the trial and, if the defense does call the witness, to prohibit the government from using her grand jury testimony to impeach her. *United States v. Kovaleski*, 406 F. Supp. 267, 271 (E.D. Mich. 1976). This principle is unique to grand jury proceedings; courts do not accept the proposition that continuing investigation through civil process is improper after indictment. See *United States v. Harrington*, 761 F.2d 1482, 1485 (11th Cir. 1985), and the discussion in note 184.

199. The Fifth Amendment federal right to indictment by a grand jury has not been incorporated into the Due Process Clause of the Fourteenth Amendment and does not apply to the states. *Hurtado v. California*, 110 U.S. 516 (1884).

of material gathered by civil process. The right to a grand jury indictment surely is satisfied by having the grand jury vote a true bill after it receives evidence, without requiring that the evidence be developed exclusively through the grand jury subpoena or through witnesses who appear only before a grand jury and not before any other agency of government.[200] The grand jury's exercise of a true screening function before a citizen is brought to trial is the essence of the grand jury's importance to the subject's liberty. Questions about the process by which evidence was gathered in the first place, which of course must be legal and constitutionally proper, are a separate matter. These evidence-gathering requirements, however, do not require an exclusive role for the grand jury.

An attempt to justify the separation by a due process notion extracted from more general ideas of "abuse of process" or "usurpation of the function of the grand jury" makes the foundation appear even more shaky. A purely historical invocation of the grand jury as the central institution in initiating a criminal prosecution does not provide a satisfying resolution. The grand jury monopolized this role at a time when the criminal law was reasonably compact and when a fairly clear dividing line between criminal and civil proceedings was apparent. Federal criminal law, now immensely swollen, frequently overlaps civil penalties; especially in the regulatory fields of administrative agencies, the same conduct frequently may be sanctioned by both criminal and civil penalties. Furthermore, the "civil" penalties often are frankly described as deterrent or punitive in nature.[201] Sometimes the agency ultimately will decide to pursue both civil and criminal sanctions. Frequently no formal criminal proceedings will be brought because civil penalties appear adequate, although strongly punitive.[202]

These developments highlight a strong need to keep options open and to pursue investigations through the medium of whatever

200. Federal law provides virtually no restrictions on the kind of evidence the grand jury may receive. Indeed, the jury may indict on the basis of hearsay: "[N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." *Costello v. United States*, 350 U.S. 359, 362 (1956).

201. Although civil penalties often are punitive, criminal penalties in the regulatory area may encompass many of the consequences that traditionally might be expected from a civil regulatory process. For example, convictions of health care fraud can result in exclusion from participation in government-funded health care programs and the loss of licenses, while convictions for defense contracting fraud can result in debarment from contractual relations with the government. See ABA Special Advisory Committee on Collatoral Consequences, *Final Report: Collateral Consequences of Convictions of Organizations* (ABA, 1991).

202. This point is developed fully, with examples, in Mann, 101 Yale L. J. at 1795 (cited in note 18).

agency appears most appropriate or most efficient to carry out the task. Often the locus of the initiation of the investigation may depend on chance, on which department or agency gets the first batch of significant information. Better coordination of procedures for deciding who then should make the major effort may be desirable, but this is a question of governmental efficiency and not of the rights of citizens or entities. Any mandated effort to hold apart the two strands of governmental inquiry and corrective action now appears anachronistic and runs counter to the intertwined nature of modern governmental investigations. Traditional assertions of the need for separation appear to be little more than an unexamined legacy of the grand jury's dominant role in criminal investigation in an earlier period.

Assume, for example, that a federal agency or commission or perhaps the Inspector General's office of a federal department begins an inquiry into suspected breaches of regulations that, if proven, almost certainly will also amount to criminal offenses. Even if no criminal prosecution is brought, civil penalties and other administrative sanctions likely will have a large deterrent, punitive impact. Because of its criminal aura, such an investigation might have been initiated in some branch of the Department of Justice and been conducted through a federal grand jury. But it happens to be initiated by an agency, which appears natural and proper since presumably the agency personnel will have the expertise and knowledge to conduct the probe effectively. Indeed, for that reason, the Department of Justice, if it acquires information suggesting that a probe likely would be a productive expenditure of resources, may well suggest to the agency that it begin the investigation.

Assume further that at some point in the inquiry the agency personnel decide not only that civil penalties are indicated, but that pursuit of a criminal prosecution is warranted, due to the gravity of the conduct uncovered during the investigation. At this point, collaboration with prosecutors obviously would be prudent, because agency personnel may be less sophisticated about the preparation of a criminal case and might make blunders or omissions that would prejudice the best presentation of the criminal case. The government parties may agree that the most efficient way to proceed is to turn the criminal aspect of the case over to federal prosecutors for further development through a grand jury's subpoena power. Such a complete referral should not be required, however, especially if further compulsory process by the agency must cease with the referral. First, the agency may have a legitimate interest in pursuing the civil

penalty aspects of the inquiry. Second, the government parties may agree that the agency is competent and well-suited to continue to develop the criminal aspects of the case and "package" the evidence for the grand jury before later turning it over to the prosecutor for the formal initiation of the indictment process.

Although such a process generally is not objectionable, it creates a sensitive situation, not only when an already-indicted defendant is involved, but also when the target of possible criminal prosecution is subpoenaed to give oral testimony (as opposed to producing documents) before an administrative agency. The federal grand jury may subpoena these targets to testify[203] because it enjoys a special historical position that justifies its extraordinary powers. By comparison, the notion that a citizen who is suspected of crime can be summoned to testify before an administrative authority has vaguely disreputable antecedents, evoking traditional rhetoric about Star Chamber proceedings. The situation sharply raises Fifth Amendment issues because, while the privilege against self-incrimination has been considerably eroded with respect to documents, especially the records of a commercial entity,[204] it still retains full force with respect to oral testimony.

These considerations have led courts to scrutinize closely claims that agencies are entitled to compel the testimony of a target in a criminal or quasi-criminal investigation. In *United States v. Minker*,[205] the Supreme Court held that the powers conferred by the Immigration and Nationality Act of 1952 on immigration officers to "require by subpoena the attendance and testimony of witnesses" did not extend to subpoenaing a naturalized citizen for this purpose when the investigation was intended to determine whether good cause existed for the institution of denaturalization proceedings. *Minker*, however, did not rest on any broad principle of the impropriety of such action but rather on a narrow construction of the key statutory concept of "witness." The Court did not in principle question

203. "The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry." *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973). The Court also has declined to hold that the target is constitutionally entitled to a self-incrimination warning, leaving this question open for future determination. See note 60 and accompanying text.

204. "[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis v. United States*, 417 U.S. 85, 88 (1974). Further, the modern position concludes that the privilege protects only against the compulsion to make a fresh testimonial declaration. Thus, documents that the witness produced voluntarily on a previous occasion are not subject to the privilege, even though they may contain incriminating statements. *Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Doe*, 465 U.S. 605 (1984).

205. 350 U.S. 179 (1956).

congressional power to provide for the issuance of a subpoena to a potential target of an investigation, but in essence did conclude that the statute in *Minker* did not provide for this possibility with sufficient clarity.[206] In modern cases, courts have not questioned the proposition that an administrative agency, acting within its statutory powers, may properly direct a *subpoena duces tecum* to the target of an inquiry even when criminal proceedings are possible or even likely. With respect to subpoenaing a target to give testimony, *Minker* no doubt continues to be valid but, properly understood, does not invalidate such a process. Instead, it only requires that the process be expressly set out in the governing statute.[207]

Therefore, while issuing administrative subpoenas for testimony to targets of criminal investigations may not be general practice, such a practice is not improper (at least before indictment) if clearly contemplated by the governing statute. Targets will not be harmed because their rights and privileges are not less with respect to the compulsory process of the agency than with respect to the compulsory process of the grand jury. The target of a criminal investigation might object to an administrative subpoena because he enjoys greater protection from the citizen composition of the grand jury. However, the general practice of allowing a witness before an administrative agency to be accompanied by counsel more than compensates for any danger posed by an administrative subpoena.

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206. The Court concluded that complete clarity was especially important since the statute conferred the subpoena power broadly on any immigration officer. Id. at 190. The concurring opinion of Justice Black suggested a rather broader basis; after expressing general uneasiness about "compulsory questioning by law enforcement officers behind closed doors," Justice Black asserted that "a police practice so dangerous to individual liberty as this should not be read inte an Act of Congress in the absence of a clear and unequivocal congressional mandate." Id. at 191-92 (Black, J., concurring).

207. *United States v. Hossbach*, 518 F. Supp. 759, 766-67 (E.D. Pa. 1980) (citing and relying on *Minker*). In *Hossbach*, subpoenas were issued to third parties by the Drug Enforcement Administration (DEA) during the course of a criminal investigation. The governing statute, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 876(a), provides inter alia that, "in any investigation" under the statute, "the Attorney General may subpoena witnesses [and] compel the attendance and testimony of witnesses . . . ." *Hossbach*, 518 F. Supp. at 765. The statutory scheme clearly encompasses both the civil regulation of drug dealings and the enforcement of criminal offenses in that area. Id. It empowers the Attorney General to delegato his functions to any employee of the Department of Justice; in this connection, the Attorney General made such a delegation to agents-in-charge in the DEA, under 28 C.F.R. Subpt. R., App. § 7(a). *Hossbach*, 518 F. Supp. at 765-66. The *Hossbach* court took the position that the DEA could issue subpoenas under the statuto in a purely criminal investigation but, relying on *Minker*, concluded that they could not properly direct subpoenas to the targets of the criminal investigation. Id. at 766. Again, this dictum turns on a construction of the term "witness" in the statute rather than on any broader ground. Id.

The converse case, in which the process has begun with a grand jury investigation into suspected criminality, poses greater difficulty. Suppose that ample evidence has been developed before the grand jury to procure an indictment but that further evidence would be useful to strengthen the case of a government agency that wants to press for civil penalties. As noted, once the indictment is returned, the grand jury may not continue its process solely to strengthen the criminal case. Arguably, the prosecutor likewise may not properly delay the formal return of the indictment in order to use grand jury process to gather further evidence merely to strengthen an agency's hand in a civil matter because, in the absence of a continuing need for criminal investigation, such a delay would amount to an abuse of the grand jury process.

This problem rarely will arise in practice because the task of demonstrating that the grand jury has no continuing legitimate criminal investigatory purpose is difficult[208] and because, once a criminal case has been soundly built, the foundation for civil proceedings also is likely to be in place. The more vexing question asks to what extent the product of the grand jury investigation can be made available to civil attorneys for the government or for an agency of government. Any such disclosure clashes with the traditional requirement, reiterated by modern rules and decisions, that grand jury proceedings must be kept secret. To this problem Part VIII now turns.

VIII. THE GRAND JURY

The most reiterated and cherished condemnation of the mixing of civil and criminal process lies in the context of investigations by the grand jury. *United States v. Procter & Gamble*[209] provides a modern starting point. In *Procter & Gamble*, a grand jury conducted an investigation into antitrust violations but returned no indictment. The government then brought a civil suit under the Sherman Act[210] to enjoin alleged violations of the Act, making use of the grand jury transcript in its preparation of the litigation. The defendants moved for disclosure of the transcript to assist them in the preparation of their defense. The Supreme Court reversed an order requiring

208. In order to make such a showing, a party objecting to a grand jury subpoena would have to have full access to the grand jury file, which is not permitted.

209. 356 U.S. 677 (1958).

210. 15 U.S.C. § 4 (1988).

disclosure, relying on the traditional policy favoring secrecy with respect to grand jury proceedings and finding that the defendants had made no showing of particularized need sufficient to displace the application of this policy.[211] At the same time the Court declared that, if the government had been using a criminal process to gather evidence for a civil case, it would have been flouting the policy of the Sherman Act, which provides that depositions taken under government civil process in an antitrust case "shall be open to the public."[212] However, the district court had made no finding that criminal procedure had been "subverted" in this fashion.[213]

Procter & Gamble is instructive; it states the basic position that criminal process must not be used for a civil investigative purpose and also contains a fresh and strong assertion of the importance of grand jury secrecy. At the same time, the decision does not hold the two kinds of process wholly separate because it permitted the government (though not the defendant), in the absence of a finding of bad faith, to avail itself in a civil proceeding of evidence gathered through traditional criminal investigatory compulsory process.[214]

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211. The Court listed the reasons justifying grand jury secrecy by quoting the enumeration in *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954):

> (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 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 an 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.

Procter & Gamble, 356 U.S. at 681-82 n.6 (quoting *Rose*, 215 F.2d at 628-29). When *Procter & Gamble* was decided, exceptions to the grand jury secrecy principle appeared in an early version of F.R.Cr.P. 6(e). That Rule subsequently was amplified by amendments in 1966, 1977, 1979, 1983, and 1985. The present version of Rule 6(e) is discussed in notes 148-49.

212. *Procter & Gamble*, 356 U.S. at 683 (quoting 15 U.S.C. § 30).

213. *Procter & Gamble*, 356 U.S. at 684 (Whittaker, J., concurring). Jnstice Whittaker suggested that a desire on the part of government to avoid open hearings and to take evidence ex parte "probably has often been the real purpose of grand jury investigations in like cases." Id.

