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AGE BEFORE EQUITY? FEDERAL REGULATORY AGENCY DISGORGEMENT ACTIONS AND THE STATUTE OF LIMITATIONS

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I. Introduction

At what point may a person rest assured that the government will not confiscate her money due to a past alleged regulatory infraction? In *Kokesh v. SEC*, the Supreme Court is poised to resolve a three-way split among the federal circuit courts of appeals over whether the statute of limitations in 28 U.S.C. § 2462 applies to federal regulatory actions seeking disgorgement of a person's funds for long-past alleged regulatory infractions.[1] Congress enacted the statute of limitations in § 2462 to prohibit federal courts from entertaining an action for the enforcement of "any civil fine, penalty, or forfeiture, pecuniary or otherwise," unless the case is commenced within five years of the alleged violation.[2] Federal regulatory enforcement agencies such as the Securities and Exchange Commission (SEC) nonetheless bring actions to confiscate a person's funds for alleged violations beyond that limitations period by seeking "disgorgement" of the defendant's funds.[3]

The claimed difference between the terms "forfeiture" and "disgorgement" is not

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[1] Kokesh v. SEC, 137 S. Ct. 810 (2017).

[2] 28 U.S.C. § 2462 (2012). For actions brought by the government under this section, the date of a claim's accrual is the date of the alleged violation.

[3] *See, e.g.*, Brief for the Respondent at 12, Kokesh v. SEC, 137 S. Ct. 810 (2017) (No. 16-529) (seeking disgorgement of approximately $30 million based on actions beyond the statute of limitations) ; SEC v. Graham, 823 F.3d 1357, 1359 (11th Cir. 2016) (demonstrating that the SEC sought disgorgement of gains despite commencing suit more than five years after all alleged activity at issue); Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[Appellant] was required to pay nearly $1.5 million in disgorgement and interest. But he would have to pay just a small portion of that amount if the SEC could consider only the . . . transactions [within the statute of limitations] when calculating disgorgement.").

apparent from their common legal definitions. "Forfeiture" is defined as "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty,"[4] while "disgorgement" is defined as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."[5]

Federal courts in various circuits have three distinct and inconsistent responses to agency efforts to confiscate a defendant's funds for infractions beyond the limitations period. Some courts accept that the government may obtain *disgorgement* of a person's funds beyond the limitations period even though it may not seek *forfeiture* of those funds after that period has expired.[6] Others resolve the issue through a fact-intensive inquiry into, among other things, the government's motivation for seeking the defendant's funds and the financial circumstances of the particular defendant.[7] Yet another response is that disgorgement is simply one form of forfeiture, and thus disgorgement is categorically limited by the statute of limitations.[8] The first and last of these approaches are simple, predictable, and cost little for practitioners to ascertain, though they produce opposite outcomes. The fact-intensive middle option is, by contrast, unpredictable, costly, and time-consuming, thus effectively depriving the public of repose even after the limitations period has run, unless and until the issue is litigated and the defendant prevails.

Moreover, as to the argument that such actions call for courts to invoke equitable powers unconstrained by the statute of limitations, well-founded equitable principles similarly support precluding agency actions for disgorgement after the expiration of the limitations period. Those principles deny circumvention of the statute of limitations due to the availability of a legal remedy had the government diligently acted within the five-year limitations period. Indeed, many state legislatures have barred courts' use of equity to circumvent statutes of limitations.[9]

Part II of this Article summarizes the statute of limitations and catalogues the courts' three divergent approaches to federal agency attempts to confiscate funds after the expiration of the limitations period. Part III analyzes these approaches in light of the Supreme Court's interpretation of the statute of limitations and considers the weaknesses in each approach. Part IV applies the relevant maxims of equity to these various approaches. Finally, this Article concludes that the plain text of the statute of limitations applies to all actions seeking confiscation of a defendant's funds for deposit into the U.S. Treasury due to a regulatory infraction regardless of whether the remedy is pleaded as forfeiture or disgorgement. To distinguish between actions based on whether the remedy sought is pleaded as forfeiture or disgorgement would nullify the statute of limitations and the important purposes it serves: providing repose for the potentially liable, precluding the government from unjustly launching surprise actions based on stale claims, and saving the courts from engaging in fact-finding using incomplete evidence.

This conclusion is consistent with the logic and tenor of the Supreme Court's holding in *Gabelli v. SEC* in 2013.[10] Although the Court did not then address whether injunctive relief and disgorgement are subject to § 2462, its holding reflects a reluctance on the part of the Court to

[4] *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[5] *Disgorgement*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[6] *See infra* Part II.C.1.
[7] *See infra* Part II.C.2.
[8] *See infra* Part II.C.3.
[9] *See infra* Part IV.
[10] 133 S. Ct. 1216 (2013).

nullify § 2462 with judicially-legislated exceptions.[11] It is also consistent with the recent decision of the Eleventh Circuit in *SEC v. Graham*, in which the court held that "forfeiture" is synonymous with, or includes, "disgorgement," therefore making disgorgement subject to the statute of limitations.[12] Accordingly, in *Kokesh v. SEC*, the Supreme Court should reverse the Tenth Circuit's decision and hold that the statute of limitations categorically applies to actions seeking confiscation of funds for past regulatory infractions, regardless of whether the government seeks the funds through forfeiture or disgorgement.

II. Circuit Split on the Application of Statutes of Limitations to Regulatory Enforcement Suits Seeking Disgorgement

A. The Statute of Limitations

Section 2462 provides that claims the government seeks to bring against a party for the enforcement of a civil "fine, penalty, or forfeiture, pecuniary or otherwise" must be commenced within five years of the date of the claim's accrual.[13] For the purposes of § 2462, the weight of authority holds that the date when the claim first accrues is the date of the underlying violation, not the date of the final administrative order assessing a penalty.[14]

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[11] *Id.* at 1224 ("As we held long ago, the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would [be] mak[ing] the law instead of administering it.' . . . Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of § 2462, we decline to do so.") (quoting Amy v. Watertown (No. 2), 130 U.S. 320, 324 (1889)).

