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How Much Cooperation Between Government Agencies Is Too Much?: Reconciling United States v. Scrushy, the Corporate Fraud Task Force, and the Nature of Parallel Proceedings

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HOW MUCH COOPERATION BETWEEN GOVERNMENT AGENCIES IS TOO MUCH?: RECONCILING UNITED STATES V. SCRUSHY, THE CORPORATE FRAUD TASK FORCE, AND THE NATURE OF PARALLEL PROCEEDINGS

INTRODUCTION

A. The Corporate Fraud Task Force

In the first few years of this century, our nation experienced an epidemic of corporate fraud, igniting a fear amongst investors about the future of the marketplace. In response to public outcry, President George W. Bush announced his “Ten-Point Plan to Improve Corporate Responsibility and Protect America’s Shareholders” in March of 2002. The plan was “based on three core principles: information accuracy and accessibility, management accountability, and auditor independence.” This plan was part of the Bush administration’s promise to wage an aggressive fight against corporate fraud and abuse.

In furtherance of this assertive position, President Bush created the Corporate Fraud Task Force (“Task Force”) on July 9, 2002. Its purpose is to “provide direction for the investigation and prosecution of cases of securities fraud, accounting fraud, mail and wire fraud, money laundering . . . and other related financial crimes committed by commercial entities.” Moreover, the Task Force provides recommendations for the allocation of resources to conduct investigations, acts to enhance cooperation between government agencies, and suggests potential changes in rules and procedures to

3. Id.
4. See id.
6. Id.
improve “effective investigation and prosecution of significant financial crimes.”\footnote{Id.} The Task Force also works to “[r]estore confidence to the marketplace; [p]rovide fair and accurate information to the investing public; [r]eward shareholder and employee trust; and protect [the] jobs and savings of hard-working Americans.”\footnote{DEPARTMENT OF JUSTICE, FACT SHEET: CORPORATE FRAUD TASK FORCE (2005), http://www.usdoj.gov/opa/pr/2005/August/05_opa_434.htm.} The Executive Order is intended to improve internal management of the federal government by encouraging agencies to work together to fight perpetrators of financial crimes.\footnote{Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (Jul. 9, 2002).} Thus, the Department of Justice (DOJ) works closely with the Securities and Exchange Commission (“SEC”), the Commodities Future Trading Commission, the Federal Energy Regulatory Commission, and the Federal Communications Commission under the Task Force’s order.\footnote{Id.}

\section*{B. Parallel Proceedings}

Encouraging government agencies to work together to combat financial crime often results in parallel proceedings.\footnote{See Carl H. Loewenson, Jr., \textit{Parallel Proceedings}, 865 PRAC. L. INST. 641, 647 (2004).} “‘Parallel proceedings’ occur when two or more investigations or actions, concerning allegations arising from the same (or substantially the same) set of facts, proceed simultaneously or successively against the same or related parties”\footnote{Id. Parallel proceedings are common in cases involving alleged securities violations. \textit{Id.} While parallel proceedings also arise among other commercial agencies, the scope of this Comment is limited to parallel proceedings conducted by the DOJ and the SEC only. \textit{Id.}} Since the creation of the Task Force, the DOJ and the SEC have worked closer together to fight white-collar criminals.\footnote{See Barrie McKenna, \textit{They Can Run but They Can't Hide: Ebbers' Conviction an Ominous Sign for Other CEOs Facing a Date in Court}, GLOBE & MAIL, Mar. 16, 2005, at B7.} The SEC is responsible for civil enforcement of federal securities law, and the DOJ is in charge of enforcing those criminal federal securities laws.\footnote{Id.} Despite having the power to conduct both
civil and criminal investigations of violations of the federal securities laws, the SEC has no independent prosecutorial power, therefore the SEC often refers criminal securities violations to the DOJ or to the local United States Attorney’s Office (U.S. Attorney) if the SEC believes a criminal investigation is warranted.15

The SEC’s primary concerns, like those of the DOJ, are “the nature and degree of a company’s ‘self-policing, self-reporting, remediation and cooperation.’”16 The two agencies consider similar factors during enforcement investigations, including the nature of the misconduct, the reason for the misconduct, the amount and severity of harm suffered by investors and other parties, the extent of the company’s cooperation, the possibility that the actor will commit the harm again in the future, and several other factors.17

C. United States v. Scrushy18

In United States v. Scrushy, Richard Scrushy, former Chief Executive Officer of HealthSouth Corporation, moved to suppress his deposition taken during a civil investigation by the SEC from use in the criminal prosecution brought by the U.S. Attorney.19 During trial testimony, Mr. Scrushy and the court learned that the SEC had cooperated with the U.S. Attorney’s office when the SEC took Mr. Scrushy’s testimony several months before the criminal trial at issue.20 The government argued that the SEC’s civil investigation of HealthSouth and the U.S. Attorney’s investigation of Mr. Scrushy for criminal offenses involved different conduct, however, the court found that the testimony at issue “reflected a serious overlap” in the two investigations, as both concerned accounting fraud at HealthSouth.21 The court had to decide “whether the government

15. Id.
17. Id. at 241.
19. See id. at 1134-35.
20. Id. at 1135.
21. Id. at 1137.
departed from the proper administration of criminal justice” when it obtained Mr. Scrushy’s deposition testimony. The court ultimately held that the civil and criminal investigations improperly merged when the U.S. Attorney’s office called the SEC office, gave the SEC advice about what to ask and avoid asking in deposition, and requested that an SEC investigator participate in the criminal investigation interviews.

The goals of the Task Force are to restore market confidence and cut down on corporate fraud. The Task Force seeks to accomplish these goals by encouraging and maximizing communication between government agencies; yet in Scrushy, the court found the cooperation between agencies was improper and unfairly risky to the defendant. This appears to be a gray area for the courts with no bright line rules or controlling law defining what constitutes lawful cooperation and what is considered an improper administration of justice.

