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Securities

Procedure

WilmerHale attorneys Randall R. Lee and Timothy C. Perry argue that because the SEC conducts quasi-criminal investigations and seeks quasi-criminal penalties, it should adopt the *Brady* standard and turn over to the accused all favorable evidence as a matter of policy.

A 'Cop on the Beat'?: Why the SEC Should Adopt the *Brady* Standard

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I. Introduction

In recent years, the SEC has steadily increased the number and variety of its enforcement actions and the severity of the sanctions it seeks.[1] Meanwhile, the SEC has subtly ramped up its rhetoric, portraying its Enforcement Division as ''a cop on the beat, and . . . a tough cop to boot.''[2] The SEC proclaims itself ''[f]irst and foremost'' a ''law enforcement agency,'' ''prosecuting'' securities cases and working ''closely with law enforcement . . . to bring criminal cases.''[3]

[1] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Speech at the IOSCO 39th Annual Conference: The Challenge of Coverage, Accountability and Deterrence of Global Enforcement (Oct. 2, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370543090864.

[2] Daniel M. Gallagher, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks at FINRA Enforcement Conference (Nov. 7, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370540310199. Moving beyond metaphor and into policy, the Chairwoman has espoused a ''broken windows'' approach to securities enforcement, aligning herself with former New York Mayor Rudy Giuliani in a no-offense-is-too-small style of policing. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539872100.

[3] *See*, *About the SEC*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Dec. 19, 2014) (''First and foremost, *the SEC is a law enforcement agency*. The Division of Enforcement assists the Commission

The SEC's ''cop'' metaphor is both apt and a cause for concern. Like the police, the SEC increasingly coordinates with federal criminal prosecutors and other law enforcement agencies like the FBI and the IRS, leveraging those agencies' investigative powers in a way that private litigants could never replicate. Similarly, the SEC can seek quasi-criminal remedies ranging from harshly punitive fines to lifetime bars against directors, officers, and securities industry participants—sanctions that can end careers and result in financial ruin. Moreover, once in court, the SEC enjoys advantages unknown to ordinary litigants, claiming the authority of the federal government and wielding uniquely broad claims of deliberative process privilege and work product protection to fend off discovery requests.

Yet while the SEC has increasingly adopted the methods of a police agency, it has nevertheless consistently declined to accept the due process obligations of its criminal counterparts. This stands in stark contrast to its sister institution, the Department of Justice, which has adopted for its prosecutors a broad discovery policy that goes beyond what is legally required.[4]

We contend that the SEC is not—and should not be viewed as—an ordinary civil litigant. In its role as market watchdog and enforcer, the SEC serves the people of the United States. As a result, its interests lie in achieving justice, not winning at all costs; it has no client but fairness—it ''wins . . . whenever justice is done.''[5]

We therefore argue that so long as the SEC continues to use robust investigative techniques and uniquely broad claims of privilege in pursuit of quasi-criminal penalties, it should adopt a commensurately expansive discovery policy to ensure due process for those it prosecutes. In short, we argue that the SEC should adopt the *Brady* standard.[6]

This article proceeds in four parts. First, we examine the due process concerns that arise from the SEC's increasingly aggressive approach to its investigations, coupled with the harsh penalties that it pursues.

Second, we review the *Brady* standard to show that its requirements are commensurate with the seriousness of the SEC's cases.

Third, we review the case law governing the applicability of *Brady* in the civil context, demonstrating that courts have sympathized with applying *Brady* to civil actions—and in some cases, have actually done so.

Fourth and finally, we argue that due process requires the SEC to adopt *Brady* as the standard for discovery in all its cases—and that the SEC should adopt this standard voluntarily, before the courts impose it on them.

II. Due Process Concerns

A. Police-Style Evidence-Gathering for Civil Enforcement.

Investigations of potential securities violations will often produce overlapping civil and criminal investigations by the SEC and federal prosecutors.[7] Indeed, for most securities fraud violations, the SEC and a U.S. attorney's office must prove essentially the same elements.[8]

Of course, criminal authorities cannot leverage civil process to gain advantage in their criminal case.[9] Nor can the SEC direct criminal investigations in their evidence gathering efforts. But unsurprisingly, the exchange of information between prosecutors and the SEC is commonplace.[10] Thus, in its enforcement actions, the SEC will often gain access to information gathered by the FBI and other law enforcement agencies, yet decline to turn it over to the defense in discovery.[11]

The SEC's access to these materials increasingly raises due process concerns. In recent years, federal prosecutors and the FBI have embraced an aggressive approach to evidence-gathering in their white collar in-

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in executing its law enforcement function by recommending . . . investigations of securities law violations . . . and by prosecuting these cases on behalf of the Commission. As an adjunct to the SEC's civil enforcement authority, *the Division works closely with law enforcement agencies in the U.S. and around the world to bring criminal cases* . . . .'') (emphasis added).

[4] U.S. Dep't of Justice, United States Attorneys' Manual § 9-5.001(C) (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.9-5.001(C) (last visited Dec. 19, 2014).

[5] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[6] *Id.*

[7] *See, e.g.*, *United States v. Stringer*, 535 F.3d 929, 933 (9th Cir. 2008) (vacating dismissal of criminal indictments because ''[t]here is nothing improper about the government undertaking simultaneous criminal and civil investigations''); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980) (''Effective enforcement of the securities laws requires that the SEC and [Department of] Justice be able to investigate possible violations simultaneously.''); *United States v. Gupta*, 848 F. Supp. 2d 491, 492 (S.D.N.Y. 2012) (''That separate government agencies having overlapping jurisdiction will cooperate in the factual investigation of the same alleged misconduct makes perfect sense; but that they can then disclaim such cooperation to avoid their respective discovery obligations makes no sense at all.''); *see also, United States v. Kordel*, 397 U.S. 1, 11–12 (1970) (holding that the government may conduct parallel criminal and civil investigations without violating the due process clause, as long as it does not act in bad faith).

