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COMMENTS

PARALLEL PROCEEDINGS IN THE POST-ENRON ERA: THE DUTY TO WARN AND THE CASE FOR ABOLISHING THE GOVERNMENT MISCONDUCT TEST

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The fall of Enron[1] fundamentally changed the federal government's approach to corporate criminal law enforcement and ushered in an era of increased governmental oversight of corporate America.[2] With the creation of the Corporate Fraud Task Force in 2002,[3] President George W. Bush

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1. *See, e.g.*, John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 58 n.4 (2005) (noting that on December 2, 2001, Enron filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York); James K. Glassman, *Diversify, Diversify, Diversify*, WALL ST. J., Jan. 18, 2002, at A10 (reporting that Enron's stock price had dropped to nearly zero dollars per share from a high of eighty-four dollars per share).

2. *See* Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 275 (2004) (discussing that the collapse of Enron brought about a "sea change" in corporate criminal law enforcement and led the government to take a more aggressive approach to corporate wrongdoing); *see also* Stephen A. Jonas & Jonathan A. Shapiro, *Parallel Prosecutions and Their Collateral Consequences*, CHIEF LEGAL EXECUTIVE, Winter 2004, at 42 (explaining that Stephen Cutler, Director of the Securities and Exchange Commission's (SEC) Division of Enforcement, said "it's a whole new ball game" in the securities law enforcement community since the collapse of various companies, including Enron). Although federal and state prosecutors have begun investigations of possible wrongdoing related to the current decline of financial markets, this Comment does not specifically address these issues. *See, e.g.*, Vikas Bajaj, *Joint U.S.—New York Inquiry into Credit-Default Swaps*, N.Y. TIMES, Oct. 20, 2008, at B4 (Bajaj reported that "New York State and federal prosecutors are investigating trading in credit-default swaps . . . . Prosecutors are looking at whether traders manipulated the largely unregulated market for credit-default swaps . . . .").

3. *See* Exec. Order No. 13,271, 3 C.F.R. 245 (2003) (establishing the Corporate Fraud Task Force); *see also* Jody M. Arogeti, Note, *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*, 23 GA. ST. U. L. REV. 427, 427 (2006) (stating that the Bush Administration "promise[d] to wage an aggressive fight against corporate fraud and abuse[,]" and that the Corporate Fraud Task Force was one of the principal means of elevating oversight of corporate America); Carrie Johnson, *Executives Spend Lavishly on Defense: In Corporate Cases, a Wealth of Resources*, WASH. POST, Dec. 24, 2003, at E1 (noting that after the fall of Enron, President Bush established the Corporate Fraud Task Force and U.S. Attorneys offices throughout the country secured funding to hire additional attorneys).

emphasized the need for greater coordination between federal prosecutors and civil enforcement agencies.[4] Since then, the government has increasingly used simultaneous or successive civil and criminal proceedings, also known as parallel proceedings,[5] as a strategy to efficiently and effectively bring criminal indictments against corporations and their officers.[6]

Parallel proceedings are one or more civil and criminal proceeding arising out of a single transaction against the same defendant.[7] Neither civil nor

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4. *See* Department of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity, http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html (last visited Oct. 24, 2008) (stating that the purpose of the Corporate Fraud Task Force is to coordinate investigations and prosecution of financial crimes, make recommendations for allocating resources among various agencies, and facilitate cooperation across agencies involved in the investigation and prosecution). Cooperation among agencies increased dramatically in the wake of Enron's collapse. *See* Jonas & Shapiro, *supra* note 2, at 42. Prior to the collapse of various companies, the SEC had to virtually "cajol[e]" federal prosecutors into taking securities cases; however, after the company's downfall, the SEC and U.S. Attorneys now coordinate on parallel criminal and civil enforcement proceedings. *Id.*

5. *See* Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends*, 68 MO. L. REV. 149, 176 (2003) (discussing that parallel proceedings have become a valuable tool for the government since the creation of the Corporate Fraud Task Force); David H. Kistenbroker et al., *Criminal and Civil Investigations:* United States v. Stein *and Related Issues*, 1574 PLI/CORP. 401, 405 (2006) (explaining that the Sarbanes-Oxley Act gave the SEC significantly more power to carry out its corporate oversight functions, and at the same time, "the [DOJ] began ramping up its financial crimes prosecutions, often in tandem with those pursued by the SEC"); *see also* Richard C. Smith, *Parallel Proceedings Put Certain Rights at Risk: Defendant's Can't Always Count on Constitutional Rights in Such Situations*, NAT'L L.J., July 24, 2006, at S2 (noting a recent spike in the number of parallel proceedings against corporate officers brought by the DOJ and the SEC); Richard M. Strassberg et al., *Navigating Parallel Proceedings*, N.Y.L.J., July 24, 2006, at 9 (noting that in the post-Enron era, the government is more frequently coordinating civil and criminal cases).

6. *See* Brickey, *supra* note 2, at 275 (indicating that the government initiated "unprecedented numbers of major fraud cases in a record period of time" following Enron's collapse); Department of Justice, Corporate Fraud Task Force: Significant Criminal Cases and Charging Documents, http://www.usdoj.gov/dag/cftf/cases.htm (last visited Oct. 24, 2008) ("The President's Corporate Fraud Task Force has enjoyed tremendous success in bringing 'real time,' decisive criminal and civil enforcement action against those who have traded on their positions of trust to defraud their investors, their employees and the public."). *Compare* Paul J. McNulty, Deputy Attorney Gen., Prepared Remarks of Deputy Attorney General Paul McNulty at the Corporate Fraud Task Force Fifth Anniversary Event (July 17, 2007) (transcript available at http://www.usdoj.gov/archive/dag/speeches/2007/dag_speech_070717.html) (indicating that since 2002, the government has obtained 1236 corporate fraud convictions, including 214 chief executive officers and 129 vice-presidents), *with* Jonas & Shapiro, *supra* note 2, at 42–43 (stating that in 1999 there were just sixty-four indictments of corporate executives).

7. *See* Hunter, *supra* note 5, at 149 (noting that while the term "parallel proceeding" frequently refers to joint civil and criminal proceedings, it also encompasses a wide array of actions including any "investigations by any federal regulatory agency, civil injunctive or penalty actions, administrative disciplinary proceedings, cease and desist proceedings, private action[] . . . proceedings by self-regulatory agencies, various state proceedings, grand jury inquiries, and/or criminal prosecutions"); *see also* Randy S. Eckers, Note, *Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules*, 27 HOFSTRA L. REV. 109, 109 (1998)

criminal procedures[8] specifically address situations that are unique to parallel proceedings,[9] such as whether evidence, statements, or admissions provided in one forum may be used in the other.[10] As a result, a defendant in a parallel proceeding may find himself faced with a uniquely difficult choice: whether to make disclosures in one proceeding that potentially could be self-incriminating in a parallel proceeding.[11] Thus, a defendant in a civil case may have to choose from the lesser of three evils: asserting his Fifth Amendment right

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(providing that the key feature of a parallel proceeding is involvement of substantially the same parties and the same matter); Georgia A. Staton & Renee J. Scatena, *Parallel Proceedings: A Discovery Minefield*, 34 ARIZ. ATT'Y 17, 17 (1998) (indicating that a parallel proceeding may include simultaneous discovery in both the civil and criminal proceedings).

8. *See, e.g.*, Staton & Scatena, *supra* note 7, at 17 (noting the sharp distinction between discovery rules for civil and criminal litigation); Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277, 1277 & n.1 (1967) [hereinafter *Concurrent Civil and Criminal Proceedings*] (explaining that the criminal process is "fundamentally unlike" the civil process because of the requirement that the prosecution prove the government's case beyond a reasonable doubt, the emphasis on constitutional protections for the accused, and distinctly different procedural rules).

9. *See* Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1024 (1985) [hereinafter *Equitable Powers*] (describing that the prosecution must prove its case beyond a reasonable doubt without assistance of the accused, whereas civil procedure rejects the strict and narrow discovery guidelines of criminal procedure because such obstacles would interfere with the "search for truth"). *Compare* FED. R. CRIM. P. 16(b)(2) (establishing a criminal process in which the government must prove its case without relying on assistance from the accused), *with* FED. R. CIV. P. 26(b)(1) (establishing civil procedures that afford litigants broad discovery of any matter not privileged).

10. *See* Staton & Scatena, *supra* note 7, at 17 (indicating that the federal and criminal procedure rules provide neither answers nor guidance as to how much information gained in a criminal trial may be used in a civil case, when a defendant may assert his Fifth Amendment right against self-incrimination in a civil case, and when one action should be stayed to avoid prejudice to a defendant); *see also Concurrent Civil and Criminal Proceedings*, *supra* note 8, at 1277 (noting that the defendant's Fifth Amendment privilege is often preserved during a parallel proceeding at the expense of civil discovery); *Equitable Powers*, *supra* note 9, at 1024 (discussing that the civil process elevates the importance of "the search for truth" over the protection of parties to the proceeding, whereas a criminal action emphasizes protections for the defendant by retaining an adversarial format).

11. *See Equitable Powers*, *supra* note 9, at 1024 (discussing that the most serious conflict caused by a parallel proceeding arises when a defendant is forced to choose between his Fifth Amendment right against self incrimination and disclosing evidence necessary to secure a just resolution of his civil claim); *see also* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 316 (John T. McNaughton rev., 1961) (describing that harmful disclosure, contempt, or perjury are the "three horns of the triceratops" that defendants face). Even taking the Fifth in a parallel civil proceeding has risks because the opposing side may draw negative inferences from the defendant's silence. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify . . . ."); LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995) (holding that the trier of fact may draw negative inferences from a defendant's silence).

against self incrimination and risking negative inferences;[12] making self-incriminating disclosures;[13] or refusing to comply with the court's discovery orders and risk being found in contempt of court.[14]

The courts and Congress have encouraged the use of parallel proceedings as an efficient means of law enforcement.[15] But many critics, including targets of parallel proceedings, argue that the government's coordinated tactics are unfair and unconstitutional.[16] The leading Supreme Court case on parallel proceedings, *United States v. Kordel*, established that parallel proceedings are not inherently unconstitutional,[17] but suggested that a defendant's due process

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12. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

13. Eckers, *supra* note 7, at 130 (calling the defendant's choice between asserting the Fifth Amendment and exposing incriminating evidence a "double-edged sword").

14. *See, e.g.*, Hanley v. James McHugh Constr. Co., 419 F.2d 955, 956 (7th Cir. 1969) (noting that the defendant was found guilty of contempt for failing to comply with a court's discovery order).

15. *See, e.g.*, Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2000) (providing that the SEC "may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter"); Securities Exchange Act of 1934 § 21(e), 15 U.S.C. § 78u(d)(1) (2000) (using virtually identical language); Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(d) (providing for cooperation among governmental branches by requiring the Attorney General to consult with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury); *accord* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1386 (D.C. Cir. 1980) (indicating that in passing the Foreign Corrupt Practices Act, the Congress expressed approval for close coordination between the DOJ and the SEC). The Senate Report to the Foreign Corrupt Practices Act stated that "[t]he 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 [sic] that the evidence needed for a criminal prosecution does not become stale." S. REP. NO. 95-114, at 12 (1977). The House echoed a similar sentiment: "Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee fully expects that this cooperation between the two agencies will continue with respect to the enforcement of the provisions of this bill." H.R. REP. NO. 95-640, at 10 (1977).