[12] 823 F.3d 1357, 1363 (11th Cir. 2016).

[13] 28 U.S.C. § 2462 (2012).

[14] *See, e.g.*, United States v. Core Labs., Inc., 759 F.2d 480, 482 (5th Cir. 1985) (relying on holdings of the Second, Third, Sixth, and Ninth Circuits to conclude that "[t]he current Sec. 2462 is derived from predecessor statutes dating from 1799. The statutes have produced a respectable body of decisional law. A review of these cases clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run.") (internal citations omitted); *see also* FEC v. Nat'l Right to Work Comm., 916 F. Supp. 10, 13–15 (D.D.C. 1996); FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 20 (D.D.C. 1995); United States v. Appling, 239 F. Supp. 185, 195 (S.D. Tex. 1965). *But see* United States v. Godbout-Bandal, 232 F.3d 637, 640 (8th Cir. 2000) (holding that where an act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination); United States v. Meyer, 808 F.2d 912, 922 (1st Cir. 1987) (holding that when final assessment of an administrative penalty was a prerequisite to the bringing of an action to enforce that penalty, the statute of limitations did not begin to run until a final administrative decision had resulted as long as administrative proceedings had been seasonably initiated). The interpretation of the Eighth Circuit in *Godbout-Bandal*, adopting what was also the interpretation of the First Circuit in *Meyer*, *see Godbout-Bandal*, 232 F.3d at 640, was based on a concern that lawbreakers could evade punishment by malingering during an administrative enforcement proceeding. These decisions did not address the risk explained in *Core Labs* that such an interpretation would mean that the expiration of the limitations period was entirely within the control of the agency and would not even start to run until the agency completed its administrative action. *Core Labs, Inc.,* 759 F.2d at 482–83. That is, effectively, there was no statute of limitations beyond which a defendant would obtain repose from the threat of a government enforcement action. The Supreme Court's decision in *Gabelli*, summarized in the text above, recently viewed the issue through a different lens that is in tension with the interpretations of the First and Eighth Circuits. *See generally* Gabelli v. SEC, 133 S. Ct. 1216 (2013). The D.C. Circuit also recently held that there is a presumption that a statute of limitations applies and, quoting Chief Justice Marshall in *Adams v. Woods*, 6 U.S. 336, 342 (1805), noted that the absence of a statute of limitations would be "repugnant to the genius of our laws." *See* PHH Corp. v.

In 2013, the Supreme Court had occasion to survey the history of § 2462 in *Gabelli v. SEC*.[15] The Court noted that § 2462, alongside its predecessor from the 1830s, "sets a fixed date when exposure to the specified [g]overnment enforcement efforts ends, advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'"[16] Such statutes "are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'"[17] This provides "security and stability to human affairs," and such statutes are "vital to the welfare of society."[18] As the Court observed in *Gabelli*, "even wrongdoers are entitled to assume that their sins may be forgotten."[19]

Several key principles appear in this exposition. First, the purpose of statutes of limitations includes fixing a date after which the potential defendants in government enforcement actions may obtain "repose," that is, certain knowledge that their "exposure to the specified [g]overnment enforcement effort ends."[20] Second, such statutes "promote justice" by preventing "surprises through the revival of claims that have been allowed to slumber."[21] The particular focus of this Article is the potentially unjust surprise of the revival of stale claims *by the government*. Third, statutes of limitations recognize that claims brought beyond the limitations period pose a practical obstacle to the courts' fact-finding function due to lost evidence, faded memories, and missing witnesses. A court's inability to accurately determine the facts necessarily interferes with its ability to reach the correct and just result. Fourth, the Court in *Gabelli* emphasized the importance of this interest in certainty and justice, holding that statutes of limitations provide "security and stability to human affairs"[22] and that they are "vital to the welfare of society"[23] notwithstanding that in some cases they may benefit those who may have violated a law.

All the justifications identified by the Court apply with full force to any cause of action and not less so depending on how the government characterizes the remedy sought. The Court gave no indication that any of these justifications would be diminished based on the historical origin of the remedy, the theoretical government motivation, or the severity of the impact on the particular defendant.

The importance of statutes of limitations to the American system of laws was recognized early in our country's jurisprudence, and remains vital to this day. The D.C. Circuit recently responded to a federal agency's assertion that its enforcement power was unconstrained by any statutes of limitations:

Consumer Fin. Prot. Bureau, 839 F.3d 1, 50 (D.C. Cir. 2016), *reh'g granted*, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb. 16, 2017) (citing *Adams v. Woods*, 6 U.S. 336, 342 (1805), to reject a federal agency's argument that no statute of limitations applied to its enforcement action).

[15] *Gabelli*, 133 S. Ct. at 1224. The precise issue addressed in this Article, that provision's application to disgorgement, was not before the court.

[16] *Id.* at 1221 (quoting Rotella v. Wood, 528 U.S. 549, 555 (2000)).

[17] *See id.* (quoting R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944)).

[18] *See id*. (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

[19] *Id.* (quoting Wilson v. Garcia, 471 U.S. 261, 271 (1985)).

[20] *See id.*

[21] *See id.* (quoting R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944)).

[22] *Id.* (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

[23] *Id.* (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)).

> The general working presumption in federal civil and criminal cases is that a federal civil cause of action or criminal offense must have some statute of limitations and must not allow suits to be brought forever and ever after the acts in question. . . . As Chief Justice Marshall stated, allowing parties to sue 'at any distance of time' would be 'utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'[24]

B. Federal Agency Actions for Disgorgement for Time-Barred Claims in Federal Courts

Federal agencies routinely seek disgorgement of ill-gotten gains by characterizing it as an equitable remedy in civil enforcement cases filed in district courts.[25] Although the U.S. Federal Trade Commission,[26] the Commodity Futures Trading Commission,[27] the Federal Election Commission,[28] and the SEC all have pursued disgorgement in enforcing the laws and regulations under their charge, the SEC avails itself of the remedy especially frequently and has aggressively litigated the issue.[29]

Federal agencies, such as the SEC, have pursued disgorgement after the expiration of the statute of limitations on the theory that disgorgement is inherently equitable and thus not subject to § 2462.[30] The jurisprudence and outcomes of several such cases are far from consistent.