214. The question before the Court was the propriety of disclosing the grand jury file to the defendant. Thus, the holding does not expressly validato nse of the grand jury file by the government; indeed, it now appears, under the authority of *United States v. Sells Engineering*, 463 U.S. 418 (1983), and the present version of F.R.Cr.P. 6(e) (see the discussion in notes 148-49 and accompanying text), that the government should apply to the court and must show particularized need before it can use the file in a civil proceeding. Nevertheless, the tenor of the Court's opinion seems to find no impropriety in the government's use of the grand jury materials absent a showing that the government acted with bad faith *ab initio*. The Court's resolution may appear perverse, since the grand jury secrecy principle, which the Court advanced as tending toward the protection of targets and defendants, ultimately was applied to deny the defendant access to a file that the government had compiled secretly and then was permitted to use against

Applying the principle of separating criminal and civil investigatory process in the context of grand jury investigations is not without difficulty. What kind of showing must a party make to demonstrate abuse of the grand jury process in this context?[215] Must she show that the grand jury investigation was a sham from the first in the sense that the government made a prior commitment to civil proceedings while it perceived no possibility or only a bare possibility that criminal proceedings would ensue? Or will it suffice to show that, although the possibility existed that criminal conduct would be unearthed, which would lead to an indictment, nevertheless an equal, perhaps stronger, purpose of the agency was to promote a civil investigation? The Supreme Court has made no clear statement on this issue, although language in *Procter & Gamble* can be interpreted to approve the first, stronger version of the burden imposed on a party who challenges government use of the material in a civil context.[216]

The weaker version of the burden surely would be inappropriate.[217] The functioning of grand juries would be inhibited

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him. This view of secrecy is one-sided, however. The "bad faith" or "abuse of process" restriction on government use seems inconsequential since the government usually will be able to assign some not wholly implausible criminal investigatory purpose to grand jury activity.

215. A movant might seek a remedy at different stages. One possibility is to petition for prohibition to halt the grand jury proceedings; another is to move for dismissal of an indictment that the jury has returned; a third, to move for suppression of evidence. Contempt proceedings against the prosecutor also are possible. Frequently the issue will arise when a movant has applied to release grand jury materials for a civil purpose.

216. See the discussion in LaFave and Israel, *Criminal Procedure* § 8.8(c) at 661-63 (cited in note 2) (noting that the language in *Procter & Gamble* "suggests that the Court there was considering only that situation in which the prosecutor fully anticipated bringing a civil suit and viewed an indictment 'as merely an unexpected bare possibility'") (quoting *United States v. Procter & Gamble*, 187 F. Supp. 55, 58 (D.N.J. 1960)). To support this view, the authors cite *Universal Mfg. Co. v. United States*, 508 F.2d 684 (8th Cir. 1975); *In re Grand Jury Subpoenas, April 1978*, 581 F.2d 1103 (4th Cir. 1978); *Robert Hawthorne Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D. Pa. 1975). See LaFave and Israel, *Criminal Procedure* § 8.8(c) at n.35. These cases interpret the test to ask whether the grand jury was "used for the primary purpose of obtaining materials relevant only to civil liability." *In re Grand Jury Subpoenas*, 581 F.2d at 1110. In this case, the appellant sought to quash grand jury subpoenas and sought an order to terminate the grand jury proceedings on the ground that the grand jury proceeding was instituted only after the appellant had been successful in quashing several IRS administrative summonses. Id. at 1105. The appellant contended further that the IRS had a history of resorting to grand juries when its administrative investigations had been thwarted. Id. at 1107. Nevertheless, the court denied a hearing on these issues, concluding that the petitioner would be adequately protected by later judicial review of an application for disclosure of the grand jury proceedings. Id. at 1110.

217. *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079 (7th Cir. 1982), appeared to adopt the weaker view of the burden. In *Miller Brewing*, the court stated, "A grand jury investigation is not conducted in good faith unless it is used to conduct investigations that are in their inception exclusively criminal." Id. at 1086. However, the court also found "no evidence of bad faith from the mere fact that the government conducted a grand jury proceeding without returning an indictment and later seeks to use the material in a civil investigation. . . . [T]here was no intent in the legislative history of Rule 6(e) to generally preclude the use of grand

seriously if they were prevented from inquiring into possible criminality simply because it was likely from the outset that a civil remedy also would be pursued and perhaps preferred, to the exclusion of criminal proceedings. The stronger burden, while preferable, may be enormously difficult to discharge. The government rarely will be unable to make some plausible showing that the grand jury was charged with an inquiry into possibly criminal conduct. These assurances ought to be accepted unless they clearly can be demonstrated to be mere subterfuge. This analysis remains consistent with the traditional presumption of regularity in grand jury proceedings[218] and with the traditional freedom of the grand jury to investigate mere possibilities of crime.

The weaker test runs the risk of compelling the government to show that, from the first, it had probable cause to believe a crime had been committed, which would defeat the very purpose of the grand jury—to uncover the existence of that probable cause.[219] Moreover, the weaker test would compel the government to rebut by showing that it had made an institutional commitment to a criminal prosecution if certain facts were uncovered. This situation would be unfortunate, since the choice between civil and criminal sanctions, and whether they should be pursued concurrently or whether one should be followed exclusively, often cannot be made intelligently at an early stage. These decisions depend upon the exact, final configuration of the uncovered facts and, beyond that, on the willingness of a target to repair damage and make restitution, perhaps even to submit to serious civil sanctions without contest. Consultation between prosecutors and civil agencies, when all the facts are known and the posture of the target ascertained, ultimately will be necessary to decide what are the preferred remedies.[220] This

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jury developed evidence for civil law enforcement purposes, 'assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.'" Id. (quoting S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977)).

218. "A presumption of regularity attaches to a grand jury's proceedings and appellants have the burden of demonstrating that an irregularity occurred." *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976).

219. "The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." *United States v. Dionisio*, 410 U.S. 1, 15 (1973) (citing *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)). The Court noted further that "a sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received." *Dionisio*, 410 U.S. at 15-16.

220. One problem is that such a consultation may be inhibited by the obstacles in F.R.Cr.P. 6(e) that restrain disclosure of grand jury materials. See the discussion in notes 148-49. The inclusion of agency attorneys in the prosecutor's team will make consultation easier. These attorneys may consult with their agency superiors but, if this consultation involves the disclosure

process should be encouraged and not inhibited by the risk of imputing taint to evidence uncovered by the grand jury.

Auxiliary tests can be helpful in arriving at the proper conclusion. If a grand jury actually returns an indictment, any assertion of grand jury abuse will be facially implausible. Therefore, the question of abuse of process likely arises only when no indictment has been returned.[221] If a grand jury hearing is held, important questions will be whether the prosecutor acted in response to a civil agency referral, and whether and to what extent civil agency personnel were involved in the preparation of the case for and its presentation to the grand jury. Apparently, no federal courts have found abuse of the grand jury process in this context.

Another subject of scrutiny should be the Court's concern in *Procter & Gamble* that government will obtain an unfair advantage in civil proceedings by amassing a secret file through use of the grand jury subpoena power.[222] No doubt the idea is rooted historically in the perception that a procedure as intrusive as the pre-trial inquisitorial subpoena for purposes of investigation can be justified only by the public necessity to solve and prosecute criminal cases. The pursuit of a civil remedy, which, until recently, was almost entirely a matter for private parties seeking to vindicate private rights, was not considered sufficiently urgent to warrant the use of compulsory process for investigative purposes.

In addition, the process employed by the grand jury was (and is) a harsh one, with an uncounseled witness (who may be a target of the investigation) subject, unless she is very vigilant, to potential self-incrimination and even to prosecutions for contempt or perjury. To convert this severe brand of compulsory process to civil use traditionally appeared unconscionable. Until recent times, because of the rarity of civil litigation by the government, these propositions seemed obvious while the danger of abuse seemed remote. In modern times, however, the huge increase in administrative regulation and

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of grand jury materials, the superiors also then become hound by the rules relating to grand jury secrecy.

221. A showing of good faith on the part of the government "is particularly important where the grand jury fails to return an indictment. In such case, the likelihood of improper use of the grand jury process is substantially greater. . . ." *In re Grand Jury Subpoenas, April 1978*, 581 F.2d 1103, 1110 (4th Cir. 1978). But see *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079, 1086 (7th Cir. 1982) (suggesting that the failure to return an indictment should not count at all as evidence of bad faith).

222. This proposition is conventionally accepted: "The grand jury should not be used by the prosecutor for the purpose of aiding or assisting in any administrative inquiry." Neil A. Kaplan, et al., eds., *Parallel Grand Jury and Administrative Agency Investigations* 542 (ABA, 1981) (quoting *ABA Policy on the Grand Jury* (ABA, 1977)).

public civil remedies has transformed the situation. Government now has the strongest interest in building good cases for the pursuit of civil sanctions and remedies. At the same time, the processes of civil and criminal investigation have become intertwined in many cases. In these cases, government civil attorneys conduct a large part of the investigation and often participate in the preparation of the case for the grand jury, sometimes even acting as specially designated Assistant United States Attorneys and actually presenting the case to the grand jury.[223] The two streams of investigation and process have converged and, as a result, the danger of using the grand jury for civil purposes has become real.

The danger seems less deadly, however, because many government agencies and departments now enjoy civil compulsory process nearly equal to the grand jury's powers. If government can use a civil investigative demand to procure documents or to compel testimony, what does it matter if they find it more convenient to funnel the same process through the agency of the grand jury? Many state jurisdictions do not employ grand juries for investigative purposes; instead, they conduct criminal investigations through subpoenas returnable before a magistrate, a procedure that might be thought virtually indistinguishable from the execution of a civil investigative demand. The question thus arises whether continued adherence to the principle that the grand jury must not be used for predominantly civil purposes amounts to anything more than an obeisance to no-longer-relevant history.

Observers can suggest some reasons for continuing, legitimate concern about using grand juries for civil purposes. First, not all agencies and government departments have compulsory process powers co-extensive with the grand jury. Inspectors General possess limited powers for the production of documents and lack the power to compel testimony. For an agency or office with such restricted powers to exploit the grand jury's historical plenary process would constitute an evasion of a legislative decision to accord the agency only a limited investigative role. Second, even if the agency has power to compel testimony, it must allow a witness to be accompanied by counsel, a privilege not accorded under federal grand jury practice. The intimidating atmosphere of an inquisition without the assistance of counsel may be justifiable only by the great public interest in solving and prosecuting crimes. Third, grand jury proceedings are secret,

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223. See note 148.

while a target may have a better chance of discovery of proceedings before an administrative agency. If government civil agencies are to have access to grand jury materials, adversarial equipoise may require enlarging the rights of the defense in a civil matter to have co-extensive access. Fourth, the use of the grand jury process to further civil remedies may constitute a breach of secrecy, which chills the willingness of witnesses to testify or to come forward to the prosecutor with information.

Although these concerns are legitimate, protocting them through rules or principles in the abuse of process context would be nearly impossible because a litigant then would face the extremely difficult task of showing that a grand jury inquiry was launched with no legitimate purpose of criminal investigation. Courts are very reluctant to interfere with the ongoing proceedings of a grand jury.[224] In recent years these considerations have found expression through another outlet—the elaboration of the concept of grand jury secrecy.[225] Even if a grand jury were used predominantly for the improper purpose of inquiring into a civil matter, no harm will come if the fruits of the inquiry are not disclosed to the interested civil agency or party. Because the grand jury is eminently likely to have uncovered facts relevant to the possibility of civil proceedings, even when acting with perfect legitimacy,[226] the question of when disclosure is proper becomes crucial and has generated much recent litigation.

IX. DISCLOSURE OF GRAND JURY MATERIALS

Rule 6(e) of the Federal Rules of Criminal Procedure embodies the present state of the law with respect to disclosure of proceedings before the grand jury. In the context of this discussion, the current rule, produced by a series of amendments over several decades,

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224. "Any holding that would saddle a grand jury with . . . preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Further, the *Dionisio* Court recognized that the grand jury "must be free to pursue its investigations unhindered by external influence or supervision. . . ." Id.

225. As the Fourth Circuit explained:

> [T]o hold an evidentiary hearing into prosecutorial motivation with an eye toward quashing otherwise lawfully issued subpoenas and even terminating the entire process would be substantial judicial intervention. Nonetheless, such intervention might well be required if it were the only means of protecting petitioner from the abuse he alleges. There is, however, a less drastic remedy in F.R.Cr.P. 6(e).

In re Grand Jury Subpoenas, April, 1978, 581 F.2d 1103, 1108 (4th Cir. 1978).

226. In this context, the Supreme Court has described the grand jury as a "storehouse of relevant facts." *Dennis v. United States*, 384 U.S. 855, 873 (1966).

provides two principal possibilities of disclosure of grand jury information. First, disclosure may be made to "an attorney for the government for use in the performance of such attorney's duty. . . ."[227] Second, disclosure is proper "when so directed by a court preliminarily to or in connection with a judicial proceeding"[228] (usually referred to as a (C)(i) order). The Judiciary Committee Notes on these provisions are ambivalent, stating on one hand that the rules are intended to affirm the traditional commitment to preventing "misuse of the grand jury to enforce non-criminal Federal laws" but also asserting that "[t]here is . . . no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes."[229] Clearly, the provisions were not meant to impose an absolute ban on disclosure with respect to civil proceedings, but rather were viewed affirmatively as an adequate mechanism for releasing grand jury information for such purposes.

The permission to disclose, without an order of the court, to an attorney for the government in the performance of that attorney's duty is facially capable of a wide interpretation that might include use by any attorney on the civil side of the Department of Justice (though not an agency attorney)[230] to prepare civil proceedings or merely to aid

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227. F.R.Cr.P. 6(e)(3)(A)(i).

228. F.R.Cr.P. 6(e)(3)(C)(i). Rule 6(e)(3)(C) lists other grounds for disclosure: a request of a defendant based on a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, a disclosure made by an attorney for the government to another federal grand jury, or disclosure to an appropriate state official upon a showing that grand jury matters may disclose a violation of state criminal law. F.R.Cr.P. 6(e)(3)(C)(ii-iv). These additional grounds are not pertinent to the subject of this Article and will not be considered further.

229. *Amendments to the Federal Rules of Criminal Procedure*, S. Rep. No. 93-354, 95th Cong., 1st Sess. 8 (1977). The full passage reads:

> The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. *There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation.* Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions.

Id. (emphasis added).

