# *LaSALLE* REVISITED: THE USE OF AGENCY SUBPOENA POWERS IN PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

## INTRODUCTION

Where a criminal charge appears imminent, or is pending against a defendant who is the target of a civil investigation or suit pertaining to the same matter, there is a possibility that the criminal defendant will be prejudiced by the use of discovery obtained in the course of the civil proceeding.[1] In certain circumstances, the courts have reacted by staying the civil proceeding or discovery until completion of the criminal suit.[2] Where an administrative summons has been issued, the courts have at times refused enforcement.[3] While these remedies may safeguard the defendant's interests,[4] it has been argued that

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[1] At the investigation stage, the primary danger is that a civil summons will be issued solely to obtain evidence for a criminal prosecution. *See, e.g.*, United States v. LaSalle Nat'l Bank, 437 U.S. 298, 308 (1978); Donaldson v. United States, 400 U.S. 517, 532-33 (1971); Reisman v. Caplin, 375 U.S. 440, 449 (1964). There is also a danger that the defendant's fifth amendment right against self-incrimination will be violated. *See, e.g.*, United States v. Kordel, 397 U.S. 1, 7-10 (1970); United States v. Parrott, 248 F. Supp. 196, 200-01 (D.D.C. 1965).

Once an indictment is issued the danger becomes more acute. Enforcement of the summons may expand criminal discovery, or force the defendant to reveal his defense in the criminal suit. *See, e.g.*, SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1376 (D.C. Cir.) (en banc), *cert. denied*, 100 S. Ct. 529 (1980); United States v. Henry, 491 F.2d 702, 704 (6th Cir. 1974).

[2] *E.g.*, Gordon v. FDIC, 427 F.2d 578, 580-81 (D.C. Cir. 1970) (stay denied, but protective order to prevent discovery may be justified); Perry v. McGuire, 36 F.R.D. 272, 274 (S.D.N.Y. 1964) (stay granted); Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., 14 F.R.D. 333, 335 (E.D. Pa. 1953) (stay granted).

If the government demands a stay in a purely civil suit, the courts will readily grant it. *Panel Discussion of Practicing Law Institute*, [1979] 522 SEC. REG. & L. REP. (BNA) A-9 (Sept. 3, 1979). *See, e.g.*, Cambell v. Eastland, 307 F.2d 478, 485 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

Judicial authority to grant a stay of discovery derives from FED. R. CIV. P. 26(c). The federal rules "apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States." Fed. R. Civ. P. 81(a)(3). It should be noted, however, that application of the rules is discretionary with the court. *Id.*

For a detailed discussion of remedies available in civil and criminal proceedings, see Comment, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277, 1284-94 (1967).

[3] *E.g.*, United States v. Henry, 491 F.2d 702 (6th Cir. 1974). Typically, statutes provide that agency summonses must be enforced through the district courts. J. GRUFF, B. MEZINES & J. STEIN, ADMINISTRATIVE LAW § 21.02, at 21-9 (1980) [hereinafter cited as J. GRUFF]. *E.g.*, I.R.C. § 7402(b); Securities Act of 1933, 15 U.S.C. § 77t(c) (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78u(e) (1976). *See* Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 286 (10th Cir. 1964). In the case of parallel investigations courts will almost always enforce summonses. *Panel Discussion of Practicing Law Institute*, [1979] 522 SEC. REG. & L. REP. (BNA) A-8 (Sept. 3, 1979) (remarks of Arthur Mathews).

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

government agencies should be free to investigate civil liability despite criminal proceedings, and that to restrict this freedom is contrary to the best interests of the nation.[5]

This clash between competing interests has arisen most frequently with respect to Internal Revenue Service (IRS) summonses.[6] The Supreme Court dealt with this conflict in *United States v. LaSalle National Bank*,[7] and concluded that enforcement of an IRS summons is improper once a recommendation for criminal prosecution has been made. In addition, the Court concluded that issuance of a summons solely to obtain evidence for a criminal prosecution constitutes bad faith. The criminal recommendation issue is related to that of bad faith in that in both instances information obtained through a civil summons may improperly further a criminal prosecution. This comment examines whether the two-fold rule enounced in *LaSalle* pertaining to parallel civil and criminal proceedings[8] should be applied to the Securities and Exchange Commission (SEC) and other administrative agencies.

## THE IRS CONTEXT

Section 7602 of the Internal Revenue Code (IRC) provides the agency with broad statutory authority[9] to summon records and witnesses in order to investigate civil tax liability.[10] This civil summons

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[5] *See* United States v. Kordel, 397 U.S. 1, 11 (1970); Pickholz, *Parallel Enforcement Proceedings: Guidelines for the Corporate Lawyer*, 7 SEC. REG. L.J. 99, 116 (1979).

[6] The IRS issues more summonses than any other agency. *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1329 (1979)[hereinafter cited as *Developments*]. The number of IRS summonses should continue to rise because the IRS's demand for documents is growing even greater. *See* Rout, *Auditors Say IRS Demand for Documents Is Poisoning Relations with Client Firms*, Wall St. J., Jan. 15, 1981, at 25, col. 4.

The number of SEC summonses has also risen dramatically of late. Pickholz, *supra* note 5, at 101.

[7] 437 U.S. 298 (1978).

[8] "In its purest sense, the phrase 'parallel proceedings' conjures up . . . coexisting investigations and proceedings by the SEC (or other federal regulatory agencies) and the Department of Justice." Pickholz, *supra* note 5, at 110.

[9] United States v. Bisceglia, 420 U.S. 141, 150 (1975) (holding John Doe summons valid). The IRS need not even show probable cause when issuing a summons. *Id.* at 146; Ryan v. United States, 379 U.S. 61, 62 (1964). Furthermore, the courts have liberally construed I.R.C. § 7602. United States v. Northwest Pa. Bank & Trust Co., 355 F. Supp. 607, 614 (W.D. Pa. 1973).

[10] I.R.C. § 7602.

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

power[11] is subject to few limitations.[12] The IRS may also issue a summons when investigating criminal violations of the Code as long as there is also a valid civil purpose to the investigation.[13] The agency

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(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

*Id.*

[11] The SEC is empowered to "subpoena" witnesses, Securities Act of 1933, 15 U.S.C. § 77s (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78u(b) (1976), whereas the IRS is given the power to "summon" witnesses. I.R.C. § 7602. Courts have treated the terms summons and subpoena as synonymous. *E.g.*, Townsend v. United States, 95 F.2d 352, 356 (D.C. Cir.), *cert. denied*, 303 U.S. 664 (1938).

[12] There are some limitations on this power, however. Courts have stated that I.R.C. § 7602 does not justify "fishing expeditions." *E.g.*, Mays v. Davis, 7 F. Supp. 596, 596 (W.D. Pa. 1934). *But see* United States v. Luther, 481 F.2d 429, 432-33 (9th Cir. 1973) (such "expeditions" will be sanctioned if information sought is relevant). Once liability has been determined, and the tax paid, the IRS no longer has authority to issue a summons. United States v. Tosie, 336 F. Supp. 1051, 1052 (E.D. Mo. 1971). Furthermore, the IRS must comply with the good faith standard set forth in Powell v. United States, 379 U.S. 48 (1964). *See* note 32 *infra*. All summonses are also subject to constitutional attack.

With respect to bank records, the Financial Privacy Act, 12 U.S.C. § 3405 (Supp. II 1978), does not really place any limitations on the IRS summons power. To obtain records the summons must merely be relevant to a legitimate law enforcement inquiry, and the IRS must serve a notice and copy of the summons upon the customer being investigated. *Id. Cf.* The Tax Reform Act of 1976, I.R.C. § 7609(b)(1) (party entitled to notice when third party recordkeeper is summoned).

[13] *LaSalle*, 437 U.S. at 308; Donaldson v. United States, 400 U.S. 517, 535 (1971). I.R.C. § 6653(b) provides for a 50% penalty in cases of underpayment due to fraud. I.R.C. §§ 7201-7207, concerning fraudulent returns and statements, provides for criminal penalties. Therefore, an IRS summons must have been intended to be used both for the investigation of criminal tax fraud and for the calculation of the 50% civil penalty. *LaSalle*, 437 U.S. at 308.

This analysis is bolstered by 26 C.F.R. § 601.107(a) (1980), which states that the Intelligence Division of the IRS should encourage compliance with the internal revenue laws by "the investigation of possible criminal violations of such laws and the recommendation (when warranted) of prosecution and/or assertion of the 50 percent ad valorem addition to the tax." *Id.* On its face, I.R.C. § 7602 does not appear to forbid the issuance of summonses for solely criminal proceedings. Nevertheless, the courts have construed the statute to preclude such activity. *E.g.*, Reisman v. Caplin, 375 U.S. 440, 449 (1964) (dictum); United States v. Roundtree, 420 F.2d 845, 851 (5th Cir. 1969); Wild v. United States, 362 F.2d 206, 208-09 (9th Cir. 1966); Boren v. Tucker, 239 F.2d 767, 772 (9th Cir. 1965). *But cf. LaSalle*, 437 U.S. at 320 (Stewart, J., dissenting) (summons not invalid merely because issued solely for criminal purpose); United States v. Morgan Guar. Trust Co., 572 F.2d 36, 39 (2d Cir.), *cert. denied*, 439 U.S. 822 (1978)(summons not invalid merely because issued solely for criminal purpose).

has a special investigatory division which handles criminal matters.[14] Once sufficient evidence is obtained,[15] however, the IRS refers the case to the Justice Department for criminal prosecution.[16]

The "criminal purpose defense" is simply a way of stating that the defendant claims a summons was issued for the sole purpose of furthering a criminal investigation.[17] Despite relatively clear statutory language[18] and much case law,[19] many defendants in early cases appear to have misused the defense. They contended that a summons was improper if issued in an investigation which could potentially result in a recommendation for criminal prosecution.[20]

*Donaldson v. United States*[21] dispelled much of this confusion. The main issue in *Donaldson* was whether a taxpayer had the right to

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[14] This division is known as the Intelligence Division, and it utilizes "special agents." Stroud, *The Criminal Prosecution Defense: A Defense to a Section 7602 Summons?*, 4 AM. J. CRIM. L. 152, 158-59 (1975-76). The appearance of a special agent shifts the emphasis of the investigation from civil to criminal. Beckwith v. United States, 425 U.S. 341, 345 (1976); United States v. LaSalle Nat'l Bank, 554 F.2d 302, 309 (7th Cir. 1977), *rev'd*, 437 U.S. 298 (1978). *See* Andrews, *The Right to Counsel in Criminal Tax Investigations under* Escobedo *and* Miranda: *The "Critical Stage,"* 53 IOWA L. REV. 1074, 1111 (1968).

[15] Evidence collected by special agents may be used either in the civil or the criminal proceeding. Stroud, *supra* note 14, at 161.

[16] "There is effectively a recommendation at each level upward in the Service's chain of command regardless of the labels attached. The ultimate recommendation by the Service is referral to the Department of Justice." United States v. Billingsley, 469 F.2d 1208, 1210 (10th Cir. 1972). For a detailed discussion of the recommendation procedure, see Andrews, *supra* note 14, at 1082-85.

[17] The criminal purpose defense has also been referred to as "the institutional bad faith defense," "the criminal prosecution defense," and "the improper purpose defense." All these terms "grasp the vital core of Donaldson." *LaSalle*, 437 U.S. at 305 (quoting United States v. LaSalle Nat'l Bank, 554 F.2d 302, 309 (7th Cir. 1977), *rev'd*, 437 U.S. 298 (1978)).

[18] *See* note 13 *supra*.