This Note will analyze the Corporate Fraud Task Force, the United States v. Scrushy decision, and the different standards and factors courts use in determining whether cooperation and communication between government agencies is fair and proper. Part I provides background information about the Task Force, the effect of the Sarbanes-Oxley Act on the Bush Administration’s aggressive fight against corporate fraud, and the implications for the SEC. Next, Part II offers a thorough look at the Scrushy case and the arguments presented by both parties. Part III discusses a number of cases where the courts found cooperation and communication between government agencies proper and lawful. Part IV lists and explains other factors courts have taken into account when faced with parallel proceedings and issues similar to those in Scrushy, such as due

22. Id.
23. Id.
25. See id.; Scrushy, 366 F. Supp. 2d at 1140.
27. See infra Part I.
28. See infra Part II.
29. See infra Part III.
process concerns and whether to grant a stay in civil proceedings. Part V states that the outcome of the Scrushy trial may have been different if the Government had simply informed Mr. Scrushy of the pending criminal trial. Finally, this Note concludes that the Northern District of Alabama, in United States v. Scrushy, correctly held that the DOJ and SEC’s actions were unfairly risky to defendant and improper because the defendant was unaware of the pending criminal trial and because the U.S. Attorney’s office was so extensively involved in the SEC’s civil deposition.

I. THE USE OF THE CORPORATE FRAUD TASK FORCE AND THE SARBANES-OXLEY ACT TO FIGHT CORPORATE FRAUD

A. Additional Background Information on the Task Force

After the fall of Enron and WorldCom and with corporate corruption making headlines far too frequently, President Bush recognized the need for both increased sentences for financial crimes and stricter enforcement of such crimes, and created the Task Force to implement his plan to reduce egregious corporate conduct. As part of the DOJ, the Task Force falls under the Attorney General’s jurisdiction. It includes the Deputy Attorney General who serves as a chair, Assistant Attorney Generals for the Criminal and Tax Divisions, the Director of the FBI, United States Attorneys from various districts, and other officers or employees of the DOJ as the Attorney General may designate.

One theory behind the Task Force’s formation was that civil prosecutions were not enough to keep corporate wrongdoers from acting unlawfully. The Executive Branch believed that pooling

30. See infra Part IV.
31. See infra Part V.
32. See infra Conclusion.
33. See Johnson, supra note 1.
34. 2 HAROLD S. BLOOMENTHAL, SEC. L. HANDBOOK § 36:2.10 (2004).
36. McKenna, supra note 13.
resources and capabilities from the DOJ, FBI, and SEC, among other agencies, would help send Bush's emphatic message: Dishonest corporate leaders "will be exposed, and . . . will be punished. No boardroom in America is above or beyond the law."

Further, by encouraging inter-agency cooperation, "real time enforcement" emerged; complex financial fraud suits that would have taken several years before the Task Force's creation were being tried within months of the initial investigations. "Real time' enforcement is best accomplished when distinctive cases, which comprise separate segments of conduct involved in a larger investigation, are brought when they are ready and tried as expeditiously as possible." "The Task Force has assisted the investigation in virtually every corporate fraud case brought by federal prosecutors" in its first year of existence, instituting over 300 criminal fraud investigations in that first year alone. There is no doubt that the creation of the Task Force is a leading factor in the record number of criminal securities prosecutions that have been brought to date.

Recently the Task Force has shifted gears, focusing more on those outside the company who may have assisted fraud, such as accountants, lawyers, suppliers, vendors, and financial advisors. While still pursuing accounting fraud cases, the Task Force is seeking the facilitators of the fraudulent conduct and attempting to hold everyone involved accountable, "not just those in the board room."

37. Johnson, supra note 1.
38. Stanley A. Twardy, Jr. & Edgardo Ramos, Fighting on Several Fronts: Today's White-Collar Crime Defendant May Find Himself Facing Parallel Criminal and Civil Proceedings, 26 NAT'L L. J. S1 (July 19, 2004); see also Brickey, supra note 16, at 250 (noting that "the HealthSouth investigation is another example of successful use of real-time prosecutions").
39. CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT, at § 2.5 (July 22, 2003).
40. Bloomental, supra note 34. The Task Force's website lists companies which have been investigated and charged with corporate fraud. The list includes Enron, WorldCom, ImClone, HealthSouth, Rite Aid, Adelphia, and many others. Id.; Brickey, supra note 16, at 230.
43. Id.
There is no doubt that the government will continue to “flex[] its muscles” and carry on the trend of aggressive prosecutorial enforcement in the future.\textsuperscript{44}

\textbf{B. The Sarbanes-Oxley Act}

DOJ prosecutors and the enforcement division attorneys at the SEC received a “crucial boost from Congress in their effort to root out fraud when lawmakers overwhelmingly passed the Sarbanes-Oxley Act a month after the WorldCom scandal news broke.”\textsuperscript{45} This monumental piece of legislation makes chief executive officers (“CEOs”) and chief financial officers (“CFOs”) personally liable for the accuracy of their financial statements.\textsuperscript{46} By requiring these top executives to certify truthfulness and precision of their financials, the Act attempts to eliminated the common excuse that these corporate leaders did not know or understand what was really going on in their companies’ books.\textsuperscript{47} Additionally, Sarbanes-Oxley provided regulators with the authority to create and enforce new accountability rules on corporate executives, to reinforce rules dealing with auditor independence, to ensure that publicly held corporations provide accurate and precise financial reports, and to reduce accounting errors.\textsuperscript{48} Under this Act, “executives who falsely certify their financial statements are accurate can be held criminally and civilly liable, with penalties of up to 20 years in prison and \$5-million fines.”\textsuperscript{49}

\textsuperscript{44} See id.


\textsuperscript{46} See Chad Terhune et. al., Sarbanes-Oxley fails in first trip to the jury room, GLOBE & MAIL, June 29, 2005, at B10. The rules require CEOs and CFOs to certify that they have reviewed each quarterly or annual report filed with the SEC, that to the best of their knowledge the report does not contain any material false statements or omissions, and that it fairly represents the financial condition and results of operations of the company for the period being reported. See Sarbanes-Oxley Act of 2002 § 906.

