

# Parallel Proceedings: Constitutional Questions

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# PARALLEL PROCEEDINGS: CONSTITUTIONAL QUESTIONS



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The U.S. Constitution provides extensive protections for persons subject to criminal investigation and prosecution. One’s knowledge and proper exercise of these rights is vital for preserving liberty. However, an individual’s Fourth, Fifth, and Sixth Amendment rights can be endangered when one is engaged in a civil matter with the government and unaware that the information he is providing is being simultaneously shared with criminal investigators.

Parallel proceedings occur when two investigations or prosecutions, relating to the same set of facts, occur contemporaneously, or successively, against the same party.<sup>1</sup> Most frequently, a parallel prosecution occurs when the Securities and Exchange Commission (“SEC”) institutes a civil action while the Department of Justice (“DOJ”) simultaneously initiates an undisclosed criminal investigation. Although it may be permissible to address an individual’s conduct through both civil and criminal proceedings, significant constitutional concerns arise when the government does not disclose simultaneous or successive proceedings.

At the outset, it should be noted that Congress both permits and encourages parallel proceedings. Both the Securities Act of 1933 and the Securities Exchange Act of 1934 expressly authorize simultaneous civil and criminal proceedings.<sup>2</sup> Additionally, the Foreign Corrupt Practices Act reaffirmed the SEC’s authority to share its

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findings with DOJ.<sup>3</sup> Even before these acts of Congress, the U.S. Supreme Court stated that a person’s actions could result in both civil and criminal proceedings conducted either simultaneously or successively.<sup>4</sup> Noting in *Standard Sanitary Manufacturing Co. v. United States* that postponing civil proceedings until the completion of a criminal trial “might result in injustice or take from the statute a great deal of its power,” the Court cautioned lower courts to use their discretion to prevent injury to either party during such proceedings.<sup>5</sup> However, notwithstanding that parallel proceedings may increase judicial economy, they can also take a form that might cause some to argue that a prosecutor is seeking to blunt an individual’s assertion of Fourth, Fifth, and Sixth Amendment rights.

Fifty years after *Standard Sanitary*, two district courts addressed parallel proceedings in the *Parrott* cases, creating lasting confusion. In *Parrott I*, the defendants had been advised of their rights during a civil SEC investigation—including the right against self-incrimination.<sup>6</sup> However, the defendants were told that “the Division has not instituted any criminal proceedings against any of [the defendants],” even though the SEC had already referred the matter to DOJ.<sup>7</sup> The district court threw out the indictment, holding that the government may not “avail itself of civil discovery devices to obtain evidence for a subsequent criminal prosecution.”<sup>8</sup> Specifically, the *Parrott I* court held that the government must do more than simply inform a defendant of his constitutional rights if it is aware of a contemplated parallel prosecution.<sup>9</sup>

Conversely, the *Parrott II* court held that the government need only inform a defendant of his rights, with no obligation to disclose a parallel proceeding.<sup>10</sup> Specifically, the court stated that the government has no duty, “once having advised the defendants of their right against self-incrimination, to warn them that, as the investigation proceeded, it might warrant presentation to a grand jury and prosecution upon criminal charges.”<sup>11</sup> As a result of these seemingly contradictory decisions, the landscape remained muddled.

The Supreme Court’s decision in *United States v. Kordel* sought to resolve this conflict.<sup>12</sup> In *Kordel*, the government used several civil interrogatory answers in a subsequent criminal prosecution.<sup>13</sup> The defendants first argued that such use of civil interrogatory answers

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violated their Fifth Amendment right against self-incrimination. The *Kordel* Court held that there was no Fifth Amendment violation so long as the defendant was informed that the government may bring a parallel criminal action and had an opportunity to assert his Fifth Amendment right.<sup>14</sup> Finding adequate warning, the Court found no Fifth Amendment violation.

