

10-1-2013

Parallel Investigations between Administrative and Law Enforcement Agencies: A Question of Civil Liberties

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Recommended Citation

Persaud, Shiv Narayan (2013) "Parallel Investigations between Administrative and Law Enforcement Agencies: A Question of Civil Liberties," *University of Dayton Law Review*: Vol. 39: No. 1, Article 4.
Available at: <https://ecommons.udayton.edu/udlr/vol39/iss1/4>

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PARALLEL INVESTIGATIONS BETWEEN ADMINISTRATIVE AND LAW ENFORCEMENT AGENCIES: A QUESTION OF CIVIL LIBERTIES

*Shiv Narayan Persaud*¹

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I. INTRODUCTION

During an investigation of criminal culpability, a law enforcement agency is duty-bound to serve the public good.² Similarly, in investigating regulatory matters, an administrative agency must seek to enforce the statutes under its delegated authority in the interest of the public good.³ While both administrative and law enforcement agencies have objectives that center on the public good, a cause for concern arises when these entities work together against an individual's proprietary and civil rights.⁴ This concern is exacerbated by the likelihood that constitutional rights could be subverted in the quest to serve the public good.⁵

For example, with nominal oversight a law enforcement officer who does not have a warrant can simply turn to an agency investigator who, in his or her regulatory capacity, may conduct a warrantless search.⁶ This

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² See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 27 (1985) (O'Connor, J., dissenting).

³ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928).

⁴ See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 521 (4th ed. 2004).

⁵ See *id.*

⁶ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (“[A]n exception from the search warrant requirement [for administrative agencies] has been recognized for ‘pervasively regulated business[es],’

action is enabled by the more relaxed requirements for search and seizure in particular administrative investigations than for criminal investigations.⁷ In short, an administrative agency has, in certain circumstances, unfettered access to materials for which a higher burden of proof is required from the law enforcement agency that desires to collect and examine such materials.⁸

In the event the officer does not have adequate information to serve as the basis for reasonable suspicion of criminal activity, he or she may benefit from materials collected by the administrative agency – relying on these as the basis for reasonable suspicion to initiate a criminal investigation.⁹ The consequence seems clear: the regulatory powers of an administrative agency can be used by law enforcement to circumvent due process unless there are strict standards in place to detect and avoid the complicity of the administrative agencies.¹⁰

In instances where such information exchange results in parallel investigations by both agencies, one in which the individual's rights become abrogated, it is left to the affected party to raise and contest the administrative agency's action on a case-by-case basis.¹¹ When an individual is subject to the jurisdiction of an administrative agency, the judicial branch has not regularly struck down parallel investigations.¹² On the contrary, such investigations have been consistently upheld under the reasoning that the individual has either previously submitted to the jurisdiction of the regulatory agency, or is conducting activities within the purview of agency authority.¹³ Hence, the potential for the misuse of authority by an administrative agency can be drastic, and ultimately overlooked by the judiciary, as long as the administrative agency remains within its statutory scope of authority.¹⁴

Now transpose the scenario and assume that it is a law enforcement officer who takes an individual into custody for questioning regarding his or

and for 'closely regulated' industries 'long subject to close supervision and inspection.' These cases . . . represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy [exists] . . . [W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.") (citations omitted).

⁷ See *id.* at 313.

⁸ See, e.g., *New York v. Burger*, 482 U.S. 691, 702–04 (1987) (finding that the warrantless inspection of premises of “closely regulated” businesses is allowed for certain administrative purposes without particularized suspicion of misconduct); *Michigan v. Tyler*, 436 U.S. 499, 507–09 (1978) (approving administrative inspection of fire-damaged premises to determine the cause of the blaze); *Camara v. San Francisco*, 387 U.S. 523, 534–39 (1967) (approving administrative inspection to ensure compliance with city housing code); see also *Indianapolis v. Edmond*, 531 U.S. 32, 35 (2000).

⁹ See, e.g., *Burger*, 482 U.S. at 716–17.

¹⁰ See DANIEL WEBB, ET AL., CORPORATE INTERNAL INVESTIGATIONS 14-6, 14-7 (1993).

¹¹ See *United States v. Gel Spice Co.*, 773 F.2d 427, 433–34 (2d Cir. 1985).

¹² See *Smith v. Richert*, 35 F.3d 300, 304 (7th Cir. 1994).

¹³ See *id.* at 303.

¹⁴ See WEBB, *supra* note 10, at 14-6, 14-7.

her culpability on a criminal matter.¹⁵ In the event the officer learns that the individual is subject to the regulatory authority of an administrative agency, the officer may refer information regarding the individual's actions to that agency.¹⁶ On its own, the administrative agency can initiate a parallel investigation within its delegated statutory authority to determine whether or not any violations of its regulations occurred.¹⁷ As long as these investigations remain separate, there does not seem to be a constitutional infringement.¹⁸

Thus far, neither the judicial nor the legislative branch has determined that there are any inherent problems with parallel investigations.¹⁹ As such, a law enforcement agency can utilize nearly all the information gathered from the administrative proceeding in a subsequent criminal proceeding.²⁰ However, in the event the administrative agency conducts its investigation solely for the purpose of assisting the law enforcement agency, the courts have made the distinction that these instances do not constitute legitimate parallel investigations.²¹

The foregoing discussion begs the question as to the circumstances under which administrative and law enforcement agencies should be allowed to exchange information, and to what extent. Currently, no explicit federal guidelines for parallel investigations by law enforcement and administrative agencies can be found in the Administrative Procedure Act ("APA"), and judicial decisions on the issue remain sparse.²² In addition,

¹⁵ See generally *Bram v. United States*, 168 U.S. 532 (1897).

¹⁶ See *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995).

¹⁷ See *Choiniere v. United States*, No. 3:07-CV-27 RM, 2009 WL 112585, at *7 (N.D. Ind. Jan. 14, 2009) (citing *United States v. Med. House, Inc.*, 736 F. Supp. 1531, 1537 (W.D. Mo. 1989)) ("Parallel or overlapping criminal and civil investigations generally aren't objectionable.").

¹⁸ See *United States v. Scrusby*, 366 F. Supp. 2d 1134, 1138, 1140 (N.D. Ala. 2005) (citing *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 579 (S.D.N.Y. 2001)).

¹⁹ See *id.* at 1140 (citing *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 579 (S.D.N.Y. 2001)); see also *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375, 1377 (D.C. Cir. 1980); Gary P. Naftalis, *Defending Parallel Civil and Criminal Proceedings*, AMERICAN LAW INSTITUTE, SM090 ALI-ABA 1257, 1314 (2007) ("The double jeopardy clause likely will [also] not have much of an application in parallel or successive criminal and civil securities proceedings.").

²⁰ *McQueen v. United States*, 179 F.R.D. 522, 529 (S.D. Tex. 1998) (citing *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983); *United States v. Baggot*, 463 U.S. 476, 479–80 (1983)) ("The most common means by which an agency record becomes a 'matter before a grand jury' is when that record is actually shown to the grand jury. It is irrelevant whether the record was initially gathered by a grand jury subpoena or through an agency's administrative investigation. In fact, many criminal cases are originate[d] with an investigation by a[n] administrative agency other than the [Department of Justice]. When the agency refers the case to the [Department of Justice] for prosecution, it invariably transfers the records it gathered in its investigation (administrative record). Much, if not all of that administrative record is inevitably presented to the grand jury. At that point, it becomes incontrovertibly a 'matter before the grand jury'.")

²¹ *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 314 (1978) (footnote omitted).

²² There are case-by-case examples that apply to particular agencies. See, e.g., *Donaldson v. United States*, 400 U.S. 517, 529 (1971) (disallowing the intervention of an employee during an IRS enforcement proceeding against an employer to obtain the employee's tax records). But see *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 31516 (1985) (noting that *Donaldson* was superseded by Congress's amendment of the law to require that the IRS give the taxpayer notice and provide intervention rights).

the judicial system, as the equalizer of constitutional disparities, does not always adequately convey the nuances of administrative and constitutional principles to the lay individual.²³

In the absence of more precise public policy guidelines or a judicial standard for review, parallel investigatory issues will continue to remain uncertain and subject to piecemeal interpretations.²⁴ While a person trained in the law may be able to navigate the problems associated with agency investigations in case-by-case situations, it is essential for the average person of common intelligence to comprehend his or her rights in that system.²⁵ With the foregoing in mind, this article will seek to address problematic issues inherent in parallel administrative – law enforcement investigations.

II. PARALLEL INVESTIGATIONS IN PUBLIC POLICY

Parallel investigations could be attractive to law enforcement agencies for two main reasons. First, while the law enforcement agency must generally have reasonable suspicion before an investigation, the administrative agency does not typically need to fulfill this prerequisite.²⁶ Rather, the administrative agency may have the authority to conduct an investigation whether or not there is even evidence of a regulatory infraction.²⁷ Second, the public policy reasons for allowing administrative oversight are broad enough to encompass materials that are under public scrutiny and may additionally subject the affected party to criminal culpability.²⁸ In other words, obtaining these administrative materials may solely serve to incriminate the affected party.²⁹

According to the judiciary, the above-mentioned public policy concerns do not interfere with an affected party's rights when the parallel investigations are conducted separately and independently.³⁰ However, when both the administrative and law enforcement agencies cooperate with

²³ See WARREN, *supra* note 4, at 521.

²⁴ See THOMAS R. VAN DERVORT, *AMERICAN LAW AND THE LEGAL SYSTEM: EQUAL JUSTICE UNDER THE LAW* 311 (2d ed. 2000).

²⁵ *Brennan v. Occupational Safety and Health Rev. Comm'n*, 505 F.2d 869, 872 (10th Cir. 1974) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *Bass Plating Co. v. Town of Windsor*, 639 F. Supp. 873, 880 (D. Conn. 1986) (citing *Fleming v. U.S. Dept. of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983)) (“[W]hen the persons affected by the regulations are a select group with a specialized understanding of the subject being regulated, the degree of definiteness required to satisfy due process is measured by the common understanding and commercial knowledge of the group.”).

²⁶ See *Rodriguez v. City of Cleveland*, 619 F. Supp. 2d 461, 47879 (N.D. Ohio 2009).

²⁷ *DeMasters v. Arend*, 313 F.2d 79, 88 (9th Cir. 1963) (“The investigative power granted administrative agencies is inquisitorial in nature; its exercise does not depend upon a showing of probable cause to believe that a violation of law has occurred. . . . [A]dministrative agencies charged with enforcement of law, ‘can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.’”) (footnotes omitted).

²⁸ See generally *Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994).

²⁹ See *id.* at 304.