[8] *See, e.g.*, 15 U.S.C. § 78j(b) (2012); 15 U.S.C. § § 78dd-1 *et seq.* (2012) (pertaining to the Foreign Corrupt Practices Act); 17 C.F.R. § 240.10b-5 (2014) (codifying ''Rule 10b-5''). The Sarbanes-Oxley Act created a generic ''securities fraud'' criminal statute, for which there is no precisely equivalent civil violation. 18 U.S.C. § 1348 (2012). Modeled on the wire fraud statute, Section 1348 was meant to eliminate the technical requirements that beset Section 78j of Title 15. *See,* Tom Hanusik, *Sarbanes-Oxley: Broader Statutes, Bigger Penalties*, 39 Rev. Sec. & Comm. Reg. 177, 179 (2006). However, prosecutors rarely use it.

[9] *United States v. Carriles*, 541 F.3d 344, 356–57 (5th Cir. 2008) (noting that deceptive use of civil immigration process can constitute outrageous government conduct leading to dismissal, but reversing the district court's dismissal of the indictment); *United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973) (stating that IRS agent may not mislead taxpayer into thinking investigation is purely civil in nature, but reversing the district court's suppression of evidence on that basis).

[10] *Stringer*, 535 F.3d at 939 (''Congress has expressly authorized the SEC to share information with the Department of Justice to facilitate the investigation and prosecution of crimes.''); *Gupta*, 848 F. Supp. 2d at 492.

[11] *See, e.g.*, *Williams & Connolly v. SEC*, 662 F.3d 1240 (D.C. Cir. 2011).

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vestigations,[12] as epitomized by the FBI's use of wiretaps to investigate insider trading.[13]

While the wiretap statute prevents prosecutors from disclosing wiretap recordings to the SEC,[14] this prohibition only serves to highlight how many types of evidence *can* be shared wholesale. For instance, the FBI can execute search warrants on homes, offices, and email accounts, and they can share the fruits of these searches freely with the SEC. The FBI can conduct rolling surveillance and interview witnesses, generating reports of what was seen and said—and then give those reports to the SEC. Working together with prosecutors, the FBI has considerable leverage in ''flipping'' witnesses to become confidential informants, who in turn, at the FBI's direction, will often record incriminating conversations with other targets of an investigation.[15]

In service of these efforts, prosecutors can unilaterally afford witnesses varying levels of immunity, from plea deals that limit penal exposure[16] to formal court-ordered use immunity for all testimony.[17] In fact, formal use immunity operates not just in federal court, but also against any state prosecution, making it an especially compelling inducement to cooperate.[18] Nothing prohibits prosecutors from sharing these recordings with the SEC, and the witness himself has every incentive to testify in support of the SEC's case.[19]

Alternatively, the FBI can forego confidential informants in favor of undercover special agents, who are specially trained to deceive targets into making incriminating statements.[20]

The SEC's partnership with criminal authorities also allows SEC attorneys to avoid ethical rules that ordinarily would apply to them.

Like other civil litigators, SEC lawyers are prohibited from directly contacting represented parties.[21] By contrast, prosecutors and the special agents that act on their behalf are not wholly subject to this restriction; particularly in a pre-indictment environment, prosecutors and special agents are ''authorized . . . by law''[22] to speak to represented persons, either overtly or through deception.[23] This has always given prosecutors an inside track in gathering evidence.[24]

When the SEC rides these prosecutorial coattails, it gains an advantage in civil litigation that is alien to ordinary civil litigants—including the defendants the SEC has charged.[25]

Further, in FCPA investigations and other cases that span the globe, federal prosecutors have the ability to obtain evidence from foreign jurisdictions through a series of bilateral treaties collectively shorthanded as the Mutual Legal Assistance Treaty (''MLAT'')[26] process. While some treaties limit the use of information shared,[27] others do not.[28]

By virtue of its status as a government agency, the SEC can access these same foreign records—something that is probably impossible for a private litigant to accomplish.

Less common, but still illustrative of their evidence-gathering capacity, prosecutors can obtain a warrant for the arrest of foreign witnesses traversing United States territory, essentially leveraging the witness's freedom against cooperation.[29] Prosecutors can also obtain evidence through grand jury subpoenas; generally, records that preexist the subpoena can be shared with the SEC.[30]

To be sure, in our experience the SEC is careful to remain within the bounds of its statutory authority as well as its own internal policies governing its investigative tactics and its sharing of information with criminal authorities. At the same time, however, the SEC can and

[12] *See*, George Packer, *A Dirty Business: New York City's top prosecutor takes on Wall Street crime*, New Yorker, June 27, 2011, at 42, *available at* http://www.newyorker.com/magazine/2011/06/27/a-dirty-business.

[13] *United States v. Rajaratnam*, 719 F.3d 139, 160 (2d Cir. 2013) (affirming conviction after review of challenge to the use of wiretap recordings in an insider trading case). The use of wiretaps in white collar cases, while accepted as more common now than ever before, was not unprecedented prior to the *Rajaratnam* case. *See*, *United States v. Greyling*, No. 00CR631, 2002 WL 424655, at *4–6 (S.D.N.Y March 18, 2002) (denying a motion to suppress wiretap evidence in a case charging securities fraud, wire fraud, and commercial bribery); Christopher L. Garcia and Boyd M. Johnson III, Defending Clients in Insider Trading Investigations and Enforcement Actions § 13.1 (Daniel J. Fetterman & Mark P. Goodman eds., 2012).

[14] 18 U.S.C. § 2517(1) *et seq.* (2012) (limiting disclosure and use of wiretap recordings to ''[a]ny investigative or law enforcement officer,'' a term further defined by statute as essentially prosecutors and police).