C. Inconsistent Judicial Approaches to Disgorgement and § 2462 Statute of Limitations

1. Courts Holding that Disgorgement is Categorically Exempted from the Statute of Limitations

In the past, courts and administrative tribunals have tended to agree with agencies' contentions that disgorgement may be characterized as an equitable remedy in circumvention of the statute of limitations.[31] Several courts accept the agencies' argument that if the government

[24] *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 50 (D.C. Cir. 2016), *reh'g granted*, No. 15-1177, 2017 WL 631740 (D.C. Cir. Feb 16, 2017) (quoting Adams v. Woods, 6 U.S. 336, 342 (1805)) (rejecting the agency's argument that no statute of limitations applied to its enforcement action).

[25] *See, e.g.*, Brief of the Petitioner at 19, SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) (No. 96-56687), 1997 WL 33545458; Brief of the Petitioner at 34, SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997) (No. 96-5401), 1996 WL 33649983 (quoting SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

[26] *See, e.g.*, Complaint ¶¶ 46, 50, FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (S.D.N.Y. Apr. 20, 2015) (No. 15-cv-3031).

[27] *See, e.g.*, Complaint at 50, CFTC v. Optiver US, LLC, 2008 WL 2915421 (S.D.N.Y. July 24, 2008) (No. 08-06560), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfoptiverus complaint 072408.pdf.

[28] *See, e.g.*, FEC v. Craig for U.S. Senate, 816 F.3d 829 (D.C. Cir. 2016).

[29] The SEC has statutory authority to pursue a range of remedies against individuals and entities that violate securities laws. Over the decades since the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, courts have regularly granted disgorgement as an ancillary remedy in SEC enforcement actions. *See, e.g.*, SEC v. Whittemore, 659 F.3d 1, 4 (D.C. Cir. 2011).

[30] *See, e.g.*, Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010); SEC v. Rind, 991 F.2d 1486, 1492–93 (9th Cir. 1993).

[31] *See, e.g.*, SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989) (holding that a disgorgement

simply requests confiscation of the defendant's funds by pleading the remedy of disgorgement rather than the remedy of forfeiture, the court's jurisdiction is not bound by the statute of limitations. This interpretation relies on the premise that the statute of limitations is itself categorically limited to "punitive" remedies rather than "remedial" remedies and that by pleading the requested confiscation as disgorgement rather than forfeiture, the requested remedy is not punitive and thus not subject to the statute of limitations.[32]

For example, in *SEC v. Kokesh*, the appeal of which is currently pending before the Supreme Court, the Tenth Circuit held that "disgorgement is not a penalty because it is remedial," in reliance on its prior conclusion that disgorgement belongs to those equitable remedies that "*sanction* past conduct."[33] Interestingly, the plain meaning of "sanction" is to penalize when used in that context.[34] Further, although the Tenth Circuit noted that disgorgement must be "properly applied" so as not to "inflict punishment" and "[leave] the wrongdoer in the position he would have occupied had there been no misconduct," it also paradoxically concluded that "there is nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as to himself."[35] This is true even if he never controlled those funds, and the Court analogized such disgorgement (to the U.S. Treasury) to compensation paid to a victim by a tortfeasor.[36] And although the Tenth Circuit stated that under the non-punitive theory of disgorgement, it "just leaves the wrongdoer 'in the position he would have occupied had there been no misconduct,'" it held that the disgorgement order in *Kokesh* could nonetheless be imposed on an insolvent elderly person with "no prospect of his restoring the gains he received."[37]

Similarly, in *SEC v. Jones*, the district court concluded that the primary purpose of the SEC's request to have $109,004,551 of the defendants' funds transferred to the U.S. Treasury was to deter them from continued violations by depriving them of their gains from the alleged violations.[38] The court concluded that because, in the Second Circuit, this asserted public protection purpose was considered remedial rather than punitive, the statute of limitations did not apply.[39] The Ninth Circuit also has held that SEC claims for disgorgement are not subject to any statute of limitations.[40]

The D.C. Circuit, which plays a significant role in informing federal agencies' understanding of their authority, has employed a similar rationale to that of the Second Circuit but has not yet resolved this precise issue. Generally, the D.C. Circuit does not interpret

order was equitable and lawful because the amount of illegal profits could not be determined and future harm was likely to occur); *see also* SEC v. First Pac. Bancorp, 142 F.3d 1186 (9th Cir. 1998); SEC v. Hughes Capital Corp., 124 F.3d 449 (3d Cir. 1997).

[32] *See First City Fin. Corp.*, 890 F.2d at 1231.

[33] 834 F.3d 1158, 1164 (10th Cir. 2016) (quoting United States v. Telluride Co., 146 F.3d 1241, 1247 (10th Cir. 1998) (emphasis added)).

[34] *Sanction*, Black's Law Dictionary (10th ed. 2014) ("A provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience" or "A penalty or coercive measure that results from failure to comply with a law, rule or order. . . . Essentially, a shortened version of punitive sanction").

[35] *Kokesh*, 834 F.3d at 1164–65.

[36] *Id*.

[37] *Id.* (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. Law Inst. 2010)).

[38] 476 F. Supp. 2d 374 (S.D.N.Y. 2007).

[39] *Id*. at 380–81.

[40] *See* SEC v. Rind, 991 F.2d 1486, 1490–93 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993).

disgorgement as a penalty so long as it is causally related to the alleged violation. In theory, disgorgement restores the *status quo* by depriving violators of ill-gotten gains and is thus remedial rather than punitive.[41] In *Riordan v. SEC*, however, the court found the application of this doctrine to be questionable in cases where the disgorgement is to the government acting purely in its role as law enforcer, noting "it could be argued that disgorgement is a kind of forfeiture covered by § 2462, at least where the sanctioned party is disgorging profits not to make the wronged party whole, but to fill the federal government's coffers."[42] Significantly, the panel concluded that the D.C. Circuit has never expressly considered that scenario in any matter where it found that there was no statute of limitations for disgorgement actions.[43]

The *Riordan* panel's comment suggests that the D.C. Circuit could distinguish disgorgement to the government as the wronged party in a transaction from disgorgement to the U.S. Treasury in the course of an agency law enforcement action. The latter case is difficult to distinguish factually and doctrinally from a government penalty or forfeiture, which is subject to the statute of limitations.

