The FTC's Power To Seek Preliminary Injunctions in Anti-Merger Cases

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Congress vested responsibility for enforcement of the anti-merger provisions of the Clayton Act, the Federal Trade Commission (FTC), and private parties who claim to be injured by a merger. Courts permit the Department of Justice to use almost all remedial measures "reasonably necessary" to deal with mergers which are found to be violative of section 7 of the Clayton Act, and the Act expressly authorizes the Department to seek preliminary relief in the district courts. Comparable statutory authority is also given to private litigants. Until recently, however, it had always been believed that the FTC did not have authority to go to court to obtain preliminary injunctions to bar corporations from proceeding with mergers which the FTC intended to attack under section 7. The FTC has often taken the position

5. See, e.g., United States v. E. I. DuPont de Nemours & Co., 366 U.S. 316, 323, 329, 331 (1961). See also N.Y. State Bar Ass'n, 1965 Antitrust Law Symposium 37-38 (Trade Reg. Rep. ed.). The Justice Department's remedial measures spoken of in this connection are measures ancillary to or in lieu of divestiture. The FTC, however, has had considerable difficulty persuading the courts that its remedial powers are as broad. E.g., FTC v. Eastman Kodak Co., 274 U.S. 619, 623 (1927) (suggesting that since it was created by statute, "the commission exercises only the administrative functions delegated to it by Congress"). See also FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) and Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) for other statements concerning those remedial powers available to the FTC.
8. As Mr. Justice Fortas observed, this view was even "repeatedly stated by spokesmen for the FTC." FTC v. Dean Foods Co., 384 U.S. 597, 657-40 (1966) (appendix to dissent). See, e.g., Ekco Prods. Co., 1965 Trade Reg. Rep. § 71,487 (FTC 1964); Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 84th Cong., 2d Sess., ser. 15, at 465 (1956); id. ser. 15, at 28 (1956). See also Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong., 1st Sess., ser. 5, at 93 (1961); Dixon, Recent Developments in FTC Enforcement, 18 A.B.A. Sect. Antitrust Law 107, 114 (1961); Dixon, Significant New Developments, 21 A.B.A. Sect. Antitrust Law 247, 255 (1965). Moreover, Mr. Justice Fortas was unable to find any commentator who disagreed with this limited conception of the FTC's power. For authorities which he cites as endorsing this limited position, see 384 U.S. at 614 n.2.
that it needs this authority to enjoin mergers in advance of their consummation in order to effectuate its enforcement powers. Its argument is that if companies are allowed to proceed with their merger plans while FTC proceedings are taking place, then by the time the proceedings are completed it may be highly difficult, if not impossible, for a final order of divestiture to restore a competitive market situation. Admittedly, such mergers are not entirely immune from attack under section 7 in the absence of FTC authority to obtain preliminary relief. The FTC could always request the Department of Justice to seek an injunction restraining a proposed merger. The FTC, however, has never believed that the mere power to make such a preliminary reference to the Justice Department adequately effectuates the purposes of the statute; under the

9. See generally id. at 636-40. On only one occasion has a court granted such power, and in that instance it was granted to the Board of Governors of the Federal Reserve System, not to the FTC. Furthermore, without such preliminary relief the potential jurisdiction of a court of appeals would have been eliminated. Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir. 1950); see note 53 infra and accompanying text.

10. Completion of a merger will often mean that the merging companies no longer have available to them the personnel and management necessary for their independent existence. Moreover, because of the delay usually attendant to FTC adjudication of mergers, mergers not enjoined before their consummation may already have returned a substantial profit by the time they are found to be illegal. Often this delay will also mean that the separate reputations of the merging firms will no longer be intact when the FTC concludes its proceedings, and this loss of separate identities may make orders of divestiture an unrealistic solution. See generally Daly, Current Trends in Relief Under the Clayton Act, 70 Dick. L. Rev. 1 (1965); Edwards, Tests of Probable Effect Under the Clayton Act, 9 Antitrust Bull. 369 (1964); see note 39 infra.

The procedure used by the FTC in entering a final order of divestiture has been described as follows:

The essence of FTC enforcement is an administrative order requiring the offending corporation to divest itself of the illegally acquired stock or assets. Prior to entering such an order, the FTC must issue a complaint to the corporation and to the Attorney General, hold a Commission hearing where the corporation may show cause why an order for divestiture should not be entered, and make a written report of the hearing. If the Commission then determines that the merger will violate the Clayton Act, it issues a cease and desist order to compel the corporation to divest itself of the stock or assets acquired through the merger. [Clayton Act § 11(b), 15 U.S.C. § 21(b) (1964)]. The administrative order to cease and desist becomes final upon expiration of the time allowed for filing a petition for review in the court of appeals. [Clayton Act § 11(g), 15 U.S.C. § 21(g) (1964)]. If review is requested by the corporation and the FTC order is affirmed, the court of appeals then issues its own order commanding obedience to the final FTC order. [Clayton Act § 11(c), 15 U.S.C. § 21(c) (1964)]. Violations of the final FTC order are subject to heavy civil fines. [Clayton Act § 11(1), 15 U.S.C. § 21(1) (1964)].


11. It has been suggested that the Justice Department may be required to seek a preliminary injunction upon FTC request. See J. Burns, A STUDY OF THE ANTITRUST LAWS 321 (1958).
existing statutory framework it is doubtful whether the FTC could make the reference without yielding control of the case.\textsuperscript{12}

In \textit{FTC v. Dean Foods Co.},\textsuperscript{13} the Supreme Court recently ruled in a 5-4 decision, that the FTC can seek a preliminary injunction from a federal circuit court of appeals in anti-merger cases. Thus, it closed the gap in the FTC's enforcement powers and substantially eliminated the historical imbalance between the authority of the Department of Justice and that of the FTC. This Comment will examine the bases and the implications of the Supreme Court's holding. It will point out a number of problems raised by granting the FTC this remedial power, and will suggest that the situations in which preliminary injunctions may be obtained from a court of appeals should be strictly limited.

\section{I. THE DEAN FOODS LITIGATION}

In the \textit{Dean Foods} case, the FTC attacked the proposed merger of Dean Foods and Bowman Dairy, two of the nation's largest dairy companies,\textsuperscript{14} on the ground that the merger would violate section 5 of the Federal Trade Commission Act (FTC Act),\textsuperscript{15} which prohibits unfair methods of competition, and section 7 of the Clayton Act.\textsuperscript{16}

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\textsuperscript{12} The Antitrust Subcommittee of the House Committee on the Judiciary has explained this resultant loss of control in the following manner:

\textit{Careful scrutiny of the language of section 15 of the Clayton Act empowering the Attorney General to seek injunctions reveals that its provisions are not sufficient to carry out the intent of Congress in amended section 7. Under the provisions of section 15, if the Attorney General were successful in obtaining an injunction from a District Court in aid of the Federal Trade Commission, the court itself would be required to \textit{"proceed, as soon as may be, to hearing and determination of the case."} Thus, upon the obtaining of a district court injunction, the administrative proceeding would be at an end and the Commission would no longer have any power to hear and determine the case. This would defeat the statutory intent expressed in sections 7 and 11 of the Clayton Act of having the Federal Trade Commission hear and decide merger cases. H.R. REP. No. 1889, 84th Cong., 2d Sess. 10 (1956).

\textsuperscript{13} 384 U.S. 597 (1966) (majority opinion per Clark, J., joined by Justices Warren, Brennan, Black & Douglas; dissenting opinion per Fortas, J., joined by Justices Harlan, Stewart & White).

\textsuperscript{14} On December 13, 1965 respondents entered into a merger agreement which provided for a transfer of assets on January 3, 1966 (later extended to January 10 by the parties). At this time Dean Foods Co. was approximately the twelfth largest dairy company in the United States, and the third or fourth ranking seller of packaged milk in the Chicago Federal Milk Marketing Order (FMMO) Area (Cook, DuPage, Kane, Lake and Will Counties, Illinois; Lake County, Indiana) with sales of $75 million, total assets of $25 million, and a net income of $2.8 million before taxes. Dean Foods Co. controlled 7% of the packaged milk sales in the Chicago FMMO Area. Bowman Dairy Co. was about the eleventh largest dairy company in the United States, and the first or second ranking seller of packaged milk in the Chicago FMMO Area with nearly 16% of the total sales. See Papers filed in principal case with the Court of Appeals for the Seventh Circuit on Dec. 30, 1965 [hereinafter cited as Papers] (on file in the offices of the \textit{Michigan Law Review}).

\textsuperscript{15} 15 U.S.C. § 45 (1964) ("Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.").

