NOTES

PROTECTING PRIVACY EXPECTATIONS AND PERSONAL DOCUMENTS IN SEC INVESTIGATIONS

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I. INTRODUCTION

Consider the following hypothetical: the Securities and Exchange Commission ("SEC") is investigating a corporation for stock option backdating by the corporation's officers and directors, and possible criminal charges are looming.[1] The implicated company fires an executive, and seals her office. All of the executive's documents inside the office, including her personal documents, are subpoenaed by the SEC.[2] In a modern world, both work related documents and purely personal documents are often left at the office. These documents could include, but

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1. *See* Janet McFarland & Paul Waldie, *The Options Backdating Game; The Latest U.S. Corporate Scandal Involves Executives Falsifying the Dates on Stock Options. A Series of Reviews in Canada is Starting to Reveal Worrisome Patterns*, THE GLOBE AND MAIL (Toronto), Dec. 1, 2006, at B4. In 2006, for example, over 180 companies were under investigation by the SEC for possible stock option backdating. *Id.*

2. *See* Charles Forelle & James Bandler, *Axe Falls Again Over Options Backdating; CNET CEO Out As Filing Deadline Close*, THE GLOBE AND MAIL (Toronto), Oct. 12, 2006, at B16. As of October 2006, at least twenty-four officers or directors had been fired or suspended because of possible stock option backdating. *Id.*

are not limited to, personal bank statements, other personal financial documents, letters, a diary, and even medical information. While personal files could have nothing to do with the corporation, the corporation must turn over these documents to the SEC pursuant to a valid subpoena.[3] The SEC later can provide these documents to the U.S. Attorney's office in a parallel criminal investigation of securities fraud.[4] In a traditional criminal case, the government would need a search warrant and probable cause to enter someone's home or office and take personal documents from the individual.[5] Through the SEC subpoena, however, the documents may be subpoenaed for mere "official curiosity" and then handed over to the U.S. Attorney's office, as long as the parallel proceedings were not carried out in bad faith.[6]

The subpoena power is one of the SEC's most commonly used and powerful tools for investigating and regulating securities transactions and is used in almost every formal SEC investigation.[7] Once the SEC begins a formal investigation it is granted the subpoena power which forces "corporations to release information that, because of financial privacy rules, they really cannot voluntarily produce."[8] In 2006, the SEC was believed to be investigating as many as 120 corporations for possible stock option backdating.[9] Those subpoenaed in SEC investigations are not only corporations under investigation, but also individuals from whom the SEC has demanded document production.[10] Requested documents can include "e-mails, travel records, expense reports and other documents" related in

3. *See generally* United States v. Powell, 379 U.S. 48 (1964). Although *Powell* interpreted the power of the Internal Revenue Service under statutes regulating its investigations, the Court's analysis has been widely used to determine the validity of other administrative subpoenas, including those of the SEC. *E.g.*, SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 124–25 (3d Cir. 1981); SEC v. Wall St. Transcript Corp., 422 F.2d 1371, 1375 (2d Cir. 1970).

4. *See* Gabriel L. Gonzalez, Blair G. Connelly & Elias Eliopoulos, *Parallel Civil and Criminal Proceedings*, 30 AM. CRIM. L. REV. 1179, 1188–89 (1993).

5. Risa Berkower, Note, *Sliding Down A Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations*, 73 FORDHAM L. REV. 2251, 2251 (2005).

6. Gonzalez et al., *supra* note 4, at 1189–90.

7. J. WILLIAM HICKS, 17 CIVIL LIABILITIES: ENFORCEMENT & LITIG. § 2:12 (2007).

8. Bill Husted, *ChoicePoint Inquiry Goes 'Formal'; SEC Targets the Timing of Executives' Stock Sales*, ATLANTA J.-CONST., Aug. 11, 2005, at 1C (quoting Jacob S. Frenkel, a former SEC enforcement lawyer and federal prosecutor).

9. *See, e.g.*, Matt Hines, *Stock Options Backdating Probe Hits McAfee Boardroom*, E.WEEK.COM, Oct. 11, 2006, http://www.eweek.com/article2/0,1759,2028241,00.asp.

10. *See, e.g.*, *AIG Chairman Exiting Amid Probes; Greenberg Is Retiring Two Weeks After Inquiries of Possible Earnings Manipulation Forced His Resignation As the Insurer's CEO*, L.A. TIMES, Mar. 29, 2005, at C5; Annette Haddad, *SEC Launches Formal Probe of KB Home*; *The Agency Elevates Its Inquiry Into Stock Option Grants by the L.A. Builder, Which is Struggling to Rebound From a Housing Slump*, L.A. TIMES, Jan. 27, 2007, at C1.

any way to an SEC investigation, even if such documents contain personal financial information.[11] Many of those subpoenaed for documents also face criminal charges for possible securities violations.[12] The SEC has even subpoenaed personal financial information from former Senator Bill Frist[13] and has attempted to subpoena journalists in connection with its investigations.[14] In the words of one author, "[t]here is very little that the SEC cannot obtain."[15]

The SEC's subpoena powers are expansive and give the SEC the power to "compel the production of books and records of companies and individuals on the basis of little more than official curiosity."[16] Recognizing the privacy implications involved in granting administrative agencies this broad subpoena power, Congress has enacted various legislations protecting individual privacy—including the Right to Financial Privacy Act,[17] the Electronic Communications Privacy Act,[18] and the Privacy Act of 1974.[19]

As has been shown, the SEC subpoena power is a formidable one. Even for someone who is completely innocent of wrongdoing, a subpoena of information in a high-profile case, "[i]n the minds of the reading public . . . means that you're guilty."[20] Furthermore, a subpoena directed at a third party can have a substantial impact on someone's business, with third parties no longer wanting to associate professionally with a

11. Barnett Wright, *SEC Probes Jeffco Bond Deals, Three Commissioners, Two Former Get Subpoenas Related to Municipal Financing*, BIRMINGHAM NEWS, Dec. 20, 2006, at 1A.

12. *See, e.g.*, Charles Forelle & James Bandler, *Brocade Ex-CEO, 2 Others Charged In Options Probe—Authorities Signal Hard Line As Backdating Investigations Extend to Over 80 Companies*, WALL ST. J., July 21, 2006, at A1.

13. Paul Krane, *Frist Predicts Full Exoneration; Majority Leader Breaks Silence on HCA Probes*, ROLLCALL.COM, Oct. 19, 2005, http://www.rollcall.com/issues/51_37/news/10880-1.html.

14. *See* Erica Iacono, *Analysis—SEC Subpoenas Pose Comms Challenge*, PR WEEK, Mar. 13, 2006, at 10. *See also* Bruce V. Bigelow, *Angry CEO Takes Aim At Short-Sellers and Cohorts; Columnist From San Diego Swept Up in Controversy*, SAN DIEGO UNION-TRIB., Mar. 19, 2006, at H1.

15. DAVID F. LINOWES, PRIVACY IN AMERICA: IS YOUR PRIVATE LIFE IN THE PUBLIC EYE? 85 (1989).

16. Statement of Paul R. Berger, Former Assoc. Dir. of U.S. Securities and Exchange Comm'n, U.S. S. Comm. on the Judiciary (Dec. 5, 2006), *available at* http://judiciary.senate.gov/testimony.cfm?id=2437&wit_id=5922.

17. Right to Financial Privacy Act of 1978, Pub. L. No. 95-360, 92 Stat. 3697 (codified as amended at 12 U.S.C.A. §§ 3401–22 (West 2008)).

18. Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in various sections of 18 U.S.C.).

19. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C.A. § 552a (West 2008)).

20. Michele Galen, *When the Subpoena Has Your Name On It*, BUSINESS WEEK, Oct. 7, 1991, at 150 (quoting one public relations expert).

subpoenaed individual.[21] Because "[t]he daily operations of the securities industry depend on reputation and trust," an SEC subpoena can have drastic negative implications on a person's professional reputation.[22] While the majority of subpoenas by the SEC are necessary and valid exercises of administrative power used to determine whether wrongdoing has occurred, even properly executed SEC subpoenas, by their expansive nature, will invariably demand production of personal documents and will have wide-ranging professional repercussions.

This Note discusses what role, if any, privacy rights should have when considering whether the SEC can subpoena documents containing personal information, either from a target or a third party. Although this Note has broader implications for all administrative law, and even grand jury subpoenas, the primary focus of the Note will be the SEC's subpoena powers and the privacy rights challenged by these broad powers, especially when the SEC and the Department of Justice ("DOJ") are concurrently investigating an individual for both civil and criminal penalties. This Note will first argue that in a modern world, substantial privacy interests are implicated when personal documents are subpoenaed by the SEC. The best way to protect both the necessary role of the SEC and basic privacy interests, this Note will argue, would be for the courts to offer a modicum of protection to personal documents by applying the Fourth Amendment to purely personal documents subpoenaed by the SEC and apply a standard between the "merely relevant" one used today, and the "probable cause" necessary for a traditional search warrant. Because the Supreme Court, over the past eighty years, has not shown any general concern for an individual's privacy rights when subpoenaed by the SEC or any other administrative agency, this Note concludes that Congress should create a law requiring that once an individual proves documents subpoenaed by the SEC are personal in nature, the SEC must prove that the documents are "necessary" to an investigation before the documents can be subpoenaed.

Part II of this Note briefly discusses the history of administrative law before discussing the Supreme Court's progression from strong protections for both corporations and individuals subpoenaed by administrative agencies to allowing agencies to subpoena any documents "relevant" to an investigation. The SEC's use of the administrative subpoena is also

21. *See* Gallard v. U.S. Gov't., 882 F. Supp. 1440, 1441 (S.D.N.Y. 1995) (holding that a subpoena was valid even though banks and brokers from whom the SEC requested documents no longer wanted to associate with the target).

22. Robinson B. Lacy, *Adverse Publicity and SEC Enforcement Procedure*, 46 FORDHAM L. REV. 435, 435, 438–46 (1977).

discussed in Part II. Part III examines American notions of privacy, and how traditional privacy rights have been threatened by the modern world generally, and the administrative state specifically. Part IV discusses the possible violations of the Fourth Amendment when the SEC and the DOJ conduct parallel civil and criminal proceedings. Part V discusses justifications for the current analysis of administrative subpoenas, why those justifications are problematic, and previously proposed alternatives to the current subpoena framework. Part VI proposes three different approaches the Court or the legislature could take to balance the necessary investigatory needs of the SEC and the privacy rights of an individual and proposes that for any privacy protection for individuals to come about, Congress will have to legislate. Finally, Part VII makes some concluding remarks about the subpoena power and privacy in the administrative state.

II. THE HISTORY OF THE SUBPOENA IN ADMINISTRATIVE LAW AND THE SEC

A. ADMINISTRATIVE LAW AND THE NEED TO INVESTIGATE

Although every civilization by necessity develops an administrative state, the American administrative state is a relatively new concept in American society, certainly never imagined by the founding fathers to govern the way it does today.[23] Nevertheless, as America became more complex, the national government had to respond to specific interests through the use of "expert commissions" such as the Interstate Commerce Commission in 1887 and, with the creation of the Department of Agriculture in 1889, administrative agencies began promoting the specific interests of the clientele they served.[24] In an effort to deal with economic problems brought about by the Great Depression, the federal government added to the growing list of administrative agencies the SEC, the Federal Deposit Insurance Corporation, and the Social Security Board, among others.[25] Congress gave these administrative agencies the authority to regulate private conduct through the creation of rules, adjudicatory power and, the focus of this Note, investigatory power.[26] In response to the

23. GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 10-11 (Univ. of Mich. Press 1991).

24. *Id.* at 10–13.

25. DONALD P. ROTHSCHILD & CHARLES H. KOCH, JR., FUNDAMENTALS OF ADMINISTRATIVE PRACTICE AND PROCEDURE: CASES AND MATERIALS 3 (Murray L. Schwartz et al. eds., 1981).

26. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 18–19 (2d ed. 2001).

incredible authority given to the executive branch and these agencies, the legislature enacted the Administrative Procedure Act ("APA") in 1946, which codified the power of the courts to review and invalidate administrative actions that were arbitrary, unconstitutional, without statutory authorization, or procedurally insufficient.[27]

To fulfill their duty to regulate private conduct, administrative agencies must be provided with information, which is "the fuel without which the administrative engine could not operate."[28] Although most information is provided to administrative agencies through voluntary submissions of testimony and documents, sometimes information necessary to an agency investigation is not available without compulsion. Agencies, in dealing with the necessity of such information have three primary methods of obtaining information: (1) requiring records and reports; (2) inspecting books, records and premises; and (3) subpoenaing witnesses and documents.[29] There are two types of subpoena powers that are usually given to a specific administrative agency, the subpoena *ad testificandum*, which requires someone to testify before an agency hearing, and the subpoena *duces tecum*, which requires someone to give specific records or documents to an agency.[30] Since an administrative agency without the subpoena power would only be able to get information with consent,[31] agencies must have the subpoena power to be successful in regulating private conduct. This power, however, is not without limits, because to enforce a subpoena and compel testimony from a noncooperating individual, an agency must go to the federal courts to compel document production.[32] If the subpoenaed party cannot show cause for noncompliance, it must either produce the documents or face a contempt order.[33]

In 1934, in response to the Great Depression and the "perceived need to protect investors and the integrity of the marketplace," Congress created the SEC and gave the commission broad investigatory powers consistent

27. GLEN O. ROBINSON ET AL., THE ADMINISTRATIVE PROCESS 44 (4th ed. 1993). *See also* 5 U.S.C. §§ 701–06 (2000).

28. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.1 (3d ed. 1991).