[15] *See, e.g.*, *Rajaratnam*, 719 F.3d at 145 (noting the use of a confidential informant in an insider trading case).

[16] *United States v. Wilkes*, 744 F.3d 1101, 1105 n.1 (9th Cir. 2014) (stating ''[o]ur cases make clear that government witnesses who are granted favorable plea deals in return for their testimony are encompassed by *Straub*'s use of the term 'immunized.' '').

[17] 18 U.S.C. § 6002 *et seq.* (2012).

[18] *Adams v. Maryland*, 347 U.S. 179, 183 (1954).

[19] Defendants can earn a discounted sentencing recommendation from criminal authorities in recognition for cooperating with the SEC. *Cf. United States v. Love*, 985 F.2d 732 (3d Cir. 1993) (defendant may receive substantial assistance credit for cooperating with state and local authorities).

[20] *United States v. Balis*, 2009 BL 87715 (S.D.N.Y. 2009) (''[T]he purported investor was actually an undercover FBI agent, and Balis's co-conspirator 'flipped' and testified for the prosecution, and since the conversations . . . were all recorded, the evidence of Balis's guilt was overwhelming.'').

[21] Model Rules of Prof'l Conduct R. 4.2.

[22] *Id.*

[23] *But see*, *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000).

[24] *See, e.g.*, *United States v. Kenny*, 645 F.2d 1323, 1338 (9th Cir. 1981).

[25] *Id.* at 1338–39 (prerogative belongs to the government in a ''criminal matter'').

[26] *See, e.g.*, Treaty Between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Mar. 18, 1985, 24 I.L.M. 1092–99.

[27] Treaty Relating to Mutual Legal Assistance Between the U.S. and the United Kingdom concerning the Cayman Islands (subsequently expanded to cover Anguilla, the British Virgin Islands, Montserrat and the Turks and Caicos Islands), U.S.-U.K., July 3, 1986, 26 I.L.M. 536 (defining ''criminal offense'' not to include ''any conduct or matter which relates directly or indirectly to the regulation . . . or collection of taxes'').

[28] Italy-United States Mutual Assistance Treaty, U.S.-It., Nov. 9, 1982, 24 I.L.M. 1539 (containing no such limitation on use of evidence for taxes, as in Note 29).

[29] 18 U.S.C. § 3144 (2012).

[30] *See, e.g.*, *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir. 1980) (prosecutors do not violate Rule 6 in sharing preexisting records with outside agencies, even if those records were obtained through grand jury subpoena).

does supplement traditional law enforcement techniques with aggressive (but lawful) tactics of its own.

For instance, SEC attorneys will make ''ambush calls'' to targets of an investigation, or conduct unsworn interviews that are memorialized exclusively in SEC attorney notes. The SEC will then assert that its evidence of the witness's statements falls within the attorney work product protection, effectively insulating those statements from disclosure in discovery—a phenomenon we address in more detail below.

In 2010, Congress empowered the SEC to grant monetary awards to ''whistleblowers'' who voluntarily provide the SEC with original information leading to the successful enforcement of covered SEC enforcement actions.[31] In implementing this program, the SEC touts the potential size of the monetary awards,[32] as well its commitment to ''protecting [a whistleblower's] identity to the fullest extent possible.''[33] In effect, through this whistleblower regime, the SEC has adopted a program of paid confidential informants whose rewards are directly tied to the size of the penalty the SEC collects.[34]

In a given case, the SEC may have information deriving from any number of these robust investigative techniques, thus setting the SEC apart from ordinary litigants and making them akin to prosecutorial agencies in terms of investigative resources and leverage. Yet, unlike prosecutors, the SEC maintains that it has no obligation to tell defendants about its possession of such information—let alone disclose even information that would be exculpatory.

In theory, the SEC could, for example, possess an FBI recording in which an uncharged subject of their investigation had proclaimed the innocence of a defendant. Certainly, this would be the type of evidence that, if withheld, would ''undermine confidence in the outcome [of a trial].''[35] But without a well-targeted interrogatory, the defendant in an SEC action may never even know it exists.

B. Quasi-Criminal Sanctions in Civil Court.

The SEC employs its evidence-gathering techniques in pursuit of severe penalties, which further heightens due process concerns. For instance, the SEC has the power to impose lifelong director and officer bars, limitations on participation in common stock offerings, and bars from operating as a broker-dealer or investment adviser.

These penalties target a defendant's prospective ability to earn a living—a harsh remedy to anyone who has made a career in the securities industry or as a corporate officer.[36]

The SEC can also obtain disgorgement of profits and punitive fines, comparable to the forfeiture and fines that accompany a criminal sentence. Both in form and substance, these penalties go well beyond those typically available in civil litigation and more closely resemble—in the words of the Supreme Court—''penalties, which go beyond compensation [and] are intended to punish, and label defendants wrongdoers.''[37]

None other than Justices Breyer and Scalia agreed on this point during oral argument concerning statutes of limitations for SEC enforcement actions in *Gabelli*. Denominating the SEC's case as ''quasi-criminal,'' Justice Breyer commented that its sanctions ''looked like criminal penalties.''[38] Justice Scalia added: ''You just call it a civil penalty and—and you don't have to prove it beyond a reasonable doubt . . . . [A] penalty is a penalty as far as I'm concerned if the government's taking money from you.''[39]

The numbers themselves speak volumes: in fiscal year 2014, the SEC obtained a record $4.16 billion in monetary sanctions against alleged wrongdoers—a 22 percent increase over fiscal year 2013.[40]

Despite the resemblance to criminal penalties, this smorgasbord of sanctions implicate no protection against double jeopardy.[41]

Moreover, the SEC faces lower burdens of proof and persuasion than do criminal prosecutors. To prove a civil fraud charge, the SEC need only prevail by a preponderance of the evidence.[42] In 2002, the Sarbanes-Oxley Act lowered the requisite findings for a statutory director and officer bar from ''substantial unfitness'' simply to one of ''unfitness.''[43]

And while the securities laws only provide for such bars for scienter-based fraudulent conduct, the SEC has

[31] 15 U.S.C. § 78u-6 *et seq.* (2012).