\textsuperscript{47} Terhune, supra note 46.

\textsuperscript{48} Brickey, supra note 16, at 231. Further, this Act marks the first securities fraud crime to be codified in the federal criminal code. Id.

\textsuperscript{49} Terhune, supra note 46.
The driving force behind this Act, according to President Bush, was the need for "higher ethical standards [that are] enforced by strict laws and upheld by responsible business leaders." President Bush added that the government vowed it would find, arrest, and act against CEO's that attempted to distort their books in an effort to make their companies look better. The Sarbanes-Oxley Act and other recent corporate reforms provide greater precision and accountability in corporate governance issues, increase communication and collaboration among prosecutors and other enforcement agents, intensify the penalties against the perpetrators of corporate fraud, and restore substantial financial balance to the SEC.

When considering the gravity and seriousness of financial and accounting fraud that occurred in companies such as Enron and WorldCom, Congress's implementation of these major structural reforms is not surprising, as drastic measures were necessary in order to restore corporate compliance and regain public trust. The number and success of the enforcement actions taken in the post-Enron era has been impressive, due in large part to these important governance reforms.

C. Effect on the Securities and Exchange Commission

Prior to these corporate reforms, the SEC was in financial trouble. Congress considered freezing the SEC's budget for five years and suggested lessening the number of SEC commissioners from five to three. There was low staff morale and little enthusiasm,
which resulted in high turnover.\textsuperscript{57} However, since the creation of the Task Force and the passage of Sarbanes-Oxley, the SEC’s professional staff of attorneys has grown 27\%, and the number of both accounting and financial fraud cases has increased dramatically.\textsuperscript{58} Additionally, the SEC’s budget increased by 77\% immediately following the enactment of Sarbanes-Oxley, with $776 million authorized in 2003 alone. Since then, the number of enforcement actions has steadily increased.\textsuperscript{59} This growth over the past several years reflects the government’s new stance on fighting corporate-related criminal behavior.\textsuperscript{60}

The criminal trial against Mr. Scrushy was Sarbanes-Oxley’s first trip to the courtroom.\textsuperscript{61} Because the outcome of the trial failed to set a good precedent for Sarbanes-Oxley cases, legal experts fear prosecutors may be more hesitant to bring suits against CEO’s under the Act.\textsuperscript{62} Despite the loss, the DOJ remains committed to the Sarbanes-Oxley Act and devoted to the underlying “principles of the corporate fraud task force, including vigorous enforcement of the law as part of [their] overall efforts to restore integrity to the financial marketplace.”\textsuperscript{63}

II. \textit{United States v. Scrushy} and an Improper Administration of Justice

Although the Task Force encourages inter-agency cooperation, the SEC and the DOJ were reprimanded for their collaboration in \textit{United States v. Scrushy}, where the defendant moved to suppress a deposition taken during the SEC’s civil investigation and prevent the U.S. Attorney from using it in the criminal prosecution.\textsuperscript{64} During trial

\begin{itemize}
\item \textsuperscript{57} Id. at 243-44.
\item \textsuperscript{58} Johnson, \textit{supra} note 1.
\item \textsuperscript{59} Hemann & Kimball, \textit{supra} note 41.
\item \textsuperscript{60} See \textit{id}.
\item \textsuperscript{61} See Terhune, \textit{supra} note 46. The prosecution claimed Mr. Scrushy “willfully” certified a securities filing that he knew was fraudulent. \textit{Id}.
\item \textsuperscript{62} \textit{Id}.
\item \textsuperscript{63} \textit{Id}.
\item \textsuperscript{64} United States v. Scrushy, 366 F. Supp. 2d 1134, 1134-35, 37 (N.D. Ala. 2005).
\end{itemize}
testimony, Mr. Scrushy and the court learned of the SEC and DOJ's cooperation and communication during investigation of Scrushy and HealthSouth. 65 Although Mr. Scrushy's deposition was scheduled to take place in Atlanta, Georgia, the SEC changed the venue to Birmingham, Alabama just two days prior to the deposition. 66 During trial, an SEC employee revealed that the U.S. Attorney's office in Birmingham requested the change. 67 Before the SEC's deposition of Mr. Scrushy, the U.S. Attorney's office in Birmingham informed the SEC investigators about a massive fraud at HealthSouth of which Mr. Scrushy was allegedly aware. 68 They asked that an SEC employee to be present during interviews at the U.S. Attorney's office because they "need[ed] his accounting help" on this issue. 69 Testimony also revealed that this location change was due in part to a perjury trap: if Mr. Scrushy lied in Birmingham, rather than in Atlanta, he would be lying in the U.S. Attorney's district. 70 Further, the U.S. attorney advised the SEC employee to avoid certain topics, such as "cash; property, plant and equipment . . . and accounts payable." 71 During the deposition, the SEC did not notify Scrushy or his attorneys about the criminal investigation. 72 The SEC investigator asked a number of questions that admittedly would not have been asked had the U.S. Attorney's office not contacted him. 73

Despite the government's claim that the civil and criminal investigations involved different conduct, the court found that the testimony at issue created a problem in terms of the overlap of information, as both concerned the alleged accounting fraud at HealthSouth. 74

65. Id. at 1135.
66. Id.
67. Id. at 1135-36.
68. Id. at 1136.
69. Id.
70. See Scrushy, 366 F. Supp. 2d at 1136.
71. Id.
72. Id. at 1137.
73. Id.
74. Id.
The defendant argued that the court should follow United States v. Parrott, where the court held "the government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution." In both cases the government failed to inform the defendants that criminal charges were emerging against them at the time of their civil deposition conducted by the SEC.

The Government argued United States v. Teyibo applied instead. In Teyibo, the court held that "the prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of justice." The court agreed that Teyibo applied, although the test presented in Teyibo ultimately caused the government to lose its argument.