16. *See, e.g.*, Kistenbroker, *supra* note 5, at 440–41 (arguing that increased latitude provided to the SEC and the DOJ "often resulted in corner-cutting and served the near-term ends of those agencies rather than the larger policy goals envisioned by Congress" while failing to provide greater protection to the investing public); Smith, *supra* note 5 (suggesting that recent federal court decisions criticizing the government's coordination in parallel proceedings may suggest a trend toward increased scrutiny of parallel proceedings); Hunter, *supra* note 5, at 175 & n.195 (citing American Bar Association Resolution, adopted by the House of Delegates, Report No. 108B (Feb. 8–9, 1993)) (expressing concerns about the rights of defendants in parallel proceedings and urging Congress to enact statutory and procedural changes to protect defendants in parallel proceedings).

17. *See* United States v. Kordel, 397 U.S. 1, 11 (1970) (holding that it would "stultify enforcement of federal law" to adopt a rule forcing the government to choose between civil litigation or criminal prosecution); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 52 (1912) (holding that there is no per se rule against parallel proceedings); *see also* SEC v. First Fin. Group, 659 F.2d 660, 666 (5th Cir. 1981) ("There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal

rights prescribe limits on the government's use of parallel proceedings.[18] However, *Kordel*'s formulation of what constitutes due process in parallel proceedings has failed to produce consistent case law among the federal courts.[19]

This Comment argues that the Supreme Court's singular decision was too vague and that the federal courts should adopt a more functional standard based on the government's duty to warn and a defendant's underlying constitutional rights. Part I reviews the historical roots of the federal courts' authority to oversee parallel proceedings, the Supreme Court's early jurisprudence on the issue, and the Court's decision in *Kordel*. This Part discusses two common applications of the *Kordel* decision: those cases decided based on the adequacy of the warning given to a defendant, and those cases decided based on the court's understanding of government misconduct.

Part II analyzes the standards courts use to evaluate the propriety of parallel proceedings. First, this Part examines cases upholding or dismissing parallel proceedings based on the government's duty to warn a target of a parallel proceeding. Second, this Part discusses courts that have dismissed parallel proceedings under the Fourth Amendment due to affirmative misrepresentations by the government, but have also held that the failure to warn can never be the sole basis for a Fourth Amendment violation. Last, this Part suggests that a series of recent decisions in the First, Sixth, and Seventh Circuits provide the basis for rejecting the government misconduct test altogether and refining the application of the due process approach.

Finally, Part III argues that review of a parallel proceeding should encompass both a Fourth and Fifth Amendment analysis. This analysis begins with the question of whether or not the government has engaged in affirmative misrepresentations. Next, it calls on the court to examine whether the defendant received adequate warning. Finally, this Comment suggests that the federal courts should discard the government misconduct test because no such standard exists under either the Fourth or Fifth Amendment.

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actions by different federal agencies against the same defendant involving the same transactions."); *Dresser Indus.*, 628 F.2d at 1374 (stating that parallel proceedings are unobjectionable).

18. *See Kordel*, 397 U.S. at 11–12.

19. *See* Christian Babich, Comment, *Parallel Proceedings: The Government's Double-Team Approach and the Degradation of Constitutional Protections*, 11 LEWIS & CLARK L. REV. 753, 771 (2007) ("Thirty-six years after *Kordel*, the crux of the debate concerning the constitutionality of parallel investigations still centers on what constitutes deceptive practices on the part of the government."); *see also* United States v. Scrushy, 366 F. Supp. 2d 1134, 1137 (N.D. Ala. 2005) (noting the lack of clear case law distinguishing a legitimate parallel proceeding from an improper one); Eli Ewing, Comment, *Too Close for Comfort:* United States v. Stringer *and* United States v. Scrushy *Impose a Stricter Standard on SEC/DOJ Parallel Proceedings*, 25 YALE L. & POL'Y REV. 217, 222 (2006) ("Courts have yet to develop a clear standard that describe[s] bad faith civil discovery in parallel proceedings.").

I. DEVELOPMENT OF THE MODERN APPROACH TO PARALLEL PROCEEDINGS

A. The Creation of Judicial Discretion for Review of Parallel Proceedings

The authority of the courts to police parallel proceedings evolved from a 1912 United States Supreme Court case, *Standard Sanitary Manufacturing Co. v. United States*, in which the Supreme Court reviewed the government's suit to enjoin the defendant for antitrust violations under the Sherman Act.[20] The Court upheld the government's right to bring simultaneous or successive suits against a single defendant for violations arising out of the same statute,[21] and acknowledged that the government may determine when and how to bring the parallel proceeding.[22]

The Court refrained from establishing a bright line rule against parallel proceedings, recognizing that the Court's review is limited when a statute provides the government with the authority to carry out both criminal and civil proceedings.[23] However, *Standard Sanitary* left open the possibility that a court may be justified in intervening in parallel proceedings when such action is necessary to prevent injury to one of the parties.[24] The Court provided that the decision to intervene should be discretionary,[25] and courts should consider the circumstances and interests of both parties before exercising that discretion.[26]

In 1956, in *McNabb v. United States*, the Supreme Court took an additional step in formally establishing judicial oversight of parallel proceedings by creating the concept of "supervisory authority."[27] This authority was intended

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20. *Standard Sanitary Mfg.*, 226 U.S. at 34–35 (reviewing the government's allegations that defendants had violated the Sherman Act by "enter[ing] into and engag[ing] in a combination and conspiracy to restrain such trade and commerce").

21. *Id.* at 51–52 ("The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively.").

22. *Id.* at 52 (holding that the government determines whether to bring the suits and the order in which the suits are brought).

23. *Id.* (discussing that the question at hand is the "extent of the court's discretion" where "[t]he Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively").

24. *Id.* (noting that based on the facts at hand, the Court found no need to interfere with the government's choice to bring parallel proceedings).

25. *Id.*

26. *Id.*; *see also* Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936) (explaining that a decision to stay parallel proceedings requires the courts to "weigh competing interests and maintain an even balance").

27. McNabb v. United States, 318 U.S. 332, 341 (1943) (emphasizing that the admissibility of evidence in a federal criminal case is governed not only by the Constitution, but also by the Court's use of "supervisory authority over the administration of criminal justice in the federal courts").

to ensure that all parties adhered to procedural requirements set by the court,[28] and specifically to oversee the use of prosecutorial powers by federal agents.[29] Over time, supervisory authority gained acceptance among the federal courts as an equitable tool to remedy a violation of rights, preserve judicial integrity, and deter illegal conduct.[30] Nonetheless, there were limits on a court's ability to invoke its supervisory authority; namely, courts were precluded from using supervisory authority as a remedy for harmless errors[31] or as a means of deterring inappropriate prosecutorial behavior.[32]

B. Disagreement Grows Among Courts Regarding Standards for Reviewing Parallel Proceedings

While the advent of supervisory authority gave the courts a basic mechanism to oversee parallel proceedings,[33] this authority failed to harmonize the federal courts' approach to parallel proceedings.[34] For example, two federal district

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28. *See* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1050 (1965) [hereinafter *Judge-Made Supervisory Power*] (discussing that the supervisory authority is a relatively modern concept first arising in *McNabb*); *see also* United States v. Gonsalves, 691 F.2d 1310, 1315 (9th Cir. 1982), *rev'd on other grounds*, 464 U.S. 806 (1983) (attributing *McNabb* as the original case invoking the notion of supervisory authority and noting that this equitable power was unique in that it rested on neither constitutional nor statutory grounds).

29. *See, e.g.*, Rea v. United States, 350 U.S. 214, 217 (1956) (noting that the Supreme Court had prescribed the federal rules of searches and seizure and that "[t]he power of the federal courts extends to policing those requirements and making certain that they are observed").

30. *See* United States v. Hasting, 461 U.S. 499, 505 (1983) ("The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." (citations omitted)); *see also Judge-Made Supervisory Power*, *supra* note 28, at 1050 (characterizing the supervisory authority as an instrument "to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process").

31. *See Hasting*, 461 U.S. at 506 (noting that a judicial remedy is unnecessary when the court is presented with harmless error because the conviction would have been successful regardless of the asserted error). The error is harmless when there is no "'reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *Id.* (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)) (alteration in original).

32. *See id.* ("[D]eterrence is an inappropriate basis for reversal . . . where means more narrowly tailored to deter objectionable prosecutorial conduct are available."). The Court held that the supervisory authority over conviction reversals should be used cautiously and with an eye toward balancing the parties' interests. *Id.* at 506–07. The authority is reserved for cases in which "there is a clear basis in fact and law for doing so." United States v. Ramirez, 710 F.2d 535, 541 (9th Cir. 1983).

33. *See* United States v. Kordel, 397 U.S. 1, 11 (1970) (suggesting that the Court would be entitled to use its supervisory authority if the parallel proceedings proved to be a violation of due process or "a departure from proper standards in the administration of justice").

34. *Compare* United States v. Parrott (*Parrott I*), 248 F. Supp. 196, 199 (D.D.C. 1965) (holding that the government is required to provide more than basic notification of a defendant's constitutional rights when a parallel criminal proceeding is imminent), *with* United States v.

courts confronted with similar situations reached contradictory conclusions within four years of each other.[35]

In *United States v. Parrott* (*Parrott I*), a 1965 decision from the United States District Court for the District of Columbia, the defendant sought to dismiss a criminal indictment[36] on the grounds that the government did not properly notify him of the existence of a criminal investigation.[37] In the course of an SEC civil enforcement action against the defendant,[38] the agency informed the United States Attorney for the District of Columbia that the defendant may have also violated criminal provisions of the Securities and Exchange Act.[39] During an SEC administrative hearing, the agency informed the defendant of his constitutional rights but stated that "[t]he Division has not instituted any criminal proceedings against any of [the defendants]."[40] The court held that the government must do more than merely inform a defendant of his constitutional rights when a parallel criminal action is imminent.[41] The court explained that the government was required to specifically warn a defendant that the SEC had referred the matter to DOJ criminal investigators[42] and that a failure to do so was grounds for dismissal of the indictment.[43]

Contrary to *Parrott I*, the Southern District of New York, in *United States v. Parrott* (*Parrott II*), held that defendants received constitutionally sufficient warnings when the government advised the defendants of their Fifth

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Parrott (*Parrott II*), 315 F. Supp. 1012, 1015 (S.D.N.Y. 1969) (holding that the government has no further duty to warn a defendant of potential additional prosecutions once defendant has been notified of his constitutional rights).

35. *See* Hunter, *supra* note 5, at 151 (observing that *Parrott I* and *Parrott II* are prime examples of courts reaching opposite conclusions under similar circumstances).

36. *Parrott I*, 248 F. Supp. at 198–99 (detailing the defendant's initial involvement in two civil SEC proceedings for the sale of the defendant's corporate stock in violation of the Securities Exchange Act, and the SEC's subsequent referral of the matter to the United States Attorney for criminal prosecution).

37. *Id.* at 199 (noting that government counsel attended the SEC proceedings, "purposefully conceal[ing]" their identities, while the SEC attorney denied that criminal proceedings had been initiated against the defendants).

38. *Id.* at 198. The SEC sought a temporary restraining order, preliminary injunction, and permanent injunction against the defendant for possible violations of the Securities and Exchange Act relating to the sale of the defendant's corporate stock. *Id.*

39. *Id.* at 199.

40. *Id.* at 207. The court characterized this statement as a "deni[al] that criminal proceedings had been instituted against any of the persons involved." *Id.* at 199.

41. *Id.* at 199–200 (explaining that the issue before the court was whether the government may bring a parallel proceeding to avail itself of the benefits of civil discovery and then use that information in a criminal case). The court focused on whether the defendant was sufficiently aware of the criminal case so that he could properly prevent any self-incriminating evidence from disclosure at the civil proceeding. *Id.* at 199–200.