[32] *Frequently Asked Questions*, SEC Office of the Whistleblower, http://www.sec.gov/about/offices/owb/owb-faq.shtml#P19_5641 (last visited Dec. 19, 2014); 15 U.S.C. § 78u-6(b) (2012) (providing for awards between 10% and 30% ''of what has been collected of the monetary sanctions imposed in the action or related actions'').

[33] *Frequently Asked Questions*, SEC Office of the Whistleblower, http://www.sec.gov/about/offices/owb/owb-faq.shtml#P19_5641 (last visited Dec. 19, 2014) (noting, among other things, that the SEC ''will not disclose your identity in response to requests under the Freedom of Information Act'').

[34] 15 U.S.C. § 78u-6(b) (2012). Some of these awards have been quite large. *See, e.g.,* Josh Hicks, *$30 Million Award to Tipster Underscores Banner Year for SEC Whistleblower Program*, Wash. Post, Nov. 20, 2014, at A13, *available at* http://www.washingtonpost.com/blogs/federal-eye/wp/2014/11/19/30-million-whistleblower-award-underscores-banner-year-for-sec-program/.

[35] *United States v. Bagley*, 473 U.S. 667, 682 (1985).

[36] *See,* Exchange Act of 1934 § 21(d)(2), 15 U.S.C. § 78u(d)(2) (2012); Securities Act § 20(e), 15 U.S.C. § 77t(e) (2012); Securities Act § 20(g), 15 U.S.C. § 77t(g) (2012) (added by Sarbanes-Oxley Act of 2002 § 603(b), 116 Stat. 745, 794); Exchange Act § 21(d)(6), 15 U.S.C. § 78u(d)(6) (2012) (added by Sarbanes-Oxley Act of 2002 § 603(a), 116 Stat. 745, 795).

[37] *Gabelli v. SEC*, 81 U.S.L.W. 4142, 2013 BL 50872 (U.S. Feb. 27, 2013) (holding that ''[i]n a civil penalty action, the [SEC] is not only a different kind of plaintiff, it seeks a different kind of relief.'').

[38] Russell G. Ryan, *The SEC's Low Burden of Proof*, Wall St. J., July 25, 2013, at A13; *see also*, Transcript of Oral Argument at 34, *Gabelli*.

[39] Transcript of Oral Argument at 48–49, *Gabelli*.

[40] Press Release, U.S. Sec. & Exch. Comm'n, SEC's FY 2014 Enforcement Actions Span Securities Industry and Include First-Ever Cases (Oct. 16, 2014), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543184660; *compare* Press Release, SEC Announces Enforcement Results for FY 2013 (Dec. 17, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617.

[41] *See, Hudson v. United States*, 522 U.S. 93 (1997).

[42] *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (SEC may use a preponderance of the evidence standard in the administrative setting); *SEC v. Conaway*, 697 F. Supp. 2d 733, 745 (E.D. Mich. 2010) (collecting cases).

[43] *See,* Sarbanes-Oxley Act of 2002 § § 305(a)(1)-(2), 116 Stat. 745 (amending 15 U.S.C. § § 78u(d)(2) and 77t(e), respectively); *SEC v. Bankosky*, 716 F.3d 45, 48 (2d Cir. 2013) (explaining the amendment).

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asked courts to use their traditional equitable powers to impose such bars without a finding of intent or knowledge of wrongdoing at all.[44]

In short, the SEC consciously pursues quasi-criminal remedies that are all the harsher, and all the more crippling, because they are not accompanied by the due process protections regularly afforded to criminal defendants.

C. An Advantage on the Battleground of Discovery.

1. *Broad Assertions of Privilege.*

Traditionally, courts have observed that defendants in civil cases have more expansive discovery tools than do criminal defendants.[45] For example, a civil defendant can take depositions and serve written discovery on the plaintiff, whereas the Federal Rules of Criminal Procedure only allow depositions in ''exceptional circumstances.''[46] In practice, however, the SEC enjoys significant institutional advantages in discovery, asserting broad privileges in a way that actually narrows defendants' access to information.

First, the SEC asserts a work product protection that is, as a practical matter, broader than what even a criminal prosecutor can claim. During their investigations, SEC investigators will elicit witness statements through ambush calls and informal interviews. But because nearly all of the SEC's investigators are lawyers, the SEC will refuse to disclose the memoranda or notes of these statements, claiming that they are protected by the work product doctrine. In practice, this assertion can stretch further than the notes and memoranda themselves, shielding the underlying facts of what the witnesses said. And indeed, since the SEC is an agency of lawyers, the work product protection can stretch as far as the boundaries of the investigation itself.

Criminal prosecutors, by contrast, typically rely upon law enforcement agents (most of whom are not lawyers) to conduct witness interviews, and prosecutors routinely produce those interview memoranda to the defense. There is some question whether the SEC can properly use the work product doctrine so broadly.[47] Nevertheless, court have generally supported the SEC's assertion of work product protection, meaning that defendants may be precluded from obtaining information that may well be exculpatory.[48]

Second, the SEC also claims a privilege particular to government and law enforcement agencies, namely the deliberative process or law enforcement privilege. As originally conceived, this privilege was intended to shield internal government discussions against public exposure so as to encourage debate among government officials.[49] The privilege extends to the methods by which law enforcement agencies carry out investigations,[50] but is not absolute.[51] This privilege plays a special—and especially broad—role in SEC litigation because the SEC is both a regulatory and enforcement agency.

Consider, for example, that at times, an SEC trial team may prosecute an enforcement action on a theory that contradicts the Commission's own interpretation of a rule, or based on an interpretation of law that the Commission's own regulatory staff has struggled to apply.