29. *Id.*

30. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 4.05[D], at 91 (4th ed. 2000). Most subpoena powers are granted under both an agency's specific enabling act and the APA. *Id.* § 4.05[D], at 90. *See also* 5 U.S.C. § 555 (2000). The APA authorizes an agency to issue a subpoena to a party as long as it shows "general relevance and reasonable scope of the evidence sought." § 555(d). Of course, the subpoena must be "in accordance with law" as well. *Id.*

31. SCHWARTZ, *supra* note 28, § 3.8.

32. FOX, *supra* note 30, § 4.07[E], at 103.

33. *Id.*

with those later given to other agencies under the APA.[34] Consistent with the APA, the SEC is given the power to subpoena documents that it determines are "relevant or material to [an] inquiry."[35] This statutory power has given the SEC incredible investigatory powers, such that it can subpoena documents based on a "mere suspicion or curiosity" that a security violation has occurred or will occur.[36] Recognizing that the subpoena gives the SEC and other agencies "tremendous power over" those they seek to investigate and has "injurious effects on both personal and business reputations," the legislature and the courts have struggled to place restrictions on the SEC and other agencies that have the power of this formidable investigatory tool.[37]

B. THE HISTORY OF THE SUBPOENA POWER

Although today the Supreme Court has interpreted the SEC's subpoena power broadly, allowing documents to be subpoenaed even for a "fishing expedition,"[38] this relaxed standard did not always exist. In fact, the Court used to be protective of individuals and corporations, on both Fourth and Fifth Amendment grounds, when agencies compelled document production.[39] For example in *Boyd v. United States*, decided in 1886, the U.S. government compelled the production of twenty-nine invoices from Boyd, to prove that Boyd in fact had imported thirty-five glass plates without paying necessary customs duties.[40] The Court used powerful language in characterizing the violation of the Fourth[41] and Fifth[42] Amendments, stating that "[t]he principles laid down in this opinion affect the very essence of constitutional liberty and security . . . they apply to all invasions on the part of the government."[43] The Court, recognizing the relationship between the Fourth and Fifth Amendments, stated that while

34. Marc I. Steinberg, *SEC Subpoena Enforcement Practice*, 11 J. CORP. L. 1, 1–2 (1985). *See also* Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78(a)–(nn) (1982)). Congress gave the SEC the power to investigate "as it deems necessary to determine whether any person has violated, is violating, or is about to violate" securities law or regulations. *Id.* § 78u(a)(1).

35. 15 U.S.C. § 78u(b) (Supp. 2004).

36. Steinberg, *supra* note 34, at 23.

37. *Id.* at 23–24.

38. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 588–89 (1994) (quoting United States v. Morton Salt, 338 U.S. 632, 642 (1950)).

39. Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 813–14 (2005).

40. Boyd v. United States, 116 U.S. 616, 617–19 (1886).

41. U.S. CONST. amend. IV.

42. U.S. CONST. amend. V.

43. *Boyd*, 116 U.S. at 630.

the compulsion of documents is not exactly the same as a traditional search and seizure, the government's goal is the same—to compel evidence that may be used against the person in a court of law, which the government cannot do without probable cause.[44] Commentators have characterized *Boyd* as the Supreme Court's first foray into restricting the subpoena powers of the government.[45] The Court explained in *Boyd* that the subpoena power should be limited by the "right of personal security, personal liberty and private property" implicit in the Fourth and Fifth Amendments.[46]

At first, *Boyd* made it seem as though the courts would protect documents from being subpoenaed without probable cause. The Supreme Court, however, severely undercut its ruling in *Boyd* in 1906, with *Hale v. Henkel*, forcing the secretary and treasurer of a corporation to turn over corporate documents issued under a valid subpoena *duces tecum*.[47] The Court distinguished *Henkel* from *Boyd*, because unlike the individual who was subpoenaed in *Boyd*, the "corporation is a creature of the State" and through the very means of a corporation's charter the legislature reserves the right "to investigate its contracts and find out whether it has exceeded its powers."[48] The power to subpoena an individual, on the other hand, was different than that of a corporation because a person "owes no duty to the State or to his neighbors to divulge his business."[49] The Court stated that "there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State," but, "[t]he individual may stand upon his constitutional rights as a citizen."[50] Thus, the Court, while protecting an individual's right to privacy, refused to protect corporations through the Fifth Amendment, and limited Fourth Amendment protections only to overbroad requests for corporate documents that may result in "unreasonable" searches and seizures because of the deleterious effect the scope of the subpoena may have on a business.[51]

44. *Id.* at 630–31.

45. *See* Slobogin, *supra* note 39, at 813–14. *See also* Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After* United States v. Hubbell*—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123, 131–33 (2002).

46. *Boyd*, 116 U.S. at 630.

47. Hale v. Henkel, 201 U.S. 43, 74–76 (1906) (also holding that while the subpoena was so broad as to make it "unreasonable" under the Fourth Amendment, such grounds would not help the petitioner in his writ of habeas corpus since he had been jailed for refusing to comply whatsoever).

48. *Id.* at 74–75.

49. *Id.* at 74.

50. *Id.*

51. *Id.* at 75–77; Katherine Scherb, *Administrative Subpoenas for Private Financial Records:*

In 1924, however, the Court decided *FTC v. American Tobacco Co.*, taking a step back from its holding in *Henkel*.[52] Justice Holmes, writing for the Court, prohibited the FTC from subpoenaing the letters and wires sent from American Tobacco, a corporation, to different wholesalers, which the FTC claimed it needed to determine whether American Tobacco had engaged in unfair competition.[53] Holmes stated, "[t]he mere facts of carrying on a commerce . . . do not make men's affairs public" and that "[a]nyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies . . . to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."[54]

After *American Tobacco*, *Boyd*, and to a lesser extent *Henkel*, the Court began a steady trend in allowing virtually unlimited access to documents through the administrative subpoena, in essence disregarding both Fourth and Fifth Amendment protections.[55] World War II and various New Deal programs brought with them a necessity for information and the Court, recognizing this need, stopped scrutinizing subpoenas almost entirely.[56] In the seminal case decided in 1946, *Oklahoma Press Publishing Co. v. Walling*, the Court held that a subpoena for documents was presumptively valid, that the Fourth Amendment affords no protection for a corporation or its officers to produce corporate records, and that the Fourth Amendment is not applicable to subpoenas because requests for documents are not actual "searches" in the context of the Fourth Amendment since the government does not actually take the documents; rather it is the individual who turns them over.[57]

Only a few years later, in 1950, the Court decided in *United States v. Morton Salt Co.*, that Justice Holmes had been wrong in *American Tobacco* and that administrative agency subpoenas for documents are tolerable, even when the agency is conducting "fishing expeditions."[58] According to the

What Protection for Privacy Does the Fourth Amendment Afford?, 1996 WIS. L. REV. 1075, 1080–81 (1996).

52. FTC v. Am. Tobacco Co., 264 U.S. 298 (1924).

53. *Id.* at 304–07.

54. *Id.* at 305–06.

55. Slobogin, *supra* note 39, at 815–16.

56. Jack W. Campbell IV, Note, *Revoking the "Fishing License:" Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records*, 49 VAND. L. REV. 395, 399 (1996).

57. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 195–96, 202 (1946). The Court did note that in the context of corporate documents, the Fourth Amendment may be applicable in protection from overbroad requests that are unreasonable. *Id.* at 208.

58. *See* United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).

Court, because "the only power that is involved here is the power to get information from those who best can give it" the subpoenas are valid.[59] The Court held that corporations have no right to Fourth or Fifth Amendment protections because they share "no equality with individuals in the enjoyment of a right to privacy."[60] As Professor Slobogin has noted, *Oklahoma Press* and *Morton Salt* were decided completely in the context of a corporation's rights.[61] In both cases the Court juxtaposed the corporation's rights with an individual's right to privacy, which the Court continued to hold in the highest regard.[62] Significantly, in explaining the Court's departure from *Boyd* and *American Tobacco*, the Court explained that the field of administrative law was relatively new, and that there would be a time of "trial and error" before the Court properly characterized administrative powers.[63]

In 1964, with a pair of cases issued on the same day, the Court both created the standards the government must abide by when issuing a subpoena and disregarded the Fifth Amendment as a limiting factor on subpoenas for personal documents. *United States v. Powell* rejected probable cause as being necessary to produce documents and defined the minimum standards the government must meet for the Court to uphold an administrative subpoena and compel production of documents.[64] According to *Powell*, the government must only show that the subpoena was issued: (1) pursuant to a legitimate purpose; (2) that the inquiry *may* be relevant to the purpose; (3) that the information sought is not already in the government's possession; and (4) that the appropriate procedural steps have been followed in obtaining the subpoena.[65] Then in *Ryan v. United States*, in a two page order, the Supreme Court applied the *Powell* standards to compel production of eleven years of personal financial documents because

59. *Id.* at 642. In *Morton Salt*, the FTC already found Morton Salt in violation of anticompetitive practices in the pricing and selling of salt. *Id.* at 635–36. The commission, after a judgment was handed down, required from Morton Salt "highly particularized reports" which included books and records showing every aspect of their business to ensure continued compliance. *Id.* at 636–37.

60. *Id.* at 652.

61. Slobogin, *supra* note 39, at 816–17.

62. *Id.*

63. *Morton Salt*, 338 U.S. at 642.

64. United States v. Powell, 379 U.S. 48, 57–58 (1964).

65. *Id.* Justice Douglas dissented with two others, arguing that because the three-year window for the IRS to compel production of documents closed and the IRS was no longer dealing with its usual administrative powers, he would require a showing that the administrative agency was not acting "capriciously." *Id.* at 59 (Douglas, J., dissenting). Because the three-year statute of limitations had run, he would require a presumption that the required documents were unnecessary—a presumption that the IRS would have to overcome to compel the documents. *Id.* at 59–60.

the IRS suspected Ryan was involved in fraudulent activity.[66] The Court held that the government need not show probable cause to compel production of the documents—instead the government must only satisfy the *Powell* standards.[67] The *Powell* standards are still current law used in determining whether the government has issued a valid subpoena *duces tecum*.[68]

Although there was a short period of time when scholars thought the distinction between personal papers and business or corporate papers might continue,[69] by 1976, the Court in *Fisher v. United States* disregarded the notion that the Fifth Amendment protected personal documents from a subpoena,[70] a ruling that has been cited approvingly later by the Court.[71] As to Fourth Amendment protections for personal documents, the Sixth Circuit recently has joined the Second, Ninth and District of Columbia Circuits in holding that the relevancy standard for administrative subpoenas of personal information of corporate officers is the same as the standard for subpoenas of business records.[72] The Sixth Circuit, in *Doe v. United States*, allowed the DOJ to subpoena the personal financial information of minor children, even though the court admitted that it was "troubled" by the government's request.[73] The Third Circuit, however, has recognized the

66. Ryan v. United States, 379 U.S. 61, 61–62 (1964).

67. *See id. See also* Slobogin, *supra* note 39, at 818 (noting that "[t]he *Powell* opinion (and therefore *Ryan*) did not mention the Fifth Amendment").

68. *See* Thomas O. Gorman & Tonya M. Esposito, *Responding to SEC Subpoenas: Cooperation Through Credible Assurances of Complete Production*, 73 DEF. COUNS. J. 162, 166–67 (2006). *See also* Roger B. Handberg, *The Enforcement of Investigative Subpoenas Issued by Administrative Agencies: An Analysis of Common Defenses*, 76-OCT FLA. B.J. 40, 40–42 (2002).

69. *See* United States v. Dionisio, 410 U.S. 1, 11–12 (1973) (stating that a grand jury "cannot require the production by a person of private books and records that would incriminate him" and that "[t]he Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms 'to be regarded as reasonable'"(quoting Hale v. Henkel, 201 U.S. 43, 76 (1906))); Slobogin, *supra* note 39, at 819–20.

70. *See* Fisher v. United States, 425 U.S. 391, 400–01, 408–10 (1976). *See also* Slobogin, *supra* note 39, at 820 (explaining that "*Fisher* suggested that subpoenas virtually never implicate the Fifth Amendment's prohibition of compelled self-incrimination, either because they do not compel information or because, if they do, the information they compel is not self-incriminating").

71. United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) (stating that the majority "implicit[ly]" found "that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind" and that *Fisher* "sounded the death-knell for *Boyd*"). Although Justices Marshall and Brennan concurred with the enforcement of the subpoena since the papers at issue were corporate records, they disagreed with respect to Justice O'Connor's assertion as to the lack of Fifth Amendment protection for personal documents. *Id.* at 618–19 (Marshall, J., concurring in part and dissenting in part).

72. *See* Doe v. United States, 253 F.3d 256, 269–70 (6th Cir. 2001).

73. *Id.* at 271. In *Doe*, the court enforced the DOJ subpoena because the government severely limited the subpoena to the children's financial information where Doe was the source of funds and where the funds came from the health care business being investigated. *Id.* The court also noted that the

Fourth Amendment's heightened privacy interests in personal information and has limited some subpoenas for the personal information of noncorporate officers.[74]

In effect, the Supreme Court, in less than one hundred years, completely reversed its position regarding the production of personal documents in response to an administrative subpoena. What began as Fourth and Fifth Amendment protections for even corporate records has turned into almost no protection for the production of even personal documents in response to an administrative subpoena. Now, to compel any document from someone personally, the administrative agency must only show the Court that the document may be relevant to a legitimate governmental purpose, that the government is not currently in possession of the document, and that the correct administrative procedures have been followed.

C. THIRD PARTY SUBPOENAS

The Supreme Court made a similar progression from initially protecting an individual's privacy rights under the Fourth Amendment to upholding almost limitless access to personal documents in the context of third party subpoenas, except this change happened in less than ten years.[75] A third party subpoena seeks documents, not from the target of an investigation, but from a third party that may also have the information—for example, a bank, internet service provider, or business holding personal documents.[76] In 1967, the Court initially protected privacy expectations in the context of third party subpoenas. In *Katz v. United States*, Katz was convicted for transmitting wagering information interstate and his conviction largely rested on evidence introduced at trial of Katz's end of telephone conversations made from a phone booth, which were recorded by the FBI without a warrant.[77] The Court rejected the government's argument that the protection against an unreasonable search and seizure only applied to property rights, holding that what was actually protected were personal

requested information was relevant, especially given Doe's concession that because Doe's children were minors, Doe easily could have concealed funds in his children's accounts. *Id.*

74. *See* FDIC v. Wentz, 55 F.3d 905, 908–09 (3d Cir. 1995) (approving the district court's prohibition of the FDIC from subpoenaing the personal information of the corporate officers' family members but allowing the FDIC to subpoena the corporate officers' personal financial information).

