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NOTES

FEDERAL COURTS—DISCOVERY—Stay of Discovery in Civil Court To Protect Proceedings in Concurrent Criminal Action—The Pattern of Remedies

The federal criminal discovery rules were a carefully weighed compromise between the parties' needs for information and the defendant's need for protection from inquisatorial investigation.[1] This balance may be upset when the more liberal discovery rules in a concurrent, related civil action permit information to be obtained which is not discoverable under the criminal rules.[2] Two recent cases, *United States v. Simon*[3] and *United States v. American Radiator & Standard Sanitary Corp.*,[4] illustrate the difficulty of protecting the integrity of the criminal discovery rules in such a situation.

The *Simon* decision arose as part of a criminal action in the United States Court for the Southern District of New York in which the defendants were charged with mail fraud and conspiracy to commit mail fraud[5] and to file a misleading corporate balance sheet report with the Securities and Exchange Commission.[6] Prior to their indictment, certain of the defendants to the criminal charges were named as defendants in a civil action in the United States Court for the Eastern District of New York brought by the trustee in reorganization of the corporation involved. The civil complaint alleged a conspiracy among some of the defendants to despoil the corporation of its assets and to conceal the despoliation by means of false reports and negligence on the part of other defendants in permitting the despoliation. After the deposition of one of the defendants in the civil action had been taken and discovery of a second defendant had begun, the criminal indictment, naming these two civil defendants among others, was filed. The defendants in the criminal action immediately requested the civil court to stay the taking of their depositions until the conclusion of the criminal trial. The application for the stay was rejected, and the Court of Appeals

1. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 87 (1961). *See also* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-99 (1960).

2. *See generally* Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277 (1967); *see* notes 13-23 *supra* and accompanying text for a comparison of the civil and criminal rules of procedure.

3. 373 F.2d 649 (2d Cir. 1967), *reversing* 262 F. Supp. 64 (S.D.N.Y. 1966), *cert. granted sub nom.* Simon v. Wharton, 386 U.S. 1030 (1967), *remanded with instructions to dismiss as moot*, 36 U.S.L.W. 3252 (U.S. Dec. 18, 1967).

4. 272 F. Supp. 691 (W.D. Pa.), *reversed*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,311 (3d Cir. 1967).

5. 18 U.S.C. § 1341 (1964).

6. 15 U.S.C. § 78ff (1964), 18 U.S.C. § 1001 (1964).

for the Second Circuit dismissed an appeal on the ground that the district court's decision was not a final judgment and thus was not a proper basis for an appeal.[7] The criminal defendants then asked the criminal court for an injunction to restrain the trustee from taking their depositions in the civil action until the conclusion of the criminal trial, arguing that a failure to grant the injunction would deprive them of a fair criminal trial. The injunction was granted by the criminal court[8] only to be reversed by the Court of Appeals for the Second Circuit.[9]

In *American Radiator*, the government brought a criminal action in the United States Court for the Western District of Pennsylvania, charging that several corporations and certain corporate officers had conspired to fix prices in violation of section 1 of the Sherman Act. During the pretrial stages of this criminal action, two civil class actions, seeking treble damages for defendants' alleged price-fixing, were filed against the corporate criminal defendants in the United States Court for the Eastern District of Pennsylvania. The corporate defendants applied to the civil court for a stay of all civil proceedings until the termination of criminal proceedings, but the application was denied.[10] The corporate and individual criminal defendants then requested the criminal court to enjoin the civil plaintiffs from using civil discovery procedures to require them to answer questions and produce documents and to enjoin the criminal defendants from responding to pleadings, interrogatories, or motions to produce documents in the civil case. The criminal court, while acknowledging the civil plaintiffs' right to prompt discovery, granted the injunction on the ground that the civil discovery might disclose information which would not be available through criminal discovery.[11] The Court of Appeals for the Third Circuit later reversed this decision.[12]

As the principal cases indicate, protections guaranteed to criminal defendants through the criminal discovery rules may be of little value if the prosecution can obtain the information it seeks by discovery in a concurrent civil proceeding. The Federal Rules of Criminal Procedure, which provide very limited discovery possibilities,[13] prevent the prosecution from taking depositions or interrogatories from the defendant. Depositions of witnesses may be taken only by the defendant and then solely for the purposes of preserving testi-