Similarly, the SEC's trial lawyers may prosecute a case involving a securities market practice that the Commission's own regulatory staff has approved.

In the eyes of a jury, such circumstances could be powerful evidence of a defendant's good faith and could be devastating to the SEC's credibility. Yet the SEC will invariably assert broad claims of the deliberative process privilege to shield itself from discovery of relevant and potentially exculpatory materials.

2. *Unknown Unknowns.*

Powerful enough on their own, the SEC's uniquely broad assertions of privilege make it very difficult to overcome in litigation. It is true that the Federal Rules of Civil Procedure feature a built-in mechanism to overcome assertions of privilege that unduly interfere with the truth-seeking process.[52] Indeed, defendants in litigation against the SEC will often invoke Rule 26(b)(3) in an effort to pierce the shield of privilege.[53] But the SEC's aggressive claims of privilege make it difficult for defendants to piece together the facts for a threshold showing. In a worst case scenario, defendants will go through the discovery process beset by ''unknown unknowns''—never even knowing the full scope of information the SEC possesses.

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[44] *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998) (''The district court has broad equitable powers to fashion appropriate relief for violations of the federal securities laws, which include the power to order an officer and director bar.'').

[45] *See, e.g. United States v. Johnson*, 713 F.2d 654, 659 (11th Cir. 1983) (''[T]he scope of discovery in criminal cases is significantly more restricted.''); *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (''While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive.'').

[46] Fed. R. Crim. P. 15(a).

[47] *ECDC Envtl. L.C. v. New York Marine & Gen. Ins. Co.*, 1998 BL 2873 (S.D.N.Y. June 4, 1998); *Casson Constr. Co. v. Armco Steel Corp.*, 91 F.R.D. 376, 385 (D. Kan. 1980) (''[T]he work-product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned . . . .'') (citation omitted).

[48] *See, e.g., Williams & Connolly v. SEC*, 662 F. 3d at 1244–45 (upholding, in a FOIA appeal, the SEC's refusal to release interview notes on the basis of the work product privilege, while acknowledging that *Brady* would change the analysis); *Gupta*, 848 F. Supp. 2d at 496 (calling attorney notes ''classic work product''). *But see, SEC v. Sells*, No. 11-cv-04941 CW (NC), 2013 U.S. Dist. LEXIS 15000 (N.D. Cal. Feb. 4, 2013) (finding that SEC attorneys' memories and notes are not protected by the work product doctrine).

[49] *Casad v. Dep't of Health and Human Servs.*, 301 F.3d 1247, 1251 (10th Cir. 2002); *Gavin v. SEC*, 2007 BL 85591 (D. Minn. Aug. 23, 2007) (''[t]he purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny'') (citation omitted).

[50] *In re Dep't of Investigation of City of New York*, 856 F.2d 481, 484 (2d Cir. 1988) (''The purpose of this privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.'')

[51] *Friedman v. Bache Halsey Stuart Shields Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984).

[52] *See, e.g., Fed. R. Civ. P.* 26(b)(3)(A)(ii).

[53] *See, e.g., SEC v. Goldstone*, No. 12CV0257, 2014 U.S. Dist. LEXIS 122206, *104–105 (D.N.M. Aug. 23, 2014); *Gupta*, 848 F. Supp. 2d at 496.

III. The *Brady* Standard

The SEC's ability to impose severe sanctions, coupled with its access to wide-ranging evidence-gathering capabilities and uniquely broad assertions of privilege, should require it to extend correspondingly greater due process to its defendants.

A brief review of the *Brady* standard will show that it affords a fundamental due process right that is both manageable and entirely commensurate with the gravity of SEC enforcement actions.

In *Brady v. Maryland*, the Supreme Court held that ''the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.''[54] In justifying this rule, the Court emphasized that the government was unlike any other litigant, bound by a duty to seek justice above all else:

> [T]he administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ''The United States wins its point whenever justice is done its citizens in the courts.''[55]

Ten years later, *Giglio* extended the *Brady* rule, clarifying that it required prosecutors to disclose ''evidence affecting credibility'' of witnesses.[56]

The *Brady* obligation, though far-reaching, is not without its limits. For instance, both *Brady* and *Giglio* apply only to *materially* helpful information.[57] ''[E]vidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.''[58] This materiality test, however, ''is not a sufficiency of the evidence test''[59]; evidence is ''material'' even where the undisclosed evidence merely would have ''undermine[d] confidence in the outcome of the trial.''[60]

Although the Supreme Court has never explicitly resolved whether *Brady*'s materiality requirement imports a test of admissibility,[61] a majority of circuits have concluded that it does,[62] while a minority of circuits disagree,[63] or have reserved the question.[64]

Under *Brady*, courts must evaluate materiality ''collectively, not item by item.''[65]

As a central safeguard of due process, *Brady* imposes upon government lawyers an ongoing duty to produce exculpatory information, as well as an affirmative ''duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.''[66] In circumscribing this duty, lower courts have been careful not to charge the government's trial team with omniscience over all information possessed by the federal government, instead requiring disclosure of materials possessed only by the ''investigation'' or ''investigation team.''[67] Yet at the same time, courts have not simply deferred to the government's own description of what agencies comprise the investigative team.[68]

The Department of Justice has adopted a robust version of *Brady* as its internal policy, committing to ''disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.''[69] It has also acknowledged the potential breadth of a ''prosecution team'' as comprising more than just the prosecutors and their case agents.[70]

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[54] 373 U.S. 83, 87 (1963).

[55] *Id.*

[56] *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[57] *Valdovinos v. McGrath*, 598 F.3d 568, 577 (9th Cir. 2010), *vacated and remanded sub nom*, *Horel v. Valdovinos*, 79 U.S.L.W. 3433 (U.S. Jan. 24, 2011) (No. 10-136) (*Brady* claim dismissed on remand based on AEDPA due to the Supreme Court's decision in *Harrington v. Richter*, 79 U.S.L.W. 4030, 2011 BL 12826 (U.S. Jan. 19, 2011) (No. 09-587)).