[19] *E.g.*, United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970); United States v. DeGrosa, 405 F.2d 926, 928 (3d Cir.), *cert. denied*, 394 U.S. 973 (1969); United States v. Michigan Bell Tel. Co., 415 F.2d 1284, 1286 (6th Cir. 1969); Wild v. United States, 362 F.2d 206, 209 (9th Cir. 1966); Boren v. Tucker, 239 F.2d 767, 772-73 (9th Cir. 1956). These cases all held that a summons issued for a criminal purpose is not invalid as long as there is also a civil purpose.

[20] These claims were based on dictum in Reisman v. Caplin, 375 U.S. 440, 449 (1964). "[T]he witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defense . . . that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution . . . ." *Id.* Because of a citation to Boren v. Tucker, 239 F.2d 767, 772-73 (9th Cir. 1965) (distinguishing United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953), where the taxpayer was under indictment), courts have interpreted the *Reisman* dictum as applying "to the situation of a pending criminal charge or, at most, of an investigation solely for criminal purpose[s]." Donaldson v. United States, 400 U.S. 517, 533 (1971).

[21] 400 U.S. 517 (1971).

intervene in the government's enforcement action.[22] Having resolved that issue against the taxpayer, the Court went on to state in dictum[23] that "under Section 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."[24] Implicit in the Court's holding was the notion that an IRS summons is not issued in bad faith merely because there is the possibility that an investigation will result in criminal recommendation.

Although *Donaldson* went far towards clarifying the proper standard of review in IRS cases, it nevertheless left many questions unresolved. The lower courts were not sure whether the good faith requirement applied to the actual agent, or whether it applied to the

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[22] *Id.* at 527. *See generally* J. GRUFF, *supra* note 3, § 21.02(2), at 21-22 to -26. The taxpayer claimed a right of intervention under FED. R. CIV. P. 24(a), and also under Reisman v. Caplin, 375 U.S. 440, 449 (1964), wherein the court stated that "third parties might intervene to protect their interests." The *Donaldson* Court concluded that rule 24(a) only applied where "there [was] a significantly protectable interest," 400 U.S. at 531, and that application of the Federal Rules of Civil Procedure to summons enforcement proceedings was discretionary. *See* FED. R. CIV. P. 81(a). Furthermore, under *Reisman* intervention was permissive and not applicable to the case at bar. 400 U.S. at 529-30. The Court, exercising its discretion, held that the taxpayer could not intervene. *Id.* at 531. *Contra*, United States v. Bank of Commerce, 405 F.2d 931, 933 (7th Cir. 1969) (absolute right to intervene under *Reisman*); Justice v. United States, 365 F.2d 312, 314 (3d Cir. 1966) (absolute right of intervention under *Reisman*).

The Tax Reform Act of 1976, I.R.C. § 7609, partially overruled *Donaldson's* denial of intervention. "Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604." *Id.* § 7609(b)(2). A party is entitled to notice when "any summons . . . is served on any person who is a third-party recordkeeper." *Id.* § 7609(a)(1)(A).

[23] Technically, this is dictum because once having resolved the issue of intervention, *supra* note 22, there was no need to address the good faith issue. This created some confusion, and many courts attempted to reconcile the "true holding" with the "dictum." *E.g.*, United States v. Zack, 521 F.2d 1366, 1368 (9th Cir. 1975) (finding it necessary to harmonize dictum with holding by stating that government summons would not be issued in good faith if issued solely for purpose of furthering criminal prosecution); United States v. Weingarden, 473 F.2d 454, 460 (6th Cir. 1973) (holding that proper standard according to *Donaldson* was whether summons was issued for sole purpose of criminal prosecution, this being almost always the case where criminal prosecution is pending). *But cf.* United States v. Friedman, 532 F.2d 928, 932 (3d Cir. 1975) (no reason to distinguish holding from dictum in *Donaldson*).

The best approach is to view the *Donaldson* "dictum" as the true holding. United States v. LaSalle Nat'l Bank, 554 F.2d 302, 308 (1977) (characterizing dictum in *Donaldson* as holding). *See* United States v. McCarthy, 514 F.2d 368, 374 n.7 (3d Cir. 1975) (stating that although technically dictum, such dictum should not be lightly dismissed).

[24] 400 U.S. at 536. In prior cases, the courts had refused to enforce summonses issued after indictment. *E.g.*, United States v. O'Connor, 118 F. Supp. 248, 250 (D. Mass. 1953). Even after *Donaldson*, the fact that the target of an investigation is under indictment is a crucial factor. United States v. Henry, 491 F.2d 702, 704 (6th Cir. 1974) (refused to enforce summons where subject of summons was under indictment for violation of federal narcotic laws, even though IRS had never recommended criminal prosecution).

institution as a whole.[25] Also, it was unclear whether the critical recommendation was that of the agent to his superiors, or that of the IRS to the Justice Department.[26] Moreover, *Donaldson* was chiefly concerned with the criminal purpose defense and failed to explain adequately why criminal recommendation was chosen as the cut-off point for summons enforcement.[27]

In *LaSalle*, the Court was once again confronted with the validity of a summons issued by a special agent[28] prior to a recommendation for criminal prosecution. Unlike *Donaldson*, which involved the mere potential of a criminal recommendation, *LaSalle* focused on the claim that the investigation was being conducted solely for the purpose of obtaining evidence for a criminal prosecution.[29] Extending *Donaldson*, the Court set forth a two-fold test for determining the validity of a summons.[30] First, the summons must have been issued before a criminal recommendation. Second, the summons must have been used in good faith.[31] For a summons to have been issued in good faith, it must meet the criteria articulated in *United States v. Powell*,[32]

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[25] *E.g.*, United States v. Wall Corp., 475 F.2d 893, 895 (D.C. Cir. 1972) (agent must act in good faith).

[26] *E.g.*, United States v. Oaks, 360 F. Supp. 855, 858 (D. Cal. 1973) (holding that critical recommendation was that of agent); United States v. Billingsley, 331 F. Supp. 1091, 1092 (N.D. Okla. 1971) (critical recommendation was that of agent to superior), *rev'd*, 469 F.2d 1208, 1209 (10th Cir. 1972) (crucial recommendation was that of IRS to Department of Justice).

[27] With respect to the recommendation issue, the court merely stated that issuance of a summons must have been prior to recommendation, 400 U.S. at 536, and seemed to assume that at that point any investigation would have been improper.

The Court explained in great detail why the appearance of a special agent did not signify that the investigation was being conducted solely for criminal purposes. 400 U.S. at 535. *Accord*, United States v. Henry, 491 F.2d 702, 703 (6th Cir. 1974); United States v. Erdna, 422 F.2d 835, 836 (3d Cir. 1970). One commentator, however, has stated that the appearance of the special agent signifies that the investigation is for purely criminal purposes. Andrews, *supra* note 14, at 1084.

[28] The Court followed *Donaldson* in viewing the appearance of the special agent as insignificant, and found no need to even discuss the issue. 437 U.S. at 316. *See* note 27 *supra*.

[29] 437 U.S. at 307-08.

[30] *Id.* at 318.

[31] The dissent did not agree with this part of the test. Adopting the "bright line" test of United States v. Morgan Guar. Trust Co., 572 F.2d 36, 39 (2d Cir. 1978), Justice Stewart would have found the summons invalid only if there had been a recommendation for criminal prosecution. 437 U.S. at 321 (Stewart, J., dissenting). He found no limitation in I.R.C. § 7602 to the effect that a summons is invalid if issued solely for a criminal purpose. 437 U.S. at 320 (Stewart, J., dissenting). Justice Stewart found that the good faith requirement referred only to the matters mentioned in United States v. Powell, 379 U.S. 48, 57 (1964), *see* discussion at note 32 *infra*, and not to the criminal purpose test. 437 U.S. at 320 (Stewart, J., dissenting). *Accord*, United States v. Troupe, 438 F.2d 117, 119 (8th Cir. 1971). *See* United States v. Marine Midland Bank, 585 F.2d 36, 38 (3d Cir. 1978) (recognizing that "bright line test" which it had adopted was not valid after *LaSalle*).

and must have been issued for a civil purpose.[33] Furthermore, the Court specified that what was required was "institutional good faith" as opposed to the good faith of the individual agent,[34] and that the critical recommendation was that of the IRS to the Department of Justice.[35]

The majority opinion in *LaSalle* was based largely upon a detailed analysis of the statutory provisions of the Internal Revenue Code.[36] The Court found that the agency summons power should have been proscribed once a criminal recommendation was made, since at that point the civil and criminal aspects of the case began to diverge—albeit never completely.[37] Despite its recognition that the IRS had statutory authority to issue a summons for a civil purpose even after making a criminal referral,[38] the majority was concerned that criminal discovery would be broadened and the role of the grand jury infringed upon were the agency to exercise that power.[39] Moreover, the Court found that it was precisely because of the IRS statutory provisions that these interests would become jeopardized upon

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It has been pointed out, however, that because the taxpayer's burden of proof is so heavy, it is really as if the "bright line test" were in effect. *Developments*, *supra* note 6, at 1326. Before recommendation by the agent to his superior, the summons is "virtually unassailable." United States v. Genser (*Genser II*), 595 F.2d 146, 151 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979). After recommendation to the agent's superiors, the taxpayer's burden is "heavy." *LaSalle*, 437 U.S. at 316. This burden may be eased by allowing the taxpayer basic discovery. *See* Comment, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 COLUM. L. REV. 621, 639 (1980); note 145 *infra*.

[32] 379 U.S. 48, 57-58 (1964). Four requirements were set forth in *Powell:* (a) The summons must be issued for a legitimate purpose; (b) The summons must seek information which is relevant to the legitimate purpose; (c) The information sought must not already be in the possession of the government; and (d) Proper administrative steps must be followed.

[33] 437 U.S. at 318.

[34] The Court noted that there are several layers of review, and that in order for a recommendation to be made to the Department of Justice, officials at a minimum of two layers must concur in the agent's conclusion. *Id.* at 315. The individual agent's motivation is not dispositive since the criminal prosecution can be abandoned at any stage. *Id.*

[35] *Id.* at 318.

[36] *Id.* at 308-11. *See* note 13 *supra*.

[37] 437 U.S. at 311.

[38] *Id.* at 312. However, one commentator has stated:

> The policy of the Service is to defer the civil investigation until the criminal investigation is completed in order to avoid the improper use of a summons when an indictment has been issued. The deferment of the civil investigation continues into the prosecution stage because a summons would not be enforceable when a criminal case is pending, and the Service would have to rely on a search warrant.

Stroud, *supra* note 14, at 159. Clearly no statutory authority can be found for the proposition that the IRS lacks authority to issue a summons when a criminal case is pending, although it is recognized that for all practical purposes authority is terminated. *LaSalle*, 437 U.S. at 312. Nonetheless, a summons may be unenforcable for constitutional reasons. *See* notes 102-03 *infra*.

[39] 437 U.S. at 312.

recommendation to the Department of Justice. Once a recommendation was made, the IRS lost its authority to settle the case. This authority passed to the Justice Department.[40] Under such a scheme collaboration between the IRS and the Justice Department was to be expected.[41] Thus, the Court concluded that "it was unrealistic to attempt to build a partial information barrier between the civil and criminal branches of the executive,"[42] and adopted a prophylactic rule prohibiting enforcement after a recommendation to the Justice Department.

While *LaSalle* can fairly be said to have resolved many major questions with respect to parallel civil and criminal tax investigations,[43] it still was not clear whether the rule relating to criminal recommendation was "based on principles generally applicable to parallel civil and criminal proceedings, or on limitations unique to the IRS."[44] Another issue which remained lurking was to what extent the criminal purpose defense was viable with respect to other agency summonses.