42. *Id.* (highlighting that the government failed to specifically warn the defendant that the matter had been referred to the United States Attorney's office). However, the court noted that the defendant received general warnings during at least some of the proceedings. *Id.* at 199.

43. *Id.* at 201–02.

Amendment rights against self-incrimination while the defendants were represented by counsel in a civil proceeding.[44] The court held that a constitutionally sufficient warning is all that is required and that the government discharged that duty when it advised the defendants of their Fifth Amendment rights.[45] Specifically, the court stated that "[t]here was no duty upon the government, once having advised the defendants of their right against self-incrimination, to warn them that as the investigation proceeded it might warrant presentation to a grand jury and prosecution upon criminal charges."[46] A more detailed warning was unnecessary[47] because it would be impractical, burdensome, and even meaningless to require the government to keep a defendant constantly advised about the government's plans regarding a criminal investigation.[48]

C. Kordel: *the Supreme Court Establishes the Due Process Standard but Leaves Other Options Open*

In *United States v. Kordel*, decided nearly sixty years after *Standard Sanitary*, the Supreme Court issued its most direct ruling on parallel proceedings.[49] Detroit Vital Foods, Inc. and several of its executives were convicted in federal district court for criminal violations of the Federal Food,

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44. *See* United States v. Parrott (*Parrott II*), 315 F. Supp. 1012, 1015 (S.D.N.Y. 1969) (noting that the civil suit against the defendants provided adequate notice of the defendants' potentially criminal wrongdoing). The case arose because the defendants motioned to dismiss alleged securities violations. *Id.* at 1013.

45. *Id.* at 1015 (rejecting the defendants' characterization of the warning and finding that the government specifically advised the defendants of their Fifth Amendment rights against self incrimination, while the defendants were represented by counsel). Once the government had advised the defendants that they had a constitutional right against self-incrimination the government had fulfilled its duty to warn. *Id.*

46. *Id.* at 1015. The court drew on an analogous case, United States v. Sclafani, 265 F.2d 408 (2d Cir. 1959), in which the Second Circuit suggested that a civil tax investigation inherently suggests the possibility of a criminal action. *Parrot II*, 315 F. Supp. at 1015–16. The *Sclafani* court stated:

> A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.

Sclafani, 265 F.2d at 414–15.

47. *Parrott II*, 315 F. Supp. at 1015 (holding that the government was not required to confirm whether the SEC investigation would warrant subsequent criminal charges).

48. *Id.* at 1016 ("[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." (quoting *Sclafani*, 265 F.2d at 415)).

49. United States v. Kordel, 397 U.S. 1, 11 (1970) (referring to *Standard Sanitary* for the proposition that the government need not wait until the conclusion of a civil proceeding to initiate a criminal case); *see also* Hunter, *supra* note 5, at 152 (noting that *Kordel* revisited the Supreme Court's initial holding and rationale in *Standard Sanitary*).

Drug, and Cosmetics Act.[50] The Food and Drug Administration (FDA) obtained interrogatories from a parallel civil proceeding, which were then used in the government's criminal prosecution.[51] The executives argued that it was a violation of their Fifth Amendment privilege against compulsory self-incrimination for the government to use interrogatories obtained in the civil action in a subsequent criminal proceeding.[52] Alternatively, the executives urged the court to dismiss the parallel proceedings on the grounds that "the Government's conduct . . . reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions."[53]

Examining the Fifth Amendment allegations, the *Kordel* Court explained that a defendant who was aware of the risk that the government might bring a parallel criminal action had ample opportunity to assert his Fifth Amendment rights.[54] The Court concluded that the defendant did not suffer a Fifth Amendment violation because the defendant was notified of his Fifth Amendment rights.[55] Importantly, the FDA complied with its statutory duty to warn the defendant that he was a possible target of a parallel criminal investigation.[56]

The Court then addressed the defendants' due process argument.[57] The Court plainly stated that it would not interfere with the government's choice to bring parallel criminal or civil proceedings unless the accused could demonstrate a due process violation or a "departure from the proper standards in the administration of criminal justice."[58] The Court found nothing improper about the FDA's decision to proceed with a civil enforcement action while continuing a criminal investigation.[59] In fact, the Court recognized that civil enforcement agencies would be severely hampered if they were forced to

50. *Kordel*, 397 U.S. at 2.

51. *Id.* at 4–5.

52. *Id.* at 2–3.

53. *Id.* at 11.

54. *Id.* at 7–8 (discussing that the defendant could have invoked his Fifth Amendment privilege in the civil proceeding to prevent self-incrimination in the criminal proceeding).

55. *Id.*

56. *Id.* at 4 (finding that the FDA fulfilled its statutory duty to warn). The FDA statute stated: "Before any violation of [the Act] . . . is reported . . . to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity [to respond] . . . ." 21 U.S.C. § 335 (2000).

57. *See Kordel*, 397 U.S. at 11.

58. *Id.* at 13. The Court acknowledged that the government may not use evidence that was coerced from a defendant against the defendant in a criminal case, but found that the record in *Kordel* reflected no such coercion. *Id.* Absent such a constitutional or procedural violation, the Court held that *Standard Sanitary* still stands as good law for the proposition that the government need not choose between a civil or criminal proceeding. *Id.* at 11.

59. *Id.* (explaining that the need to protect consumers from misbranded drugs was a compelling reason for the FDA to take enforcement actions).

choose between initiating a civil action or recommending criminal prosecution.[60]

The Court then noted, in what has been described as dicta,[61] that it may have reached an alternative conclusion had the circumstances been different.[62] The Court recited five categories of special circumstances under which a court would be justified in dismissing a parallel proceeding,[63] but provided little explanation about the significance or rationale for listing those five circumstances.[64]

The first circumstance provided that dismissal of a parallel proceeding may be justified if "the Government . . . brought a civil action solely to obtain evidence for its criminal prosecution."[65] Some of the cases cited by the Court suggested that a civil action would be proper when the government adhered to the relevant procedural requirements.[66] However, the Court also cited cases that indicated that the courts must go a step further and examine when and why the government decided to institute the parallel proceeding.[67]

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60. *Id.*

61. *See* United States v. Teyibo, 877 F. Supp. 846, 855 (S.D.N.Y. 1995) (describing the circumstances in *Kordel* as dicta); *see also* Ewing, *supra* note 19, at 220–21 (noting that the circumstances in *Kordel* were unessential to the Court's holding). *But see* Hunter, *supra* note 5, at 152–53 (describing these circumstances as a more central part of the *Kordel* decision).

62. *See Kordel*, 397 U.S. at 11–12.

63. *Id.* Circumstances may warrant a remedy where:

> [1] the Government has brought a civil action solely to obtain evidence for its criminal prosecution[;] . . . [2 the Government] has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; . . . [3] the defendant is without counsel[;] [4 the defendant] reasonably fears prejudice from adverse pretrial publicity or other unfair injury; [or] . . . [5] any other special circumstances that might suggest the unconstitutionality or even the impropriety of th[e] criminal prosecution.

Id. (footnotes omitted).

64. *See id.* at 12 n.23–27 (citing various cases across jurisdictions as support for the Court's enumerated test without explanation about the rationales or holdings of those cases); *see also* Ewing, *supra* note 19, at 220–21 (noting that the special circumstances listed failed to set forth a doctrinal test that would signify when it would be improper to use evidence from a civil proceeding in a criminal proceeding).

65. *Kordel*, 397 U.S. at 11–12.

66. *See id.* at 12 n.23 (citing *Procter & Gamble* based on its proposition that when the government properly observes the rules of criminal procedure, the defendant has no claim that the criminal proceeding was used to "short-cut" discovery in the civil action (citing United States v. Procter & Gamble Co., 356 U.S. 667, 683–84 (1958))). In *Procter & Gamble*, the Court prevented a defendant in a civil action from gaining access to a grand jury transcript on the grounds that production of the grand jury transcript would be justified only if criminal procedure was violated. United States v. Procter & Gamble Co., 356 U.S. 667, 683–84 (1958).

67. *See Kordel*, 397 U.S. at 12 n.23 (citing United States v. Pennsalt Chemicals Corp., 260 F. Supp. 171, 181–82 (E.D. Pa. 1966); United States v. Thayer, 214 F. Supp. 929, 931–32 (D. Colo. 1963)). *Pennsalt* suggested that the impropriety of a parallel proceeding depended on: (1) when the government decided to initiate the grand jury investigation; (2) when the government decide to seek an indictment; (3) when the government decided to institute a civil action against the defendants; and (4) when the government decided to terminate its criminal proceeding.

Under the second circumstance, a parallel proceeding may be dismissed if the government failed to adequately warn the defendant that the government was contemplating a criminal action.[68] Specifically, a warning is insufficient if a defendant has not been advised of his constitutional rights prior to divulging information to the government.[69] The government's warning, however, need not conclusively indicate whether a criminal prosecution would necessarily follow.[70]

Third, a parallel proceeding may be improper where a defendant lacked legal counsel and was not advised of his right to be represented.[71] Fourth, it may be improper to allow parallel proceedings where one party reasonably fears that publicity from one proceeding will have an adverse or prejudicial effect on another proceeding.[72] Fifth, and finally, the Court stated that there might be "other special circumstances" where a court might find a parallel criminal proceeding unconstitutional or even improper.[73] As such, civil proceedings may be deferred at the request of the prosecution or the defense when the interests of justice require.[74]

The list in *Kordel* was not meant to be exhaustive.[75] Although the Court ruled that the parallel proceedings at issue were unobjectionable, the Court's holding did not provide a doctrinal test for evaluating the permissibility of parallel proceedings.[76] The ambiguity of the five special circumstances

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United States v. Pennsalt Chemicals Corp., 260 F. Supp. 171, 181–82 (E.D. Pa. 1966). *Thayer* held that because the SEC was considering a criminal perjury prosecution when it deposed the accused, there was a suggestion of improper conduct. *Thayer*, 214 F. Supp. at 931–32.

68. *Kordel*, 397 U.S. at 12.

69. *See id.* at 12 n.24 (citing Smith v. Katzenbach, 351 F.2d 810, 815 (D.C. Cir. 1965), which dismissed a criminal prosecution when an IRS agent conducted a lengthy interview without first apprising the defendant of his constitutional rights; United States v. Lipshitz, 132 F. Supp. 519, 524 (E.D.N.Y. 1955), which noted that the government obtained evidence from a defendant without obtaining his consent; and United States v. Guerrina, 112 F. Supp. 126, 128 (E.D. Pa. 1953), which noted that "[a]t no time was defendant warned either by [the IRS] of his constitutional right not to testify against himself nor was he warned that anything he said or any information he disclosed to them might be used against him in a criminal proceeding.").

70. *See id.* at 4 n.5 (noting that the government was required by statute to warn defendants that information obtained in a civil investigation could be shared with "any United States attorney," but that receipt of the warning "did not necessarily mean that a criminal prosecution would follow").

71. *Id.* at 12 n.25 (citing Nelson v. United States, 208 F.2d 505, 510 (D.C. Cir. 1953)) (finding that the defendant had not been properly advised of his right to counsel where defendant appeared before a Congressional Committee under a subpoena and was without counsel).

72. *Id.* at 12.

73. *Id.*

74. *Id.*

75. *See* Hunter, *supra* note 5, at 153 (noting that the list of circumstances described in *Kordel* was incomplete and left practitioners with many questions regarding what other factual situations constituted "'special circumstances'").