The court believed that United States v. Handley was the most closely analogous case. In Handley, the government used evidence obtained in civil proceedings to aid in the criminal prosecution against the same defendants. The court reversed the exclusion of deposition testimony obtained in the civil case because the "government had no advance notice of any of the depositions and no input into their conduct." The court in Scrushy, however, found the government "had both notice and direct input." The government argued that no constitutional rights were violated, yet ignored the alternative test laid out in Teyibo, which noted the prosecution can use evidence obtained from the civil trial unless there was either a

77. Id. at 1138.
80. Teyibo, 877 F. Supp. at 855 (emphasis omitted).
82. Id. at 1138. U.S. v. Handley can be found at United States v. Handley, 763 F.2d 1401 (11th Cir. 1985).
83. Handley, 763 F.2d at 1404.
84. Id. at 1403, 1406.
85. Scrushy, 366 F. Supp. 2d at 1138.
violation of constitutional rights or an improper administration of criminal justice.\textsuperscript{86}

To determine whether there was an improper administration of justice in Mr. Scrushy's case, the court looked again to \textit{Parrott}, which noted that "the danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending criminal charge."\textsuperscript{87} The \textit{Scrushy} court agreed and held:

When a defendant \textit{knows} that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. When a defendant does not know about the criminal investigation, the danger of prejudice increases. Failing to advise Mr. Scrushy or his attorneys about the criminal investigation of which he was a target, and that the deposition had been moved to accommodate the need of the U.S. Attorney's office to bring into the criminal investigation one of the very S.E.C. investigators who was questioning Mr. Scrushy, and the change of the deposition's location for venue purposes cannot be said to be in keeping with the proper administration of justice. Our justice system cannot function properly in the face of such cloak and dagger activities by those charged with upholding the integrity of the justice system.\textsuperscript{88}

Additionally, the court in the civil suit against HealthSouth, decided two years before \textit{Scrushy}, found that because the government controlled both the criminal and civil trials, "there [was] a special danger that the government [could] effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means. In that special

\textsuperscript{86} \textit{Id.} at 1139.

\textsuperscript{87} \textit{Id.} (quoting United States v. Parrott, 248 F. Supp. 196, 200 (D.D.C. 1965)).

\textsuperscript{88} \textit{Id.} at 1139-40 (emphasis in original) (citation omitted).
situation the risk to individuals' constitutional rights is arguably magnified.” Thus, the court in *Scrushy* held the SEC investigation became unavoidably commingled with the DOJ’s criminal investigation and the use of Scrushy’s civil deposition transcript would be a departure from the “proper administration of justice.”

III. PREVIOUS CASES FINDING NO IMPROPER CONDUCT BY THE GOVERNMENT IN PARALLEL PROCEEDINGS

Numerous cases have found cooperation between the SEC and the DOJ both proper and beneficial. In *SEC v. First Financial Group of Texas*, the court stated that “[t]here is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions.” Additionally, the court in *Sterling National Bank* acknowledged that “it would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities.”

Further, courts have discussed the advantages of permitting the SEC to communicate with the DOJ during the preliminary stages of an investigation, noting that such communication minimizes statute of limitations problems, time constraints, ease of becoming familiar with the facts of the case, and consistency with a defendant’s right to a speedy trial.

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93. Sterling Nat’l Bank v. A-1 Hotels Int’l, Inc., 175 F. Supp. 2d 573, 575 (S.D.N.Y. 2001). In *Sterling*, the issue concerned whether to grant a stay of the civil proceeding until the federal criminal investigation was resolved. The court denied granting a stay, noting that defendants were not entitled to a stay because the civil interests were distinct from those of the government in the criminal trial. *Id.* See also discussion infra part IV.C.
94. United States v. Fields, 592 F.2d 638, 646 (2d Cir. 1978).
Moreover, the court in *SEC v. Dresser* acknowledged that both the Securities Act of 1933 and the Securities Exchange Act of 1934 expressly authorize cooperation between the SEC and DOJ by providing that the SEC may transmit evidence to the Attorney General who may institute the necessary criminal proceedings.\(^{95}\) Additionally, as the court noted in *Teyibo*, SEC Form 1662, which the SEC Enforcement Division includes with its subpoenas, specifically warns that the SEC regularly makes their files available to other governmental agencies, particularly the United States Attorneys and state prosecutors.\(^{96}\) The form warns that there is a high likelihood that the information supplied in the response to the subpoena will be made available to other agencies when appropriate and whether the SEC discloses such information to other agencies is a confidential matter.\(^{97}\)

Courts also consider the underlying intentions of the government agencies when criminal investigations begin subsequent to civil enforcement inquiries, finding the government acts in good faith where it has a legitimate, nondiscriminatory purpose for the dual investigations.\(^{98}\) A bad faith civil investigation, on the other hand, is one performed for the sole reason of using it for subsequent criminal enforcement purposes.\(^{99}\) The *Dresser* court provided that “[w]here the [SEC] has a legitimate noncriminal purpose for the investigation, it acts in good faith . . . even if it might use the information gained in the investigation for criminal enforcement purposes as well.”\(^{100}\)

Finally, in dealing with the issue of parallel proceeding involving the FDA and DOJ, the Supreme Court held in *United States v. Kordel*

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95. SEC v. Dresser Indus., 628 F.2d 1368 1376 (D.C. Cir. 1980); accord Securities Act § 20(b), 15 U.S.C. § 77(b); Exchange Act § 21(d), 15 U.S.C. § 78u(d). The court also discussed how both the House and the Senate reports have discussed “the SEC’s dual investigative role in preparing cases for civil and criminal enforcement actions.” *Dresser*, 628 F.2d at 1386.