230. The phrase "atterney for the government" in Rule 6(e)(3)(A)(i) is a term of art defined in F.R.Cr.P. 54(c) to include "the Attorney General, an authorized assistant of the Attorney General,

in a civil investigation. But the Supreme Court resoundingly denied the viability of such an interpretation in *United States v. Sells Engineering*.[231] In a five-to-four decision, the Court held that the provision refers only to a government attorney's pursuit of the criminal aspects of a case and cannot be relied upon to justify disclosure to a Justice Department Civil Division attorney for civil investigation or even for civil proceedings initiated or contemplated by the government.[232]

The opinion of the *Sells* Court, delivered by Justice Brennan, relied principally on historic notions of the importance of grand jury secrecy, which the Court feared would be undermined by automatic disclosure to Justice Department civil attorneys for civil purposes, without a court order[233] and without a showing of particularized need. Such disclosures, the Court feared, would increase the risk of inadvertent further disclosures and might chill the readiness of witnesses to come forward. Disclosure also would heighten the danger that the grand jury would be abused *ab initio* as an organ for civil discovery and, even absent such abuse, would actually enhance government discovery powers beyond the level permissible under the general rules of discovery in civil cases.[234]

The majority could perceive no important competing interest to be weighed against the value of grand jury secrecy other than "a matter of saving time and expense," which it viewed as clearly subordinate. If the government could not obtain the same information by some duplicative process, it then could have recourse to the court-ordered disclosure provision of Rule 6(e)(3)(C)(1).[235]

The majority opinion in *Sells* lacks persuasive force in a number of areas. Although any expansion of the group of those who

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a United States Attorney, [and] an authorized assistant of a United States Attorney . . . ." Thus, the term does not include government agency attorneys. However, but for the restrictive interpretation adopted by the Court in *United States v. Sells Engineering*, 463 U.S. 418 (1983), discussed in notes 231-34 and accompanying toxt, it could include all Justice Department attorneys.

231. 463 U.S. 418 (1983).

232. In *Sells*, the IRS had begun to investigato the respondents. While this investigation was ongoing, a federal grand jury subpoenaed many documents that were the subjects of contestod summonses issued by the IRS. The grand jury indicted the respondents for tax fraud and conspiracy to defraud the United States; the parties negotiated a plea bargain. The government then moved for disclosure of all grand jury materials to attorneys in the Justice Department's Civil Division. The respondents opposed the disclosure. Id. at 421-22.

233. The government in *Sells* adopted the position that no court order was necessary since automatic disclosure was proper under Rule 6(e)(3)(A)(i). *Sells*, 463 U.S. at 427. Nevertheless, presumably in an effort to clarify the law, the government chose te proceed by requesting permission from the district court to make disclosure.

234. See *Sells*, 463 U.S. at 432-35 (discussing these dangers).

235. Id. at 431.

gain access to grand jury information must enhance the risk of further disclosures to some extent, the danger seems minimal in the context of *Sells*. First, a wide circle of government personnel already has access to grand jury material in the course of the preparation of the case for, and presentation to, the grand jury.[236] Second, in practice, no disclosures are made beyond this circle until the grand jury proceedings are terminated either by indictment or by the grand jury's refusal to return an indictment.[237] At this stage, many of the conventional reasons for grand jury secrecy, such as a desire not to inform the target of the inquiry and not to chill witnesses' willingness to come forward, have either disappeared or have lost some force. Third, the release of information to government attorneys in connection with the execution of their duties is not analogous to a release to the news media. Restrictions could be placed upon government use and disclosure of information obtained from the grand jury, just as restrictions are placed upon disclosure by personnel who assist the prosecutor in preparing the case for the grand jury.[238]

What is most troublesome about the majority opinion in *Sells* is its brief and cavalier treatment of the burdens placed on government by the severe restrictions the decision imposes on the government's use of grand jury material. First, the matter of time and expense should not be taken so lightly. The civil side of governmental law enforcement is hardly less important than the criminal side. That civil government attorneys or a civil agency should be required to enter into protracted and often contested duplicative proceedings (including the considerable delay of appellate review) to obtain material that is sitting in grand jury files seems an exercise in futility, at least in cases (which will be the vast majority) in which the grand jury inquiry unquestionably was conducted in good faith.

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236. See the discussion of Rule 6(e)(3)(A)(ii) in note 148 and accompanying text; the Rule permits disclosure to any government (including state) personnel who are deemed necessary by an attorney for the government to assist that attorney in her duty to enforce the federal criminal law.

237. The dissenting opinion in *Sells* (written by Chief Justice Burger and joined by Justices Powell, Rehnquist, and O'Connor), makes this point. *Sells*, 463 U.S. at 466 (Burger, C.J., dissenting) (citation omitted).

238. Government (federal or state) personnel who assist in the preparation of the case are bound by the general obligation of secrecy and their names must be provided to the district court. Rule 6(e)(3)(B). If wider disclosure were made to attorneys working on civil matters, the secrecy obligation of course could not be coextensive, because those attorneys necessarily would not be using the material for the preparation of a criminal case. However, they could be restricted by obligations of secrecy with respect to disclosure for any purpose other than the normal functions involved in preparing the civil case.

Second, the Court assumes that government will always be able to obtain the material in some other way, or that, if the government does not have an alternative method, it does not deserve to have one. Clearly, government organs outside the prosecutor's office do not always have alternative means to acquire the material contained in grand jury transcripts. The civil rules of discovery presuppose that litigation has been launched, but government often has a legitimate and pressing need for material in the investigative stages of a civil matter when discovery is not available. In these investigative stages, civil branches of government possess an uneven patchwork of powers. In the immediate context of *Sells*—government attorneys in the narrow sense—only the Antitrust Division on the civil side of the Department of Justice has the power to issue a civil investigative demand. Outside the Justice Department (where the "atterney for the government" concept of Rule 6 has no application), the civil investigative demand does not always include the power to compel testimony. Therefore, unless the prosecutor discloses grand jury material to a civil attorney for the government or to personnel of some government agency, the civil authority may have no inkling of the existence of serious violations of the civil law.

Further, what behavior amounts to improper disclosure under the current law remains unclear. May a prosecutor properly state to a civil attorney that a certain area of activity or the operations of a certain corporation or individual might be worthy of attention, if she has learned this information from a grand jury investigation?[239] Much social harm may result from gagging the prosecutor completely; almost as much may result from restricting the prosecutor to hints and nods while preventing her from handing over specific information.[240] This arrangement reduces law enforcement to an irrationally complex game.

The uneven distribution of powers of compulsory process cuts both ways with respect to questions of disclosure of grand jury materials. On one hand, if a civil government attorney or an agency has full powers of compulsory process, it has no need for disclosure of

239. One way a prosecutor can alert agency personnel that something of interest to them is afoot is by bringing the agency personnel into the grand jury investigation to "assist [her] in the performance of [her] duty to enforce federal criminal law," under the power conferred by Rule 6(e)(3)(A)(ii). F.R.Cr.P. 6(e)(3)(A)(ii). The agency personnel then would also be bound not to reveal specific matters occurring before the grand jury, but it likely would not be improper to use the information as a basis for beginning an agency investigation. See the discussion of *United States v. John Doe, Inc.*, 481 U.S. 102 (1987), in the text accompanying notes 244-57.

240. What constitutes disclosure turns on what amounts to "matters occurring before the grand jury" under Rule 6(e)(3)(A).

grand jury materials. On the other hand, if an agency has full powers of compulsory process, it is redundant and wasteful of time and money to compel the agency to exercise a power that is virtually identical to the power that the grand jury has already exercised. If an agency or a civil attorney in the Department of Justice outside the Antitrust Division does not have compulsory process to aid in its investigations, it has a particularly acute need to be made privy to grand jury material, as long as the material was obtained in the first place by a good faith grand jury investigation. Yet if Congress has not given the government attorney or the agency this power of process, then it should not be afforded a derivative power by relying on grand jury investigation. Unfortunately, the majority in *Sells* failed to notice the complexities of these contestable issues.

With the growing importance of civil and administrative remedies and their increasing linkage with criminal penalties,[241] *Sells* presented an opportunity to draw the channels of criminal and civil process closer together. The narrow issue in *Sells*, an interpretation of the authority conferred by Rule 6(e)(3)(A)(i), could not provide the means for a broad resolution of questions relating to disclosure of grand jury materials to government agencies because the reference to "attorneys for the government" in the Rule does not refer to agency personnel.[242] Statutory amendment would be necessary to sustain a principle of automatic disclosure that would embrace agencies and Inspectors General of government departments. A resolution of the issue in *Sells* in favor of the government could have paved the way for such a step in the future; unfortunately, by denying automatic disclosure even to civil attorneys in the Department of Justice and in United States Attorney's offices, the Court retrogressively obstructed the path to reform. The decision also turned back the clock. As the

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241. As Chief Justice Burger stated in his dissent in *Sells*:

> Grand jury investigations of criminal activity of course play a major role in protecting the Nation . . . . Many civil actions seek precisely the same object, however, and are of at least equal importance in promoting the public welfare. In a number of areas, Congress has enacted civil legislation that, together with relatod criminal law provisions, forms an integrated law enforcement scheme. . . . Most significantly for present purposes, the civil provisions of the False Claims Act at issue here were enacted as part of an integrated scheme of civil and criminal law enforcement. . . . There can be little doubt that Congress expected—and continues to expect—attorneys for the Government to investigato the possibility of both criminal and civil violations. . . .

463 U.S. at 471-72 (Burger, C.J., dissenting).

242. "The torm 'attorneys for the government' is restrictive in its application. . . . If it had been intonded that the attorneys for the administrative agencies were to have free access to mattors occurring before a grand jury, the rule would have so provided." *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962).

dissent in *Sells* pointed out, for some decades prior to *Sells*, grand jury materials often had been disclosed informally, without court order, not only to government attorneys but also to agency personnel.[243]

The complexities and subtle distinctions that *Sells* overlooked are addressed effectively in *United States v. John Doe, Inc.*[244] The Antitrust Division of the Department of Justice is empowered to convene grand juries and to conduct prosecutions. In *John Doe*, after concluding that evidence gathered by a grand jury did not warrant prosecution, the same Antitrust Division attorneys proceeded with a civil investigation in the course of which they served civil investigative demands.[245] The Antitrust Division then considered whether to bring civil suits under both the Sherman Act and the False Claims Act but wished to consult attorneys in the Civil Division and in a United States Attorney's Office who were more familiar with the law and practice under the False Claims statute.[246] To make this consultation effective, the Antitrust Division thought it necessary to make some grand jury materials available to the attorneys in the Civil Division and to the United Statos Attorney's office and, accordingly, under the principle announced in *Sells*, filed a motion under Rule 6(e) for a (C)(i) order to authorize such disclosure.

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243. "Throughout the 1940's and 1950's, those conducting grand jury investigations regularly referred matters to other attorneys in the Department of Justico if civil litigation proved desirable, and, in accordance with Rule 6(e), grand jury transcripts and materials were made available to the attorneys pursuing the civil suits. This practice appears to have been most frequent in the antitrust area." *Sells*, 463 U.S. at 455-56 (Burger, C.J., dissenting) (citations omitted). The dissenting opinion contended that this practice continued throughout the 1960s and 1970s. Id. at 460. As to government personnel outside the circle of "attorneys for the government," Chief Justice Burger noted, "[o]n occasion, the use of grand jury materials in civil actions exceeded the bounds of Rule 6(e). Agency attorneys, who are not within the definition of attorneys for the government contained in Rule 54(c), were at times allowed access to grand jury matorials for their own purposes without first obtaining a court order. . . ." Id. at 456. This contention finds support in a statement made by Judge Paul J. McCormick of the Southern District of California when the Federal Rules of Criminal Procedure were first considered: "As a matter of common practice the United States Attorney uses the grand jury transcript rather freely with investigators and attorneys for the various governmental agencies. . . . If the rule contemplates a restriction on the United States Attorney's use of the transcript, I believe he should be excepted from the provision requiring the permission of the court." Id. at 453 (quoting 2 Advisory Committoe on Federal Rules of Criminal Procedure, *Preliminary Draft: Comments, Recommendations and Suggestions Concerning the Proposed Federal Rules of Criminal Procedure* 355 (1943) (statement of Judge Paul J. McCormick)).

244. 481 U.S. 102 (1987).

245. Id. at 104-05. This action was taken pursuant to the powers granted by the Antitrust Civil Process Act (ACPA), 15 U.S.C. §§ 1311-14 (1988). *John Doe*, 481 U.S. at 105.

246. *John Doe*, 481 U.S. at 105. The Civil Division of the Justice Department is charged with the primary duty to bring claims under the False Claims Act, 31 U.S.C. §§ 3729-31 (1988), but the Antitrust Division also may bring such suits if the conduct at the same time violates the antitrust laws. 28 C.F.R. § 0.40(a) (1993).

The facts of *John Doe* raised another issue—whether the antitrust attorneys themselves properly could refresh their recollection of the grand jury materials for purposes of deciding whether to bring civil suits without a (C)(i) order, now that the criminal purpose of the grand jury inquiry had been abandoned. Reversing the court of appeals,[247] the Supreme Court, with three dissenters, held that such a refreshing look does not constitute "disclosure" under Rule 6(e) and therefore no order for such a look is required.[248]

While this outcome seems entirely sensible, it casts doubt on the practical importance and the principled basis of *Sells*. *Doe* ensures that all attorneys who worked on a grand jury investigation may make use of grand jury materials in investigating or preparing a civil case. The fact that they have doffed their criminal hats and donned their civil ones makes no difference. This rule invites planned manipulation of the grand jury secrecy rules. For example, when both criminal and civil proceedings are likely, the prosecutor need only co-opt civil attorneys as assistants in the grand jury phase to legitimize their continued use of grand jury materials when they later turn to the consideration and further investigation of the civil aspect.[249] *Sells* will only have an impact if the attorneys who are to work on the civil case did not participate in the grand jury phase.

As the dissent in *Doe* suggested, the potential for manipulation would be lessened if looking back at grand jury materials were allowed in the pursuit of a criminal prosecution but not allowed in the pursuit of a civil investigation unless a (C)(i) order is obtained. This proposal, however, stretches the irrational aspects of *Sells* too far and, in any case, provides an ineffective Chinese wall because the attorneys would still be entitled to rely on their recollection of the grand jury materials. A rule to this effect—that reliance on present recollection is permissible while refamiliarization is barred—represents a curious half-way house. The only thorough-going solution that would remain entirely faithful to the principle of *Sells* would be to bar altogether attorneys who worked in the grand jury phase from participating in the civil phase.[250] This position, however, is

247. The court of appeals's decision is *In re Grand Jury Proceedings*, 774 F.2d 34 (2d Cir. 1985).

248. *John Doe*, 481 U.S. at 109.