76. *See* Ewing, *supra* note 19, at 220–21 ("[T]he Court did not define bad faith discovery in the context of parallel proceedings, and it did not establish a doctrinal test or describe a specific

injected significant confusion into the law of parallel proceedings and has kept later courts guessing on how to differentiate between a constitutional and unconstitutional parallel proceeding.[77]

D. Post Kordel*—Different Approaches Emerge*

Following *Kordel*'s limited holding,[78] the lower courts lacked any universally applicable standard for judging parallel proceedings.[79] Some courts have interpreted *Kordel* narrowly as a directive for courts to find parallel proceedings unconstitutional only when the government fails to satisfy its duty to warn defendants of their constitutional rights.[80] A contrasting approach takes a more expansive view, which provides that government misconduct generally may be sufficient to find a parallel proceeding impermissible.[81]

1. Due Process and the Government's Duty to Warn

a. The Fifth Amendment and the Duty to Warn Requirement

The common theme in many cases upholding parallel proceedings is that a parallel proceeding is constitutionally permissible under the Fifth Amendment if the government fulfilled its duty to warn the defendant of his constitutional rights.[82] For example, in *Securities and Exchange Commission v. Dresser Industries*, the D.C. Circuit examined a defendant's motion to enjoin both the SEC and the DOJ from jointly investigating and subpoenaing the defendant's documents.[83] Dresser Industries was under investigation by the SEC and the DOJ for questionable foreign payments and inadequate disclosure of such payments in accordance with applicable securities laws.[84] The company

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set of circumstances under which a parallel criminal proceeding could not gather evidence from an agency civil proceeding."); *cf.* Hunter, *supra* note 5, at 177 (arguing against a bright line test for parallel proceedings because it would infringe on judicial discretion).

77. *See* Hunter, *supra* note 5, at 153 ("[T]he list . . . left practitioners with many questions regarding what other factual situations constituted 'special circumstances.'").

78. *See Kordel*, 397 U.S. at 11 (holding that the Court was not presented with a due process violation).

79. *See* United States v. Scrushy, 366 F. Supp. 2d 1134, 1137 (N.D. Ala. 2005) (indicating that neither the government nor the defendant could cite to "any controlling law . . . distinguish[ing] a legitimate, parallel investigation from an improper one").

80. *See infra* Part I.D.1.a.

81. *See infra* Part I.D.1.b.

82. *See* Babich, *supra* note 19, at 757 (stating that *Dresser* and *Kordel* both involved situations in which the defendants received notice).

83. SEC v. Dresser Indus., 628 F.2d 1368, 1373 (D.C. Cir. 1980). *Dresser*, although not a Supreme Court case, is considered the "seminal case" on DOJ and SEC parallel proceedings, and has been frequently cited by subsequent courts examining DOJ–SEC parallel proceedings. *See* Hunter, *supra* note 5, at 153–54 & n.26.

84. *Dresser*, 628 F.2d at 1370.

resisted an SEC subpoena on the grounds that the DOJ was also conducting a federal grand jury investigation of the company's foreign payments.[85]

The court examined the "special circumstances" listed in *Kordel*[86] and discussed various factors that should be considered in determining whether to delay one of the parallel proceedings.[87] The court held that it would not block a parallel proceeding unless the aggrieved party could demonstrate that its rights were substantially prejudiced.[88] On these facts, the *Dresser* court ruled that the defendants failed to demonstrate substantial prejudice because the government had not indicted the defendants, violated the defendants' Fifth Amendment rights, or compelled the defendants to reveal the basis of their defense.[89]

The court in *United States v. Teyibo*, a 1995 case in the Southern District of New York, also upheld a parallel proceeding because the defendant did not suffer a Fifth Amendment violation.[90] In *Teyibo*, the defendant sought to suppress evidence obtained by the SEC in a parallel civil proceeding on the ground that the DOJ used the SEC investigation to obtain evidence for the criminal proceeding.[91] The critical issue in the case was whether the SEC's warning failed to meet the minimum requirements of constitutional due process under the Fifth Amendment.[92] The court noted that while the government may not compel or coerce incriminating testimony from the defendant,[93] a defendant who is aware of his rights and voluntarily gives

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85. *Id.*

86. *See* Hunter, *supra* note 5, at 157 (noting that *Dresser* did not fully explain the "special circumstances," but provided an analysis that was helpful to subsequent courts).

87. *Dresser*, 628 F.2d at 1376 (prescribing that intervention in a parallel proceeding is justified where: (1) the parties' Fifth Amendment rights were violated; (2) the civil action was used to expand criminal discovery beyond the scope of the Federal Rules of Criminal Procedure; (3) the basis of defendant's criminal defense is exposed; or (4) the parallel proceeding would prejudice the criminal case in some other way); *see also* Hunter, *supra* note 5, at 154 (listing the *Dresser* factors).

88. *Dresser*, 628 F.2d at 1377 ("[W]e should not block parallel investigations by these agencies in the absence of special circumstances in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government."). *Dresser* suggested that *Kordel* gave courts power to assess the particular circumstances of each case and intervene where the court deems it necessary. *See id.* at 1375.

89. *Dresser*, 628 F.2d at 1376. The court also noted that the defendants failed to show that the government violated the limitations of discovery. *Id.*

90. United States v. Teyibo, 877 F. Supp. 846, 855–56 (S.D.N.Y. 1995) (stating that a defendant does not suffer a due process violation if he has knowledge of a parallel investigation).

91. *Id.* at 855.

92. *Id.* (noting that *Kordel* allows prosecutors to use evidence acquired in a civil action unless the defendant establishes that doing so would violate his constitutional or procedural rights).

93. *Id.* at 856–57 (maintaining that the defendant's failure to assert his constitutional privileges provided him with no recourse to later complain that he was compelled or coerced to abandon his rights).

testimony or evidence has not suffered a Fifth Amendment violation.[94] The court held that the defendant's Fifth Amendment right against self-incrimination was not offended because the government sufficiently warned the defendant[95] that information provided to the SEC would likely be released to United States Attorneys.[96]

In *United States v. Mahaffy*, the Eastern District of New York upheld a parallel SEC–DOJ investigation when the defendant was aware of the existence of the parallel proceeding.[97] The court found it significant that the SEC's investigation was well underway before the DOJ considered the defendant as a possible target for criminal violations.[98] The court also found it significant that the DOJ had not manipulated the SEC's investigation to gather evidence.[99]

b. The Fourth Amendment and Government Misconduct

The concept of government misconduct has arisen in parallel proceeding situations involving Fourth Amendment concerns with unreasonable search and seizure. For example, in *United States v. Tweel*, a Fifth Circuit decision, the IRS audited the defendants at the request of the DOJ's Organized Crime and Racketeering Section, a unit of the DOJ that only handles criminal investigations.[100] The court noted that the defendants submitted self-incriminating records under the mistaken belief that they were only being subjected to a civil audit.[101] While the court agreed that the IRS was under no duty to warn defendants that the audit may lead to a criminal investigation,[102]

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94. *Id.* at 856 ("'[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the [Fifth Amendment] privilege, the Government has not "compelled" him to incriminate himself.'" (quoting Garner v. United States, 424 U.S. 648, 654 (1976)) (alteration in original)).

95. *Id.*

96. *Id.* at 850. The SEC provided the defendant with SEC Form 1662, which stated in relevant part: "The [SEC] often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate." *Id.*

97. United States v. Mahaffy, 446 F. Supp. 115, 118–19 (E.D.N.Y. 2006) (finding that the defendant's attorney admitted knowing that both the SEC and the DOJ were investigating the defendant).

98. *Id.* at 126 (noting that the SEC issued a testimonial subpoena months before the DOJ indicated to the SEC that the defendant was a possible target of a criminal investigation).

99. *Id.* ("There are no facts to suggest that the [United States Attorney's Office] hid behind or manipulated the S.E.C. [sic] with the intention of misrepresenting its true intentions to the defendants.").

100. United States v. Tweel, 550 F.2d 297, 298 & n.4 (5th Cir. 1977).

101. *Id.* at 298.

102. *Id.* at 299 ("'We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation

the court held that the IRS violated the defendant's Fourth Amendment rights[103] when the agency failed to inform the defendants that the investigation was being conducted at the request of the DOJ criminal investigators.[104]

The Fifth Circuit used a Fourth Amendment analysis again to reach a similar conclusion in *Securities and Exchange Commission v. ESM Government Securities, Inc.*[105] In *ESM*, an SEC investigator misled the defendant into believing that the SEC was investigating another firm in the building and was merely conducting a routine audit of ESM.[106] Upon realizing that the SEC was, in fact, investigating ESM, the defendant ceased cooperation and the SEC then issued a subpoena.[107] Though *ESM* did not involve a parallel criminal proceeding,[108] the court drew on *Tweel* in concluding that the failure to inform the defendant was tantamount to deception.[109] The court determined that the SEC engaged in "sneaky deliberate deception" by failing to inform the defendant of the true nature of the investigation.[110] As a result, the court denied enforcement of the subpoena.[111]

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to establish the existence of fraud, and the showing must be clear and convincing.'" (quoting United States v. Prudden, 424 F.2d 1021, 1033 (5th Cir. 1970))).

103. U.S. CONST. amend IV (protecting individuals against unreasonable search and seizure).

104. *See Tweel*, 214 F. Supp. at 299 ("It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent.").

105. SEC v. ESM Gov't Secs., Inc., 645 F.2d 310, 317 (5th Cir. Unit B May 1981) ("An agency subpoena must conform to certain fourth amendment [sic] requirements . . . .").

106. *See id.* at 311. The SEC investigator told the defendant that he was "in the building investigating another . . . firm," requested a tour of defendant's offices, and subsequently returned with SEC investigators without informing the defendant that the SEC had initiated an investigation. *Id.*

107. *Id.* at 312.

108. This case does not fit the classic parallel proceeding paradigm because it only involves the SEC, but it has been cited in discussions of parallel proceedings. *See* Staton & Scatena, *supra* note 7, at 19 (noting that *ESM* provided a definition of good faith).

109. *ESM*, 645 F.2d at 315. Much like *ESM*, *Tweel* involved the use of government deception to obtain financial information that the defendant would not otherwise have released. *See Tweel*, 550 F.2d at 298–99.

110. *See ESM*, 645 F.2d at 315–16 (quoting *Tweel*, 550 F.2d at 299–300).

111. *Id.* at 317. The court emphasized that this was an instance when judicial discretion empowered the court to intervene. *See id.* at 314 (discussing that although the Supreme Court has not addressed the exact circumstances before the court, the federal judiciary is not "powerless to structure relief when necessary"); *accord* Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (discussing the *Dresser* court's interpretation that *Kordel*'s judicial flexibility permits courts to make determinations on a case-by-case basis). In *Afro-Lecon*, the court explained that the Constitution does not require judicial intervention in parallel proceedings, but that the Supreme Court implicitly left the court an option to intervene when there is evidence of "malicious prosecution, the absence of counsel for defendant during depositions, agency bad faith, malicious government tactics, and 'other special circumstances.'" *Afro-Lecon*, 820 F.2d at 1202 (quoting United States v. Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir. 1980)).