97. *Id.*

98. See *Dresser*, 628 F.2d at 1387.

99. *Id.*

100. Id. Additionally, two SEC attorneys participated in the DOJ’s Task Force, which the court found was acceptable. The court held the participation did not “cast doubt upon the good faith” of the SEC’s investigation. Id. at 1388.
that parallel investigations by the FDA and the DOJ should not be blocked in the absence of special circumstances because the prompt investigation of both criminal and civil charges can be necessary to the public interest.\textsuperscript{101} The Court noted that parallel investigations should be permitted unless the nature of the legal action blatantly prejudices substantial rights of either party.\textsuperscript{102}

These cases indicate that effective enforcement of securities laws requires that the SEC and the DOJ are able to conduct parallel investigations.\textsuperscript{103} Neither agency can wait for the other to complete its respective proceeding if it is to obtain the necessary and just remedy.\textsuperscript{104} “It would stultify enforcement of federal law to require a government agency . . . 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.”\textsuperscript{105} Sufficient protection of the securities markets may require prompt enforcement of both civil and criminal charges and the courts have consistently declined to adopt a per se rule against such actions, recognizing the necessity of regulation and protection of these vital markets.\textsuperscript{106} The SEC has a separate and distinct interest in the civil enforcement of the federal securities laws despite a criminal proceeding brought by the DOJ for the same or similar conduct.\textsuperscript{107} Further, in addition to certain courts finding a need for inter-agency communication, both the House of Representatives and the Senate have recognized the need for close cooperation between government agencies and have approved of a “close working relationship” between them.\textsuperscript{108} Thus, absent special circumstances or bad faith,

\begin{footnotesize}
\begin{enumerate}
\item See United States v. Kordel, 397 U.S. 1, 11-12 (1970) (emphasis added).
\item See id. at 11-13; see also Dresser, 628 F.2d at 1374 (noting that “[i]n the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable”).
\item Dresser, 628 F.2d at 1377.
\item Id.
\item Kordel, 397 U.S. at 11.
\item SEC v. First Fin. Group of Tex., Inc., 659 F.2d 660, 667 (5th Cir. 1981).
\item See Dresser, 628 F.2d at 1385-86.
\end{enumerate}
\end{footnotesize}
cooperation between agencies is both lawful and endorsed.\(^\text{109}\) This begs the question, then: What constitutes “special circumstances?”\(^\text{110}\)

IV. **“SPECIAL CIRCUMSTANCES” AND ADDITIONAL FACTORS COURTS TAKE INTO ACCOUNT WHEN DETERMINING WHETHER INTER-AGENCY COOPERATION IS PROPER**

A. **Special Circumstances Generally**

No lines have been drawn defining conduct that is lawful and proper or defining conduct that is unacceptable and thus, courts differ in articulating which situations are “special” and constitute improper behavior.\(^\text{111}\) In *United States v. Kordel*, the Supreme Court found that the government had not brought a civil action “solely to obtain evidence for its criminal trial,” that the defendants had notice that a criminal action was possible, that defendants had been represented by counsel, had no reason to fear prejudice from adverse pretrial publicity or other unfair injury, and that defendants failed to show any other circumstances suggesting that the parallel proceedings were unconstitutional or improper, and as such, the dual criminal and civil investigations were necessary to the public interest and were lawful.\(^\text{112}\)

The Constitution does not set forth any specific protections afforded to defendants facing simultaneous parallel civil and criminal charges, leaving it entirely within the court’s discretion to issue a number of safeguards, such as stays in civil proceedings, postponement in civil discovery, or issuance of protective orders “when the interests of justice seem[] to require such action.”\(^\text{113}\) These


\(^{110}\) See *infra* Part IV.A.

\(^{111}\) See *First Fin. Group of Tex.*, 659 F.2d at 667-668.

\(^{112}\) *Kordel*, 397 U.S. at 11-12.

determinations must be based on the facts and circumstances of the specific case at hand.\textsuperscript{114}

\subsection{Due Process Violations}

A party’s right to due process may be violated if the government deprives that person of life, liberty, or property.\textsuperscript{115} Although simultaneous proceedings are generally unobjectionable, it is a blatant violation of due process for the government to bring a civil action solely to obtain evidence for its criminal case, or to use an ongoing civil investigation solely to expand the rights of the government’s criminal discovery beyond what is prescribed in Federal Rule of Criminal Procedure 16(b).\textsuperscript{116} To establish wrongdoing by the government, the courts require a defendant to present specific evidence of agency bad faith or malicious governmental strategies.\textsuperscript{117} If the government has a bona fide independent purpose for the parallel proceeding, due process concerns are dissipated.\textsuperscript{118}

\subsubsection{Fifth Amendment}

Fifth Amendment implications often arise when the SEC and the DOJ bring parallel proceedings.\textsuperscript{119} A defendant may choose to invoke his Fifth Amendment privilege, refusing to testify against himself in a civil investigation if he knows or believes a criminal trial is

\begin{flushleft}
\textsuperscript{114} Id.
\textsuperscript{115} See U.S. CONST. amend. V. Further, due process is defined as “[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.” BLACK'S LAW DICTIONARY 538-39 (8th ed. 2004).
\textsuperscript{116} See Kordel, 397 U.S. at 11-12; Dresser, 628 F.2d at 1375-76. See also FED. R. CRIM. P. 16(b) (dealing with what types of information a criminal defendant must disclose).
\textsuperscript{117} See Dresser, 628 F.2d at 1375-76.
\textsuperscript{118} See id. at 1376 n.21.
\textsuperscript{119} See id. at 1375-76; see also U.S. CONST. amend. V (“[No person] shall be compelled in any criminal case to be a witness against himself . . .”). This privilege may be invoked in civil or criminal proceedings, formal or informal, where the testimony sought would support a conviction of the witness or “furnish a link in the chain of evidence needed to prosecute the [witness].” Hoffman v. United States, 341 U.S. 479, 486 (1951); see Mark D. Hunter, SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends, 68 MO. L. REV. 149, 162 (2003).
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pending.\textsuperscript{120} This privilege prevents a defendant from being forced to supply information that may “provide a direct link in a chain of evidence that [may] lead to his conviction” in subsequent criminal proceedings.\textsuperscript{121} In these situations, the defendant faces a double-edge sword: he has the choice of being prejudiced in the civil litigation by invoking his Fifth Amendment right or being prejudiced in the criminal investigation if he chooses to waive that right.\textsuperscript{122}