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which prohibits one corporation from acquiring another when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." After filing its complaint, the FTC petitioned the Court of Appeals for the Seventh Circuit to enjoin the companies from consummating their proposed merger pending completion of the FTC's adjudication of its complaint.\footnote{The complaint, which charged violations of the antimonopoly laws, was issued on December 22, 1965 and was followed on December 30, 1965 by a petition seeking an injunction against the contemplated merger. On January 4, 1966 the court of appeals entered a temporary restraining order enjoining consummation of the merger until five days after the denial of any injunctive relief.} The court denied the requested injunction, holding that under the Clayton Act the FTC could only exercise powers delegated to it by Congress in section 11, and that section 11 did not authorize the FTC to obtain preliminary injunctions.\footnote{Relief was denied the FTC on January 19, 1966. FTC v. Dean Foods Co., 356 F.2d 481 (7th Cir. 1966).} On appeal,\footnote{On January 24, 1966 the Supreme Court, per Clark, J., ordered a temporary stay, restraining respondents from making any material changes with respect to the assets purchased or Bowman's corporate structure. This order permitted Dean to sell Bowman's retail home delivery routes upon terms and conditions acceptable to the FTC, but required that any milk supplied by Dean to such purchasers continue to be delivered from former Bowman plants under the Bowman label. The FTC filed its petition for certiorari on January 31, 1966, certiorari being granted on February 18, 1966.} the Supreme Court reversed and remanded the case to the Seventh Circuit.\footnote{384 U.S. 597 (1966).} The Supreme Court held that the FTC could properly seek the preliminary injunction in the court of appeals which has the authority under the All Writs Act to issue "all writs necessary or appropriate in aid of" its jurisdiction,\footnote{28 U.S.C. § 1651(a) (1964).} since consummation of the merger might create a situation in which the court of appeals would be unable to enforce an effective remedial order.

On remand, the Seventh Circuit held hearings on the FTC's petition for a preliminary injunction, and enjoined Dean and Bowman from proceeding with their proposed merger for a period of four months from the date of the order.\footnote{The court's order, issued on July 18, 1966, enjoined Dean and Bowman from making any material changes "with respect to the capital stock or corporate struc-
cision on the belief that it was "reasonably probable" that the FTC would find the merger agreement in violation of section 7 of the Clayton Act and section 5 of the FTC Act. Contrary to the Seventh Circuit's prediction, the FTC hearing examiner dismissed the complaint on the ground that the evidence did not support the allegations, but his decision was reversed by the FTC, which held, one Commissioner dissenting, that the proposed acquisition "had the probability of substantially lessening competition."

II. THE SUPREME COURT OPINION

The legal foundation for the Supreme Court's decision that the FTC can institute proceedings in a court of appeals to obtain a preliminary injunction was not overly impressive, as the dissent by Justice Fortas makes clear. The FTC's responsibilities are defined by statute, thus it was unclear whether the agency could bring such an action absent express statutory authorization, especially since, although both the Department of Justice and the FTC have responsibilities for the future of Bowfund Corporation, or with respect to assets purchased by Dean from Bowman pursuant to their agreement" for a period of four months. FTC v. Dean Foods Co., Slip Opinion No. 15,493 (7th Cir. July 18, 1966). The reference to the Bowfund Corporation is explained by the fact that as of July 19, 1966 the Bowman Dairy articles of incorporation were amended so as to change its name from Bowman Dairy Co. to Bowfund Corporation.

23. Id.
25. In re Dean Foods Co. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,765 (FTC 1966). In dissent, Commissioner Elman asserted that the integrity of the Commission's adjudicatory function had been impaired by its statements to the court of appeals during argument on the preliminary injunction. He stated:

Judicial open-mindedness requires that there be no prejudgment of the merits, actual or apparent. Any expressions or hint in the injunction proceeding that the Commission has already formed a judgment adverse to the respondents on the basic factual issues of the case completely destroys that appearance of open-mindedness which is essential to fair adjudication.

Id. ¶ 17,765 at 23, 126.
concurrent jurisdiction to enforce section 7, only the Department of Justice was expressly authorized to institute temporary injunction proceedings. Moreover, the power to seek preliminary injunctive relief was also expressly given to private litigants threatened with loss or damage from antitrust violations. Congress' failure to grant such express authority to the FTC might well justify an inference that it did not intend to delegate to the FTC the same duties with respect to restraining Clayton Act violations as it delegated to the Department of Justice or to private litigants. Furthermore, be-

31. 15 U.S.C. § 26 (1964). However, a private party must demonstrate that, unless the order is issued, irreparable loss or damage will result.

The FTC and the National Labor Relations Board (NLRB) are expressly empowered to preserve the status quo pending some administrative determinations. For example, under the Food and Drug provisions of the Federal Trade Commission Act, the FTC is given a power closely analogous to the authority which it sought in Dean Foods, that is, the power to seek, in a district court, a temporary injunction against false advertising or misbranding of food, drugs and cosmetics. Wheel-Lea Act, 15 U.S.C. § 53(a) (1964). For further examples of specific authorization regarding the FTC, see Federal Trade Commission Act, 15 U.S.C. § 53(a) (1964); Wool Products Labeling Act, 15 U.S.C. § 59(e)(b) (1964); Fur Products Labeling Act, 15 U.S.C. § 69(b); Textile Fiber Products Identity Act, 15 U.S.C. § 708 (1964). Regarding the NLRB, see National Labor Relations Act, 29 U.S.C. §§ 160(j) & (f) (1964) (NLRB is required to seek temporary injunction when it has reason to believe that jurisdictional strikes or secondary boycotts exist). The Federal Power Commission (FPC), Federal Communications Commission (FCC) and the Interstate Commerce Commission (ICC) have also been authorized to preserve the status quo through the issuance of their own orders. 15 U.S.C. § 717(c) (1964) (FPC); 47 U.S.C. § 204 (1964) (FCC); 49 U.S.C. §§ 516(g), 318(c) (1964) (ICC).

33. For an application of the doctrine that exclusio amnis est exclusio alterius, that the express grant of authority to one body is an implied denial to another, see SEC v. Long Island Lighting Co., 148 F.2d 292, 256 (2d Cir. 1945). However, this maxim has generally been used only as an aid to construction, and arguably should not be allowed to contravene the purpose of an act. See FTC v. Bunte Bros., 312 U.S. 349, 356 (1941) (Douglas, J., dissenting); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R. I. & Pac. Ry., 294 U.S. 649 (1944). Therefore, it would appear that at least a modicum of evidence showing congressional intent to withhold that power which the agency considers vital is required before the maxim can be applied:

Presumptively a court of equity has the power to effectuate the purposes of a statute by maintaining the status quo where necessary. If the party seeking relief will suffer irreparable harm of a sort which it is the purpose of the statute to avoid, there is a prima facie case for relief pendente lite. It should require clear statutory language to find a purpose to exclude the judicial powers traditionally available for such purposes.

Jaffe, Judicial Control of Administrative Action 685 (1965). See the dissent of Mr. Justice Fortas in Dean Foods, 394 U.S. at 615-16, where he argues that Congress did not intend to give to the FTC by implication what it had given to private parties and the Justice Department by express grant.
between 1956 and the decision in *Dean Foods*, the FTC had supported a number of legislative proposals which would have given it express authority temporarily to enjoin proposed mergers, but none of the proposals had been adopted by Congress.\(^34\) Arguably, this fact indicates that even the FTC believed it lacked power to seek preliminary relief, absent express statutory authorization, and, in addition, that Congress was reluctant to confer the requested power.

The majority of the Supreme Court, however, dismissed these possible objections and adopted the FTC's argument that without this power there would be a gap in its enforcement authority. The Court stated that "it would stultify Congressional purpose to say that the Commission did not have this incidental power to ask Courts of Appeal to exercise their authority under the All Writs Act."\(^35\) Further, the Court examined legislative history and concluded that it did not evidence congressional disapproval of FTC authority to seek preliminary relief from a court of appeals.\(^36\) Thus, although this power had not been delegated directly to the FTC, the

\(^{34}\) The bills were proposed to *clarify* the FTC's power to seek injunctive relief and to confirm such authority through *specific* legislative authorization, thus avoiding any implication that the FTC did not in fact have such power. See S. REP. No. 2817, 84th Cong., 2d Sess. 12-13 (1956):

> Effective enforcement of Section 7 requires that . . . the Federal Trade Commission have *clear authority* to seek court action to enjoin mergers of questionable legality prior to their consummation. . . . The FTC . . . has no such authority. (emphasis added); *Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess., ser. 15, at 29 (1956): "The Commission should have *specific* legislative authority granting it the right to seek and obtain injunctions upon proper showing . . . ." (emphasis added). See generally 384 U.S. at 606-40 (appendix to dissent).