³⁰ See *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005).

one another, the individual rights could readily be jeopardized.³¹ The current legal framework fails to provide a clear opportunity to challenge the parallel investigation when the individual rights are being circumvented or diminished, unless there is actual evidence of agency interference.³²

A. Delegated Authority of Administrative and Law Enforcement Agencies, Respectively

Administrative agencies, granted enforcement authority by the legislature, are guided by the operational principles outlined in the APA.³³ While these agencies are afforded great deference in the interpretation of their respective scope of authority,³⁴ they must also abide by the limitations of that authority.³⁵ For, once the legislature clearly defines agency standards, the delegated authority is intended to operate for and serve the public good.³⁶

As statutorily created entities, administrative agencies customarily serve the following three major functions: 1) promulgating a rule – where an agency is acting in a quasi-legislative (regulatory) capacity;³⁷ 2) investigating and enforcing authority – where an agency is acting in its executive (public) capacity³⁸ (the resulting enforcement encompasses penalties which are generally civil in nature);³⁹ and 3) conducting hearings and issuing orders on regulatory violations – where an agency is acting in a quasi-judicial (adjudicatory) capacity.⁴⁰

Law enforcement agencies, like administrative agencies, are also created by statute, but with specific delegation of authority to investigate and punish criminal culpability.⁴¹ As arms of the executive branch, both the administrative and law enforcement agencies have prosecutorial discretion upon the completion of their respective investigations.⁴² However, while an

³¹ *Id.* at 1138–39.

³² *Brennan v. Occupational Safety and Health Rev. Comm'n*, 505 F.2d 869, 87273 (10th Cir. 1974).

³³ *See* 5 U.S.C. § 551–559, §701–706 (2006).

³⁴ *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

³⁵ *See, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

³⁶ *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222 (1989).

³⁷ *United States v. Williams*, 691 F. Supp. 36, 50 (M.D. Tenn. 1988); *see also* 5 U.S.C. § 551(5) (2006).

³⁸ *Chevron*, 467 U.S. at 844.

³⁹ *See Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n*, 430 U.S. 442, 450 (1977); *see also Kent v. Hardin*, 425 F.2d 1346, 1349 (5th Cir. 1970).

⁴⁰ *See Atlas Roofing*, 430 U.S. at 449–50; *Kent*, 425 F.2d at 1349. “The terms ‘quasi legislative’ and ‘quasi adjudicative’ indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court.” *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 774 (2002) (Breyer, J., dissenting).

⁴¹ *See, e.g., Dow Chem. Co. v. United States*, 476 U.S. 227, 231 (1986); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987).

⁴² *Butz v. Economou*, 438 U.S. 478, 515 (1978) (“The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor’s decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.”).

administrative agency has certain obligations that fall under the APA, the primary function of the law enforcement agency is the investigation of criminal activity that may implicate specific constitutional guarantees. This is unlike “civil issues between the government and . . . individuals,”⁴³ which fall under the domain of administrative agencies. Whereas a law enforcement agency is concerned with collecting information in order to prosecute a crime,⁴⁴ an administrative agency is concerned with regulatory compliance.⁴⁵

In carrying out their responsibilities, both agencies have obligations to impartially abide by their statutory functions and objectives. In addition to the adjudicatory means afforded under the APA, administrative agencies operate predominately under civil means of enforcement, such as compliance orders or citations.⁴⁶ The overall goal is to monitor and ensure compliance with predetermined policy considerations by way of remedial measures, rather than resorting to a utilitarian or retributivist approach for purposes of punishment.⁴⁷ The differences between the investigatory authority and methods of operation of law enforcement and administrative agencies are authorized by the legislature and derived from the agencies’ respective functions.⁴⁸

B. Regulatory Enforcement Authority and Individual Rights in Parallel Investigations

In the case of regulatory enforcement, the civil and remedial aspects have often served to the detriment of individual rights because they permit a lesser degree of judicial justification than those warranted by the law enforcement agency.⁴⁹ The potential for misuse of authority by agencies, that have both criminal and administrative investigatory powers, remains problematic in the face of parallel investigations.⁵⁰

⁴³ JOHN D. DELEO, JR., ADMINISTRATIVE LAW 36–37 (2008).

⁴⁴ *Id.* at 37.

⁴⁵ *Dow Chem.*, 476 U.S. at 233.

⁴⁶ *Id.* at 234; *see also* Old Timer, Inc. v. Blackhawk-Cent. City Sanitation Dist., 51 F. Supp. 2d 1109, 1113 (D. Colo. 1999). *Contra* David Blair-Loy, *Judicial Neglect of the Statutory Basis for the Rosario Rule: The Genesis of the Possession or Control Requirement*, 5 J.L. & POL’Y 469, 479 (1997) (“The distinction between ‘law enforcement’ and ‘administrative’ agencies is . . . artificial. The Court of Appeals has never defined what is ‘primarily’ a law enforcement agency as opposed to what is ‘primarily’ an administrative agency, and its approach in practice seems little more than arbitrary. Whether an agency’s administrative functions are primary and its law enforcement functions ‘incidental,’ or vice versa, appears to be purely in the eye of the beholder. The distinction between ‘law enforcement’ and ‘administrative’ agencies is therefore untenable as a matter of both theory and practice”) (footnotes omitted).

⁴⁷ *See* *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 441 (1942); *see also* *United States v. Hudson*, 14 F.3d 536, 541–42 (10th Cir. 1994).

⁴⁸ *See* *Columbia Broad.*, 316 U.S. at 441; *see also* *Hudson*, 14 F.3d at 541–42.

⁴⁹ *FTC v. Cement Inst.*, 333 U.S. 683, 705–06 (1948); *see also* *Kropp Forge Co. v. Sec’y of Labor*, 657 F.2d 119, 122 (7th Cir. 1981).

⁵⁰ *See* WARREN, *supra* note 4, at 521.

The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence. As long ago as 1912 the Supreme Court recognized that under one statutory scheme that of the Sherman Act a transaction or course of conduct could give rise to both criminal proceedings and civil suits. The Court held that the government could initiate such proceedings either “simultaneously or successively,” with discretion in the courts to prevent injury in particular cases. . . .

. . . .

Effective enforcement of [such] laws requires that [administrative and enforcement agencies] be able to investigate possible violations simultaneously. . . . If [an administrative agency] suspects that a company has violated the [laws under its delegated authority], it must be able to respond quickly: it must be able to obtain relevant information concerning the alleged violation and to seek prompt judicial redress if necessary. Similarly, [a law enforcement agency] must act quickly if it suspects that the laws have been broken. Grand jury investigations take time, as do criminal prosecutions. If [the law enforcement agency] moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted. The [administrative agency] cannot always wait for [the law enforcement agency] to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can [the law enforcement agency] always await the conclusion of the civil proceeding without endangering its criminal case. Thus [the court] should not block parallel investigations by these agencies in the absence of “special circumstances” in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.⁵¹

The courts have routinely stated that parallel investigations do not infringe on personal liberties, or demonstrate prejudice to the substantial

⁵¹ SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374, 1377 (D.C. Cir. 1980) (citations and footnotes omitted); *see also* United States v. Kordel, 397 U.S. 1, 11–12 (1970).

rights of an affected party so long as they are conducted in “good faith.”⁵² In other words, so long as a law enforcement agency refers a matter to an administrative agency without further interfering with that agency’s operations in obtaining information, there are no constitutional problems in utilizing any information collected by the administrative agency in a subsequent criminal prosecution.⁵³ The law enforcement agency does not necessarily need to specify a reason for the referral, if it is within the purview of authority of the administrative agency to act upon the referral.⁵⁴ However, standards for the determination of “good faith” are unclear.⁵⁵ As a consequence, the burden to show a lack of good faith on the part of the agencies shifts to the affected party.⁵⁶

Upon the completion of an investigation, both the administrative and law enforcement agencies can exchange collected information without due notice to the affected party.⁵⁷ However, a court’s reluctance to encroach on the legislature’s delegation of authority causes a lack of specific oversight on the exchange.⁵⁸ This leaves unanswered an important question for the affected individual as to whether or not cautionary prerequisites should be imposed on the law enforcement agency’s use of the collected information.⁵⁹ This is concerning. The lower standards required for the issuance of an administrative subpoena as opposed to a search warrant, for example, could allow a law enforcement agency to use the administrative agency’s information to build a criminal case with little or no regard for Fourth Amendment ramifications.⁶⁰

The purview of the law enforcement agency is therefore arguably enhanced beyond the scope of its original statutory delegation, reaching into the protected rights of a suspect simply because he or she is subject to the regulatory authority of an administrative agency.⁶¹ Presently, however, the overlap between administrative and law enforcement investigations is seen by the courts as merely a side-effect of our system of justice; so long as each entity is conducting its affairs under its own authority, there is no

⁵² See *United States v. Gel Spice Co.*, 773 F.2d 427, 433 (2d Cir. 1985); *United States v. Med. House, Inc.*, 736 F. Supp. 1531, 1537 (W.D. Mo. 1989); *United States v. Copple*, 827 F.2d 1182, 1189 (8th Cir. 1987).

⁵³ See *Gel Spice*, 773 F.2d at 433; *Med. House*, 736 F. Supp. at 1537; *Copple*, 827 F.2d at 1189.

⁵⁴ See *Gel Spice*, 773 F.2d at 434; *Med. House*, 736 F. Supp. at 1535; *Copple*, 827 F.2d at 1189.

⁵⁵ See *Gel Spice*, 773 F.2d at 433; *Med. House*, 736 F. Supp. at 1537; *Copple*, 827 F.2d at 1189.

⁵⁶ See *Gel Spice*, 773 F.2d at 433; *Med. House*, 736 F. Supp. at 1536; *Copple*, 827 F.2d at 1189.

⁵⁷ See *Gel Spice*, 773 F.2d at 432; *Med. House*, 736 F. Supp. at 1537; *Copple*, 827 F.2d at 1189.

⁵⁸ See *Gel Spice*, 773 F.2d at 433; *Med. House*, 736 F. Supp. at 1537; *Copple*, 827 F.2d at 1189.

⁵⁹ See *Camara v. Municipal Court*, 387 U.S. 523, 525 (1967). The Supreme Court noted the constitutional encroachment of administrative subpoenas for health and safety inspections of private dwellings requires probable cause. *Id.* at 534. But it also noted its concern that administrative subpoenas lacked oversight by a neutral magistrate. *Id.* at 532–33.

⁶⁰ *Id.* at 539.

⁶¹ *Id.* at 533.

disparaging effect on the rights of the individual.⁶²

C. Expansion of the Administrative State, Information Exchange and the Protection of Individual Rights

The rise of the administrative state expanded the number of areas in which the government has oversight for the purpose of public protection.⁶³ However, with this expansion there was not a proportionate increase in the judicial and congressional oversight needed to ensure that individual constitutional rights are preserved.⁶⁴ Considering the extent of administrative authority vested in the executive branch, coupled with the authority to investigate criminal culpability, protecting an individual's rights can be extremely foreboding.⁶⁵ While an administrative agency is not constitutionally a fourth branch of government,⁶⁶ it acts as such through the promulgation of rules, enforcement of its authority and policies, and, with great deference, review of its own decisions.⁶⁷ As Kenneth F. Warren explained:

[I]t would be patently naive to hold that administrative actions cannot result in the severe deprivation of a person's personal liberties since Congress, as well as state legislatures, has delegated to administrators the power to inflict grave punishments upon individuals or corporate persons without providing them with the benefit of

⁶² See *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376–77 (D.C. Cir. 1980); see also *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1138 (N.D. Ala. 2005).