## THE SEC CONTEXT

The applicability of the *LaSalle* rule to SEC subpoenas was recently addressed in *SEC v. Dresser Industries, Inc.*[45] The contro-

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[40] I.R.C. § 7122

(a) AUTHORIZATION. The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

*Id.*

[41] 437 U.S. at 312. "Interagency cooperation on the calculation of civil liability is to be expected." *Id. See* Aviation Corp. v. United States, 46 F. Supp. 491, 496 (Ct. Cl. 1942), *cert. denied*, 318 U.S. 771 (1943) (IRS official participated in negotiations for compromise settlement).

[42] 437 U.S. at 312.

[43] One point which the Court did not make absolutely clear is whether the IRS must have a civil purpose for the investigation as a whole when the summons is issued, or whether each individual summons must be issued for a proper civil purpose. *See* United States v. Genser (*Genser II*), 595 F.2d 146, 151 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979) (purpose of each summons examined); United States v. Garden State Nat'l Bank, 607 F.2d 61, 69 (3d Cir. 1979) (purpose of each summons examined).

For an excellent discussion of this point, see Comment, *supra* note 31, at 626-28, which points out that *LaSalle* furnishes more support for the general civil purpose test since the opinion never refers to the institutional purpose behind the particular summons, and Note, 25 Vill. L. Rev. 934 (1980).

[44] SEC v. Dresser Indus., Inc., 628 F.2d 1366, 1378 n.25 (D.C. Cir.) (en banc), *cert. denied*, 100 S. Ct. 529 (1980).

[45] 628 F.2d 1368 (D.C. Cir.) (en banc), *cert. denied*, 100 S. Ct. 529 (1980).

versy in *Dresser* arose over certain questionable foreign payments.[46] Pursuant to the SEC voluntary disclosure program,[47] Dresser had filed a Form 8-K on three separate occasions.[48] The agency demanded that Dresser release the documents which formed the basis of the report. Dresser refused to relinquish them for fear that the documents might be publicly disclosed, thereby endangering the lives of employees abroad.[49] The SEC staff then recommended that a formal investigation be commenced.[50] Meanwhile, the Justice Department

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[46] *Id.* at 1372. In 1976 the SEC commenced an intensive investigation of questionable payments both domestic and foreign. Tigue & Abrams, *A Current Analysis and Appraisal of IRS's Sensitive Payments Investigation*, 52 J. TAX. 160, 160 (1980). The SEC was soon joined by the IRS which began investigating the tax impact of "corporate slush funds." *Id.* The role of the IRS in such investigations has waned, however, since passage of the Foreign Corrupt Practices Act, P.L. No. 95-213, 91 Stat. 1494 (1977), under which the SEC is charged with investigating corporate bribery of foreign officials and associated inaccurate or misleading financial record-keeping. These violations have been made criminal under the Act. Tigue & Abrams, *supra*, at 163.

[47] 628 F.2d at 1371. This program was initiated in order to encourage corporations to conduct their own investigations and to make disclosures. A corporation which participated in the program would be much less likely to be subject to an SEC enforcement action. *Id.*

The IRS resorted to an inquisitorial method. It sent a questionaire to corporations nationwide (the "eleven questions") demanding that they make disclosures. Tigue & Abrams, *supra* note 46, at 160. Recently the questions to be put to corporations in dubious cases were reduced to five. They concern "payments, gifts, and loans of money, services, and property for business concessions or political purposes." Wall St. J., Jan. 14, 1981, at 1, col. 5. IRS agents were instructed to look for leads in internal audit papers, foreign cables, and SEC reports. They were also authorized to interview persons such as dismissed employees, outside auditors, and corporate airplane pilots. Suspicious signs include corporations that serve governments, have histories of payoffs, and frequent executive trips to countries with bank secrecy laws. *Id.*

[48] 628 F.2d at 1372. This was just one of several steps necessary to comply with the voluntary disclosure plan. The main steps were: (1) A thorough investigation of the corporation by an independent corporate committee; (2) Disclosure of the results to the board of directors; (3) Disclosure of the results to the SEC on Form 8-K; and (4) The issuance of a policy statement prohibiting improper practices in the future. *Id.* at 1371.

[49] *Id.* at 1372. Public disclosure might occur pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976). The Privacy Act, 5 U.S.C. § 552a (1976), offered Dresser no protection since it was a corporation. The Act only protects "individuals" who are defined as "citizen[s] of the United States or . . . alien[s] lawfully admitted for permanent residence." *Id.* § 552a(a)(2). The government has explicitly stated that business associations are not protected. Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. No. 132, 28951 (July 9, 1975). *See* OKC v. Williams, 461 F. Supp. 540, 550 (1978).

[50] 628 F.2d at 1372.

> Where . . . it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission, which may then order a formal investigation or examination if it is deemed necessary.

Informal and Other Procedures, 17 C.F.R. § 202.5(a) (1980).

task force on illegal transnational payments[51] requested access to SEC files on hundreds of corporations. These files were transferred, including a file on Dresser containing the Forms 8-K. The Justice Department subsequently presented the Dresser case to a District of Columbia Grand Jury.

Dresser filed suit claiming that the transfer of its file to the Department of Justice was the equivalent of a recommendation for criminal prosecution,[52] and that *LaSalle* prohibited post-referral use of subpoenas.[53] The SEC, however, distinguished *LaSalle* in several respects.[54] It denied that the transfer of the Dresser file was the equivalent of a recommendation for criminal prosecution. Furthermore, the SEC argued that even if *LaSalle* applied, the prophylactic rule should come into effect only upon a formal criminal recommendation.[55] The agency also claimed that contrary to section 7602 of the Internal Revenue Code, there was a clear legislative intent to

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[51] 628 F.2d at 1372. This task force was organized in May 1976, and utilized two SEC attorneys to investigate criminal violations of the security laws as well as other United States laws. Brief of Repondent-Appellant at 5, SEC v. Dresser Indus., Inc., No. 78-1702 (D.C. Cir. 1979) (panel opinion).

[52] 628 F.2d at 1373. The SEC derives authority to transmit information to the Justice Department from the Securities Act of 1933, U.S.C. § 77t(b) (1976), and the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). Unlike IRS procedure, there are two types of SEC criminal recommendation procedures: informal and formal. The informal method is utilized primarily when a United States Attorney requests files in a particular case. The request is reviewed by the Director of the Division of Enforcement and the General Counsel. It is then referred to the Commission usually with a recommendation that the files be transferred. When the file is eventually transferred, the SEC makes no recommendation as to whether any action should be taken by the Justice Department. SEC Amicus Curiae Brief, United States v. Fields, 592 F.2d 638 (2d Cir. 1979) (included in Appendix to Reply Brief of Respondent-Appellant at A7-A9, SEC v. Dresser Indus., Inc., No. 78-1702 (D.C. Cir. 1979) (panel opinion)).

In a formal criminal recommendation, the Commission staff prepares a written report. This report contains "a detailed statement of the information developed during the course of the Commission's investigation keyed to the available evidence, an analysis of applicable law, an analysis of the strengths and weaknesses of the case, and recommendations as to who should be prosecuted and for what offenses." *Id.* at A-8. The Commission then decides whether to refer the report along with any evidence and its recommendations to the Department of Justice. *Id.*

The informal procedure has been criticized because United States Attorneys often have little experience in securities law. It has been argued that the informal procedure, whereby the SEC does not make a determination of whether there has been criminal conduct, "can result in criminal prosecutions which are not part of any rational or structured enforcement policy." Kronstein, *SEC Practice: The Shadow of Criminal Prosecution over SEC Investigations*, 8 SEC. REG. L.J. 145, 147 (1980). The informal procedure was approved, however, in United States v. Fields, 592 F.2d 638, 646 (2d Cir.), *cert. denied*, 422 U.S. 917 (1979). *See* Mathews, *Criminal Prosecutions under the Federal Security Laws and Related Statutes: The Nature and Development of SEC Criminal Cases*, 39 GEO. WASH. L. REV. 902, 916 (1971), for an explanation of the factors considered in bringing criminal charges against a defendant.

[53] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 8-9 (D.C. Cir. 1979) (panel opinion).

[54] *Id.* at 11.

[55] *Id. See* note 87 *infra.*

"expand the Justice Department's access to information and to encourage cooperation between the SEC and the Justice Department in investigating illegal corporate payments."[56] Lastly, the SEC argued that a securities investigation, unlike a civil tax investigation, was independent of the Justice Department's control.[57]

After analyzing the tax cases, the court, in a panel opinion, concluded that the *LaSalle* rule was inapplicable to SEC subpoenas. The panel reasoned that the relationship between the Department of Justice and the SEC was not "inherently intertwined" as was the

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[56] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 11 (D.C. Cir. 1979) (panel opinion). This intent can be gleaned from the Senate Report to the Foreign Corrupt Practices Act.

> The SEC has thus developed considerable expertise in investigation [*sic*] corrupt overseas payments. This same expertise can be put to work in investigating potential violations of the anti-bribery provisions of this legislation. If this investigative responsibility were to be assigned solely to the Justice Department, as some have advocated, that agency would have to duplicate the investigative capability already in the SEC at a greater cost to the Government.
>
> It should be emphasized that while the SEC investigates potential violations of the securities laws, the only remedy it can bring on its own is an injunctive action. When the SEC believes it has compiled enough evidence for a criminal action, it refers the case to the Justice Department for criminal prosecution. This same division of responsibility would also apply with respect to the antibribery provisions of this legislation.
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> . . . .
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> The committee expects that close cooperation will develop between the SEC and the Justice Department at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale.

S. REP. No. 114, 95th Cong., 1st Sess. 11-12, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4109. *See also* 17 C.F.R. § 241.17099 IV (1980).

[57] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 11 (D.C. Cir. 1979) (panel opinion). The SEC has authority to settle civil suits even after a formal recommendation is made to the Justice Department. *See* 17 C.F.R. § 202.5(f) (1980). The Commission, however, cannot affect any criminal proceedings with its settlement of the civil suit. *Id.*

Dresser argued that the presence of two SEC attorneys on the Justice Department Task Force precluded independent investigations, Answering Brief of the SEC, Appellee at 30, SEC v. Dresser Indus., Inc., No. 78-1702 (D.C. Cir. 1979) (panel opinion), but the district court found no impropriety since these attorneys had not worked on the Dresser investigation while with the SEC. *Id. See* United States v. Wencke, 604 F.2d 607, 611 (9th Cir. 1979) (holding that presence of appointed special assistant United States Attorney in grand jury proceedings did not require disqualification on grounds that he had been involved in civil suit against defendant); United States v. Dondich, 460 F. Supp. 849, 853 (N.D. Cal. 1978) (in view of factual circumstances, it was proper for SEC attorney who had conducted civil investigation of defendant to participate in grand jury proceedings against him). *But cf.* General Motors Corp. v. United States, 573 F.2d 936, 934-44 (6th Cir. 1978), *cert. denied*, 440 U.S. 934 (1979) (holding that presence of IRS attorney who participated in civil investigation of defendant was improper). *See* Mathews, *supra* note 52, at 920, and Comment, *supra* note 31, at 634-35, for brief discussions of the changing attitudes with respect to the propriety of having SEC and IRS attorneys participate in grand jury proceedings.

relationship between the Department of Justice and the IRS.[58] More importantly, the court examined the national interests to be protected. It recognized that unlike a tax investigation where the sole object is to recover money owed the government, violations of the securities laws must be quickly remedied so as not to cause substantial harm to the public.[59]

Although the court agreed that *LaSalle* was inapposite, it rejected the government's argument that Congress intended the Justice Department to have unlimited access to the product of the SEC's civil discovery.[60] It therefore modified[61] the subpoena order to prevent the SEC from transferring any documents to the Department of Justice. Such a modification was intended to ensure that the criminal and

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[58] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 17 (D.C. Cir. 1979) (panel opinion). The court based this conclusion on two factors. First, it noted that the IRS and SEC provisions pertaining to settlements are different. *See* note 57 *supra*. Second, it relied on the Senate Report to the Foreign Corrupt Practices Act which stated that " '[t]he arrangements which the committee expects the SEC and Justice to work out on criminal matters is [*sic*] in no way intended to cast doubt upon the authority of the SEC to prosecute and defend its own civil litigation.' " No. 78-1702, slip op. at 18 n.38 (quoting S. REP. No. 114, 95th Cong., 1st Sess. 12, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4109).