7. *See* 262 F. Supp. 64, 69 (S.D.N.Y. 1966); 28 U.S.C. §§ 1291, 1292 (1964).
8. 262 F. Supp. at 64.
9. 373 F.2d at 649.
10. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 269 F. Supp. 540 (E.D. Pa. 1967), *writ of mandamus denied*, (3d Cir. Jan. 8, 1968) (unreported), *appeal docketed*, 36 U.S.L.W. 3334 (U.S. Feb. 27, 1968) (No. 1069).
11. 272 F. Supp. at 691.
12. 5 TRADE REG. REP. (1967 Trade Cas.) at ¶ 72,311.
13. FED. R. CRIM. P. 15-17 (1966).

mony or obtaining statements of witnesses who would not be able to attend the trial.[14] Documents within the defendant's possession which he intends to produce at trial and which are material to the preparation of the government's case may be obtained by the prosecution under rule 16(c),[15] but only if the defendant has first requested discovery of the prosecution under rule 16(a) or (b).[16]

On the other hand, civil discovery in the federal courts operates with relatively few restrictions.[17] Depositions and interrogatories

14. *Id.* 15:

Rule 15. Depositions

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

15. *Id.* 16(c):

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

16. *Id.* 16(a) & (b):

Rule 16. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by goverment witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

17. FED. R. CIV. P. 26-37 (1967).

may be served upon any person, including a party to the action, and may inquire into any matter which is relevant to the subject matter involved in the pending action and which is neither privileged[18] nor protected by the work-product limitation.[19] Documents and reports are discoverable merely upon a showing of good cause.[20]

Thus, when concurrent civil and criminal actions involve common factual elements, civil discovery may reveal the strategy of the defendant's case and the broad outlines his defense will take, including an insight into what evidence may be used and which witnesses may be subpoenaed.[21] When the government is a party to the civil action, the prosecution can obtain vital information directly from the criminal defendants or from persons closely related to the criminal action[22] by deposing them as parties or witnesses in the civil action, even though such information is not discoverable under the criminal rules. Even when the government is not actually a party in the civil action, the civil plaintiff's discovery of the defendants may be of practical benefit to the prosecution. There is, for instance, the possibility of collusion between the civil plaintiff and the government, and, even without actual collusion, it is realistic to recognize that it is difficult to restrict the fruits of civil discovery to the private party.[23] The indirect benefit to the government when it is not a party in the civil action is particularly prejudicial since the criminal defendant is denied civil discovery of the prosecution, and thus the reciprocity principle upon which the criminal discovery rules are predicated is undermined.[24]

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18. *Id.* 26(b).

19. Hickman v. Taylor, 329 U.S. 495 (1947).

20. FED. R. CIV. P. 34 (1967).

21. It should be noted that civil discovery may not turn up all of the defenses that the defendant plans to use at the criminal trial. The defense of insanity, which would probably have no relation to the civil trial, is one example.

22. Possible examples are instances in which the criminal defendants are corporate officers and the civil deposition of their corporation is attempted or where the criminal defendant is a member of a partnership and the civil deposition of another partner is sought.

23. *See* United States v. Simon, 262 F. Supp. 64, 72-73, 76 (S.D.N.Y. 1966). Such an advantage is unwarranted, especially in light of the fact that the prosecution is thought to have far greater out-of-court discovery possibilities than criminal defendants. *See* Goldstein, *supra* note 1; Louisell, *supra* note 1, at 87.

24. *See* text of FED. R. CRIM. P. 16(c) quoted in note 15 *supra*. This could be remedied by allowing defendants to seek information from the government for use in the civil case, but such a "remedy" would be an even further circumvention of the criminal rules. In the converse situation in which the United States is a party to the civil action, the same circumvention of the rules results if criminal defendants are allowed discovery as to the United States in the civil case under the civil rules. Likewise, even when the United States is not a party, the criminal rules are undermined if the defendants can depose government personnel as witnesses.

If the criminal rules were to be amended to allow broader discovery by both defense and prosecution, then civil discovery would not be in opposition to the restrictions of criminal discovery. Many commentators have supported the idea of a broader criminal discovery on the ground that such an expansion would transform the criminal trial from a sporting event into a quest for truth. *See* Brennan, *The*