When a defendant invokes his right against self incrimination and refuses to testify, the court may draw an adverse inference from his refusal.\textsuperscript{123} This adverse inference, however, is only allowed in civil proceedings and simply invoking the privilege alone is not enough to find liability.\textsuperscript{124} Further, as the court acknowledged in Sterling, “forcing a [d]efendant to choose between waiving his Fifth Amendment privilege or suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process.”\textsuperscript{125}

Not only does invoking one’s Fifth Amendment privilege carry a negative inference, “but it also may prevent a defendant from presenting evidence on his own defense.”\textsuperscript{126} Moreover, invoking one’s Fifth Amendment privilege may even lead to summary judgment for the other party.\textsuperscript{127} This dilemma is further complicated if the SEC denies advising a witnesses that there is, in fact, a parallel criminal investigation.\textsuperscript{128}

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  \item[\textsuperscript{120}] Randy S. Eckers, Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules, 27 Hofstra L. Rev. 109, 123 (1998).
  \item[\textsuperscript{121}] Hunter supra note 119, at 162 n.111.
  \item[\textsuperscript{122}] See id. at 163.
  \item[\textsuperscript{124}] Sturc & Leibowitz, supra note 107, at 55; Hunter, supra note 121, at 163.
  \item[\textsuperscript{125}] Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 578 (S.D.N.Y. 2001) (quoting Resp't Opposing Mem. at 4). However, the exercise of defendant's Fifth Amendment privilege “should not be made unnecessarily costly.” United States v. 4003-4005 5th Ave., 55 F.3d 78, 84 (2d Cir. 1995).
  \item[\textsuperscript{126}] Eckers, supra note 120, at 124. Evidence concealed by invoking the Fifth Amendment may not later be used by the defendant to support his own claim or defense. See Hunter, supra note 121, at 163.
  \item[\textsuperscript{127}] See 4003-4005 5th Ave., 55 F.3d at 83.
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Additionally, while corporations themselves do not have Fifth Amendment privileges, employees of those corporations do possess this right, and in recent times, invoking the Fifth Amendment may also lead to a loss in a job, public position, or status. If the employee invokes his Fifth Amendment privilege, his company may let him go in order to maintain its eligibility for cooperation considerations, yet testifying against the corporation may aid in an indictment.

The court has discretion to take the appropriate measures if it finds a defendant’s constitutional right has been infringed. The most important factor in determining whether a defendant’s rights and privileges have been abridged “is ‘the degree to which the civil issues overlap with the criminal issues.’” Further, failure to assert one’s Fifth Amendment privilege does not give a party the right to complain later in the trial that he was compelled to testify against himself. Ultimately, because a defendant cannot be forced to testify against himself and because any adverse inference resulting from invoking the Fifth Amendment privilege is “consistent with the constitutional guarantee,” the real risk facing defendants is “their strategic position in the civil case.”

2. Sixth Amendment

The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy
and public trial . . . .” 135 Courts reprimand the government if there was an inappropriately long delay in returning an indictment. 136 The determination of whether the delay was inappropriate is relative, however, and varies with the specific circumstances of each particular case. 137 Some of the main factors considered in a Sixth Amendment consideration are “(1) the time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; and (4) prejudice to the defendant.” 138

When considering the time involved, courts look at the “entire period between the offense and the trial.” 139 In parallel proceedings between the SEC and DOJ, the court considers when the SEC first referred the case and alleged actions to the DOJ or U.S. Attorneys or when the DOJ knew, or reasonably should have known, about the civil investigation. 140

Further, the delay in trials must not be purposeful or unfair. 141 Although there is no test to determine whether a delay was intentional, it is sufficient if the court finds that the government “made ‘a deliberate choice for a supposed advantage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith.’” 142

A court may find the government acted in bad faith if the SEC did not share its investigation with the DOJ until after receiving self-incriminating testimony, later sharing that evidence and aiding in the criminal prosecution. 143 Bad faith is more readily found if the DOJ knew about the SEC investigation for a significant amount of time

135. U.S. CONST. amend. VI.
137. See id.
138. Id. “The Sixth Amendment right to a speedy trial does not apply to preindictment delay,” although such a delay may be sufficient to constitute a Due Process violation of the Fifth Amendment under certain circumstances. Teyibo, 877 F. Supp. at 857.
140. See id. at 202-03.
141. Id. at 203.
142. Id. (quoting Petition of Provoo, 17 F.R.D. 183, 202 (D. Md. 1955), aff’d, 350 U.S. 857 (1955)).
143. See id. at 202-03.
before bringing an indictment. If the court finds a substantial, unnecessary delay, prejudice may be presumed and the government must rebut that presumption by showing that no prejudice has resulted.

C. Stay in Civil Proceeding

Courts are generally reluctant to issue a stay in civil proceedings when there is a parallel criminal proceeding, yet it is entirely within the court’s discretion to do so. In the absence of bad faith or malicious governmental tactics, a defendant’s strongest argument for deferring a civil action until completion of a criminal trial is that the government’s claim in the civil suit involves similar matters as the alleged offense in the criminal trial. The civil proceeding in such situations may “undermine the party’s Fifth Amendment privilege against self-incrimination . . . or otherwise prejudice the case.” Thus, due process, fairness, and other concerns may persuade a court to grant a stay in civil proceedings pending resolution of the criminal matter.

There are four factors which can be significant, if not dispositive, for courts to consider when deciding whether to grant a stay of civil proceedings: 1) the commonality of issues; 2) the timing of the motion to stay; 3) judicial efficiency; and 4) the public interest.