2. Exception to the Statute of Limitations Depending on the Individual Defendant's Circumstances

Another approach to determining whether disgorgement is legal or equitable, and thus whether to apply or avoid the statute of limitations, is to analyze the factual circumstances unique to the individual defendant and the government's intent in seeking the remedy. The object of the analysis is to determine whether the remedy sought, including disgorgement, is remedial in nature and not punitive—and thus not subject to the statute of limitations.

For example, in *SEC v. Wyly*, the District Court for the Southern District of New York concluded that if the government seeks disgorgement after the expiration of the statute of limitations, it has the burden of proving "a realistic likelihood of recurrence."[44] The factors in the analysis include whether the defendant has been found liable for illegal conduct, the degree of the defendant's intent, whether the defendant's violation was an isolated occurrence, whether the defendant maintains that he or she was blameless, and whether future violations by the defendant could be anticipated.[45] The analysis in *Wyly* is also consistent with the fact-based analysis in *Johnson v. SEC*, which sought to determine whether the requested injunctive relief was punitive (and therefore barred by the statute of limitations) or remedial (and thus not barred by the statute of limitations). The court did this by examining whether the remedy was "backward-looking"

[41] *See* Zacharias v. SEC, 569 F.3d 458, 473 (D.C. Cir. 2010); *see also* SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994).

[42] Riordan v. SEC, 627 F.3d 1230, n.1 (D.C. Cir. 2010); *see also* Brief for the Respondent on Petition for Writ of Certiorari at 11, Kokesh v. SEC, 137 S. Ct. 810 (2017) (No. 16-529), 2016 WL 7210497 (emphasis added) ("[The SEC states that it] is currently impeded by the decision in [SEC v. Graham, 823 F.3d 1357, 1359 (11th Cir. 2016)] from obtaining the full disgorgement remedies to which *it is entitled*.").

[43] *Riordan*, 627 F.3d at 1234. The United States District Court for the District of Columbia previously concluded the statute of limitations did not bar equitable relief available under the Federal Election Campaign Act, including injunctive relief, but the type of injunctive relief was not specified. Moreover, the government did not represent that it was seeking disgorgement, and the Court did not specifically address disgorgement. FEC v. Nat'l Republican Senatorial Comm., 877 F. Supp. 15, 20–21 (D.D.C. 1995).

[44] SEC v. Wyly, 950 F. Supp. 2d 547, 558 (S.D.N.Y. 2013).

[45] *Id.* at 558–59.

and thus punitive, or "forward-looking" and thus remedial.[46] According to this theory, a confiscation arising from an action in response to a violation and intended as a consequence for that past violation (and thus "backward-looking") is by nature penal and thereby limited by the statute. In contrast, a confiscation intended to prevent the defendant's future violations (and thus "forward-looking") is by nature remedial and thereby not limited by the statute. In one such case, the court noted the risk that, under this doctrine, the government would evade the statute of limitations simply by strategically pleading the remedy sought.[47]

3. Disgorgement Categorically Subject to the Statute of Limitations

In response to the government's argument that the statute of limitations does not bar a claim if the remedy sought is pleaded as disgorgement rather than forfeiture, parties have begun to argue that disgorgement is in fact one type of "forfeiture," and thus barred by the plain language of § 2462.

In *SEC v. Graham*, the SEC filed a civil enforcement action alleging that a real estate development company sold investments that were in fact unregistered securities using marketing that contained false and misleading statements.[48] The SEC sought, among other things, disgorgement of the profits from the allegedly noncompliant transactions that occurred beyond the statute of limitations. The district court held that the text of § 2462 applies to disgorgement because "requiring defendants to relinquish money and property . . . can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462."[49] The Court explained that "[t]o hold otherwise would be to open the door to [g]overnment plaintiffs' ingenuity in creating new terms for the precise forms of relief expressly covered by the statute in order to avoid its application," and this "would make the [g]overnment's reach to enforce such claims akin to its unlimited ability to prosecute murderers and rapists."[50]

The SEC appealed the district court's order, "arguing that § 2462 is nonjurisdictional and that the injunctive and declaratory relief and disgorgement it sought were not subject to § 2462's time bar."[51] In a published opinion, the Eleventh Circuit rejected the SEC's argument and agreed with the district court that "for the purposes of § 2462[,] forfeiture and disgorgement are effectively synonyms; § 2462's statute of limitations applies to disgorgement."[52] Comparing the dictionary definitions, the court found "no meaningful difference in the definitions of disgorgement and forfeiture."[53] The court also quoted a Supreme Court decision to support this interpretation: "Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal

[46] Johnson v. SEC, 87 F.3d 484, 488–90 (D.C. Cir. 1996). Some courts emphasize the defendant-specific impacts. *See, e.g.*, SEC v. Bartek, 484 F. App'x 949, 957 (5th Cir. 2012).

[47] *See* United States v. U.S. Steel Corp., 966 F. Supp. 2d 801, 810–11 (N.D. Ind. 2013) ("[T]he government can't get around . . . [§] 2462 just by slapping the word 'injunction' on a claim that is functionally really a penalty.").

[48] 21 F. Supp. 3d 1300, 1302–03 (S.D. Fla. 2014).

[49] *Id.* at 1311.

[50] *Id.* at 1310–11.

[51] *See* SEC v. Graham, 823 F.3d 1357, 1359 (11th Cir. 2016).

[52] *Id.* at 1363.