2. A Split Over the Government's Constitutional Obligations

Although the Fourth and Fifth Amendments prescribe certain limits on government conduct in a parallel proceeding, the law on parallel proceedings remains unclear on the issue of whether misconduct can be a stand-alone basis for invalidating a parallel proceeding.[112] In *United States v. Luce*, a 2006 decision from the United States District Court for the Northern District of Illinois, the court rejected the notion that government misconduct during the course of a DOJ–SEC parallel proceeding can amount to a due process violation.[113] At nearly the same time, two prominent DOJ–SEC district court cases,[114] *United States v. Scrushy* and *United States v. Stringer*, dismissed parallel criminal investigations based on what the court viewed as government misconduct.[115] The Ninth Circuit recently reversed *Stringer*,[116] however, it

112. *Compare* United States v. Stringer, 408 F. Supp. 2d 1083, 1089 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008) (dismissing a parallel criminal indictment where government conduct was "grossly shocking and . . . outrageous"), *and* United States v. Scrushy, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005) (describing the government's behavior as "cloak and dagger activities"), *with* United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994) ("[T]here is no authority in this circuit which *holds* that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment."), *and* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) ("[T]here are intimations that 'outrageous governmental misconduct' is an independent ground for ordering a new trial in a federal criminal case; but we agree with the First Circuit that 'the doctrine [of outrageous governmental misconduct] is moribund.'" (quoting United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993))). The First Circuit has also expressed skepticism over the doctrine of prosecutorial misconduct. United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993) (criticizing the doctrine of outrageous governmental misconduct and noting that "courts have rejected its application with almost monotonous regularity").

113. United States v. Luce, No. 05 CR 340, 2006 U.S. Dist. LEXIS 76052, at *17 (N.D. Ill. Sept. 29, 2006).

114. See Press Release, SEC Charges Health South Corp. CEO Richard Scrushy with $1.4 Billion Accounting Fraud (March 19, 2003), *available at* http://www.sec.gov/news/press/2003-34.htm, in which it was reported that the SEC charged Richard Scrushy, CEO of Health South, with accounting fraud totaling $1.4 billion dollars. In its release, the SEC commended the "excellent coordination and cooperation that has become the hallmark of efforts by the Commission and the Department of Justice to combat financial fraud." *Id.* In addition, there was much publicity generated by the decision in *Stringer* as it was seen as new precedent that could change significantly how courts evaluate DOJ and SEC coordination. *See, e.g.*, Peter Lattman & Kara Scannell, *Slapping Down a Dynamic Duo*, WALL ST. J., Jan. 25, 2006, at C1; Lee Dunst, *The Future of Parallel Criminal-Civil Investigations: Business as Usual or Increased Judicial Oversight?*, WHITE COLLAR CRIME REPORT, Mar. 17, 2006, at 1, *available at* http://media.gibsondunn.com/fstore/documents/pubs/WhiteCollar-3.17.2006-LDunst.pdf.

115. *Stringer*, 408 F. Supp. 2d at 1089–90; *Scrushy*, 366 F. Supp. 2d at 1140; *accord* Ewing, *supra* note 19, at 226 ("Departing from recent precedent, the holdings in *Scrushy* and *Stringer* encroached upon the authority of duly enacted federal laws and the policy choices of elected officials by limiting the circumstances under which the SEC may share information with DOJ.").

116. United States v. Stringer, 521 F.3d 1189, 1201 (9th Cir. 2008).

stopped short of stating that government misconduct may never be grounds for dismissal of a parallel proceeding.[117]

a. Misconduct is an Insufficient Basis for Finding Parallel Proceedings Unconstitutional

The First, Sixth, and Seventh Circuits have criticized the theory that government misconduct is a defense in criminal cases.[118] The Sixth and Seventh Circuits rejected specifically the argument that government misconduct can be used as a defense,[119] and, as discussed below, a federal district court in the Seventh Circuit expressly refused to intervene in parallel proceedings based solely on the prosecution's conduct.[120]

In a 1994 opinion out of the Sixth Circuit, *United States v. Tucker*, the court emphatically rejected the theory that government misconduct could be an independent basis for a due process violation.[121] Though not a parallel proceeding, *Tucker* established a theoretical framework for parallel proceedings, which subsequent courts could apply.[122] The *Tucker* court asserted that although the execution of federal laws is an executive branch power, it is "'subject to applicable constitutional and statutory limitations and

117. *See Stringer*, 521 F.3d at 1198 (acknowledging that "trickery or deceit" may be grounds for finding a search unconstitutional). But the court went on to find that "[t]he SEC engaged in no tricks to deceive defendants into believing that the civil investigation was exclusively civil in nature." *Id.* at 1199.

118. *See* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995); United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994); United States v. Santana, 6 F.3d 1, 6 (1st Cir. 1993). *But see* United States v. Ott, 489 F.2d 872, 873 (7th Cir. 1973) (holding that prosecutorial misconduct in the courtroom in the form of material misstatements at trial may be grounds for reversal).

119. *See Boyd*, 55 F.3d at 241; *Tucker*, 28 F.3d at 1424.

120. *See, e.g.*, United States v. Luce, No. 05 CR 340, 2006 U.S. Dist. LEXIS 76052, at *18–19 (N.D. Ill. Sept. 29, 2006) (holding that absent a constitutional violation, the courts will not intervene). The Eastern District of New York recently reached a similar conclusion in *United States v. Mahaffy*, when the defendants sought to suppress evidence on the grounds that the government used abusive tactics. 446 F. Supp. 2d 115, 126 (E.D.N.Y. 2006). The court did not find the government's tactics so abusive as to violate the universal sense of justice. *Id.*

121. *Tucker*, 28 F.3d at 1424, 1426–27.

122. *Id.* at 1427. *Tucker* reviewed whether a police sting operation violated a defendant's due process rights. *Id.* at 1421. The defendant in *Tucker* argued that his indictment should be dismissed because the government's conduct during the police sting was objectively outrageous to the point of being a due process violation. *Id.* at 1422 ("Defendants argue that this court may, indeed must, undertake an independent, objective assessment of the government's methods in this case and, if we find them to be 'outrageous,' affirm the district court's decision to dismiss."). *Tucker* noted that the Supreme Court had cautioned the lower courts against dismissing a prosecution based on what a court might view as overzealous or outrageous law enforcement. *Id.* at 1422–23 (noting that the authority to determine which crimes should be prosecuted lies not with the judicial branch, but with the executive branch (citing United States v. Russell, 411 U.S. 423, 435 (1973))). The Sixth Circuit had previously declined to use supervisory authority to dismiss an indictment because the court said that absent a constitutional violation, the court's intervention would amount to an unwarranted use of judicial power. *Id.* at 1424 (citing United States v. Leja, 563 F.2d 244, 247 (6th Cir. 1977)).

to judicially fashioned rules to enforce those limitations.'"[123] *Tucker* proposed that a defendant's due process rights are infringed only when the government violates a specific constitutionally protected right.[124] Under this approach, the government's conduct may only rise to the level of a due process violation when it infringes on an independent constitutional right of the defendant, not simply because the conduct appears unseemly.[125]

In 2006, in *United States v. Luce*, the United States Court for the Northern District of Illinois applied reasoning similar to *Tucker*'s to a parallel proceeding for the first time.[126] In *Luce*, the defendant's records were subpoenaed by a grand jury and later subpoenaed for an SEC investigation.[127] After disclosing the records, the defendant testified at an SEC administrative hearing without claiming a Fifth Amendment privilege.[128] Upon receiving an indictment, the defendant claimed that the SEC improperly used the civil proceeding to gather evidence used in the indictment.[129] The defendant alleged that the government violated his Fifth Amendment right against self-incrimination because he did not know that he was the target of a criminal investigation.[130] Alternatively, the defendant argued that the government's misconduct alone was a sufficient basis for finding a due process violation.[131]

While acknowledging that some courts accept government misconduct as a defense to liability,[132] the *Luce* court stated that the Seventh Circuit has

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123. *Id.* at 1423 (quoting United States v. Russell, 411 U.S. 423, 435 (1973)). In *Russell*, the court explained the division of responsibilities between the executive branch and the courts:

> The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard . . . .

United States v. Russell, 411 U.S. 423, 435 (1973). *Tucker* explained further that the Supreme Court has determined that the outrageous conduct approach fails to strike the proper balance between the government's right to convict criminals and the desire to curb the government's abuse tactics. *Tucker*, 28 F.3d at 1428.

124. *Tucker*, 28 F.3d at 1426–27.

125. *Id.* at 1427. The proper remedy for government misconduct is not to free the equally culpable defendant by dismissing the criminal case, but to punish the government for its own wrongdoing. *Id.* at 1423. The court explained that "'[i]f police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the [government].'" *Id.* (quoting Hampton v. United States, 425 U.S. 484, 490 (1976)) (emphasis omitted).

126. United States v. Luce, No. 05 CR 340, 2006 U.S. Dist. LEXIS 76052, at *17 (N.D. Ill. Sept. 29, 2006).

127. *Id.* at *13–14.

128. *Id.* at *15.

129. *Id.*

130. *Id.* at *16.

131. *Id.* at *18.

132. *Id.* at *18 (acknowledging, but later rejecting, the reasoning in *Stringer* and *Scrushy*).

soundly rejected this theory as an independent basis for court intervention.[133] The court found that the defendant was not unaware of the criminal proceeding.[134] More importantly, the court explained that in the Seventh Circuit, government misconduct is an insufficient basis for a due process violation.[135] The court noted that courts may consider governmental conduct as evidence to establish an underlying constitutional violation, but misconduct alone is not prima facie evidence of a due process violation.[136]

b. Judicial Discretion Used to Police Government Misconduct

Contrary to *Tucker* and *Luce*, district and appellate courts in the Federal, Fifth, Ninth, and Eleventh Circuits have adopted an expansive view of due process that includes government misconduct as an independent basis for unconstitutionality.[137] These courts argue that *Kordel* permits broad judicial discretion in determining whether a parallel proceeding is constitutionally impermissible.[138] Specifically, the courts find that they are justified in dismissing or intervening in a parallel proceeding where government conduct is so shocking or abusive as to amount to an improper administration of justice.[139]

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133. *Id.*

134. *Id.* at *16–17 (stating that the defendant "had received notice that he may be . . . the subject of a criminal investigation when he was served with the grand jury's subpoena" and that SEC form 1622 "specifically advised [the defendant] that his testimony may be shared with federal prosecutors").

135. *Id.* at *18. The *Luce* court added that that the conduct of the prosecutor or government is not wholly irrelevant, for there would have been a basis for dismissal had the government's conduct violated the defendant's Fifth Amendment rights. *Id.* at *18–19.

136. *See id.* at *18–19 (explaining that the government's misconduct may support an inference of a violation of the defendant's Fifth Amendment right, but misconduct alone does not compel the conclusion that a defendant's Fifth Amendment right was violated). Drawing on authority from the Seventh Circuit, the *Luce* court stated that "misconduct may precipitate a reversible error, but it is never in itself a reversible error." *Id.* (quoting United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995)).

137. *See, e.g.*, Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1204 (Fed. Cir. 1987); SEC v. ESM Gov't Secs., Inc., 645 F.2d 310, 314 (5th Cir. Unit B May 1981); United States v. Stringer, 408 F. Supp. 2d 1083, 1090 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008); United States v. Scrushy, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005); *see also* David A. Garcia & Ralph C. Ferrara, *Meeting in Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 38 SEC. REG. & L. 1329, 1332 (2006) (discussing that federal courts will intervene in parallel proceedings for government misconduct if the government abuses civil discovery for the benefit of collecting evidence for an indictment); Jason Schulze, Note, United States v. Tucker*: Can the Sixth Circuit Really Abolish Outrageous Government Conduct Defense*, 45 DEPAUL L. REV. 943, 957 (1996).

138. *See* United States v. Teyibo, 877 F. Supp. 846, 855–56 (S.D.N.Y. 1995).