[58] *Cone v. Bell*, 556 U.S. 449, 469–70 (2009); *cf. Alderman v. United States*, 394 U.S. 165, 185 (1969) (''None of this means that any defendant will have an unlimited license to rummage in the files of the Department of Justice.'').

[59] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

[60] *Bagley*, 473 U.S. at 678.

[61] *See, e.g.*, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (declining to hold that inadmissible polygraph results constituted *Brady* evidence, while criticizing as ''mere speculation'' the argument that polygraph results, if known to the defense, would have prompted further investigation that would have led to admissible evidence).

[62] *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 10 (1st Cir. 2013) (en banc) (inadmissible evidence can qualify as *Brady* information); *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) (same); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (same); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) (same); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) (same).

[63] *United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014) (en banc) (*Brady* does not extend to independently inadmissible evidence not used to impeach, and collecting cases); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (assuming, without clearly holding, that inadmissible evidence cannot qualify as material under *Brady*).

[64] *United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (observing the Ninth Circuit has not definitively addressed the question); *cf. Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997) (otherwise inadmissible information used to *impeach a witness* does qualify as *Brady* information).

[65] *Kyles v. Whitley*, 514 U.S. at 436; *see also, United States v. Olsen*, 704 F.3d 1172, 1183 n.3 (9th Cir. 2013) (citing *Sudikoff* and stating in dicta, ''A trial prosecutor's speculative prediction about the likely materiality of favorable evidence, however, should not limit the disclosure of such evidence, because it is just too difficult to analyze before trial whether particular evidence ultimately will prove to be 'material' after trial.''); *cf. United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) (concluding that the backward-looking ''definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context,'' and thus requiring disclosure of ''all favorable evidence that is likely to lead to favorable evidence that would be admissible'').

[66] *Kyles*, 514 U.S. at 437.

[67] *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1169–70 (7th Cir. 1996) (prosecutor has no duty to search for allegedly exculpatory information held by the Office of Thrift Supervision, SEC, or IRS where those agencies were not a part of the investigation or prosecution team); *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) (prosecutor is deemed to have knowledge of anything in ''the custody or control of any federal agency participating in the same investigation of the defendant.'') (citation omitted).

[68] *Gupta*, 848 F. Supp. 2d at 493 (finding that the United States Attorney's Office and the Securities and Exchange Commission conducted a ''joint investigation,'' over those agencies' objections).

[69] U.S. Dep't of Justice, United States Attorneys' Manual § 9-5.001(C) (2008), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.9-5.001(C) (last visited Dec. 19, 2014).

[70] ''Members of the prosecution team include federal, state, and local law enforcement officers and other government offi-

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In practice, federal prosecutors disclose exculpatory information shortly after bringing charges. Indeed, in doing so, prosecutors will typically turn over nearly all the information in their case file, whether exculpatory, incriminating, or neutral—ranging from reports and recordings to witness statements and even handwritten notes by special agents and attorneys.

Defense attorneys will frequently make informal requests for further information, which may lead to the disclosure of additional material that the prosecutor had not initially perceived as relevant. While some judges question whether all prosecutors adhere equally to *Brady*,[71] defense attorneys in federal white collar cases largely experience a non-adversarial and cooperative approach to discovery.

The Department of Justice's expansive approach highlights two points that are especially relevant here: first, the principles underlying *Brady* rest at the very core of a government prosecutor's obligation to do justice; and second, *Brady* is a perfectly manageable standard that has in no way impeded the ability of the United States to prosecute wrongdoers.

IV. Relevant Precedent: The Historical Arc of *Brady* in the Civil Context

1. *Precedent Favors Extending Brady to Civil Cases.*

There is an unexamined assumption among practitioners that *Brady* only applies to criminal cases. A closer examination of post-*Brady* case law, however, shows that the Sixth Circuit and at least one district court have explicitly extended *Brady* to the civil context. Other courts have studiously avoided the constitutional question, even while expressing sympathy in the form of dicta. Indeed, a review of the case law shows that precedent weighs in favor of extending the rule to civil prosecutions.

2. *Brady in the Supreme Court: A Question Reserved.*

The Supreme Court has never considered whether *Brady* should apply to the government in its civil cases.[72] Lower courts have often assumed that in *Goldberg v. United States*, [73] the Supreme Court explicitly declined to address whether ''a prosecutor [must] turn over exculpatory material in a *civil* case.'' [74]

Strictly speaking, *Goldberg* does not mention the applicability of *Brady* to the civil context; it is a straightforward appeal in a criminal case.[75] Nevertheless, the Supreme Court's silence on the matter plainly reflects that whether *Brady* should apply to SEC enforcement actions remains an open question.

3. *Sympathy for Extension of Brady.*

Just three years after *Brady*, in 1966, a district court in the Southern District of New York considered the extent to which due process required the Federal Trade Commission to disclose certain economic studies of the stamp industry in a case against Sperry, a collectible stamp company.[76] The *Sperry* court, noting *Brady*'s importance to criminal proceedings, expressed the conviction that some equivalent should apply to the government in civil proceedings.[77] The court wrote: ''Presumably, the essentials of due process at the administrative level require similar disclosures by the agency where consistent with the public interest.'' [78] Echoing *Brady*, the court continued: ''In civil actions, also, the ultimate objective is not that the Government shall win a case, but that justice shall be done.''[79]

Despite these dicta, however, the court found reason to avoid the constitutional question of *Brady*'s applicability in the administrative context, ruling that the defendants might still access the information they wanted, and remanding so that an FTC hearing examiner could decide whether, under administrative process, to ''compel the production of any material which is essential to Sperry's defense.''[80]