[53] *Id.*

conduct."[54] The Eleventh Circuit in *Graham* thus held "that for the purposes of § 2462 the remedy of disgorgement is a 'forfeiture,' and § 2462's statute of limitations applies."[55] The SEC argued that the words held different meanings because the scope of the definition of forfeiture encompassed more than just disgorgement, but the court rejected this contention:

> [E]ven under the definitions the SEC puts forth, disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture. . . . We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings. 'Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute.' . . . Particularly because § 2462 applies to a wide variety of agency actions and contexts, we are loath to adopt the technical definition that the SEC promotes.[56]

Consequently, the court held that claims for disgorgement are subject to, and may be barred by, the statute of limitations in § 2462.[57]

III. Critical Analysis of the Three Paradigms

A. Defects in a Doctrine Categorically Exempting Disgorgement from the Statute of Limitations

A bright-line categorical exemption has the virtue of simplicity and predictability, which would minimize the time and effort required by government counsel, defense counsel, and the courts to find and apply the law. There are several deficiencies in this theory, however.

An interpretation that actions for disgorgement are not bound by the statute of limitations is premised on an assumption that, when the government uses the civil judicial system to enforce alleged violations of federal regulations, it should be treated like any private plaintiff in a common civil suit and thus enjoy the full range of the courts' equitable powers—including the court's potential discretion to circumvent the statute of limitations.

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[54] *Id*. (quoting United States v. Ursery, 518 U.S. 267, 284 (1996)).

[55] *Id.*

[56] *Id.* at 1364 (quoting Consol. Bank, N. A. v. U.S. Dep't of the Treasury, 118 F.3d 1461, 1464 (11th Cir. 1997)).

[57] Curiously, in its brief before the Supreme Court, the SEC stated that it "is currently impeded by the decision in *Graham* from obtaining the full disgorgement remedies to which *it is entitled*." Brief for the Respondent at 11, Kokesh v. SEC, 137 S. Ct. 810 (2017) (No. 16-529) (emphasis added). Interestingly, but beyond the scope of this Article, the court in *Graham* also held that the SEC's claim for declaratory relief was a "penalty" subject to and barred by the statute of limitations. *Graham*, 823 F.3d at 1362–63 (holding that the declaratory relief sought by the SEC was a penalty subject to § 2462 because "[a] declaration of liability goes beyond compensation and is intended to punish because it serves neither a remedial nor a preventative purpose; it is designed to redress previous infractions rather than to stop any ongoing or future harm"). Separately, it concluded that it was settled law that a claim for the particular type of injunction the SEC sought was not barred by the statute of limitations because it was "forward-looking." *Id.* at 1362. The court did not determine whether the statute of limitations was jurisdictional or merely an affirmative defense. *Id.* at 1360 n.1; *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008) (discussing whether time bars are jurisdictional or constitute an affirmative defense).

The Supreme Court in *Gabelli v. SEC* rejected this equivalence argument.[58] The Court distinguished government agencies from private parties, noting that regulatory agencies have powers to proactively monitor and investigate matters within their jurisdiction, unlike private citizens.[59] Accordingly, the Court held that the government, unlike private parties, may not rely on a passive discovery rule to evade the five-year statute of limitations.[60]

Because Congress may use statutes to both supersede the common law and delineate the jurisdiction of the courts, courts adopting a categorical exemption from the statute of limitations for actions pleaded as disgorgement may conflict with the prerogative of the legislative branch. And this categorical interpretation would allow federal agencies acting in the government's executive branch law enforcement capacity to invoke equity—created to provide a refuge for the people from strict applications of the king's law—to evade a limitation on the executive branch's power duly imposed by the people's elected representatives in the legislative branch. Accordingly, there may be constitutional infirmities in this interpretation. This danger has not escaped the Supreme Court's notice. In *Gabelli*, the Court was concerned about exceeding its constitutional mandate even though it was merely interpreting the statute of limitations to determine *when* a claim accrues to start the five-year clock: "As we held long ago, the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would [be] mak[ing] the law instead of administering it.'"[61]

Furthermore, the theory that actions seeking disgorgement are categorically excluded from the statute of limitations is either tautological (disgorgement is not forfeiture because it is disgorgement), formalistic (a government confiscation pleaded as a forfeiture claim is time-barred but one pleaded as a disgorgement claim is not), or it depends on an academic supposition about the government's intent (that it pursues disgorgement to restore the *status quo* or to protect the public rather than to punish the defendant) that is potentially inaccurate and unascertainable. This claimed *per se* distinction from a punitive action without regard to the allegations or the defendant's circumstances is difficult to rationalize. It presumes that a government confiscation as a consequence of a law enforcement action is always equitable rather than punitive regardless of the nature of the violation, the government's actual purpose, and the impact on the defendant.

This categorical interpretation also suggests that, notwithstanding the five-year statute of limitations applicable to federal agency actions seeking to confiscate a person's funds for an alleged regulatory violation through a forfeiture action, a court can permit an executive agency to confiscate those same funds at any time for the same violation if the remedy is characterized as disgorgement. This remedy does not compensate the government for an injury and is otherwise indistinguishable in both genesis and effect from a punitive law enforcement remedy. It is thus difficult to reconcile such an interpretation with the recent holdings of the Supreme Court and the D.C. Circuit, both of which emphasized the admonishment of Chief Justice Marshall that the absence of a statute of limitations would be "utterly repugnant to the genius of our laws."[62]

[58] 133 S. Ct. 1216, 1222 (2013).
[59] *Id.*
[60] *Id.* at 1224.
[61] *Id.* (quoting Amy v. Watertown (No. 2), 130 U.S. 320, 324 (1889)) (quotations omitted).
[62] *See id.* at 1223 (quoting Adams v. Woods, 6 U.S. 336, 342 (1805)); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 50 (D.C. Cir. 2016) (quoting *Adams*, 6 U.S. at 342).

The government may also not be acting consistently when it asserts that disgorgement is an equitable remedy. The Internal Revenue Service (IRS) has taken an approach to disgorgement that largely aligns with the views of the *Graham* court and contradicts the SEC's characterization of disgorgement actions as purely equitable: Generally speaking, taxpayers may not deduct forfeitures or penalties imposed as a result of a legal determination of liability.[63] Under certain circumstances, however, a taxpayer may deduct payments if their purpose is compensatory or remedial.[64] In a chief counsel advice document released in May 2016, the IRS stated that disgorgement payments to the SEC in a corporate Foreign Corrupt Practices Act enforcement action were not tax-deductible, as the taxpayer could not prove that the disgorgement was intended to compensate the SEC for actual losses suffered.[65] This notion—that the government deems disgorgement to be penal to allow it to tax disgorgement payments but deems disgorgement equitable to allow it to circumvent the statute of limitations—creates additional doctrinal tension.