75. Andrew J. DeFilippis, Note, *Securing Informationships: Recognizing A Right to Privity in Fourth Amendment Jurisprudence*, 115 YALE L.J. 1086, 1102–04 (2006).

76. 2 AM. JUR. 2D *Administrative Law* § 117 (2008).

77. Katz v. United States, 389 U.S. 347, 348–50 (1967).

rights that society could *reasonably* expect to exist.[78] Thus, the Court stated that when there was a reasonable expectation of privacy, even "in a business office, in a friend's apartment, or in a taxicab, a person . . . may rely upon the protection of the Fourth Amendment."[79] Thus, the Court required probable cause to obtain the recorded telephone conversations.[80] From *Katz*, it seems to follow that if someone transmitted personal documents to a third party and reasonably expected those documents to remain private, an administrative agency would require a warrant to obtain them. At the very least, an administrative agency would have to meet the same standards expected for a subpoena directed at the target of the investigation.[81]

Documents subpoenaed from a third party, however, were not afforded any such protection when, on the same day in 1976 that *Fisher v. United States*[82] came down, the Supreme Court held in *United States v. Miller* that the Fourth Amendment provides no protection when a target's personal information is sought in a third party subpoena.[83] The Court explained that there is no "expectation of privacy" when someone voluntarily provides his or her information to a third party, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[84] *Miller* precluded the target of an administrative investigation from attempting to quash almost any third party subpoena for personal documents because that person already voluntarily gave the information to a third party.[85] For example, when an individual "voluntarily" gives medical information to a doctor, that person's belief that the information is private is, according to the Court, no longer reasonable. Consequently, the

78. *Id.* at 352–53 (holding that once one realizes that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure").

79. *Id.* at 352 (footnotes omitted).

80. *Id.* at 356–59.

81. Slobogin, *supra* note 39, at 823.

82. Fisher v. United States, 425 U.S. 391 (1976).

83. United States v. Miller, 425 U.S. 435, 440 (1976). Miller was convicted for intent to defraud the government out of a whiskey tax, among other crimes. *Id.* at 436. The Court of Appeals had overturned his conviction on the basis that the government could not subpoena Miller's financial records from his bank because there was an expectation that his documents would remain private and protected by the Fourth Amendment. *Id.* at 439.

84. *Id.* at 442–43.

85. Donald R.C. Pongrace, *Requirement of Notice of Third-Party Subpoenas Issued in SEC Investigations: A New Limitation on the Administrative Subpoena Power*, 33 AM. U. L. REV. 701, 721–22 (1984).

courts—although never explicitly overruling *Katz* and the expectation of privacy—have ruled as a matter of law that there is no "expectation of privacy" when personal information is subpoenaed from third parties such as phone companies, medical institutions, accountants, or internet service providers.[86]

In less than a decade, the Court changed its stance regarding third party subpoenas for personal information. The Court moved from a broad "expectation of privacy" that protected people who expected that personal information would be kept private when turned over to a third party, to a virtually unlimited third party subpoena power that disregards an expectation of privacy when information is transmitted to a third party, regardless of the nature of the relationship between the third party and the target of the administrative investigation. Over the course of one hundred years, the administrative subpoena power went from virtually nonexistent to the most powerful investigative tool agencies possess. Now, agencies can subpoena private information from a third party, including private purchase orders from bookstores,[87] and phone conversations between a husband and wife over an office phone.[88]

D. THE SEC AND THE SUBPOENA POWER

Courts have held that by necessity the SEC, in its pursuit of securities violations, "must be free without undue interference or delay to conduct . . . investigation[s]."[89] The SEC usually begins an investigation because of a complaint, general surveillance of the marketplace as a whole, or as a result of random inspections of a security professional's books or records.[90] After the informal phase of an investigation, the SEC orders a "Formal Order of Investigation" that determines the scope of the investigation.[91] The formal order is important because it brings with it the

86. Slobogin, *supra* note 39, at 823–25.

87. *See generally* Joyce Meskis, *Judging a Book*, 79 DENV. U. L. REV. 522 (2002) (discussing the First Amendment implications of allowing broad subpoena power to reach purchase records of bookstore customers).

88. Jennifer Kane, *Preserving the Marital Communications Privilege in Subpoena Enforcement Proceedings*, 66 GEO. WASH. L. REV. 988, 988–93 (1998) (describing *SEC v. Levin*, 111 F.3d 921 (D.C. Cir. 1997), where the case was remanded to determine if the couple had waived the marital privilege).

89. SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052–54 (2d Cir. 1973) (enforcing a subpoena *duces tecum* for any book, records or materials that may be relevant to the investigation into whether whisky manufacturers engaged in security fraud even though questions existed as to whether whisky manufacturers were even selling securities).

90. Therese Maynard, SEC v. Jerry T. O'Brien, Inc.*: Has the Supreme Court Overruled* United States v. Powell*?*, 18 LOY. L.A. L. REV. 643, 646–47 (1985).

91. *Id.* at 647.

subpoena power, and usually authorizes any SEC staff involved in an investigation the power to subpoena documents.[92]

The SEC can subpoena any documents as long as the subpoena meets the *Powell* standards.[93] An individual whose documents are subpoenaed has three choices if they believe their constitutional rights have been violated or that the SEC has overstepped its boundaries in issuing a subpoena. An individual can comply with the subpoena, bring a motion in federal court to quash the subpoena, or fail to produce the documents, thereby forcing the SEC to compel production through a court order and threat of contempt.[94] Even if an individual believes his or her privacy rights have been violated, there are substantial disincentives to attempting to quash a subpoena for documents. Not only does an attempt to quash a subpoena bring unwanted publicity to the individual, but it also influences the SEC's decision to settle an action as well as the proposed terms of settlement.[95] Once the SEC proves that the subpoena is relevant to a legitimate purpose, the target of the subpoena can argue that the subpoena is "overly broad," or that the request for documents is "unduly burdensome."[96] Similarly, although targets of a subpoena cannot argue they are innocent to avoid document production,[97] a target can quash a subpoena because the agency is operating in "bad faith" or because one of the *Powell* standards is not met.[98]

The *Powell* standards, however, give little protection to someone attempting to quash a subpoena. Although an SEC subpoena must be issued

92. *Id.* at 647–48.

93. *See* SEC v. Wall St. Transcript Corp., 422 F.2d 1371, 1375, 1380–81 (2d Cir. 1970) (enforcing an extensive subpoena of documents relating to a newspaper company despite arguments that said subpoena might "chill" speech). For review, the SEC investigation must be "conducted pursuant to a legitimate purpose, that the [subpoena] may be relevant to the purpose, that the information sought is not already within [the SEC's] possession, and that the administrative steps required have been followed." *Id.* at 1375 (quoting United States v. Powell, 379 U.S. 48, 57–58 (1964)).

94. Ralph C. Ferrara & Philip S. Khinda, *SEC Enforcement Proceedings: Strategic Considerations for When the Agency Comes Calling*, 51 ADMIN. L. REV. 1143, 1156, 1168 (1999).

95. Stephen M. Cutler, Dir. of Div. of Enforcement, U.S. SEC, Speech by SEC Staff: Remarks Before the District of Columbia Bar Association (Feb. 11, 2004) (transcript *available at* http://www.sec.gov/news/speech/spch021104smc.htm (last visited Feb. 10, 2008)).

96. Handberg, *supra* note 68, at 44.

97. *Id.* at 40.

98. For discussions of "bad faith" SEC investigations, see *SEC v. Wheeling-Pittsburgh Steel Corp*., 648 F.2d 118, 130 (3d Cir. 1981), which held that the SEC acts in "bad faith" when it pursues an investigation because of third party influence without objectively evaluating the propriety of the investigation. *See also* SEC v. ESM Gov't Securities, Inc., 645 F.2d 310, 317–18 (5th Cir. 1981) (remanding and directing the district court to refuse to compel production of documents if it finds the SEC intentionally or knowingly misled ESM about the purposes of its review, ESM was in fact misled and the subpoena was the result of SEC's improper access to ESM's records).

pursuant to a *legitimate purpose*, "[c]ourts have allowed agencies great latitude in supplying justification for the issuance" of subpoenas.[99] The Second Circuit explained that "the agency rather than the district courts" should determine "the question of coverage" because they are in the best place to determine whether document production relates to a legitimate subject of investigation.[100] Therefore, as long as the subpoena requests documents within the SEC's statutorily delegated authority, courts are deferential to the SEC and will find the existence of a legitimate purpose.[101]

Although subpoenaed documents must be *relevant* to an investigation to be valid, this test is almost an insignificant hurdle for the SEC.[102] Courts have consistently held that they will not sift through information to determine whether subpoenas relate to activities that may not be subject to an SEC regulation because "subpoenas [are] designed to produce the very information that may be needed to shed light upon those questions."[103]

Lastly, an SEC subpoena must not request documents that the government already *possesses*, and the SEC must adhere to the proper administrative *procedure* in issuance of the subpoena.[104] The lack of possession requirement arises most often in the context of Internal Revenue Service ("IRS") subpoenas and less frequently with SEC subpoenas.[105] The procedural protocol requires that the SEC issue the subpoena only by an authorized person and that it notify the target of an investigation if

99. Stephen V. Wilson & A. Howard Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, *in* PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS 29, 35 (Neil A. Kaplan et al. eds., 1981).

100. *See* SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1053 (2d Cir. 1973).

101. *See* Wilson & Matz, *supra* note 99, at 36. This standard is not completely without teeth. The court has remanded cases to find whether the SEC was acting arbitrarily or outside the scope of its authority. *E.g.*, Shasta Minerals & Chem. Co. v. SEC, 328 F.2d 285, 287–89 (10th Cir. 1964) (remanding the case even though the subpoena was clearly relevant when facts showed that the SEC had a grudge against the president of the company and that the SEC was using its investigation to gain publicity for itself). Nonetheless, a regulatory agency has only to show that they *believe* a violation has occurred and they are conducting an investigation to make such a determination. Wilson & Matz, *supra* note 99, at 36–37.

102. *See* SEC v. Arthur Young & Co., 584 F.2d 1018, 1028–29 (D.C. Cir. 1978) (rejecting the argument that for a subpoena to be enforced by the court, the SEC must first prove that the documents seeking to be produced are relevant, as it would undermine the subpoena power; documents cannot be "plainly irrelevant").

103. SEC v. Howatt, 525 F.2d 226, 229–30 (1st Cir. 1975). *See also Brigadoon Scotch Distrib. Co.*, 480 F.2d at 1052–53 (stating that the SEC "must be free without undue influence or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the [SEC's] regulatory authority").

104. United States v. Powell, 379 U.S. 48, 57–58 (1964).

105. *See* Wilson & Matz, *supra* note 99, at 38.

subpoenaing a third party for information protected by privacy legislation.[106] Although these last two requirements provide ways to quash a subpoena based on technical deficiencies in the subpoena, they are ineffective when trying to quash a subpoena because of the personal nature of the documents requested by the SEC.

There are also practical considerations people must weigh when attempting to quash a subpoena. Although a subpoena could ask for documents that are purely personal, irrelevant or not subject to a legitimate administrative purpose, full and complete compliance may be critical "to successfully resolving [an SEC] inquiry."[107] In fact, because both individuals and corporations want to be viewed as fully cooperative, they may feel pressure to produce documents that are irrelevant to an investigation or even privileged.[108] Thus, remembering the hypothetical sealed office from the introduction, a company being investigated may have interests different from, or even in conflict with, those of an individual whose personal documents have been subpoenaed. The company may want to produce the personal documents to the SEC to be viewed as "cooperative,"[109] while the individual may not want her privacy rights violated.

The SEC is "vested with sweeping investigatory and prosecutorial powers," and the subpoena power is "perhaps the SEC's most potent investigatory tool."[110] Courts, recognizing the inherent risks in granting the SEC such broad powers, have granted certain defenses to subpoenas compelling document production. These defenses, however, do not protect against the possibility that personal documents could be subpoenaed along with nonpersonal, corporate documents, and this risk—along with the lack of defense against the privacy violation—is exacerbated given the possibility that personal documents can then be used in possible criminal litigation.

III. PARALLEL CIVIL AND CRIMINAL GRAND JURY INVESTIGATIONS

During the 1970s, a profound shift took place in federal securities law, and the SEC began vigorously pursuing criminal convictions for federal

106. *See* Steinberg, *supra* note 34, at 21–23.

107. Gorman & Esposito, *supra* note 68, at 162.

108. *Id.* at 168 (noting that "the SEC's criteria relating to cooperation leaves little doubt that to be viewed as cooperative, privileged materials should be produced").

