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Antitrust: Shared Information Between the FTC and the Department of Justice

Judy Beckner Sloan*

I. INTRODUCTION

An increasing number of corporate activities are subjected to federal regulation, regulation that is often accomplished by requiring corporate disclosures of information. By disclosing such information, a corporation and its officials may subject themselves to future civil or criminal liability. Moreover, because agencies such as the Internal Revenue Service, the Securities and Exchange Commission, the Federal Trade Commission (FTC), and the Justice Department have been given both civil and criminal enforcement responsibilities, the possibility exists that information obtained by an agency pursuant to a civil proceeding may be used by the agency in a later criminal investigation or proceeding.1 The same possibility of shared information exists where two agencies are charged with enforcement in the same area, such as the Justice Department and the FTC's joint responsibility for antitrust enforcement.2

The possible use of information obtained through regulatory activities or civil discovery by one agency in a later criminal proceeding by the same or a different agency raises substantial constitutional questions, including issues of due process and self-incrimination.3 These constitutional rights provide two of the pos-

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2. The issue of information sharing has arisen most often in the context of IRS investigations that result in information being shared with the Justice Department in order to bring criminal actions. See, e.g., United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953). This practice may also be occurring between other agencies, including the Justice Department and the Federal Trade Commission. See FTC Investigational File No. 721-0091 (1978). The issue has also arisen where private plaintiffs wish to share, or the government wishes to obtain, information the plaintiffs have obtained in a private civil action. See, e.g., GAF Corp. v. Eastman Kodak Co., 1976-1 Trade Cas. 68,840 (S.D.N.Y. 1976). The Justice Department's statutory authority for antitrust investigation is provided by § 4 of the Sherman Act, 15 U.S.C. § 4 (1976). The FTC's authority is based on § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).

3. The constitutional issues arise because of the fundamental differences between civil and criminal proceedings. As stated by the court in Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962): "There is a clear-cut distinction between private interests in civil
sible defenses a corporation may assert when it finds itself within the sights of a governmental double-barreled prosecution.

How can a corporation prevent information it has been forced to disclose from being used against it or corporate officials in a simultaneous or subsequent criminal or civil proceeding? The corporation must at least (1) establish that information is being or will be shared, (2) appropriately time the objection to the sharing, (3) select the best forum in which to complain about the sharing, and (4) select the best remedy to prevent the sharing.

The FTC and the Antitrust Division of the Justice Department, each possessing power to enforce the antitrust laws, provide good subjects for consideration of the possible hazards confronting a corporation and its officials exposed to simultaneous investigations. This Article will consider defenses a corporation or its officers might raise and remedies they might seek if they are involved, actually or potentially, in simultaneous proceed-
ings. The focus of this Article will be on the FTC and the Justice Department, as well as the various methods these agencies use in antitrust enforcement; however, since other federal agencies have dual enforcement powers or concurrent jurisdiction over additional business areas, the issues considered here also have application elsewhere in administrative law.

II. ANTITRUST—JOINT RESPONSIBILITY OF THE FTC AND THE DEPARTMENT OF JUSTICE

Congress has given both the FTC and the Antitrust Division of the Justice Department responsibility for antitrust regulation. The FTC is empowered by section 5(a) of the Federal Trade Commission Act to prevent individuals, partnerships, and corporations from engaging in unfair methods of competition. The FTC carries out enforcement actions by adjudicatory proceedings governed by its own rules of procedure; if the FTC finds unfair competition, it can issue a cease-and-desist order.

The Antitrust Division of the Justice Department has been given powers to bring both criminal and civil actions. The actions are brought in federal district court and are governed by the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure. Section 2 of the Sherman Act expressly provides for criminal penalties for those found guilty of monopolizing trade. Courts have implicitly found authorization for the Justice Department to bring civil actions under the Sherman Act when it is not possible to prove criminal intent. The Justice Department

9. The FTC's rules in adjudicatory proceedings have recently been changed. For the most recent version, see 43 Fed. Reg. 56,862 (1978) (codified at 16 C.F.R. §§ 3.1-.72). One result of these changes is to give much greater control to the administrative law judge. For a discussion of the changes, see [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 882, at A-15 (Sept. 28, 1978).
10. The FTC retains the power to modify the order if it chooses. 15 U.S.C. § 45(b) (1976). The order in its final form is reviewable by the appropriate federal court of appeals, and it has priority over other cases. Id. § 45(c).
12. The element of criminal intent in antitrust actions was most recently discussed by the Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422 (1978). The Court indicated that since a violation of the Sherman Act is now a felony, a corporate
relies on civil actions more often than criminal actions; criminal penalties have been fairly light.\textsuperscript{13}

The antitrust jurisdiction of the FTC and the Justice Department overlaps in many areas. In fact, the Federal Trade Commission Act can be seen as a supplement to the Sherman Act. Traditionally, by a liaison arrangement, the two departments have coordinated their investigations.\textsuperscript{14} This arrangement began in 1938 and was formalized in 1948.\textsuperscript{15} Under the arrangement, before an investigation is begun the investigating agency informs the other agency concerning the investigation and reveals the party to be investigated, the charges, the product involved, and the fact that an investigation is contemplated.\textsuperscript{16} If the matter is pending in the other agency, there will be further liaison activities; otherwise, the investigation commences.\textsuperscript{17} Because of this arrangement, patterns in the types of industries that each agency investigates have developed.\textsuperscript{18}

Recent litigation, however, indicates that the two agencies may no longer be making independent investigations, but instead defendant cannot be held to a standard of strict liability. Actual criminal intent must be shown. \textit{Id.} at 6442-43 & n.18.

\textsuperscript{13} See Posner, \textit{A Statistical Study of Antitrust Enforcement}, 13 J.L. \& Econ. 365, 389-95 (1970). The policy toward few criminal prosecutions and light penalties, however, may be changing. There are indications that the Justice Department is increasing its criminal prosecutions under the amended Act. See, e.g., O'Leary, \textit{Criminal Antitrust and the Corporate Executive: The Man in the Middle}, 63 A.B.A.J. 1389, 1390 (1977); \textsuperscript{[1978]} \textit{TRADE REG. REP.} (CCH) No. 359, at 6 (Nov. 13, 1978). The Justice Department has issued guidelines recommending that there be an 18-month base prison sentence for conviction of a Sherman Act violation, with the use of fines only if the court refuses to impose the recommended prison sentence. \textit{See} Justice Department Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act, \textit{reprinted in} \textsuperscript{[1977]} \textit{ANTITRUST \& TRADE REG. REP.} (BNA) No. 803, at F-1 to -3 (Mar. 1, 1977). The Department of Justice is also recommending minimum corporate fines of $100,000. \textit{Id.} at F-5 to -6.