[59] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 17-18 (D.C. Cir. 1979) (panel opinion). That substantial harm would result is obvious. One need only examine the harm resulting from rule 10b-5 violations to appreciate this.

[60] *Id.* at 18. The government based its argument on passages from the Senate Report to the Foreign Corrupt Practices Act. *See* note 56 *supra*. Judge Bazelon, however, interpreted this report as indicating that the status quo should be preserved. "[T]he legislative history stresses that the Act was meant to preserve the independence and separation of the two agencies, and to maintain the traditional relationship between civil and criminal investigations." SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 20 (D.C. Cir. 1979) (panel opinion).

[61] SEC v. Dresser Indus., Inc., No. 78-1702, slip op. at 28 (D.C. Cir. 1979) (panel opinion). Such a modification was not without precedent. In SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978), the SEC brought an action against Judson Streicher charging him with violations of the Securities Exchange Act of 1934. Shortly after the civil suit began, the United States Attorney began an investigation into criminal violations of the same act. Grand jury subpoenas were issued for Streicher's records. The agency wanted to take the deposition of Streicher, but he moved for a protective order which the Commission granted until termination of the parallel criminal proceeding. *Id.* at 684. The district court vacated the protective order for two reasons. First, it concluded that Streicher's fifth amendment rights would not be violated if discovery were granted. *Id.* at 685-86. Second, the court found that the conduct of the Commission did not justify a protective order. The court stated that a protective order should be granted only where the degree of cooperation between the SEC and the Justice Department is unusually prejudicial. In an effort to eliminate any taint of unfairness, however, the court ordered the Commission to withhold any information gathered in the course of discovery. *Id.* at 687.

In one sense, this middle ground approach aided the defendant because he did not have to invoke his fifth amendment privilege in order to avoid prejudice in the criminal suit. Where the fifth amendment privilege is invoked in a civil suit, the court is allowed to draw an adverse inference. SEC v. Vesco, [1973] FED. SEC. L. REP. (CCH) ¶ 93,777, at 93,386 (S.D.N.Y. 1973). On the other hand, had the court denied enforcement, the defendant would not have been prejudiced in the criminal suit. In addition, progress in the civil suit would have been hampered.

civil enforcement proceedings would be kept separate, and that the criminal discovery and grand jury processes would thus be safeguarded.[62] A dissenting opinion characterized the panel's action as judicial legislation.[63] The dissent found no valid reason to restrict the flow of information from the SEC to the Justice Department and stated that such a restriction was contrary to legislative intent.[64]

Both the SEC and Dresser applied for a rehearing which was granted.[65] The court, sitting *en banc*, first examined parallel proceedings in general and established as its underlying premise that "the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings."[66] The court quoted *United States v. Kordel*,[67] the principal Supreme Court case dealing with parallel proceedings, wherein the Supreme Court stated that "it would stultify enforcement of federal law to require a governmental agency . . . to invariably . . . choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil

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Another innovative method of protecting a defendant is for the court to grant use immunity for any statements made at the deposition. In *Vesco*, the court refused to allow discovery unless use immunity was granted to the defendant. *Id.* at 93,389-90. The SEC petitioned for a writ of mandamus directing the trial judge to vacate the order. In SEC v. Stewart, 476 F.2d 755, 759 (2d Cir. 1973), a majority of the court of appeals concluded that mandamus was not warranted in such a case, and did not reach the merits. Judge Mulligan, concurring, went further and explained that it was error to condition discovery upon a grant of immunity. *Id.* at 759 (Mulligan, J., concurring). According to 18 U.S.C. §§ 6001-6005 (1976), certain procedures must be followed in order to gain immunity. Immunity must be requested by the United States Attorney, and cannot be initiated by the court. 476 F.2d at 759 (Mulligan, J., concurring). Furthermore, the witness must specifically claim immunity. *Id.* at 759 (citing H.R. REP. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4005, 4008). Judge Timber, dissenting, stated that he would have granted mandamus, and expressed fear that the SEC enforcement powers were being impaired. 476 F.2d at 766 (Timber, J., dissenting).

[62] SEC v. Dresser Indus., No. 78-1702, slip op. at 22-23 (D.C. Cir. 1979) (panel opinion).

[63] *Id.*, dissenting slip op. at 2 (Robb, J., dissenting).

[64] *Id.* at 1 (Robb, J., dissenting). Judge Robb found the court's order to be directly contrary to 15 U.S.C. § 78(u)(d) (1976), which directs that any evidence obtained may be transmitted to the Justice Department.

[65] The SEC saw the decision as a threat to its enforcement powers. Dresser objected to the fact that the *LaSalle* rule had not been followed.

[66] 628 F.2d at 1375.

[67] 397 U.S. 1 (1970). Scarcely a case dealing with parallel proceedings can be found which does not cite *Kordel* for the proposition that the government may institute concurrent civil and criminal proceedings. *E.g.*, Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1970) (relied on *Kordel* to deny stay of civil proceedings where defendant was under indictment); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978) (concurrent civil and criminal prosecutions allowed, but defendant may show that civil procedure was not used in good faith); SEC v. United Brands Co., [1975] FED. SEC. L. REP. (CCH) ¶ 95,357, at 98,775 (S.D.N.Y. 1975) (federal government may pursue parallel civil and criminal suits).

proceedings pending the ultimate outcome of a criminal trial."[68] The *en banc* court did not kill all hope of ever having a subpoena quashed, however, since it did state that parallel proceedings might be blocked where there are special circumstances in which the defendant's rights might be substantially prejudiced.[69] It viewed the case at bar as a weak one for staying the investigation because "no indictment had been returned; no Fifth Amendment privilege was threatened; [Fed. R. Crim. P.16(b)] had not come into effect; and the SEC subpoena did not require Dresser to reveal the basis for its defense."[70]

Having decided what the outcome would be under general principles of parallel proceedings, the court turned to consider whether these general principles were modified by *LaSalle*. After scrutinizing both the IRS and SEC statutory schemes, the court concluded that there were substantial differences which warranted the imposition of

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[68] 397 U.S. at 11-12. The Court stated, however, that:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

*Id.* From this passage it is evident that although *Kordel* sets up a basic principle with respect to parallel proceedings, it does not give much guidance in the majority of cases. For example, it does not cover situations such as those in United States v. Rand, 308 F. Supp. 1231 (N.D. Ohio 1970) and United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965). In *Parrott*, the SEC failed to advise the defendant that a criminal referral to the Justice Department had been made before requiring him to testify in response to a subpoena. The case had been dormant in the Justice Department office for approximately one year. *Id.* at 198. The court held that the Commission could not bring a parallel civil proceeding in order to obtain evidence for a subsequent criminal prosecution. *Id.* at 202. Because the defendant was not warned of the criminal prosecution, he could very well have incriminated himself. *Id.* at 201. The court based its decision to dismiss the indictment on the fact that there was pre-indictment delay which violated the defendant's sixth amendment right to a speedy trial. *Accord*, United States v. Fields, 592 F.2d at 638, 647 (2d Cir.), *cert. denied*, 442 U.S. 917 (1979) (held improper for SEC to hide criminal recommendation from defendant, although misconduct was held not to require drastic remedy of dismissal of indictment).

In *Rand*, the FDA used the civil proceeding to obtain evidence for the criminal action. The evidence obtained was irrelevant to the civil proceeding, and the defendant had not been warned of the criminal prosecution. 308 F. Supp. at 234. Thus, the court dismissed the indictment. *Id.* at 238. For a detailed discussion of self-incrimination problems, see Mathews, *supra* note 52, at 922-34.

[69] 628 F.2d at 1377.

> Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party *under indictment* for a serious offense is required to defend a civil or administrative action involving the same matter.

*Id.* at 1375-76 (emphasis added).

[70] 628 F.2d at 1376.

two different rules.[71] Once the IRS makes a criminal recommendation to the Justice Department, for all "practical" purposes its authority ceases.[72] Under the security laws, however, the SEC retains full power over investigations and enforcement actions[73] even after a criminal investigation by the Justice Department has begun. The court found that the investigative provisions of the Securities Acts were far broader than those provided in section 7602 of the Internal Revenue Code as interpreted in *LaSalle*.[74] Moreover, in order to protect the public, the SEC must be able to respond rapidly to suspected violations of the securities laws. Reasoning that "the validity of summonses or subpoenas 'depends ultimately on whether they were among those authorized by Congress,' "[75] the court concluded that the subpoena was enforceable.[76]

Once the statutory argument was lost, Dresser attempted to invoke the policy interests put forth in *LaSalle*. The court, however, explained that it was not necessary to examine these policy interests in the SEC context.[77] The *LaSalle* Court only directed its attention to these policy interests after it had determined that the IRS had no "practical authorized purpose" for continuing a civil investigation once a referral had been made. The policy interests were invoked only in order to explain why a proplylactic rule prohibiting the use of a

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[71] *Id.* at 1378-80.

[72] *Compare* note 39 *supra* and accompanying text *with* note 45 *supra* and accompanying text.

[73] "The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person had violated, is violating, or is about to violate any provision of this [Act]." 15 U.S.C. § 78u(a) (1976). Clearly there is no limitation which would restrict the agency's authority to investigate once a criminal recommendation was made.

[74] IRS summonses are limited to four civil purposes. *See* note 10 *supra*. The SEC can investigate any violations of the Securities Acts. SEC v. Blackfoot Bituminous Inc., [1980] FED. SEC. L. REP. (CCH) 97,532, at 97,773 (10th Cir. 1980); SEC v. Arthur Young & Co., 584 F.2d 1018, 1022-24 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). *See* note 50 *supra*.

[75] 628 F.2d at 1380 (quoting *LaSalle*, 437 U.S. at 307). The SEC's subpoena power derives from the Securities Act of 1933, 15 U.S.C. § 77s(b) (1976), and the Securities Exchange Act of 1934, 15 U.S.C. § 78u(b) (1976).

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this [Act], any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any territory at any designated place of hearing.

*Id.* § 77s(b).

[76] 628 F.2d at 1380.

[77] *Id.*

summons after referral was warranted.[78] Since the SEC had "legitimate investigative authority"[79] to conduct investigations after referral,[80] these policy interests did not come into play. Furthermore, the court determined that the policy interests of *LaSalle* were not even applicable in the instant case.[81]

Dresser agreed that the first policy consideration espoused in *LaSalle*, namely that the Justice Department's right to criminal discovery should not be broadened, was inapplicable.[82] Dresser argued, however, that the subpoena should not be enforced in order to avoid infringement upon the role of the grand jury. This infringement was likely to occur in two respects. Dresser contended that the secrecy provisions of the grand jury would be violated, and that the SEC could exert influence by selecting which documents to send to the grand jury.[83] The court responded to these arguments by stating that the secrecy provisions only apply to matters occurring before the

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[78] *Id.*

[79] *Id.* at 1280-81.

[80] *See* note 74 *supra*.

[81] 628 F.2d at 1381.

[82] *Id.*

[83] *Id.* at 1382-83. The traditional rule of grand jury secrecy has been codified, and states:

> (2) General Rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule.