⁶³ See *VAN DERVORT*, *supra* note 24, at 311.

⁶⁴ See Marc Chase McAllister, *Judicial Review of Administrative Agency Action: Should America Adopt the German model?*, in 2 ANNUAL OF GERMAN AND EUROPEAN LAW 88 (Russell A. Miller & Peer Zumbansen eds. 2006) (“Because administrative agencies engage in lawmaking processes, some form of institutional check upon their activities is necessary to ensure that agencies do not run roughshod over individual rights and liberties.”); SUSAN GLUCK MEZEY, *NO LONGER DISABLED: THE FEDERAL COURTS AND THE POLITICS OF SOCIAL SECURITY DISABILITY* 14 (1988) (“The reliance on judicial scrutiny of agency action to protect individual rights has evolved with the rise of the modern administrative state. Judicial review of administrative procedure frequently involves balancing the enhanced protection of individual rights against the possible loss of bureaucratic efficiency and expertise resulting from judicial oversight. Despite its potential interference with bureaucratic autonomy, judicial review has become more prevalent as ‘courts are increasingly asked to review administrati[ve] action that touches on fundamental personal interests in life, health, and liberty’”) (citation omitted).

⁶⁵ E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 813 (1992) (noting that “[t]he checks and balances that in theory are supposed to limit the power of government have not been utilized by the Court to keep the power of administrative agencies in check.”); see also Matthew S. Melamed, *A Theoretical Justification for Special Solicitude: States and the Administrative State*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 577, 607 (2010) (“Agencies are Frankensteins—conceived by the legislative branch, only, upon birth, to become entities over which that branch can assert little, if any, control. Thus, judicial review is necessary to preserve our constitutional scheme, lest agencies act as a fourth branch of government, politically unaccountable to states and largely insulated from congressional control.”).

⁶⁶ See *INS v. Chadha*, 462 U.S. 919, 986 (1983) (White, J., dissenting) (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 43–44 (1981); *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

⁶⁷ See *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (citations omitted).

independent judicial judgment. Consequently, concerned observers have begun to question very seriously how fair it is to deny persons constitutional due process protections in certain situations just because the proceedings are labeled “civil” instead of “criminal.”⁶⁸

In the separation of authority, the legitimate branches of government have either contributed to the expansion of the administrative state without assessing its effect on individual rights, or created a distinction between individual rights and regulatory requirements protecting the public’s welfare.⁶⁹ Agencies seeking to protect the public under their delegated authority have effective tools for enforcement.⁷⁰ Furthermore, each agency has a responsibility to adequately investigate and enforce the provisions under its delegated authority.⁷¹ Yet, an agency’s responsibility stops short of an analysis of how its authority affects the due process rights of the individual in parallel investigations.⁷²

As noted earlier, upon completion of an investigation, an agency may share all of the material it collected within the scope of its authority, subject to confidentiality concerns.⁷³ Unfortunately, however, there is no broad-based affirmative safeguard to control the exchange of information.⁷⁴ Hence, when the administrative agency collects information from the regulated public, a law enforcement agency may request access to that information and thereby circumvent its separate requirements for

⁶⁸ See WARREN, *supra* note 4, at 520–21 (citations omitted).

⁶⁹ Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1204 (2008) (“Congress provided . . . for the protection of individual rights with the judicial review provisions of the APA, which contemplate a broad judicial role in checking agency utilization of delegated power.”) (citations omitted); Patrick M. Garry, *The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 721 (2006) (“An examination of constitutional history shows that a system of separation of powers exists not just as an organizational model for democratic government. It is also the primary means by which to ensure the protection of individual liberty. But this aspect of separation of powers has been largely ignored in modern constitutional law. Instead of protecting the separation of powers as a means of protecting individual rights, the Court has turned its sights almost completely on the articulation of a vast array of substantive rights. It has created new privacy rights and new substantive due process rights, rather than relying on the structural or procedural safeguards built into the Constitution by the Framers.”).

⁷⁰ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁷¹ See *id.*

⁷² See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 43233 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 53841 (1935) (establishing that agencies have limitations on their authority).

⁷³ See *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 442 (1983); *Chrysler Corp. v. Brown*, 441 U.S. 281, 292–93 (1979); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 651 (5th Cir. 1999); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979); *Jaymar-Ruby, Inc. v. FTC*, 496 F. Supp. 838, 844 (N.D. Ind. 1980); see generally Sara Levy, *The Patriot Act Grand Jury Disclosure Exception: A Proposal for Reconciling Civil Liberty and Law Enforcement Concerns*, 5 CHI.-KENT J. INT’L & COMP. L. 2, (2005); see also Elias C. Selinger, Comment, *An Unredeemed Promise: How Courts can Prevent Offensive Collateral Estoppel from Undercutting the Policy Goals of Amended Federal Rule of Evidence 408*, 102 NW. U. L. REV. 1953, 1963–72 (2008).

⁷⁴ See *Sells Eng’g*, 463 U.S. at 464–66 (Burger, C.J., dissenting).

independent reasonable suspicion or probable cause.⁷⁵ Essentially, by grouping and interpreting the authority of these entities under the executive branch, the other branches have done the public a disservice, especially since the investigatory authorities are subjected to differing standards.⁷⁶

[A]s regulation as expanded and intensified, legislative and judicial authorities have conferred broad investigative powers to practically all administrative agencies.

Statutes usually grant an agency the power to use a variety of methods in carrying out its fact-finding functions. These methods include requirements of reports from regulated businesses, the conducting of inspections, and the use of judicially enforced subpoenas. Failure to comply with agency requests for information is usually dealt with swiftly by easily obtained court orders requiring compliance.

. . . .

The power to investigate is one of the functions that distinguishes the administrative law process from the traditional civil law process. The administrative law process is more like the criminal law process in that the investigative power gives government agencies a standing right to monitor and detect violations of rules.⁷⁷

It is imperative that the sharing of investigatory material between the authorized enforcement agencies be scrutinized. Specific standards must be implemented by the legislature or judiciary that would readily allow affected parties the ability to prevent the use of such information.⁷⁸ In the absence of such scrutiny and action, an affected party facing agency investigation must fear the disclosure of required administrative records because he or she may not afterward be entitled to Fifth Amendment protection in a subsequent criminal prosecution.⁷⁹

To safeguard against an individual's loss of rights, the judicial branch should take an active role in the exchange of this information, and

⁷⁵ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–21 (1978) (noting that during an administrative agency investigation, “[p]robable cause in the criminal law sense is not required. For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that ‘reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]’”) (citations omitted); *see also* Abraham Tabaie, Note, *Protecting Privacy Expectations and Personal Documents in SEC Investigations*, 81 S. CAL. L. REV. 781, 799 (2008).

⁷⁶ *See* VAN DERVORT, *supra* note 24, at 311.

⁷⁷ *Id.*

⁷⁸ *See* Robert Gellman, *Does Privacy Law Work?*, in *TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 197–98* (Philip E. Agre & Marc Rotenberg eds. 1997).

⁷⁹ JOHN F. COONEY ET AL., *ENVIRONMENTAL CRIMES DESKBOOK* 51 (1996).

not leave the burden solely on the affected party to prove a lack of good faith.⁸⁰ The legislative branch is also in the primary position to develop statutes that would limit the delegated authority of administrative agencies to freely share material that was gathered under standards that do not rise to the level of full constitutional protection.⁸¹ When either the administrative or law enforcement agency requests information from the other, with intent to utilize such in its own proceedings, both branches should have mechanisms in place that scrutinize the exchange and use of such information. To presume that these agencies have general public safety policy objectives should not justify the end result of circumventing an individual's rights.⁸²

III. THE ADMINISTRATIVE SUBPOENA

The ability of an administrative agency to obtain information from a regulated party is patently less cumbersome than the law enforcement requirement of probable cause.⁸³ The primary tool for accessing this information is through the use of an administrative subpoena.⁸⁴ An administrative agency has expansive authority to investigate complaints and conduct reviews using warrantless searches and seizures.⁸⁵ It further has the ability to collect and secure information that would not otherwise be readily accessible to a law enforcement agency.⁸⁶

Likewise, information collected by a law enforcement agency that is precluded by the "fruit of the poisonous tree" doctrine may otherwise be used by the administrative agency during its proceedings.⁸⁷ The Supreme Court has explained that an administrative agency need not demonstrate

"[probable] cause in the criminal law sense" to obtain a warrant to inspect property for compliance with a regulatory scheme. Rather, an administrative warrant may [be] issue[d] "not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment] . . .'"⁸⁸

Although the potential for abuse is clear, whether through political or vindictive motives, the system has relied on the good faith standard for use

⁸⁰ See *Martin v. Gard*, 811 F. Supp. 616, 621–24 (D. Kan. 1993).

⁸¹ See *INS v. Chadha*, 462 U.S. 919, 974, 986–87 (1983) (White, J., dissenting).

⁸² *Id.* at 973.

⁸³ See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (citation omitted).

⁸⁴ See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

⁸⁵ *Id.*

⁸⁶ See *Smith v. Richert*, 35 F.3d 300, 305 (7th Cir. 1994).

⁸⁷ See *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 369 (1998).

⁸⁸ *Dow Chem. Co. v. United States*, 476 U.S. 227, 252 n.14 (1986) (Powell, J., concurring in part and dissenting in part) (alteration in original; citations omitted).

of the subpoena during an initial independent investigation, even where these motives may be considered suspect, and run counter to Fourth Amendment rights.⁸⁹

The Fourth Amendment protects against unreasonable searches and seizures by requiring in most instances that a search warrant be obtained before a physical search for evidence is conducted Agencies can conduct warrantless searches in several situations. Warrants are not required to conduct searches in certain highly regulated industries. Firms that sell firearms or liquor, for example, are automatically subject to inspections without warrants. Sometimes, a statute permits warrantless searches of certain types of hazardous operations, such as coal mines A warrantless inspection might . . . be considered reasonable in emergency situations⁹⁰

In order for an administrative agency to properly function in protecting the public welfare, it needs to have the freedom to collect information from regulated individuals or entities.⁹¹ Gathering information may involve regulatory goods and services in accordance with specific standards, or studying the accounting materials of a corporation to ensure compliance with record-keeping procedures.⁹² The danger in the accumulation of such information lies in its sheer enormity, and the ability of the agency to collect the information “at will.”⁹³ From the agency’s perspective, the information is vital to its essential function of regulating a particular industry or profession.⁹⁴

However, from the perspective of individuals and entities, the readily identifiable cost, in light of the agency authority, seems to be in the form of an accepted encroachment into their sphere of personal rights.⁹⁵ The court system has effectively reduced, or reinterpreted, these rights in the name of regulatory efficiency.⁹⁶ Where the rights of the individual have to be balanced against the public welfare, the regulatory efforts have increasingly found support in both the legislative and judicial branches.⁹⁷ It

⁸⁹ SEC v. Wheeling-Pittsburg Steel Corp., No. 80-1375, 1980 WL 8157, at *10 (3rd Cir. Aug. 27, 1980) (“[A] court should not decline to enforce a summons issued by that agency simply because it does not approve of the political objectives that prompted a public official to call to the attention of the agency instances of possible wrong doing. It is not the identity or political motivations of informants that should determine whether the agency’s subpoenas are to be enforced, but whether the agency has made an independent, good faith decision to commence action.”).