Additionally, the Supreme Court addressed the defendants' due process argument contending that the government's actions "reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions" by adopting a "departing from proper standards of criminal justice" test.<sup>15</sup> Although finding that investigators in the *Kordel* case had not departed from the proper standards of criminal justice, the Court explained that it may have reached a different result if there had been any "special circumstances."<sup>16</sup>

According to the Supreme Court, there are five special circumstances where the court should dismiss the government's criminal indictment:

- (1) When a civil action is brought solely to gain evidence for a criminal action;
- (2) If the government failed to sufficiently warn a defendant that the government was contemplating a parallel proceeding—where a warning must, at a minimum, advise a defendant of his constitutional rights;
- (3) If the defendant lacked adequate access to counsel;
- (4) Where a defendant reasonably fears that publicity from one proceeding will negatively impact the other proceeding; and
- (5) Any "other special circumstance."<sup>17</sup>

While this list is not exhaustive, it serves to show that the government is not free to engage in parallel proceedings without a conscientious eye towards the defendant's constitutional rights.

In light of their increased use following the advent of President George W. Bush's Corporate Fraud Task Force and the Sarbanes-Oxley Act, closer attention and caution need to be given to parallel prosecutions. In one of the first post-Sarbanes-Oxley actions, Richard Scrushy, the former CEO of HealthSouth

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Corporation, moved to suppress a deposition he had given in a SEC civil investigation from use by DOJ in a parallel criminal proceeding.<sup>18</sup> The SEC had originally scheduled the deposition in Atlanta. However, in order to create criminal jurisdiction over any perjury issues that might arise during the deposition, the interested U.S. Attorney's office requested that the SEC move it to Alabama.<sup>19</sup> Additionally, DOJ personnel counseled the SEC investigators on what to ask and what to avoid in the deposition. Although DOJ notified the SEC during these discussions that it was initiating a criminal investigation of HealthSouth and Scrushy, the SEC never informed Scrushy about the criminal investigation or that DOJ's criminal wing was so involved in the SEC's civil investigation.<sup>20</sup>

In light of these facts, the *Scrushy* court found that DOJ was inappropriately engaged in the SEC's civil investigation, and that the defendant's rights were not sufficiently protected.<sup>21</sup> The court ultimately held that, while the government does not have to explicitly warn a defendant if it is unaware of an ongoing criminal proceeding, failing to inform a defendant when the government has notice amounts to an "improper administration of criminal justice."<sup>22</sup>

Additionally, in 2008 the district court in *United States v. Stringer*<sup>23</sup> threw out a parallel criminal indictment, finding that the government's actions were "so grossly shocking and so outrageous as to violate the universal sense of justice."<sup>24</sup> In *Stringer*, the criminal investigation had been stalled so that civil discovery could first continue and be used in the criminal matter.<sup>25</sup> On appeal, however, the Ninth Circuit Court of Appeals created more uncertainty when it reversed *Stringer*, holding that there was no showing of deceit or trickery by government personnel and that the government bears no affirmative duty to disclose the existence of a parallel criminal investigation—but is only required to provide a defendant with "sufficient notice" that testimony and evidence produced in the civil matter may be used against him in a subsequent criminal proceeding.<sup>26</sup>

In light of the inconsistent application of parallel prosecution rules, the constitutional implications for a person's Fourth, Fifth, and Sixth Amendment rights, as well as discovery protections, must be considered.

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The Fourth Amendment protects against unreasonable searches and seizures. In *United States v. Tweel*,<sup>27</sup> the Internal Revenue Service conducted an audit at DOJ's request which resulted in the defendant giving the government incriminating documents under the belief that they were being used only by the IRS in a civil audit.<sup>28</sup> Despite holding that the IRS had no duty to warn the defendant that audits may lead to criminal investigations, the court held that a defendant's Fourth Amendment rights are violated when civil investigators fail to inform him that the civil investigation is actually being conducted at the direct request of DOJ.<sup>29</sup>

The Fifth Amendment protects against self-incrimination and may be asserted in *any* proceeding if an individual fears that information may later be used against him in a criminal proceeding.<sup>30</sup> Although a criminal fact-finder is prohibited from drawing conclusions from a person's invocation of his Fifth Amendment privilege, the same is not true for civil proceedings.<sup>31</sup> As such, the subject of a civil investigation or charge has a substantial disincentive to invoke his Fifth Amendment privilege. Doing so is likely to have a direct negative impact on him in the civil matter. It is thus reasonable to assume that defendants will not readily invoke such protections as a matter of course, unless they are informed that there is an ongoing or potential criminal aspect to the investigation.