FED. R. CRIM. P. 6(e)(2). The traditional rationales for this rule are the following:

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

United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954). *See* Pittsburgh Plateglass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting); United States v. Malatesta, 583 F.2d 748, 752 (5th Cir. 1978), *rehearing*, 590 F.2d 1379 (5th Cir. 1979) (en banc), *cert. denied*, 440 U.S. 962 (1979).

It should be noted that under FED. R. CRIM. P. 6(e)(2)(A)(i) any information obtained by the grand jury is obtainable by a government attorney in order to enforce federal criminal law. An SEC attorney is not a "government attorney." *See In re* Grand Jury Proceeding, 309 F.2d 440, 443 (3d Cir. 1962). Under FED. R. CRIM. P. 6(e)(3)(A)(ii), however, disclosure may be made to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." An SEC attorney is included in "government personnel." *In Re* Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978).

grand jury,[84] and that the second argument was purely speculative. In any case, in order to avoid giving the grand jury a distorted picture, Dresser could have supplied it with all the documents.[85]

Finally, the court turned to the modification of the subpoena order which was made by a panel of the court. The court discussed several reasons why this modification was improper.[86] First, neither the SEC nor Dresser requested such an order. Second, the relevant statutes and legislative history all indicated that Congress intended the SEC to be able to transmit information to the Justice Department.[87] Third, there was little or no precedent for such an order.[88] Lastly, such a modification served no compelling purpose and would only interfere with enforcement of the securities laws.[89]

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[84] "[When] testimony or data is sought for its own sake-for its intrinsic value in the furtherance of a lawful investigation-rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been or were presently being, examined by a grand jury."

*Dresser*, 628 F.2d at 1382 (quoting United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960)). *See* United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). The court noted that the documents in question were created by the Dresser Corporation and that their production would not reveal what occurred before the grand jury. 628 F.2d at 1383.

[85] 628 F.2d at 32.

[86] *Id.* at 1384.

[87] *Id.* at 1385. The SEC has specific statutory authority to transmit evidence to the Attorney General who may, at his discretion, institute criminal proceedings. *See* note 51 *supra*. The legislative history of the Foreign Corrupt Practices Act, *see* note 56 *supra*, also indicates that the SEC is authorized to transmit information to the Justice Department. Were it not able to do so, it would make no sense to have the SEC investigate corporate bribery since the Act makes it a crime to make foreign bribes, and the SEC cannot conduct its own prosecutions. Responsibility for criminal prosecutions rests with the Department of Justice. 28 U.S.C. § 547(1) (1976).

[88] 628 F.2d at 1386. The court was aware of SEC v. Gilbert, 79 F.R.D. 683 (S.D.N.Y. 1978). *See* note 61 *supra*. It correctly pointed out, however, that *Gilbert* did not cite any precedent for its order, and gave no reason for it other than that the court should prevent the possibility of abuse. *Cf.* Gellis v. Casey, 338 F. Supp. 651, 653 (S.D.N.Y. 1972) (holding that mere possibility of criminal proceedings was not sufficient cause to stay civil administrative proceeding).

[89] 628 F.2d 1387. Dresser unsuccessfully argued that enforcement of the security laws would not be impaired if discovery were stayed as in *LaSalle*. Petition for Rehearing en banc at 8, SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980) (en banc). It correctly interpreted the *LaSalle* decision as only limiting discovery by the IRS, and not the pursuit of civil remedies. *See LaSalle*, 437 U.S. at 318. Because of this, Dresser reasoned that the SEC would still be able to obtain injunctive relief under the Securities Act of 1933, 15 U.S.C. § 77t(b) (1976), and the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d) (1976). The SEC would supposedly already have been able to obtain the information necessary to proceed. Any additional information could be obtained through an exception to the grand jury secrecy rule, FED. R. CRIM. P. 6(e)(3)(C)(i). Dresser should not have been penalized because the SEC transmitted information before it had gathered sufficient evidence to seek a remedy other than enforcement.

The *Dresser* court was primarily concerned with whether the criminal recommendation part of the *LaSalle* test was applicable to the SEC. In *SEC v. OKC Corp.*,[90] the district court for the southern district of Texas dealt with the *LaSalle* test in toto. On March 27, 1978, the SEC began a civil investigation of OKC Corporation in order to determine whether certain persons were violating or about to violate sections 10(b) and 13(a) of the Securities Exchange Act of 1934.[91] During the course of this investigation the SEC issued a subpoena to OKC. The corporation failed to comply with the subpoena, and the agency filed an enforcement action. OKC attacked the subpoena by asserting, among other things, that a criminal

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This argument is subject to several objections. First, the SEC should be encouraged to make early referrals to the Justice Department so that the criminal case can be properly prepared without incurring any statute of limitations problems. United States v. Fields, 592 F.2d 638, 646 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). *See* Senate Report, *supra* note 56. This is consistent with the defendant's right to a speedy trial. " '[T]he constitutional guarantee protects against undue delays in presenting a formal charge as well as delays between indictment and trial.' " United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) (quoting Mann v. United States, 304 F.2d 394, 396-97 n.4 (D.C. Cir.), *cert. denied*, 371 U.S. 896 (1962)).

Second, the SEC might not have been able to obtain additional information from the grand jury. FED. R. CRIM. P. 6(e)(3)(C)(i) provides that disclosures may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding." In enacting rule 6(e) there was "no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes." S. REP. No. 95-354, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532. Whether disclosure would be made to the SEC in a civil investigation is open to argument since it is not clear whether such an investigation is "preliminary to or in connection with a judicial proceeding." ED. R. CRIM. P. 6(e)(3)(C)(i). *Compare In re* Grand Jury Proceedings, 309 F.2d 440, 443-44 (3d Cir. 1962) (disclosure denied to SEC since no judicial proceeding in progress, and investigation may never result in judicial proceeding) *and In re* Proceedings before Grand Jury for District of Nevada, 487 F. Supp. 1098, 1101-02 (D. Nev. 1980) (testimony not disclosed, since Gaming Control Commission investigation not judicial proceeding) *with* SEC v. Everest Management Corp., [1980] 560 SEC. REG. & L. REP. (BNA) A-1 (S.D.N.Y. 1980) (SEC granted access to original grand jury documents in order to save costly and time consuming discovery by the SEC) *and* United States v. Saks & Co., 426 F. Supp. 812, 815 (S.D.N.Y. 1978) (testimony revealed to FTC for use in investigation).

The Supreme Court has adopted a fairly liberal standard with respect to granting disclosure of grand jury testimony. Although a "particular need" must still be shown, it is much easier to meet this test than it had been traditionally. Such a grant is still completely discretionary with the court. *See* Dennis v. United States, 384 U.S. 855, 868-75 (1966). Courts are also more likely to grant disclosure once grand jury proceedings are terminated. *See* United States v. Northside Realty Assoc., 613 F.2d 501, 506 (5th Cir. 1980); Wisconsin v. Schaffer, 565 F.2d 961, 967 (7th Cir. 1977); Beatrice Foods Co. v. United States, 312 F.2d 29, 38 (8th Cir.), *cert. denied*, 373 U.S. 904 (1963).

An alternative method of obtaining grand jury testimony is to have an agency attorney appointed Special Attorney. *E.g.*, *In re* Perlin, 589 F.2d 260 (7th Cir. 1978). *See* note 57 *supra*.

[90] 474 F. Supp. 1031, 1037 (N.D. Tex. 1979).

[91] *Id.* at 1033-34.

recommendation by the Department of Energy to the Justice Department precluded further SEC investigation.[92]

OKC based its argument on the Supreme Court decisions in *Donaldson* and *LaSalle*. The court, however, pointed out that these cases contemplated recommendations by the agency issuing the subpoena.[93] Where a different agency makes a recommendation based on similar facts and alleging violation of a completely different statute, the policy reasons identified in *LaSalle* for not enforcing the subpoena do not come into play.[94] The court stated that these interests become operative only if the non-referring agency actively assists the Department of Justice. After concluding that cooperation between the Justice Department and the non-referring agency was neither inevitable nor expected, the court stated that it was "unwilling to hold as a matter of law that a non-referring agency's investigation, commenced independently of a criminal investigation referred by a difference agency, must cease simply because of the pendency of the independent criminal investigation."[95]

Judge Higginbotham advocated instead a good faith analysis—one which "looks to the circumstances of the particular investigation."[96] The court must examine the non-referring agency's role in the criminal prosecution and decide whether the investigation was carried out in good faith, or whether the agency issued the subpoena for the sole purpose of obtaining evidence for criminal prosecution. This good faith inquiry must look to the actions and intent of the agency as an institution and not to the intent of any particular

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[92] *Id.* at 1034. OKC Corp. also argued that the subpoena was unenforceable because of the attorney-client privilege. This claim was found to be without merit. *Id.* at 1040.

General rules pertaining to the attorney-client privilege apply in the corporate context. "There must be an attorney-client relationship and any communication to the attorney must be made in confidence, in the attorney's professional capacity, for the purpose of obtaining legal advice or legal assistance." J. GRUFF, *supra* note 3, § 20.04, at 20-35. The corporate context presents some special problems. One such problem involves the scope of the privilege. Recently, in Upjohn Co. v. United States, 101 S. Ct. 677 (1981), the Court rejected the "control group" test which protected only communications "to those officers who play a 'substantial role' in deciding and directing a corporation's legal response." *Id.* at 684. Justice Rehnquist perceived two problems with such a test. First, he found that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 683. Second, he noted that there is no universal definition of the term "control group." *Id.* at 684. Although the Court rejected this test, it declined to devise a broad rule to protect corporate communications, preferring instead to proceed on a case by case basis. *Id.* at 686.

[93] 474 F. Supp. at 1037.

[94] *Id.* at 1038.

[95] *Id.*

[96] *Id.*

agent.[97] Since the SEC investigation began long before the referral by the Department of Energy, and the SEC stated a valid civil purpose for the subpoena, the *OKC Corp.* court concluded that the SEC was acting in good faith,[98] and that the subpoena should be enforced.

## AN EVALUATION

An examination of *LaSalle* and the SEC cases dealing with the *LaSalle* rule reveals several disturbing problems. The *LaSalle* Court clearly was misguided with respect to its reliance upon criminal recommendation as the cut-off point for the imposition of a prophylactic rule. Modern provisions governing criminal discovery are much more restrictive than those dealing with civil discovery.[99] Nonetheless, the Court's fear that criminal discovery would be expanded beyond permissible bounds were the subpoena enforced was unfounded because the Federal Rules of Criminal Procedure are not applicable until after the defendant is indicted.[100]

An IRS summons should be enforced at least until indictment. Once an indictment is returned, there is the very real danger that criminal discovery will be expanded as a result of the IRS statutory scheme, which contemplates cooperation with the Justice Department.[101] Such an expansion is improper because the defendant's fourth and fifth amendment[102] rights, which are the traditional

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[97] *Id.*

[98] *Id.* at 1039.

[99] *See* Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769, 780 (1978). Criminal discovery was traditionally limited so as to avoid any possible infringement upon the defendant's fourth and fifth amendment rights. *Id.* at 774. Although the Federal Rules of Criminal Procedure expanded the availability of discovery somewhat, this basic rationale still holds true today. *Id.*

[100] *Dresser*, 628 F.2d at 1381; Comment, *supra* note 31, at 643; *Developments*, *supra* note 6, at 1320, 1335.

[101] *See* notes 40-41 *supra*. Judge Edwards, in a concurring opinion in *Dresser*, seemed to indicate that upon indictment of the defendant there might be reason to refuse enforcement of the subpoena. "Once an indictment has issued, the policy interest expressed in United States v. LaSalle Nat'l Bank, 437 U.S. 298, 312 (1978), concerning the impermissibility of broadening the scope of criminal discovery through the summons authority of an agency, may come into play." *Dresser*, 628 F.2d at 1391 (Edwards, J., concurring).