⁹⁰ FRANK B. CROSS & ROGER MILLER, THE LEGAL ENVIRONMENT OF BUSINESS 129 (7th ed. 2009).

⁹¹ See WARREN, *supra* note 4, at 527.

⁹² See *id.* at 527–29.

⁹³ See *id.* at 527.

⁹⁴ See *id.*

⁹⁵ See *id.* at 558.

⁹⁶ See *id.*

⁹⁷ See *id.*

is argued that in the area of administrative subpoenas, individual rights are either seemingly non-existent, or must be affirmatively defended.⁹⁸ Courts have declined to bar administrative subpoenas despite the possibility that a criminal investigation will ensue, or that the evidence gathered may become relevant in a subsequent criminal proceeding:⁹⁹

Administrative subpoenas are not a traditional tool of criminal law investigation, but neither are they unknown. Administrative subpoenas and criminal law overlap in at least [three] areas. First, under some administrative regimes it is a crime to fail to comply with an agency subpoena or with a court order secured to enforce it. Second, most administrative schemes are subject to criminal prohibitions for program-related misconduct of one kind or another, such as bribery or false statements, or for flagrant recalcitrance of those subject to regulatory direction. In this mix, agency subpoenas usually produce the grist for the administrative mill, but occasionally unearth evidence that forms the basis for a referral to the Department of Justice for criminal prosecution. Third, in an increasing number of situations, administrative subpoenas may be used for purposes of conducting a criminal investigation.¹⁰⁰

Indeed, there are numerous statutes that authorize both administrative agency subpoenas,¹⁰¹ as well as the use of these subpoenas during criminal investigations.¹⁰² The standard for allowing these warrantless searches is that the search itself, though not originally for the purposes of law enforcement, was nevertheless authorized by law.¹⁰³ Customarily, the government's intrusion is upheld under the scope of the Fourth Amendment where the subpoena is issued "within the authority of the agency, [and] the demand is not too indefinite and the information

⁹⁸ See *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 906 (Temp. Emer. Ct. App. 1984) (quoting *United States v. Thriftyman, Inc.*, 704 F.2d 1240, 1249 (Temp. Emer. Ct. App. 1983)) ("Subpoena enforcement proceedings are not intended to be 'exhaustive inquisitions into the practices of regulatory agencies.'").

⁹⁹ See *United States v. Copple*, 827 F.2d 1182, 1189 (8th Cir. 1987) ("An administrative agency investigation is not improper merely because it seeks evidence that by its nature could be relevant to a civil as well as to a potential criminal proceeding."); *Martin v. Gard*, 811 F. Supp. 616, 624 (D. Kan. 1993).

¹⁰⁰ Charles Doyle, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments*, in *NATIONAL SECURITY ISSUES* 4 (Daniel D. Pegarkov ed. 2006).

¹⁰¹ *Id.* at 5 ("There are now over 300 instances where federal agencies have been granted administrative subpoena power in one form or another.") (footnote omitted).

¹⁰² *Id.* at 4 ("(1) 18 U.S.C. 3486 (administrative subpoenas in certain health care fraud, child abuse, and Secret Service protection cases); (2) 21 U.S.C. 876 (Controlled Substances Act cases); and (3) 5 U.S.C.App.(III) 6 (Inspector General investigations).") (footnote omitted).

¹⁰³ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

sought is reasonably relevant.”¹⁰⁴ After issuance, the affected party has the burden of showing unreasonableness.¹⁰⁵

Despite the constitutional guarantees, in the case of a parallel investigation the law enforcement agency may encroach upon the protections afforded under the Fourth Amendment because the delineation between each entity’s entitlements to the information may not always be clear.¹⁰⁶ In other words, while the courts have followed the standard for reasonableness in issuing administrative subpoenas, they have not articulated a clear rationale for a law enforcement agency’s entitlement to the administrative agency’s collected information as it pertains to a subsequent criminal proceeding.¹⁰⁷ What is lacking is a sound system of checks and balances, since the authority of both types of agencies are interpreted and enforced under the auspices of the executive branch.¹⁰⁸

A. Public Protection and the Good Faith Standard

The current public policy climate appears to favor the use of administrative jurisdiction to justify or assist in criminal investigations, the most common exemplification being that of counter-terrorism intelligence gathering.¹⁰⁹ While there appears to be no public disclosures of these investigations and tactics as they relate to other areas of legal violations, the potential danger of agency misconduct cannot be dismissed as nonexistent or implausible.¹¹⁰ Maneuvering between the legal nuances of an administrative agency and a law enforcement agency can be cumbersome for the individual and the courts, which calls into question whether the public welfare is truly being protected.¹¹¹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 652–53.

¹⁰⁶ ROBERT M. BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE: EXAMPLES & EXPLANATIONS 98–99 (5th ed. 2006).

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See* WARREN, *supra* note 4, at 576 (“Signed into law on October 26, 2001, the [USA PATRIOT Act or Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act] is amazingly complex and comprehensive. . . . [Its purpose is to provide] ‘tools to intercept and obstruct terrorism’; whether the tools are appropriate from a democratic and constitutional perspective remains a hot debate. In addition to greatly increasing the power of [some 40 different] agencies to conduct administrative/criminal searches and seizures through the use of a variety of traditional and high-tech electronic surveillance means, the act . . . severely limits judicial review of these searches. . . . [It] gives the attorney general broad discretionary powers to . . . interpret and apply the meaning of what constitutes a terrorist or terrorist group under the act; decide whether certain persons or organizations should be targeted in terrorist investigations; determine whether the financial assets of suspected terrorists, terrorist organizations, or those supporting terrorists or terrorist groups should be frozen; and whether certain aliens should be detained or deported because they are suspected of being terrorists or having ties with terrorists.”) (footnotes omitted).

¹¹⁰ *See* United States v. Scrusby, 366 F. Supp. 2d 1134, 1139 (N.D. Ala. 2005).

¹¹¹ *Dolfi v. Pontesso*, 156 F.3d 696, 700 (6th Cir. 1998) (“The special deference [given to administrative interpretation, for example,] . . . is based on the expertise of an administrative agency in a complex field of regulation with nuances perhaps unfamiliar to the federal courts . . . Unlike

For instance, one common airport screening method is to utilize profiling to compile information about airline passengers. Though initially employed by an administrative agency as a counter-terrorism initiative, it is conceivable that the information collected through the profiling could be readily disclosed to law enforcement agencies.¹¹² Such sharing would skirt privacy issues, especially where the purpose of the regulation is to serve the public good.¹¹³ Although not widely acknowledged, the potential for this type of information exchange is real, and has already occurred under a federal program entitled “Operation Talon.”¹¹⁴ This program allowed for the exchange of information from agencies maintaining welfare records to law enforcement officers.¹¹⁵ Recipients with active warrants were asked to report to a local food stamp office to either correct a “problem with their benefits” or to collect a prize, and were apprehended upon arrival.¹¹⁶

Given the perception of public good, affected parties are less likely to prevail in challenging the parallel investigation under the good faith standard, or in preventing the exchange of information.¹¹⁷ From the administrative agency’s perspective, there appears to be the presumption of good faith until the individual can prove otherwise.¹¹⁸ However, the nature of the administrative proceeding is daunting from a constitutional perspective, even absent the prospect of a parallel investigation.¹¹⁹ The

environmental regulation or occupational safety, criminal law and the interpretation of criminal statutes is the bread and butter of the work of federal courts.”) (citation omitted).

¹¹² See Deborah von Rochow-Leuschner, *CAPPS II and the Fourth Amendment: Does it Fly?*, 69 J. AIR L. & COM. 139, 163–64 (2004).

¹¹³ See *id.*

¹¹⁴ See Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 669–70 (2009).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 670 (“Operation Talon transformed food stamp offices into the sites of sting operations for arresting aid recipients with outstanding arrest warrants and facilitated use of welfare administrative data to capture low-income individuals who are wanted by the criminal justice system. Through this program the welfare system has become an extension of the criminal justice system, transforming the welfare system into a trap for hungry lawbreakers.”).

¹¹⁷ *United States v. Rodriguez*, Crim. No. 92–259(RLA), 1993 WL 34641, at *2 (D. P.R. Feb. 2, 1993) (“The caselaw on the investigatory authority of administrative agencies has hardly allowed suppression when a legitimate or good faith investigation is challenged under improper purpose standards. This is more so when it falls within the realm of the authority and purpose of the agency creation. If the investigation may lead to civil, administrative or even criminal liability for violations is but one of the alternatives allowed.”) (citations omitted).

¹¹⁸ *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (“The presumption that government officials act in good faith is nothing new to our jurisprudence.”) (citation omitted); *TK-7 Corp. v. FTC*, 738 F. Supp. 446, 449 (W.D. Okla. 1990) (“In performing its law enforcement duties, an administrative agency is entitled to a presumption of regularity, i.e., that it will discharge diligently and in good faith its responsibilities under the law.”) (citations omitted).

¹¹⁹ *Yakus v. United States*, 321 U.S. 414, 473 (1944) (“In the enforcement of administrative orders the courts have been assiduous, perhaps at times extremely so, to see that constitutional protections to the persons affected are observed.”) (footnote omitted); *Salgado-Diaz v. Ashcroft*, 395 F.3d 1158, 1162 (9th Cir. 2005) (“Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the *Fifth Amendment’s* requirement of due process.”) (citation omitted); *Sealed v. Sealed*, 332 F.3d 51, 56 (2nd Cir. 2003) (“Where the administrative scheme does not require a certain outcome, but merely *authorizes* particular actions and remedies, the scheme does not create ‘entitlements’ that receive constitutional protection under the Fourteenth Amendment.”) (emphasis in

threat of an individual's constitutional liberties being diminished through administrative proceedings cannot be minimized.¹²⁰

With this in mind, the good faith standard should be more carefully weighed toward the possibility that a law enforcement agency's prosecution has the potential to deprive an individual of his or her civil liberties.¹²¹ As such, the judiciary should scrutinize the good faith standard in light of the fact that the deprivation in a criminal proceeding can be predicated on administrative findings.¹²² Fundamentally, it is the responsibility of the other governmental branches to limit the executive branch's authority in the administrative arena in order to avoid a potential misuse of power.¹²³

B. Parallel Investigations and the Notion of Good Faith

The legitimacy of parallel investigations finds justification in the unique purpose of each agency's investigation.¹²⁴ Obviously, the administrative agency cannot merely conduct an investigation with the immediate objective of delivering this information to the law enforcement agency.¹²⁵ "An administrative agency investigation is not improper merely because it seeks evidence that by its nature could be relevant to a civil as well as to a potential criminal proceeding."¹²⁶ However, "if the subject of [an] investigation could establish that [an] administrative summons was issued for an improper purpose—that is, solely to gather evidence for a criminal investigation—the summons would be unenforceable."¹²⁷ Yet the judicial branch, thus far, has been reluctant to interfere where the good faith standard has been met.¹²⁸ As long as the agency's objectives are accomplished "pursuant to a valid administrative scheme and not for the purpose of gathering evidence for a criminal prosecution," the investigation

original) (citation omitted); *Bardeau v. Meadows*, Civil Action No. 7:08-cv-00486, 2008 WL 4057310, at *2 (W.D. Va. Aug. 29, 2008) ("Because administrative proceedings such as prison disciplinary proceedings are not tantamount to a criminal charge or trial, prisoners charged with disciplinary infractions do not have the same constitutional procedural protections as does a criminal defendant.") (citation omitted).