\textsuperscript{15} \textit{Id.} at 2077.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} at 2077-78.

\textsuperscript{18} Areas traditionally investigated by the Justice Department Antitrust Division include the following: banking and securities; aviation; newspaper acquisitions; aluminum; tire manufacturing; computers; international agreements; communications; manufacturing; automobile industry monopolization and dealer relations; steel (primary) patents and knowhow (with some major exceptions). \textit{Id.} at 2080.

The FTC has traditionally investigated the following areas: brewing monopolization and price discrimination; autparts monopolization and acquisitions; tires, batteries, and accessories distribution; cement; shopping center trade restraints; department store acquisitions; health care; food and food distribution; petroleum monopolization; copiers and business machines; franchising; textile mill products acquisitions; dairy industry acquisitions. \textit{Id.}
are supplying information to each other on concurrent investigations. The result of this practice is that information obtained by the FTC through its more liberal discovery methods may be supplied to the Justice Department for use in criminal prosecutions. The impact of this sharing of information should be of considerable concern to a corporation with potential antitrust problems, especially when the rapidly expanding power of the FTC to gather information about corporate activities through its investigatory, rulemaking, adjudicatory, and regulatory activities is considered.

III. The Role of the FTC

The FTC has broad investigatory powers. It is empowered "[t]o gather and compile information concerning, and to investigate from time to time . . . any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers." This provision has been interpreted as permitting simultaneous investigatory and adjudicatory proceedings by the FTC.

The FTC recently used its investigatory power to initiate a line-of-business and corporate-pattern reports program.

19. Letter from Joel R. Platt, Attorney, Chicago Regional Office of the FTC, to Earl E. Pollock (July 26, 1978) (attached as an exhibit in a motion to the FTC to stay discovery, FTC Investigational File No. 721-0091 (1978)).

[T]he FTC has made available to the United States Attorney all of the material contained in its files relating to this matter and will continue to do so in the future. In addition, the U.S. Attorney's office has authorized our office to indicate to you that they will seek to obtain any new information which the FTC receives.

If you wish to object to the FTC sharing newly submitted information with the Justice Department or any other agency, you may make a request for confidentiality under 5 U.S.C. 552(b)(4) which is incorporated into the FTC Rules at 4.10(a)(2).

Id.

20. See Roll, supra note 14, at 2078.

[T]he FTC's line-of-business proposal would require most corporations with assets of $50 million or more to report their profits, revenue, advertising expenditures, and R&D costs for any of about 400 product categories ranging from the manufacturing of food products, to industrial trucks and tractors, and to computers. As of now, the number of firms covered by the reporting requirements would be close to 2,000.
FTC has indicated that one purpose of these reports is to select possible targets for antitrust enforcement.\textsuperscript{24} However, the value of the information that the FTC will obtain by these reports is disputed.\textsuperscript{25} After the program was implemented in 1974, numerous corporations responded by initiating court challenges to the new program. These challenges have been largely unsuccessful. The Supreme Court recently refused to grant certiorari to consider whether the FTC has authority to require such reports.\textsuperscript{26} With the failure of these court challenges, it is likely that the FTC will be able to force compliance with its reporting program.\textsuperscript{27} The question as to the confidentiality of the data that the corporations furnish remains unanswered.

The FTC also has rulemaking power. The basis of this power was provided by amendments 7(b) and (c) to the procedures and rules of practice of the FTC in 1962.\textsuperscript{28} As a result of these amendments, the FTC began promulgating trade regulation rules that were to be used as standards for obtaining cease-and-desist orders.

Since these rules lacked an explicit statutory basis, there was a question concerning their validity. The test of the FTC’s power to promulgate these rules came in \textit{National Petroleum Refiners Association v. FTC}.\textsuperscript{29} The D.C. Circuit held that section 6(g) of the Federal Trade Commission Act\textsuperscript{30} empowered the FTC to promulgate such rules and that the rules have the force of substantive law. In \textit{FTC v. Sperry & Hutchinson Co.}\textsuperscript{31} the Supreme Court

\textsuperscript{24} Id. at A-16.


\textsuperscript{26} See, e.g., American Air Filter Co. v. FTC, 439 U.S. 958 (1979) (denying cert. to Appeal of FTC Line of Business Report Litigation, 595 F.2d 685 (D.C. Cir. 1978)). The appellate court rejected the corporation’s arguments that the FTC lacked power to require the reporting procedures, that the program violated the confidentiality provisions of the Census Act, that rulemaking procedures should have been initiated before establishing the program, and that the FTC had exceeded its investigatory powers. The court also indicated that the issue of the use of the line-of-business and corporate-pattern data by the FTC in other administrative proceedings should be raised in those proceedings. For other earlier decisions reaching similar conclusions, see A.O. Smith Corp. v. FTC, 396 F. Supp. 1108 (D. Del. 1975), revised, 530 F.2d 515 (3d Cir. 1976).

\textsuperscript{27} See [1978] \textit{ANTITRUST & TRADE REG. REP. (BNA)} No. 888, at A-1 (Nov. 9, 1978).


\textsuperscript{29} 482 F.2d 672 (D.C. Cir. 1973).


\textsuperscript{31} 405 U.S. 233 (1972).
indicated that through its rulemaking power the FTC, in addition to regulating deceptive acts and practices, could regulate unfair business practices.

Explicit statutory authorization of rulemaking power was given to the FTC by the Magnuson-Moss amendments to the Federal Trade Commission Act in 1975. Prior to instituting a rule, the FTC must generally follow formal rulemaking procedures. These include publication of notice of the proposed rule in the Federal Register, allowance of submission of written materials by interested parties, opportunity for interested parties to present materials at an informal hearing, preparation of a transcript of any such presentation, and promulgation of a rule based on the evidence in the record. After a rule is issued, it may be challenged in the appropriate United States court of appeals. If the rule is not supported by substantial evidence in the rulemaking record, it can be overturned. Because of the relatively recent enactment of this amendment, the areas in which the FTC will choose to exercise its rulemaking power are not yet defined. The FTC could use the authority, in a method similar to the line-of-business reports procedure, to promulgate rules requiring disclosure of facts that could later be used in antitrust enforcement actions.