The Sixth Amendment protects against criminal prosecution without access to counsel. This protection can be endangered in parallel proceedings where a defendant may determine, believing the civil matter to be minor, that he does not need to retain counsel. However, if there is an ongoing undisclosed criminal investigation, where the criminal investigators are privy to all evidence produced in the civil matter, the defendant's right to counsel is seriously infringed if he is not fully informed. Moreover, a defendant's right to maintain the confidentiality of his privileged communications with his attorney may be compromised. A defendant in a civil matter who is unaware of a parallel proceeding may decide that it is in his best interest to waive this privilege and present material to an agency such as the SEC. However, in light of the fact that such material could also be used in a parallel criminal matter, a defendant is likely to analyze the decision differently if he knows of an ongoing criminal matter.

Lastly, criminal defendants may be disadvantaged by the government's circumvention of discovery rules in parallel proceedings. Rule 16 of the Federal Rules of Criminal Procedure allows for "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Because of the civil proceeding's lower discovery threshold, criminal investigators can use otherwise unavailable material to build their case.

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Prosecutorial efficiency may be one of the most common results of parallel proceedings, and certainly can be an appropriate goal. But the American criminal justice system is not premised on facilitating investigations, prosecutions, and convictions without, as the *Kordel* and *Scrushy* courts made clear, taking into account important liberties that can be endangered by parallel civil and criminal proceedings in various circumstances. With such considerable implications for an individual's Fourth, Fifth, and Sixth Amendment rights, it is imperative that parallel proceedings be used only in such a way that infringements or violations of these individual liberties are prevented.

## Endnotes

1 Jody Arogeti, *How Much Cooperation Between Government Agencies is Too Much?: Reconciling United States v. Scrushy, the Corporate Fraud Task Force, and the Nature of Parallel Proceedings*, 23 GA. ST. U. L. REV. 427 (2006).

2 Securities Act of 1933, 48 Stat. 74 (1933); Securities Exchange Act of 1934, 48 Stat. 881 (1934).

3 15 U.S.C. §§ 78dd-1, *et seq.*

4 Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912).

5 *Id.*

6 *United States v. Parrott*, 248 F. Supp. 196, 198 (D.D.C. 1965) ("*Parrott I*").

7 *Id.* at 199

8 *Id.* at 202.

9 *Id.* at 200.

10 *United States v. Parrott*, 315 F. Supp. 1012, 1015 (S.D. N.Y.



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1969) (“*Parrott II*”).

11 *Id.* at 1015.

12 397 U.S. 1 (1970).

13 *Id.* at 4-5.

14 *Id.* at 8. At the civil proceeding, the defendants had been informed of their rights, and the Court thus determined that there was no Fifth Amendment violation.

15 *Id.* at 11, 13.

16 *Id.* at 12.

17 *Id.*

18 *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005). It was not until his criminal trial that Scrushy even learned of the SEC-DOJ cooperation and communication during the civil proceeding. *Id.* at 1135.

19 *Id.* at 1135-1136.

20 *Id.* at 1137.

21 *Id.*

22 *Id.* at 1139.

23 408 F. Supp. 2d 1083 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008).

24 *Id.* at 1089-90.

25 *Id.* at 1088.

26 *Id.* at 1197-1198.

27 U.S. CONST. amend. IV; 550 F.2d 297, 298 (5th Cir. 1977).

28 *Id.* at 298.

29 *Id.* at 299 (stating that “a consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery or misrepresentation”).

30 U.S. CONST. amend. V; *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

31 *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).



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