109. *See id.*

110. Steinberg, *supra* note 34, at 23–24.

securities law violations.[111] With this shift came the popularity of "parallel proceedings," wherein the SEC or some other private entity investigates for possible civil litigation, while the DOJ also investigates possible criminal prosecution.[112] In a parallel proceeding, the SEC may refer cases to the DOJ and transfer any documents obtained in an investigation to the DOJ for its criminal investigation.[113] The D.C. Circuit, for example, in *SEC v. Dresser Industries, Inc.*, held that the SEC's document sharing power[114] is not improper when there are concurrent civil and criminal investigations.[115]

Parallel proceedings pose substantial problems for defendants in criminal investigations. Most importantly, parallel proceedings allow evidence gathered by the SEC through the subpoena process to be transmitted to the DOJ.[116] Through this transfer of documents, administrative subpoenas allow the government to "bypass . . . probable cause [and] to obtain private records" and documents that the SEC has gathered during what could even be an agency fishing expedition.[117] Unlike the "probable cause" necessary in most criminal cases, administrative agency subpoenas must only be "reasonable" and meet the *Powell* requirements.[118] This sharing system allows the SEC to give documents to the DOJ that the DOJ would not have been able to compel without "probable cause."[119] Although information sharing is problematic, it is also absolutely necessary. Because the DOJ has limited resources, if it had to begin every criminal investigation with only SEC referrals and no

111. *See* Marvin G. Pickholz, *Parallel Enforcement Proceedings: Guidelines for the Corporate Lawyer*, *in* PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS, *supra* note 99, at 3, 5. For example, compared to 1976, in 1978 criminal convictions for securities fraud almost doubled. *Id.*

112. *See id.* at 6–9.

113. *See* Hughes, *supra* note 38, at 598.

114. 15 U.S.C.A. §78(u)(d) (West 2008). Under the statute, the SEC "may transmit such evidence as may be available concerning such acts or practices as may constitute a violation . . . to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings . . . ." *Id.*

115. *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1384–87 (D.C. Cir. 1980) (en banc). In *Dresser*, the SEC and the Department of Justice were concurrently investigating possible illegal payments by a corporation to agents of foreign governments. *Id.* at 1370–71. The SEC subpoenaed documents, including those already subpoenaed by the grand jury, and the court refused to quash the subpoena. *Id.* at 1373, 1388–89.

116. Paul L. Friedman, *Problems Relating to Sharing of Information in Parallel Investigations*, *in* PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS, *supra* note 99, at 807, 808. *See also* U.S. v. Szur, 1997 WL 153832, at *2 (S.D.N.Y. Apr. 2, 1997).

117. *See* Berkower, *supra* note 5, at 2251–52, 2264–65. Berkower explains, for example, that if the FBI suspects a doctor is defrauding health insurance companies but does not have probable cause to search the doctor's record room, it could use an administrative subpoena to mandate production of the doctor's records and then the U.S. Attorney could prosecute based on that information. *Id.* at 2251–52.

118. United States v. Powell, 379 U.S. 48, 57–58 (1964).

119. *See* Berkower, *supra* note 5, at 2264–65.

documents or evidence of misconduct it would be almost impossible for the DOJ to make any progress in the ever increasing number of criminal investigations.[120]

Although Congress has notably not given the DOJ a generalized subpoena power consistent with administrative agencies like the SEC, the DOJ can also use the grand jury subpoena powers to sidestep probable cause and compel document production.[121] This method has come under recent criticism because the DOJ has increasingly used grand jury subpoenas to acquire information, especially in the context of white collar crimes in the wake of the Enron and Arthur Anderson scandals.[122] Many of the problems with administrative subpoenas addressed in this Note apply to grand jury subpoenas as well, given that the DOJ can simply subpoena personal documents through a grand jury subpoena; however, important reasons for limiting the use of personal information acquired by the SEC in a parallel proceeding still remain.

First, although the DOJ also has the grand jury subpoena to assist it in determining guilt or innocence in criminal investigations, the grand jury subpoena has fewer privacy implications than the administrative subpoena due to the presumption of secrecy surrounding grand jury proceedings.[123] One important reason for the secrecy of grand jury subpoenas is that secrecy assures "persons accused [of criminal activity] but exonerated will not have their reputations sullied."[124] People present at a grand jury proceeding cannot generally disclose any matter revealed during the grand jury investigation without prior court approval, with exceptions for certain law enforcement functions.[125] Furthermore, all subpoenaed documents must be placed under seal.[126] Although the possibility of course remains that personal documents may be subpoenaed by a grand jury, the information necessary to determine criminal liability will often not be personal in nature, and the remainder of the personal information will be

120. *See* Hughes, *supra* note 38, at 578–79.

121. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 38 (2004).

122. *See id.* at 2. The DOJ has also used grand jury power to acquire terrorism related information since the September 11, 2001 attacks. *Id.* at 1–2.

123. Gonzalez et al., *supra* note 4, at 1199–200.

124. *Id.* at 1199.

125. FED. R. CRIM. P. 6(e)(2)–(3). *See also* Berkower, *supra* note 5, at 2264 n.111 (describing how the USA PATRIOT Act allows prosecutors to disclose intelligence information to certain officials); Hughes, *supra* note 38, at 635–37 (describing the most common circumstances under which grand jury information is disclosed).

126. FED. R. CRIM. P. 6(e)(6).

placed under seal.[127] Federal courts have recognized that "[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of [a criminal] investigation."[128]

The actual secrecy of the grand jury has been questioned in recent years,[129] but those responsible for leaks can be seriously punished.[130] Grand jury leaks have occurred in the context of highly public investigations[131] in which the personal information released will often not include the types of personal information that can be compelled by an SEC subpoena. As discussed previously, documents subpoenaed by a grand jury must be necessary to determine criminal liability, while the SEC can obtain a broad variety of personal documents merely relevant to an investigation. Moreover, even though in today's information hungry society information revealed during highly publicized grand jury hearings may be leaked to the public, documents produced pursuant to a grand jury subpoena are less susceptible to access by multiple government agencies or the public at large than documents compelled by an SEC subpoena.[132]

Second, there are strategic reasons for why the DOJ would not want to subpoena personal information in the grand jury context, making information acquired by the SEC all the more useful. Because the defense in a criminal trial is entitled to use evidence and testimony introduced at a grand jury proceeding if that evidence will be used at trial, the DOJ "has an affirmative incentive to *limit* the evidence presented to the grand jury in connection with the indictment process, so as to avoid creating materials that may be used by the defense in trial preparation."[133] Recognizing the potential for cross-examination material, the DOJ often uses a "one-agent summary," where "a canned presentation," vetted by the prosecution, is

127. *See id.*

128. Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 864 (D.C. Cir. 1981) (quoting Baez v. Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) (quoting an affidavit submitted by an agent of the Federal Bureau of Investigation)).

129. *See* Berkower, *supra* note 5, at 2259.

130. *See, e.g.*, T.J. Quinn & Teri Thompson, *Bonds Scribes Take Walk, Lawyer Admits to Grand Jury Leak*, DAILY NEWS, Feb. 15, 2007, at 70.

131. *See, e.g.*, *id.* at 70 (discussing leaks made during investigation of the Barry Bonds steroid scandal); Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 339–40 (1999) (discussing allegedly illegal leaks made by Independent Counsel Kenneth Starr in the context of the Clinton impeachment proceedings).

132. *See* Gonzalez et al., *supra* note 4, at 1199–201.

133. Kuckes, *supra* note 121, at 21–22 (emphasis in original). *See also* 18 U.S.C. § 3500(b) (2000) (explaining that after a witness testifies, upon the defendant's motion, the Department of Justice must "produce any statement . . . of the witness . . . in the possession of the United States which relates to the subject matter as to which the witness has testified").

given to the grand jury by an FBI agent.[134] This process has proven effective in returning indictments and limits grand jury subpoena powers.[135] Because the DOJ has an incentive to limit the amount of information the grand jury has, it becomes all the more necessary for the DOJ to rely on administrative agencies, like the SEC, to give it documents acquired from the agency investigations, particularly the subpoenaed documents. This information sharing, which exacerbates privacy concerns when the document sharing involves personal documents, is particularly helpful to the DOJ when it seeks information it does not want exposed to the grand jury.

Third, after an indictment has been returned by the grand jury, the DOJ's ability to use the grand jury subpoena to obtain information is restricted by the limiting rules of discovery.[136] Because the DOJ no longer has the subpoena at its disposal, it must either use a warrant, requiring probable cause, or receive information from administrative agencies like the SEC. Generally, as long as the DOJ and the SEC are not acting in bad faith to subvert the trial process, the SEC can issue subpoenas and then cooperate with the DOJ in developing its criminal case.[137] Therefore, even if the DOJ could initially subpoena personal information through the grand jury process, the limitations placed on the DOJ after the indictment is returned provide a justification for limiting the type of personal information that can be subpoenaed by the SEC and then turned over to the DOJ.

Lastly, the possible abuse of information sharing coincides with the possibility of "government manipulation of parallel proceedings."[138] The DOJ can abuse the SEC's subpoena power to gain an improper advantage in a criminal proceeding when the SEC and DOJ cooperate so extensively that their investigations are no longer parallel, but merged.[139] In *United States v. Stringer*, for example, the court dismissed an indictment against Stringer because the U.S. Attorney's Office was concealing its criminal investigation of Stringer in order to best take advantage of the civil discovery process, including the SEC's subpoena power.[140] The court held

134. Kuckes, *supra* note 121, at 22.

135. *See* Fred A. Bernstein, Note, *Behind the Gray Door:* Williams, *Secrecy and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 57–58 (1994).

136. Hughes, *supra* note 38, at 669.

137. Gonzalez et. al., *supra* note 4, at 1186–89.

138. Ralph C. Ferrara & David A. Garcia, *Meeting In Dark Corners and Strange Places: Scheming Between the SEC and the Department of Justice*, 1557 PRACTISING L. INST./CORP. 515, 524 (2006).

139. *See id.*

140. United States v. Stringer, 408 F. Supp. 2d 1083, 1087–90 (D. Or. 2006).

that Stringer's due process rights were violated because the DOJ hid behind the lenient civil discovery practices and used the SEC's subpoena powers to circumvent the criminal discovery process because the SEC, working with the DOJ, lied to Stringer about any possible criminal investigation.[141] Absent an egregious set of facts, however, courts will also stay a civil investigation until a criminal investigation has finished if the defendant can prove the parallel proceedings were used in "bad faith," meaning that the government used trickery and deceit to advance its criminal proceedings.[142]

The possibility of parallel criminal and civil litigation underscores the importance of the SEC's subpoena powers. Because the SEC is required to refer criminal investigations to the DOJ and the SEC provides the DOJ with documents obtained through the compelled production pursuant to an SEC subpoena, it becomes even more important to protect the privacy rights of individuals when personal documents are subpoenaed. Under the current framework of parallel investigations, the SEC can subpoena documents it believes to be relevant to its investigation, even the most personal of documents. That evidence can then be used against an individual in a criminal investigation. Preventing "arbitrary abuses of police power" was one of the primary concerns of the framers of the Fourth Amendment when they delineated probable cause as the standard necessary to protect against unreasonable searches and seizures.[143]

IV. PRIVACY AND THE FOURTH AMENDMENT

An explicit *right to privacy* is found nowhere in the Fourth Amendment, or anywhere else in the Constitution.[144] Before 1890, little to no attention was paid to a person's legal right to privacy.[145] Yet, in *Griswold v. Connecticut*, the Supreme Court found "zones of privacy"

141. *Id.* at 1087–89. The U.S. Attorney's Office went so far as to say it would "need to be spoonfed" the evidence from the SEC investigation. *Id.* at 1089.

142. *See* Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202–04 (Fed. Cir. 1987). Courts have held that "[o]ther than where there is specific evidence of bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." *Id.* at 1203 (quoting SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980)). In *SEC v. Horowitz & Ullman, P.C.*, for example, the defendants attempted to quash an SEC subpoena because the SEC was using the civil process to obtain evidence for a DOJ investigation. The court enforced document production because the SEC did not act in "bad faith." SEC v. Horowitz & Pullman, P.C., No. C80-590A, 1982 WL 1576, at *1, 7 (N.D. Ga. Mar. 4, 1982).

143. Berkower, *supra* note 5, at 2254.

144. *See* U.S. CONST. amend. IV. *See also* AMITAI ETZIONI, THE LIMITS OF PRIVACY 201 (1999).

145. FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 12 (1992).

emanating from the First, Third, Fourth, Fifth, and Ninth Amendments.[146] The "zones of privacy" analysis has been used to protect the right to contraceptives for unmarried persons,[147] the right to an abortion,[148] and the right to conduct consensual sexual acts.[149] Although courts have found particularized rights to privacy, such as the right to contraception, "neither philosophers nor jurists have been successful in converting the value into a clearly defined, protectable legal standard" in part because of "changing technological and social forces."[150]

Although no general right to privacy exists, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[151] In advocating for the adoption of the Bill of Rights, Patrick Henry spoke about the importance of restraining the officers of Congress, who could use the "terrors of paramount federal authority" to take from people what is reasonably theirs.[152] The first major legal argument for a right to privacy was by Samuel Warren and Louis Brandeis in response to the press being able to report events without being physically present at the scene. They argued that through the common law people had a "right to be let alone."[153] The Fourth Amendment began to be viewed as protecting privacy interests in *Boyd v. United States*.[154] Initially, though, the Fourth Amendment only applied to situations where physical trespass was involved, for example, forcibly going into someone's home.[155] The notion that the Fourth

146. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (holding that penumbras of privacy created by various constitutional amendments extend to the use of contraceptives by married couples). Numerous commentators have criticized the very notion that there is a right to privacy at all in the U.S. Constitution, or argued that the nature of the right was misconceived. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 103 (1996) (arguing that the Court created a right to privacy "out of thin air"); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 44–46, (1967) (noting, for example, that the "third, fourth, and fifth amendments, which are rightly said to protect interests in privacy, are guarantees of security, not freedom").

147. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

148. Roe v. Wade, 410 U.S. 113, 152–53 (1973) (citing with approval *Boyd v. United States*, 116 U.S. 616 (1886) as one of several cases finding "at least the roots of" the right of privacy in the Fourth and Fifth Amendments).

149. Lawrence v. Texas, 539 U.S. 558, 564–67 (2003).

150. PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 41 (1995).

151. U.S. CONST. amend. IV.

152. REGAN, *supra* note 150, at 35.

153. *Id.* at 25 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890)).