Another means for the FTC to obtain information that might later be used in antitrust enforcement actions is through premerger notification requirements. Premerger notification requirements were part of the Hart-Scott-Rodino Antitrust Improve-


33. These requirements should be considered in light of the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In Vermont Yankee the Court indicated that judicial review of agency rulemaking is limited to assuring that the agency rulemaking meet the minimal statutory requirements. For a thorough discussion of Vermont Yankee, see Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 HARV. L. REV. 1833 (1978); Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 HARV. L. REV. 1823 (1978); Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805 (1978).
The rationale for enactment of the requirements was to prevent future antitrust violations by controlling present corporate mergers. The premerger notification provisions require the Justice Department and the FTC to be notified before mergers of certain size corporations take place. The FTC, through its rulemaking power, is authorized to determine the form of the required report. Once the report is filed, the merger can take place in thirty days—unless it is challenged in federal court by the Department of Justice or the FTC. The FTC can extend the thirty-day period for up to twenty additional days if it requests further information from the corporation. Civil penalties of up to $10,000 per day exist for companies and individuals who fail to comply with the premerger notification provisions.

The form promulgated by the FTC requires, for example, information as to the dollar revenue of manufactured products, a description of voting securities, and submission of all documents that may have been prepared for the purpose of evaluating the acquisition in advance of the merger. The potential use of the information the FTC collects from this form may not appear great; however, the FTC indicated in its comments about the form that it does not view the information obtained from the form as confidential as to use within the agency. The FTC also indicated that its interpretation of the confidentiality section of the premerger notification provisions permits it or the Justice Department to use the information in any administrative or judicial proceedings in which the agencies are involved. The FTC has indicated that it would instruct its staff and the staff of the Justice Department to give the companies notice whenever the information submitted on the premerger forms might become part of

37. Id. § 18a(d).
38. Id. § 18a(b). In the case of a cash tender offer, however, the time limit is 15 days. Id. § 18a(b)(1)(B).
39. Id. § 18a(e). In the case of a cash tender offer, however, the time period can be extended by only 10 days. Id.
40. Id. § 18a(g)(1).
42. See id. at 33,518-19 (1978).
43. Id. at 33,519.
the public record.\textsuperscript{44} There has been no litigation to date concerning the use of this data by the FTC.

The premerger notification requirements, the line-of-business/corporate-pattern reports, and the rulemaking power are all examples of the FTC's increasing ability to obtain a wide range of information concerning corporate activities that may later be used against corporations in antitrust enforcement actions. The FTC also has its traditional means of acquiring information through investigations or adjudicatory proceedings. The possibility that information the FTC collects may be turned over to the Justice Department for use in criminal prosecutions is a frightening prospect for corporate executives. A successful criminal prosecution can lead to corporate and individual fines and can stigmatize the individual defendant with a felony conviction, which can result in the loss of professional memberships. Another possible result of finding criminal liability is the susceptibility of the corporation to a \textit{parens patriae} action, a civil action that can be brought by a state attorney general for violations of the Sherman Act.\textsuperscript{45} This course of action is another result of the Antitrust Improvement Act of 1976.

An additional hazard for a corporation found guilty in criminal or civil proceedings instituted by the FTC or the Antitrust Division is potential liability in a private antitrust action for treble damages and attorneys' fees.\textsuperscript{46} A final judgment against the defendant in a criminal or civil antitrust proceeding is prima facie evidence against the defendant in a later private antitrust action.\textsuperscript{47} Even if there has not been a final judgment against the corporate defendant, the possibility exists that information the FTC has in its files may be used against a corporation in a private antitrust action. As the Supreme Court stated in a decision involving the FTC:

\begin{quote}
The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties.\textsuperscript{48}
\end{quote}

\textsuperscript{44} Id.
\textsuperscript{46} Id. § 15.
\textsuperscript{47} Id. § 16(a).
The Federal Rules of Civil Procedure and the Freedom of Information Act provide the mechanism for a plaintiff in a private antitrust action to obtain information the government holds concerning a corporate defendant. Limitations on discovery within the Federal Rules of Civil Procedure are that the information must be relevant, not privileged, and not the work product of an attorney. Statutory limits on information the federal government will provide under the Freedom of Information Act include trade secrets, customer lists, privileged or confidential information, and interagency memos. There are few statutory limits on the release of information to a private antitrust plaintiff.

IV. THE ROLE OF THE DEPARTMENT OF JUSTICE

The Justice Department has a number of methods of acquiring information when investigating corporate antitrust violations. One method is the use of informal means. Justice Department employees read newspapers and journals and receive tips from disgruntled employees or competitors. Another source of information is the voluntary letter request, backed up by two other means of obtaining information—civil investigatory demands (CID’s) and the subpoena power.

The CID powers were recently increased for the Justice Department by the Antitrust Improvement Act. The Assistant Attorney General or the Attorney General can use the CID to request documents or depositions or issue interrogatories to corporations, partnerships, associations, or individuals prior to a civil or criminal proceeding. The conduct under investigation must involve antitrust violations or merger activities that may result in violations.

The information obtained may be used by the Department

52. In a recent case, the New York Attorney General attempted to use the Freedom of Information Act to obtain information that a corporate defendant had provided to the FTC to use against the corporation in a parens patriae action for violations of state antitrust law. [1979] TRADE REG. REP. (CCH) No. 377, at 5 (Mar. 20, 1979).
54. Id.
55. Id.
57. Id. § 1312(b)(1).
of Justice before a court or grand jury and may be given to the FTC upon written request.\textsuperscript{58} If an individual or corporation refuses to comply, the Justice Department can seek judicial enforcement in federal district court, where all objections to the CID must be aired.\textsuperscript{59} If the individual or corporation still refuses to comply after a court order, the Department of Justice can seek criminal penalties, including a fine of up to $5,000, a prison term of up to five years, or both.\textsuperscript{60} Information cannot be obtained, however, that is protected from disclosure by either the Federal Rules of Civil Procedure or restrictions on the subpoena duces tecum.\textsuperscript{61} For instance, during depositions possible objections might include improper motive and first, fourth, and fifth amendment privileges.\textsuperscript{62}