249. As discussed above, Rule 6(e)(3)(A)(ii) permits this interaction.

250. The court of appeals ultimately recognized this issue as the crucial question: "Since it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts learned during the

particularly futile in contexts similar to *Doe*, in which the Antitrust Division has civil investigative demand powers virtually co-extensive with the grand jury subpoena power. When such co-extensive powers exist, an absolute bar would only push the Division into costly, time-wasting efforts to duplicate grand jury materials (already examined by some of its attorneys) through its own brand of compulsory process.

The decision in *Doe* leaves a trail of uncertainties, for while the Court made it clear that refreshing recollection is not a "disclosure," the question remains as to what kinds of acts by attorneys in the preparation of a civil case would amount to disclosure. Language in the Court's opinion (and its general logic) obliquely indicate that grand jury information may not be imparted to other attorneys working on the civil case who have not obtained a (C)(i) order.[251] In addition, while "[m]ere 'use' of grand jury information in the *preparation* of a civil complaint would not constitute prohibited disclosure,"[252] the Court's language suggests that if actual excerpts from grand jury materials were used in the complaint or if the complaint were even "based on information obtained during the grand jury investigation," the question of an improper disclosure might arise.[253]

Doe thus creates a situation of Byzantine complexity. Attorneys who have worked in the grand jury phase may refamiliarize themselves with grand jury materials when they move to a civil aspect of the case. They may not impart any grand jury material to their colleagues who have not been empowered under a (C)(i) order. Also, the extent to which the attorneys may "use" information they have acquired from the grand jury in formulating the complaint is unclear, although they likely cannot allude to or quote from grand jury materials in the body of the complaint. This doctrine is reminiscent of the rules pertaining to the use of immunized testimony

grand jury investigation, we think the real question is whether the prosecutor must be disqualified from litigating the civil case. Since appellants have expressly declined to present that issue, we are not called upon to address it." *In re Grand Jury Investigation*, 774 F.2d at 43.

251. The Court's validation of the "continued use" of grand jury information extended only to "attorneys who legitimately obtained access to the information through the grand jury investigation." *John Doe*, 481 U.S. at 108.

252. Id. at 110 n.6 (emphasis added).

253. See id. at 110. The Court did not decide this question, since it concluded that "[t]his hypothetical fear is not substantiated by the record in this case." Id. The holding in *Doe* is narrowly drawn: "Without addressing the very different matter of an attorney's disclosing grand jury information to others, inadvertently or purposefully, in the course of a civil proceeding, we hold that Rule 6(e) does not require the attorney to obtain a ceurt order before refamiliarizing himself or herself with the details of a grand jury investigation." Id. at 111. The Court made it clear that its ruling did not encompass "any further disclosure to others." Id.

under *Kastigar v. United States*,[254] with two important differences. First, *Kastigar* is properly driven by the great weight that must be given to the constitutional privilege against compelled self-incrimination after a grant of immunity. Second, *Kastigar* establishes a doctrine of use and derivative use immunity that, while by no means free from difficulty, clearly does impose extensive and onerous duties on the prosecution with a consequent heavy burden of proof to demonstrate its freedom from any significant direct or indirect exploitation of the immunized testimony.[255] By contrast, the combined impact of *Sells* and *Doe*, cases that did not rest on a constitutional mandate but rather stem from historical and statutory concepts of secrecy and disclosure, leaves considerable confusion about the extent to which grand jury materials may be used in the preparation of a civil case.

Whatever the extent of the permissible civil use of grand jury material by attorneys who assisted in the grand jury phase, clearly they cannot disclose these materials to other government agencies that may have a strong interest in pursuing civil or administrative remedies within their particular spheres of interest and jurisdiction. Even the grant of a (C)(i) order would not permit broadcasting of the information.[256] The antitrust context of *Doe* also highlights questionable aspects of this broader rule. If the Antitrust Division obtained identical information through the use of its own compulsory process, the Division properly could pass that information on to attorueys in the Civil Division of the Department of Justice.[257] However, grand jury information (although obtainable under the Division's CID powers) may not be imparted to Civil Division attorneys unless they have been the subject of a (C)(i) order, thus forcing a perhaps lengthy and expensive parallel process if the order cannot be obtained.

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254. 406 U.S. 441 (1972).

255. Id. at 460-61. The difficulty of overcoming this burden is illustrated by *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990), in which the court held that a conviction must be reversed if the material testimony of any witness was significantly shaped, directly or indirectly, by exposure to the defendant's immunized testimony. Id. at 943-47.

256. See the discussion in Part IX.A.

257. The Antitrust Civil Process Act authorizes disclosure of CID material to duly authorized employees of the Department of Justico. 15 U.S.C. § 1313(c)(2) (1988).

A. Disclosure Orders Under Rule 6(e)(3)(C)(i)

Many of the difficulties this Article has outlined would disappear if a (C)(i) order were relatively easy to obtain. Unfortunately, this is by no means the case. The Rule permits these orders only when disclosure is sought "preliminarily to or in connection with a judicial proceeding."[258] Not much difficulty is occasioned by the phrase "in connection with," which is interpreted to refer to a judicial proceeding already pending.[259] "Preliminary to" is more difficult to construe. The Supreme Court discussed this provision in *United States v. Baggot*[260] (decided on the same day as *Sells*), in which the government had filed a (C)(i) petition seeking disclosure of grand jury matters for use in a civil tax audit by the IRS. Although the grand jury proceeding had not resulted in an indictment, the target had pleaded guilty to misdemeanor counts—no doubt as the result of a plea bargain.

In *Baggot* the Court made it abundantly clear that the mere pursuit of an administrative or civil investigation is not in itself a sufficient reason for disclosure of grand jury material. The majority opinion, written by the author of the *Sells* decision, Justice Brennan, held that Section (C)(i) refers much more restrictively to a use "related fairly directly to some identifiable litigation, pending or anticipated."[261] A showing "even that litigation is factually likely to emerge" is not sufficient.[262] An IRS audit of civil tax liability *may* result in litigation, but, unless later contestod by the taxpayer, the IRS may levy the tax without resort to any judicial proceeding.

The Court did not go so far as to suggest that a (C)(i) order is proper only after litigation has commenced. *Baggot* conceded that such an order would be proper, for example, when a taxpayer clearly has expressed an intention to contest a matter in the Tax Court.[263] If, on the other hand, the government agency involved in the case likely will initiate litigation, the *Baggot* opinion offers only meager

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258. F.R.Cr.P. 6(e)(3)(C)(i). This provision dates from the original version of the Rule in 1946. For a comment on the history and genesis of this provision, see generally Noto, 91 Yale L. J. at 1621-25 (cited in note 148).

259. *United States v. Baggot*, 463 U.S. 476, 479 (1983).

260. Id.

261. Id. at 480.

262. Id.

263. Id. at 483. The Court adopted the holding in *In re Grand Jury Proceedings (Miller Brewing Co.)*, 687 F.2d 1079 (7th Cir. 1982), in which the taxpayer had expressed a clear intontion to seek judicial review of the IRS deficiency determination in the Tax Court; the court of appeals held that the request for disclosure of grand jury materials for that reason was preliminary to a judicial proceeding.

illumination. The Court expressly declined to decide "how firm the agency's decision to litigate must be before its investigation can be characterized as 'preliminar[y] to a judicial proceeding,' or whether it can ever be so regarded before the conclusion of a formal preliminary administrative investigation."[264] While its implications are unclear, this dictum nevertheless creates a chilling climate for any hopes of disclosure for purely investigative purposes, even if the investigation is launched with a strong initial belief that litigation is likely.[265]

Chief Justice Burger, the sole dissenter in *Baggot,* argued that the Court's grudging reading of the Rule virtually eliminatod the possibility of disclosure preliminarily to judicial proceedings and in effect confined disclosure to situations in which the material at least would be actually used to prepare for litigation. The Chief Justice would have preferred a test broad enough to cover any situation in which "there is a possibility that the agency's action, should it ultimately act, would be subject to judicial review."[266] In his view, the majority was too impressed by the "strawman" threat of abuse of the grand jury process and ignored the severe impairment of administrative investigations and pursuit of civil remedies that its holding imposed. Notably, Chief Justice Burger's approach, while broader than the majority position, would still preclude disclosure

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264. *Baggot,* 463 U.S. at 483 n.7. The Court added a gloss of possible importance when it stated:

> We need not decide whether an agency's action would always be preliminary to litigation if it arose under an administrative scheme that does require resort to courts—one in which, for example, the agency, when it found a probable violation of law, was required to bring a civil suit or criminal prosecution to vindicate the law and obtain compliance. We also do not hold that the Government . . . may never obtain (C)(i) disclosure of grand jury materials any time the initiative for litigating lies elsewhere.

Id. at 482-83. However, "[w]here an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding . . . ." Id. at 482.

265. The Court also stated that "[t]he focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted." Id. at 480 (emphasis in original). Applications for disclosure by government agencies that appear to be primarily for investigative purposes have been denied. *United States v. Bates,* 627 F.2d 349 (D.C. Cir. 1980); *In re June 20, 1977, Concurrent Grand Jury Investigation (J. Ray McDermott & Co., Inc.),* 622 F.2d 166 (5th Cir. 1980). *In re Grand Jury Proceedings,* 309 F.2d 440 (3d Cir. 1962), provides an example of the difficulty in obtaining disclosure. In that case, the Federal Trade Commission (FTC) applied for disclosure in order te pursue an investigation of violations of its cease and desist orders. Id. at 443-44. If such violations were discovered, the statuto required the FTC to notify the Attorney General, who then was required to initiato an enforcement proceeding in federal court under 15 U.S.C. § 56. The court denied disclosure on the grounds that no judicial proceeding was actually pending and "it is possible that none may result from the investigation." Id. at 444.

266. *Baggot,* 463 U.S. at 488.

when judicial review is not a possibility—a position that seems inescapable under the language of the Rule.

B. Particularized Need

The questions of what constitutes a judicial proceeding and what may be viewed as preliminary to such a proceeding have not been the subject of further elucidation in the Supreme Court. Lower courts that have dealt with the question of what constitutes a "judicial proceeding" have not carried forward the *Baggot* analysis in any significant way.[267] However, even if the severely narrow *Baggot* reading of a severely narrow rule can be satisfied, the moving party must clear yet another hurdle. In *Sells* the Court considered the appropriate standard for a (C)(i) order and referred to its previous holdings that a showing of particularized need must be made. In particular, the Court quoted and reaffirmed an earlier statement that such a showing must demonstrate that the material sought is "'needed to avoid a possible injustice in another judicial proceeding, that the

267. The often-cited, although not particularly illuminating, definition of a "judicial proceeding" in the context of Rule 6 is found in the opinion by Judge Learned Hand in *Doe v. Rosenberry*, 255 F.2d 118 (2d Cir. 1958): "The term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable te the punishment of crime." Id. at 120. The Second Circuit has held that an evidentiary hearing in an attorney disciplinary proceeding constitutes a judicial proceeding. *In re Federal Grand Jury Proceedings (United States v. Doe)*, 760 F.2d 436 (2d Cir. 1985). However, in *Doe*, the court denied the request for disclosure on the ground that it was premature. The appropriate test asks whether judicial review of the disciplinary proceedings is a routine outcome. Disclosure was granted on this basis in *In re Grand Jury Transcripts*, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970); *In re Disclosure of Testimony Before the Grand Jury (Troia)*, 580 F.2d 281, 286 (8th Cir. 1978); *Wolf v. Oregon State Bar*, 741 F.2d 250, 253 (9th Cir. 1984). Compare *In re Grand Jury Proceedings (John Doe No. 1 v. United States)*, 932 F.2d 481 (6th Cir. 1991), which held that a Michigan Attorney Grievance Commission hearing was not a judicial proceeding since an administrative board determined facts and review by the Michigan Supreme Court was discretionary and occurred only rarely. *In re Grand Jury Proceedings (Daewoo)*, 613 F. Supp. 672 (D. Or. 1985), is of some interest. In *Daewoo*, the Customs Service had assessed a civil penalty in excess of six million dollars for illegal activities in connection with the importation of steel. The government moved for disclosure of materials from a grand jury inquiry into the same incident. Id. at 676. The court held that since, under the applicable law (19 U.S.C. § 1592(e) (1930)), the civil penalty could be enforcod only through resort to the courts, the matter was preliminary to a judicial proceeding. Nevertheless, the court denied the motion since the government had failed to make a sufficient showing of particularized need. *Daewoo*, 613 F. Supp. at 683. In *United States v. Metropolitan Edison Co.*, 585 F. Supp. 231 (M.D. Pa. 1984), the utility moved for disclosure of grand jury materials in connection with administrative proceedings before the Nuclear Regulatery Commission. The court denied the motions on the ground that the utility had not shown that the administrative proceeding was likely te be subject te judicial review. Id. at 233-34. See generally Bruce I. McDaniel, *What Is a "Judicial Proceeding" Within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure*, 52 A.L.R. Fed. 411 (1981).

need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed. . . .'"[268] The Court proclaimed that this standard is applicable to government as well as to private parties, although it conceded that the public interest and the decreased danger of wide dissemination of grand jury material could be taken into account under the particularized need concept when the government is the moving party.[269]

The particularized need inquiry thus is a balancing test that includes, on one side, the traditional bevy of reasons that justify the general principle of grand jury secrecy plus the degree of ease with which the moving party might obtain the information by other means, and, on the other side, the interests of justice, particularly protection against the commission of perjury by a witness in judicial proceedings that are in process or contemplated.[270] In *Sells* itself (in which the government had moved for disclosure of grand jury materials to Civil Division attorneys), the district court had held that disclosure should be permitted because the materials were "rationally related" to a contemplated civil suit. The Supreme Court affirmed the action of the court of appeals in reversing and remanding[271] on the ground that this standard was too relaxed.