154. Boyd v. United States, 116 U.S. 616, 630 (1886).

155. REGAN, *supra* note 150, at 35–36.

Amendment only applied to physical trespass changed in *Katz v. United States*, when the Court, in 1967, held that the Fourth Amendment applied to "people, not places"[156] and that for the Fourth Amendment to be implicated there must be: (1) a subjective expectation of privacy; and (2) the expectation of privacy must be one that society is prepared to recognize as reasonable.[157] In effect, *Katz* created a reasonableness test when seeking Fourth Amendment protection in situations not involving physical trespass.[158]

In the forty years since *Katz*, the Court has created a legal framework to determine the reasonableness of an expectation of privacy. Even if there is a general notion in society that information should be private, the Supreme Court has determined that an expectation of privacy does not exist "if one has permitted others to have access to [the information]."[159] This means that no "reasonable expectation" of privacy exists when individuals have either conveyed their information to third parties or failed to properly protect their own personal information.[160] This has led the Court to find, for example, that no Fourth Amendment interest exists when someone's garbage is searched,[161] when personal information transmitted to a bank is subpoenaed,[162] or when a police airplane flies over a person's house.[163] Consequently, because a reasonable expectation of privacy is directly proportional to the amount of information people keep from third parties, as the world changes and new technologies increasingly expose people's personal lives, the Fourth Amendment will afford even less privacy protection, even though people may have the subjective intent for such privacy.[164]

156. Katz v. United States, 389 U.S. 347, 351 (1967).

157. *See id.* at 361 (Harlan, J., concurring). Justice Harlan's concurring opinion has been adopted by the Court in its analysis of privacy interests. *E.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001); Smith v. Maryland, 442 U.S. 735, 743 (1979).

158. *See Katz*, 389 U.S. at 361.

159. Sam Kamin, *Little Brothers Are Watching You: The Importance of Private Actors in the Making of Fourth Amendment Law*, 79 DENV. U. L. REV. 517, 518 (2002).

160. *Id.* at 574.

161. California v. Greenwood, 486 U.S. 35, 40 (1988) (concluding that "respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection").

162. United States v. Miller, 425 U.S. 435, 443 (1976).

163. California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (holding that a government flight above a home does not invoke the Fourth Amendment because the police officers were in publicly navigable airspace when they saw marijuana plants). The Court did hold, in *Kyllo v. United States*, that thermal imaging was a search requiring a warrant because the thermal imaging detailed the interior of a house in a way that violated someone's reasonable expectation of privacy. Kyllo v. United States, 533 U.S. 27, 33–35 (2001).

164. *See* Kamin, *supra* note 159, at 574.

As the necessity for the conveyance of information between individuals and third parties increases, be it for personal, medical or financial services, the standard for what is a "reasonable" search and seizure will become more relaxed, and probable cause will be less necessary when acquiring information. Because the Supreme Court has decided to hold the "reasonable expectation" test static while it becomes harder to shield personal information from prying eyes and third parties, the reasonable expectation of privacy test is becoming a nullity. For example, the Supreme Court recently held that the use of thermal imaging by the police without a warrant is unconstitutional per the Fourth Amendment.[165] The use of thermal imaging by the police would presumably be constitutional, even without a search warrant, if thermal imaging becomes commonplace throughout society, and it is no longer reasonable to assume that the general public does not have access to thermal imaging technology.[166] Therefore, steps should be taken to prevent government access to personal information, be it through a shift in judicial policy or congressional action.

V. THE SEC'S SUBPOENA POWER SHOULD BE LIMITED FOR PURELY PERSONAL DOCUMENTS

The Supreme Court has recognized the privacy intrusions associated with searches of a person's papers, stating:

> In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.[167]

Moreover, the language of the Fourth Amendment explicitly protects "papers" from unreasonable searches and seizures.[168]

Recognizing the inherent privacy implications involved in subpoenaing personal documents, this section explains what justifications the courts make for their current Fourth Amendment framework for subpoenaing personal documents, and why the justifications are

165. *Kyllo*, 533 U.S. at 34–35.

166. *See id.* at 34, 40.

167. Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) (explaining the privacy implications of a general warrant "authorizing a search and seizure of a person's papers").

168. U.S. CONST. amend. IV.

problematic.

A. THREE INITIAL ASSUMPTIONS

The Supreme Court has concluded that administrative agencies can subpoena any documents they believe to be relevant, even if those documents are purely personal and the target intended them to be private.[169] As this framework is discussed and alternative standards are proposed, three basic assumptions must be made: (1) some documents are purely personal in nature; (2) officers and directors, although part of a corporation, do not completely give up their right to privacy once they join a corporation; and (3) an agency can still remain effective even when agency subpoena power is limited in scope.

The Supreme Court has repeatedly held that certain documents are "private" in nature. Personal documents can include diaries, an individual's bank accounts, letters or any other documents that have nothing to do with a business or other regulated activity.[170] In *Nixon v. Administrator of General Services*, for example, the Supreme Court recognized that private documents could include "a marriage certificate, insurance policies, household bills and receipts, and personal correspondence."[171] Justice Powell often spoke about privacy interests in certain personal documents such as letters, checkbooks,[172] and other papers involving financial transactions, because these papers "touch upon intimate areas of an individual's personal affairs" and "reveal much about a person's activities, associations and beliefs" that "[a]t some point . . . would implicate legitimate expectations of privacy."[173] More recently Justice Blackmun recognized the existence of private documents[174] and Justice Breyer spoke of the existence of private documents and their importance in Fourth Amendment jurisprudence.[175]

169. *See* United States v. Powell, 379 U.S. 48, 57–58 (1964).

170. *See, e.g.*, FTC v. Am. Tobacco Co., 264 U.S. 298, 305–07 (1924); Boyd v. United States, 116 U.S. 616, 623–24 (1886).

171. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 465, 484 (1977) (upholding the constitutionality of the Presidential Recordings and Materials Preservation Act against former President Richard M. Nixon).

172. *See* South Dakota v. Opperman, 428 U.S. 364, 380 n.7 (1976) (Powell, J., concurring).

173. Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring). *See also Opperman*, 428 U.S at 380 n.7 (quoting *Cal. Bankers Ass'n*, 416 U.S. at 78–79).

174. *See* O'Connor v. Ortega, 480 U.S. 709, 738 n.5 (1987) (Blackmun, J., dissenting) (pointing out that even the Attorney General had said he does not "think public employees' private documents belong to the Government").

175. Hudson v. Michigan, 547 U.S. 586, 599 (2006) (Breyer, J., dissenting) (speaking approvingly of *Boyd* and the protection afforded to private documents).

The assumption that officers and directors, although part of a corporation, do not completely give up their right to privacy once they join the corporation, while seemingly logical, may be somewhat more controversial. In the wake of the Enron and WorldCom scandals, governance practices have been put under a microscope, and corporate officers and directors have fallen out of favor with the American public.[176] In response, with the passage of the Sarbanes-Oxley Act in 2002, Congress has increased the powers of the SEC's enforcement authority.[177] Recently, some have sought to give the SEC even more investigative authority, specifically in an amendment to the Right to Financial Privacy Act that would allow the SEC to subpoena an individual's financial records without notification.[178] Although the American public currently has little trust in corporate officers and directors, most are probably not guilty of any criminal wrongdoing. Furthermore, the SEC subpoena power does not only apply to officers and directors, but also to stock traders, family members of an officer, or anyone that could possibly have information about securities fraud. If it is accepted that many officers and directors are also esteemed members of the community, and no different than other individuals, then it follows that even though public sentiment is against people governing corporations, they should still be afforded the same privacy rights as other individuals in society.

The last assumption, that an agency can remain effective although some of its subpoena power has been curtailed, is probably the most controversial of the three assumptions. A review of various statutes, however, renders this argument moot. Congress has already curtailed the SEC's power to issue third party subpoenas without notifying a target in the Right to Financial Privacy Act and the Electronic Communications Privacy Act. The Right to Financial Privacy Act forbids an administrative agency, like the SEC, from subpoenaing personal financial information from a banking institution without notifying the customer whose information is sought.[179] The notice must identify the administrative agency that subpoenaed the information so the target has an opportunity to quash the subpoena.[180] Like the Right to Financial Privacy Act, the

176. *See* Interview by Robert Siegal with William Donaldson, *All Things Considered* (NPR radio broadcast, July 30, 2003).

177. William R. Baker III & Christopher E. Campbell, *Sarbanes-Oxley Enhancements to the SEC's Enforcement Authority*, 1386 PRACTISING L. INST./CORP. 499, 506–09 (2003).

178. *See* Securities Fraud Deterrence and Investor Restitution Act of 2004, H.R. 2179, 108th Cong. § 3(c)(3) (2004).

179. 12 U.S.C. § 3405(2) (2000).

180. *Id.*

Electronic Communications Privacy Act requires the government to give the target notice before his or her electronic information held by an internet service provider is subpoenaed by an administrative agency.[181] Lastly, the Privacy Act of 1974, among other things, allows people to determine what records and papers an agency has concerning them and gives individuals access to those records and any information pertaining to them.[182]

B. JUSTIFICATIONS FOR A RELAXED STANDARD FOR SEC SUBPOENAS

Although justifications exist for why subpoenas should not be regulated when the subpoena compels production of personal or nonpublic documents, those justifications have been discredited by recent scholarly criticism.[183] The first justification is that subpoenas are not really "actual searches," because they do not require a physical intrusion—the subpoenaed person is providing the documents to the agency, the target can bring a motion to quash the subpoena, and there is no physical force associated with document production.[184] Although it is the subpoenaed person, and not the police, who must produce the documents, it is inaccurate to say that the document production is not compelled through the use of force. Those who refuse to produce documents subpoenaed by the SEC can be threatened with civil contempt after an enforcement proceeding.[185] No matter who actually retrieves the documents, be it the police, a target, or a third party, the information in the documents is still forcibly disclosed.[186] Moreover, "[t]he less intrusive nature of the 'seizure' . . . does not justify the lack of meaningful protection of the subpoenaed party's privacy interest . . . in the nondisclosure of the contents of the [personal] papers."[187] In other words, the privacy interest does not change depending on the nature of the search.

The second argument for why subpoenas should not be regulated is that third party subpoenas cannot, by their very nature, subpoena private

181. 18 U.S.C.A. § 2703(b)(1)(B)(i) (West 2008).

182. 5 U.S.C.A. § 552(a)(d)(1) (West 2008). *See also* 76 C.J.S. *Records* § 79 (2007). The act does not, however, pertain to materials collated by an administrative agency in anticipation of upcoming litigation. 5 U.S.C. § 552(a)(d)(5).

183. See, for example, Slobogin, *supra* note 39, at 826–41, for a much more thorough analysis of six possible justifications for a "paltry regulatory regime." *Id.* at 809.

184. *Id.* at 827. *See also* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 195 (1946) (a subpoena for records presents "no question of actual search and seizure").

185. Steinberg, *supra* note 34, at 3.

186. *See* Slobogin, *supra* note 39, at 827–28.

187. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.13(e) (4th ed. 2004).

documents. According to the courts, by giving documents to a third party, individuals lose their reasonable expectation of privacy because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[188] The target "assume[s] the risk" that the information will be made public when giving the information to a third party.[189] This argument's basic proposition is based on the faulty premise that today people have a true choice whether to give information to private actors.[190] The reality is that individuals often have no choice, unless they are supposed never to own a home, receive medical services, or receive an education. In a similar vein, subpoena advocates argue that information given to a third party belongs to the third party, so any "privacy interest in information [is] surrendered to [the] third party" when the information is transferred.[191] The most glaring flaw in this argument is that although the third party does possess the person's information, it cannot do whatever it wants with the information.[192] For example, when people give a hospital their social security numbers, there is a reasonable expectation that the information will be held in privity and a hospital cannot give that information to whomever it pleases.[193] Therefore, while people often give their information to a third party, they do not "assume the risk" that the information will be broadcast to the world. They expect that information to remain private. The third party does not own the information in a traditional sense, because they cannot do whatever they want with it.

Subpoena advocates also argue that if witnesses have the right to personally testify to the government about any potential wrongdoing, why should third parties be unable to do the same through document production? Record holders, however, are not persons testifying, but institutions whose role is, in part, to hold information.[194] Similar to the

188. Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (holding that there is no expectation of privacy with respect to telephone numbers dialed). *See* Slobogin, *supra* note 39, at 828–29. *See also supra*, Part II.C.

189. *Smith*, 442 U.S., at 743–44.

190. *See* Slobogin, *supra* note 39, at 829. Slobogin points out that providing information to "doctors, banks, schools, and phone and [i]nternet [s]ervice [p]roviders" is not voluntary at all, and is in fact a necessity given the demands of modern life. *Id.*

191. *Id.* at 831.

192. *Id.* Recently, however, some third parties are changing their privacy policies to explicitly say that the third party owns the information that someone gives them. For example, AT&T recently changed its privacy policy, probably to provide the government information under less public scrutiny. David Lazarus, *Personal Information Isn't That Confidential; Experts Weigh in on AT&T's Assertion That It Owns Your Data*, S.F. CHRON., June 23, 2006, at D1.

193. *See* Slobogin, *supra* note 39, at 831–32.