¹²⁰ See *Yakus*, 321 U.S. at 437–39; *Salgado-Diaz*, 395 F.3d at 1162; *Sealed*, 332 F.3d at 56; *Bardeau*, 2008 WL 4057310, at *2; see also Shiv Persaud, *Deconstructing the Bill of Rights in Administrative Adjudication – Enfranchising Constitutional Principles in the Process*, 51 S. TEX. L. REV. 369, 37071 (2009).

¹²¹ See *McQueen v. United States*, 179 F.R.D. 522, 528–31 (S.D. Tex. 1998).

¹²² *Id.* at 531–32.

¹²³ See *Krauss*, *supra* note 65, at 797–99.

¹²⁴ See *Ferguson v. City of Charleston*, 532 U.S. 67, 99 (2001) (Scalia, J., dissenting).

¹²⁵ See *id.* at 73 (majority opinion).

¹²⁶ *United States v. Copple*, 827 F.2d 1182, 1189 (8th Cir. 1987) (citing *Donaldson v. United States*, 400 U.S. 517, 53233 (1971); *United States v. Giordano*, 419 F.2d 564, 568 (8th Cir. 1969)).

¹²⁷ *WEBB*, *supra* note 10, at 14–6.

¹²⁸ *Id.* at 14-614-8 ("Rather than focus on the due process considerations, the Court's analysis [has] centered on [the agency's authority to issue summonses] . . . [However,] courts have routinely rejected the application of the improper purpose doctrine outside the context of parallel IRS proceedings. . . . Moreover, many federal agencies are explicitly authorized to work with the Department of Justice through their Inspectors General which have broad administrative investigatory authority.").

has been deemed legitimate.¹²⁹ The potential infringement upon the rights of the affected party in other proceedings that could follow from an open exchange of information between agencies is not enough to overcome the good faith standard.¹³⁰

Ultimately, the burden appears to remain with the affected party to show that the parallel investigation was conducted in bad faith.¹³¹ An unsupported accusation alone will not require the agency to justify its investigation beyond showing proper adherence to delegated authority.¹³² “Mere allegations are not enough to put the agency’s good faith in issue, or to raise a substantial question of abuse.”¹³³ First, an affected party must clearly demonstrate an instance of selective prosecution by the agency.¹³⁴ Next, the party must show that the agency is not conducting investigations against others who are similarly situated and committing the same acts.¹³⁵ And, even if there is evidence of bad faith, the courts may still justify an administrative inspection, as long as that inspection is properly within their statutory authority.¹³⁶

Despite the broad investigatory authority, an administrative agency’s subpoena power is not limitless. Rather the Fourth Amendment demands that the investigation be conducted pursuant to a legitimate, Congressionally authorized purpose and that the subpoena be relevant to that purpose. Further, the necessary statutory procedures must be followed and the information sought must not be already within the agency’s possession.

...

... [For example, a taxpayer cannot argue] that an Internal Revenue summons could not be utilized in aid of an investigation that potentially might result in a recommendation of criminal prosecution. . . . [S]o long as the summons was issued in good faith pursuant to a Congressionally authorized purpose and prior to a referral to the Department of Justice, it [is] enforceable.

...

[Indeed,] [t]he better analysis is one in which the

¹²⁹ *United States v. Gel Spice Co.*, 773 F.2d 427, 433 (2nd Cir. 1985).

¹³⁰ *Id.* at 432.

¹³¹ *See Martin v. Gard*, 811 F. Supp. 616, 624 (D. Kan. 1993) (citations omitted).

¹³² *See id.*

¹³³ *See id.* (citations omitted).

¹³⁴ *See Comptroller of Currency v. Lance*, 632 F. Supp. 437, 443 (N.D. Ga. 1986).

¹³⁵ *See id.*

¹³⁶ *See generally People v. Weems*, No. B168721, 2004 WL 2526429 (Cal. Ct. App. Nov. 9, 2004).

court looks to the circumstances of the particular case to assess the nonreferring agency's role in the criminal investigation. The court must determine whether the sole purpose of the nonreferring agency's investigation and subpoena is to gather evidence for the criminal investigation or whether the subpoena was issued in good faith pursuit of a Congressionally authorized purpose.¹³⁷

Essentially, the judiciary's primary focus is on the distinction between the investigations according to each agency's delegated authority without consideration of the good faith standard on individual rights.¹³⁸ This places the investigations within procedural boundaries without looking at the private consequence.¹³⁹ Additionally, in cases involving parallel investigations where the private consequences of civil and criminal acts are intertwined, it is the "Federal courts [that] have supervisory authority over the manner in which Federal agents exercise their power. . . . To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect."¹⁴⁰ But does this always occur? The following example helps to shed some light on the issue.

In a case that came before the United States District Court of Alabama regarding an administrative investigation by the Securities and Exchange Commission ("SEC") concerning accounting fraud, a defendant learned that the agency was conducting a parallel investigation in conjunction with the Department of Justice.¹⁴¹ The defendant moved to suppress a deposition that was conducted by the SEC during the subsequent criminal proceeding for perjury.¹⁴² The court employed the good faith standard, and required the defendant to demonstrate that the parallel proceeding would either violate his constitutional rights or "depart from the proper administration of criminal justice."¹⁴³

The court recognized that the location of the deposition was moved by the SEC to accommodate agents from the justice department, and that the defendant was questioned regarding a criminal investigation that had not been disclosed.¹⁴⁴ Because of these actions, it concluded that the administrative agency acted with bad faith in conducting the deposition.¹⁴⁵ This finding was based on the premise that the civil investigation had

¹³⁷ SEC v. OKC Corp., 474 F.Supp. 1031, 1034, 103738 (D. Tex. 1979) (in the matter of an application to enforce administrative subpoena duces tecum of the SEC) (citations omitted).

¹³⁸ United States v. Scrushy, 366 F. Supp. 2d 1134, 1137 (N.D. Ala. 2005).

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 1137–39 (asserting there does not appear to be "any controlling law . . . [that] distinguishes a legitimate, parallel investigation from an improper one.").

¹⁴¹ *Id.* at 1135.

¹⁴² *Id.* at 1137.

¹⁴³ *Id.* at 1138 (citations and emphasis omitted).

¹⁴⁴ *Id.* at 1139.

¹⁴⁵ *Id.* at 1140.

become “inescapably intertwined with the criminal investigation[,]” a commingling that “negated the existence of [the] parallel [nature of the] investigations.”¹⁴⁶

From the court’s reasoning, it appears that the good faith standard was treated as though it were a presumption that must be overcome by the affected party.¹⁴⁷ In other words, the affected party must provide clear evidence of bad faith against an inherent notion of fairness.¹⁴⁸ Specifically, the evidence must essentially rise to the level of irrefutability, proving that the sole purpose of the administrative action was to assist the parallel criminal prosecution.¹⁴⁹

In a separate case, the Supreme Court of Kentucky considered the cooperation of a local sheriff’s office and a state licensing agency in a drug bust.¹⁵⁰ While responding to neighborhood complaints regarding individuals loitering outside a medical clinic, the sheriff’s office began an investigation in conjunction with an administrative licensing agency for the suspected sale of illegal narcotics.¹⁵¹ The administrative agency utilized its subpoena power to search the premises under the direction of the law enforcement agency.¹⁵² During the search, the enforcement investigators accompanied the administrative investigators and even directed them as to which files to procure.¹⁵³ The court found that the administrative investigation was “inextricably entwined” with the enforcement objectives, even though it admitted the statements made during the illegal search.¹⁵⁴

In a separate case, the Third Circuit stated:

If the court concludes that an administrative subpoena has been issued for the purpose of developing a criminal case it will decline enforcement. [The reasoning is similar i]n the grand jury context[, where] a court will not enforce a subpoena if its purpose is to gather evidence for a pending criminal indictment or information. A court will not enforce a grand jury subpoena if the grand jury is not pursuing an investigation in good faith or is motivated by a desire to harass an individual.¹⁵⁵

With regards to bad faith, the terms used by the courts, such as

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1138 (citations and emphasis omitted).

¹⁴⁸ *See id.* (citations and emphasis omitted).

¹⁴⁹ *See SEC v. OKC Corp.*, 474 F. Supp. 1031, 1038 (N.D. Tex. 1979) (citations omitted).

¹⁵⁰ *Williams v. Commonwealth*, 213 S.W.3d 671, 673–74. (Ky. 2006).

¹⁵¹ *Id.*

¹⁵² *Id.* at 677.

¹⁵³ *Id.* at 680.

¹⁵⁴ *Id.* at 67677.

¹⁵⁵ *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 91 (3d Cir. 1973) (citations omitted).

“inescapably intertwined,”¹⁵⁶ “‘trickery’ or cloaking,”¹⁵⁷ “a desire to harass,”¹⁵⁸ or “a substantial question of abuse”¹⁵⁹ remain broad enough to essentially require specific evidence of malicious intent on the part of the government.¹⁶⁰ As the judicial branch has not been inclined to interfere with the enforcement of an agency’s subpoena during a parallel investigation, these terms should, at the very least, be streamlined in light of this overall noninterventionist stance in construing an administrative enforcement scheme.¹⁶¹

Furthermore, the public purpose served through regulatory authority should encompass clearly defined procedures and protocols to prevent the subsequent use of collected materials, which the administrative agency’s investigation was not designed to accomplish.¹⁶² The legitimacy of arguing that administrative agencies are not a fourth branch government lies in the fact that the other branches have supreme oversight over encroachment and misuse of authority.¹⁶³ This being the case, the good faith standard should not have to rise to the level of an “improper purpose” or constitute an “abuse of process” on the part of the agency before an individual can seek remedy against parallel investigations.¹⁶⁴ The judiciary and legislature should revisit the statutory policies to determine whether they have provided these agencies too much authority. In the absence of such examination, the standard of good faith would simply be tantamount to evidence that the agency acted beyond the scope of its delegated authority.¹⁶⁵ As long as agencies appear to act within their statutory boundaries, the courts seem

¹⁵⁶ *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005).

¹⁵⁷ *United States v. Setser*, 568 F.3d 482, 493 (5th Cir. 2009).

¹⁵⁸ *Schofield*, 486 F.2d at 91.

¹⁵⁹ *Martin v. Gard*, 811 F.Supp. 616, 624 (D. Kan. 1993).