The grand jury is another means by which the Justice Department can acquire information about the activities of a corporation. The Justice Department may begin an investigation with a grand jury but later decide to use civil proceedings.\textsuperscript{63} The use of the grand jury is governed by the Federal Rules of Criminal Procedure.\textsuperscript{64} The Rules govern such aspects of grand jury proceedings as the means by which the jurors are summoned, objections to the grand jury or jurors, who may be present, the secrecy of the proceedings, and the findings included in the return of the indictment.\textsuperscript{65}

The corporate official subpoenaed to testify before a grand jury must be careful if he wishes to preserve his fifth amendment privilege. A witness before a federal grand jury does not have the right to have his attorney present while he is questioned,\textsuperscript{66} nor does he have the right to be informed that he is the target of the grand jury investigation.\textsuperscript{67}

V. \textbf{SUBSTANTIVE ARGUMENTS AGAINST SHARING OF INFORMATION}

A crucial issue for a corporation or its officers under investigation or indictment by the Justice Department for a criminal

\begin{footnotes}
\item \textsuperscript{58} \textit{Id.} § 1313(d).
\item \textsuperscript{59} \textit{Id.} § 1314(d).
\item \textsuperscript{60} 18 U.S.C. § 1505 (1976).
\item \textsuperscript{61} 15 U.S.C. § 1312(c) (1976).
\item \textsuperscript{62} Reeves, \textit{supra} note 53, at 360.
\item \textsuperscript{63} \textit{Id.} at 358-59.
\item \textsuperscript{64} \textit{See Fed. R. Crim. P.} 6.
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} 6(d).
\item \textsuperscript{67} \textit{Cf.} United States v. Mandujano, 425 U.S. 564 (1976) (a witness before a grand jury did not have to be given \textit{Miranda} warnings before his testimony).
\end{footnotes}
antitrust violation is how to prevent any information they may have previously or currently disclosed to the FTC from being used against them in a criminal proceeding. They can make several arguments. Each of these arguments involves two important issues. First, how can it be established that the FTC is in fact giving information it has gathered to the Justice Department for use in criminal proceedings? Assuming that the information sharing would be invalid if proved, the corporation or officers can argue that since information sharing occurs solely within the province of the government, the burden of proving that information sharing has occurred should not be on the private party. Instead, it should be up to the FTC and the Justice Department to demonstrate that information sharing has not occurred. The corporation or officers can also seek a suspension of any FTC investigation until after the criminal prosecution is concluded and a ban on any use of evidence gathered by the FTC from any criminal trial, unless it could have been obtained independently through criminal discovery or was part of the public record.

The other important issue is timing. Should the objection to the shared information be made, for example, in FTC adjudicatory proceedings in an effort to stop an administrative subpoena, in a private civil action, or in the criminal case itself? Another aspect of timing involves ripeness—can a corporation or its officers object to information sharing before the FTC when no criminal prosecution is currently pending?68

If the corporation or officers can overcome the problems of timing and proof, the issue becomes what substantive law and arguments can be marshalled to attack the information sharing. There are several theories that can be advanced to support the substantive attack.

A. FTC Procedural Rules

The first theory that may be advanced to defeat information sharing was espoused in FTC v. Atlantic Richfield Co.,69 which concerned the sharing of information between the FTC’s investi-

68. The appellate court in the line-of-business report cases indicated that concern over confidentiality of data was premature and should be raised in the specific proceeding where the violation was occurring. See, e.g., Appeal of FTC Line of Business Report Litigation, 585 F.2d 685, 707-08 (D.C. Cir. 1978). In another pertinent decision, In re Folding Carton Antitrust Litigation, 465 F. Supp. 618 (N.D. Ill. 1979), the district court held that claims of fifth amendment privilege were not applicable where there appeared to be little chance of any future criminal prosecution.

69. 567 F.2d 96 (D.C. Cir. 1977).
gatory and adjudicatory staffs. Atlantic Richfield was simultaneously involved in an adjudicatory proceeding concerning alleged antitrust violations and a congressionally authorized investigation of the natural gas industry, both conducted by the FTC. Atlantic Richfield was seeking to ensure that the documents obtained by the FTC investigatory staff would not be used by the FTC staff in the adjudicatory proceeding without an opportunity for the administrative law judges or Atlantic Richfield to object.

Two arguments were advanced by Atlantic Richfield. First, Atlantic Richfield argued that such a sharing of information was violative of the FTC's procedural rules that arguably did not permit access by the prosecutorial staff to documents obtained by investigatory subpoena. Second, Atlantic Richfield argued that such information sharing was violative of due process.

Atlantic Richfield based its first argument, concerning the separation of adjudicatory and investigatory functions of the FTC, on the existence of separate rules of procedure for each activity. The existence of separate rules of discovery procedure for investigative and adjudicative proceedings conducted by the FTC indicated that information was not freely transferable between the two proceedings. The FTC responded by arguing that such information sharing was permissible where, as in this case, the adjudicatory proceeding was launched in good faith. The D.C. Circuit agreed with Atlantic Richfield's argument. Such sharing of information, according to the court, would remove important powers of the administrative law judge to limit, quash, or approve subpoenas in adjudicatory proceedings. The court concluded, however, that the FTC's position on the issue was unclear and remanded the case so the FTC could clarify its rule on the use of investigatory documents in adjudicative proceedings.

Although the court used Atlantic Richfield's first argument as the basis for its decision, it indicated in dicta its opinion regarding the due process issue. The court concluded that due process issues were inherently involved if such a sharing of information were permitted. The FTC has not yet clarified its position on this issue.

Thus a corporation or its officers could argue that if the FTC rules of procedure do not permit internal sharing of information,

70. This argument may have been strengthened by the new FTC rules that seek to give the administrative law judge greater control over adjudicatory proceedings. See [1978] Antitrust & Trade Reg. REP. (BNA) No. 882, at A-15 (Sept. 28, 1978).
71. See id. at A-16.
then, a fortiori, the FTC should not be permitted to provide such information to the Justice Department for use in criminal proceedings. The ultimate basis of such an argument is due process.