194. *Id.* at 833–35.

distinction between corporations and persons recognized in *Henkel*,[195] although persons have the right to testify to the government, this same right should not apply to an institution or corporation because corporations do not have "autonomy interests."[196]

One last justification, and probably the most important one when discussing curbing the SEC's subpoena power, is the fear that regulating subpoenas could decrease the efficiency of SEC investigations by putting up barriers to an investigation.[197] As previously enacted congressional legislation has shown, however, regulation of subpoenas and allowing effective investigations are not always at odds.[198] SEC officials themselves have concluded that "the SEC has succeeded in respecting legitimate claims of privacy without significantly compromising its effectiveness in its law enforcement mission."[199] Furthermore, the court dramatically limits the SEC's initial subpoena power by requiring that the SEC go to court to enforce a subpoena.[200] If advocates of a strong subpoena power were really concerned about the possibility of ineffective investigations they would not provide the target with the option to quash a subpoena, which slows down an investigative proceeding until there is an opportunity for a court to determine the subpoena's relevancy and whether it conforms to the *Powell* standards.[201] There even remains the possibility, referred to by Justice Murphy, that investigations would be made easier by regulating subpoena powers because individuals would be more willing to participate in investigations if their liberties were respected.[202]

The justifications for leaving SEC subpoenas completely unregulated are based on a fictionalized understanding of personal relationships and informational institutions, the belief that subpoenas compelling documents are not actual searches, and a fear that any regulation of administrative subpoenas would "[d]estroy [i]nvestigative [e]ffectiveness."[203] These justifications either disregard the current relationship between people and the institutions those people depend on for necessary services, or play upon

195. Hale v. Henkel, 201 U.S. 43, 74–76 (1906). *See also supra* text accompanying notes 47–51.

196. Slobogin, *supra* note 39, at 833–35.

197. *See id.* at 837.

198. *See supra* Part V.A.

199. Thomas C. Newkirk, Assoc. Dir., U.S. SEC, Speech by SEC Staff: Conflicts Between Public Accountability and Individual Privacy in SEC Enforcement Actions, http://www.sec.gov/news/speech/speecharchive/1999/spch472.htm (last visited Apr. 21, 2008).

200. *See* William R. McLucas, J. Lynn Taylor & Susan A. Mathews, *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53, 95 (1997).

201. *See supra* Part II.D.

202. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 219 (1946) (Murphy, J., dissenting).

203. *See* Slobogin, *supra* note 39, at 827–37.

the politics of fear and uncertainty to justify government power.

C. PREVIOUS ALTERNATIVES FOR STRENGTHENING PRIVACY RIGHTS ARE FLAWED IN THE SEC CONTEXT

There are many alternatives the law could take in curbing the ever growing threat of SEC subpoenas to privacy interests. Professor Slobogin advocates a requirement of probable cause when a subpoena for personal papers is requested, "similar to that extended to [an] individual's house, person, and effects."[204] Another possible privacy protection might be that if private papers are to be subpoenaed, Congress should place limits on their use beyond the administrative or regulatory context.[205] One last possibility that has been proposed is that when personal documents are subpoenaed from a third party, a rebuttable presumption exists that there was a reasonable expectation of privity, or what DeFillipis calls an "informationship."[206] This alternative would allow an administrative agency to overcome a presumption of privity and the requirement of probable cause if the agency could show the "need to know the information," that "obtaining a warrant would have unreasonably hindered a government . . . investigation," and that "the methods used to obtain the information were reasonable."[207]

Although all three proposed solutions to the lack of privacy protection in the context of administrative subpoenas have their merits, all are either inappropriate or unrealistic solutions in the context of SEC subpoenas, especially given the current political climate when dealing with securities violations. The Supreme Court has not restricted the SEC's subpoena powers since *Powell*,[208] and currently, the SEC considers the subpoena

204. *Id.* at 845. While this Note does not discuss what should be considered personal documents, Slobogin argues that when papers contain personal information but are "required records," meaning that they are "essentially public documents" or are documents held by "persons engaged in highly regulated industries [that] are required to be maintained," then those documents should be considered public, not private. *Id*. at 843–44 (internal citations omitted). *See also* Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975, 993–95 (2007) (discussing what kinds of documents should be considered personal in nature).

205. *See* Berkower, *supra* note 5, at 2286–87. Berkower is mainly concerned about the use of administrative subpoenas in criminal investigations in the terrorism and health care context, but the same concerns also relate to the SEC's investigations in conjunction with the Department of Justice.

206. DeFillipis, *supra* note 75, at 1108–09.

207. *Id.* at 1110.

208. MARC I. STEINBERG & RALPH C. FERRARA, 25A SECURITIES PRAC. FED. & STATE ENFORCEMENT § 9:2 (2007).

power its most powerful investigative tool in securities investigations.[209] In fact, proposals have been made to increase the SEC's subpoena powers and limit the Right to Financial Privacy Act so the SEC would no longer have to give notice to the target when subpoenaing documents from banking institutions.[210] Because of the current expansive role of the SEC in all aspects of the market and the general public displeasure with corporate officers and directors, the Supreme Court will never apply the Fourth Amendment to the subpoena power in the way intimated over one hundred years ago in *Boyd v. United States.* Requiring probable cause when the SEC subpoenas personal documents, while an attractive proposal, is an unrealistic solution given the trends of the Court and Congress.

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

Lastly, although recognizing privity relationships would help protect privacy in the context of third party subpoenas, nothing stops the SEC from demanding that the target of an investigation produce the personal documents; all that the SEC would need to prove when requesting personal documents from the target is that "official curiosity" is fulfilled. Furthermore, the SEC would argue that it "needs" all documents relevant to an investigation, and courts are deferential to any need articulated by the SEC. Thus, to reconfigure the SEC's subpoena power and the protections afforded by the Fourth Amendment, new possibilities will have to emerge.

VI. THREE PROPOSED ALTERNATIVES TO PROTECT PRIVATE DOCUMENTS FROM SEC SUBPOENAS

As the law stands today, the SEC can subpoena any document it deems to be "relevant" to an investigation, even if its inquiry is only

209. *See, e.g.*, Thomas C. Newkirk, Assoc. Dir., Div. of Enforcement, U.S. SEC, Insider Trading—A U.S. Perspective, 16th International Symposium on Economic Crime, Jesus College, Cambridge, England (Sept. 19, 1998), *available at* http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm (last visited Apr. 18, 2008).

210. *See supra* text accompanying note 178.

"official curiosity."[211] It makes no difference to the courts whether these documents are corporate or business documents, such as the financial records of one's business, or whether the documents are purely personal, such as a letter or personal financial information. The Court no longer protects personal papers through either the Fourth or Fifth Amendments and the SEC may subpoena a third party, such as an internet service provider or bank, for any documents or personal information as long as the SEC notifies the target. I propose three alternatives that would protect the privacy interests of an individual while still protecting the important role the SEC's subpoena power plays in effective market regulation and securities fraud investigation.

A. JUDICIAL SHIFT FROM "RELEVANT" TO "NECESSARY" STANDARD WHEN ASSESSING THE SEC'S SUBPOENA POWERS UNDER THE FOURTH AMENDMENT

The first possibility is for the Court to shift its analysis of whether a subpoena was issued correctly from the merely "relevant to an investigation" standard applied in *Powell* to an emphasis on the *nature* of the subpoena, and whether there existed a "reasonable expectation of privacy," the standard first recognized in *Katz v. United States*.[212] When a document is subpoenaed, if the document is private in nature and the subjective intent for privacy is one society deems reasonable, then the documents should be afforded some protection. Courts have gone astray in assuming that the objective reasonableness of privacy expectations is determined by whether other persons or institutions have access to such information.[213]

The Court now assumes documents fall into one of two polar opposite categories. Some documents are private, meaning that no one has ever seen them and no one would expect to see them. If a document has been shared with, or simply left open to, a third person, however, the reasonable expectation of privacy is lost. A majority of the Supreme Court in *Katz* understood that a gray area existed, yet courts have since discarded such a notion.[214] The Supreme Court should reform its Fourth Amendment analysis in conjunction with the changes in the way personal information is shared in the modern world. Justice Harlan in his concurring opinion in

211. *See* SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1053 (2d Cir. 1983); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

212. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

213. *See, e.g.*, United States v. Miller, 425 U.S. 435, 440–43 (1976).

214. *Compare Katz*, 389 U.S. at 350–02, *with Miller*, 425 U.S. at 440–43.

Katz described the objective privacy standard as "one that society is prepared to recognize as 'reasonable.'"[215] Since almost any personal financial information or email, for example, can now be acquired by a third party with access to the right database, courts should no longer base a subpoena's reasonableness on someone having access to such information.[216]

This first alternative would be for courts to return to the notion that the Fourth Amendment "protects people, not places" and if, for example, an officer, director, journalist, or even congressman is subpoenaed for personal documents, a higher standard than relevancy should apply for the SEC to compel production. It should make no difference whether the information is subpoenaed from a third party or from the target. Relying on the early distinction between personal and business records, found in *Oklahoma Press* and *Morton Salt*,[217] the target of an SEC investigation should bear the initial burden of proving that the documents requested in the subpoena are personal in nature.[218] Many times the SEC will ask for a multitude of documents,[219] and the target should bear the initial burden of proving some of the documents subpoenaed are personal, and should not be produced. The SEC will undoubtedly argue it would be impossible to determine whether documents are personal unless it has an opportunity to see them.[220] To solve this problem, the initial proof by the target that documents are private could be done in the form of an *in camera* inspection, initially protecting the information within the documents from the SEC.[221] Strategically, it is important to remember that targets would

215. *Katz*, 389 U.S. at 351 (Harlan, J., concurring). As discussed previously, Justice Harlan's concurring opinion has been used by the Court as the test for whether a protectable privacy interest exists. *E.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001); Smith v. Maryland, 442 U.S. 735, 743 (1979).

216. Even recently courts have held that personal computer files on a computer attached to a network were not reasonably expected to be kept private, United States v. King, No. 2:05CR301-WHA, 2006 WL 3421253, at *2–3 (N.D. Ala. Nov. 28, 2006), and that sending a phone number to a pager makes an expectation of privacy unreasonable, United States v. Meriwether, 917 F.2d 955, 958–59 (6th Cir. 1990).

217. *See supra* Part II.B.

218. If there is no longer a distinction between subpoenas directed at a target and those directed at a third party, there will be problems in determining which third party subpoenas implicate personal information, and thus require notifying the target, as opposed to subpoenas only directed at business or corporate records, wherein no notice would be required.

219. *See, e.g.*, Michael Stanton, *Smith Barney to Wait for NYSE Approval on SEC Subpoena*, THE BOND BUYER, May 20, 1996, at 2.

220. *See, e.g.*, SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1053 (2d Cir. 1973) (allowing the SEC to see documents in order to make a determination whether respondents' activities were even subject to the SEC's regulatory power).

221. Although not the norm, some courts have suggested using an *in camera* inspection to

only move to quash in instances where the possibility for egregious privacy interests have been violated, since targets usually seek to cooperate with the SEC in hopes of a possible settlement.[222]

Once the target proves that the documents are personal in nature, the burden would shift to the SEC to prove that the documents are "necessary" to an investigation, meaning that the information is pertinent to an element of an offense and that the necessary information could not be obtained through less intrusive means. Should a court find the personal documents necessary to an investigation, the court should allow the documents to be subpoenaed, but prevent access to them by the DOJ for any possible criminal investigation.[223]

It is important to note the limited nature of this alternative. The distinction between corporations, which are creatures of the state and deserve no privacy protection, and individuals who should be afforded such protection,[224] still allows the SEC to easily subpoena documents that are corporate in nature. This initial limitation would nevertheless compel production of most documents requested by the SEC. Second, the SEC would still be able to compel document production if it could prove that the information in the private documents is necessary to an investigation.

The most obvious criticism of this recommendation is that courts consistently have held that the SEC must only prove relevance. To prove more than relevance, when the SEC is trying to determine whether a wrongdoing has occurred, could frustrate the purpose of the SEC subpoena power—to investigate whether *any possible* wrongdoing *may* have occurred.[225] The SEC, however, will still have all relevant business documents at their disposal to determine whether violations have occurred; only private documents should be held to a higher standard.

Besides general concerns for privacy interests and possible violations of the Fourth Amendment, another concern underlies the notion that a shift from relevance to necessity should be implemented in the context of personal documents. Currently, targets of SEC subpoenas are under immense pressure to fully comply with the SEC and provide all

minimize the privacy intrusion on an individual and to determine whether subpoenaed documents are even relevant to an investigation under the *Powell* requirements. *See* LAFAVE, *supra* note 187, § 4.13(e). *See also In re* Horowitz, 482 F.2d 72, 75 n.2 (2d Cir. 1973).

222. *See* Gorman & Esposito, *supra* note 68, at 162–63.

223. Potential barriers between information sharing between the SEC and the DOJ are not discussed in this Note, but could be a possible area for future study.

224. Hale v. Henkel, 201 U.S. 43, 74–76 (1906).

225. *See Brigadoon Scotch Distrib. Co.*, 480 F.2d at 1053–54.

subpoenaed documents. Because the SEC often conditions settlement with cooperation and full compliance with any subpoenas, the target or third party can be incentivized to give up their privacy rights in the face of increased civil or criminal penalties, even if the target is in a circuit that recognizes limited Fourth Amendment protection.[226] If the SEC knew it did not have carte blanche access to any personal information it wished, the SEC might, on its own accord, draft more finely crafted subpoenas that do not request potentially private documents. The SEC has limited resources,[227] and when faced with either potential litigation over subpoena enforcement or a more focused subpoena, the SEC will probably choose a more focused subpoena. Although targets may still be forced to produce personal documents when the SEC conditions settlement on full cooperation, many investigations do not end in settlement. Of the 914 formal SEC investigations in fiscal year 2006, 574 ended either in civil or administrative proceedings.[228] These people would fight for their privacy right when settlement is not an option. Even if settlement is a serious option, rational actors balance risks and rewards when pursuing litigation strategies. By restricting the SEC's subpoenas, those facing subpoenas that directly implicate privacy rights will be more willing to litigate a subpoena's appropriateness.

Similarly, a third party, like a corporation holding a director's personal documents, has no interest in fighting a subpoena for those documents because if the company fully cooperates, it could resolve an incident with minimum penalties or sanctions.[229] Allowing a target to quash a subpoena for personal documents, even if the documents are in the possession of a third party, would help protect personal information third parties have no incentive in protecting.