144. Compare United States v. Teyibo, 877 F. Supp. 846, 855-56 (S.D.N.Y. 1995) (finding there was no violation of due process rights when, among other things, the SEC’s investigation began several months before the U.S. Attorney’s inquiry), and United States v. Moses, 1:04-CR-508-CAP, 2005 U.S. Dist. LEXIS 40185 (N.D. Ga. Oct. 12, 2005) (stating there was no improper administration of justice when the criminal indictment came 8 months after the SEC’s motion for civil penalties), with Parrott, 248 F. Supp. at 204, 206 (finding prejudice to defendants from delay in criminal trial because important witnesses became unavailable during the delay and considering a 22-month delay between the SEC’s referral to the U.S. Attorney and the date of indictment cause for a dismissal of the indictment).


146. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980); Hunter, supra note 119, at 168. A court’s decision to grant a stay will not be overturned unless there is an abuse of discretion. Id.

147. Dresser, 628 F.2d at 1375-76.

148. Id. at 1376.


150. Eckers, supra note 120, at 132. See also Gourevitch, supra note 128, at 517 (listing the same four factors).
The most important factor in determining whether to grant a stay is the degree of overlap between the criminal and civil issues.\textsuperscript{151} The court may be more persuaded to grant a motion to stay civil proceedings where the charges in both proceedings involve the same statute.\textsuperscript{152}

The status of the criminal proceeding and the timing of the motion is another factor courts take into account.\textsuperscript{153} While courts are more likely to grant a stay when a grand indictment has been returned than they are when the DOJ or U.S. Attorney is conducting a criminal investigation but no indictment has been returned, there is no absolute rule regarding when the timing of the trials is determinative enough for the court to order a stay.\textsuperscript{154} At that stage, however, the potential for self-incrimination is greatest because the defendant faces the immediate threat of having his Fifth Amendment rights violated.\textsuperscript{155}

The main judicial efficiency consideration is whether a guilty verdict would have a collateral estoppel or res judicata effect on the civil case.\textsuperscript{156} Courts also consider whether an acquittal could reveal each party's strengths and weaknesses, which may affect settlement negotiations in later proceedings.\textsuperscript{157} This factor goes hand in hand with the degree of issue overlap, however, because collateral estoppel only applies where there is a great deal of overlap in issues.\textsuperscript{158} Also, "transcripts from the criminal case will [be] available and reduce the need for civil discovery," which aids judicial efficiency.\textsuperscript{159}

Unsurprisingly, the public interest is an underlying and important factor taken into account by courts when deciding whether to grant a motion to stay.\textsuperscript{160} SEC and DOJ parallel proceedings are almost

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151. HealthSouth Corp., 261 F. Supp. 2d at 1326.
152. \textit{See} Hunter, \textit{supra} note 121, at 172.
155. Eckers, \textit{supra} note 120, at 132-33.
156. \textit{See} Hunter, \textit{supra} note 121, at 174.
157. \textit{Id.}
158. \textit{Id.}
159. \textit{Id.}
160. \textit{Id.}
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always a matter of public interest and alleged violations of securities laws have often proven to be “sufficiently damaging to the public interest to justify denial of a stay.”\(^\text{161}\)

Weighted against those factors, however, lies the possibility that the government has acted in bad faith.\(^\text{162}\) If a stay is not granted and a party testifies, the prosecution may obtain self-incriminating testimony from the defendant and information about the defense from the SEC that it would not have been able to attain otherwise.\(^\text{163}\) This gives the criminal prosecution the ability to circumvent strict discovery rules, as defined in Federal Rule of Criminal Procedure 16(b).\(^\text{164}\) Information received from the SEC pursuant to statutory provisions of the Securities and Exchanges Act, even if lawfully obtained, may be used against the defendant in the criminal prosecution, which no doubt encourages the DOJ and U.S. Attorneys to “cooperate” with the SEC and the resulting benefit to the DOJ may be so great as to necessitate granting a stay in civil proceedings to ensure justice to the defending party.\(^\text{165}\)

In SEC v. HealthSouth Corp, for example, the court granted a stay in civil proceedings pending the outcome of the criminal trial against Scrushy.\(^\text{166}\) The court found that portions of the evidence used in the SEC’s motion to freeze Scrushy’s assets resulted from the FBI and the parallel criminal investigation.\(^\text{167}\) Further, because the sentence in the criminal case had not yet been imposed, Scrushy’s witnesses that already plead guilty had a legitimate fear of adverse consequences

\(^{161}\) Id. at 175. But see SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298, 1330 (N.D. Ala. 2003) (granting a stay of civil proceedings against a corporate officer pending resolution of any criminal charges for alleged securities fraud).

\(^{162}\) See Eckers, supra note 120, at 134-37.

\(^{163}\) See id. at 134-35.

\(^{164}\) See id. at 135-36; see also FED. R. CRIM. P. 16(b). This rule lists information subject to disclosure by defendants, such as documents, reports, examinations, and lists of expert witnesses.

\(^{165}\) See Eckers, supra note 120, at 134-35. Another device used to impede parallel proceedings is a protective order. Although used less frequently than motions to stay civil proceedings, defendant may request a protective order if he believes full disclosure would be unfairly prejudicial. “In determining whether to issue a protective order . . . courts weigh the potential prejudice to the movant against the harm the danger to the public interest should a protective order be entered.” Sturc & Leibovitz, supra note 107, at 52.

\(^{166}\) See SEC v. HealthSouth Corp, 261 F. Supp. 2d 1298, 1330 (N.D. Ala. 2003).