B. Due Process

The Supreme Court has recognized limits upon the information gathering powers of administrative agencies, including the FTC. In *United States v. Morton Salt Co.* the issue was whether the FTC could require corporations to file reports showing their compliance with a cease-and-desist order. The Court stated:

The judicial subpoena power not only is subject to specific constitutional limitations, which also apply to administrative orders, such as those against self-incrimination, unreasonable search and seizure, and due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

In *United States v. Powell*, which involved a dispute over enforcement of an IRS summons, the Court stated: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." Thus, even though the Court upheld the agency action in both *Morton Salt* and *Powell*, it explicitly recognized that due process limits the scope of agency investigative activity.

Another context in which the due process issue might arise is illustrated by the case of *Silver v. McCamey*. *Silver* involved the revocation of a license at an administrative hearing prior to a criminal trial concerning the same charges. On appeal from the district court's injunction against the administrative revocation, the D.C. Circuit held that "due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him." Due process considerations were also raised in *United States v. Parrott*, a case involving civil proceedings initiated by the Securities and Exchange Commission contemporaneously.
neously with criminal proceedings initiated by the United States Attorney against the same defendant. The criminal court indicated that this situation could also arise in the antitrust area and stated: "The Court holds that the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecutions."\(^7^9\)

The prohibition against the use of the civil process to obtain information for a criminal prosecution on the same facts is well established.\(^8^0\) The major factor courts cite for the prohibition is the essential difference between criminal and civil proceedings.\(^8^1\) Judge Bell, in a concurring opinion in *Campbell v. Eastland*,\(^8^2\) noted that "[t]he criminal aspect of the matter could not be ignored. The end result was tantamount to allowing discovery under Federal Rules of Civil Procedure in a criminal proceeding, something we are powerless, as was the trial court, to authorize."\(^8^3\)

The issue of the use of civil proceedings to discover criminal violations has arisen most often in the context of Internal Revenue Service cases. *Reisman v. Caplin*\(^8^4\) involved a taxpayer's challenge to an IRS summons of records held by the taxpayer's accountant. The Supreme Court in dicta indicated that the summons could be challenged on any appropriate grounds, including the allegation that the material was being sought for the improper purpose of obtaining evidence for use in a criminal prosecution.\(^8^5\)

The Court next dealt with the issue of what constitutes an improper use of an IRS summons in *Donaldson v. United States*.\(^8^6\) The IRS had issued a summons to Donaldson's former employers and his accountant for records relating to Donaldson's compensation. The employer refused to comply, and the IRS filed an action in district court to enforce the summons. Donaldson intervened, alleging that the summons was being used solely to obtain infor-

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79. Id. at 202.
80. For a discussion of these prohibitions, see Comment, Concurrent Civil and Criminal Proceedings, 67 COLUM. L. REV. 1277 (1967); Note, Stay of Discovery in Civil Court to Protect Proceedings in Concurrent Criminal Action—The Pattern of Remedies, 66 MICH. L. REV. 738 (1968).
82. 307 F.2d 478 (5th Cir. 1962).
83. 307 F.2d at 492-93 (Bell, J., concurring).
84. 375 U.S. 440 (1964).
85. Id. at 449.
86. 400 U.S. 571 (1971).
information against him for use in a later criminal trial. The Supreme Court held that Donaldson had no protectable interest or privilege that would permit intervention under Federal Rule of Civil Procedure 24(a)(2). The Court also held that an IRS summons could be used in connection with a criminal investigation if issued in good faith and prior to a recommendation for prosecution. The Court intimated, however, that use of an IRS summons was not permitted if its sole purpose was to gather information for a criminal trial.87

In the most recent case involving an IRS summons, United States v. LaSalle National Bank,88 the Court further described the good faith requirement. In LaSalle National Bank an IRS special agent issued a summons to the bank to obtain information concerning the tax liability of a bank customer. The district court refused to enforce the summons since the agent admitted that his sole purpose in issuing it was to gain information for a criminal prosecution. The district court held that such a motivation indicated bad faith. The appellate court affirmed.

The Supreme Court reversed, and in so doing made several points about IRS powers. First, it noted that Congress had given the IRS both civil and criminal enforcement power. Therefore, the Court argued, the IRS could use the summons to obtain information prior to the initiation of a criminal prosecution. Once criminal proceedings began, however, the Court reasoned that the IRS summons could no longer be used to gather information. The Court called this a prophylactic rule that helped to protect discovery in criminal litigation and to preserve the role of the grand jury. The Court refused to define the requirement of good faith in terms of the IRS agent’s motivation in conducting the investigation. It referred to the various agency procedures that must be followed before a prosecution is initiated, and the protection they offer to the individual taxpayer against a vendetta by an IRS agent. The Court then indicated that the burden of proving that an investigation was solely for criminal prosecution was on the taxpayer, who must prove the absence of a valid civil tax determination or collection purpose in the IRS investigation. Since the bank had failed to prove a lack of good faith or the existence of a pending criminal proceeding the Court held that the IRS could obtain the information from the bank.

87. Id. at 532-36.
These cases attempt to clarify the dual enforcement powers of the IRS. A possible analogy might be drawn between the IRS in the tax area and the FTC and Justice Department in the antitrust area. However, several arguments can be made against the applicability of the tax cases to the antitrust area. Neither Donaldson nor LaSalle National Bank indicate whether their holdings apply to administrative agencies other than the IRS. Another way to distinguish the IRS summons from the FTC summons is by reference to the basic differences between the two agencies. One of the Court's premises in LaSalle National Bank was that Congress has explicitly granted the IRS dual civil and criminal enforcement powers. It is not inappropriate, therefore, for the IRS to use the summons to acquire information to carry out these powers. But Congress has not given the FTC dual enforcement powers. Instead, the FTC has only been given civil powers to prevent restrictions on trade. Arguably, the use of the FTC's sweeping civil powers to obtain information about the antitrust activities of a corporation for later use by the Justice Department in a criminal proceeding is an abuse of the investigatory and prosecutorial powers of the FTC.

Even if a court allows the FTC to use its civil powers to obtain information for criminal prosecutions, the holdings in Donaldson, Reisman, and LaSalle National Bank can still be used to the advantage of the corporation or its officers under the double gaze of the FTC and the Justice Department. For example, if there have been simultaneous investigations of a particular company by the Justice Department and the FTC, Donaldson and LaSalle National Bank would require the FTC to cease its civil discovery as soon as the Justice Department decided to prosecute. As the Court indicated in LaSalle National Bank, this

89. The Court stated: “Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined. When an investigation examines the possibility of criminal misconduct, it also necessarily inquires about the appropriateness of assessing the 50% civil tax penalty.” Id. at 308 (footnote omitted).