Applying this solution to the hypothetical sealed office of an executive accused of stock option backdating illustrates the solution's parameters. The corporation, hoping to fully cooperate with the SEC subpoena to avoid substantial civil liability, produces all documents inside the executive's office. These documents include personal financial statements, personal emails, and medical information. The executive bears the initial burden of proving that some of the subpoenaed documents consist of personal

226. *See* Gorman & Esposito, *supra* note 68, at 162–63.

227. *See* Ethan S. Burger & Mary S. Holland, *Why the Private Sector is Likely to Lead the Next Stage In the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 45, 53 (2006).

228. U.S. SECURITIES AND EXCHANGE COMMISSION, 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 8 (2006), *available at* http://www.sec.gov/about/secpar/secpar2006.pdf.

229. *See* Gorman & Esposito, *supra* note 68, at 162–63.

documents where a reasonable expectation of privacy exists.[230] Using a modern expectation of privacy discussed in Part VI.B, the court might find all three types of documents are personal and come with reasonable expectations of privacy.

At this point, the SEC may draft a new subpoena without the medical information, which is probably not relevant to possible stock option backdating. If the SEC still sought the personal emails and financial statements, it would bear the burden of showing that the information is necessary to an investigation. The personal financial information would not be compelled because it would not be necessary to prove liability. The SEC could determine whether the executive profited from the backdating from the corporation's own financial statements, and does not need the personal information to determine liability.[231] The personal emails, however, should be subject to an *in camera* inspection by the court, as they may indeed provide evidence that the executive was aware of "in-the-money" options and could thus be subpoenaed by the SEC.[232] Emails having nothing to do with option backdating should be excluded from the subpoenaed materials.

While this possible solution may seem farfetched given the Supreme Court's general view of the role of subpoenas and the continued acceptance of *Powell* over the past 40 years, there have been signs that the Court is considering returning some protection to people in the area of administrative subpoenas. In *United States v. Hubbell*, decided in 2000, an independent counsel investigated the defendant for possible violations of federal law involving the Whitewater Development Corporation.[233] After a plea agreement resulting in a conviction, the independent counsel subpoenaed the defendant to determine whether the defendant had violated the plea agreement. The defendant invoked his Fifth Amendment privilege against self incrimination and the prosecution extended immunity "to the extent allowed by law."[234] The independent counsel found, in the documents provided by the subpoenaed defendant, information that led to a

230. The "reasonable expectation" of privacy framework used by the courts must be adapted to take into account modern realities—for example, that it is necessary in today's society to keep personal information in places beside one's home. *See, e.g.*, *infra* Part VI.B. *See also* DeFillipis, *supra* note 75, at 1109–10.

231. *See* Paul H. Dawes & Kory Sorrell, *Tools for the Imperfect Instrument: Practical Advice For Investigating Stock Option Awards*, 1557 PRACTISING L. INST./CORP. 641, 647–48 (2006).

232. *See, e.g.*, Press Release, SEC, SEC Charges Former Comverse Technology, Inc. CEO, CFO, and General Counsel in Stock Option Backdating Scheme (Aug, 9, 2006) *in* STOCK OPTION PRICING: WHAT YOU NEED TO KNOW, at 267 (PLI Corp. Law & Practice, Course Handbook Series No. 12104, 2006).

233. United States v. Hubbell, 530 U.S. 27, 30 (2000).

234. *Id.* at 30–31.

second prosecution for claims unrelated to the immunity arrangement.[235] The Court barred the use of such documents because it was the testimonial value of the subpoena that led to the defendant's subsequent indictment.[236] The Court characterized the assembly of the documents as "telling an inquisitor the combination to a wall safe," which the Court could not allow, even in the context of a subpoena.[237] Now, when the SEC subpoenas a wide range of documents, if the act of producing such documents tells a story the SEC could not otherwise have figured out, courts will allow a defendant to assert his Fifth Amendment privilege against self incrimination.[238]

More recently, in *Georgia v. Randolph*, decided in 2006, the Supreme Court suppressed evidence obtained by police in a warrantless search of a defendant's home when his estranged wife consented to the search, but the defendant expressly did not consent.[239] Although the case dealt with the physical search of someone's home and consent doctrine, the Court spoke in strong language as to the reasonable expectation of privacy someone has in their own home, and that the simple sharing of space does not equal the sharing of control.[240] If the Court assumes a reasonable expectation of privacy associated with private documents, it follows that simply because someone shares control over documents with third parties, or shares control over their own office with a corporation, the third party cannot "consent" to the production of those personal documents.

Less than sixty years ago, the Court in *Morton Salt* recognized that agencies are "relative newcomers in the field of law" and that it "will continue to take experience and trial and error to fit this process into our system of judicature."[241] Not long ago, the Court recognized that there was a distinction between personal and corporate documents, that the Fourth Amendment protects people and not property, and that agencies should not have access to all information that is "relevant" to an investigation. Even though this privacy protection has been largely forgotten over the past forty years, the Supreme Court has recently issued a pair of decisions that signal the Court may be willing to offer some protection to subpoenaed individuals and that strengthen the notion of a "reasonable expectation of privacy." Although the necessity to investigate efficiently remains, the

235. *Id.* at 31–32.
236. *Id.* at 42–43.
237. *Id.* at 43.
238. Cole, *supra* note 45, at 165–66.
239. Georgia v. Randolph, 547 U.S. 103, 122–23 (2006).
240. *Id.* at 114–15.
241. United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

SEC's power to subpoena must be curtailed to recognize the privacy rights of individuals involved in investigations.

B. USE STATE ALTERNATIVES TO DETERMINE REASONABLENESS OF PRIVACY EXPECTATIONS

A second alternative for federal courts that are trying to balance the privacy interests of an individual with the subpoena power of the SEC would be to adopt the approach taken by states interpreting privacy protections in their own constitutions. For example, the Illinois State Constitution expressly protects against "invasions of privacy."[242] In analyzing subpoenas in Illinois, the courts balance between "the individual's privacy interest and the public interest in effective grand jury investigations."[243] This balancing test has led to more protection for personal documents and information. Illinois courts have found Illinoisans had a "reasonable expectation of privacy in their bank records"[244] and in their telephone records[245] because the records revealed highly personal matters, such as "personal associations and dealings which create a 'biography'" of the individual.[246]

Illinois is not the only state that has recognized a person's right to privacy in regard to personal information. Utah,[247] Colorado,[248] and Florida,[249] have also recognized such a privacy interest, but in the case of personal bank records, have balanced the public need for investigation and have allowed subpoenas for those records. Montana has found a reasonable

242. "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." ILL. CONST. art. I, § 6.

243. Hon. Michael J. Burke & Kathryn E. Creswell, *Constitutional Privacy Limitations on Grand Jury Subpoenas*, 81 ILL. B.J. 462, 463 (1993).

244. People v. Jackson, 452 N.E.2d 85, 88–89 (Ill. App. Ct. 1983). Although the court allowed production of the documents, the court balanced the expectation of privacy against the public need for information. In this case, the defendant's personal bank records were necessary to establish liability. *Id.* at 89–90.

245. People v. DeLaire, 610 N.E.2d 1277, 1282 (Ill. App. Ct. 1993). Although the court allowed the telephone records to be subpoenaed, the court recognized the right to privacy and would not allow the information to be used in obtaining a search warrant of the defendant's house. *Id.* at 1282, 1288–89.

246. *Id.* at 1282.

247. State v. Thompson, 810 P.2d 415, 418 (Utah 1991).

248. Charnes v. DiGiacomo, 612 P.2d 1117, 1120–21 (Colo. 1980); People v. Lamb, 732 P.2d 1216, 1220–22 (Colo. 1987).

249. Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (allowing an administrative subpoena for bank records because the information was essential to the investigation).

expectation of privacy for both medical and employee records.[250] Pennsylvania[251] and California,[252] alternatively, have found a privacy interest in personal bank records and, in the case of Pennsylvania, quashed some subpoenas.

California's state constitution has one of the most protective interpretations of a privacy interest. In California, whenever a privacy interest is recognized, that interest is balanced against the legitimate interests of government entities.[253] To bring a valid claim for an invasion of privacy, one must prove that California has recognized a privacy interest in the documents[254] and that the individual has a reasonable expectation of privacy.[255] For example, the California Supreme Court has held that someone has a privacy interest in "one's confidential financial affairs" and "the details of one's personal life."[256] Once a privacy interest and a reasonable expectation of privacy are proved, the courts compare the person's privacy interest to the government's interest in compelling production.[257] Thus, California uses a form of intermediate scrutiny to protect privacy interests in personal documents.[258]

Two significant recommendations can be made based on the legal frameworks of many of these states. First, the Supreme Court could take notice of the privacy balancing test used by a variety of the states and use intermediate scrutiny when evaluating the propriety of administrative subpoenas for personal documents. With this alternative, most subpoenaed documents would still be compelled. No legally recognized privacy interest in corporate documents would exist, and when personal information is

250. State v. Nelson, 941 P.2d 441, 448 (Mont. 1997) (medical records); Missoulian v. Bd. of Regents of Higher Educ., 675 P.2d 962, 970 (Mont. 1984) (employment records); Mont. Human Rights Div. v. City of Billings, 649 P.2d 1283, 1287–88 (Mont. 1982) (same).

251. Commonwealth v. DeJohn, 403 A.2d 1283, 1291 (Pa. 1979).

252. Burrows v. Superior Court, 529 P.2d 590, 593–94 (Cal. 1974) (requiring that evidence be suppressed where a police officer obtained the defendant's bank records through an informal verbal request, without warrant or subpoena). For an excellent discussion of *Burrows*, see Henderson, *supra* note 204, at 985–88.

253. *See* Hill v. NCAA, 865 P.2d 633, 655–56 (Cal. 1994).

254. A specific type of interest explicitly referenced by the court is "informational privacy." *Id.* at 654.

255. *Id.* at 654–55.

256. Valley Bank of Nev. v. Superior Court, 542 P.2d 977, 979 (Cal. 1975).

257. *NCAA*, 865 P.2d at 655–56.

258. Thus, a variety of states take different approaches to the right to privacy than the Supreme Court. For an in-depth analysis of all the states that reject, or may reject, the Supreme Court's third party doctrine as applied to their own state constitution's privacy protections, see Stephen E. Henderson, *Learning From All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 395–426 (2006).

requested, as long as the SEC is acting in good faith, the balance would usually be tipped in favor of the SEC and production would be compelled. A balancing test, however, differs substantively from the current relevance standard because it protects people against egregious privacy violations or overinclusive subpoenas. For example, subpoenas for emails may be protected if some emails consist of personal information that does not relate to an SEC inquiry.

Second, the Supreme Court, instead of accepting a balancing test, could recognize that privacy relationships have changed, and that perhaps the reasonableness test explained in *Katz* should adapt to a modern world. Currently, federal courts analyze a privacy interest by determining whether the interest is one society is willing to accept.[259] The Court has used this framework to hold that when information is given to a third party, society cannot reasonably expect that information to be kept private.[260] Although states are interpreting their own constitutions, and many have made it clear that their constitutions, which explicitly protect privacy, go further than the U.S. Constitution, which only implicitly recognizes a right to privacy, the states are still only determining when a reasonable expectation of privacy exists in society.[261] If the Supreme Court's standard for determining privacy interests is truly based on what society expects, then the Court should take notice that at least eight states, whose population constitutes nearly one third of the nation,[262] have expressly provided that privacy interests extend to personal information, even if that information is available from a third party. In fact, a recent court in New Jersey stated:

> Development of photocopying machines, electronic computers and other sophisticated instruments have accelerated the ability of government to intrude into areas which a person normally chooses to exclude from prying eyes and inquisitive minds. Consequently judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by these new devices.[263]

259. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

260. *See* United States v. Miller, 425 U.S. 435, 440–43 (1976).

261. In fact, the California Supreme Court has said that the privacy protected by the California State Constitution "is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment." *NCAA*, 865 P.2d at 650 n.9.

262. *See* United States Census, Population Table, *available at* http://www.census.gov/popest/states/tables/NST-EST2007-01.xls (last visited Apr. 18, 2008). As described above, states which have recognized privacy interests in personal information, even if that information is available from a third party, include Illinois, Utah, Colorado, Florida, Pennsylvania, California, and New Jersey.

263. State v. McAllister, 840 A.2d 967, 973 (N.J. Super. Ct. App. Div. 2004), *rev'd on other grounds*, 875 A.2d 866 (N.J. 2005) (quoting Burrows v. Superior Court, 529 P.2d 590, 596 (Cal. 1974)).

The example of a closed office with personal financial information, emails and medical information inside is helpful when examining this possible alternative. If the SEC were to subpoena these documents from the third party, the court would still be using the *Katz* test: whether there was a subjective expectation that the documents would remain private and whether those privacy rights were ones that society would be willing to accept as reasonable.[264] Now, however, instead of the court refusing to allow any privacy expectations when the SEC subpoenas a third party for personal information, the court would analyze the privacy expectations in the context of a modern, technologically advanced world. Just as several states are willing to find expectations of privacy in personal information in the possession of third parties, the court would begin to shift its analysis of what society expects to remain private. The personal financial information, emails and medical information would each have an expectation of privacy. These privacy expectations would then be balanced against the government's need for that information. In the case of the executive involved in stock option backdating, the privacy expectation in medical information would be greater than the SEC's need for that information. On the other hand, while people do have expectations of privacy in their personal emails and financial information, the courts, based on the specific facts of the case, may determine that the government's interest is greater and allow the documents to be subpoenaed.

Although not in the context of the SEC, the Second Circuit seemed to have adopted a similar approach in *In re McVane*.[265] In this case, the Federal Deposit Insurance Corporation was investigating directors of a failed bank and subpoenaed personal financial information from the bank's directors and their family members.[266] Because the family members were not targets of an investigation, nor participating "in corporate matters that might reasonably become the subject of government inquiry," the court concluded that they had not given up their "reasonable expectation of privacy" in their personal financial documents.[267] The court required some "need" beyond relevance and adopted a balancing test, in effect recognizing that society has a reasonable expectation of privacy in its personal financial information and using the intermediate scrutiny test adopted by many states.[268]

264. *Katz*, 389 U.S. at 361.