\(^{167}\) Id. at 1305.
from further testimony.\textsuperscript{168} Although Mr. Scrushy had not yet been indicted, no one doubted that such indictment was anything but an eventuality.\textsuperscript{169} Finding the factors in \textit{Kordel} applicable, the court granted a stay in the civil proceedings.\textsuperscript{170} \textit{SEC v. HealthSouth} presents an example of how courts balance the SEC’s need for resolution of securities fraud claims with the resulting prejudice to defendants.\textsuperscript{171} The court’s role is to “to ensure that fairness permeates the proceeding and to try to ascertain the truth” and the court was correct in granting a stay to ensure fairness to the defendant under the circumstances of the civil case.\textsuperscript{172}

V. THE NORTHERN DISTRICT OF ALABAMA’S FINDING OF IMPROPER COOPERATION WAS NOT ERRONEOUS

In \textit{Scrushy}, the court found the cooperation between the SEC and U.S. Attorneys improper, because both investigations concerned financial fraud at HealthSouth and because the defendant was unaware of the criminal investigation.\textsuperscript{173} Statutory provisions specifically permit the SEC to share investigative evidence with other agencies, including the DOJ and U.S. Attorneys, where it deems necessary for effective enforcement of the securities laws. Additionally, effective enforcement of the securities laws requires that these agencies be able to investigate possible securities violations concurrently.\textsuperscript{174} Conceivably, the government could have avoided repercussions in \textit{Scrushy} simply by informing Mr. Scrushy of the simultaneous criminal investigation, allowing him to make a strategic decision regarding his Fifth Amendment right against self-

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\item \textsuperscript{168} \textit{Id.} at 1315-16, n.35 (quoting Mitchell v. United States, 526 U.S. 314, 326 (1999)).
\item \textsuperscript{169} \textit{See id.} at 1303.
\item \textsuperscript{170} \textit{Id.} at 1316 n.36, 1330.
\item \textsuperscript{171} \textit{See generally HealthSouth Corp.}, 261 F. Supp. 2d 1298.
\item \textsuperscript{172} \textit{Id.} at 1327.
\item \textsuperscript{173} United States v. Scrushy, 366 F. Supp. 2d 1134, 1139-40 (N.D. Ala. 2005).
\end{itemize}
incrimination and other due process concerns. However, by denying Mr. Scrushy this information, the government undermined the defendant’s criminal rights. "[L]awyers need to take special care to ensure that their clients appreciate the extent of that cooperation and the likelihood that information developed by the SEC will be shared with and used by the Department of Justice." A present concern remains; courts must now ensure that the Scrushy decision does not open the floodgates for motions by defendants who claim they received an improper administration of justice simply because the DOJ and SEC conducted parallel proceedings.

The holding of this case suggests that the SEC has an affirmative obligation to inform defendants of an existing criminal investigation if the cooperation between the SEC and the DOJ is significant enough for a court to consider the cases commingled. Because the risk to individuals testifying before the SEC is high, better practice favors full disclosure to ensure defendants are not denied their fundamental constitutional privileges.

CONCLUSION

In United States v. Scrushy, the Northern District of Alabama re-examined issues that numerous courts have dealt with in the past; how to deal with parallel proceedings and where to draw the line with inter-agency cooperation. During trial, the defendant, Mr. Scrushy, and the court discovered that the SEC and the U.S. Attorney worked

175. See SEC Scrushy Deposition Suppressed Based on Overlap With Criminal Probe, 37 Sec. Reg. & L. Rep. (BNA) 771 (May 2, 2005) [hereinafter SEC Deposition Suppressed].
177. SEC Deposition Suppressed, supra note 175. But see Dresser, 628 F.2d at 1383-84 (finding no prosecutorial misconduct in allowing SEC agents to work for the DOJ’s task force to assist in the criminal investigation even though the SEC agents’ contribution was likely to effect the jury’s decision).
180. See id.
181. See supra Part II.
together in the deposition of Mr. Scrushy during the civil investigation of alleged securities fraud. The SEC did not inform Mr. Scrushy about the criminal investigation prior to taking the civil deposition. Additionally, SEC employees went directly to the U.S. Attorney’s office after the deposition, presumably to share the information obtained. The court found that the government departed from the “proper administration of criminal justice” when the U.S. Attorney's office called the SEC, gave advice and preferences regarding the content of the civil deposition and its venue, and recruited an SEC enforcement agent to participate in the criminal investigation.

Generally, overlaps between civil and criminal proceedings are unobjectionable, for “it is unrealistic to attempt to build a partial information barrier between the two branches of the executive.” In the absence of special circumstances, parallel civil and criminal proceedings are consistent with effective enforcement of federal laws. Courts consider various factors to determine if a case is one of special circumstances, including whether the civil case was filed solely to obtain evidence for the criminal prosecution or whether there defendants received notice of a probable criminal trial. Other factors include whether the civil allegations are viable entirely separate from any criminal implication is another factor taken into account, as well as the time period between the two proceedings.

A few years ago, Congress decided that, while the SEC and DOJ were individually capable of performing their respective jobs, the agencies were more effective and efficient when they worked

182. Scrushy, 366 F. Supp. 2d at 1135.
183. Id.
184. See id. at 1137.
185. Id. at 1137.
187. See United States v. Kordel, 397 U.S. 1, 11-12 (1970). For discussion on special circumstances, see supra Part IV.A.
188. See Kordel, 397 U.S. at 11-12; supra Part IV.A.
189. See supra Part IV.C.
2006]

PARALLEL PROCEEDINGS

453

together.190 In the face of the financial fraud outbreak that took place in the early part of this century, the Corporate Fraud Task Force was established to encourage agencies to work together to fight against corporate fraud perpetrators and restore confidence in our nation’s marketplace.191 Courts differ in drawing lines of acceptable inter-agency cooperation, and each struggles to find the proper balance between the need for efficient regulation and protection of the federal securities markets, by conducting parallel criminal and civil proceedings with underlying principles of fairness and a party’s inherent constitutional privileges.192

The Northern District of Alabama did not err in finding the government’s actions improper and unfairly prejudicial to Mr. Scrushy given the “unprecedented cooperation” between government agencies.193 The outcome of the case may have been different if the Government had simply informed Mr. Scrushy about the pending criminal trial. The court’s holding certainly suggests that disclosure of such information is both necessary and essential to ensure that defendants are guaranteed their inherent Constitutional rights.194

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193. See supra text accompanying notes 173-181.
194. See SEC Deposition Suppressed, supra note 175.