139. *See Scrushy*, 366 F. Supp. 2d at 1138–39 (comparing the government's conduct with the conduct at issue in *Parrott I* and suggesting that the similarities establish that the government's conduct departed from the proper administration of criminal justice); *see also Stringer*, 408 F. Supp. 2d at 1088 (holding that the government abused the standards of criminal justice by secretly conducting a criminal investigation while the civil investigation was ongoing).

United States v. Scrushy, a high profile[140] case in the Northern District of Alabama, examined the defendant's argument that the DOJ prosecutors improperly used an SEC enforcement action to gather evidence for its criminal indictment.[141] The court determined that, according to *Parrott I*,[142] proper administration of justice requires that a defendant know about the criminal investigation.[143] While the government did not lie to the defendant about the existence of a criminal investigation,[144] the court stated that the commingling of the investigations was clear evidence of impropriety.[145] Therefore, *Scrushy* held that the government compromised the integrity of the criminal justice system by allowing the DOJ and the SEC to work so closely[146] and by failing to explicitly warn about the status of the criminal investigation.[147]

In 2006, just one year after *Scrushy*, the court in *United States v. Stringer* dismissed a criminal case because the government failed to disclose the existence of a parallel criminal investigation.[148] The Federal District of Oregon found that the government concealed its intention to initiate a criminal prosecution,[149] delayed its criminal case to allow the civil proceedings to

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140. *See* Carrie Johnson, *Scrushy Jury Still Uncertain: Complex Fraud Charges Prolong Deliberations*, WASH. POST, May 27, 2005, at E1 (describing that the prosecution of Health South executive Richard Scrushy was the first high profile case under the Sarbanes-Oxley Act and that it illustrated the challenge for the prosecution in keeping a complex case simple).

141. *Scrushy*, 366 F. Supp. 2d at 1137 (noting that while the civil proceeding was ongoing, the SEC discussed the existence of a criminal investigation with the United States Attorney's Office but did not alert the defendant or his attorneys of this fact when the SEC deposed defendant).

142. *Id.* at 1139. The court embraced *Parrott I* after deciding that it could identify no controlling case law. *Id.* at 1137–38 ("The question to which neither side could cite any controlling law is what distinguishes a legitimate parallel proceeding from an improper one. The court could find no controlling authority on this critical point.").

143. *Id.* at 1139.

144. *Id.* at 1140.

145. *See* Ewing, *supra* note 19, at 223 ("[The court] concluded that the SEC's standard form of notice had, in light of extensive interagency cooperation, departed from the proper administration of justice."). In *Scrushy*, the court looked unfavorably on the extensive communication between the United States Attorneys and SEC civil attorney. 366 F. Supp. 2d at 1138 (observing that the government "had both notice and direct input" on the U.S. Attorney's Office strategy for deposing the defendant). Furthermore, the court recited that United States Attorneys had directed the SEC civil attorneys to "keep [the defendant] in the dark regarding the criminal investigation" and caused the SEC to include questions in their depositions that the agency would not have otherwise included. *Id.*

146. *Scrushy*, 366 F. Supp. 2d at 1140 ("This commingling . . . negated the existence of parallel investigations.").

147. *Id.* (The district court acknowledged that the government "did not outright lie," but refused to limit its authority to intervene only to cases involving actual deceit. Instead, the court took an expansive view that bad faith may also be grounds for judicial remedy.).

148. United States v. Stringer, 408 F. Supp. 2d 1083, 1088 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008).

149. *Id.* at 1088–89 (finding the government's answer to defendants' question about the existence of a parallel criminal investigation particularly misleading given the extent of

divulge evidence,[150] and provided the defendants insufficient warning.[151] Based on these findings, the *Stringer* court held that the defendants' due process rights were violated because the government's tactics were "'so grossly shocking and so outrageous as to violate the universal sense of justice.'"[152] It also held that the government violated the defendant's Fifth Amendment rights by involving the DOJ in the investigation without notifying the defendant.[153]

On appeal, the Ninth Circuit reversed the district court's decision in *Stringer* on three critical points.[154] First, the court held that the government had not engaged in trickery or deceit because the government had no legal duty to further disclose the existence of the parallel criminal investigation.[155] Reversing the district court, the circuit court held that the government was only required to provide the defendants with "'sufficient notice . . . that any information could be used against [them] in a subsequent criminal proceeding.'"[156] Second, and contrary to the district court, the circuit court found that the SEC's investigation was a "bona fide civil investigation," rather than "a pretext for the . . . criminal investigation."[157] Third, the Ninth Circuit held that the defendants may state a claim under the Fourth Amendment if they can show that the government used trickery or deceit to induce the defendants to divulge evidence.[158] However, the court went on to clarify that the true test of a Fourth Amendment violation is whether the government made affirmative

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coordination between the SEC and the United States Attorney). The court recited that defendants' counsel asked the SEC attorney "whether . . . the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice." *Id.* at 1087. The SEC attorney referred the defendants' counsel to Form 1662 and said that "it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned." *Id.*

150. *Id.* at 1088 (stating that the United States Attorney delayed revealing his intent to prosecute to defendant for almost a year after the start of the SEC investigation even though from the beginning the United States Attorney viewed a criminal prosecution as likely).

151. *Id.* at 1088 (finding the standard SEC Form 1662 notice was insufficient in light of the fact that the defendants were identified by the DOJ as potential targets early in the investigation). The court rejected the government's argument that it provided the defendant "with adequate notice that their statements could be used in a criminal proceeding." *Id.* at 1087–88.

152. *Id.* at 1089 (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991)). The court also described the government's conduct as "deceit and trickery." *Id.*

153. *Id.* at 1089–90 (noting that it would be unfair to penalize a defendant for failing to invoke his Fifth Amendment right when the defendant was not "on guard against incriminating [himself]" (quoting United States v. Rand, 308 F. Supp. 1231, 1237 (N.D. Ohio 1970))).

154. United States v. Stringer, 521 F.3d 1189, 1191 (9th Cir. 2008).

155. *Id.* at 1197 (holding that the defendants were sufficiently apprised of their constitutional rights once the SEC had provided the defendants with Form 1662).

156. *Id.* (quoting United States v. Teyibo, 877 F. Supp. 846, 855 (S.D.N.Y. 1995)) (alteration in original).

157. *Id.* at 1198.

158. *Id.*

misrepresentations to the defendant.[159] Because the SEC gave no false or misleading responses to the defendants, the court held that defendants failed to state Fourth Amendment violations.[160]

II. RETURNING TO THE BASICS: THE DUE PROCESS TEST

A. The Importance of the Duty to Warn

The due process test provided in *Kordel* was fundamentally sound, but did not fully explain the significance of a warning or what qualifies as an adequate warning.[161] As illustrated above, the duty to warn is the defining factor in considering whether a parallel proceeding is unconstitutional under the Fifth Amendment.[162] This section analyzes what constitutes an adequate warning and why a warning is a critical factor in examining a parallel proceeding.

The *Kordel* Court correctly identified that due process requires that a defendant receive sufficient warning of a parallel proceeding.[163] Missing from the Court's holding is an explanation of what makes a warning constitutionally adequate.[164] The Court's holding should be understood as a minimal requirement, mandating that the government simply warn a defendant that his disclosures *could* be used in a criminal prosecution.[165] When such a warning is given, then the defendant has the choice of whether or not to invoke his constitutional rights.[166]

Subsequent lower court decisions, particularly *Teyibo* and the *Stringer* appellate court decision, support the view that an adequate warning need only inform a defendant of his rights and the possible ramifications of disclosure.[167]

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159. *Id.* at 1198–99.

160. *Id.* at 1198–2000.

161. *See* Babich, *supra* note 19, at 753 (stating that the Supreme Court has failed to clarify how *Kordel* should be applied).

162. *See supra* Part I.D.1.

163. *See* United States v. Kordel, 397 U.S. 1, 4 (1970) (noting that the FDA satisfied its statutory requirements). Here the adequate warning was statutorily prescribed, mandated by an FDA statute:

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

21 U.S.C. § 335 (2000); *cf.* Ewing, *supra* note 19, at 226 ("Current SEC policy sufficiently protects the constitutional rights of those involved in civil enforcement proceedings.").

164. *Kordel*, 397 U.S. at 5 (affirming a district court ruling that reasoned that the FDA's warning was adequate even though it "did not conclusively indicate the government would institute a criminal proceeding").

165. *See* Ewing, *supra* note 19, at 220.

166. *Id.*

167. *See* United States v. Stringer, 521 F.3d 1189, 1197 (9th Cir. 2008); United States v. Teyibo, 877 F. Supp. 846, 856 (S.D.N.Y. 1995).

SEC Form 1662, received by the defendants in *Teyibo* and *Stringer*, informed the defendants that they may refuse to make disclosures based on their Fifth Amendment privilege and that any information provided to the SEC would likely be transmitted to the U.S. Attorney's Office.[168] As Form 1662 makes clear, whether the SEC actually chooses to share information gathered in a parallel proceeding is confidential information unavailable to the defendant.[169]

The adequacy of a warning must also be judged against any statutory mandate placed on the agency that would elevate the warning requirements beyond basic due process. As *Kordel* illustrates, the FDA was required under the Food, Drug, and Cosmetic Act to serve the defendant with notice specifying that the agency contemplated initiating a criminal proceeding relating to the same matter at issue in the civil enforcement action.[170] It would be inappropriate to equate the same statutorily imposed warning as in *Kordel* on the SEC, for example, because the SEC has adopted a different form of warning provided by SEC Form 1662.[171]

To hold that the notice requirement goes beyond a duty to inform the defendant of his constitutional or statutory rights[172] would be to place an undue burden on the government to constantly update a defendant about the government's plans to proceed with a criminal action.[173] Whereas the district courts in *Stringer* and *Scrushy* adopted the requirement of a heightened warning,[174] these decisions confused the government's duty to warn with

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168. *Stringer*, 521 F.3d at 1197; *Teyibo*, 877 F. Supp. at 856. SEC Form 1662 contains a section describing the routine uses of information gathered by the SEC: "The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate." SEC Form 1662, *available at* http://www.sec.gov/about/forms/sec1662.pdf.

169. *See id.* ("Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.").

170. *See* United States v. Kordel, 397 U.S. 1, 4 (1970).

171. *See* Brief of Plaintiff-Appellant at 40–41, United States v. Stringer, No. 06-30100 (9th Cir. Sept. 1, 2006) [hereinafter Brief for the United States] (arguing that unlike *Kordel*, where the government had a statutory duty to warn, the SEC has no similar notification requirement because of its use of Form 1662).

172. *See* Babich, *supra* note 19, at 780 (arguing that "defendants should have access to communications between investigative agencies when there is a concern that a defendant has been fraudulently lulled into cooperation with a civil proceeding").

173. United States v. Parrott (*Parrott II*), 315 F. Supp. 1012, 1016 (S.D.N.Y. 1969) (noting that keeping a defendant constantly updated on the direction of the criminal investigation would be unrealistic, burdensome, and even useless to the defendant (quoting United States v. Scalfani, 265 F.2d 408, 415 (2d Cir. 1959))).