89.1. Alternatively, a court could allow the FTC investigation to continue even after the Justice Department initiates criminal proceedings but could order the FTC not to divulge any information to the Justice Department once the Justice Department decides to prosecute. This was the approach taken by the United States Court of Appeals for the District of Columbia in a recent case involving shared information between the SEC and the Justice Department. SEC v. Dresser Indus. Inc., [1979] Fed. Sec. L. Rep. (CCH) ¶ 97,172, at 96,476 (D.C. Cir. Nov. 19, 1979). The court of appeals refused to order the SEC to halt its investigation because the relationship between the SEC and the Justice Department was not as close as that between the IRS and the Justice Department and because “there is a substantial public interest in swiftly remedying civil securities law violations.”
somewhat artificial limitation was set up to preserve the role of the grand jury and to protect discovery in criminal litigation. Arguably, this same limitation would apply in the antitrust area where both civil and criminal liabilities exist.

Even if the decision to prosecute has not been made, the FTC's good faith could be challenged under LaSalle National Bank, even though the Court there refused to consider an agent's motivation as evidence of bad faith. Arguably, the FTC, by using its civil powers solely to obtain information for use in a criminal proceeding by another agency, is guilty of bad faith. Therefore, even though the FTC may not have referred the matter to the Justice Department for possible prosecution, a showing of bad faith may be grounds for disallowance of any information sharing.

In summary, there are procedural due process arguments that offer hope to the corporation or its officers who attempt to prevent information obtained by the FTC during civil discovery from being used by the Justice Department in a criminal proceeding. This would be particularly true if it could be shown that the Justice Department had decided to prosecute. If no such recommendation has been made, then other arguments are available: the summons was issued without good faith; the FTC is exceeding its congressionally authorized civil powers by obtaining information for a criminal investigation; LaSalle National Bank should not be extended to agencies other than the IRS. Arguments such as these support the proposition that the use of an administrative summons during civil discovery to obtain evidence for use in a criminal proceeding should be forbidden.

C. Self-Incrimation

Another constitutional basis that courts have relied on to enjoin civil proceedings while contemporaneous criminal proceedings on the same facts are in progress is the fifth amendment proscription of self-incrimination. In United States v. Simon, however, the Second Circuit rejected fifth amendment challenges to the civil discovery process. Simon involved criminal proceed-
ings instituted because of alleged violations of the Securities Exchange Act and a civil action brought by the trustee in reorganization of a company the criminal defendants were involved with. The trustee was seeking the defendants' depositions just prior to the criminal proceeding. The judge in the civil case refused to enjoin discovery, but the judge in the criminal trial issued an order enjoining discovery for ninety days. This order was appealed. On appeal the Second Circuit ruled that the defendants had failed to specifically allege the need to avail themselves of their fifth amendment privileges. According to the court, there was also a strong public interest in obtaining the information from the defendants. In addition, the defendants could avail themselves of the privilege in response to individual questions. Moreover, since it was a trustee that was seeking the information and not the government, there was less likelihood of prejudice to the defendants.

In SEC v. Vesco, on the other hand, the Federal District Court for the Southern District of New York was willing to find prejudice against the defendants. This case involved civil proceedings brought by the Securities and Exchange Commission against Robert Vesco and others for violation of the Securities Exchange Act. The defendants also faced possible criminal prosecution. The defendants alleged that the civil proceedings had been purposely initiated before criminal proceedings so that the government could take advantage of the liberal civil discovery rules. Although the defendants could refuse to testify in the civil proceedings, the court reasoned that such a refusal could give rise to the inference that the defendants were guilty of the criminal charges. If the inference were used in determining guilt, the defendants would be penalized unjustly for exercising their privileges against self-incrimination.

On the other hand, the court argued that the defendants could choose to testify, but that such testimony might be used against them in a later criminal proceeding. The court reasoned that "it is probable that defendants will suffer grave, irreparable civil and criminal consequences should they choose either course of action, testifying at the depositions or invoking the protections of the Fifth Amendment." The court granted restrictions on discovery with respect to certain defendants but indicated that

93. Id. at 93,387.
it might be willing to allow discovery if the government granted immunity to the defendants.\textsuperscript{84}

The Supreme Court has ruled that the fifth amendment only protects individuals, not corporations or partnerships.\textsuperscript{85} Thus the corporate official, when claiming his fifth amendment privilege, should allege that the information he wishes to withhold stems from his own activities and not those of the corporation. If he fails to do so, the court can rule that the fifth amendment is not applicable. Corporate and partnership records are also not entitled to the privilege against self-incrimination.\textsuperscript{86} However, there is a privilege against self-incrimination with respect to the personal records of the corporate officer.\textsuperscript{87} Therefore, if an attempt to withhold records is made, the records must be the officer's, not the corporation's.

\textbf{D. Inadequate Time to Prepare Defense}

One final argument can be made in an attempt to prevent the sharing of information between the Justice Department and the FTC. Many times simultaneous prosecutions do not give the defendant corporation or its officers sufficient time to adequately prepare a criminal defense. In such a case, the proceedings of the FTC should be suspended until after completion of the criminal prosecution. In \textit{United States v. Amrep Corp.}\textsuperscript{88} this argument was advanced and accepted by the federal court in the southern district of New York. The investigation of Amrep began in April 1973 and the FTC filed a complaint in March 1975. A grand jury investigation was begun by the United States Attorney in March 1974 and an indictment of Amrep and some of its officials returned on October 28, 1975. Both investigations were based on similar information. Amrep requested a stay of the FTC proceedings, claiming that the appearance of corporate officers before the FTC proceedings would prevent them from adequately preparing for the criminal proceedings. The administrative law judge denied the stay, and Amrep initiated an action in district court.

\textsuperscript{84} Of course, any immunity that would be granted would only be use immunity. See 18 U.S.C. §§ 6001-6002 (1976). The government could still maintain the prosecution later if there were independent sources of information.


\textsuperscript{87} \textit{Wilson v. United States}, 221 U.S. 361, 377 (1911).