The Court appeared to take a somewhat more relaxed posture toward disclosure to government parties in *Doe*, in which the government moved for disclosure to attorneys in the Civil Division who had not participated in the presentation to the grand jury. Reversing the Court of Appeals, the Court found particularized need

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268. *Sells*, 463 U.S. at 443 (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)). In *Douglas*, the Court added that the movant must show need even if the grand jury had concluded its investigation, since the court must consider "not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." *Douglas*, 441 U.S. at 222. This statement refers to the interest in not discouraging the testimony of witnesses before future grand juries by fear that their testimony might be disclosed. The party moving for disclosure bears the burden of demonstrating that the need for disclosure outweighs the need for secrecy. The district court has substantial discretion in ruling on such a motion as well as the power to "include protective limitations on the use of the disclosed material. . . ." Id. at 223.

269. *Sells*, 463 U.S. at 445.

270. In *United States v. Procter & Gamble*, 356 U.S. 677 (1958), the Court stated that "problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to tost his credibility . . ." are "cases of particularized need where the secrecy of the [grand jury] proceedings is lifted discretely and limitedly." Id. at 683. This situation seems to present an extremely strong case for disclosure since, if the witness is to testify at a trial, most of the reasons for maintaining secrecy as to her grand jury testimony are dissolved. Under F.R.Cr.P. 26.2, both the government and defense in a criminal trial are entitled to discovery during trial of the grand jury testimony of a witness who testifies for the other party at the trial.

271. *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190-92 (9th Cir. 1981).

and, reaffirming earlier observations in *Sells*, emphasized the special aspects of disclosure to government attorneys that, according to the Court, moderate normal disclosure concerns. These cases present less risk of further disclosure to third parties or to the general public. Moreover, the public interest in disclosure to a governmental body must count for something.[272] The Court acknowledged a general concern that grand juries should not be abused to broaden normal channels of discovery in civil cases, but stated that the requirement of showing particularized need was in itself a safeguard against this possibility.[273] The Court remained concerned that discovery broader than otherwise allowed in litigation actually may be realized by use of grand jury materials, but this concern was not implicated in *Doe* because the government wished to use the material only for consultation.[274] This point undercuts the Court's frequent pronouncement that particularized need requires a showing of need to avoid injustice in a pending or contemplated judicial proceeding.[275] It is hard to see how consultation with respect to the advisability of bringing a lawsuit can avoid an injustice occurring *in* that suit. The Court diluted the concept of injustice to include questions of prudence and policy as to whether to bring a suit in the first instance.[276]

Finally, the Court was not impressed by a point that the court of appeals had found persuasive—that the government might have obtained the same materials through civil process under the Antitrust Civil Process Act. While recognizing that this process could be an "important factor," the Court agreed with the district court that this consideration was outweighed by the public interest involved.[277]

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272. *United States v. John Doe, Inc.*, 481 U.S. 102, 112-14 (1987) (citing *United States v. Sells Engineering*, 463 U.S. 418 (1983)). The Court recognized the importance of Antitrust Division lawyers obtaining the advice of their colleagues in the Civil Division, who regularly handle actions of the type contemplated, and the importance of the public purposes served—"efficient, effective and evenhanded enforcement of federal statutes." *John Doe*, 481 U.S. at 113.

273. *John Doe*, 481 U.S. at 114-15.

274. The Court stated that "when the Government requests disclosure for use in an actual adversarial proceeding, this facter . . . may require a stronger showing of necessity." Id. at 115.

275. See also *In re Grand Jury Testimony (John Doe)*, 832 F.2d 60 (5th Cir. 1987), a civil RICO action in which the court denied disclosure to a private litigant on the ground that it had not sufficiently shown a danger of perjury or inconsistont testimony.

276. Thus, this portion of the *Doe* decision also might be taken obliquely to have broadened a fundamental concept in Rule 6(e): what is preliminary to a judicial proceeding.

277. Lower court decisions in this regard seem somewhat unpredictable and inconsistont. In *In re Sealed Case*, 801 F.2d 1379 (D.C. Cir. 1986), the court denied disclosure of grand jury materials to the SEC on particularized need grounds sinco the SEC had not yet engaged in any civil discovery and had failed to establish "an inability to obtain through ordinary processes, timely and diligently pursued, the particular documents, or the particular category of documents, requested from the grand jury." Id. at 1382. In *In re Grand Jury Proceedings ("Operation Gateway")*, 877 F.2d 632 (7th Cir. 1989), the court stated that the IRS had failed to demonstrato

The last point is of particular interest to this Article's general theme. As noted earlier, the possibility of acquiring the information through civil process could cut the other way. First, the fact that a statute permits the government to acquire the information through civil process seems to establish conclusively the general propriety of such discovery. Second, if the government has such a power, then why should it be put to the expense and delay of exercising that power when the information already is available in another government record? Thus, to view the government's power to acquire the information in other ways as a reason for *denying* discovery of grand jury materials is thoroughly perverse. It would be more understandable to assert that the government may not broaden its discovery process by acquiring, via the grand jury, information that it could not obtain through civil process. Indeed, this point is the most fundamental policy question that ought to be the subject of attention in this area. The particularized need test, as presently constituted, raises this question only in a limited way through the inquiry into abuse of the grand jury process.

Overall, *Doe* announces the possibility of a somewhat more relaxed attitude to the disclosure of grand jury materials in favor of the government, although the decision hardly endorses extensive disclosure. Cases in lower courts confirm the impression that the particularized need standard will not be met lightly, which indicates that an applicant, especially a private party, often will be unsuccessful under this test even though the application is clearly connected with or preliminary to a judicial proceeding.[278]

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particularized need as to its application for disclosure for purposes of pending tax litigation since a demonstration of inconvenience and delay are inadequate to meet that standard. See also *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987), which held that the saving of time and expense was not sufficient to establish particularized need (in this case, for a private litigant) when the movant had not pursued ordinary discovery or routine avenues of investigation. Id. at 715. Accord, *FDIC v. Ernst & Whinney*, 921 F.2d 83 (6th Cir. 1990). But see *In re Grand Jury Subpoenas Duces Tecum (Larson)*, 904 F.2d 466 (9th Cir. 1990) (affirming a district court's order of disclosure to the IRS for use in a tax court proceeding on the ground that, since the disclosure was "pertinent," it could not be said that the district court had abused its discretion).

278. In *In re Request for Access to Grand Jury Materials, Grand Jury No. 81-1, Miami*, 833 F.2d 1438 (11th Cir. 1987), the court granted disclosure to the House Judiciary Committee for use in connection with the Committee's inquiry into the possible impeachment of a federal judge. The court of appeals recognized that the public has a special interest in disclosure when the movant is an organ of government. In *Hernly v. United States*, 832 F.2d 980 (7th Cir. 1987), the court denied a private litigant a subpoena to depose an IRS agent whose information was obtained as the result of grand jury proceedings, on the grounds that the movant had failed to show exactly what information he expected, that the information was unavailable to him from other sources, and that disclosure would prevent an injustice. In *In re Grand Jury Testimony (Appeal of John Doe)*, 832 F.2d 60 (5th Cir. 1987), the court denied disclosure to a private civil litigant on the

X. REFORM OF GRAND JURY SECRECY RULES

The Supreme Court's insistence on the importance of grand jury secrecy has not escaped criticism.[279] Writing before the decisions in *Sells* and *Baggot*, Professor Charles Wright distinguished between the strong case for secrecy while the grand jury is conducting an investigation and the much-diminished force of the arguments against disclosure once the grand jury has concluded its work.[280] Judge Posner of the Court of Appeals for the Seventh Circuit, although dutifully following the dictates of the Supreme Court, is less than enthused with the secrecy principle.[281] Some courts have acknowledged that the reasons conventionally offered to justify secrecy are much weaker when the grand jury proceedings have concluded, the applicant for

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ground that he had not shown particularized need in terms of specific necessity to impeach a witness or to refresh the memory of a witness who was unable to recall certain facts. In *Illinois v. F.E. Moran, Inc.*, 740 F.2d 533 (7th Cir. 1984), the court reversed a disclosure order on the ground that the movants, defendants in a civil antitrust action in which witnesses had not yet been deposed, had not shown a need for the material in order to impeach or refresh recollection at trial.

279. Discussions of grand jury secrecy rules, all somewhat critical, are found in the following commentaries: William B. Lytton, *Grand Jury Secrecy—Time for a Reevaluation*, 75 J. Crim. L. & Criminol. 1100 (1984); Marvin G. Pickholz and Joyce Merrick Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards*, 36 Wash. & Lee L. Rev. 1027 (1979); Note, 91 Yale L. J. at 1614 (cited in note 148); Noto, *Fedsral Agency Access to Grand Jury Transcripts Under Rule 6(e)*, 80 Mich. L. Rev. 1665 (1982); Gail Heriot, Comment, *Civil Discovery of Documents Held by a Grand Jury*, 47 U. Chi. L. Rev. 604 (1980); Noto, *Administrative Access to Grand Jury Material Under Amended Rule 6(e)*, 29 Case W. Res. L. Rev. 295 (1978); Peter C. Hein, Note, *Administrative Agency Access to Grand Jury Materials*, 75 Colum. L. Rev. 162 (1975).

280. Charles Alan Wright, *Federal Practice and Procedure: Crim. 2d* § 106 at 244-45 (West, 1982). Professor Wright cited the following commentaters as critical of the extent of the secrecy rule: Arthur H. Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668, 684 (1962) (characterizing the secrecy principle as "an anachronism that has long outlived any real necessity"); Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 John Marshall J. Prac. & Proc. 18 (1967); Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e)*, 38 Fordham L. Rev. 307 (1969); Evalyn S. Lipton, Note, *A Reexamination of the Rule of Secrecy of Grand Jury Minutes in the Federal Courts*, 34 N.Y.U. L. Rev. 606 (1959); Comment, *Grand Jury Minutes and the Rule of Secrecy in Federal Litigation*, 55 Nw. U. L. Rev. 482 (1960). See Wright, *Federal Practice and Procedure* at 243 n.2.

Butterworth v. Smith, 494 U.S. 624 (1990), recegnized, to an extent, the diminished need for grand jury secrecy when the jury's work is complete. In *Butterworth*, the Court upheld a First Amendment challenge to a state practice according to which grand jury witnesses were bound by a secrecy obligation even after the jury had been discharged; the Court found that the state had no compelling interest in imposing secrecy on a witness after the jury was disbanded. Id. at 632-34. The federal system imposes no secrecy obligation on grand jury witnesses.

281. "California allows liberal access to grand jury transcripts and the heavens have not fallen there yet. So little is kept secret nowadays that many participants in grand jury proceedings, whether as witnesses, jurors, or prosecutors, probably have no expectations of long-term secrecy." *Illinois v. F.E. Moran, Inc.*, 740 F.2d 533, 539 (7th Cir. 1984) (citation omitted). However, Judge Posner did acknowledge special interests in grand jury secrecy arising from the facts that "grand jury witnesses testify without counsel present and testify about other people as well as themselves." Id.

disclosure is an organ of government, and disclosure would serve a legitimate governmental interest.[282]

In fact, despite the superficially resounding reaffirmation of the secrecy principle and the restricted nature of disclosure under Rule 6(e) set out by the Court in *Sells* and *Baggot*, there has been a certain, stealthy relaxation of the traditional position, particularly with respect to disclosure to government attorneys and agencies. As discussed in Part IX, the Court's decision in *Doe*, although it did not depart formally from the earlier cases, appears to have arrived at a more expansive interpretation of the grounds for a (C)(i) order when the applicant is an organ of government.

Another important development has been a series of decisions on the question of what constitute "matters occurring before the grand jury" under Rule 6(e). This question can arise when the material in question consists of documents subpoenaed by or presented to the grand jury but generated independently of the jury, often before the grand jury was impaneled. The testimony of a witness is the most basic instance of a matter that occurs before the grand jury, but how should courts classify reports of an investigation conducted by government agents before the jury existed, even if their substance has been presented to the jury, or documents prepared by a private party that were subpoenaed by the jury? These matters "occur" before the grand jury in the weak sense that they are presented to the jury and thereafter constitute a part of the file, but if courts adopt a stronger test and confine the concept to testimony that is generated and created by the grand jury's power of subpoena or the course of its investigation, they need not be so categorized, for they had a prior and independent existence. Indeed, while testimony of a witness cannot be disclosed without revealing a portion of the grand jury transcript, the disclosure of a document, although it uncovers part of the grand jury file, does not necessarily expose any part of the proceedings before the jury. Under this view, it is not necessary in these cases even to apply for a (C)(i) order and the document could be

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282. See *In re Grand Jury Proceedings*, 800 F.2d 1293 (4th Cir. 1986), in which the grand jury proceedings had concluded, a trial had been held on the grand jury's indictment, the defendant had been acquitted, and subsequently sued the government for extra charges arising out of a defense procurement contract. Id. at 1295. The court noted that the need for secrecy was much diminished by the conclusion of the grand jury's proceedings and the public airing of much of the grand jury material in the criminal trial. Furthermore, the criminal defendant (now the civil plaintiff) possessed a grand jury transcript. Thus, the government was entitled to a (C)(i) order to help it prepare for the civil suit. Id. at 1300-02.

communicated to other government agencies or to private litigants without the permission of the court.[283]

Some cases have gone a considerable way toward adopting the weaker view and thus relaxing secrecy requirements with respect to documents. One line of reasoning asserts that Rule 6(e) has no application unless disclosure would reveal "what has occurred before the grand jury."[284] This approach is not altogether convincing because in some sense every disclosure will reveal some element of what has occurred before the grand jury, at least in the minimal sense of indicating or confirming that a document is one that the grand jury examined.[285] Generation of the document prior to and independent of the grand jury's subpoena provides a more comprehensible test for disclosure. Adoption of this test, however, would exempt nearly all documents from the secrecy provisions.[286]

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283. See the discussion of this topic in *Guide on Rule 6(e) After* Sells *and* Baggot 9-17 (U.S. Dep't of Justice: Office of Legal Policy, 1984).

284. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980) (en banc). *Dresser* stated that Rule 6(e) did not intend to draw "a veil of secrecy . . . over all matters occurring in the world that happen to be investigated by a grand jury," id. at 1382, and emphasized the fact that the documents at issue were creatod for independent corporate purposes unrelated to the grand jury's investigation. Id. at 1383. Validating the *Dresser* approach, the same court lator held that the Department of Justice must indicate that the material in question would "'elucidate the inner workings of the grand jury'" in order to respond adequately to a request for disclosure of grand jury information by a Committee of the Senate of Puerto Rico. *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 583 (D.C. Cir. 1987) (quoting *Fund for Constitutional Gov't v. National Archives and Records Serv.*, 656 F.2d 856, 870 (D.C. Cir. 1981)). Accord, *Anaya v. United States*, 815 F.2d 1373 (10th Cir. 1987), in which the court stated, "When documents or other material will not reveal what actually has transpired before a grand jury, their disclosure is not an invasion of the protective secrecy of its proceedings. . . . " Id. at 1379. See Russell J. Davis, Annot., *What Are 'Matters Occurring Before the Grand Jury' Within Prohibition of Rule 6(e) of the Federal Rules of Criminal Procedure*, 50 A.L.R. Fed. 675 (1980).

285. This point was made squarely in *In re Sealed Case*, 801 F.2d 1379 (D.C. Cir. 1986), in which the court observed that "[d]isclosure of which documents the grand jury considered reveals, at the very least, the direction of the grand jury's investigation and the names of persons involved. . . . " Id. at 1381. The court concluded that a (C)(i) order was necessary for release of grand jury documents to the SEC. The situation would be different if the document was generated by a government agency prior to a grand jury investigation and only later presented to the grand jury, while the agency retains a copy. The agency then may properly make use of the document since the document at all times was legally in its hands, and its further reference to the document would not reveal anything that took place before the grand jury. Thus, in *Sisk v. Comm'r of Internal Revenue*, 791 F.2d 58 (6th Cir. 1986), the Sixth Circuit, distinguishing *Baggot*, held that the IRS could use an agent's report in the preparation of civil litigation, even though the report had been presented to a grand jury subsequent to its preparation. See also *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), in which the court held that the FBI properly could show documents to interviewees, even though the documents had been presented to a grand jury, since they had been created earlier for purposes unconnected with the grand jury and the disclosures were made for purposes unconnected with the grand jury investigation. Id. at 291.

286. See *In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988), in which the district court had permitted disclosure by the prosecutor to government civil attorneys without any particularized need inquiry on the ground that the materials, which included subpoenaed confidential corporate records, were not matters occurring before the grand jury. The ceurt of

Perhaps perceiving the extensive sweep of such an exception, some courts have found significant the power of the moving party to obtain the document through its own process. Their theory is, presumably, that if (a) the document was generated independently of the grand jury, and (b) the moving party would have a right to obtain it absent grand jury secrecy requirements, then the secrecy rules are of insufficient weight to put the movant to the expense and delay of pursuing its own process.[287] Furthermore, if such an exception were not accepted, then the subject of an inquiry could insulate a document by surrendering it in response to a grand jury subpoena and keeping no copies.

These developments represent a significant but limited movement away from grand jury secrecy requirements.[288] They have

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appeals, in an opinion that presents the fullest and most sophisticated discussion of this question, reversed and emphasized that the adoption of the district court's position would virtually exempt all pre-generated documents from the secrecy principle, no matter how confidential they might be. Id. at 865-66. So extreme an approach would ignore the fact that one justification for the grand jury secrecy rules is the desire to protect confidential material procured by subpoena. Andrea M. Nervi, Comment, *FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. Chi. L. Rev. 221 (1990), reviews the various standards in this area; the Comment concludes that disclosure of documents should be allowed when the presumption in favor of secrecy interests is displaced by a showing (a) that the request lists specific documents that are identified without reference to the grand jury and (b) that the documents sought were created for a specific purpose unrelated to the grand jury investigation.

287. See *United States v. DiBona*, 610 F. Supp. 449 (D.C. Pa. 1985), in which the defendants opposed a government discovery request on the ground that compliance would breach the grand jury secrecy provisions. The documents in question were connected with audits performed by the Defense Contract Audit Agency (DCAA), which is responsible for auditing defense contract projects as required by the Department of Defense. The first audit was incomplete because the defendants failed to provide all their records as required by law. Id. at 451. The defendants subsequently produced the missing records in compliance with a grand jury subpoena, and the DCAA performed a second audit, which it presented to the grand jury. Id. The court held that the second audit could be released te Civil Division attorneys in connection with a civil suit since the DCAA always had a right to examine all records, to produce an audit based on them, and to communicate this audit te civil government attorneys. The court concluded, "It cannot be said that information was illegally disclosed when the party who saw it was authorized by Congress te see it." Id. at 452. Other cases indicate that documents producod for investigative purposes before a grand jury was convened are not subject to Rule 6(e) unless their release would reveal significant aspects of the grand jury's proceedings. See, for example, *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982) (noting that the relevant information was developed earlier by the FBI); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980) (noting that the information was obtained from an earlier government investigation). See *Guide on Rule 6(e)* at 9-12 (cited in note 283).

288. In one area—the rights of the defendant in a criminal case—the Supreme Court has indicated that grand jury secrecy is not momenteus. In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court held that violations of Rule 6(e) by the prosecutor (including the improper release of grand jury documents to the IRS) were subject to harmless error analysis and would not lead to dismissal of an indictment unless "'it is established that the violation substantially influenced the grand jury's decision to indict.'" Id. at 256 (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)). A defendant cannot take a pretrial appeal from a denial of a

not been sufficient to remove the constraints on transmission of information that government at times considers to be major obstacles to rational law enforcement.[289] A revolt against the severity of secrecy rules has broken out in recent years in connection with frauds and irregularities in the savings and loan industry. In 1988 a House Committee Report on Government Operations recommended that Rule 6(e) be amended to allow federal prosecutors to petition for the sharing of grand jury information with a bank regulatory agency based upon a showing of "substantial need."[290] At the same time, the Report suggested that the difficulty resides not only in the language of Rule 6(e) but in a habitual tendency of prosecutors to keep investigations secret, leading to an overly expansive reading of Rule 6(e) by the Department of Justice itself.[291]

Legislative action resulted in a section of the Financial Institutions Reform, Recovery and Enforcement Act of 1989[292] (FIRRE), now codified in Title 18 of the United States Code.[293] The new provisions are twofold. First, the statute permits those who legitimately have acquired grand jury information concerning certain

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motion to dismiss on such a ground, since such a ruling is not a "final decision" under 28 U.S.C. § 1291. *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989). Because it is hard to imagine a situation in which the grand jury itself could have been swayed by the improper disclosure of grand jury material, the probable result in virtually every case will deny the defendant any remedy for improper disclosure, although occasionally disclosure might have led to the discovery of other evidence as to which the defendant then might make a motion to suppress. The possibility also remains that the prosecutor could be censured or held in contempt for improper disclosures.

289. A Justice Department monograph quotes a memorandum from the Attorney General to United States Attorneys that advises that "in order to avoid problems arising from Rule 6(e) of the Federal Rules of Criminal Procedure . . . 'where possible, documents should be obtained by methods other than grand jury subpoenas.'" *Inspector General Subpoenas* at 1 (cited in note 110) (quoting a memorandum of the Attorney General dated July 16, 1986). The monograph suggests an alternative method: use of Inspector General subpoenas. Id. See the discussion of Inspector General subpoenas in Part VI.C.

290. H.R. Rep. No. 100-108, 100th Cong., 2d Sess. 30 (1988). The report gave an example of "substantial need": "evidenco that a financial institution is almost insolvent." Id. at 107. The subcommittoe characterized the results of the secrecy provisions in one instance as "almost ludicrous," referring to the following testimony from the Federal Reserve Board: "[T]he FBI agent, who was contacted by the staff of a Federal Reserve Bank to report the unusual circumstances of the reciprocal loans . . . could not disclose pertinent information regarding the State member bank and its suspect president to us because of the legal restrictions in effect due to Rule 6(e)." Id. at 106. The report then states that "[t]he agencies and the Justice Department strongly believe that an amendment to Rule 6(e) is necessary to allow for necessary sharing of such information, and we concur that such an amendment would serve a very important public interest." Id. at 108.

291. "It has been Congress' experience that the Justice Department very frequently invokes Rule 6(e) so as not to reveal any information about an investigation, irrespective of whether the information was learned from a grand jury . . . . Rule 6(e) is still a convenient excuse for the Justice Department to reveal little, if anything." Id. at 107.

292. Pub. L. No. 101-73, 103 Stat. 505 (1989), codified at 18 U.S.C. § 3322 (1989).

293. 18 U.S.C. § 3322.

banking law violations to disclose it to a government attorney[294] for use in enforcing Section 951 of FIRRE[295] or in civil forfeiture proceedings connected with corruption, embezzlement, and crimes connected with banking, credit institutions, and so forth.[296] This first provision, while limited in scope to a particular category of civil penalties and forfeitures, nevertheless is radical in principle because it permits disclosure without any application for a court order.

The second provision, while less radical in principle, also effects a considerable modification of Rule 6(e). This provision permits disclosure of grand jury materials upon motion by a government attorney (but not by an agency attorney), during an investigation of a banking law violation, to personnel of a financial institution regulatory agency for use in any matter within the jurisdiction of that agency.[297] A court order still is necessary and the movant must show "substantial need," a standard intended to be somewhat less exigent than "particularized need."[298] Most notably, this provision eliminates any requirement that the disclosure be in connection with or preliminary to a judicial proceeding.

Whether or not the FIRRE provision is the crack that eventually will cause the collapse of the whole dam of grand jury secrecy,[299] it certainly focuses attention on the wisdom of retaining the severe restrictions on disclosure under the present Rule 6(e).

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294. "Attorney for the government" in this context has the meaning given in the Federal Rules of Criminal Procedure. See note 230. Thus, in effect, the term includes civil attorneys in the Department of Justice but not attorneys for government agencies.

295. This section, codified at 12 U.S.C. § 1833a (1989), provides civil penalties for certain banking law violations. The maximum penalty for a single violation is one million dollars; for a continuing violation, the maximum is one million dollars a day, up to five million; and the maximum penalty may exceed five million dollars if the defendant has derived pecuniary gain from the violation or inflicted pecuniary loss on another. The penalty is enforced by a civil action brought by the Attorney General, who enjoys full compulsory process powers of investigation by way of civil investigative demand. 12 U.S.C. § 1833a(f).

296. 18 U.S.C. § 981(a)(1)(C) (1986) lists the crimes.

297. 18 U.S.C. § 3322(b) (1989).

298. The section-by-section analysis of the Senate bill explains the term "substantial need" as follows:

> Under the substantial need standard, a court could consider a number of factors. . . . In weighing these considerations . . . a court would not be able to deny disclosure merely because the agency for whom the disclosure is sought may have alternative discovery tools available to it. On the other hand, the "substantial need" test does not contemplate that a court would become simply a "rubber stamp" for the government's request for disclosure. Review under this standard should require a Justice Department attorney to make more than a showing of mere convenience or simple relevance to matters within the jurisdiction of the agency.

135 Cong. Rec. S2396 (Mar. 8, 1989).

299. A bill introduced in 1990, similar to the FIRRE provision, provided for the release to the SEC of grand jury material relating to matters that might constitute a violation of any provision

XI. REFORM OF RULE 6(e)

In reviewing Rule 6(e)'s disclosure provisions, one might start by appraising the requirement that the disclosure be in connection with or preliminary to a "judicial proceeding." Neither the origin of nor the policy behind this restrictive requirement is clear.[300] Perhaps the restriction was driven by the belief that judicial proceedings would provide an opportunity for anyone who might be injured by disclosure to vindicate herself or to challenge the propriety of the disclosure. This approach seems rather hit-or-miss. Petitions for disclosure made by the government usually are heard *ex parte* so that disclosure perhaps will be made long before any judicial proceeding actually commences.[301] Challenging the propriety of the disclosure at this later date does not provide an effective remedy. Of course, a challenge in the course of judicial proceedings might prevent use of the disclosed materials in those proceedings. In the absence of judicial proceedings, however, this interest need not be asserted and cannot, therefore, provide a reason for *requiring* that proceedings should be contemplated before disclosure is mandated.

Alternatively, the "judicial proceedings" requirement exhibits a concern for truth-finding and accuracy and a consequent decision not to deprive a court of any element that might contribute to adversarial equipoise and expose perjury or refresh recollection. These aims certainly are worthy, but they may not outweigh the list of compelling reasons for disclosure. Secondly, they are equally relevant when administrative proceedings, which may implicate powerful public interests and result in extensive penalties, are likely to ensue.

Courts themselves seem to view the "judicial proceedings" requirement as a rule searching for a reason. On one hand, courts sometimes have expanded the "judicial proceedings" requirement

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of the securities laws. H.R. Rep. No. 101-975, 101st Cong., 1st Sess. § 501 (1990). The provision did not appear in the ensuing statute, the Securities Law Enforcement Remedies Act of 1990.

300. One theory as to the origin of the requirement postulates that it stems from Section 126 of the American Law Institute's Code of Criminal Procedure (ALI Code), which provided a model oath for grand jurors, including a promise not to disclose proceedings before the jury "except when required or permitted in the course of judicial proceedings." *American Law Institute: Code of Criminal Procedure: Proposed Final Draft* § 126 (ALI, 1930). However, the ALI Code permitted disclosure of grand jury proceedings "in the furtherance of justice" even outside the contoxt of judicial proceedings. ALI Code § 145. See the discussion in Noto, 91 Yale L. J. at 1622-25 (cited in noto 148).