In *Kokesh v. SEC*, the Tenth Circuit disagreed with the Eleventh Circuit's holding in *Graham*, summarized above, that § 2462 limits actions for disgorgement. The Tenth Circuit reasoned that "[w]hen the term *forfeiture* is linked in [§] 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in [a] historical sense."[66] The Tenth Circuit concluded that by "forfeiture," Congress meant a procedure to seize a person's property due to the property's involvement in an offense, even if "[t]he owner of the seized property" was "completely innocent of any wrongdoing" and regardless of the property's value in "relation to any . . . gain to the owner."[67] As the court held, "[t]he nonpunitive remedy of disgorgement does not fit in that company"—particularly given that "[the court is] to construe [§] 2462 in the government's favor to avoid a limitations bar."[68]

Three aspects of the Tenth Circuit's response to *Graham* bear scrutiny. First, the Tenth Circuit's view of "forfeiture" as something imposed regardless of guilt or innocence conflicts with the paradigmatic understanding of § 2462 as applying solely to punitive remedies for a person's violations and, therefore, the lengths to which the government and courts—including the Tenth Circuit—have gone (as summarized in this Article) to analyze whether disgorgement is or is not punitive. If § 2462 applies to non-punitive actions such as *in rem* proceedings, as the Tenth Circuit concluded,[69] then the case for also applying it to assertedly non-punitive disgorgement remedies is arguably *stronger*. Second, the Tenth Circuit's acknowledgement that it

[63] *See, e.g.*, Nacchio v. United State*s*, 824 F.3d 1370, 1372 (Fed. Cir. 2016) (holding that a taxpayer could not take a deduction for forfeiture of insider trading profits to the government); King v. United States, 152 F.3d 1200, 1202 (9th Cir. 1998) (holding that a taxpayer could not deduct the forfeiture of drug profits to the FBI).

[64] *See, e.g.*, Huff v. Comm'r, 80 T.C. 804, 824 (1983) (quoting S. Pac. Transp. Co. v. Comm'r, 75 T.C. 497, 652 (1980)) (distinguishing non-deductibility for civil penalties imposed to enforce a law and punish violators from deductibility under the federal tax code for civil penalties "imposed to encourage prompt compliance with a requirement of the law, or as a remedial measure to compensate another party for expenses incurred as a result of the violation").

[65] INTERNAL REVENUE SERV., OFFICE OF CHIEF COUNSEL, SECTION 162(F) AND DISGORGEMENT TO THE SEC, (January 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf.

[66] 834 F.3d. at 1166.

[67] *Id.*

[68] *Id*.

[69] *Id.* at 1165–66.

was consciously favoring the government in the manner it construed § 2462 undercuts the objectivity and reasonableness of its analysis as a whole.[70]

Finally, the interpretation categorically exempting disgorgement from the statute of limitations provides no answers to those interests that the statute of limitations was created by Congress to protect. The Court in *Gabelli* focused on the interest in "justice" for potential "wrongdoers," the evidentiary concerns complicating the judicial fact-finding function in stale claims, and the importance of the statute to societal welfare.[71] Accordingly, it is not clear how courts may, consistent with *Gabelli*, permit the government to circumvent the statute of limitations for regulatory violations in an otherwise stale *claim* by strategically pleading the particular *remedy* sought to vindicate that claim. This is even more true where, as here, the disgorgement remedy is materially indistinguishable from a remedy—forfeiture—plainly listed in the statute of limitations.[72]

B. Defects in Fact-Intensive Examinations of Government Intent and a Remedy's Impact on Particular Defendants to Determine the Application of the Statute of Limitations

An approach that requires courts to engage in a case-by-case examination of the government's intent in pursuing an action for disgorgement, as well as the particular impact on an individual defendant, offers little comfort to either the government or prospective defendants because each must suffer the burdens of contested litigation after the five-year statute of limitations has run before learning whether or not disgorgement is possible. Individuals who cannot afford to litigate against an expert federal agency with a virtually unlimited litigation budget necessarily are tempted to capitulate—hardly an outcome consistent with equity. And because the test turns on defendant-specific circumstances (and may produce a different settlement calculus in each case), there is the real possibility that the application or non-application of the statute of limitations, and thus the regulatory consequences for the same violation, will differ from defendant to defendant. Accordingly, this is a costly and time-consuming approach, and a potentially inequitable one, which may not produce predictable outcomes. Like the *per se* approach analyzed above, it also thwarts the benefits—to courts, defendants, and society—that compelled Congress to enact the statute of limitations.[73]

In addition to the burdens this imposes on the government, defendants, courts, and society, this interpretation—like the categorical exception discussed above—reserves for the courts the power to exempt executive agency actions from the protections created by the democratically enacted statute of limitations.

C. Disgorgement Actions Categorically Subject to the Statute of Limitations

This interpretation has the benefit of clarity and simplicity, like the categorical exemption from the statute of limitations described above. Accordingly, it allows potential litigants to be certain of the statute's application and the outcome of the analysis. Unlike the first two

[70] *Id.* at 1166.

[71] Gabelli v. SEC, 133 S. Ct. 1216, 1217–21 (2013) (noting that "the basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities"); *see also supra* Part II.A.

[72] *Id.*

[73] *See id.*

approaches, the third approach does not reserve for judges the right to disregard the elected legislature's judgment—one that balances many interests on a subject squarely within the legislature's province. And it avoids the spectacle of courts—under the guise of equity—allowing the executive to pursue members of the public despite a statute specifically designed to protect people from the injustice of extended liability for stale allegations. Finally, it protects courts from having to resolve stale claims based on faded memories and incomplete evidence.