[102] The fifth amendment right against self-incrimination is a personal one and cannot be invoked by "artificial organizations." United States v. White, 322 U.S. 694, 698 (1944). Such an organization has been defined as:

> an oganization which is recognized as an independent entity apart from its individual members. The group must be relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access of them.

reasons for limiting criminal discovery, may be vitiated. This unilateral expansion of criminal discovery may well render the criminal trial unfair, resulting in a denial of due process.[103] Furthermore, some courts have held that such an expansion violates the integrity of the criminal process, and that public policy demands an end to such abuses.[104] Therefore, in order to protect the defendant's constitutional rights, an IRS summons should not be enforced after indictment.[105]

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Bellis v. United States, 417 U.S. 85, 92-93 (1974). Corporations are included in such a definition. With respect to corporate records, an individual acting in his official capacity may not assert his personal privilege. Were it otherwise, the rule that a corporation cannot claim privilege would be undermined. *Id.* at 90. The distinction between private and business papers is thus a critical one, and the term private papers is narrowly construed by the courts.

Although the officer of a corporation cannot assert the privilege on behalf of the corporation, he may assert it if he would be personally incriminated. *Kordel*, 397 U.S. at 7. Where no one is able to answer the subpoena without self-incrimination, the *Kordel* Court stated that the appropriate remedy would be for the court to grant "a protective order . . . postponing civil discovery until termination of the criminal action." *Id.* at 9. *See* SEC v. Vesco, [1973] FED. SEC. REG. L. REP. (CCH) P 93,777, at 93,389 (S.D.N.Y. 1973) (defendants could not respond to interrogatories without risk of self-incrimination, therefore court stayed discovery unless immunity granted).

Even when the privilege is applicable, the fifth amendment is not violated absent an element of compulsion. In Fisher v. United States, 425 U.S. 391, 397 (1976), and Couch v. United States, 409 U.S. 322, 329 (1973), the Court held that a summons directed to a third party did not violate the taxpayer's fifth amendment rights since the taxpayer was not compelled to do anything. For an interesting discussion of the compulsion requirement of the fifth amendment, see Andresen v. Maryland, 427 U.S. 463, 470-77 (1976), where the Court discussed the interaction between the fourth and fifth amendments with respect to the seizure of business records.

Courts have generally followed *Kordel* in holding that forcing the defendant to choose between testifying or asserting the fifth amendment does not violate due process. *E.g.*, SEC v. United Brands Co., [1975] FED. SEC. L. REP. (CCH) ¶ 95,357, at 98,776 (S.D.N.Y. 1975); Gellis v. Casey, 338 F. Supp. 651, 653 (S.D.N.Y. 1972). *But cf.* SEC v. Vesco, [1973] FED. SEC. L. REP. (CCH) ¶ 93,777, at 93,387 (defendant would suffer grave, irreparable civil and criminal consequences if forced to choose between testifying or invoking fifth amendment).

[103] Due process precludes even the "probability of unfairness" in a criminal trial. *In re* Murchison, 349 U.S. 133, 136 (1955). Courts have generally recognized this standard. *See, e.g.*, United States v. Parrott, 248 F. Supp. 196, 200 (D.D.C. 1965). *But cf. Kordel*, 397 U.S. at 11 (government use of evidence obtained in civil proceeding not violative of due process); United States v. Simon, 373 F.2d 649, 652 (2d Cir.), *vacated as moot sub nom.* Simon v. Wharton, 389 U.S. 425 (1967) (fact that information becomes available to prosecution is merely "natural by-product" of judicial proceeding, not discovery initiated by government). For a discussion of the expansion of criminal discovery as a violation of due process, see Comment, *supra* note 99, at 784-87.

[104] *E.g.*, Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

[105] The rights of the parties should be fixed as of the time of the hearing, not when the summons is issued. *Developments*, *supra* note 6, at 1328 & n.104. *Contra*, United States v. Weingarden, 473 F.2d 454, 461 (6th Cir. 1973); United States v. Held, 435 F.2d 1361, 1364 (6th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); United States v. Giordano, 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970).

The second policy consideration invoked by the Court was infringement upon the role of the grand jury. Issuance of an agency subpoena, however, does not infringe upon the grand jury's role, which is to investigate and prosecute suspected criminal violations of law.[106] There is nothing in the Constitution to the effect that the grand jury is the sole body authorized to investigate criminally. The fifth amendment merely states that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."[107] Enforcement of an agency subpoena should not be denied in an attempt to "keep things separate out of a sense of judicial propriety or concern for appearances."[108]

In addition, the scope of a grand jury subpoena is at least as broad as that of an administrative agency subpoena.[109] This being the case, the defendant has nothing to complain about, since one way or another, the government could have obtained the documents.[110] The only objection which could be raised is that the grand jury, because it is completely disinterested, might be less inclined to use the subpoena as a means of harassment. It has been suggested, however, that this danger should be dealt with as an independent ground for denying enforcement.[111] This suggestion appears valid since the issue of harassment is related to the good faith of the agency.[112] It is only natural, then, that harassment be dealt with under that doctrine.

Although the *LaSalle* rule is not required as a matter of strict legal analysis, some justification for the rule has been advanced. The rule has been viewed as allowing the defendant a period of grace between the criminal referral and the indictment, during which there is an opportunity to challenge the summons.[113] Such a grace period is unwarranted, however, since even if the summons were issued immediately before indictment the defendant would have an opportunity to

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[106] Beavers v. Henkel, 194 U.S. 73, 84 (1904).

[107] U.S. Const. amend. V.

[108] *Developments, supra* note 6, at 1326.

[109] *Developments, supra* note 6, at 1312. *See* United States v. Cortese, 540 F.2d 640, 641 (3d Cir. 1976); United States v. Matra, 487 F.2d 1271, 1274 (8th Cir. 1973). "While agency summonses may be roughly as broad as grand jury subpoenas in terms of jurisdiction and relevance, summonses are subject to more restrictive procedural limitations." *Developments, supra* note 6, at 1312. *See* United States v. Calandra, 414 U.S. 338, 343-44 (1974). For a discussion of the stricter procedural requirements of administrative subpoenas, see Comment, *supra* note 31, at 642-43 n.121; *Developments, supra* note 6, at 1312-13.

[110] *See* note 57 *supra*.

[111] *Developments, supra* note 6, at 1326-27.

[112] Where a subpoena is issued in order to harass, it clearly fails the good faith test of *Powell*, which requires the subpoena to have been issued for a legitimate purpose. *See* note 32 *supra*.

[113] *Developments, supra* note 6, at 1328.

challenge its validity. The defendant could refuse to comply with the summons and the agency would be forced to apply to the district court for enforcement[114] at which time the defendant could object.[115] A temporary stay could be granted[116] if an appeal were necessary.[117] Another commentator has argued that removing the recommendation limitation would allow the agency to "wield an unrestrained summons power, conditioned only upon proof of a good faith issuance."[118] It may well be that the IRS has a great deal of power. Still,

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[114] The district court has the power to order compliance with SEC subpoenas. Securities Act of 1933, U.S.C. § 77t(c) (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78u(e) (1976). The defendant also has another alternative. He may move to quash at the agency level. Reisman v. Caplin, 375 U.S. 440, 445 (1963).

> Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 5 days after the date of service of such subpoena, apply to the hearing officer, or if he is unavailable, to the Commission, to quash or modify such subpoena, accompanying such application with a brief statement of the reasons therefore.

17 C.F.R. § 201.14(b)(2) (1980). If the motion is denied, review may be had.

> In any proceeding in which an initial decision is made by a hearing officer, any party to the proceeding, and any person who would have been entitled to judicial review of the final order entered in the proceeding if the Commission itself had made the initial decision, may file a petition for Commission review of the initial decision.

*Id.* § 201.17(a). If the Commission does not rule in the defendant's favor, he may refuse to comply, and the Commission will be forced to seek enforcement in the federal courts. It should be noted that the agency must bring the controversy before the court in an enforcement proceeding. Reisman v. Caplin, 375 U.S. at 446. *See* Anheuser-Busch, Inc. v. FTC, 359 F.2d 487, 490 (8th Cir. 1966). The courts will not entertain a subpoenaed party's motion to quash. 375 U.S. at 446. Furthermore, although the Securities Acts provide for contempt penalties, *e.g.* Securities Act of 1933, 15 U.S.C. § 77v(b) (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78u(c) (1976), the Supreme Court has held that a similar statute "on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witness 'neglects' either to appear or to produce." 375 U.S. at 447. Where the defendant fails to comply with a court order, however, a separate proceeding may be instituted to cite the party for civil contempt. J. GRUFF, *supra* note 3, § 21.02(1), at 21-10.

[115] According to Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943), no substantive defenses may be raised at an enforcement proceeding. "If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed." Interstate Commerce Commission v. Gould, 629 F.2d 847, 852 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 856 (1981). *See* Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 213 (1946). Appropriate defenses to the enforcement of the subpoena may be raised. Reisman v. Caplin, 375 U.S. 440, 449 (1964).

[116] *E.g.*, NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 103 (3d Cir. 1979) (discovery stayed pending appeal); United States v. Roundtree, 420 F.2d 845, 848 (5th Cir. 1969).

[117] The enforcement order of the district court is a final order and thus appealable. Ellis v. ICC, 237 U.S. 434, 442 (1915); ICC v. Brimson, 154 U.S. 447, 489 (1894); International Bhd. of Elec. Workers v. United States Equal Educ. Opp. Comm'n., 398 F.2d 248, 251 (3d Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); United States v. McDonald, 313 F.2d 832, 835 (2d Cir. 1963).

[118] Stroud, *supra* note 14, at 172. The author believes that if the "prior to recommendation" part of the *Donaldson* test were excised, the IRS would be able to obtain incriminating evidence

one must remember that this power was granted by Congress, and that any restrictions on this power should be imposed for constitutional reasons,[119] or as a result of legislative action.

The *Dresser* Court, in an *en banc* decision, correctly determined that *LaSalle* was inapplicable in the context of the SEC, although its rationale was not very convincing as a matter of statutory construction. The critical conclusion was that under the Internal Revenue scheme the Service's authority to issue a summons ends for all practical purposes upon criminal referral. Under the SEC scheme, however, the agency's subpoena power is not confined to four purposes and continues undiminished after a referral.[120] This analysis is ironic in that after stating that the validity of a summons depends on whether it was authorized by Congress, the court proceeded to consider IRS practice in order to determine the extent of its summons authority. What the agency voluntarily chooses to do in practice is irrelevant in matters of statutory interpretation. Also, it is important to note that the *Dresser* court analyzed the SEC statutory scheme in terms of the scope of SEC power.[121] Whether the scope of the subpoena power is broad or narrow does not really pertain to the crucial issue: does the power continue after referral? Finally, it should be noted that the *Dresser* court misinterpreted *LaSalle*. The Supreme Court did not conclude that IRS summons authority ceases upon criminal recommendation. On the contrary, the Court stated that "the IRS could use its summons authority under Section 7602 to uncover information . . . regardless of the status of the criminal case." The Court did not base its restriction of IRS summons authority upon an analysis of IRS practice, but upon the need for a prophylactic.

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from the taxpayer, and the taxpayer would not be able to obtain equitable relief in the form of an injunction or mandamus since the criminal prosecution defense is an adequate remedy at law. *See* United States v. Roundtree, 420 F.2d 845, 854 (5th Cir. 1969). Finally, he argued that "summons enforcement [could] not be curtailed by alleging an unconstitutional search and seizure." Stroud, *supra* note 14, at 173. The general attitude of the courts appears to be contrary to this view, however. "These weapons, to be sure, are potent, but hardly dispensable in the protection of the investing public and the fairness and honesty of the Nation's financial markets." SEC v. Arthur Young & Co., 584 F.2d 1018, 1023 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979).