301. Rule 6(e)(3)(D) provides that petitions for disclosure shall be filed in the district court where the grand jury convened. The Rule then states that the hearing on the petition may be ex parte when the petitioner is the government. Hearings on any matter affecting the grand jury may be closed to the extent necessary to prevent disclosure of matters occurring before the grand jury. F.R.Cr.P. 6(e)(5).

rather loosely to include disciplinary hearings and cases in which no more than a possibility of judicial review is present. On the other hand, the courts have applied the rule uniformly to deny disclosure to an administrative agency for the purpose of administrative proceedings. This outcome is irrational because it allows disclosure in some cases in which no judicial proceedings ultimately result and denies it in other cases in which administrative proceedings, which possess virtually all of the characteristics of judicial proceedings,[302] certainly will result. More generally, unless diluted to the vanishing point, the requirement denies government agencies the use of grand jury materials for investigation at a stage when such materials might be crucially helpful but the agency is unable to assert confidently that judicial proceedings are contemplated. Given the general requirement of demonstrating particularized need in the interests of justice, the further requirement of connection with a judicial proceeding appears superfluous and obstructive of the important interest in facilitating administrative investigations and procedures.[303] This provision of Rule 6(e) should be repealed.

The next question is whether such reform would be sufficient. The most radical conceivable reform of Rule 6(e) would reject altogether the requirement of a petition and court order and permit the government to release grand jury materials to designated recipients for designated purposes. The recipients may include all or most government agencies that assert a need for the material in the pursuit of their statutorily assigned mandate. Although sweeping change may be somewhat attractive, some substantial reasons counsel against such a radical departure. We cannot so lightly throw off

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302. One court explained that:

> federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 U.S.C. § 555(b) (1976). They are conducted before a trier of fact insulated from political influence. See § 554(d). A party is entitled to present his case by oral or documentary evidence, § 556(d), and the transcript of testimony and exhibits together with the pleadings constituto the exclusive record for decision. § 556(e). The parties are entitled to know the findings and conclusion on all the issues of fact, law, or discretion presented on the record. § 557(c).

Butz v. Economou, 438 U.S. 478, 514 (1978) (holding that the absoluto immunity enjoyed by state and federal judges also applies to administrative law judges).

303. One of the best studies of the grand jury secrecy provisions concludes that the "judicial proceeding" requirement should be satisfied when an administrative agency can show that it is possible, as a matter of law, that its actions will be reviewed in a subsequent judicial proceeding. See Note, 80 Mich. L. Rev. at 1680 (cited in note 279). This standard certainly would improve on the present position, but it does not go far enough, since many administrative proceedings do not carry the possibility of judicial review. No compelling case can be made for denying all disclosure of grand jury materials in these situations.

centuries of tradition associated with the grand jury. The grand jury is a constitutionally required mechanism for prosecution of serious crime; it exercises almost unchecked subpoena power and proceeds in an inquisitorial manner. So mighty an engine should not be devalued or denigrated in the public eye. Allowing disclosure to government agencies to go unreviewed by a court risks a decline in esteem for the grand jury.

This danger is enhanced because many grand jury investigations are conducted with the assistance of the expertise of agency attorneys and other personnel.[304] Automatic, or virtually automatic, disclosure might strongly tempt agency personnel and attorneys to run the grand jury proceedings solely for agency purposes without any real interest in or realistic pursuit of the possibility of an indictment, reviving the traditional spectre of employing the grand jury as a tool for civil purposes. This temptation would be particularly strong when the grand jury subpoena powers are more extensive than those of the agency involved in the grand jury investigation. At least in such cases, the need for judicial examination of possible abuse of the grand jury process remains strong. Such review is ensured by requiring an application to the court before disclosure may be made.

One can draw distinctions with respect to the degree of danger of abuse. For example, one can conceive of an approach under which a court order would not be necessary in cases in which (a) the grand jury has returned an indictment and (b) disclosure is sought by a government agency whose investigatory powers are virtually coextensive with those of the grand jury. In such a case, the return of an indictment sufficiently indicates that the grand jury process was not abused, while the extent of the agency's own powers of subpoena lessens the importance of any remaining interest in secrecy. However, saving judicial and other governmental time and resources may not justify the drawing of such fine distinctions. Public confidence in the grand jury may be best maintained by a general requirement of judicial scrutiny prior to any disclosure.

Such scrutiny, however, should not turn on the existence or contemplation of judicial proceedings. If the "judicial proceeding" requirement were eliminated, adequate safeguards would remain. First, courts should not grant disclosure if the grand jury process has been abused for a purely civil inquiry. Second, the petitioner bears

304. See Part VIII.

the burden of showing particularized need.[305] However, the elimination of the "judicial proceeding" requirement inevitably would lead to a concomitant modification of the concept of particularized need. In light of the underlying "judicial proceeding" requirement, particularized need hitherto has been defined largely in terms of a need to avoid injustice by countering the possibility of perjury or refreshing the recollection of witnesses in the actual or contemplated judicial proceeding.[306] At the same time, some courts have observed that it is proper to take into account the facts that the petitioner is an organ of government and that disclosure would be in the public interest.[307]

With the elimination of the "judicial proceeding" requirement, these latter considerations should move into a dominant position. When a government agency is the petitioner, the showing of need should be satisfied by a demonstration that the requested material likely is relevant to a subject of inquiry within the mandate of the government agency. The underlying principle in this situation always has been that the need should overcome the historical understanding of the value of grand jury secrecy. In the great majority of cases, the grand jury proceedings will have ended and the weight of secrecy considerations therefore will be much diminished. While the impact on the conduct of future grand jury investigations remains a consideration of some importance, it seems speculative and remote to conjecture that these investigations would be inhibited significantly by an awareness of the possibility of disclosure to government agencies in their pursuit of authorized investigations. If that were the case, witnesses surely would not be significantly more likely to lie and face perjury sanctions or to refuse to testify and face contempt sanctions. It is even less likely that subpoenas duces tecum would be significantly obstructed by this knowledge.

Most serious violations of agency rules also constitute criminal offenses. Thus, the grand jury subpoena in itself usually will constitute the major threat to any person who sees herself or a business entity with which she is associated as a target of the grand jury inquiry. The concurrent threat that the material may find its way into the hands of a civil agency that is likely to pursue civil actions or administrative sanctions is unlikely to cause a person or

305. See Note, 91 Yale L. J. at 1614 (cited in note 148) (recommending the abolition of the "judicial proceeding" requirement).

306. See text accompanying note 268.

307. See text accompanying note 269.

entity to risk the sanctions for failing to cooperate with the grand jury. After all, the most striking characteristic of the grand jury is that it wields compulsory process backed by powerful sanctions. This fact in itself virtually guarantees its effective functioning.

Disclosure of grand jury materials certainly widens the circle of those who may inspect the fruits of compulsory process. Under the old system, in which the grand jury had an investigatory monopoly of compulsory process, the justification for its singular possession of this power was the urgent public need to bring well-grounded prosecutions. Thus, the classical heart of grand jury secrecy principles was fear of a considerable indirect extension of compulsory process by disclosing its fruits rather liberally to civil agencies. The core of the response is that we have, in the areas of concern noted above, gone a long way toward erasing any bright lines that once divided criminal, civil, and administrative proceedings. When civil penalties may be massive and when the interests they defend are identical with the interests protected by concurrent possibilities of criminal sanctions, the reservation of compulsory process to the formally criminal side becomes increasingly less convincing. The system's acceptance of this proposition has manifested itself in the increase of compulsory process vested in the regulatory agencies.

If an agency enjoys compulsory process substantially equivalent to that of the grand jury, why should the material be withheld when the agency has the power to obtain it in any event? The vesting of this power in the agency makes the material vulnerable to its process and thus powerfully undermines the primary set of arguments in favor of grand jury secrecy. The denial of disclosure, which forces the agency into a duplicative effort, is an inefficient, costly, and time-consuming expenditure of resources. This wastefulness is sharply inimical to the public interest when civil intorvention may be urgently necessary. The concept of need should not be confined to a showing that the agency has no other means of getting the material. The better approach is first, to recognize that secrecy arguments have very little initial weight when Congress has made the material accessible to the agency's own process, and, second, to acknowledge that in such a case the concept of need should be confined to a showing of relevance to the agency's mandate. This relevance requirement generally should be satisfied by a showing that the agency could properly exercise its own process to acquire the materials. Thus, in practice, disclosure should be virtually automatic in these cases.

In the other situation, in which the agency or Inspector General does not have powers of compulsory process that extend to the materials in question, as when the agency does not have the power to compel testimony, the case for free disclosure might seem more difficult to make. However, to deny disclosure for this reason alone would be radically severe. Historically, in the typical case of disclosure of grand jury materials, the petitioner could not acquire the materials in any other way. Indeed, disclosure would have greatly diminished importance if it were never permitted in such cases. The important practical question is what concept of "need" should be applied when the agency petitioner does not enjoy process that would reach the materials in question (under the assumption that the requirement of connection with a judicial proceeding would be eliminated).

In this context the very inability of the agency to obtain the material by any other procedure in itself can reasonably be seen as the basic component of the element of "need." But if this inability alone sufficiently demonstrates need, grand jury files would be wide open to fishing expeditions. A petition for release of grand jury files in this situation should be required to state the nature of any actual, contemplated, or foreseeable investigation and to show that such investigation would be within the statutory mandate of the agency; it should state exactly what materials are sought and why they would be relevant. An agency sometimes will be able to make these showings with considerable particularity because it either will have participated in the grand jury investigation or will have received information from a prosecutor prior to the launching of the grand jury investigation. But occasionally the agency will not have participated in the investigation. In such cases, perhaps only a federal prosecutor will be aware of the possible utility of the grand jury materials to an agency. Under present rules, however, the prosecutor likely would commit a violation of secrecy by telling the agency enough to permit them to make an informed application for disclosure. This dilemma can be avoided by permitting the United States Attorney's office sua sponte to make an application to the court for release of material to an agency that they identify as having an interest in the terms described above.[308]

308. No doubt such a possibility would not always mature. Federal prosecutors sometimes may want to carry a criminal case into court without the delays that might be occasioned by parallel civil proceedings. However, this possibility does not seem to present a great danger since, for the most part, civil proceedings are much more likely to be delayed than criminal ones.

Under these proposals, a court's power to deny disclosure would be minimal. Provided a legitimate agency purpose is identified and some minimal showing of a relevant connection between that purpose and the grand jury materials is made, the court should order disclosure. Thus, in the end, the scope of permissible disclosure when the agency has no power to issue its own subpoena would be substantially identical with cases in which it has subpoena power.

The avowed object of these reforms should be to facilitate the exchange of information between organs of government in the public interest, to acknowledge the convergence of criminal and civil sanctions, and to move toward a unified theory of compulsory process in that context. But reforms along these lines would not lay all questions to rest. Defendants in civil cases request disclosure of grand jury materials fairly often. Any expansion of the powers of government agencies to discover grand jury materials for civil purposes inevitably would lead to strong calls for expansion of the rights of civil parties to access grand jury files, at least when they are involved in litigation with the government, which might enjoy this privilege. While this issue lies outside the scope of this Article, the changes proposed necessarily would involve re-evaluation of the civil party's rights in this context in the interest of adversarial equipoise.

XII. THE UNIFICATION OF COMPULSORY PROCESS

The present configuration of statutes, rules, and decisions regulate civil subpoenas or investigative demands in two senses. First, the process must relate to a subject matter defined by a statute as a designated, legitimate field of inquiry. Second, the scope of the process itself, whether, for example, it is confined to the equivalent of a subpoena duces tecum or includes the broader power of testimonial compulsion, and the manner of its enforcement also will be regulated by statute. The grand jury's investigation itself must have a criminal investigative purpose and its proceedings generally are subject to secrecy requirements that are powerfully and restrictively expressed in the limitation of disclosure for civil purposes to matters in which judicial proceedings are contemplated or likely. As a result, while civilly discovered material is virtually unrestricted in its disclosure to

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Prosecutors generally have little or nothing to lose by releasing information to civil agencies; indeed, this cooperation should be encouraged by the government.

a prosecutor,[309] the system is counterbalanced by powerful restrictions on the release of grand jury material to government agencies for civil purposes.

The current approach can be criticized as anomalous. First, grand jury secrecy provisions can be and frequently are finessed by allowing an agency with full compulsory process to conduct the investigation, thereby facilitating the release of material discovered to other agencies as well as to the prosecutor. Second, if the grand jury launches and carries on the investigation, the restrictive provisions of Rule 6(e) may impede or fully balk the efforts of government agencies to gain access to relevant materials even when the agencies have a legitimate need for these materials in order to pursue their proper regulatory goals. An agency may be able to acquire the material by issuing its own process, but this effort will not always be successful and in any event would be wasteful, time-consuming, and duplicative. Third, the position of targets and witnesses will differ according to whether they are summoned by a grand jury or an agency. A target subpoenaed by an agency may, if testimony is required, be accompanied by counsel—a privilege not available before the grand jury. On the other hand, a target may be comforted by the secrecy rules that govern the grand jury—both the prohibition against general publicity and the Rule 6(e) barrier to automatic disclosure to civil agencies. Thus, in different fields, significantly different rules and standards apply, although it is increasingly likely that an agency investigation, to the same extent as a grand jury investigation, may have a criminal prosecution as both its aim and its outcome.

As a radical means of ironing out these anomalies and achieving assimilation in the field of compulsory process, the United States could simply eliminate the grand jury, as the English have done. This act would clean the slate and allow the construction of new institutions for criminal investigation that could be deliberately dovetailed with civil process. However, at least in the federal jurisdiction, constitutional requirements make pursuit of this idea unfruitful. The grand jury must be retained federally as a charging agency; while it continues to function in this capacity, it is unlikely that government will neglect its powerful investigative potential.

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309. "While Rule 6(e) prevents disclosure of what is presented to the grand jury, it does not prevent an [Inspector General's] agent from disclosing te prosecutors, other agencies or a grand jury what the agent has discovered." *United States v. Medic House, Inc.*, 756 F. Supp. 1531, 1537 (W.D. Mo. 1989).