35. 384 U.S. at 606.

36. For the Court's reaction to congressional failure to act on the FTC's proposals, see 384 U.S. at 609-12.

The legislative history of the Clayton Act is noticeably devoid of exact delineation of those powers available to the FTC. See *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 609 (1934), where Chief Justice Hughes and Justices Stone, Brandeis and Cardozo stated, in their dissent, that it should not "be said that the purpose of the [Clayton Act] must be defeated because the law-makers did not attempt to provide with a meticulous precision how the Commission should proceed in every contingency that might arise." Similarly, some recent cases suggest that a federal court may take any reasonable action necessary to insure the proper administration of the functions with which an administrative agency has been entrusted. Public Utilities Comm'n v. *Capitol Transit Co.*, 214 F.2d 242 (D.C. Cir. 1954); *Federal Maritime Comm'n v. Atlantic & Gulf-Panama Canal Zone*, 241 F. Supp. 766 (S.D.N.Y. 1965). But see 79 *HARV. L. REV. 391, 402-04 (1965); cf. *J. I. Case v. Borak*, 377 U.S. 426 (1964).

Court decided that it was necessary for the effective performance of the FTC's duties and, not having been expressly denied, it should be treated as an ancillary power granted by implication.\(^{37}\)

On the basis of policy, the majority’s result does at first glance seem consistent with the general aim of section 7 of the Clayton Act—to arrest anti-competitive mergers in their incipiency\(^{38}\)—and of section 5 of the FTC Act—to prevent unfair competition.\(^{39}\) Certainly, divestiture alone had proved to be an inadequate remedy.\(^{40}\) Moreover, it can reasonably be argued that the drafters of this legislation meant only to spell out specific areas of FTC concern, and not to enumerate the particular remedial procedures that the FTC could use to prevent the proscribed conduct.\(^{41}\) In fact, the Supreme Court had previously conceded that an extensive array of implied enforcement powers were available to the FTC.\(^{42}\) Given

\(^{37}\) 384 U.S. at 607-08.

\(^{38}\) See, e.g., S. REP. No. 1775, 81st Cong., 2d Sess. 4296 (1950); H.R. REP. No. 1191, 81st Cong., 1st Sess. (1949); REPORT OF THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 7 (1955).


\(^{40}\) See Duke, note 39 supra; Zimmerman, note 39 supra; Diversified Problems in Merger Cases, BNA ANTITRUST & TRADE REG. REP. No. 196, at B-1 (April 13, 1965); Comment, Diversified of Illegally Held Assets, 64 MICH. L. REV. 1574, 1583-97 (1966); note 10 supra and accompanying text. See also United States v. Chrysler Corp., 1964 Trade Cas. ¶ 71,307 (D.N.J.).


This is not to say that the Commission is, in all respects, a "court of equity." One difference between the Commission's powers under section 11 and the powers of the Federal District Courts under section 15 may be that the courts, by virtue of their express authority "to prevent and restrain violations" of the Clayton Act, but not the Commission, can enjoin a merger in advance of consummation.

Id. n.10.

\(^{41}\) See 51 CONG. REC., 14,000-16,144 (1914); Henderson, supra note 3, at 56-60; McIntyre, The Federal Trade Commission After 50 Years, 1964 TRADE REG. REP. 61, 103-04. See also note 36 supra.

these considerations, a decision barring the FTC—a governmental body which was expressly designated to administer merger violations and which presumably acts in accordance with its expert view of the public good—from seeking preliminary relief in the courts, while any private litigant claiming to be injured can do so if it suits his private interests, would seem anomalous.\footnote{39}

As noted earlier, the statutory basis of the Court’s decision was neither the Clayton Act nor the FTC Act, which the court also found to be silent on the matter,\footnote{40} but rather the All Writs Act, which provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.\footnote{41}

Since its creation the FTC has gradually accepted increasing responsibility for enforcement of the Clayton Act. See 51 Cong. Rec. 11,083-2,146 (1914); MacIntyre, note 41 supra. In fact, it has been stated that the FTC was intended from the beginning to be the body primarily responsible for the administration of the Clayton Act. Elman, \textit{Rulemaking Procedures in the FTC’s Enforcement of the Merger Law}, 78 Harv. L. Rev. 385 (1965). \textit{But see} Henderson, supra note 3. In fact, as of November 6, 1962, the FTC had brought forty-six suits under § 7 of the Clayton Act while the Department of Justice had only brought sixty. \textit{Staff of House Select Comm. on Small Business, 87th Cong., 2d Sess., Mergers and Superconcentration} 271-72 (Comm. Print 1962).

\footnote{39}. But see 384 U.S. at 618-19, where Mr. Justice Fortas states that the FTC’s expertise was intended to be used to bring “to bear upon the complex economic problems of a merger . . . judgment and experience which can emerge only from careful factual inquiry, the taking of evidence and the formulation of a report. The Federal Trade Commission was not intended to be a gun, a carbon copy of the Department of Justice.”

\footnote{40}. See note 36 supra and accompanying text.

\footnote{41}. 28 U.S.C. § 1651(a) (1964). This statute provides the clearest source of power for a federal appellate court desiring to grant injunctive relief. \textit{In re Philadelphia & Reading Coal & Iron Co.}, 103 F.2d 901 (3d Cir. 1989). \textit{See also} Armstrong v. Board of Educ., 323 F.2d 333 (5th Cir. 1963); \textit{cf. Ex parte United States}, 287 U.S. 241, 246 (1932) (“the issue of the writ may rest upon the ultimate power which we have to review the case . . . .”); McClellan v. Carland, 217 U.S. 268, 280 (1910).

Further statutory authority may be found in § 10 of the Administrative Procedure Act which provides:

Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 1009(d) (1964). Courts have held that the power conferred by this section may also be extended to a potential reviewing court. \textit{E.g., Long Beach Fed’l Sav. & Loan Ass’n v. Federal Home Loan Bank Bd.}, 189 F. Supp. 589 (S.D. Cal. 1960).

Both the courts of appeals and the United States Supreme Court also have \textit{inherent} equity power to stay administrative orders. \textit{See, e.g.,} Scripps-Howard Radio Inc. v. FCC, 316 U.S. 4, 9-10 (1942); Drath v. FTC (D.C. Cir. 1956) (no opinion), \textit{cert. denied}, 352 U.S. 917 (1956); \textit{cf. United States v. First Nat’l City Bank}, 379 U.S. 378 (1965) (affirming power of district court to issue injunction pendente lite pending determination of income tax suit on the merits); SEC v. Long Island Lighting Co., 324 U.S. 837 (1945) (enjoining consummation of recapitulation plan pending review of court of appeals’
Courts differ as to the degree of necessity they require before issuing a writ pursuant to this authorization. Some issue such writs when to do so serves to make their exercise of jurisdiction more effective; others only grant this relief when their jurisdiction would otherwise be defeated. In *Dean Foods*, the Supreme Court apparently did not adopt the latter view, since if the FTC were not allowed to seek preliminary relief, the jurisdiction of the court of appeals in any given case would not necessarily be defeated. It would always remain possible, even if unlikely, that the FTC might be able to fashion an effective order of divestiture. However, by admitting that an application for a preliminary injunction pending FTC hearings is appropriate under the All Writs Act, the Supreme Court necessarily acknowledged that the factual situation presented by a proposed merger is one that can at least threaten the jurisdiction of a federal court. The theory behind this conclusion is fairly simple. If a merger is consummated before the FTC can complete its adjudication, then a *res in custodia legis* may be destroyed—the corporate structures in existence prior to the merger may be lost beyond reconstruction. The FTC may thereby be prevented from framing


46. FTC v. International Paper Co., 241 F.2d 372 (2d Cir. 1956) (per curiam); cf., In re Chappell, 201 F.2d 343 (1st Cir. 1953); Avon Dairy Co. v. Eisaman, 69 F. Supp. 500 (N.D. Ohio 1946).


an effective order, and the circuit court deprived of the opportunity
to enforce such an order. On this ground, the Supreme Court in-
voked the All Writs Act.