The substantive argument for this interpretation is also compelling. As stated above, "forfeiture"—expressly barred by § 2462 for claims beyond the statute of limitations—is defined as "the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."[74] In the regulatory enforcement actions at issue here, the government is undeniably seeking to deprive the defendant of property "because of a crime, breach of obligations, or neglect of duty." The logic of the *Graham* courts[75] is forceful: calling a functionally identical remedy "disgorgement" does not change the fact that the defendant is being deprived of property because of a breach of the law—that is, suffering a "forfeiture" subject to the statute of limitations. In other words, how one defines "disgorgement" does not alter the applicable definition of "forfeiture," which would encompass any such action and therefore subject it to § 2462.

The main cost of the Eleventh Circuit's interpretation that disgorgement is categorically subject to § 2462 is the possibility that a lawbreaker whom an agency has failed to pursue within five years of an alleged violation will not face one possible claim. But the Supreme Court in *Gabelli* explained that this is an acknowledged cost of a statute of limitations. Government agencies acting in their law enforcement capacities have investigatory powers that private litigants do not.[76] This provides a diligent agency with the enhanced ability to avoid the loss of claims to the statute.[77]

IV. Application of Relevant Maxims of Equity

Courts considering government agency requests to invoke the court's equitable powers to compel a defendant's disgorgement for violations otherwise barred by the statute of limitations may evaluate such requests using equitable maxims. To a limited extent, courts in jurisdictions that consider the totality of the circumstances to determine whether the disgorgement is punitive already do so *sub silentio*. Courts not employing either of the categorical approaches could certainly use the maxims summarized below to evaluate the government's request.

As terms of art, the words "equity" and "equitable" elude precise definition. In the lay sense, "equitable" is commonly understood to mean "fair" or "proportionate."[78] In the legal sense, however, "equitable" generally means a court's ability to use its own discretion to further justice on a case-by-case basis, rather than adhering to strict legal rules.[79]

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[74] *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[75] SEC v. Graham, 21 F. Supp. 3d 1300, 1302–03 (S.D. Fla. 2014), *aff'd*, SEC v. Graham, 823 F.3d 1357, 1359 (11th Cir. 2016).

[76] 133 S. Ct. 1216, 1221 (2013).

[77] *See id.*

[78] *Equitable*, OXFORD ENGLISH DICTIONARY (3d rev. ed. 2010).

[79] *See, e.g.*, Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (Summer 1997).

Historically, "equity" refers to the system of doctrines, rules, and remedies initially developed by the English Court of Chancery and currently applied by American courts sitting in equity (as opposed to in law, where a court cannot furnish legal relief if the law does not allow it to do so).[80] In essence, equity's guiding conviction is that where there is a right, there is a remedy,[81] and hence the principles of equity can be used to ensure justice for a wronged party where the law fails to specify the form of relief.

The more discretionary nature of equitable remedies lies in contrast to that of legal remedies, which are set by statute. Legal remedies take effect *ex post*, and seek to provide the plaintiff with compensatory relief that puts her in the "rightful position" that she would have been in absent the wrong suffered.[82] Legal remedies generally provide for substitutionary relief, with the valuation of the judgment based on the fact finder's assessment of the plaintiff's loss. In contrast, equitable remedies can act *ex ante* (as with injunctions and declaratory judgments), and may provide the plaintiff with restitutionary relief, which is measured by the wrongdoing defendant's gain rather than the plaintiff's loss.[83] Equitable remedies may also provide for specific performance, which is extraordinary rather than ordinary. Equitable judgment is a matter of reasonable judicial discretion, rather than a matter of right or of law.[84]

Equity jurisprudence, although tailored to individual cases, is not completely open ended. Courts sitting in equity are assumed to be acting in good conscience, but they may not grant equitable relief in the absence of a statute or clear precedent that establishes the right to the remedy requested.[85] Thus, when judges seek to determine the appropriate form of equitable relief, they must first consult precedent, determine the principles applicable to the case at bar, and then tailor these principles to the facts at hand in order to provide the ideal form of relief. Professor Karl Llewellyn summarized this process in his observation that the decisions of equity judges should have "reasonable regularity."[86] In exercising judicial discretion, courts should apply general maxims of equity to the facts presented by the particular case.

The maxims of equity, developed over centuries of jurisprudence, offer a great deal of insight into the equitable discretion of modern courts and provide general parameters for judges sitting in equity. Although this Article does not endeavor to provide a comprehensive overview of the maxims of equity, it will address the applicability of three key equitable principles to the current tension inherent in the federal courts' treatment of the remedy of disgorgement: first, equitable remedies are not punitive; second, equity is a form of "extraordinary" relief; and third, equity aids the vigilant, not those that slumber on their rights. These maxims should inform a court's consideration of government requests for courts to exercise their equitable powers for claims otherwise barred by the statute of limitations.

A. Equitable Remedies are Not Punitive

[80] *Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[81] *See, e.g.*, United States v. Loughrey, 172 U.S. 206, 232 (1898) ("The maxim, 'Ubi jus, ibi remedium,' lies at the very foundation of all systems of law . . .").

[82] *Remedy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[83] *Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[84] *See, e.g.*, Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 591 (1982).

[85] *See, e.g.*, Kennedy, *supra* note 79, at 614.

[86] KARL LLEWELLYN, THE COMMON-LAW TRADITION: DECIDING APPEALS 216 (1960).

Although the disgorgement of ill-gotten gains was traditionally considered an equitable remedy (rooted in restitution and measured by the defendant's profit, rather than the plaintiff's losses), disgorgement only maintains its equitable status to the extent that it attends an unjust enrichment claim.[87] Otherwise, disgorgement can effectively operate as a penalty and is a legal, punitive remedy rather than an equitable one.[88] Additionally, in the context of securities law enforcement actions (wherein many claims for disgorgement arise), courts are compelled to evaluate the economic circumstances of the defendant to determine if there are any losses that should be applied to offset the gains or profits the defendant incurred as a result of the wrongful act.[89] If such losses exist, the amount disgorged may be reduced or eliminated because the defendant's wrongdoing did not improve her economic position.[90] In such cases, unjust enrichment is absent, and equity requires the elimination or reduction of disgorgement.[91]

1. Equity is Extraordinary Relief Available Only Where Legal Remedies Are Inadequate

It is axiomatic that a court's equitable powers apply only when a plaintiff needs "extraordinary" relief; in other words, a court sitting in equity will not provide a remedy when the plaintiff already has an adequate remedy at law. Adequate legal remedies are available to regulatory agencies because they have the power to impose extensive penalties.[92] Accordingly, disgorgement to the U.S. Treasury may be a mere substitute for the plaintiff agency's legal remedies and, therefore, denied.