When the criminal defendant has standing in the civil suit—either as a party or a deponent—and the government is not a party to the suit, the criminal defendant can prevent the government from gaining knowledge of his criminal defense by obtaining a protective order from the civil court under rule 30(b) of the Federal Rules of Civil Procedure.[25] Such an order may restrict all but the parties and their attorneys from attending the deposition, may require the deposition to be sealed and subsequently opened only by the civil court, and may enjoin opposing parties and counsel from disclosing the information obtained.[26] An arrangement of this type would allow civil discovery to proceed while the criminal action is still pending. This remedy is, of course, ineffective if the United States is a party to the civil action. Moreover, it is unavailable if the criminal defendant is neither a party nor a deponent in the civil action, even though he may stand to suffer from the revelations in the civil deposition of a person closely related to the criminal action. Indeed, even when the criminal defendant has standing to seek a protective order and the government is not a party to the civil case, it may be difficult to tell whether or not disclosure of information has occurred in disregard of the order.[27]

The reported cases indicate that the usual remedy sought by criminal defendants in these situations is a stay of civil discovery pending termination of the criminal trial.[28] In these civil cases, the courts have suggested that a stay was necessary to protect the defendants' privilege to be free from self-incrimination even though the government was not a party.[29] Whatever merit such a rationale may have in a case where the government is a party,[30] there seems to be

Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 WASH. U.L.Q. 279; Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Note, *Discovery in Federal Criminal Cases—Rule 16 and The Privilege Against Self-Incrimination*, 35 FORDHAM L. REV. 315 (1966).

25. FED. R. CIV. P. 30(b) (1967). Such a protective order was requested in *Simon*. 262 F. Supp. 64, 69 (S.D.N.Y. 1966).

26. *Cf.* United States v. American Radiator & Standard Sanitary Corporation, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,311 (3d Cir. 1967); D'Ippolito v. American Oil Co., 272 F. Supp. 310 (S.D.N.Y 1967).

27. *See* text accompanying note 23 *supra*.

28. *E.g.*, Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); National Discount Corp. v. Holzbaugh, 13 F.R.D 236 (E.D. Mich. 1952).

29. Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964), granted a stay of discovery to the defendants in a case in which the government was not a party to the civil action. *See also* Kaepple v. Jas. H. Matthews & Co., 200 F. Supp. 229 (D.C. Pa. 1961); Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953); National Discount Corp. v. Holzbaugh, 13 F.R.D. 236 (E.D. Mich. 1952). *But see* D'Ippolito v. American Oil Co., 272 F. Supp. 310 (S.D.N.Y. 1967).

30. In ordinary civil cases, the privilege against self-incrimination is applicable but it may be invoked only as to individual questions, the answer to which the party believes would be incriminating. *See* United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103 (1927); United States v. Matles, 247 F.2d 378, 383 (2d Cir. 1957) (concurring opinion of Judge Lumbard); 8 J. WIGMORE, EVIDENCE § 2268 (3d ed. 1961). In a criminal action, on the other hand, the defendant has an absolute right to refuse to

little support for the proposition that a stay of discovery is required by the self-incrimination privilege, when, as in the principal cases, the government is not the party seeking discovery in the civil action.[31]

A stay of civil discovery, by either the prosecution or a private party, can better be supported by the rationale which is often articulated by civil courts in staying a criminal defendant's civil discovery of the United States: to allow discovery in the civil case would be "tantamount to allowing discovery under Federal Rules of Civil Procedure in a criminal proceeding,"[32] which a court is, of course, powerless to do. The converse situation, in which the government seeks discovery of the defendants, is surely no less an attempt to substitute civil for criminal procedure in a criminal case.[33] Similar reasoning applies when civil discovery is sought against a person who is not a criminal defendant but is so closely related to the defendants that he might disclose strategic elements of the criminal defense. Since, rule 15 of the Federal Rules of Criminal Procedure[34] would prevent the prosecution from deposing all third parties, the prosecution should not be able to obtain the prejudicial information it desires through a civil deposition if the integrity of the criminal rules is to be protected.

For several reasons, however, criminal defendants threatened by civil discovery should not have to rely solely on the civil court's granting a stay or protective order. As noted above, criminal defendants may not have the standing necessary to obtain a stay or protective order in the civil case,[35] and protective orders, even when available, may not be entirely reliable. Moreover, the principal cases indicate that civil courts may adopt parochial attitudes about their

take the witness stand at his trial. *See id.* § 2260. Furthermore, it could be argued that the right to refuse to submit to all questioning applies to the discovery stages of the criminal case, *but see* Jones v. Superior Ct., 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). Thus when the government is a party to the civil action, perhaps pretrial discovery should not be permitted there as well if, as has been suggested, the purpose of the fifth amendment privilege is to prevent the prosecution from enlisting the aid of the defendant in developing a case against him. *See* 8 J. WIGMORE, EVIDENCE § 2251 (3d ed. 1961).