¹⁶⁰ *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 905 (Temp. Emer. Ct. App. 1984) (“The mere existence of parallel ongoing civil and criminal investigations does not prevent the enforcement of [an administrative agency’s] subpoena . . . absent special circumstances which demonstrate prejudice to the substantial rights of [the affected party]. There [needs to be] evidence of agency bad faith or malicious tactics.”).

¹⁶¹ *DeMasters v. Arend*, 313 F.2d 79, 87 (9th Cir. 1963). The judiciary won’t interfere with public policy regulations. *Id.* (“These grants of power are to[o] liberally construed in recognition of the vital public purposes which they serve. . . . An investigation cannot be said to be ‘unnecessary’ if it may contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry.”) (footnote omitted).

¹⁶² *See id.*

¹⁶³ *See generally* *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁶⁴ *Martin v. Gard*, 811 F. Supp. 616, 620 (D. Kan. 1993) (“Once the agency has made its threshold showing of these factors, then the court is to enforce the subpoena unless the respondent proves that the subpoena is overly broad or burdensome; or that enforcement would constitute an abuse of the court’s process. An abuse of process occurs when the administrative agency is acting for an improper purpose, such as to harass or pressure settlement in a collateral matter, or any other purpose that lacks good faith.”) (citations omitted).

¹⁶⁵ *United States v. RFB Petroleum, Inc.*, 703 F.2d 528, 531 (Temp. Emer. Ct. App. 1983) (“Before a referral to the [Department of Justice] has been made, an administrative subpoena is issued for the improper purpose of gathering information for a criminal case only if the issuing agency is found to have formed an institutional commitment to refer the case, with a concurrent abandonment of any civil [administrative] purpose. Furthermore, ‘the question of institutional purpose is one of fact.’”) (citations omitted).

reluctant to impede the general purpose of these agencies.¹⁶⁶ These generalized purposes, however, fail to explain the specific public purpose served by a parallel investigation, especially in the absence of clear legislative specifications.¹⁶⁷

To illustrate, in a matter before the Eighth Circuit, the Federal Bureau of Investigation (“FBI”) received information regarding a savings bank issuing sham loans.¹⁶⁸ It notified the Federal Deposit Insurance Corporation (“FDIC”), who initiated a parallel administrative investigation.¹⁶⁹ After the FDIC located questionable loan documents, the FBI subsequently requested the information for their criminal prosecution.¹⁷⁰ Although the defendants argued that the FDIC was acting solely as an “information-gathering” agency for the FBI, the court found that neither investigation was improperly conducted.¹⁷¹ In light of the affirmative duties imposed upon the FDIC by the legislature, that agency was entitled to conduct its investigation within its “areas of responsibility.”¹⁷²

Here again, there was no specific policy regarding the parallel investigation, as long as the general policy objectives of each agency were being fulfilled.¹⁷³ Consider the following:

[A]n inquiry by the government for information—whether sought by a request for “voluntary cooperation” or by means of compulsion—almost always raises the specter of parallel proceedings. Information gathered in the context of a civil action seeking monetary sanction may lead to a criminal prosecution seeking a prison term. Conversely, information shared or surrendered in the criminal context may hurt a defendant's cause in the civil action, where, under certain circumstances, he may face equitable or financial claims more damaging than the criminal penalties.

. . .

. . . .

[In the area of securities law regulation and enforcement,] [t]he Department of Justice has . . . become

¹⁶⁶ *Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.*, 878 F.2d 875, 878–79 (5th Cir. 1989) (“When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may inform itself as to whether there is probable violation of the law. The court's inquiry is limited to two questions: (1) whether the investigation is for a proper statutory purpose and (2) whether the documents the agency seeks are relevant to the investigation.”) (citations omitted).

¹⁶⁷ *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374, 1377 (D.C. Cir. 1980).

¹⁶⁸ *United States v. Copple*, 827 F.2d 1182, 1186 (8th Cir. 1987).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1189.

¹⁷² *Id.*

¹⁷³ *Id.*

increasingly aggressive in its pursuit of entities and individuals it believes to have violated the securities laws, often working with regulatory agencies to gather information and apply pressure to force a plea agreement. . . . [It] now frequently asks target corporations to waive the attorney-client privilege, dangling the carrot of a deferred-prosecution agreement while brandishing the stick of criminal indictment. . . .

. . . .

[Although t]here is evidence that courts are growing more circumspect of the power wielded by government agencies pursuing concurrent civil and criminal investigations . . . [t]ime will tell whether these decisions presage a broader change in judicial sensitivity to the issues criminal defendants face when litigating across forums.¹⁷⁴

Arguably, the courts should focus attention on the extent to which the sharing of information should occur between agencies during and after a parallel investigation, even when the exchange occurs in the absence of dual investigations.¹⁷⁵ In addition, the legislative and judicial branches should give greater attention to the potential effects the parallel investigatory process has on the rights of the individual in both proceedings.¹⁷⁶ This is because the current system allows for a near unrestricted means of access to a regulated entity, such as a corporation, in the name of the public good, forcing the corporation to prove the agency's disentanglement under an ad hoc standard of review.¹⁷⁷ Given the access to investigatory information, the judicial branch should act, and not wait until the corporation proves that an administrative agency is acting beyond its delegated authority. It should require that a law enforcement agency prove its entitlement to use collected information during and after a parallel investigation, or legitimately provide

¹⁷⁴ Naftalis, *supra* note 19, at 1259–60.

¹⁷⁵ *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008) (“Other circuits have agreed that Fourth Amendment and possible due process limitations may be implicated in a dual investigation. . . . Almost every other circuit has denied suppression, [however,] even when government agents did not disclose the possibility or existence of a criminal investigation, so long as they made no affirmative misrepresentations.”) (citations omitted).

¹⁷⁶ *See id.* (citations omitted).

¹⁷⁷ *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311–12 (1978) (quoting *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977) (“The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. . . . The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. ‘[The] Fourth Amendment’s commands grew in large measure out of the colonists’ experience with the writs of assistance. . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.’ Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.”) (citations omitted).

the affected party a clear point of entry into the administrative process prior to the information exchange.¹⁷⁸

III. REQUIRED RECORDS INFORMATION EXCHANGE AND INDIVIDUAL RIGHTS

The collection and sharing of information has also raised concern among affected parties regarding the application of the Fifth Amendment.¹⁷⁹ In order to protect the public and ensure regulatory compliance, an affected party is required to maintain certain records.¹⁸⁰ By accepting a license to practice a particular profession, or starting a business in a pervasively regulated field, the party has “voluntarily” accepted the rules of the regulatory environment.¹⁸¹ This interpretation pertaining to licensing has allowed the courts to circumvent the affected party’s right against self-incrimination.¹⁸² Using the administrative agency’s subpoena power and regulatory authority, a law enforcement agency can obtain any record that the affected party is required to customarily keep.¹⁸³ A full application of the Fifth Amendment would, as the judiciary has stated, frustrate the regulatory scheme and “public aspect” of the required records.¹⁸⁴ As one court stated:

[T]he required records exception [to the Fifth Amendment may apply to administratively required records] despite the self-incriminating and testimonial aspects of the production, for the following reasons: (1) the public interest in obtaining the information necessary to the regulatory scheme outweighs the private interest in disclosure, and if a private individual were able to invoke the privilege the regulatory purpose of the scheme would be frustrated; (2) the individual, by engaging in the regulated activity, is deemed to have waived his privilege as to the production of those records which are required to be kept; and (3) the individual admits little of significance by the act of production because of the public aspects of the documents. [Further,] the required records exception to the Fifth Amendment privilege [applies] to the act of production by a sole proprietor even where the act of production could involve compelled testimonial self-incrimination.¹⁸⁵

¹⁷⁸ *Id.* (citations omitted).

¹⁷⁹ *See* *Smith v. Richert*, 35 F.3d 300, 303 (7th Cir. 1994).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 301–02.

¹⁸² *Grosso v. United States*, 390 U.S. 62, 63–65 (1968).

¹⁸³ *See* *United States v. Lehman*, 887 F.2d 1328, 1333 (7th Cir. 1989).

¹⁸⁴ *See In re Grand Jury Subpoena (U.S. v. Spano)*, 21 F.3d 226, 230 (8th Cir. 1994).

¹⁸⁵ *Id.* (footnote omitted).

Similar to the application of the Fourth Amendment, the administrative agency may not utilize the required records doctrine to obtain information solely for the purpose of a criminal prosecution.¹⁸⁶ In fact, the doctrine places the responsibility on the affected party to avoid commingling private records, since the information contained in the required records may be subjected to the agency's subpoena power.¹⁸⁷ While the affected party's course of action may be to seek a protective order to safeguard incriminating information,¹⁸⁸ the courts tend to focus on the testimonial nature of the information for the Fifth Amendment's application.¹⁸⁹

In determining the extent to which the subpoena may affect the incriminating private records, an arguable standard may be one of reasonableness that "stops short of probable cause."¹⁹⁰ For example, a defendant facing criminal investigation may decide to request a stay of the administrative investigation,¹⁹¹ possibly to avoid issues associated with self-incrimination.¹⁹² The court then will have to balance the inequity arising from the agency's need to proceed against the harm to the defendant.¹⁹³ As noted by Warren:

The record-keeping and reporting requirements have never faced serious legal challenges. The courts have held in general that the record-keeping requirement does not violate the Constitution as long as "there is a sufficient relation between the activity sought to be regulated and the public concern so that the government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the administration."

. . . .

¹⁸⁶ See *Marchetti v. United States*, 390 U.S. 39, 56–57 (1968).

¹⁸⁷ See *id.*; see generally *Fisher v. United States*, 425 U.S. 391 (1976).

¹⁸⁸ See *WEBB*, *supra* note 10, at 14-6, 14-7.

¹⁸⁹ *Fisher*, 425 U.S. at 418 ("History and principle teach that the privacy protected by the Fifth Amendment extends not just to the individual's immediate declarations, oral or written, but also to his testimonial materials in the form of books and papers.") (footnote omitted).

¹⁹⁰ *Parks v. Fed. Deposit Ins. Co.*, 65 F.3d 207, 214 (1st Cir. 1995), *rehearing en banc granted, opinion withdrawn* ("In such cases, the Supreme Court has often utilized a reasonableness standard which requires the government to articulate a reasonable suspicion of wrongdoing by the target of the search.") (citations omitted).

¹⁹¹ See *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980).

¹⁹² *COONEY*, *supra* note 79, at 51 ("Those seeking a stay must show that a criminal investigation is active or that indictment is likely, and must clearly demonstrate how continuation of civil or administrative [action] would compel them to assert the Fifth Amendment privilege The Supreme Court has ruled that the Double Jeopardy Clause does not preclude the government from imposing both civil and criminal sanctions based on the same behavior, as long as the civil sanction serves only a remedial purpose [and does not inappropriately further the criminal goal of punishment]. . . . Although a court will generally allow civil penalties that are greater than the loss the defendant's action caused, a penalty may be so excessive as to constitute a second punishment.") (footnotes omitted).