That the All Writs Act might be used to confer this power on
the FTC was not a novel idea when the Supreme Court adopted it.
In the only two cases close to being on point with *Dean Foods*, the
Second and Ninth Circuits differed on the question of whether they
were authorized under the All Writs Act to grant temporary injunctions pending the outcome of administrative hearings examining the legality of a proposed merger. In *Board of Governors v. Trans-
america Corp.*,49 the Ninth Circuit issued a preliminary injunction preventing the respondent corporation from acquiring the assets of certain banks until the administrative agency could determine whether the acquisition violated section 7 of the Clayton Act. Since
the agency was without any statutory authority to protect its own jurisdiction, the court reasoned that it (the court) had authority under the All Writs Act to issue an injunction pendente lite in order to “prevent frustration of the ultimate exercise of its jurisdiction even before an appealable or reviewable order has been entered . . . .”50 Six years later, the Second Circuit, in *FTC v. International
Paper Co.*,51 denied the FTC’s request for a preliminary injunction in a similar case. The court emphasized that it was improper to use the All Writs Act as a basis for granting the injunction because the “pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority . . . .”52 The Supreme Court in *Dean Foods*, clearly re-
jected the Second Circuit’s position on this question.

III. THE IMPLICATIONS OF DEAN FOODS

The Supreme Court’s conclusion that logic and policy support giving the FTC a power which it needs to carry out the mandate of the Clayton Act loses some of its attractiveness under the weight of practical considerations which suggest that the courts of appeals may

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50. 184 F.2d at 315. The Ninth Circuit’s decisions in *Transamerica* and *Dean Foods* could easily have been distinguished on their facts, for in *Transamerica* the agency could not have ordered divestiture after the planned acquisition. The power to require divestiture of acquired assets as well as stock was not conferred upon the FTC until 1950. 15 U.S.C. § 21(b) (1964). Thus, in *Transamerica* the merger would have absolutely defeated the jurisdiction of the agency. This was not the case in *Dean Foods*; in fact, the *Dean Foods* case was closer to *International Paper* which dealt with acquired stock. See note 51 infra.

51. 241 F.2d 372 (2d Cir. 1956).

52. Id. at 373.
be an unsuitable forum for hearing these petitions for preliminary relief. It is submitted that only if close limits are imposed upon the FTC's use of this power, which is at present ill defined, will it prove useful in effectuating the purposes of the Clayton Act. The third part of this Comment will discuss some of the implications and difficulties which follow from the Dean Foods decision, and will explain why and how the decision should be limited.

A. Standards

The availability of preliminary and final relief for violations of section 7 are closely related. As noted earlier, unless companies are temporarily prevented from merging pending FTC adjudication of the legality of the merger arrangement, fully effective final relief by divestiture may prove impossible. However, since mergers are a commonplace business phenomenon, if clear and reliable criteria are not established for determining what acquisitions should be preliminarily enjoined, many mergers will be "subjected to paralyzing uncertainties for years, to the detriment of effective planning and vigorous exploitation of the possibilities of the merged company." Moreover, it is inevitable that the strictness of the test adopted will have a great effect upon the number of petitions for injunctions brought before the courts of appeals, and ultimately upon the effectiveness of enforcement of section 7 by the FTC. Thus, one very important question raised by Dean Foods is what standard should the courts of appeals apply in ruling on FTC requests for preliminary injunctions.

The most natural, and seemingly simple, approach to this problem would be to adopt the same procedural standard employed by the district courts in reviewing Justice Department petitions for temporary injunctions. Presumably, this is the same standard that the courts would apply to petitions by private individuals. How-


55. Private parties have obtained injunctions barring violations of §7 of the Clayton Act, but the cases have typically involved situations wherein one corporation attempts to prevent another from purchasing its stock on the market, or to prevent it from voting such stock. See, e.g., Muskegon Piston Ring Co. v. Gulf & Western Industries, Inc., 328 F.2d 830 (6th Cir. 1964); Crane Co. v. Briggs Mfg. Co., 280 F.2d 747 (6th Cir. 1960); Ramsburg v. American Inv. Co., 231 F.2d 333 (7th Cir. 1956).
ever, the various district courts in passing on Justice Department petitions for injunctive relief have not adopted any uniform standard. Some courts grant preliminary relief if the petitioner raises "serious and substantial questions" about the merits of the merger; others apply a stricter test and require a showing that it is *reasonably probable* that the petitioner will win on the merits in a full trial; still others demand that the petitioner demonstrate a *clear probability* of final success.

In practice, which one of these possible standards is ultimately adopted may not prove too significant. The Supreme Court's recent decision in *United States v. Von's Grocery Co.*, so expands the potential substantive coverage of section 7 that virtually any horizontal merger which the FTC chooses to attack may require preliminary restraint under all of the tests suggested above. In *Von's Grocery*, the Supreme Court found that a merger between two local retailers whose total grocery sales comprised 7.5% of the total dollars of retail sales in the relevant market violated section 7 of the Clayton Act, primarily because the merger occurred in a market which was undergoing a threatening trend toward concentration. When the Seventh Circuit heard the *Dean Foods* case on remand, the FTC, basing its position on the *Von's Grocery* decision, argued as follows: (1) where there is a trend toward fewer and fewer dairies and a merger occurs between two leading companies, a presumption arises that the effect of the merger will be substantially to lessen competition; and (2) such a showing constitutes sufficient grounds for issuing a preliminary injunction.

The Seventh Circuit agreed with the FTC that, in the light of *Von's Grocery*, it was reasonably probable that the FTC would find the merger in violation of section 7, and it found that this was

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60. It is noteworthy that the dairy industry has been described as the "most merger-prone industry." STAFF OF HOUSE SELECT COMM. ON SMALL BUSINESS, 87th CONG., 2d SESS., REPORT ON MERGERS AND SUPERCONCENTRATION 26 (Comm. Print. 1962). The size of the two dairies contemplating merger in *Dean Foods* is discussed at note 14 supra.

61. 347 F.2d 745, 751-52 (7th Cir. 1965). As a result of the merger, Dean Dairy Co. would have controlled about 23% of the packaged milk market. This percentage, coupled with the concentration of the industry and the relevant market in the Chicago area, indicate that the merger might well have violated § 7 of the Clayton Act. Papers, note 14 supra. Dean Foods Co., however, has consistently urged that the reselling of Bowman's home delivery business to smaller dairies following the acquisi-
enough to warrant granting the requested relief. This reliance on *Von's Grocery* indicates that in granting preliminary relief the court used a different substantive standard than that which the Supreme Court had previously laid down in *United States v. Philadelphia National Bank*. There, in ruling on a Department of Justice suit for injunctive relief, the Court had stated:

A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.

The Seventh Circuit's rejection of this standard in favor of the one applied in *Von's Grocery* reflects a trend in section 7 litigation; the courts are now demanding less and less proof of concentration or anti-competitive effect before proscribing mergers under section 7. As a result of this development, it may well become a moot question whether the FTC need show a "serious and substantial" question, or a reasonable probability of a violation, or a clear probability of final success.

To determine whether or not *Von's Grocery* is precedent for finding a violation in the context of the *Dean Foods* merger would involve a complicated analysis of the facts of the *Von's Grocery* case and speculation as to what the Court intended the breadth of its holding in *Von's* to be. This is beyond the scope of this Comment. Still, regardless of the substantive standard applied, the Seventh Circuit's order granting temporary relief presents a problem as to the procedural standard to apply. The court framed the preliminary injunction issue not in terms of finding a reasonable probability that the FTC would ultimately win on the merits, but rather of finding a reasonable probability that the FTC would find a violation.


64. Id. at 363.
66. See note 61 supra.
At first glance, the very fact that the FTC is seeking the injunction would appear to satisfy this test. In fact, one member of the FTC, in dissenting from the holding that the Dean-Bowman merger was illegal, vigorously maintained that some of the FTC's remarks before the court of appeals during argument on the petition for temporary relief impaired the integrity of the FTC's adjudicatory function and thereby rendered it an unsuitable forum for a later hearing on the merits.67

This problem of FTC prejudice which is raised by the Seventh Circuit's test is one which Congress attempted to meet in the Administrative Procedure Act by protecting the adjudicative function of agencies from prosecutorial contamination.68 The courts, too, have demonstrated concern when the functions of investigator, prosecutor, and adjudicator are rolled into one.69 However, since these functions are in practice performed by different divisions within the FTC,70 it is submitted that this allocation effectuates such internal separation of duties that the danger of prejudice is kept to a minimum.71

67. See note 25 supra. The “appearance of justice” standard which the FTC is required to maintain may be violated if its actions border on prosecution. See Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964); American Cyanamid Co. v. FTC, 1966 Trade Cas. ¶ 71,807 (6th Cir. 1966). See also Motion and Supporting Memorandum of Respondent Dean Foods Co. for An Order Dismissing The Appeal [to the Full Federal Trade Commission] and Allowing The Initial Decision to Become the Decision of the Commission, FTC Doc. No. 8674, at 10 (1966).