31. *Cf.* 8 J. WIGMORE § 2268 (3d ed. 1961). *Contra* Paul Harrigan & Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953).

32. Campbell v. Eastland, 307 F.2d 478, 493 (1962) (Bell, J., concurring). *See also* United States v. $2,437.00 United States Currency, 36 F.R.D. 257 (E.D.N.Y. 1964); United States v. Steffes, 35 F.R.D. 24 (D. Mont. 1964); United States v. Maine Lobstermen's Ass'n, 22 F.R.D. 199 (D. Maine 1958). *But see* Hiss v. Chambers, 8 F.R.D. 480 (D. Md. 1948).

33. In such cases, courts staying discovery have merely said that discovery would be oppressive or that the constitutional rights of the defendant would be impaired. *See, e.g.*, Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964).

34. *See* text of rule 15 quoted in note 14 *supra*.

35. *See* text accompanying notes 25-27 *supra*. It also appears that the persons to be deposed have no standing to request a stay on behalf of the criminal defendants. *Cf.* Federal Deposit Insurance Corp. v. Fireman's Fund Insurance Co., 271 F. Supp. 689 (S.D. Fla. 1967), denying a requested stay by the plaintiff on behalf of the United States, the government not being a party to the action.

own actions and refuse to give relief despite effects on the criminal trial.[36] Because of the irreparable nature of harmful disclosures, the criminal defendant should have remedies available to him when a motion for a stay or a protective order is denied or unavailable.

One possible remedy for the denial of either a stay or a protective order in the civil court is immediate appeal. Under the final judgment rule,[37] however, it has been held that orders denying a temporary stay of discovery are not appealable since they are merely interlocutory orders.[38] The only exception to this rule, other than the limited statutory procedure permitting a district judge to certify controlling questions of law to a court of appeals,[39] is the collateral order doctrine. Under this doctrine an appeal, though interlocutory in nature, will be allowed from an order which is auxiliary to the main cause of action, which does not make a step toward final disposition of the merits of the case, and which would cause irreparable harm if review were postponed until after final judgment on the merits.[40] This doctrine was apparently used in *Overly v. United States Fidelity & Guaranty Co.*,[41] to permit an appeal from a trial court order directing a bank to produce correspondence from the Comptroller of Currency and to produce bank examiners' reports. The government had intervened and claimed that the reports were privileged and that their production would be injurious to the public interest. The Court of Appeals for the Fifth Circuit viewed the order to produce as appealable since such an order would irrevocably destroy any value of the privilege claimed by the government and place it beyond the protection of an appellate court. Though the denials of the stays in the principal cases might have been appealable under the collateral order doctrine,[42] most courts, as in the *Simon* case, have denied the appeal.[43]

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36. A stay was denied in *Simon*.

37. 28 U.S.C. § 1291 (1964):

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except when a direct review may be had in the Supreme Court.

38. See Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir. 1965); Brown v. St. Paul City Ry. Co., 241 Minn. 15 (Supp. Ct. 1954); 4 J. MOORE, FEDERAL PRACTICE ¶ 26.37, at 1711 (1966).

39. 28 U.S.C. § 1292(b) (1964).

40. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). *See also* 4 J. MOORE, FEDERAL PRACTICE ¶ 26.37, at 1719 (1966).

41. 224 F.2d 158 (5th Cir. 1955).

42. It could be argued, on the other hand, that injury to the defendant in this situation is not irreparable because a resulting criminal conviction could be reversed on the grounds of unfairness. A second criminal trial, however, would likewise be tainted by the prosecution's prior knowledge of the defense. To avoid such a stalemate, civil discovery should be curtailed to prevent the prosecution from gaining such knowledge in the first instance.

43. *See* note 38 *supra* and accompanying text.

Another remedy which may be available to the criminal defendants is a writ of mandamus from the court of appeals ordering the district court judge to grant the defendants' request for a protective order or a stay of discovery. The court of appeals is authorized to grant a writ of mandamus by the "All Writs Act," which provides that "[t]he 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."[44] This has been interpreted to mean that whenever a court of appeals can at some time review the proceedings of a lower court on appeal, it has the power in proper circumstances to issue writs of mandamus reaching such proceedings, even though no appeal has been perfected.[45] At least one court has issued the writ to correct errors in a discovery order.[46] Nevertheless, although there exists a broad power to grant the writ, this does not "authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders."[47] Rather, the writ may usually issue only in "exceptional circumstances."[48] The Court of Appeals for the Seventh Circuit, in *Schlagenhauf v. Holder*,[49] explained that exceptional circumstances permitting the use of the mandamus power would exist if the district court acted outside its power or "clearly abused [its] discretion as to make the equities of [the] case truly extraordinary, precluding adequate relief by way of appeal. . . ."[50] Still, it is possible that concurrent criminal proceedings might be considered to satisfy the exceptional circumstance requirement.