265. *In re* McVane, 44 F.3d 1127 (2d Cir. 1995).

266. *Id.* at 1131–32.

267. *Id.* at 1137.

268. *See id.* at 1138. The court, however, explicitly limited this analysis to subpoenas seeking "personal records of persons who are not themselves targets of the investigation and whose connection

As states increasingly recognize that privacy interests must adapt over time, and if the Supreme Court is serious about providing privacy protections in areas where society is willing to accept them, the Supreme Court's interpretation of a reasonable expectation of privacy should also adapt. This adaptation would not substantively change what could be subpoenaed and what could not in the vast majority of cases, but when the SEC makes broad subpoena requests that incorporate personal documents not necessary to an investigation, the balancing test enunciated by at least five states would preclude many of those documents from being produced.

C. CONGRESSIONAL LEGISLATION PROTECTING PERSONAL PRIVACY RIGHTS

A third alternative, which is probably the most plausible of the three, is for Congress to enact legislation restricting the SEC from subpoenaing personal documents. I propose that Congress enact the following legislation:

> The SEC may only issue subpoenas for private or personal documents if the SEC reasonably believes a violation of securities laws has occurred, and may only subpoena such documents to the extent necessary to determine liability for securities violations already under investigation.[269]

This statute would work in much the same way as the proposed shift in Supreme Court analysis. The SEC could initially issue a subpoena for any documents it wished. The target of the subpoena would bear the burden of proving that the personal documents were intended to be private.[270] The burden would then shift to the SEC to prove that the documents are necessary to investigate liability. The SEC could not simply reply that all the documents are necessary to prove liability because they are relevant (the current *Powell* standard), as it could no longer use the personal documents for a "fishing expedition," but only to prove elements of an already existing investigation.

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to the investigation consists only of their family ties to the corporate participants, [which] must face more exacting scrutiny than similar subpoenas than similar subpoenas seeking records solely from corporate participants." *Id.* Thus, even this analysis would be of no avail to the hypothetical executive, who, as corporate participant, has a diminished reasonable expectation of privacy.

269. This proposed statute is modeled after 26 U.S.C.A. § 7611(b)(1) (West 2008), discussed *infra* note 273.

270. Whether the documents are personal or not would require an analysis similar to the one conducted by the states. *See supra* Part VI.B. Several commentators have also made proposals for how to differentiate between personal and business documents. *See supra* note 204.

This statute is modeled after the restriction on the IRS in the context of church tax inquiries and examinations.[271] That statute allows for the examination of church records if a "high-level Treasury official reasonably believes . . . that the church . . . may not be exempt"[272] and only "to the extent necessary to determine . . . liability."[273] Courts have used this statute to restrict the IRS from enforcing a summons for various church records or documents that would have been considered relevant under the *Powell* test.[274] The First Circuit has held that the words "to the extent necessary to determine liability" requires a standard stronger than the *Powell* relevance standard, and "requires the IRS to explain why the particular documents it seeks will significantly help to further the purpose of the investigation."[275]

Interestingly, the IRS, in advocating for the *Powell* relevancy standard to apply to the examination of church documents, made an argument similar to one previously made by the SEC. The IRS argued that to require them to prove "to the extent necessary" would "hamper tax investigations significantly" and that it could not know whether something is necessary unless it could see the documents.[276] The court disregarded the IRS's arguments and explained that the statute pertains to the necessary needs of an investigator, not those of a prosecutor. If the IRS agent can prove that the types of documents are necessary to "determine liability," the documents can be compelled.[277]

In the context of securities investigations, the courts have similarly held that to force the SEC to prove anything more than relevance would limit investigative effectiveness.[278] The interpretation of "necessary" adopted by the First Circuit, however, sufficiently protects the effectiveness of the SEC, especially since the limiting statute only pertains to purely personal documents, and business documents would still only have to meet the *Powell* relevancy standard. In the context of a diary, for example, an SEC investigator would be hard pressed to explain how the contents of a diary or even personal emails and letters would "significantly help to further the purpose of [an] investigation" in the same way that many types

271. 26 U.S.C. § 7611 (2000).
272. 26 U.S.C. § 7611(a)(2).
273. 26 U.S.C. § 7611(b)(1)(A).
274. *E.g.*, United States v. Church of Scientology, Inc., 933 F.2d 1074, 1078–79 (1st Cir. 1991).
275. *Id.* at 1078–79.
276. *Id.*
277. *Id.* (emphasis omitted).
278. *See* SEC v. Brigadoon Scotch Distrib. Co., 480 F.2d 1047, 1052–53 (2d Cir. 1973). *See also* Slobogin, *supra* note 39, at 837–38.

of church records are not "necessary" to determine church tax liability.[279] Instead of looking into the contents of the documents, with this legislation courts will be analyzing the types of personal documents involved and whether those types are necessary for the investigation. Therefore, a subpoena for a personal diary would not be appropriate unless diaries in general are necessary to determine liability. Courts have previously "recognized the similarity between tax and securities regulations" and that the tax statute "concerning administrative subpoenas provides a good model for a possible securities investigation statute."[280]

The hypothetical executive's sealed office is helpful in understanding this alternative. Again, the sealed office contains personal medical information, emails and financial information. In response to a third party SEC subpoena, the executive would have the initial burden of proving that the documents are personal. The SEC would then have to prove that each type of document is necessary to prove liability, or significantly helps further an investigation. The medical documents and personal financial information would be excluded because they are not the *types* of documents usually necessary to an SEC investigation of stock option backdating. If the SEC usually needs personal emails–not corporate ones–to determine liability in stock option backdating cases, these would be permissible subpoenaed documents. If certain documents were unnecessary, however, the target could submit these documents for an *in camera* inspection and proper removal from the list of subpoenaed documents.

Why would Congress pass such legislation, given the current climate pertaining to corporate ethics and responsibility? First, Congress has legislated to protect privacy before, in the wake of potentially disturbing Supreme Court precedent. In response to *United States v. Miller*, which held that an individual has no legal right to privacy in their personal financial information held by a bank,[281] Congress passed the Right to Financial Privacy Act.[282] The act requires a government agency to notify an individual and gives the individual standing to object before a bank discloses personal financial information.[283] Since Congress has been the only federal branch to respond to administrative agency encroachment on

279. *See Church of Scientology*, 933 F.2d at 1078–79.

280. Lawrence A. LePorte, Note, *SEC Investigations—SEC Need Not Notify Target of Third-Party Subpoenas:* SEC v. Jerry T. O'Brien, Inc., *104 S.Ct. 2720 (1984)*, 75 J. CRIM. L. & CRIMINOLOGY 940, 948 (1984).

281. *See* United States v. Miller, 425 U.S. 435, 440 (1976).

282. Right to Financial Privacy Act of 1978, Pub. L. No. 95-360, 92 Stat. 3697 (codified as amended at 12 U.S.C.A. §§ 3401–22 (West 2008)).

283. 12 U.S.C.A. §§ 3402–20 (West 2008).

the privacy of people, it seems to be the logical branch from which privacy protection would originate.

The Right to Financial Privacy Act is not the only instance in which Congress has passed legislation to protect an individual's privacy interest. Over twelve major pieces of legislation have been passed protecting an individual's privacy, four of which are aimed to protect the privacy of individuals from government agencies.[284] Because the courts have "not been aggressive" in expanding privacy protections as technology advances, Congress' track record makes it a much more realistic branch for protecting personal privacy.[285]

Second, Congress has recognized the privacy implications involved in turning personal documents over to administrative agencies. It passed legislation generally prohibiting the IRS from providing income tax information to agencies when the investigation is unrelated to tax collection.[286] In *Commodity Futures Trading Commission v. Collins*, the Futures Trading Commission wanted to subpoena the defendant's tax returns to determine whether the defendants made illegal futures trades.[287] In quashing the subpoena, Chief Judge Posner stated that, "[i]ncome tax returns are highly sensitive documents" and that the "Commission made no showing that it needed the appellants' tax returns. All it legitimately wants to know is whether the appellants traded off the exchange and if so, why. It can ask them."[288] In making its decision to quash the subpoena, the Seventh Circuit applied the congressional legislation and balanced "the privacy of income tax returns and the needs of law enforcement."[289] A similar reasoning should be applied by Congress to personal documents subpoenaed by the SEC because of their sensitive, private nature. If the SEC wants to subpoena personal documents, it should show that it needs them. Moreover, as argued by Judge Posner in the IRS context, if the SEC wants information that may or may not be contained in personal private documents, but the documents are not necessary to prove liability, the SEC should just ask the target for the information sought for the investigation.

Third, although during the 1990s congressional concern over privacy was dominated by agency efficiency and the effectiveness of law

284. *See* REGAN, *supra* note 150, at 5–7.
285. *See id.* at 41.
286. 26 U.S.C.A. § 6103 (West 2008).
287. Commodity Futures Trading Comm'n v. Collins, 997 F.2d 1230, 1231–32 (7th Cir. 1993).
288. *Id.* at 1233.
289. *Id.* at 1234.

enforcement,[290] there are signs that privacy may again become a dominant congressional concern. Former Republican Congressman Bob Barr, a staunch conservative who has worked as a consultant for the ACLU,[291] is advocating for a return of the Fourth Amendment and general privacy protections into American society.[292] Similarly, in response to congressional unease about the privacy implication of data mining, the Senate Judiciary Committee has held hearings on the topic,[293] and senators have introduced legislation requiring congressional oversight of data mining used by federal agencies, including the SEC.[294] Senator Patrick Leahy, now chairman of the Senate Judiciary Committee, has promised hearings on a "series of hearings on privacy-related issues throughout" the current congressional term.[295] Furthermore, as the DOJ advocates for the use of the subpoena to investigate possible terrorist activity,[296] Congress will be forced to decide the limits of the administrative subpoena power once again. Perhaps as Congress inevitably expands the administrative subpoena power in the context of public information to combat terrorism, it will recognize the privacy implications in keeping the *Powell* relevancy standard when applied to personal documents and require a necessity standard for administrative subpoenas of such documents.

In 1946 Justice Murphy, in his dissent in *Oklahoma Press*, recognized that the future would lead to an increasingly expansive role of the administrative agency subpoena power and criticized this abuse on liberty.[297] He stated:

> [With the] growth [in the administrative subpoena power] should be a new and broader sense of responsibility on the part of administrative

290. REGAN, *supra* note 150, at 92.

291. Press Release, American Civil Liberties Union, ACLU Announces Collaboration with Rep. Bob Barr; Says Conservative Congressman Will Consult on Privacy Issues (Nov. 25, 2002), *available at* http://www.aclu.org/privacy/gen/15182prs20021125.html.

292. Bob Barr, Editorial, *Privacy or Protection? Loss of Privacy Threatens Civilization*, S.F. CHRON., Feb. 11, 2007, at C5.

293. *Balancing Privacy and Security: The Privacy Implications of Government Data Mining Programs: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2007) [hereinafter *Balancing Privacy and Security*].

294. Associated Press, *Sununu Amendment Requires Agencies to Report on Data-Mining*, BOSTON.COM, Feb. 17, 2007, http://www.boston.com/news/local/new_hampshire/articles/2007/02/17/sununu_amendment_requires_agencies_to_report_on_data_mining.

295. *Balancing Privacy and Security*, *supra* note 294 (opening statement of Sen. Patrick Leahy).

296. *Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 1 (2004) (testimony of Rachel Brand, Principal Deputy Assistant Att'y Gen.). *See also* Siobhan Gorman, *NSA's Domestic Spying Grows as Agency Sweeps Up Data: Terror Fight Blurs Line Over Domain; Tracking Email*, WALL ST. J., Mar. 10, 2008, at A1.

297. Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 218 (1946) (Murphy, J., dissenting).

> agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people.
>
> . . . .
>
> Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.[298]

VII. CONCLUSION

The SEC subpoena power has become, over the past 100 years, a formidable tool in investigating businessmen, senators, journalists and others in connection with securities violations. The courts, in fleshing out the parameters of the subpoena power, have allowed the SEC to subpoena whatever documents they deem relevant, subjecting the SEC only to superficial limitations. At the same time, the Court has also limited an individual's "expectation of privacy" whenever that individual gives personal information to a third party. Taken in conjunction, the courts have effectively denied individuals an expectation of privacy in any written information when the SEC subpoenas that information, as long as the information is relevant.

This Note has proposed three possible alternatives to the current subpoena framework in the context of SEC subpoenas. First, the Court could protect privacy interests by forcing the SEC to prove that personal documents are "necessary" to an investigation. Second, using the current analytical framework under *Katz*, the Court could take notice of what many states recently consider a "reasonable expectation of privacy" and adjust its understanding of the amount of privacy "society" is willing to accept. Third, Congress could legislate, as it has in the context of the IRS subpoena power and church documents, and restrict the SEC subpoena power when personal documents are not necessary to an investigation. Each of these alternatives would protect an individual's privacy rights in the context of a modern world while concurrently allowing the SEC to conduct effective

298. *Id.* at 218–19.

investigations.

Any protection of privacy rights will unavoidably lead to a trade-off in investigatory effectiveness. Recognizing the inherent trade-off, the Supreme Court and Congress must be willing to protect a modicum of privacy. Forcing the SEC to apply a heightened standard when subpoenaing personal documents balances these competing interests.

While this Note has focused on the SEC's subpoena powers, many of these recommendations apply to all administrative agencies and even the grand jury subpoena power. As data mining and subpoenas of nonprivate information invariably increase, so too will the protection of an individual's privacy need to increase for the Fourth Amendment's protection of "papers" to hold any substantive weight.