Less than ten years later, in *EEOC v. Los Alamos Constructors, Inc.*, a federal court in New Mexico issued a consolidated opinion strongly criticizing the EEOC for its approach to discovery.[81]

Expressing concern about the EEOC's refusal to share information with defendants, the court denounced the ''zeal with which plaintiff resists routine discovery,''[82] and declared: ''[P]laintiff [EEOC] here cannot play with defendant's hole card upturned and its hole card down under any claim of governmental or executive privilege.''[83]

The court further stated that ''[*Brady*] orders that exculpatory information must be furnished a defendant in a criminal case.'' [84] ''A defendant in a civil case brought by the government,'' the court syllogized, ''should be afforded no less due process of law.''[85]

The court then ordered the EEOC to turn over certain discovery, including the identity of EEOC ''informers,'' and even surmised it may impose on the EEOC a ''rough approximation'' of the Jencks Act[86] obligation to disclose prior witness statements, before trial.[87]

In 1993, the Sixth Circuit became the first court to extend the *Brady* obligation to a civil proceeding.[88]

The case concerned a civil denaturalization case brought by the Department of Justice against John Demjanjuk, a man once alleged to be the notorious Nazi

cials participating in the investigation and prosecution of the criminal case against the defendant.'' *Id.* at 9-5.001(B)(2) (citing *Kyles*, 514 U.S. at 437).

[71] *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (dissent from denial of reh'g en banc) (stating that there ''is an epidemic of *Brady* violations abroad in the land,'' but supplying only anecdotal support for the assertion).

[72] *United States ex rel. Redacted v. Redacted*, 209 F.R.D. 475, 481 (D. Utah 2001) (collecting cases).

[73] 425 U.S. 94, 98 n.3 (1976).

[74] *SEC v. Pentagon Capital Mgmt. PLC*, 2010 BL 269176 (S.D.N.Y. Nov. 12, 2010) (emphasis added).

[75] It is unclear why *[Redacted]* and *Pentagon* both erroneously characterize *Goldberg*. It is an error worth correcting in future judicial decisions.

[76] *Sperry and Hutchinson Co. v. FTC*, 256 F. Supp. 136 (S.D.N.Y. 1966).

[77] *Id.*

[78] *Id.* at 142.

[79] *Id.* (internal quotation marks omitted).

[80] *Id.*

[81] 382 F. Supp. 1373 (D.N.M. 1974).

[82] *Id.* at 1374.

[83] *Id.* at 1383.

[84] *Id.* at 1383 n.5.

[85] *Id.*

[86] 18 U.S.C. § 3500 (2012). This assertion is all the more remarkable, since by its plain terms, the Jencks Act applies only to federal prosecutions.

[87] *Los Alamos Constructors, Inc.*, 382 F. Supp. at 1386.

[88] *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). *But see, In re Drayer*, 190 F.3d 410, 414–15 (6th Cir. 1999) (emphasizing *Demjanjuk*'s holding was closely tied to its facts).

death camp guard "Ivan the Terrible."[89] During the case, which culminated in Demjanjuk's extradition from the United States to Israel to face death-eligible charges,[90] the government failed to disclose exculpatory evidence suggesting Demjanjuk was not, in fact, the Nazi guard in question.[91]

After Demjanjuk's extradition, however, the Sixth Circuit, on its own motion, raised the question whether the responsible government attorneys "engaged in prosecutorial misconduct by failing to disclose to the courts and to the petitioner exculpatory information . . . ."[92] Even though denaturalization proceedings are civil, the court concluded that the *Brady* standard applied.[93]

In reaching this conclusion, the court cited the quasi-prosecutorial atmospherics of the government's denaturalization push.[94] First, the court noted, "Demjanjuk was extradited for trial on a charge that carried the death penalty."[95]

Second, the Office of Special Investigations ("OSI"), which represented the government in denaturalization proceedings, "is part of the Criminal Division of the Department of Justice . . . and they approach these cases as prosecutions."[96]

Third, the OSI attorneys held themselves out as prosecutors, referring to themselves as such in correspondence and memoranda.[97]

Together, the Sixth Circuit decided, these factors imposed a *Brady* obligation on government attorneys in the civil denaturalization case.[98]

Recent cases have taken a more neutral stance on *Brady*'s applicability to civil cases.

For instance, in *Pentagon*, defendants in an SEC enforcement action sought an order compelling the SEC to disclose *Brady* and *Giglio* material,[99] contending "that although this is a civil enforcement action, *Brady* and *Giglio* are applicable because the SEC is seeking a penalty."[100]

Observing the Supreme Court had not yet passed on the question,[101] the *Pentagon* court declined to reach it, specifically stating: "It remains an open question whether *Brady* and *Giglio* are applicable in civil proceedings at all, or are limited to defendants in criminal actions."[102]

Two years after *Pentagon*, in *Gupta*, a Southern District of New York court conspicuously avoided the conclusion that the SEC has no *Brady* obligations, emphasizing the limits of its ruling: "only that in a normal civil case, the Government as plaintiff does not automatically have a *Brady* obligation."[103]

While the court did not impose *Brady* obligations on the SEC, it nevertheless ordered disclosure of certain SEC attorney notes in the parallel criminal case against Gupta.[104] In this way, the *Gupta* decision brought us full circle to the *Sperry* decision of decades prior—compelling the government to disclose the sought-after material, while avoiding the larger constitutional question of whether *Brady* applied to civil litigation.

4. *SEC's Pro-Brady Stance in Administrative Cases.*

As if to mirror the ambivalence of federal courts in their approach to the applicability of *Brady* to the government in civil cases, the SEC actually imposes a *Brady* obligation upon itself—but only in the cases it chooses to bring in an administrative forum, where defendants have no right to a jury trial.[105]

The SEC's patently inconsistent approach toward its *Brady* obligations—abiding by *Brady* in its administrative prosecutions but disclaiming such obligations in federal court—further illustrates that the time is ripe to resolve the constitutional question.