A third remedy which may be available to criminal defendants is an injunction from the criminal court preventing further discovery in the civil action. Indeed, this may be the criminal defendant's only remedy when he lacks standing to request a civil stay or protective order and, consequently, has no standing to seek appeal or mandamus.[51] The injunction might be considered, under the "All

44. 28 U.S.C. § 1651(a) (1964).

45. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). *See also* Rocke v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966); Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise With Finality*, 52 CALIF. L. REV. 1036 (1964).

46. *Ex parte* Uppercu, 239 U.S. 435 (1915) (granting mandamus to correct a lower court action impeding production of documents essential to the petitioner's case in excess of jurisdiction). *Contra*, Byram Concretetanks, Inc. v. Meaney, 286 F.2d 170 (3d Cir. 1961) (denying the writ which was requested to expand the possible subject matter of interrogatories that had been limited by the trial court); Fisher v. Delehant, 250 F.2d 265 (8th Cir. 1957) (denying mandamus to compel discovery in bankruptcy reorganization proceedings).

47. LaBuy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

48. *Id.* at 256.

49. 321 F.2d 43 (7th Cir. 1963).

50. *Id.* at 48. *See also* Comment, *supra* note 45.

51. This might occur if the defendant is neither a party nor a deponent in the civil case. *See* notes 25-27 *supra* and accompanying text.

Writs Act," to be a writ necessary or appropriate in aid of the criminal court's jurisdiction[52] in the sense that it aids the court's control over the evidence which it is allowed to consider. Some recent cases can be read to the effect that a writ is in aid of jurisdiction if it merely protects the effectiveness of the court's rulings.[53] Thus, injunctions have been used by a bankruptcy court to prevent picketing which was hindering the court's ability to reorganize the picketed corporation effectively,[54] and by a federal district court to prevent interference with the implementation of an order to desegregate schools.[55] Though the injunctions issued in the *Simon* and *American Radiator* cases may not have been aimed at activity which would have denied effectiveness to the courts' final decisions,[56] they were aimed at activity designed to frustrate one of the major intermediate goals of any criminal trial court: fairness in all aspects of the litigation.

A stronger support for the criminal court's injunctive power in these situations is its supervisory power over its own standards of procedure. Relying on *McNabb v. United States*,[57] the criminal courts in the principal cases argued that the injunctions were necessary to preserve the standards of procedure and evidence required in a criminal case,[58] and that the criminal court was under an obligation to prevent encroachment upon those standards.[59] That the

52. *See* note 44 *supra* and accompanying text. The "All Writs Act" was relied on in United States v. Simon, 262 F. Supp. 64 (S.D.N.Y. 1966), *reversed*, 373 F.2d 649 (2d Cir. 1967), *cert. granted*, 386 U.S. 1030 (1967); United States v. American Radiator & Standard Sanitary Corp., 272 F. Supp. 699 (W.D. Pa. 1967), *reversed*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,311 (3d Cir. 1967). *See also In re* Standard Gas & Elec. Co., 139 F.2d 149 (3d Cir. 1943), *cert. denied*, 321 U.S. 796 (1943); United States v. Western Pennsylvania Sand & Gravel Ass'n, 114 F. Supp. 158 (W.D. Pa. 1953).

53. *See* Bullock v. United States, 265 F.2d 683 (6th Cir.) *cert. denied*, 360 U.S. 909 (1959); Dixie Highway Express, Inc. v. United States, 268 F. Supp. 239 (E.D. Miss. 1967), *rev'd on other grounds*, 36 U.S.L.W. 3253 (U.S. Dec. 18, 1967) (per curiam). On the other hand, it has been suggested that jurisdiction is not threatened unless the activity sought to be enjoined threatens to remove the *basis* of the litigation from the enjoining court's jurisdiction. *See* Note, *Concurrent Civil and Criminal Proceedings*, 67 COLUM. L. REV. 1277, 1294 (1967). This appears, however, to be an unnecessarily restrictive reading of the cases.

54. *In re* Quick Charge, Inc., 69 F. Supp. 961 (W.D. Okla. 1947).