[119] Indeed, two of the most common reasons why courts have refused enforcement of summonses are infringement upon the party's fifth amendment rights and violations of procedural due process.

[120] There can be no question that the SEC is empowered to continue its investigation after referral since there is no statutory language which even suggests that the Commission's powers are restricted upon referral. *See* note 50 *supra*. *Cf.* note 10 *supra* (IRS summons authority confined to four purposes).

[121] 628 F.2d at 1379.

Perhaps the *Dresser* court's statutory analysis actually cloaks the true rationale behind its decision. The IRS holds civil actions in abeyance when the defendant is involved in criminal proceedings in order to avoid any impropriety.[122] No policy reasons prevent such procedure. The Service merely seeks money due the government and postponement does not harm the public. The SEC, on the other hand, cannot defer its civil investigation because of the possibility that the public will be substantially harmed.[123] In short, both the IRS and SEC are statutorily authorized to conduct civil investigations after a criminal referral. Yet, policy considerations do not militate against a delay in an IRS investigation, whereas public policy demands speedy resolution of an SEC civil investigation. This realization seems to be at the core of the *Dresser* court's decision, and is evidenced by the court's examination of IRS practice instead of statutory authority. The fact that the court came close to giving this policy reason as an "alternative" rationale for its decision further supports this analysis. It stated that "the nature of the SEC's civil enforcement responsibilities required that the SEC retain full powers of investigation and civil enforcement action, even after the Justice Department had begun a criminal investigation."[124] Furthermore, "fulfillment of the SEC's civil enforcement responsibilities requires this conclusion."[125] The court should have recognized that both the IRS and SEC have statutory authority after referral, and should have based its holding on the fact that different policy considerations existed, as well as on the fact that the defendant was not prejudiced.

A question remains as to whether the panel was correct in modifying the enforcement order to provide that no information be passed to the Justice Department. In deciding this issue, the *en banc* court adhered to a strict statutory construction theory. Judge Wright correctly observed that the SEC has statutory authority to transmit any information or evidence obtained to the Justice Department, and that the statute does not place any limitation on when such information sharing is allowed.[126] Furthermore, the legislative history of the Foreign Corrupt Practices Act[127] supports the conclusion that such cooperation was intended by Congress.[128] Finally, the defendant was

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[122] Stroud, *supra* note 14, at 159.
[123] *See* note 59 *supra*.
[124] 628 F.2d at 1379.
[125] *Id.* at 1380.
[126] *See* note 50 *supra*.
[127] P.L. No. 95-213, 91 Stat. 1494 (1977).
[128] *See* note 56 *supra*.

not prejudiced since the grand jury could easily have subpoenaed the information.[129]

As with IRS summonses, an automatic cut-off for SEC subpoena enforcement should be imposed once a defendant is indicted. It is clear that Congress intended to establish a close working relationship between the SEC and the Justice Department.[130] One commentator has gone so far as to state that "the SEC staff, in its investigations, is effectively serving as an arm of Justice Department prosecutors." [131] Because of this close working relationship, criminal discovery would be expanded beyond permissible bounds were subpoenas to be enforced after indictment. Refusal of enforcement is therefore necessary to protect the defendant's constitutional rights.

It should be pointed out that neither *LaSalle* nor *Dresser* contemplated the situation where an agency other than that conducting the investigation makes a criminal referral to the Justice Department. In *OKC Corp.*, the court concluded that it could not hold as a matter of law that an agency's investigation must cease as a result of another agency's criminal recommendation.[132] This conclusion is sound since the criminal violation might be totally unrelated to the agency investigation. If so, the civil inquiry would not prejudice the defendant.[133] Although the *OKC Corp.* court correctly held that the agency's power did not cease after criminal referral as a matter of law, it stated that the best analysis is to look at the particular circumstances of the case to determine the non-referring agency's role in the criminal investigation.[134] It concluded that if the subpoena were issued solely to obtain

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[129] *See* note 109 *supra*.

[130] *See* note 56 *supra*.

[131] Kronstein, *supra* note 52, at 145.

[132] 474 F. Supp. at 1038.

[133] In such a case, even if information did flow to the Justice Department, there could be no meaningful expansion of criminal discovery since the information would be of no use to the prosecution.

[134] 474 F. Supp. at 1038. The court relied heavily upon a tax case, United States v. Henry, 491 F.2d 702 (6th Cir. 1974). In *Henry*, the taxpayer was served with an IRS summons after he was indicted for violations of the federal narcotics laws. The court concluded that the summons was issued solely to aid the criminal investigation. The court could have refused to enforce the summons on this ground alone. It chose, instead, to refuse enforcement because of the "prior to recommendation" part of *Donaldson*. Critical to the court's decision was the fact that the taxpayer was under indictment. The fact that the summons was issued solely to aid the criminal prosecution was significant because it indicated that if the subpoena had been enforced, it would not only have "benefit[ed] the government in its prosecution of the criminal conspiracy case, but could also have result[ed] in the deprivation of some of the taxpayer's Constitutional and other rights." *Id.* at 704. The court recognized that *Donaldson* envisioned a referral for criminal tax prosecution rather than a criminal prosecution totally unrelated to the tax laws. It concluded, however, that where there was a strong possibility that relevant information would be supplied to the prosecution were the summons enforced, "the use of the civil summons [was] as much an

evidence of criminality, it would be unenforceable because not in good faith.[135] The court seems to have confused the issue of good faith with that of criminal recommendation. As far as the criminal recommendation issue is concerned, the good faith of the agency is irrelevant.[136] Indeed, it is not even necessary to consider the recommendation issue if the summons is issued in bad faith since enforcement may properly be refused on this ground alone.

Where a defendant has been indicted, it is possible that criminal discovery would be improperly expanded were the courts to allow enforcement of another agency's subpoena.[137] In such a case, the proper inquiry is whether there is a possibility that information relevant to the criminal proceeding will flow from the investigating agency to the Justice Department. It should be stressed that unlike the case where a defendant is indicted for violating a provision of an act which the referring agency is charged with enforcing, indictment should not necessarily constitute an automatic cut-off point. The courts should examine the circumstances and decide on a case by case basis whether enforcement should be denied. A crucial factor should be the relationship between the criminal violation and the information sought through the subpoena. The central question is whether the information would aid the prosecution in proving the criminal case. If it would, and if it were possible that the information would be passed to the Justice Department, enforcement should be refused.

Differences in statutory authority must be considered before adopting the good faith part of the *LaSalle* test to other agency summonses. With respect to *LaSalle* itself, the IRS statutory scheme must be examined in order to determine whether it sanctions a criminal purpose defense. Interpretations of this scheme are quite varied.

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abuse of process as if a criminal tax case had been recommended or had actually been begun." *Id.* at 705. The *Henry* court preferred to base its decision on an "abuse of process" theory, rather than on a lack of good faith.

[135] United Sates v. Henry, 491 F.2d 702 (6th Cir. 1974) demonstrated that the court could also refuse enforcement on an "abuse of process" theory.

[136] The court seems to have misconstrued United States v. Henry, 491 F.2d 702 (6th Cir. 1974). Although in *Henry* the court found that the summons was issued for the sole purpose of aiding the criminal prosecution, it based its decision on an abuse of process. *Id.* at 705. Because the summons was issued to aid the prosecution, this abuse was sure to occur. The court offered no opinion, however, about whether an abuse of process could occur if only one of the purposes of the summons was to gather criminal information. The critical point is that the court must determine whether relevant information would be passed to the prosecution, in which case an abuse of process would result.

[137] Such was the case in United States v. Henry, 491 F.2d 702 (6th Cir. 1974). It must be remembered that the party in *OKC Corp.* had not been indicted. Therefore, there seems to be no reason not to have enforced the summons. *See* Comment, *supra* note 31, at 643.

One commentator believes that the statutory scheme clearly prohibits the use of a Section 7602 summons for the purpose of gathering evidence of criminality even though there is also a civil purpose to the summons.[138] He suggests that IRS subpoenas be limited to purely civil purposes and that any evidence of criminality be barred from use at a criminal trial.[139] Another view is that there is nothing to prevent the use of an IRS summons for criminal investigations alone.[140] The courts, on the other hand, have consistently held that it can be enforced as long as there is a civil purpose to the summons regardless of whether a criminal purpose also exists.[141] *LaSalle* and other courts have correctly interpreted the vague provisions of the Internal Revenue Code.[142] Although other views cannot be definitively rejected, they are not as easily defended.[143]

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[138] Ise, *Tax Fraud and Constitutional Rights*, B. INDUS. & COM. L. REV. 1176, 1193-94 (1971). This view is based on a strict reading of I.R.C. § 7602, which only contains language pertaining to civil tax investigations. *See* note 10 *supra*. Ise also maintains that criminal tax investigations are carried out by special agents who have no authority to issue summonses. *But see* note 143 *infra*. Consequently, he concludes that Congress did not intend the summons to be used in criminal investigations.

[139] Ise, *supra* note 138, at 1194. This solution is based on the commentator's belief that there is no statutory authority to issue summonses which have any criminal purpose, and also on the belief that the use of an IRS summons during a criminal investigation might well violate the probable cause requirement of the fourth amendment. This is not a view held solely by Ise. *See* Lipton, *The Relationship Between the Civil and Criminal Penalties for Tax Frauds*, 1968 U. Ill. L.F. 527, 533 n.40 (no statutory authority for summons used for civil and criminal investigations); Lipton, *Constitutional Rights in Criminal Tax Investigation*, 45 F.R.D. 323, 329 (1968) (summons should be enforced only if evidence obtained is barred from use in criminal prosecution).

[140] *Developments*, *supra* note 6, at 1326. This view is based on the theory that the IRS should be allowed to perform solely criminal investigations because section 7602 neither authorizes nor prohibits such activity. *Id.*

[141] *E.g.*, *LaSalle*, 437 U.S. at 308-09; *Donaldson*, 400 U.S. at 532; United States v. Roundtree, 420 F.2d 845, 851 (5th Cir. 1969); Wild v. United States, 362 F.2d 206, 208-09 (9th Cir. 1966). *See* Comment, *supra* note 31, at 624.

[142] Nothing in I.R.C. § 7602 appears to allow investigations for both civil and criminal purposes. Nevertheless, when a taxpayer submits a fraudulent tax return he is subject to criminal penalties under I.R.C. §§ 7201-7207, and a civil penalty of 50% of any underpayment under I.R.C. § 6653. I.R.C. § 6659(a)(2) provides that the penalty becomes part of the tax liability. Since a summons may be issued to "determin[e] the liability of any person for any internal revenue tax," I.R.C. § 7602, it follows that a summons may be issued to investigate a fraudulent tax return since a tax liability is attached to such a return. Where such an investigation is made, the Service investigates the possibility of assessing the civil penalty, but must also be investigating the criminal violation since both civil and criminal penalties are linked to the filing of a fraudulent return. The civil and criminal elements are "inherently intertwined." *LaSalle*, 437 U.S. at 309.

[143] 437 U.S. at 316. One cannot examine the IRS summons power in a vacuum. A careful scrutiny of the entire statutory scheme reveals that Congress intended a summons to be used to

Whether the good faith test is of much use to the defendant largely depends upon whether he is granted discovery rights. *LaSalle* suggested that the taxpayer be granted discovery.[144] Unfortunately, the Court did not expand upon this statement, and this has led to considerable confusion.[145]

In *OKC Corp.*, the court applied the *LaSalle* good faith test to the SEC, although not specifically centering on the criminal purpose defense.[146] The court can be criticized for assuming that the *LaSalle*

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investigate both civil and criminal violations. *See* note 142 *supra*. Furthermore, special agents investigating criminal violations are able to issue summonses. *See* 26 C.F.R. § 301.7603-1(b) (1980). Indeed it was a special agent who issued the agency summons in *LaSalle*.