As the SEC continues to adopt aggressive tactics in pursuit of quasi-criminal penalties, and as a growing number of defendants choose to challenge the SEC's charges in court rather than to settle, courts will inevitably be forced to confront the constitutional question directly.

V. The SEC Should Adopt the *Brady* Standard

In summary, the SEC should adopt *Brady* in all its enforcement actions, for five principal reasons. Each of these reasons is independently sufficient to demonstrate a due process right to exculpatory information; together, they create an overwhelming case that the SEC should adopt *Brady*.

First, the SEC's increasingly aggressive approach to investigations calls for a high level of due process protection. By partnering with federal criminal prosecutors and law enforcement agencies, the SEC avails itself of the most robust investigative techniques, from undercover recordings to rolling surveillance, MLAT results and grants of immunized testimony. These techniques far exceed the evidence-gathering capacity of private litigants.

As the SEC continues to leverage its institutional advantage, approaching its investigations like a "cop on the beat," it should afford a commensurate level of due process, by disclosing exculpatory information under the rule of *Brady* as a matter of policy.

Second, the SEC's pursuit of harsh punishments likewise requires it to afford greater due process protection through the adoption of the *Brady* rule.

As Justice Breyer observed, the SEC pursues "quasi-criminal" sanctions that "look like criminal penalties"[106]—part of a punitive arsenal that ranges from lifetime bars to disgorgement and fines "intended

[89] *Demjanjuk*, 10 F.3d at 339.
[90] *Id.* at 354.
[91] *Id.* at 340.
[92] *Id.* at 339.
[93] *Id.* at 353.
[94] *Id.* at 354.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *SEC v. Pentagon Capital Mgmt. PLC*.
[100] *Id.* at *2.
[101] *Id.* at *3.
[102] *Id.* at *6 n.2.
[103] *Gupta*, 848 F. Supp. 2d at 496.
[104] *Id.*
[105] 17 C.F.R. § 201.230(b)(2) (2014) ("Nothing in this paragraph (b) [describing documents to be withheld] authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence."); Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 Minn. L. Rev. 1424, 1436–37 (2011).
[106] Russell G. Ryan, *The SEC's Low Burden of Proof*, Wall St. J., July 25, 2013, at A13; *see also*, Transcript of Oral Argument at 34, *Gabelli v. SEC*.

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to punish, and label defendants wrongdoers.''[107] While not as harsh as prison time, these consequences nevertheless can be draconian, ending careers and causing financial ruin. These punitive measures are all the more crippling because the SEC can impose them on a lower burden of proof, and a lesser burden of persuasion, than could a criminal prosecutor.

In recognition of these harsh punishments, pursued using police-like tools, the SEC should extend a commensurate level of due process protection in the form of *Brady*.

Third, case law weighs in favor of applying *Brady* to SEC enforcement actions.

Generally, courts have sympathized with the expansion of *Brady*; indeed, the only circuit court to rule on the matter has explicitly extended *Brady* to the civil context.[108]

The Sixth Circuit's reasoning in *Demjanjuk*, holding that *Brady* applied to the OSI because the OSI held itself out as, and functioned like, a prosecutor's office, applies with equal force to the SEC in every relevant aspect. Not only has the SEC leveraged police-style investigative techniques in pursuit of severe sanctions, it has—even more so than the OSI—touted its prosecutorial role, deeming itself ''[f]irst and foremost'' a ''law enforcement agency,'' ''prosecuting'' securities cases and working ''closely with law enforcement . . . to bring criminal cases.''[109] In short, the SEC has brought itself well with *Demjanjuk*'s ambit.

Fourth, the SEC should be a leader, not a follower, in matters of due process.

As the SEC continues to press its institutional advantages in pursuing its aggressive enforcement agenda, defendants will increasingly raise legal challenges in an attempt to obtain commensurately strong due process protections. Faced with the tension inherent in the SEC's status as a civil ''law enforcement agency,'' courts will inevitably draw upon the sentiments already expressed by Justices Breyer and Scalia—that the SEC's prosecutions are ''quasi-criminal''—and extend *Brady* to the SEC's enforcement actions.

By moving now to adopt *Brady* voluntarily, however, the SEC would distinguish itself not just for its aggressive enforcement techniques, but as a careful steward of constitutional rights—a cause no less important to the SEC's role in serving the public trust.

Fifth, it is the right thing to do.

In voluntarily adopting *Brady*, the SEC would ensure a single, consistent approach to discovery across its thousand-strong enforcement lawyers, just as the Department of Justice does. More importantly, the SEC would publicly commit itself to a principle that is sensible and just—to automatically disclose evidence that, if withheld from the defense, would ''undermine confidence in the outcome of the trial.''[110] To do otherwise risks casting the SEC in the ''role of an architect of a proceeding that does not comport with the standards of justice.''[111]

Justice requires a more expansive approach to discovery, consistent with the due process command of *Brady*. The SEC should adopt *Brady*.

[107] *Gabelli*.
[108] *See, Demjanjuk*.
[109] *See, About the SEC*, U.S. Sec. & Exch. Comm'n, http://www.sec.gov/about/whatwedo.shtml (last visited Dec. 19, 2014) (''First and foremost, *the SEC is a law enforcement agency*. The Division of Enforcement assists the Commission in executing its law enforcement function by recommending . . . investigations of securities law violations . . . and by prosecuting these cases on behalf of the Commission. As an adjunct to the SEC's civil enforcement authority, *the Division works closely with law enforcement agencies in the U.S. and around the world to bring criminal cases* . . . .'') (emphasis added).
[110] *Bagley*, 473 U.S. at 678.
[111] *Brady*, 373 U.S. at 87.