¹⁹³ See *id.*

. . . Court rulings from the 1970s into the 2000s have almost totally destroyed the idea that governmental administrators could not compel the release of any business records, as long as they were not of a purely personal nature (for example, one's personal diary). What constitutes records of a purely personal nature has not been resolved as [of] yet

. . . In *Fisher* [*v. United States*, 425 U.S. 391 (1976)], the Internal Revenue Service was investigating taxpayers (husband and wife) for possible civil or criminal violations of federal income tax statutes. . . . Upon learning that their accountants' work papers were in the hands of their attorneys, the IRS subpoenaed the work papers

. . . The Court reasoned that although the evidence sought was incriminating in nature, the taxpayers were not being compelled to produce the incriminating evidence themselves.

. . . .

During the same term, the Supreme Court, in *Andresen v. Maryland* [, 427 U.S. 463 (1976)], immediately affirmed its contention in *Fisher* that the Fifth Amendment's privilege against self-incrimination is not applicable when the individual is not compelled to do anything in the production of the incriminating evidence.

. . . .

. . . [T]he holdings appear quite shocking from a historical perspective, because these rulings have . . . dampened the constitutional privilege against self-incrimination in areas previously enjoyed by individuals under the Fifth: "Historically, the Fifth Amendment was read to allow an individual a privacy interest in his personal business papers. Now the Court has interpreted the Fifth Amendment to allow the government to obtain indirectly the information that it cannot obtain directly from the individual, if the information leaves the individual's possession or is seized pursuant to a search warrant." The *Fisher* and *Andresen* decisions have apparently made virtually all "private" business records the public's

business.¹⁹⁴

In *Fisher v. United States*, the Court found that requiring the records from the accountant did not serve to incriminate the taxpayers.¹⁹⁵ Essentially, the reasoning rests on the proposition that documents produced pursuant to a regulatory scheme do not necessarily provide affected parties a clear avenue for a claim against self-incrimination.¹⁹⁶ Instead, it left the parties with the recourse of seeking a protective order to show that the information was not compelled by a regulatory scheme and was produced voluntarily or inadvertently.¹⁹⁷ The Court found that “the Fifth Amendment [was not] violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.”¹⁹⁸

Clearly, the Court did not favor protecting the documents, as it reiterated the rule that there was no “special sanctity in papers” when it addressed a similar issue in *Andresen v. Maryland*.¹⁹⁹ Although not specifically dealing with a parallel investigation, the Court noted that ruling against allowing the seizure of a criminal defendant’s business records was tantamount to undermining the principles it had announced in earlier decisions allowing seizure.²⁰⁰ The specific issue for parallel investigations, however, is not whether the records can be seized, but the manner in which the records were created under the regulatory scheme.²⁰¹

In a criminal investigation, the affected party is forewarned of its Fifth Amendment rights.²⁰² The same does not hold true in an administrative agency investigation that necessitates the scrutiny of records for purposes of determining a licensee’s compliance.²⁰³ To a large extent, the purpose of the required records doctrine is to protect the public by

¹⁹⁴ WARREN, *supra* note 4, at 528, 561, 562, 565 (emphasis in original) (citations and footnotes omitted).

¹⁹⁵ *Fisher v. United States*, 425 U.S. 391, 409 (1976).

¹⁹⁶ *Id.* at 409, 411–12.

¹⁹⁷ *Id.* at 423 (Brennan, J., concurring).

¹⁹⁸ *Id.* at 409 (majority opinion).

¹⁹⁹ *Id.* at 407; *see generally* *Andresen v. Maryland*, 427 U.S. 463 (1976).

²⁰⁰ *Andresen*, 427 U.S. at 474.

²⁰¹ *See generally* *Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994).

²⁰² *United States v. Valdivieso Rodriguez*, 532 F. Supp. 2d 316, 322–23 (D. P.R. 2007) (“The Fifth Amendment privilege allows one not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. . . . Testimony obtained in civil suits, or before administrative or legislative committees, could [absent a grant of immunity] prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding. The Supreme Court has held that the failure to assert the privilege while giving testimony in civil suits, or before administrative or legislative committees will forfeit the right to exclude the evidence in a subsequent ‘criminal case.’ If the privilege could not be asserted in such situations, testimony given in those judicial proceedings would be deemed ‘voluntary.’ Consequently, a party’s failure at any time to assert the constitutional privilege against self-incrimination leaves him in no position to complain later that he was compelled to give testimony against himself.”) (citations omitted).

²⁰³ *See id.* at 322.

requiring information that ensures affected parties' regulatory compliance.²⁰⁴ It does not concurrently signify that affected individuals cannot assert their constitutional privileges against self-incrimination when providing information that falls under regulatory disclosure.²⁰⁵ The judiciary tends to overlook the specific disclosure issue by focusing on the "public aspect" of the court's reasoning, allowing information to be used by the law enforcement agency to incriminate the affected party during a criminal investigation without notice.²⁰⁶ In fact, the affected party has relinquished any claim of self-incrimination through the information in the record simply because the party has voluntarily entered the public industry and must comply with the administrative agency's regulatory policies.²⁰⁷ This reasoning focuses on the affected party's intent to assert compliance with the regulatory scheme, and not on the operational waiver regarding self-incrimination.²⁰⁸

While the legislative intent of compelling the disclosure of information through empowerment of an administrative agency is meant to benefit the public through a specific regulation,²⁰⁹ the purpose for a law enforcement agency in using the same information is strictly for incriminatory purposes; that is, to usurp an individual's civil liberties.²¹⁰ The courts have used this "public aspect" of the required records as a bridge between the parallel investigations, even though the affected party was effectively compelled to disclose the information under a regulatory scheme, though it may have voluntarily engaged in the regulated activity.²¹¹ Any challenge by affected parties to this public aspect seems to summarily face a high threshold of scrutiny.²¹² Similar to a challenge under the Fourth Amendment, affected parties are left with having to prove that the agency

²⁰⁴ See *Richert*, 35 F.3d at 303.

²⁰⁵ See *Valdivieso Rodriguez*, 532 F. Supp. 2d at 322–23 (citations omitted).

²⁰⁶ See *In re Grand Jury Subpoena* (United States v. Spano), 21 F.3d 226, 228 (8th Cir. 1994); see also *Richert*, 35 F.3d at 304.

²⁰⁷ See *Spano*, 21 F.3d at 228; see generally *Richert*, 35 F.3d 300.

²⁰⁸ See *Spano*, 21 F.3d at 230; *Richert*, 35 F.3d at 302.

²⁰⁹ See *Richert*, 35 F.3d at 303–04.

²¹⁰ *Jefferson v. Dep't of Justice*, 284 F.3d 172, 182–83 (D.C. Cir. 2002) (Randolph, J., dissenting) ("Not every investigation will conclude that the target engaged in misconduct. And as with any agency conducting law enforcement investigations, not every piece of information [collected] will constitute evidence of illegal activity. In the course of investigating someone for committing a crime, the FBI for instance might have its agents conduct investigations into the individual's friends and associates, his lifestyle, his spending habits and so forth. None of these inquiries will necessarily reveal criminal activity, but there can be no doubt that the records thus compiled are for law enforcement purposes . . .").

²¹¹ See *Spano*, 21 F.3d at 230.

²¹² *In re Grand Jury Proceedings* (McCoy and Sussman), 601 F.2d 162, 168 (5th Cir. 1979) ("[The required records] doctrine does not lend itself to obliteration of the privilege against self-incrimination by allowing any record to be required of any person; an individual may invoke the privilege if the records required by law do not have 'public aspects.' Moreover, if the record-keeping requirement is directed at a group inherently suspect of criminal activity, and a noncriminal and regulatory area of inquiry is patently not involved, the disclosure then has such a pervasive incriminatory effect that the [F]ifth [A]mendment may be invoked.").

was acting beyond its delegated authority in requiring the records.²¹³

Given current investigatory practices and the extent to which information between agencies is shared, the application of the Fifth Amendment in parallel investigations should be more carefully examined by the judiciary. While the public purpose behind a regulatory scheme and criminal enforcement authority may be similar, the particular methods of investigation by these agencies are not the same.²¹⁴ An administrative agency may utilize an enforcement mechanism that mimics civil and criminal elements,²¹⁵ whereas the law enforcement agency must clearly satisfy stricter constitutionally imposed requirements.²¹⁶ The application of the Fifth Amendment is fundamentally different by both agencies.²¹⁷ For instance, an affected party's failure to disclose information under a required record, or invoking the right to remain silent, could allow the agency to argue the adverse inference of silence during an administrative proceeding.²¹⁸ As Cooney explained:

The Supreme Court has held that the fact that an individual has invoked the privilege [against self-incrimination] and declined to answer questions may not be used against that individual in a criminal case. Thus, no prosecutor, judge, or jury may draw an inference that a person is guilty from the fact that he or she has invoked the privilege. A litigant in [an administrative agency] case is not accorded the same level of protection, however. Although a person retains the absolute right to decline to answer questions, the fact finder in [the administrative] case may draw an adverse inference from the person's silence.

. . . Statements an individual makes in the civil (or

²¹³ See *Spano*, 21 F.3d at 230.

²¹⁴ *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1361 (9th Cir. 1994) (“[The] Supreme Court has repeatedly emphasized the importance of keeping criminal investigatory motives from coloring administrative searches. . . . These cases make it very clear that an administrative search may not be converted into an instrument which serves the very different needs of law enforcement officials. If it could, then all of the protections traditionally afforded against intrusions by the police would evaporate, to be replaced by the much weaker barriers erected between citizens and other government agencies. It is because the missions of those agencies are less patently hostile to a citizen's interests than are the missions of the police that the barriers may be as weak as they are and still not jeopardize Fourth Amendment guarantees.”) (citations omitted).

²¹⁵ *Atlas Roofing Co., v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977); see also *Kent v. Hardin*, 425 F.2d 1346, 1349 (5th Cir. 1970).

²¹⁶ *Paterno v. Lyons*, 334 U.S. 314, 321 (1948) (“Procedural requirements are essential constitutional safeguards in our system of criminal law. These safeguards should constantly and vigilantly be observed to afford those accused of crime every fair opportunity to defend themselves.”); *Withrow v. Williams*, 507 U.S. 680, 695 (1993) (“We must remember in this regard that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda's* requirements.”) (citations omitted).

²¹⁷ See COONEY, *supra* note 79, at 49.

²¹⁸ *Id.*

administrative) proceeding could then be used in the criminal case as evidence against the individual or his or her employer. But if the individual invokes the right to decline to answer questions, that silence could be the basis of a negative inference in the civil proceeding, and thus a significant factor in the [agency's] determination whether to impose a penalty²¹⁹

Two main defensive points surface against administrative subpoenas for required records where: 1) pleading the Fifth Amendment is necessary to avoid criminal liability in a parallel investigation, and 2) this course of action is necessary to protect an affected party's rights, as silence can be the basis of an adverse inference in the administrative proceeding.²²⁰ To these stated reasons, the courts responded in two different ways. First, the courts have not allowed blanket individual coverage under the Fifth Amendment (because the privilege does not apply to corporations),²²¹ instead leaving the burden on the affected party to prove entitlement.²²² Second, "many courts have concluded that the threat of adverse inferences does not demand a stay of agency enforcement actions during parallel criminal proceedings[,] nor is there a due process violation where a party must choose whether to invoke the right."²²³ These rationales require that the affected party create a privileged log of each specific record, with a request for hearing on its legitimacy,²²⁴ as well as seeking a protective order to avoid losing the privilege.²²⁵ Unfortunately, the government continues to have the opportunity to petition the judiciary for an order compelling the records.²²⁶

Arguably, the public purpose of a regulatory scheme can be accomplished with stricter limits regarding use of the collected information before disclosure to a law enforcement agency.²²⁷ In the event that an

²¹⁹ *Id.* (footnotes omitted).