\textsuperscript{88} 405 F. Supp. 1053 (S.D.N.Y. 1976).
The district court rejected the Commission's contention that the court did not have jurisdiction. The court held that it was proper to intervene to prevent interference with the defendants' preparation for trial. The court then dealt with the issue of whether the simultaneous actions could interfere with trial preparation. The court indicated that it saw no current conflict, but believed that there could be problems in the future as the time of the criminal trial drew near. The court stayed the FTC's investigation until one month after entry of the jury verdict, indicating that such a delay was not prejudicial to the FTC. By taking this position the court avoided the difficult issue of information sharing. By advocating the need for a stay in the FTC proceedings, the corporation confronted with information sharing, like the court in Amrep, may be able to sidestep the sharing issue.

VI. REMEDIES

The issue of information sharing can arise in criminal, civil, or administrative proceedings. Possible remedies for the corporation or its officials must be considered in the context of these forums and their various procedures.

A. Administrative Remedies

Administrative procedures may be governed by the Federal Rules of Civil Procedure or an agency's own procedural rules. The FTC has chosen to adopt its own rules. Separate rules of procedure govern its adjudicatory and nonadjudicatory proceedings.\(^99\) In nonadjudicatory proceedings the FTC is generally involved in investigations of various industries.\(^101\) Investigatory actions generally have three limitations: they must be authorized by Congress, the information sought must be definite, and the information sought must be relevant to the inquiry.\(^102\) Adjudicatory proceedings of the FTC are focused on a particular corporation and violations of particular laws.\(^103\)

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101. These investigations can be instigated on request of the President, Congress, governmental agencies, the attorney general, the courts, or the public. Also, the FTC can initiate its own investigations. Id. § 2.1.
103. See United States v. Morton Salt Co., 338 U.S. 632 (1950) (FTC could require the filing of periodic reports rather than inspection of books and records in order to insure that no laws were being violated).
In both adjudicatory and nonadjudicatory proceedings the principal method of acquiring information from the corporation is the administrative subpoena.104 If the corporation and its officers do not wish to comply with the subpoena, they can file a motion to quash.105 At that time they may raise such defenses as denial of due process, the prohibition against self-incrimination, the irrelevancy of the materials sought, or the burdensomeness of the request.

The FTC, like other federal administrative agencies, has no power to enforce its administrative subpoenas.106 Instead, it must file an action in federal district court. Thus, if the motion to quash the administrative subpoena is denied and the corporation still refuses to comply, the FTC must go to district court to enforce the subpoena. The same contentions can be raised in district court that were raised before the agency. The order of the district court, if adverse to the corporation, may then be appealed. Even if the final determination is in favor of the agency, the agency has no power to punish the corporation for further noncompliance. Instead, it must go back to district court to get an order of contempt.

These procedures are time consuming. If the corporation fears that the FTC will obtain information in its administrative proceedings that may be used against it or its officials in civil or criminal proceedings, these cumbersome enforcement procedures can work in its favor. It is likely that the civil or criminal proceedings may be over before the agency succeeds in getting enforcement of its subpoena.107

The subpoena enforcement process also applies to other aspects of discovery, particularly in adjudicatory proceedings where the corporation decides not to comply. The FTC recently enacted new rules to govern these proceedings.108 In the comments preceding the new rules, the FTC indicated its attempt to give the administrative law judge greater control over adjudicatory pro-

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105. 16 C.F.R. § 3.34(b)(1) (1979) (adjudicatory proceedings); id. § 2.11(c) (nonadjudicatory proceedings).

106. For a discussion of this issue, see Benton, Administrative Subpoena Enforcement, 41 Tex. L. Rev. 874 (1963).

107. For a case that illustrates the complexity and time-consuming nature of these proceedings, see Penfield Co. v. SEC, 157 F.2d 65 (9th Cir. 1946), aff'd, 330 U.S. 585 (1947).

ceedings.\textsuperscript{109} It also indicated that the new regulations are similar to the Federal Rules of Civil Procedure. The comments also state, however, that “judicial constructions of such analogous provisions may serve as interpretative aides, but they are not to be regarded as binding because application of the Commission’s rules must be tailored to the circumstances of the Commission’s proceedings.”\textsuperscript{110} Despite the Commission’s warnings, it may be helpful to examine judicial decisions in civil actions for further arguments that corporate defendants might make in administrative proceedings.

\begin{flushright}
B. Civil Remedies
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What can a corporation do in a civil case when no one in the corporation can answer interrogatories without the risk of self-incrimination with respect to a concurrent criminal proceeding? The Supreme Court answered this question in \textit{United States v. Kordel}.\textsuperscript{111} “In such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action.”\textsuperscript{112}

Rule 30(b) is now Rule 26(c) of the Federal Rules of Civil Procedure. Under Rule 26 a protective order can be obtained to protect a party from “annoyance, embarrassment, oppression, or undue burden and expense.”\textsuperscript{113} If any of these circumstances exist, the district court judge may prohibit or limit discovery. A corporation involved in concurrent civil and criminal proceedings on the same matter could argue that a protective order should be imposed in order to prevent the liberal civil discovery provisions from being used for criminal discovery. Possible arguments for the protective order could be based on the prohibition against self-incrimination as suggested in \textit{Kordel}, on due process considerations,\textsuperscript{114} or on bad faith.

Since a decision on a stay order is not a final order, it is not clear whether it would be appealable.\textsuperscript{115} Under the Supreme

\begin{itemize}
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. at 56,863.
  \item \textsuperscript{111} 397 U.S. 1 (1970).
  \item \textsuperscript{112} Id. at 9 (footnote omitted).
  \item \textsuperscript{113} \textit{Fed. R. Civ. P.} 26(c).
  \item \textsuperscript{114} For decisions on these grounds, see Dienstag v. Bronsen, 49 F.R.D. 327 (S.D.N.Y. 1970); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953).
  \item \textsuperscript{115} For decisions holding that the district judge’s decision regarding discovery was not appealable, see Carolina Power & Light Co. v. Jernigan, 222 F.2d 961 (4th Cir. 1955)
\end{itemize}
Court's decision in *Brown Shoe Co. v. United States*,\(^{116}\) however, it could be argued that the district court judge's decision should be appealable because it has the appearance of finality and delay may foreclose the possibility of later review. The issue of appealability in such cases has not been considered by some courts,\(^ {117}\) but where it has been considered, the appellate court has sustained its power to hear the appeal.\(^ {118}\)

Based on the comments preceding the new rules governing adjudicatory proceedings before the FTC, similar arguments could be made before the administrative law judge to stay FTC proceedings until completion of a criminal trial. The administrative law judge's decision would be discretionary.\(^ {119}\)

C. Criminal Remedies

The remedies available to a corporation or its officials in a criminal proceeding in order to stay a concurrent administrative or civil proceeding are much more limited. The Federal Rules of Criminal Procedure indicate that the purpose of the Rules is "to provide for just determination of every criminal proceeding."\(^ {120}\) This policy can form the basis for a defendant's motion to stay simultaneous administrative or civil proceedings.