70. See organization chart of the FTC, 3 TRADE REG. REP. ¶ 16,039, at 9556.


The Commission has a separate office of hearing examiners whose members are involved in neither the investigating nor prosecuting activities of the Commission. It is their duty to conduct “fair and impartial” hearings on the merits of a case. Under the Commission’s rules of procedure, a party to an FTC action may file a motion seeking removal of an examiner believed to be biased. There has apparently been no procedure yet established for exercising the Commission’s new power to seek preliminary relief. Under the Commission’s present organization, the most logical office to file a petition for preliminary relief would be the office of the General Counsel. This office presently defends the Commission’s decisions in the courts of appeals. If the FTC’s new power is administered in this way, there should at least be no personal involvement on the part of the hearing officers in a petition for a temporary injunction brought before the court of appeals. In any event, it should be no more difficult for the Commission to make an objective decision after a preliminary injunction has been granted than it is for a district court to do so.

In this regard it is interesting to compare the procedures of the NLRB, which has statutory power to seek preliminary relief under § 10(j) of the National Labor Relations Act. The Board, in turn, has delegated this responsibility to the agency’s regional directors. 29 C.F.R. § 101.37 (1967). They, however, are under the direct supervision of the agency’s general counsel [29 U.S.C. § 153(d) (1966)], and thus for practical purposes the delegation is to the general counsel. This delegation of § 10(j) powers was upheld in Evans v. International Typographical Union, 76 F. Supp. 881 (S.D. Ind. 1948). It is suggested that this more explicit differentiation of functions, which has proven highly advantageous in the NLRB context, might well be copied by the FTC. The FTC could
A further problem is evidenced by the proceedings before the Seventh Circuit. Although the court verbalized a test based on the reasonable probability that the FTC would find a violation, it appears that it did not give serious attention to the facts upon which the FTC would have to rely in order to make such a finding. Indeed, it appears that the Seventh Circuit believed that it was under a mandate from the Supreme Court to enter the injunction, regardless of the merits. The court, on remand, examined no evidence other than the affidavits and summaries of factual evidence which were submitted by the parties to the proceeding; it did not even consider a summary of the record of the FTC hearing, which by chance happened to be completed prior to the proceedings in the court,72 when that record was made available to it. Given the factual complexity of merger litigation, the time pressures of a busy court calendar, and the court's lack of experience in holding original hearings for injunctive relief, this failure thoroughly to investigate the facts may not be surprising, but the Seventh Circuit's experience indicates that the courts of appeals would have trouble applying even a uniform standard in a consistent fashion.

It is submitted that the Supreme Court's reliance on the All Writs Act, and its emphasis on the fact that consummated mergers often prevent the subsequent entry of effective orders, require that all FTC requests for injunctive relief should be carefully assessed against the strict standard that the injunction be "reasonably necessary" or "urgently necessary" to preserve the divestiture remedy.73 More particularly, it is recommended that the courts of appeals impose the following requirements on the FTC in temporary injunction cases: (1) the petition should be filed immediately upon notice of the proposed merger;74 (2) the FTC should present evidence that it had no reason to believe that the proposed merger was lawful when the petition was filed; and (3) the court should require the FTC to prove that the divestiture remedy was not unreasonably delayed.

expressly delegate responsibility for seeking preliminary relief to its General Counsel, and, although such delegation would only confirm the natural FTC practice, such a straightforward recognition and solution of the prejudice problem would seem advantageous.

Another possible way of separating the FTC's adjudicatory function from its investigatory and prosecutory functions would be through the creation of a trade court. The tax courts provide an obvious precedent. See Kintner, The Trade Court, The ABA, the Lawyer and the Public Interest, ABA ANTITRUST SECTION PROCEEDINGS 72 (1957); Berger, Removal of Judicial Functions From Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner, 59 MICH. L. REV. 199 (1960).

72. The fact that the hearing before the examiner had been completed before the court of appeals considered the petition for the preliminary injunction was fortuitous. That the court refused to consider the record of that hearing, and instead requested the parties to submit their own factual summaries, may indicate a refusal to undertake a thoroughgoing factual investigation, and without such an investigation, the proper application of standards is impossible.

73. See notes 105-10, & 113 infra and accompanying text.

74. In Dean Foods such petition was filed on December 30, 1965, seventeen days after the agreement to merge had been reached, and eight days after the FTC had filed its complaint against respondents. Cf. Fein v. Security Banknote Co., 1957 Trade
dence sufficient to demonstrate the likelihood both that the merger would violate section 7 of the Clayton Act, and that consummation of the merger would present a real obstacle to divestiture, if that remedy proved necessary; and (3) the FTC should show that irreparable harm to the public interest would result if the merger were not halted pendente lite. Even if these recommendations were to be accepted, there remains to be considered the host of procedural difficulties which result from having courts of appeals sit as trial courts.

B. Procedure

The greatest and most obvious difficulty arising from the Supreme Court's ruling in Dean Foods is that the decision places a court of appeals in a position where it must sit as a court of original jurisdiction and, perhaps, engage in complex fact-finding determinations—a task for which it has neither the "facilities nor the institutional aptitude." Unless it is true that the substantive test to be applied in merger cases is now so broad that virtually any horizontal merger violates section 7, preliminary hearings for injunctive relief can be expected to assume "all the essentials of a trial on the merits," since the court will have to determine the probable competitive effects of a merger which will require making an extended factual examination of the relevant product and geographical markets. The courts of appeals should not perform this function on

Cas. ¶ 68,858 (S.D.N.Y.) (preliminary injunctive relief to prevent commingling of assets denied where directors did not act promptly after learning of the intended acquisition, but stood by while the acquisition was completed).

75. Ordinarily, both elements of a government suit—probable injury to competition and the likelihood of ineffective divestiture—will have to be shown before a temporary injunction will issue. E.g., United States v. Continental Can Co., 1956 Trade Cas. ¶ 68,479 (S.D.N.Y.).

76. Cf. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Note, 79 HARV. L. REV. 391, 393 (1965); see notes 10 & 41 supra.

77. 384 U.S. at 630.

78. See text accompanying note 65 supra.


80. It is frequently said that a definitive resolution of inquiries into "probable competitive effect," "line of commerce" and "section of the country" lies particularly with the office of the FTC. See, e.g., Elman, supra note 54, at 624:

[T]o determine the probable competitive effects of a merger is very often not possible without an extended factual inquiry.

Before a merger's legal status can be determined, it is necessary to understand the market and industry setting of the merger. This requires an economic study.

The Commission's staff of economists and statisticians, with the aid of compulsory process, where necessary, should be able to conduct such studies; and a staff economic study and report would normally be the first step in the fact-finding process

the basis of affidavits alone. A summary judgment may be permissible when application is made for a stay pending appeal from a district court ruling after the district court has already heard evidence at a full trial,81 but to allow courts to enter preliminary injunctions for violations of section 7 on only the basis of affidavits would seemingly invite "justice which is rough and ready, to say the least."82 Moreover, not only should parties be allowed to present evidence at hearings on preliminary injunctions, but experience shows that in its applications for preliminary relief the Department of Justice has tended to present all the evidence then available to it.83 Obviously, requiring an appellate court to engage in such a complete factual examination raises a number of problems. Therefore, courts of appeals acquired jurisdiction in section 7 cases only to review a certified transcript of completed FTC proceedings.84 And, this review was limited, since FTC orders could only be overturned if not supported by substantial evidence. In disposing of requests for preliminary relief, the courts will usually have no record,85 and whatever standard is applied the question they face should require a closer analysis of the evidence than is necessary in deciding whether or not there is substantial evidence to support the FTC's result. Moreover, further problems arise because the federal appellate courts lack any statute or rules governing venue, service

81. While applications to a court of appeals for a stay pending appeal from a ruling by a district court may result in the resolution of factual issues on the presentation of affidavits [Dunn v. Retail Clerks Int'l Ass'n., 299 F.2d 873, 874 (6th Cir. 1962)], the district court is generally required to hear the evidence in the actual application for temporary relief. See 7 J. Moore, Federal Practice § 65.04, at 1638-39:

On the hearing for the [preliminary] injunction an adequate presentation of the facts is necessary... The court should normally be reluctant to decide controverted issues in favor of the movant on the basis of affidavits alone. For examples of the extensive presentation of evidence which frequently occurs, see United States v. Penick & Ford, Ltd., 242 F. Supp. 518 (D.N.J. 1965) (6 witnesses called by Government to testify on alleged impact of reciprocity in the starch industry); United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 329 F.2d 569 (3d Cir. 1964) (5 day hearing); United States v. Pennzoil Co., 1966 Trade Cas. ¶ 71,659 (W.D. Pa. 1965) (6 day hearing). See also Note, 79 Harv. L. Rev. 391, 400 (1965). Where factual antitrust issues have been presented, however, summary judgment has been held inappropriate in many cases. See, e.g., United States v. Diebold, Inc., 369 U.S. 654 (1962).