The contrary view, that an IRS summons may be issued solely for a criminal purpose, also seems weak. Proponents of this view rely on a version of the argument put forth in note 142 *supra*. Section § 7602 authorizes investigations solely for criminal purposes since such investigations subject the taxpayer to criminal sanctions under I.R.C. §§ 7201-7207, and are carried on to determine the "correctness of any return." I.R.C. § 7602. What this argument fails to consider, however, is that the filing of a fraudulent return at the same time entails civil penalties under I.R.C. § 6653, and therefore any investigation also involves a civil purpose.

[144] 437 U.S. at 316-17. Courts, however, have not agreed on what showing the defendant must make in order to be entitled to discovery. The Court of Appeals for the Third Circuit has stated:

> At a minimum, the taxpayer should be entitled to discover the identities of the investigating parties, the date the investigation began, the dates the agent or agents filed reports recommending prosecution, the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation, the date the Office of Regional Counsel referred the matter for prosecution, and the dates of all summonses issued under 26 U.S.C. § 7602. Furthermore, the taxpayer should be entitled to discover the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.

United States v. Genser (*Genser II*), 595 F.2d 146, 152 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979). According to United States v. Fensterwald, 553 F.2d 231 (D.C. Cir. 1977), a defendant is only entitled to discovery if he takes himself "out of the class of the ordinary taxpayer, whose efforts at seeking discovery would, if allowed universally, obviously to be too burdensome to the Internal Revenue Service." *Id.* at 231-32.

[145] For an excellent discussion of the scope and extent of the taxpayer's right of discovery, see Comment, *supra* note 31, at 637-43, in which the author suggests a sensible solution. The proposed solution would introduce a single evidentiary hearing where the IRS would be required to file an affidavit including certain basic items of information. The summoned party would then be required to make a substantial showing as to why the summons should not be enforced. If such showing were made, the IRS would be permitted to present evidence and witnesses. If substantial questions still remained, further discovery could be ordered. *Id.* at 640-41. This procedure has the advantage of being time efficient, and yet allowing the taxpayer an opportunity to prove bad faith.

[146] 474 F. Supp. at 1035. The court was actually concerned with the effect of a recommendation to the Justice Department by another agency. *See* notes 106-12 *supra* and accompanying text. The *LaSalle* good faith test was recently dealt with by the Third Circuit in SEC v. Wheeling Pittsburgh Steel Corp., 648 F.2d 118 (3d Cir. 1981) (en banc). In *Wheeling*, the subpoenaed party claimed that the summons was not issued in good faith since the agency had been prodded to make the investigation by a powerful United States Senator. The court, sitting *en banc*, made a distinction between agency bad faith and agency acquiesence in an abuse of its

good faith standard applies to the SEC.[147] Whether the sole criminal purpose defense is applicable to a particular agency should depend upon whether that agency has been authorized by Congress to conduct investigations solely to uncover evidence of criminality.[148] The court should have analyzed the SEC statutory scheme in order to make such a determination. Had it done so, it would have found that the statutes strongly indicate that Congress intended the SEC to be able to conduct solely criminal investigations.[149] Therefore, the criminal purpose defense should not be applied in the SEC context, although the other elements of good faith must still be complied with when issuing a subpoena.[150] At first sight, it appears that the SEC power would be unlimited, since it has also been argued that the SEC should be able to obtain subpoena enforcement at any time prior to indictment. It must be remembered, however, that the criminal purpose defense is but one branch of the good faith test. The subpoena would still have to meet the *Powell* standards of good faith.[151] As a practical matter, the elimination of the criminal purpose defense in the SEC context would have little effect since it is a rare case in which there is absolutely no civil purpose to an investigation.[152] In any case,

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process, which in turn leads to an abuse of the court's process. *Id.* at 125. In the former case, there is a conscious decision to pursue a meritless allegation. In the latter situation, the court's process could be abused where the agency permits an influential third party to control the investigation. These two situations constitute two distinct grounds for refusing summons enforcement. *Id.* at 125. The agency should "give congressional comments only as much deference as they deserve on the merits." *Id.* at 126.

[147] Indeed, this seems to be a common mistake among the lower courts. *E.g.*, United States v. Bloom, 450 F. Supp. 323, 330-31 (E.D. Pa. 1978). Even if it were common knowledge that the good faith part of the *LaSalle* test applied to the SEC, which it certainly is not, the courts should at least have acknowledged that such was the case. United States v. Handler, [1978] FED. SEC. REG. L. REP. (CCH) ¶ 96,519, at 94,026 (C.D. Cal. 1978); SEC v. United Brands Co., [1975] FED. SEC. REG. L. REP. (CCH) ¶ 95,357, at 98,775 (S.D.N.Y. 1975).

[148] *Developments*, *supra* note 6, at 1329. The opposite situation has arisen in grand jury proceedings where the defendant claimed that the grand jury was investigating solely for a civil purpose. *E.g.*, United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958); United States v. Pennsalt Chem. Corp., 260 F. Supp. 171, 172 (E.D. Pa. 1966).

[149] *See* Developments, supra note 6, at 1329. The Securities Act of 1933, 15 U.S.C. § 77s(b) (1976) states that a summons may be issued "[f]or the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of [the Act]." The Act criminalizes certain conduct without imposing civil penalties, *e.g.*, 15 U.S.C. §§ 77x,77w (1976), as does the Securities Exchange Act of 1934, *e.g.*, 15 U.S.C. §§ 78ff, 78h(a) (1976). Furthermore, the SEC investigates violations of the Foreign Corrupt Practices Act which has criminal penalties. Clearly then, the SEC may investigate violations of these criminal provisions, and issue a subpoena for that purpose.

[150] *See* note 32 *supra*.

[151] *Id.*

[152] It is much more difficult to determine when an SEC investigation is solely for criminal purposes since, unlike the IRS, civil and criminal investigations are not departmentalized. *See*

even where there must be both a civil and criminal purpose, almost s much criminal evidence can be compiled as would be in a purely criminal investigation.

The above evaluation demonstrates that to resolve parallel enforcement issues by resorting to statutory interpretation inevitably leads to confusion in the courts. It has been suggested that "the relevant concern should not be whether the summons was issued for a proper purpose, but rather whether the effect of enforcement will be to obtain criminal discovery at a time when it would be improper." [153] It is thought that such a test applies uniformly to all agencies "since it rests not on exegesis of varying statutory authority to issue a summons, but rather on the duty of courts to oversee activity which threatens to interfere with the safeguards erected around criminal trials." [154] Although the proposed test is a favorable one, it is doubtful whether it would truly avoid problems of statutory interpretation. The test is merely another way of asking whether criminal discovery would be impermissibly expanded. Such a decision necessarily entails an examination of the statutory scheme of the agency so as to determine to what extent it envisions information sharing with the Justice Department. If criminal discovery is not expanded, the court must still determine whether the agency has authority to issue a summons after recommendation. Thus the test accomplishes little in the way of avoiding statutory interpretation. It redeems itself, however, in that it forces the court to focus on the danger which threatens the criminal discovery process.

## CONCLUSION

Subject to statutory and constitutional limitations, administrative agencies should be free to investigate possible violations of law. *Dresser* is extremely significant in that it indicates that the recommendation part of the *LaSalle* rule may be confined to the IRS context. Since courts have not been called upon to consider the application of the criminal recommendation rule to administrative agencies other than the SEC, it is still too early to evaluate the total impact of *LaSalle*.[155] Unlike the criminal recommendation rule, however, the

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[1976] FED. SEC. L. REP. (CCH) ¶ 446, at 1112 (Aug. 11, 1976) for an organization chart of the SEC.

[153] *Developments*, *supra* note 6, at 1329.

[154] *Id.* at 1329-30.

[155] In the great majority of cases, the cutoff point should be indictment, since for the most part the various statutory schemes show no indication that upon referral to the Justice Department the agency subpoena power is diminished. Indeed, most statutes do not even explicitly confer the power to transfer information to the Justice Department. Where the statutory scheme provides

good faith test has been applied to other agencies,[156] although no case could be found in which a subpoena was not enforced because of the sole criminal purpose defense.

It was urged above that one limitation on the SEC's investigatory power should be that upon indictment an SEC subpoena should not be enforced.[157] Other less drastic methods for protecting a criminal defendant are available, however. Although the SEC and the Justice Department have a close working relationship which makes it inevitable that information will pass between them,[158] the SEC, unlike the IRS, remains independent of the Justice Department even after a criminal referral.[159] Consequently, it might be possible to "build a partial information barrier"[160] between the SEC and the Justice Department by imposing a protective order such as that used by a panel of the court of appeals in *Dresser*. Unfortunately, such a safeguard cannot protect the criminal defendant against possible information leaks. Also, application of this method to other agencies requires an examination of each agency's statutory scheme to determine the feasibility of imposing such a "barrier." This entails additional problems of statutory interpretation.

Another approach is to exclude any information obtained by the Justice Department from the criminal trial.[161] Nevertheless, the mere fact that the Justice Department is able to inspect the evidence may

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for criminal penalties, however, it is clear that such power must be allowed since most agencies do not have the authority to criminally prosecute a defendant. Furthermore, in most instances cooperation between the agency and the Justice Department can be expected, therefore significantly increasing the risk that criminal discovery will be expanded. *See, e.g.*, 7 U.S.C. §§ 13, 15 (1976) (Commodities Futures Trading Commission); 15 U.S.C. § 1714 (1976) (Land Sales Disclosure Commission); 15 U.S.C. §§ 49, 50 (1976) (Federal Trade Commission); 29 U.S.C. § 161 (1976) (National Labor Relations Board); 49 U.S.C. §§ 11701-10 (Supp. III 1979) (Interstate Commerce Commission).

[156] *E.g.*, ICC v. Gould, 629 F.2d 847, 854-56 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 856 (1981); NLRB v. Interstate Dress Carrier, Inc., 610 F.2d 99, 111-13 (3d Cir. 1979). *Gould* is the only case which correctly analyzed *LaSalle* and the criminal purpose defense. The court recognized that *LaSalle* was dealing with the criminal purpose defense in the tax context. A statutory analysis was necessary to determine whether it was an abuse of power for the Interstate Commerce Commission to issue a summons solely for a criminal purpose. The court concluded that "the congressional approach to the regulation of commerce [was] similarly structured." 629 F.2d at 855.

[157] Whether this limitation pertains to other agencies depends on their statutory scheme, although in the majority of cases, the limitation will be applicable. *See* note 55 *supra*.

[158] *See* note 56 *supra*.

[159] One of the major reasons why enforcement of the Foreign Corrupt Practices Act was delegated to the SEC was its independence from the executive branch of government. *See* [1977] 400 SEC. REG. & L. REP. (BNA) A-2 (Apr. 27, 1977) (statement by Congressman Eckhardt (D-Tex)).

[160] *LaSalle*, 437 U.S. at 312.

[161] *See* Comment, *supra* note 99, at 786-87.

prove unfair to the defendant. The evidence might lead the prosecution to evidence which it would otherwise not have obtained under normal criminal discovery.

Clearly, the best solution is for the court to refuse enforcement of the subpoena after indictment. Protection of the defendant's rights demands that nothing less be done. Such a solution is not unduly burdensome to the SEC since, prior to indictment, it has ample time to subpoena any documents or witnesses necessary for the civil case. Furthermore, once the grand jury is convened, the SEC is on notice that its subpoena power may soon be terminated. Finally, this solution is not substantially harmful to the public because the SEC will have progressed sufficiently in the civil investigation to be able to warn the public of any market abuses.

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