The defendants in *United States v. Simon*\(^ {121}\) found themselves in just such a situation. The criminal charges included conspiracy to commit mail fraud and violations of the Securities Exchange Act. Civil actions, one of which involved the same transaction, were pending in another district court. The civil actions, however, were brought by a trustee in bankruptcy and not by the government. After the judge in the civil trial denied a

\(^{119}\) The administrative law judge's decision may be appealed to the full Commission if there is a controlling question of fact or law and the appeal would enhance the ultimate outcome or subsequent review would be an inadequate remedy. 16 C.F.R. § 3.23(b) (1979).
\(^{120}\) Fed. R. Crim. P. 2.
protective order to one defendant, the judge in the criminal trial was asked to issue a temporary restraining order to prevent depositions from being taken from the criminal defendants. The criminal court judge indicated that the need to preserve fairness in criminal proceedings underpinned the court's power to issue such an order. The court presented two bases for this power: one was the All Writs Act; the other was the power of the federal criminal court to grant injunctive relief to preserve the fairness of its proceedings through its supervisory powers. The defendants had no intention of using their fifth amendment privileges during the deposition because of their positions in the community. They only wished, according to the court, "to have all the relevant facts and circumstances completely brought out in the course of their defense at the proper time, but that they should not be compelled to do so before trial." The judge indicated that there was a substantial likelihood that the prosecutor would ascertain the defendants' defense from the depositions before trial.

The court found that the defendants would suffer "substantial and irreparable prejudice" if the depositions were permitted. At the same time, the court indicated that the civil proceedings would not be prejudiced by this delay. The court then issued an injunction for ninety days to prevent the taking of depositions from the defendants.

The decision in Simon was appealed. The court of appeals reversed, finding that the defendants had failed to make a showing that the taking of the depositions would interfere with the criminal trial. The court of appeals intimated, however, that a court in a criminal trial may have the power to issue an injunction if a sufficient showing of harm is made. The court believed that the refusal of the injunction did not infringe the defendants' constitutional rights since they could avail themselves of their fifth amendment privileges as to individual questions. The defendants' reasons for not invoking the privilege were rejected. Another source of concern to the court was the possible conflict that could arise between courts because of such orders. The decision was appealed to the Supreme Court and certiorari was granted, but the case was later vacated as moot.

122. Id. at 72.
123. Id. at 72-73.
124. Id. at 77.
The applicability of Simon to other situations is not clear. A defendant involved in simultaneous criminal and civil or administrative proceedings could ask the court in the criminal proceedings to enjoin the civil or administrative proceedings based on the criminal courts supervisory powers or the All Writs Act. Given the court of appeals' decision in Simon, however, a strong showing of harm to the defendant would need to be made.

For a corporation and its officials involved in simultaneous civil and criminal proceedings within the same federal district, an additional problem may present itself. In United States v. American Radiator & Standard Sanitary Corp., the defendants were involved in simultaneous civil and criminal antitrust proceedings within the same federal judicial district. The defendants moved for a stay of the civil proceedings, which was denied by the judge presiding over the civil proceedings. The defendants then requested the judge presiding over the criminal proceedings to stay the civil proceedings. The judge granted the stay, but was reversed on appeal. The appellate court indicated that it was improper for one court within the same federal district to reverse another court. According to the appellate court, the defendant should have appealed the decision in the civil action via a preemptory writ—it was not proper to attempt to overrule the decision of the judge in the civil proceedings by later requesting the judge in the criminal trial for a stay of the civil proceedings. The rationale for this decision included avoiding the appearance of conflict within the district and saving judicial time and expense. The decision was appealed to the Supreme Court, but certiorari was denied. Other courts have generally followed this opinion.

VII. CONCLUSION—A MATTER OF ETHICS

Federal agencies are continually receiving more power from Congress to regulate various corporate activities. Increased power necessarily countenances the possibility of increased abuses of that power. The FTC abuses its powers when it utilizes its extremely liberal discovery powers to obtain information for use in concurrent or contemplated criminal proceedings—criminal pro-

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ceedings that have traditionally given only limited discovery power to the government. Such a practice raises serious ethical questions.

The Code of Professional Responsibility indicates that "a government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring unjust settlements or results." A sharing of information between the FTC and the Justice Department could violate this ethical consideration if it is unfair or brings unjust results. In determining what is unjust or unfair, an important issue arises: who is the client the government attorney serves?

Judge Charles Fahy, in a speech before the Columbia University School of Law, indicated: "Our government is one of the very greatest institutions ever to come into being, and to grow and live. But is it truly the servant of the human beings who are the country... The rights of the citizens must be assiduously protected, and also the rights of the general community." In an opinion by the Professional Ethics Committee of the Federal Bar Association the government lawyer was described as follows:

This lawyer assumes a public trust for the government, overall and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations.

If the public is the ultimate client of any federal agency, the question of whether it is appropriate to use civil or administrative proceedings to obtain information for use against a corporation and its officers in a criminal proceeding should be answered by ascertaining whether the public, qua client, would endorse such an activity. The government attorney's conduct should set an example to the public—his client—of the highest ethical standards. Abuse of the civil process to obtain information for another prosecution is unfair, unjust, and unethical. Another reason why

130. ABA Code of Professional Responsibility, Canon 7, EC 7-14.
such behavior should not be sanctioned by a court is that it is not needed by the government for successful prosecutions. The government has ample power to secure information without resort to unfair or unjust means. As the Supreme Court indicated with respect to the prosecuting counsel: "[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Permitting a government attorney to abuse process to gather information may be an "improper method." Thus the validity of the arguments against governmental information sharing, such as self-incrimination, violation of agency function, and due process, while legally important, are as a matter of social policy irrelevant. The ultimate issue is an ethical one: how do the American people wish to have their laws enforced?