84. 15 U.S.C. § 21 (1964). See FTC v. International Paper Co., 241 F.2d 372, 373 (2d Cir. 1966); cf. FTC v. Metropolitan Edison Co., 304 U.S. 375 (1938); In re NLRB, 304 U.S. 486 (1938). It is also worth noting that 15 U.S.C. § 21(c) (1964) expressly provides that the court of appeals "shall have power... to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

85. In Dean Foods, although a record was available, the court failed to give it consideration. See note 72 supra.
of process, subpoena power,\textsuperscript{86} discovery power, or admissibility of evidence.\textsuperscript{87} These procedural shortcomings were summarily noted by Justice Fortas in his dissent in \textit{Dean Foods},\textsuperscript{88} and the Seventh Circuit's confusion on remand demonstrated the correctness of his views.

One way that courts of appeals may be expected to try to avoid being swamped by the factual complexity of section 7 cases is to refer the fact-finding duties to a master or referee,\textsuperscript{89} or perhaps even to the FTC itself as a special referee, since the FTC is supposedly expert in merger problems. If reference to the FTC should become the standard practice, it would make sense for the FTC to conduct its fact-finding hearings \textit{before} it files its request for a preliminary injunction with the circuit court. Under this procedure, if the FTC


\textsuperscript{87} The problem of adopting appropriate rules of evidence in hearings for preliminary relief from alleged violations of § 7 merits special consideration. Generally, rules of admissibility appear to be more relaxed in administrative proceedings than in judicial proceedings. The FTC standard is that "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded." 16 C.F.R. § 3.14 (1967). If the court of appeals is trying to determine whether it is "reasonably probable" that the FTC will find a violation (as the Seventh Circuit envisioned its role), it would seem that the court should consider whatever evidence the FTC would subsequently consider; it should not limit itself by the more stringent judicial rules, for only by considering the same evidence as the FTC will subsequently admit can a court make a sound judgment as to what action the FTC is likely to take. Even if the court of appeals is trying to decide whether the requested relief is reasonably, or urgently, necessary (as recommended by this Comment), it would seem that the rules of evidence governing the preliminary proceeding in the court of appeals should still be those which will govern the subsequent FTC hearing for otherwise the court might find itself excluding evidence upon which the FTC would later rely in finding a violation necessitating remedial action.

It may be, however, that the question raised in this footnote is moot, for it has been said that FTC hearing examiners "give very stringent effect to the rules which govern non-jury cases in the federal courts." If this is true, it would make no difference whether the court is nominally applying judicial or agency rules, and it would seem that the FTC might well revise its regulations to conform with its actual practice. \textit{Compare} the regulations governing evidence in NLRB hearings: "Any proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the rules of civil procedure . . . ." 29 C.F.R. § 102.39 (1967).

\textsuperscript{88} 384 U.S. at 634-35.

\textsuperscript{89} This ploy is open to the objection that in so doing the courts of appeals would be abdicating their judicial function and thus depriving the parties of their right to trial before a court. See \textit{La Buy} v. Howes Leather Co., 352 U.S. 249 (1956), where the Supreme Court upheld a circuit court writ of mandamus requiring a district court judge to vacate orders referring an antitrust matter to a master. The \textit{La Buy} case, however, is arguably distinguishable from the \textit{Dean Foods} situation in that \textit{La Buy} involved a master making findings on the merits of a case, not simply on the question of preliminary relief.
files its findings of fact along with its request for preliminary relief, the court of appeals can grant or deny a preliminary injunction without further factual hearings. Such a procedure is not entirely without precedent, for in a somewhat analogous context—the enforcement of cease and desist orders prior to 1959 under section 11 of the Clayton Act—90—the FTC was allowed to conduct hearings on order violations before seeking judicial enforcement. 91 While the hearings in the cease and desist order cases have been criticized as unduly long and cumbersome, 92 part of the explanation for their duration and complexity is that the FTC conducted adjudicatory hearings, although the Administrative Procedure Act provides that such formal hearings are not required in "cases in which an agency acts as an agent for a court." 93 Since in the section 7 context the FTC would be acting as the court's agent if appointed master, and would presumably be interested in an expeditious handling of the preliminary matter so that it could proceed to the merits of the merger as quickly as possible, the problem of delay might be avoided. However, it is suggested that the FTC's findings in the preliminary hearings may well be reflected in its conclusion on the ultimate legality of the merger, and if this is the case, the defendant corporations, despite the Administrative Procedure Act, should be entitled to the more elaborate processes connected with adjudicatory hearings.

If the courts of appeals do adopt the practice of using the FTC as a master to avoid burdensome fact-finding chores, and if the FTC holds pre-filing hearings on the injunction issue as would seem likely, then it appears that when the FTC finds facts which merit filing a request for a preliminary injunction, FTC victory will be virtually assured in a court of appeals. This being true, it would seem that the entire responsibility for issuing the injunction might as well have been vested in the FTC from the outset. This prospect, of course, magnifies the threat of agency prejudice discussed earlier. 94 After it has completed an adjudicatory hearing as master and de-

91. FTC v. Standard Brands, Inc., 189 F.2d 510 (2d Cir. 1951). It should be noted that in this context there is little danger that the FTC's ruling on the order violation will prejudice its performance of subsequent responsibilities. Compare note 94 infra and accompanying text.
92. Kauper, supra note 90.
94. See notes 67-71 supra and accompanying text. The possible prejudice problem here is substantially greater than that discussed earlier. The danger of combining prosecutorial and adjudicatory functions can be dissipated by internal separation of functions. Here, however, we are combining two different adjudicatory tasks in the FTC, and although different hearing examiners might be used, if an examiner's decision that the facts warranted a petition for preliminary relief were appealed to the Commissioners, they would have to draw conclusions as to the probability of a violation, thus influencing their later adjudication of the merger on its merits.
cided that the facts warrant a preliminary injunction, the FTC can hardly be expected to move to another hearing on the merits of the merger with a fully open mind. It is possible to contend that the possibility of prejudice here is really no greater than when courts which have made a prejudgment on adjudicatory facts are allowed to hear a case a second time on remand. Still, despite the advantage of making use of the FTC's expertise, the possibility of prejudice together with the possibility of cumbersome proceedings should bar the courts of appeals from turning to the FTC as a master in their attempt to avoid fact-finding duties. The use of other, impartial masters or referees, however, seems sensible.

One alternative to the use of a master is, of course, to have the FTC bring its action for a preliminary injunction in a district court. However, it is doubtful whether the FTC can do so without express statutory authorization. To the extent that Dean Foods rests on the All Writs Act, it is no authority for the proposition that the action may be brought in a district court, since no threat to a district court's jurisdiction is involved if preliminary relief is unavailable. Yet, Dean Foods does reflect a liberal attitude toward allowing the FTC powers that have not been specifically granted, and it is conceivable that the Court might admit that the FTC does have standing to seek preliminary relief in a district court. This result would not only reduce the workload of the courts of appeals, but would send the proceeding to a tribunal which is more familiar with the fact-finding function than are the appellate courts. It should be noted that even the district courts might have some difficulty with this action since even they might find it necessary to apply unfamiliar FTC rules of evidence.

If the appellate courts do prove to be the forum to which the FTC resorts when it wants preliminary injunctions—and, given the ease with which the FTC finally obtained the injunction from the Seventh Circuit and the doubt which beclouds its right of access to the district courts, this would seem the likely result—then the courts of appeals are placed in a position in which they must serve as appellate bodies in cases which they have already heard at the trial level. After they have heard and weighed evidence relevant to the merits of a case while ruling on the petition for preliminary relief, if the FTC then finds a violation and issues a cease and desist order, the courts of appeals will have to consider any appeal from that order.