174. Ewing, *supra* note 19, at 225 (noting that *Stringer* and *Scrushy* misconstrued *Kordel* by requiring that the DOJ and the SEC refrain from cooperation when the DOJ intends to prosecute, whereas *Kordel* only mandated that civil proceedings must not be brought "solely" to obtain evidence).

issues of affirmative misrepresentation by the government.[175] By concluding that insufficient warning was tantamount to a false statement,[176] the district courts in *Stringer* and *Scrushy* mistakenly articulated a rule for warning that was higher than basic due process and contrary to the statutory requirements.[177] By contrast, the *Stringer* Ninth Circuit decision properly explained that *Kordel* draws the line so that statements by the government would only be improper if those statements prevented the defendant from knowing or exercising his constitutional rights.[178]

B. Flaws in the Government Misconduct Test

Although some courts have stated that government misconduct during a parallel proceeding can be a violation of the Fourth Amendment,[179] these cases do not support the theory that the government's failure to warn a defendant is sufficient to constitute a Fourth Amendment violation.[180] As explained by the Ninth Circuit in *Stringer*, the Fourth Amendment is only violated if the government makes affirmative misrepresentations.[181]

General allegations of government trickery or deceit are insufficient to trigger a Fourth Amendment violation.[182] In addition, as explained in *Stringer*, the government's omission or failure to answer questions cannot be labeled as affirmative misrepresentations.[183] Because a Fourth Amendment violation requires an affirmative misrepresentation and the failure to warn a defendant of a parallel investigation is merely an omission—not an affirmative misrepresentation—a mere failure to warn a defendant does not amount to a Fourth Amendment violation.[184]

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175. *Id.* (noting that neither *Stringer* or *Scrushy* cited a case in which "the government's failure to inform (as opposed to making a false statement) was the sole basis for deeming a parallel proceeding improper").

176. *Id.* ("The holding[s] in *Stringer* and *Scrushy* also blurred an important distinction in the case law between the government's false statements to defendants and the government's failure to inform a civil defendant of probable prosecution.").

177. *See id.* at 225–26.

178. *See* United States v. Stringer, 521 F.3d 1189, 1199 (9th Cir. 2008) ("[T]he SEC made no affirmative misrepresentations [and] engaged in no tricks to deceive defendants into believing that the investigation was exclusively civil in nature."); *see also* United States v. Kordel, 397 U.S. 1, 11–12 (1970) (discussing that this was not a case in which the government has "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution"); United States v. Teyibo, 877 F. Supp. 846, 856–57 (S.D.N.Y. 1995) (finding no coercion by the government that would have prevented defendant from asserting his Fifth Amendment rights).

179. *See supra* notes 100–09 and accompanying text.

180. *See supra* notes 100–11 and accompanying text (discussing that both *Tweel* and *ESM* dealt with situations in which government agents not only failed to warn but also misrepresented the nature of their investigation).

181. *Stringer*, 521 F.3d at 1198–99.

182. *See id.* at 1199.

183. *Id.* at 1198–99.

184. *Id.* at 1199–1200.

Nor is government misconduct necessarily a violation of the Fifth Amendment. Courts in the Sixth and Seventh Circuits have taken the approach that government misconduct can be relevant as evidence of a due process violation, but does not compel such an inference.[185] This approach is helpful for several reasons. First, this approach helps focus the court's attention on the defendant's rights and whether those rights have been violated.[186] Second, this approach does not foreclose a defendant from challenging the government's conduct, but requires that the defendant ultimately link the alleged misconduct to a violation of some discernible right.[187] Third, this approach adheres to the requirements Congress prescribed for federal criminal offenses.[188] Finally, the jury remains the ultimate backstop against arbitrary law enforcement because the defendant may ultimately argue before the jury about law enforcement's corruption or overzealousness.[189]

Importantly, the Supreme Court has not established authority for the federal courts to dismiss a parallel criminal investigation based solely on government misconduct.[190] The *Kordel* Court's dictum that dismissal may be proper where the defendant establishes a departure from the administration of justice[191] has erroneously been interpreted as an approval of the government misconduct approach.[192] This interpretation takes *Kordel*'s holding out of context, for as

185. *See* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995).

186. *See, e.g.*, Hampton v. United States, 425 U.S. 484, 490 (1976) (providing that a due process defense is available only when the Government violates an identifiable right of the defendant).

187. *See* United States v. Luce, No. 05 CR 340, 2006 U.S. Dist. LEXIS 76052, at *18–19 (N.D. Ill. Sept. 29, 2006) (indicating that governmental misconduct may "precipitate a reversible error, but it is never in itself a reversible error"); *see also Boyd*, 55 F.3d at 241 ("The gravity of the prosecutors' misconduct is relevant only insofar as it may shed light on the materiality of the infringement of the defendants' rights . . . .").

188. *See* United States v. Tucker, 28 F.3d 1420, 1428 (6th Cir. 1994) (holding that when none of the defendant's rights have been violated, the court must keep its focus on whether the elements of the offense, as provided by Congress, are met).

189. *See id.* (providing that both Congress and the Supreme Court have drawn the line to ensure that the jury may be the ultimate defense against misconduct by law enforcement (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968))).

190. *See id.* ("[T]here is no binding Supreme Court authority recognizing a defense based solely upon an objective assessment of the government's conduct . . . ."); United States v. Teyibo, 877 F. Supp. 846, 855 (S.D.N.Y. 1995) (explaining that the government may use evidence acquired in a civil action "unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice").

191. United States v. Kordel, 397 U.S. 1, 11 (1970).

192. *See* United States v. Stringer, 408 F. Supp. 2d 1083, 1088 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008) (finding that government's conduct clearly falls within the category of improper administration of justice); *see also* Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (stating that the court may stay a parallel proceeding based on "agency bad faith, malicious government tactics, and 'other special circumstances'"); United States v. Scrushy, 366 F. Supp. 2d 1134, 1138 (N.D. Ala. 2005) (characterizing the government's civil and criminal investigations as improperly coordinated).

Teyibo illustrates, improper administration of justice deals with situations where a defendant's rights were violated because he was coerced or intimidated into testifying.[193] Therefore, improper administration of justice only comes into play when a defendant has not been informed of the possibility of a parallel proceeding and the consequences of disclosures.[194]

There are courts, such as the district courts in *Stringer* and *Scrushy*, that argue that misconduct itself may be a due process violation when it is egregious enough.[195] While it may be difficult to draw a sharp line defining a due process violation,[196] dismissal based on government misconduct is reserved for only the most severe and shocking behavior.[197] Also telling is that very few cases have found such extreme violations.[198] This suggests that government misconduct is not a well-established basis for dismissing a parallel proceeding.

Dismissal of a parallel proceeding for government misconduct is also inconsistent with the notion that the use of supervisory powers is the exception[199] and that courts should be reluctant to become involved absent "a clear basis in fact and law."[200] Based on historical origins, the courts' use of

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193. *See Teyibo*, 877 F. Supp. at 857 (finding no evidence that defendant was coerced); *see also Concurrent Civil and Criminal Proceedings*, *supra* note 8, at 1282–83 (describing that the defendant is a victim of fundamental unfairness where a judge is interested in a trial's outcome, publicity prevents an impartial jury, or the prosecution uses false and misleading evidence).

194. *See* United States v. Stringer, 521 F.3d 1189, 1199 (9th Cir. 2008) (finding no affirmative misrepresentations by the SEC); *Teyibo*, 877 F. Supp. at 857 (noting that the defendant was notified of his rights and understood their implications).

195. *See, e.g.*, *Stringer*, 408 F. Supp. 2d at 1089 (stating that dismissal of the criminal proceeding was justified given that the "government engaged in deceit and trickery"); *Scrushy*, 366 F. Supp. 2d at 1138 (endorsing court intervention where the court finds an improper administration of criminal justice).

196. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981) (explaining that due process should not be viewed as a technical concept, but courts "must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake").

197. *See, e.g.*, United States v. Gurolla, 333 F.3d 944, 950 (9th Cir. 2003) (describing that the standard for dismissal based on a due process violation is met when the government "'engineer[s] and directs a criminal enterprise from start to finish'" (quoting United States v. So, 755 F.2d 1350, 1353 (9th Cir. 1985)); United States v. Garza-Juarez, 992 F.2d 896, 904 (9th Cir. 1993) (barring prosecution pursuant to due process requirements "'only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice,'" such as when the government engages in actual illegal behavior over an extended period of time (quoting United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983))).

198. *See* Hunter, *supra* note 5, at 171; Eckers, *supra* note 7, at 126 (noting that concrete examples of circumstances egregious enough to amount to an unconstitutional parallel proceeding are "few and far between"); Schulze, *supra* note 137, at 957 (noting that claims of outrageous government conduct are rarely successful).

199. *See, e.g.*, United States v. Hasting, 461 U.S. 499, 506 (1983) (directing courts to use narrowly tailored remedies to deter governmental misconduct); *Ramirez*, 710 F.2d at 542 (calling for supervisory authority only when there is a clear basis in law).

200. United States v. Ramirez, 710 F.2d 535, 542 (9th Cir. 1983).

supervisory authority is most appropriate to govern conduct within the courtroom.[201] This means that the courts' supervisory authority does not extend to conduct outside the courtroom unless there is a constitutional or statutory violation.[202]

To read *Kordel* as a license to critique government coordination more broadly without some connection to a defendant's constitutional rights is a mistake, because many federal agencies are expressly encouraged to cooperate with one another.[203] *Kordel* and *Dresser* provided that the public interest favors increased coordination between the civil and criminal investigations to effectively enforce federal laws.[204] The *Kordel* Court was reticent to interfere with prosecutorial discretion[205] and courts have been particularly mindful of congressional approval of interagency coordination in law enforcement.[206] Given prosecutorial discretion and the policy of sharing information among agencies, dismissing a case based solely on government coordination affords courts overly broad discretion and overlooks congressional intent.[207]

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201. *See supra* notes 30–32.

202. *See* United States v. Simpson, 927 F.2d 1088, 1091 (9th Cir. 1991) (holding that the supervisory powers may be used to supervise a court's affairs, but not to police conduct outside of the courtroom, as the "supervisory power comprehends authority for the courts to supervise their own affairs, not the affairs of the other branches").

203. *See* SEC v. Dresser Indus., 628 F.2d 1368, 1385 (D.C. Cir. 1980) (providing that the relevant statutes, the Securities Act of 1933 and the Securities Exchange Act of 1934, evidence express authority for the SEC to transmit evidence to the DOJ and that there is "no limitation on when this transmittal may occur"); United States v. Fields, 592 F.2d 638, 646 (2d Cir. 1978) ("[T]he procedure permitting preliminary communications with the United States Attorney has significant advantages. Allowing early participation in the case by the United States Attorney minimizes statute of limitations 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."); *see also* Hunter, *supra* note 5, at 177 ("Allowing the SEC and the DOJ to freely share evidence is appropriate, in light of the voluminous amount of evidence in the form of paperwork that is common in actions regarding violations of the federal securities laws.").

204. *See* United States v. Kordel, 397 U.S. 1, 11 (1970) (discussing that the public policy in protecting consumers was best served through prompt action by the agency charged with enforcing federal food and drug laws); *Dresser*, 628 F.2d at 1377 ("Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously.").

205. Ewing, *supra* note 19, at 225 (noting that it would "invade prosecutorial discretion" to permit judicial intervention based solely on interagency coordination).

206. *See Dresser*, 628 F.2d at 1385 (explaining that the Securities Act and the Securities and Exchange Act expressly authorize the SEC to share and transmit information to the DOJ, and that there is no limit on when the SEC may transmit such information); *see also* Brief for the United States, *supra* note 171, at 33 ("Congress has determined that the proper administration of justice includes a 'close working relationship' between civil and criminal authorities to maximize the effectiveness of federal law.").