²²⁰ *SEC v. Caramadre*, 717 F. Supp. 2d 217, 221 (D. R.I.) (citing *Baxter v Palmigiano*, 425 U.S. 308, 318 (1976)); *see also SEC v. First Jersey Sec., Inc.*, No. 85-Civ.-8585(RO), 1987 WL 8655, at *2 (S.D.N.Y. Mar. 26, 1987).

²²¹ *See generally Braswell v. United States*, 487 U.S. 99 (1988).

²²² *See Caramadre*, 717 F. Supp. 2d at 221.

²²³ *Id.* at 222.

²²⁴ *Dee v. Borough of Dunmore*, 549 F.3d 225, 232 (3rd Cir. 2008). Arguably, this could entail a discussion of whether the affected party has liberty or proprietary due process claim. *Id.* ("[O]nce it is determined that the Due Process Clause applies, 'the question remains what process is due.' In *Mathews v. Eldridge* . . . the Supreme Court held that 'identification of the specific dictates of due process generally requires the consideration of three distinct factors.' Those factors are: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.") (emphasis and citations omitted).

²²⁵ *Caramadre*, 717 F. Supp. 2d at 224.

²²⁶ *See SEC v. OKC Corp.*, 474 F. Supp. 1031, 1034-38 (N.D. Tex. 1979).

²²⁷ *Tabaie*, *supra* note 75, at 812. For instance:

although placing legislative barriers on the use of private documents by other governmental agencies is helpful to prevent due process violations when private

affected party can proffer the incriminatory nature of the required record, then the burden of showing probable cause from independent sources should at least be placed on the law enforcement agency.²²⁸ The public policy reason for affirmatively limiting disclosure would be to highlight the higher level of scrutiny required for documents collected by a law enforcement agency than that of an administrative agency.²²⁹

Such a specific policy consideration is currently present to some degree in the Freedom of Information Act,²³⁰ where certain records are exempt from disclosure during an administrative investigation.²³¹ In applying the exemption, a distinction is drawn between records that are routine in nature, and those that depart from the routine operation and oversight of the agency.²³² Once the agency focuses its attention on a particular party, an investigation may be underway for purposes of the investigatory records exception.²³³ At the time an affected party is under investigation (in any manner or subject to similar circumstances), he or she should be entitled to claim a distinction between regulatory compliance and that of the Fifth Amendment.²³⁴

This type of distinction should at least be scrutinized by the judiciary where the statutory authority of the administrative and law enforcement agencies are identical or substantially similar.²³⁵ While the penalties for an administrative or criminal violation are certainly distinct, the statutory language under criminal codes usually focuses on the issue of intent.²³⁶ The clear separation between each agency's independent investigations can be used to foster impartiality in the collection of records

papers are used in parallel investigations, these limitations do not solve the essential privacy problem. People should be secure that their private documents remain private even though the documents may be relevant. To say that [an administrative agency] can review personal documents, so long as they are not allowed to share the information with other governmental agencies, merely restricts the privacy violation rather than truly protecting the documents.

Id.

²²⁸ *United States v. Lawson*, 502 F. Supp. 158, 165 (D. Md. 1980) (“A lower standard of probable cause is constitutionally permissible in the administrative inspection context because the intrusion into an individual’s privacy is less than that in the criminal context, and is outweighed by the public’s interest in the regulatory program. But once the purpose behind the search shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter the premises only upon securing a warrant supported by full probable cause.”) (citations omitted).

²²⁹ *See Jefferson v. Dep’t of Justice, Office of Prof’l Responsibility*, 284 F.3d 172, 182–83 (D.C. Cir. 2002) (Randolph, J., dissenting).

²³⁰ *See* 5 U.S.C. § 552 (2006).

²³¹ *Ctr. for Nat’l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974).

²³² *Id.* at 373.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See Iran Air v. Kugelman*, 996 F.2d 1253, 1258 (D.C. Cir. 1993) (“It is not unusual for Congress to provide for both criminal and administrative penalties in the same statute and to permit the imposition of civil sanctions without proof of the violator’s knowledge.”) (footnote omitted).

²³⁶ *See id.*; *see also United States v. Fox*, 95 U.S. 670, 671 (1877).

by an administrative agency.²³⁷ In light of the burden of proof required for a law enforcement agency, clear notice and an opportunity to be heard on the issues of incrimination should be provided to the affected party by each agency prior to the exchange of information.²³⁸

IV. CONCLUSION

When policy reasons become the basis for an expansion of administrative authority, the legal community should approach it with some degree of apprehension.²³⁹ Undoubtedly, administrative law is comprised of aspects from both civil and criminal law.²⁴⁰ However, the information gathering process and the applicability of collected information within the current legal framework has allowed law enforcement agencies access, without clear oversight, to an expansive continuum of information gathered by administrative agencies. This is not to suggest that parallel investigations should be automatically prohibited as intrusive into individual rights. Indeed, there are certainly instances where an exchange of information would be beneficial to the public welfare, such as white-collar investigations²⁴¹ or professional licensing issues.²⁴² Properly conceived and

²³⁷ See *Iran Air*, 996 F.2d at 1258; *Fox*, 95 U.S. at 671.

²³⁸ See *Bialek v. Mukasey*, 529 F.3d 1267, 1272 (10th Cir. 2008) (“The privilege against self-incrimination, of course, ‘can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.’ . . . An individual’s decision to invoke the privilege is always one of personal choice no matter which agency takes the investigatory lead, and the effect of concurrent jurisdiction on that decision would be speculative and likely inconsequential.”) (citation omitted); see also *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008).

²³⁹ See generally von Rochow-Leuschner, *supra* note 112; see generally Gustafson, *supra* note 114.

²⁴⁰ *United States v. Valdivieso Rodriguez*, 532 F. Supp. 2d 316, 322–23 (D. P.R. 2007).

²⁴¹ Regarding federal white-collar crime enforcement, the Attorney General issued a memorandum which stated the following:

In order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions, and to agency administrative actions, and that they discuss all significant issues that might have a bearing on the matter as a whole with their colleagues. When appropriate, criminal, civil, and administrative attorneys should coordinate an investigative strategy that includes prompt decisions on the merits of criminal and civil matters; sensitivity to grand jury secrecy, tax disclosure limitations and civil statutes of limitation; early computation and recovery of the full measure of the Government’s losses; prevention of the dissipation of assets; global settlements; proper use of discovery; and compliance with the Double Jeopardy Clause. By bringing additional expertise to our efforts, expanding our arsenal of remedies, increasing program integrity and deterring future violations, we represent the full range of the Government’s interests.

Memorandum from the Attorney Gen. on Coordination of Parallel Criminal, Civil, and Admin. Proceedings (July 28, 1997), <http://www.justice.gov/ag/readingroom/970728.htm>.

²⁴² For example, in the same year of the housing market crash of 2008, the State of Florida investigated the background of mortgage broker licensees in the State. It found that many of the brokers suspected of conducting mortgage fraud had criminal records which had not been thoroughly investigated prior to licensure. The State of Florida’s Chief Inspector General’s Office found that the agency responsible for regulating the brokers had ignored potentially valid citizen complaints and granted licenses to hundreds of brokers without thoroughly investigating their criminal backgrounds, even though much of the information was accessible through the State’s law enforcement agencies. Without highlighting potential concerns, which have already been addressed in this Article, the recommendation of the Inspector General was that the administrative agency attempt to work more closely with law

implemented, a system of agency cooperation can be accomplished, while at the same time ensuring the protection of individual liberties in accordance with proper legal standards.²⁴³

For example, during an administrative investigation, an agency procedure defined by statute could allow for the referral of complaints to other agencies, or other internal or external resources. This referral is likely to facilitate investigation without the specific exchange of investigatory materials that violate the affected party rights and the opportunity to protect the public interests.²⁴⁴ The private interests should not simply be outweighed by the public policy reasons for regulation or criminal enforcement, as long as these agencies are acting in “good faith.”²⁴⁵ The current standards and protocols do not readily protect the rights of the individual.²⁴⁶

Hence, the judicial and legislative branches, which were created to ensure that our system of government effectuated balance with the executive branch, should seek to redress the imbalances that exist between administrative and law enforcement agencies, especially as to those that relate to self-incrimination and burden of proof.²⁴⁷ Given the inherent nature of administrative agencies to conduct affairs as a veritable fourth branch of government, the other branches have a stronger incentive to ensure that these agencies actually practice a stronger and more well-defined notion of good faith.²⁴⁸

enforcement agencies instead of simply referring cases. *See* Inspector General’s Office Report to the Governor on the Office of Financial Regulation, Case Number 2008-07290003 (Chief Inspector General September 15, 2008) (the report also reviewed information received by the news media, which was consistent with the conclusions documented).

²⁴³ *See id.*

²⁴⁴ *See* *United States v. Rutherford*, 555 F.3d 190, 198 (6th Cir. 2009). “[G]iven the substantial likelihood that [administrative and law enforcement agencies] may intentionally blend its civil and criminal arms in conducting an investigation, [the courts] must strongly encourage [these agencies] to observe and protect the public’s constitutional rights when exercising its power.” *Id.* at 200 (Cole, J. concurring).

²⁴⁵ *United States v. Gel Spice Co.*, 773 F.2d 427, 433 (2d Cir. 1985); *see generally* *Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994).

²⁴⁶ *United States v. Lazar*, No. 04–20017–DV, 2006 WL 3761803, at *17 (W.D. Tenn. Dec. 20, 2006) (“In many respects, agency officials and prosecutors have become so entwined in federal criminal law enforcement that agencies sometimes act as *de facto* prosecutors, if not outright prosecutorial delegates . . .”) (emphasis included).

²⁴⁷ STEVEN J. CANN, *ADMINISTRATIVE LAW* 273 (4th ed. 2006) (“The founding fathers attempted to control the discretion of those in power through a written constitution and the concept of separation of powers. These concepts do not have much application to modern agencies in the administrative state. Legislative delegations of power, which should serve the channeling purposes of the Constitution, are written so loosely and vaguely as to impose almost no constraints at all on agency behavior. There is no separation of powers within agencies (agencies make rules, enforce the rules they make, and adjudicate infractions of those rules). Agencies may, however, be checked by the other branches, as in congressional review, the Office of Management and Budget’s review, and judicial review.”).

²⁴⁸ *INS v. Chadha*, 462 U.S. 919, 984–85 (1983) (White, J., dissenting).