It is possible that two different courts of appeals might handle


97. See note 87 supra.
such a case—one deciding the preliminary injunction issue and the other the appeal from the FTC’s order. Indeed, after one court of appeals has ruled adversely to a defendant on the preliminary matter, it would seem likely that the defendant would try to have the appeal on the merits litigated before another circuit, provided this was feasible.98 This possibility raises a question as to the effect to be given to the findings of the first court in the later proceeding. It can be said that the virtues of administrative convenience, finality, and consistency argue for giving binding effect to the prior findings, and that the “law of the case” doctrine99 should be used to make the findings of the first court of appeals binding upon its fellow circuit court. However, this position is easily criticized. First, it may be said that different issues are involved in the two proceedings, since the first hearing only requires the court to investigate the probability of a violation or irreparable harm, whereas the second requires the court to find substantial evidence supporting the FTC’s finding of a violation. If this point is valid, “law of the case” cannot be invoked since it applies only to matters previously decided.100 However, although the issue broadly framed may be different in the two proceedings, some of the same questions are likely to be in dispute in both, and to these at least the “law of the case” might arguably apply. Second, the doctrine has never prevented a court from switching its own position on a given matter;101 if the same court can so change its mind, it is hard to see why a second equal and coordinate court should be denied the right to do so. Finally, the fact-finding role played by the court of appeals which hears the petition for preliminary relief may justify viewing that court not as an appellate court, but rather as a de facto district court. If so, it is arguable that its findings should be treated as those of an inferior court, and the doctrine of “law of the case” would then be inapplicable. Thus, the better view would seem to be that the findings made by one court of appeals on the preliminary matter should not be binding when the

98. This possibility is recognized by Justice Fortas who points out that § 11(c) of the Clayton Act, 15 U.S.C. § 21(c) (1964), provides that appeal from an FTC order may be “in the court of appeals . . . for any circuit within which such violation occurred or within which such person resides or carries on business.” In Dean Foods, review of the final FTC order might have been sought not in the Seventh Circuit, but rather in the Sixth or Eighth Circuits, where Dean and Bowman carried on business. 384 U.S. 597, 624 n.12 (1966) (Fortas, J., dissenting).

99. Basically, the doctrine is that when a federal court enunciates a rule of law, it establishes that law which other courts owing obedience to it must, and which it itself normally will, apply to the same issues in subsequent proceedings in that case. See generally 1b J. MOORE, FEDERAL PRACTICE ¶ 0.404 (2d ed. 1965).

100. See, e.g., Electric Research Prods. v. Gross, 120 F.2d 301 (9th Cir. 1941); 1b J. MOORE, FEDERAL PRACTICE ¶ 0.464(1) n.14 (2d ed. 1965).

101. The power to re-examine questions previously determined is exercised sparingly, but when a court decides that justice so requires, it may in its discretion reopen such questions. See, e.g., Messenger v. Anderson, 225 U.S. 436 (1912); United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946).
FTC findings on the merits of the merger are reviewed in another court of appeals.

In some cases the same court of appeals will hear both the request for the preliminary injunction and the appeal from the FTC's finding of a section 7 violation. While in this situation there is no legal obstacle to the court's changing its mind, the situation does once again raise a possible prejudice problem. It is questionable whether, after hearing the evidence and argument on the preliminary injunction issue, a court will still be able to rule fairly on the question raised on appeal of whether the FTC's finding of a violation was supported by substantial evidence. This possible source of bias seems less than an overwhelming objection to having courts of appeals hear requests for preliminary relief, for it would seem simple enough for them to assure impartiality by using a different panel of judges in the second proceeding. In addition, if the courts of appeals all grant preliminary relief almost as a matter of course, as did the Seventh Circuit in Dean Foods, then they will hardly have looked at the evidence in the original proceeding, and their minds should be quite open when they actually examine the sufficiency of the evidence on appeal. Finally, since it can be contended that the court is faced with two different issues in the two proceedings, it may be said that its conclusion on the first need not, in fact, prejudice it on the second. It is suggested, however, that the latter two arguments are not altogether convincing, and that if the same court of appeals does hear both matters then a fresh panel should be used in the second proceeding.

C. Orders

The difficulties raised by the Dean Foods decision do not end with the problems of enunciating a proper standard for granting preliminary relief and establishing a proper procedure. The case also leaves considerable confusion as to what the terms of a preliminary order should be. A comparison of the majority and dissenting opinions in Dean Foods indicates two different, though not mutually exclusive, views as to the real purpose sought to be achieved by granting preliminary relief in a section 7 case. Justice Fortas' dissent suggests that a court of appeals' main concern should be

102. Cf. note 99 supra.
103. See note 72 supra and accompanying text.
104. See text at note 100 supra.
105. The Department of Justice's frequent use of preliminary relief reflects a diversity of orders ranging from temporary injunctions which flatly enjoin an acquisition to injunctions imposing a number of conditions designed to maintain the separation and identity of the merging companies. E.g., compare United States v. Greater Buffalo Press, Inc., 1962 Trade Cas. ¶ 70,380 (W.D.N.Y), with United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68,244 (E.D. Mo. 1956).
with preventing the detrimental effects on the economy which result from mergers which "tend substantially to lessen competition or create danger of monopoly." The logical consequence of such a position is that the only truly effective preliminary injunction is one which absolutely prevents the companies from operating together until there has been a factual determination that the merger is legal. On the other hand, if the predominant concern in granting preliminary relief is, as Justice Clark speaking for the majority indicated, with giving the FTC the opportunity to enter an effective order of divestiture, and thus with giving the courts the opportunity to enforce such an order, then a court need not at this preliminary stage bar joint operation entirely. Instead, it can allow joint operation to the extent that it will not interfere with a later order of divestiture.

The majority opinion offers no specific guidance as to how a court may condition or limit its order so that its interference with normal business activity will be kept to a minimum, and thus it leaves open several questions. First, should the proposed mergers be allowed to operate together during the FTC proceedings, and, if so, to what extent? Certainly, if joint operation is not allowed, companies who are not in fact in violation of section 7 are inevitably penalized by the order, for they must either remain in a state of limbo until the FTC rules on the legality of the proposed merger, or spend time and effort seeking other ways to accomplish the legitimate ends of the merger. Second, how should the order be framed to minimize the dissipation of the mergers' capital and personnel arrangements, and prevent the companies from being so weakened that they are unable to proceed with the merger when the FTC finally reaches a determination favorable to them? Third, can or should the acquired company be forced to operate as a separate division or a wholly owned subsidiary of the acquiring company, pending the FTC adjudication?

In Dean Foods, the Seventh Circuit order read in part as follows:

[D]uring the period of four months from the date of this order . . . [Dean and Bowman] are enjoined from making any material changes, directly or indirectly, with respect to the assets purchased by Dean from Bowman pursuant to their agreement . . . including the operation and policies affecting those assets . . . pending entry of a final order.

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107. See 384 U.S. at 605-06.
108. See note 111 infra.
It is clear that this order adopted the conceptual framework apparently endorsed by the Supreme Court majority in *Dean Foods*. However, the possibility remains that another court of appeals may think that the real purpose of a preliminary injunction is to prevent all immediate effects of what may prove to be an improper merger, and not to preserve the effectiveness of the divestiture remedy. This position would probably lead to an order less accommodating to the mergants than that entered by the Seventh Circuit. Nevertheless, under either view it is fair to say that businessmen involved in mergers may find it difficult to operate when their carefully gauged plans can be at least temporarily thwarted, and perhaps wholly altered, before the legality of the proposed arrangement is finally determined. Thus, whichever theory is followed, the courts should limit the duration of any injunction that they order so that there will be pressure on the FTC to decide on the merits as quickly as possible; in this way, some protection may be extended to mergants who may not be found to have violated section 7 and who are entitled to proceed with their plans with a minimum of delay. The

110. See note 76 supra. Despite the sale of Bowman home delivery routes authorized by the Supreme Court's temporary stay, see note 19 supra, as well as by the preliminary injunction, the losses incurred by Bowman's former operations during the first two quarters of 1966 were $278,566 and $845,905 respectively. Motion for modification of Seventh Circuit's preliminary injunction order (July 18, 1966).

In other situations involving government control of business activity, particularly the regulation of stock ownership, it has been demonstrated that when courts attempt to protect the status quo pending final determination on the merits, they are likely to issue orders which themselves alter the status quo. See Daly, *Current Trends in Relief Under the Clayton Act*, 70 Dick. L. Rev. 1, 14-17 (1965).

111. Temporary relief may substantially alter the normal incidents of stock ownership as well as regulate the enjoined corporation's day-to-day business activity. See Daly, supra note 110. In fact, the mere grant of a temporary injunction in actions brought by the Government has frequently occasioned the abandonment of the planned merger. See, e.g., United States v. Ingersoll-Rand Co., 218 F. Supp. 530 (W.D. Pa. 1963), aff'd, 320 F.2d 509 (3d Cir. 1963); United States v. Pennzoil Co., 1966 Trade Cas. ¶ 81,958 (W.D. Pa. 1965); United States v. Parents Magazine Enterprises, Inc., 1966 Trade Cas. ¶ 76,737 (N.D. Ill. 1965). Compare, e.g., United States v. Gimbel Brothers, Inc., 202 F. Supp. 779 (E.D. Wis. 1962) (preliminary injunction denied—government voluntarily drops case). This is due in large part to the fear that the changes wrought by such an injunction will affect the corporate structures involved as to necessitate abandonment of the planned merger, despite the probability that the merger would ultimately be found legal. This apprehension accounts in part for Justice Fortas' great concern that a full consideration on the merits will result in lengthy proceedings and delays while the FTC "wends its leisurely way toward a wearying conclusion." 384 U.S. at 632.