More modest reforms should, however, be considered; these reforms should be aimed at unifying the rules governing compulsory process to the extent that this unification is compatible with its functional role in modern investigations. The need to identify the justifications for compulsory process in a particular field and the legitimate goals of process in different contexts, rather than the mere historical accretions accumulated by different institutions, should govern the reform process. Overall, the modern intertwining of civil and criminal investigations in the regulatory context and the increased blurring of the division between criminal and civil sanctions must be prime considerations.

The continued coexistence of grand jury and agency investigations is bound to create an indistinct and shifting border. Jurisdiction to launch initial investigations overlaps enormously and a clean division is difficult to draw. A superficially neat proposal would allocate to agencies an exclusive power to investigate matters (including crimes) within their purview while restricting grand juries to classic crimes and other offenses that do not fall squarely within the province of an agency endowed with criminal investigative powers. However, bearing in mind the weight of the historical location of power to prosecute in the Department of Justice and United States Attorneys' offices, this idea is impractical and is susceptible to policy objections.

In the first place, investigations may encompass a cluster of crimes not all of which fall within an agency's mandate. This fact often may not appear until the investigation is well under way. Second, while an agency usually is the proper decisionmaker as to whether a prosecution is warranted in areas that come under its regulatory sphere, allowing it to monopolize authority as to these decisions would be dangerous. Agencies may be overly influenced by parochial regulatory policy and hence may not pay enough attention to the moral gravity of the conduct involved; improper influence might find its way into deliberations. The power of the United States Attorney to launch an investigation deemed to be in the public interest and to follow through with an indictment in light of general principles of criminal justice policy should be preserved.

If grand jury compulsory process and agency process must continue to coexist, however, one must recognize that the allocation of an investigation to one organ rather than the other often is accidental, and at times results from consultation aimed at efficiency and convenience, rather than from any sharp functional differentiation.

This recognition creates a strong argument for a high degree of assimilation in the applicable procedures.

Whenever the nature of a regulatory scheme is such that violations frequently will amount to crimes or may carry severe civil penalties that are quasi-criminal in nature, the governing agency should be accorded full investigatory compulsory process. This power generally is allocated to an agency; the only major change that this proposal would effect would be to confer compulsory powers to take testimony on Inspectors General. This proposal is not meant to include the Federal Bureau of Investigation, since the FBI is not a regulatory agency but rather a police force in relation to which the prosecutorial arm, acting through the grand jury, possesses full subpoena power.[310]

If this invitation is accepted, the result will be a full extension of compulsory process to regulatory agencies, for several reasons. First, it would be difficult to isolate situations in which criminal liability is not a possible outcome. Second, even if these situations could be segregated, the civil and administrative sanctions that may be imposed often are functionally indistingnishable in their deterrent and punitive aims and impact from formal criminal sanctions. Restrictions on agency process powers (as exemplified by the present lack of compulsory process for oral testimony in Inspector General's departments) would mean only that the inquiries into criminal conduct, or conduct that may be sanctioned by quasi-criminal penalties, sometimes will be half-hearted and incomplete and, at some point, at least when crimes are suspected, must be referred to a grand jury. But the propriety of an agency (and of Inspectors General) inquiring into conduct that may be criminal has long been accepted and expressly written into governing statutes. The corollary is that the agency and the Inspector General should have the full powers of criminal investigation that are traditional in American law. Under federal law, the Constitution requires that any criminal charge in the

310. In June, 1990, legislation was introduced in the House of Representatives (H.R. 5050) and the Senate (S. 2735) te confer on the FBI power to issue subpoenas for documents. The ABA's Criminal Justice Section commented negatively on the proposed bill; the ABA House of Delegates called for full hearings on the matter. 5 BNA Crim. Prac. Man. at 78 (citod in note 94). Critics feared that giving the FBI subpoena power would undermine the authority of the Justice Department and United States Attorneys and might imperil the secrecy of the grand jury. The Criminal Division of the Justice Department did not support the bill. One should note also that the FBI has a general mandate to inquire into violations of the federal criminal law so that any subpoena power it might enjoy would be sweeping in scope rather than confined to the statutory basis of inquiry that pertains to a particular department or agency. At present, the FBI remains without subpoena power.

end must rest on an indictment by a grand jury, but this requirement can be satisfied both formally and substantially by the agency's handing a packaged case to the United States Attorney and can be facilitated by employing specially designated agency attorneys to assist in the presentation of the case to the grand jury.

Recognition that agencies and Inspectors General already, to a substantial extent, have become the prime investigators of certain categories of crime (and, indeed, are best suitod to discharge this task) raises the question of whether public rights and privileges might be curtailed in any way by such a broad use of compulsory process. In response, one should note first that the development already is so advanced that the proposed change is only marginal. It is true that the existing distribution of process can place a party at a considerable tactical disadvantage when parallel proceedings are ongoing or likely to be launched, but the mechanisms for alleviating intolerable burdens already exist in stays and protective orders.[311] Certainly, close liaison between agencies, the Department of Justice, and United States Attorneys is desirable to minimize the possible harassment that might arise when more than one kind of process is directed against a party. A great deal of informal consultation and coordination already occurs, but as parallel proceedings flourish—and no doubt exists that they will be an increasingly conspicuous feature of the landscape—this liaison should be formalized both to further efficiency in governmental investigations and to protect the rights of parties under investigation. Each agency and Inspector General's office might vest in a senior attorney the responsibility for decisions concerning the distribution of information to other agencies and to the Justice Department, for consultation with these bodies to coordinate investigations and the use of process, and for planning the course of potential parallel proceedings.

Prosecutors working with grand juries generally must halt their use of the subpoena once the grand jury has returned an indictment. As discussed above, the justification for this rule is that a continued use of compulsory process would ride roughshod over the controlling principles of criminal discovery once adversary proceedings

311. In February, 1993, the House of Delegates of the American Bar Association asked the Judicial Conference of the United States te consider problems arising out of parallel proceedings, stressing the significant burdens that such proceedings place on the exercise of Fifth Amendment rights. The report of the Sections on Criminal Justice and Business Law, on which the delegates acted, recommends a rule that would create a rebuttable presumption in favor of a complete stay of parallel civil proceedings and suggests that the Federal Rules of Criminal Procedure should be amended to include guidelines for the granting of these stays. See 52 Crim. L. Rep. 1431 (1993).

are commenced by a formal charge. When an agency investigation is the main instrument in building a criminal case, the question then arises whether a parallel rule should be applied in that context. Two possible situations must be considered. First, the agency might protract the criminal aspect of its investigation by delaying referral to the grand jury and the consequent indictment. No special danger appears in this situation since the prosecutor working with a grand jury enjoys the same power. The prosecutor has no duty to press for an indictment as soon as he has accumulated a case that is barely legally sufficient. A rule imposing this duty would be unwise since it would inhibit perfectly proper governmental efforts to build a strong case before it commits itself to formal prosecution. One should note that the rule prohibiting further grand jury investigation after indictment is not concerned with investigations as such but rather with the propriety of compulsory process after formal charging steps have been initiated. Similarly, an agency should not be prohibited from continuing the criminal aspect of an investigation simply because it has accumulated a case barely sufficient to support a reference for criminal prosecution. Indeed, such a position in essence would adopt the strong and disputed version of the IRS rule, as expressed in *LaSalle*, and apply it across the board to agency investigations.[312] The *LaSalle* rule either should be confined to the IRS context or, indeed, be dropped even in that field by further statutory clarification.

A more sensitive situation arises once an indictment has been returned. Even in this situation, however, the grand jury may continue to issue its process as long as legitimate possibilities of indicting others or indicting an already-indicted defendant for different crimes, perhaps by means of a superseding indictment, exist. Clearly, the law should extend similar latitude to agencies. Indeed, agencies can justly claim exemption in many cases from any halting of their process by citing the independent justification of a need to accumulate further information with respect to the pursuit of civil remedies.[313]

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312. See the discussion of *LaSalle* in the text accompanying notes 127-46.

313. "Further we note that the procedures concerning an administrative enforcement proceeding, including the issuance of a NOPV [Notice of Probable Violation] and the filing of a Motion for Discovery, do not limit the authority of the DOE [Department of Energy] to initiate judicial civil enforcement actions. . . . Consequently, the commencement of an administrative enforcement proceeding does not necessarily demonstrato that civil investigations by the DOE are complete." *United States v. Thriftyman, Inc.*, 704 F.2d 1240, 1247-48 (Temp. Emer. Ct. App. 1983).

A question remains as to whether an agency should be permitted, after indictment, to disclose to the prosecutor any information obtained through post-indictment use of its process that the prosecutor could not have procured properly through continued use of grand jury subpoenas. In this contoxt, the importance of filing formal charges should have precedence. Formal charging triggers the right to counsel in the strongest sense[314] and sets in motion the rules of discovery in criminal cases. If an agency could transmit to a prosecutor, after an indictment is returned, information derived from its process that is material to the prosecution, then the rules of discovery would be subverted and an irrational distinction established between two classes of criminal cases. When agencies are involved, a prosecutor could continue to enjoy a flow of information that would not be available in a case in which agency process was not involved. This division would be indefensible.

As discussed earlier, a party involved in criminal proceedings or in a situation in which criminal proceedings seem likely (such as when a grand jury is in session or a criminal investigation is in progress) can request a stay of civil proceedings or civil discovery or can apply for a protective order with respect to materials produced in response to a civil subpoena. When the grand jury has returned an indictment, the case for such relief becomes stronger. Once an indictment is filed, a protective order should issue automatically as to any material requested by civil subpoena that the movant can show to be inappropriate for discovery in the criminal case or no longer subject to a valid grand jury subpoena. Agencies should elaborate procedures to insulate such material and shield it from the prosecutor and from any agency attorney or other government civil attorneys who are collaborating with the prosecutor in the criminal case.

The processes can be further assimilated by recognizing the right of a witness (or at least a target) to be accompanied by counsel when appearing before a federal grand jury. If different government agencies are charged with substantially identical tasks of criminal investigation, a compelling reason must be given to explain why our system should tolerate sharply different procedures affecting important rights.

The most difficult question with respect to assimilation remains—the issue of secrecy as to material obtained by the grand jury. For practical purposes, secrecy has two different meanings in the grand jury setting, although historically they may spring from the

314. *Massiah v. United Stqtes*, 377 U.S. 201 (1964).

same roots. In one sense, secrecy refers to the non-public nature of ongoing proceedings and the consequent strict imposition of a secrecy obligation on participants, with the exception of witnesses. In a second sense, secrecy refers more specifically to the requirement that a party apply for disclosure and make a special showing under Rule 6(e) before grand jury materials may be disclosed, even to a government agency.

In the context of a release of information to other organs of government, therefore, a sharply anomalous position has developed under which an agency often may make disclosures to another agency that a grand jury could not make without a Rule 6(e) order. As discussed above, formidable obstacles block a successful application for such an order. The recommendation made in Part XI therefore should be adopted, and Rule 6(e) should be substantially modified by replacing the current obstructive and irrational standard with the proposed standards, which require no more than a showing of substantial need by the civil branch.

A more radical reform would allow disclosures of grand jury materials to other government officers and agencies upon an internal, administrative showing of need (which might be subject to later judicial review), without the necessity of an initiating application to the court. Under such an approach, only the court's ultimate power to find an abuse of process would check the sharing of information. When the agency has subpoena powers coextensive with those of the grand jury and thus is empowered to obtain the same materials through its own process, such a solution has much to commend it. But the nature of the grand jury's process, its existence as an organ of the court, and the concept that grand jury materials are in the custody of the court rather than the prosecutor make it difficult to fit so radical a proposal harmoniously into the existing structure. Retaining judicial scrutiny of applications for disclosure also can be defended as a mattor of policy as follows: A subpoena or civil investigative demand can always be challenged, and denial of a challenge can be appealed. But when a government agency attempts to obtain matorial from the grand jury, parties have no effective opportunity for a challenge, for only in a rare case will a prosecutor perceive a good reason for denying a request from another government agency. Thus, judicial scrutiny substitutes for the usual opportunity to challenge a subpoena or civil investigative demand. But no reason exists for extending judicial scrutiny beyond the standards usually applied when the court faces a motion to quash a subpoena. If the agency-applicant can satisfy the

court that the material is relevant to matters that the agency wishes to investigate, that the investigation is within the purview of its statutory mandate, and that the grand jury investigation was not a mere sham devoid of any genuine criminal law aims, the court should order disclosure.

Under this approach, and under the general aim of assimilation, equity might appear to require that a similar approach (requiring a judicial order) should be applied to disclosure of material acquired through compulsory process by one agency to another. However, the agency context is not encumbered with the difficulties that arise from the grand jury's existence as an organ of the court, particularly in light of the historical baggage relating to grand jury secrecy. First, material obtained by agencies is not in the custody of the court in the way that grand jury material is. Second, when an agency issues a subpoena, it acts under statutory authority, and the legislature may be deemed already to have considered the questions of confidentiality and secrecy. In the absence of statutory restrictions on agency process, it is proper to assume that the legislature intended no restrictions. Third, the party responding to an agency subpoena, even a subpoena that requests testimony, may apply for a protective order if she can show some special reason for keeping the product secret. Fourth, appellate review may be had before a court can compel compliance with agency subpoenas. Fifth, little danger exists that an investigation by one agency will be used as a sham to further the investigative aims of another agency. Free agency disclosure to other government entities should be permitted.

XIII. CONCLUSION

The time is now ripe for a consciously fashioned coordination of federal compulsory process. In regulatory fields, criminal, civil, and administrative remedies now should be viewed as an armory of weapons not decisively distinguishable in their aims and functions. Their particular deployment in an individual case is governed by strategic and tactical considerations that often do not embody clear differences in remedial purpose nor clear differences in impact on the citizen or entity. Consultation, coordination, and efficiency should be the prime ideals for government departments and agencies in the employment of compulsory process. This aim can be achieved to an extent by administrative arrangements; statutory intervention will be

necessary with respect to modernizing the rules about access to grand jury materials.