Historically, equity foreclosed plaintiffs from bringing claims after the legal statute of limitations had run. Various state legislatures have codified this traditional rule by providing that the same limitations period applies to both legal and equitable actions, thus eliminating a court's equitable discretion to entertain a claim after the applicable statute of limitations has expired.[93] In states where the legislature has taken this view, prejudice to the defendant is thus presumed if the plaintiff brings an action for equitable relief beyond the limitations period.

2. Equity Aids the Vigilant

The maxims of equity also provide that "equity aids the vigilant, not those who slumber on their rights."[94] This maxim embodies the equitable doctrine of laches, which provides that an individual seeking equitable relief must not delay in asserting her rights.[95] Laches is analogous to

[87] *See* SEC v. Penn Central Co., 425 F. Supp. 593, 599 (E.D. Pa. 1976) ("Disgorgement depends on the proper invocation of equity jurisdiction.").

[88] *See* SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978) ("Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.").

[89] *See* Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. L. 347, 352 (Feb. 2008).

[90] *See id.*

[91] *See id.*

[92] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, sec. 929P, § 308, 124 Stat. 1376 (2010) (granting the SEC the power to seek civil penalties for violations); 52 U.S.C. § 30109(a)(6) (2012) (authorizing the Federal Election Commission to file suit for the imposition of civil penalties).

[93] *See* Kennedy, *supra* note 80, at 622; *see also* MICH. COMP. LAWS ANN. § 600.5815 (West 1987).

[94] *See* HENRY J. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 52 (2d ed. 1948).

[95] *See id.*

the legal rule embodied in various statutes of limitations, but differs in that statutes of limitations are concerned with the fact of delay, while "laches are concerned with the effects of delay."[96]

As a defense to an action in equity, laches seeks to avoid undue prejudice to the defendant due to the plaintiff's failure to bring a claim in a timely manner.[97] The consequences to the defendant when a plaintiff sleeps on its rights are myriad: relevant evidence can disappear or be destroyed, witnesses can pass away, and memories can fade. McClintock aptly summarizes the equitable defense of laches as valid "[w]here a party has unreasonably delayed the assertion of an equitable claim until the other party has acted, or the circumstances have changed, so as to result in prejudice because of the delay, equity will hold the party claiming the right to be guilty of laches, and will deny relief to him."[98]

3. The Use of Equity to Strengthen the Government's Prosecutorial Powers

It exacerbates the potential doctrinal incoherency for the judiciary to use its equity power, which was intended to protect the public from the unjust application of the law, to enable the executive to circumvent Congress's statutory limitation on the executive's power. As discussed previously in Part II, the Supreme Court in *Gabelli* reasoned that courts should refrain from rescuing the government from its failure to initiate suit within the statute of limitations through exceptions not found in the statute itself. The Court in *Gabelli* thus recognized that the government was not entitled to the benefit of the judicially created "discovery rule," which operated "to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury."[99] Such a rule is intended to protect private litigants, who should not be expected to be on constant alert regarding whether they have been defrauded by another party. In contrast, the mission of the SEC and other federal agencies is the enforcement of laws under their purview, which they fulfill using the government's deep coffers and vast prosecutorial powers to investigate violations of these laws.

V. Conclusion

Consistent with the holding of the Eleventh Circuit in *Graham*, the rationale of the Supreme Court's decision in *Gabelli,* and the decision of the D.C. Circuit in *PHH*, there are several significant problems with courts' and agencies' interpretation that the statute of limitations does not apply to federal agency law enforcement actions seeking disgorgement of funds from a defendant to the U.S. Treasury, or that its application can only be resolved after a fact-intensive judicial inquiry. The plain text of the statute applies to forfeitures, which are indistinguishable from disgorgement in all material aspects. Furthermore, every purpose of the statute of limitations applies with equal force to actions for disgorgement. Regardless, insofar as circumvention of the statute depends on deeming disgorgement to be an equitable remedy, established maxims of equity also should operate to support the application of the statute of limitations to actions for disgorgement.

Moreover, the constitutional prerogatives of Congress include the creation of laws for the executive branch to enforce and for the judicial branch to interpret. As the Supreme Court

[96] *See* 1 AM. JUR. 2D *Actions* § 64 (2015).
[97] *Laches*, BLACK'S LAW DICTIONARY (10th ed. 2014).
[98] MCCLINTOCK, *supra* note 94, at 71.
[99] 133 U.S. 1216, 1222 (2013).

recognized in *Gabelli*, it is problematic for courts to risk making their own law by allowing executive agencies to evade the statute of limitations. This potential error is compounded by the potential use of a court's equitable powers—originally designed to protect people from the consequences of a strict application of the law—to enable the government to circumvent a statutory limit on its prosecutorial powers. With respect to the statute of limitations contained in § 2462, Congress explicitly recognized the importance of promoting justice by preventing stale claims and providing repose.

When the Supreme Court addresses the circuit split discussed in this Article in the course of deciding *Kokesh v. SEC*, there are several potential modes of analysis to resolve the issue. The Court should use the authorities described here to fulfill the line of reasoning that extends from its holding over two hundred years ago in *Adams v. Woods* through its most recent expression in *Gabelli*. Ultimately, whether the Court relies on the plain text of § 2642, congressional intent, or the maxims of equity, it should fulfill this line of reasoning by applying the statute of limitations to all agency civil law enforcement actions seeking to confiscate funds for disgorgement to the U.S. Treasury.