For example, upon the conclusion of the trial examiner's hearing and within such time as the hearing examiner may prescribe, the parties are required to file their proposed findings and conclusions of law (FTC REG. 3:46); the hearing examiner then has ninety days in which to file his initial decision (FTC REG. 3:51); notice of intention to appeal such decision is due ten days thereafter; the appellate brief is due thirty days after the initial decision; and the answering brief must be filed within thirty days following receipt of the appellate brief (FTC REG. 3:52). Thereafter, the FTC docket the case for review, the filing of additional briefs being at the FTC's discretion (FTC REG. 3:53). Thus, an indefinite period of time may elapse before FTC action.
courts should try to force the FTC to complete its hearings before the time when effective consummation of the merger could no longer take place, but if this time cannot be determined, then they should simply require that the FTC issue its final order within a reasonable period of time.112

D. Extensions

Professor Llewellyn once said that a case "may at the will of the court stand either for the narrowest point to which its holding may be reduced, or for the widest formulation that its ratio decidendi will allow."113 An interesting, but disturbing, aspect of Dean Foods

Moreover, the examples cited by Justice Fortas at 384 U.S. 597, 631-32 n.17 (1965) and accompanying text would seem to indicate that he believes that it will be impossible to impose any effective time limitation upon the FTC's consideration of a case. The Seventh Circuit's order, however, would appear to accomplish such a result by limiting the period of injunction to four months. It may be argued that the accelerating device used by the Seventh Circuit on remand and approved by this Comment, that is, imposing a time limit on the length of a preliminary injunction, forces the FTC to abrogate its own procedures and is therefore an unwarranted order. The success of this argument seems doubtful, however, since the grant of temporary relief is an extraordinary and discretionary remedy in the first place.

One of the difficulties of accelerated proceedings is highlighted by the FTC's contention on appeal to the Commissioners in the Dean Foods litigation. Prompted by a desire to have an ultimate determination before expiration of the four-month injunction, the Commissioners ordered the hearing examiner to file his initial decision within sixty days of the close of evidence, thus giving the examiner only fifteen days after the submission of the parties' initial and reply findings in which to prepare his decision. On appeal from the examiner's decision, the FTC argued that the examiner's dismissal of the complaint should be rejected since it "virtually adopted in haec verba respondent Dean's proposed findings of fact" and therefore reflected "an absence of an independently reasoned analysis of the facts." Brief of Petitioner Before the Federal Trade Commission, at 4-5. Whether or not the contention was true, the argument raises a danger inherent in upsetting and accelerating the normal FTC procedures.

Securing a prompt FTC ruling is not a total solution for following their decision, a petition for reconsideration may be filed within twenty days, the prevailing party having an additional ten days in which to answer such request (FTC REG. 3.55). Bar­rering reconsideration, however, court of appeals review is commenced by the filing of a petition within sixty days after service of the FTC's order. 15 U.S.C. § 21(c) (1964). In the Seventh Circuit, at least, forty days are then allowed for filing the transcript of the record [7th Cir. R. 14(g)]; appellant's brief must be filed within thirty days after the record is filed (7th Cir. R. 16); respondent's brief is due thirty days later; and a further fifteen-day period is provided for the filing of a reply brief (7th Cir. R. 16). No time limit is set for the filing of a decision by the court. Presumably, similar delays would accompany proceedings in other circuits. In addition, if review by the Supreme Court is sought, there will be a further lapse of time.

112. Then, upon an adequate showing of undue delay, the merging companies would be able to get a vacation of the injunction. This, in turn, would discourage delaying techniques on the part of the FTC. Note, 40 N.Y.U.L. Rev. 771, 784 (1965). In this regard it may be useful to compare the Clayton Act's direction to district courts with respect to Department of Justice proceedings to obtain preliminary relief. The courts are directed to "proceed, as soon as may be, to the hearing and determination of the case." 15 U.S.C. § 25 (1964). See generally note 11 supra and accompanying text.

113. LLEWELLYN, INTRODUCTION TO CASES ON SALES X (1930).
is that the decision leaves the door open for extending the preliminary injunctive power to other types of cases besides those potentially involving section 7 violations. If the FTC can proceed under the All Writs Act in section 7 cases, the question arises whether it will, or should, be allowed to obtain preliminary relief for other kinds of antitrust violations. The Supreme Court wrote in *Dean Foods* that “Congress has never restricted the power which the courts of appeals may exercise under . . . that [All Writs] Act,” and, in addition, the Court is apparently of the opinion that the FTC has all powers essential to its operation except those specifically denied to it. Nothing in the case explicitly limits the FTC’s authority to seek and obtain preliminary relief to section 7 cases; thus, the FTC may well have the power to seek preliminary relief to enjoin violations of section 2 of the Robinson-Patman Act, section 3 of the Clayton Act, and section 5 of the FTC Act. Since the *Dean Foods* case itself involved an allegation of a violation of section 5 of the FTC Act, as well as the alleged section 7 violation, the argument that preliminary relief should be available for other types of violations of section 5 might seem particularly strong. It is submitted, however, that in *Dean Foods* the Court’s most fundamental concern was the need for preserving an effective remedy. Thus, the *Dean Foods* case should be interpreted to bar the FTC from seeking preliminary relief in cases in which a denial of such relief does not endanger the effectiveness of the final remedy, which is the situation in most types of cases dealing with alleged antitrust violations. On the other hand, it has been suggested that some violations, for example, advertising practices attacked as unfair under section 5 of the FTC Act, may cause irreparable harm to the public interest before the FTC can issue a final order. It is arguable, by reasoning parallel to that of Justice Fortas’ dissent in *Dean Foods*, that in such cases the FTC should have implied power to seek preliminary relief.

114. 384 U.S. at 608.
115. See note 37 supra.
117. An exclusive-dealing case offers a possible example. Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962): Congress not only indicated that the “tests of illegality under § 7] are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act,” but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act, 15 U.S.C. § 14, which had been interpreted by this court to require an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement.
120. For example, in price fixing or price discrimination cases, treble damages would seemingly provide injured parties with a fully adequate remedy.
121. In the case of false advertising of foods, drugs, and cosmetics the FTC would not have to resort to implied power. See note 119 supra.
It remains to be seen whether the FTC will exercise restraint and petition for preliminary relief only when it is necessary to maintain the effectiveness of the final order. Such restraint seems doubtful, however, since some of the Commissioners have indicated that they may try to obtain preliminary relief in Robinson-Patman cases,¹²² and since the FTC has long taken the position that it has broad equitable powers under section 11 of the Clayton Act.¹²³ Moreover, it is quite possible that other agencies may now attempt to assert implied powers to obtain preliminary relief under the All Writs Act. Finally, as noted earlier,¹²⁴ it is conceivable that the FTC, or other agencies following its lead, may attempt to obtain the right to issue preliminary orders on its own, without resort to either circuit or district courts.

IV. CONCLUSION

In sum, the FTC has been granted a power that, while perhaps founded on sound theoretical considerations, finds no conclusive support in express statutory language. Although it may be desirable to strengthen the remedial arsenal at the disposal of the FTC, the procedural difficulties involved in implementing the decision in Dean Foods, as well as the disruptive effects the decision may have on the business community, argue strongly for limiting its application. The courts should adopt a strict standard for assessing FTC requests for preliminary relief. Further, they should develop some flexible procedure for conducting hearings, perhaps referring complex fact-finding duties to impartial masters or referees.

Despite the criticisms that may be directed at Dean Foods, the Supreme Court's decision may have the salutary effect of eliminating the paralyzing delays that typically mark the FTC's consideration of merger cases. If the emphasis in ordering temporary relief is placed upon protecting the divestiture remedy, as the Court's opinion suggests that it should be, the courts of appeals will have considerable leeway in framing their orders and they can force the FTC to adjudicate the merits of a merger within a reasonable period of time. Only if this interpretation of Dean Foods is adopted will businessmen be able to carry on their plans for merger without complete frustration and uncertainty, for otherwise the FTC's ability to obtain preliminary relief will give it virtually unbridled power over the practical ability of companies to merge.

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¹²³. See, e.g., Fruehauf Trailer Co., 3 TRADE REG. REP. ¶ 17,292 (July 19, 1965); Ekco Products Co., 1965 TRADE REG. REP. ¶ 71,487 (FTC 1965); see note 42 supra.
¹²⁴. See note 94 supra and accompanying text.

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