207. *Cf.* Ewing, *supra* note 19, at 225 ("There is nothing in existing case law that would require the Ninth Circuit or courts in other circuits to suppress evidence obtained in a DOJ/SEC

Dismissing a parallel criminal proceeding based on government misconduct is also flawed because it fails to consider whether the civil proceeding was conducted for a legitimate, noncriminal purpose.[208] Whether an agency has a legitimate, noncriminal reason for its investigation is a critical factor.[209] As long as an agency has a legitimate, noncriminal purpose for conducting an investigation, the court should not inquire further into the government's reasons for bringing the statutorily authorized proceeding.[210] For this reason, the government misconduct test is inappropriate because it permits courts to dismiss criminal actions when the government has a legitimate, noncriminal purpose.[211]

Finally, government misconduct alone is not a functional approach because it gives no meaningful guidance for when disclosure of a criminal investigation would be required.[212] In fact, the government misconduct test could have the distorted effect of requiring civil investigators to notify a defendant about the possibility of a criminal prosecution even though it may hinder criminal prosecution by alerting an investigatory target.[213] Courts that consider government misconduct fail to appreciate that other courts have expressed reservations about labeling the conduct of another branch of government improper without any constitutional or statutory basis.[214]

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parallel proceeding solely on the basis of extensive interagency cooperation that was not revealed to the civil defendant.").

208. *See, e.g.*, United States v. Teyibo, 877 F. Supp. 846, 856 (S.D.N.Y. 1995) (finding no due process violation as long as: 1) the SEC's investigation was genuine; 2) the SEC's investigation began before the DOJ started the criminal investigation; 3) there was no substantive consultation between the agencies; and 4) the SEC ultimately received judgment on the initial action).

209. *See* Ewing, *supra* note 19, at 224 ("[W]hen the SEC could show that it might pursue civil enforcement, the Commission's discovery process had never been halted merely because DOJ would likely prosecute.").

210. *See Dresser*, 628 F.2d at 1387 ("A bad faith investigation, in the Court's conception, is one conducted solely for criminal enforcement purposes. Where the agency 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." (citations omitted)).

211. *See* United States v. Stringer, 408 F. Supp. 2d 1083, 1088–89 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008) (dismissing the criminal proceeding even though the SEC investigation was a legitimate investigation of possible securities fraud).

212. Brief of the Securities and Exchange Commission as Amici Curiae Supporting Appellants at 13, United States v. Stringer, No. 06-30100 (9th Cir. Sept. 13, 2006).

213. *Id.* at 15–16 (arguing that the creation of a relative disclosure standard based on government misconduct would "severely threaten the criminal authorities' investigatory privileges . . . [because] [i]n many cases criminal authorities legitimately do not want their presence or interest known to potential . . . targets").

214. *See* United States v. Tucker, 28 F.3d 1420, 1422 (6th Cir. 1994) (noting that it is a "highly suspect" undertaking to determine whether the conduct of another "co-equal branch of . . . government [is] either 'outrageous or not outrageous'").

III. COURTS SHOULD ADOPT A RIGHTS-BASED DUE PROCESS STANDARD

The confusion among the courts about the appropriate standard for parallel proceedings has led to inconsistent rulings[215] and created unpredictability and uncertainty for both the government and defendants facing possible parallel proceedings.[216] When presented with a claim that a parallel proceeding is improper due to government misconduct, the federal courts should examine the claim in relation to both the Fourth and Fifth Amendments.[217]

Under the Fourth Amendment prong, the court should determine whether the government made affirmative misrepresentations in order to gain access to evidence.[218] General allegations of trickery or deceit will not qualify as an affirmative misrepresentation,[219] nor will evidence of the government's intent to prevent disclosure of an actual criminal proceeding to a defendant.[220] The defendant must establish that the government "'affirmatively [misled]' the subject of parallel civil and criminal investigations 'into believing that the investigation [was] exclusively civil in nature and [would] not lead to criminal charges.'"[221]

Under the Fifth Amendment, the court's analysis should focus on whether the defendant received an adequate warning, as measured against constitutional and statutory requirements.[222] The adequacy of a warning should first be tested against any statutory requirements.[223] As part of this process, the court must consider the policy and intent of the legislation.[224] If the court is satisfied that the government provided an adequate warning, then the court should presume that the parallel proceeding is constitutionally permissible unless the defendant can establish other grounds for the unconstitutionality of a parallel proceeding. Given that the courts have repeatedly acknowledged that parallel proceedings are unobjectionable and that the government has the authority to

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215. *Compare Teyibo*, 877 F. Supp. at 856 (holding that the SEC's standard warning is sufficient notice), *with Stringer*, 408 F. Supp. 2d at 1088 (holding that SEC's standard warning is inadequate notice).

216. *See Scrushy*, 366 F. Supp. 2d at 1137 (finding no controlling authority on parallel proceedings).

217. *See Stringer*, 521 F.3d at 1196–1200 (reviewing the alleged improper parallel proceeding under both the Fourth and Fifth Amendments). The court explained that "[o]ther circuits have agreed that Fourth Amendment and possible due process limitations may be implicated in a dual investigation." *Id.* at 1198.

218. *See Stringer*, 521 F.3d at 1199 (examining whether the government made affirmative misstatements during its parallel proceeding).

219. *Id.*

220. *Id.*

221. *Id.* at 1198 (quoting United States v. Robson, 477 F.2d 13, 18 (9th Cir. 1973)) (internal quotation marks omitted).

222. *See* United States v. Kordel, 397 U.S. 1, 11 (1970) (considering the parallel proceedings proper given the FDA's warning). Therefore, this approach is consistent with *Kordel*.

223. *Accord id.* at 4 (describing that the FDA satisfied its statutory warning requirement).

224. *See* SEC v. Dresser Indus., 628 F.2d 1368, 1385 (D.C. Cir. 1980).

decide when to bring the parallel actions,[225] a proper burden-shifting scheme would envision that the party alleging the violation has both the burdens of production and persuasion as to evidence of a violation.[226]

Under the Fifth Amendment analysis, courts should adopt the approach that government misconduct is not an independent basis for dismissal of a parallel proceeding.[227] Instead, dismissal of a parallel proceeding should be based on violation of a specific constitutional right held by the defendant or a statutory obligation placed on the government.[228] Because the Sixth and Seventh Circuits have established that government misconduct alone cannot be a basis for dismissal,[229] the defendants must establish which right was allegedly violated.[230] The importance of identifying this right is supported by the fact that the court's supervisory authority to intervene in parallel proceedings should be used only when "there is a clear basis in fact and law for doing so."[231] A specific violation of a defendant's rights provides a clear basis in law.[232] Following the Seventh Circuit's reasoning in *Boyd*, the court may properly consider the government's conduct insofar as the court uses such evidence to establish the severity of the injury to a defendant's rights.[233]

Finally, the court will examine whether the government caused the harmful injury or prejudice.[234] This provides the last essential link to ensure that the harm was caused by the government, and is not a self-inflicted injury, as in *Kordel*, when the defendant knowingly failed to assert his Fifth Amendment

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225. *See, e.g.*, *id.* at 1374 ("[P]arallel proceedings are unobjectionable under our jurisprudence.").

226. *See Kordel*, 397 U.S. at 11 (indicating that the defendant bears the burden of establishing the due process violation and that defendant failed to make out such a claim); *see also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (providing that the party alleging the constitutional violation must carry the burden of persuasion).

227. *See* United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994) (holding that there is no authority supporting the proposition that the outrageousness of the government's conduct, standing alone, can warrant dismissal of a criminal action against a predisposed defendant).

228. *See id.* at 1427 (holding that government misconduct, no matter how outrageous, cannot be a defense unless the defendant's constitutional right has been violated).

229. *See supra* notes 118–19.

230. United States v. Luce, No. 05 CR 340, 2006 U.S. Dist. LEXIS 76052, at *17 (N.D. Ill. Sept. 29, 2006).

231. *See Ramirez*, 710 F.2d at 541; United States v. Gonsalves, 691 F.2d 1310, 1316 (9th Cir. 1982) (quoting United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir. 1977)).

232. *See* Hampton v. United States, 425 U.S. 484, 490 (1976) (Rehnquist, J., plurality opinion) ("The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *Defendant*." (emphasis added)).

233. *See* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (allowing considerations of misconduct as one type of evidence to establish a due process violation).

234. *See Kordel*, 397 U.S. at 7 (providing no grounds for recourse when defendant voluntarily incriminated himself).

privilege against self-incrimination.[235] But this element of the test would be satisfied, for example, where the government coerced a defendant to testify against his will[236] or caused him to disclose information without knowledge of his rights.[237]

Applying this approach to the *Kordel* scheme would yield a more level and predictable body of law for parallel proceedings. Under the first *Kordel* circumstance, whether the government brought a civil action for legitimate reasons, the government would clearly retain the right to exercise its prosecutorial discretion as the *Kordel* Court envisioned.[238] However, courts would recognize that the government's discretion is limited by the defendant's constitutional and statutory rights.[239] A violation of the defendant's procedural rights would still be tantamount to a procedural due process violation, and thus would give a defendant a valid defense against his prosecution.[240]

Under the second *Kordel* circumstance, the issue of sufficient notification would require the court to identify whether a defendant's right to a warning is founded on the Fifth Amendment privilege against self-incrimination,[241] or whether a higher warning is specified by statute.[242] Consequently, a defendant would be entitled to assert a due process defense where the government failed to carry out its duty to warn and thus triggered a procedural due process violation.[243]

Finally, the *Kordel* court's provision for special circumstances would be more narrowly conceived as a subset of examples of due process violations.[244] While the conduct of the government on its own would not rise to the level of a

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235. *Id.*

236. *See* United States v. Teyibo, 877 F. Supp. 846, 856 (S.D.N.Y. 1995).

237. *See id.*

238. *See Kordel*, 397 U.S. at 11 (noting that the Court did not want to "stultify enforcement of federal law" by requiring the government to choose between instituting criminal or civil proceedings).

239. *See supra* notes 169–78.

240. *See, e.g.*, United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) (noting that prosecutorial misconduct is relevant only in conjunction with an infringement of a defendant's due process rights, thereby implying that due process concerns are always valid).

241. *See Teyibo*, 877 F. Supp. at 856 (providing that the Fifth Amendment afforded the defendant the right to refuse to disclose self-incriminating information).

242. *See Kordel*, 397 U.S. at 4 & n.5 (discussing that the FDA had a statutory obligation to warn defendant); *see also* United States v. Robson, 477 F.2d 13, 18 (9th Cir. 1973) (holding that an IRS audit agent conducting a civil audit was under no duty to inform defendant that the audit could have criminal consequences).

243. *See* United States v. Parrott (*Parrott I*), 248 F. Supp. 196, 201 (D.C. Cir. 1965) (finding that IRS agents who were investigating for a civil proceeding had not informed defendant that a criminal investigation was ongoing and that he was entitled to assert his Fifth Amendment rights (citing United States v. Lipshitz, 132 F. Supp. 519 (E.D.N.Y. 1955))).

244. *See Teyibo*, 877 F. Supp at 855–56 (viewing the special circumstances in *Kordel* as specific examples of due process violations).

due process violation, the court would still play a key supervisory role in ensuring that a defendant's constitutional rights are protected.

IV. CONCLUSION

Parallel proceedings are a proper exercise of the government's statutory rights and a vital tool for enforcement of federal law in the public interest. Defendants in parallel proceedings have protections that extend to the limits of their constitutional rights, statutory rights, and their rights to proper procedure. However, courts have greatly expanded the holding of *Kordel* by using judicial discretion to police parallel proceedings. A more functional approach suggests that the first critical question a court must address is whether a defendant received an adequate warning. Where adequate warning is provided, the defendant bears the burden of demonstrating specific constitutional or statutory grounds for intervention. Though courts will have less discretion than under the district court decisions in *Stringer* or *Scrushy*, this revised approach will ensure a fair balance between the rights of all parties in the course of parallel proceedings.