55. Bullock v. United States, 265 F.2d 683 (6th Cir. 1959).

56. One could, however, make the argument that if the criminal court is denied the injunctive remedy, it would never be able to render a final judgment in the case. The only remedy available to the criminal court for the use of the prejudicial knowledge—a new trial—would be ineffective because the prosecution's knowledge about strategic elements of the defense could not be erased, and therefore it is probable that a judgment could never be obtained.

57. 318 U.S. 332 (1943).

58. See Fay v. New York, 332 U.S. 261 (1947); Bohrod v. United States, 248 F. Supp. 559 (W.D. Wis. 1965); United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962).

59. *See* Mallory v. United States, 354 U.S. 449 (1957); Ballard v. United States, 329 U.S. 187 (1946); Washington v. Clemmer, 339 F.2d 715 (D.C. Cir. 1964); Wilson v. Schnettler, 275 F.2d 932 (7th Cir. 1960); Tooisgah v. United States, 137 F.2d 713 (10th Cir. 1943); United States v. Bonanno, 178 F. Supp. 62 (S.D.N.Y. 1959).

criminal court has the power through the issuance of injunctions to insure that its procedural rules are not circumvented was established in *Rea v. United States.*[60] In *Rea,* the Supreme Court of the United States held that a district court should have prevented federal officials from violating the Federal Rules of Criminal Procedure by enjoining them from using evidence in a state court proceeding obtained in violation of the federal rules, although such evidence was admissible in the state court. Basing its decision upon the *McNabb* supervisory power theory, the Court said that "[t]o enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."[61] Admittedly, *Rea* differs from the instant cases in that a direct violation of the rules occurred there, but certainly preservation of the integrity of the criminal rules is equally at issue in *Simon* and *American Radiator.*[62] When civil discovery threatens the integrity of the criminal court's procedure, the criminal court's supervisory power would seem to support an injunction against participation in the discovery.

Of the three possible remedial approaches when a stay is denied in the civil court, an injunction granted by the criminal court seems to be preferable, although it does have the disadvantage of effectively overruling a prior determination of a court of equal jurisdiction.[63] The criminal court should have greater familiarity with the issues in the criminal case and be more responsive to possible unfairness to the criminal defendants than would an appellate court reviewing the decision of the civil court on an appeal of a request for mandamus. And, since it is the criminal trial which is most

60. 350 U.S. 214 (1956). *See also* Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955); United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965), where the dictum of the court stated that an injunction against civil discovery was proper when such discovery might disclose evidence which may be used against the defendant in a related criminal trial.

61. 350 U.S. at 217. In a dissenting opinion Justice Harlan conceded that the court had the power to issue the injunction although he felt that it should not exercise the power in the instant case. *Id.* at 219. The complex issue in the case was the propriety of a *federal* court interfering with state proceedings, and in Cleary v. Bolger, 371 U.S. 392 (1963), the court refused to authorize such an injunction against *state* officials in a state proceeding. Indeed, 28 U.S.C. § 2283 (1964) expressly bars injunctions from federal to state courts except as authorized by Congress or where necessary in aid of jurisdiction. *See generally* Note, *The Dombrowski Remedy—Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights,* 21 RUTGERS L. REV. 92 (1966). *Simon* and *American Radiator,* on the other hand, involved interferences with concurrent *federal* proceedings and thus did not raise the federal-state complexities present in *Rea* and *Cleary.*

62. *See* notes 21-24 *supra* and accompanying text.

63. It is conceivable, though unlikely, that the civil court might respond to the criminal court's injunction with a counter injunction or an order to produce coupled with the dismissal sanctions of Rule 37 of the Federal Rules of Civil Procedure. *Cf.* James v. Grand Trunk W. Ry., 14 Ill. 2d 356, 152 N.E.2d 858 (1958). Overly sensitive fears about the impropriety of inter-court injunctions are not warranted in the federal-federal context. State-federal and state-state injunctions, on the other hand, present unusual difficulties regarding enforcement and comity because we are dealing with coordinate political authorities as well as coordinate courts.

severely affected by the unfairness of the civil discovery, the criminal court should be permitted to decide whether a stay is appropriate.[64]

But at the least, the potential detriment to a criminal defendant of discovery in a concurrent civil case requires the availability of some remedy from the civil court's denial of a stay. The most recent aspect of the *American Radiator* litigation illustrates the complexity of the remedial pattern.[65] Following the Third Circuit's reversal of the injunction by the criminal court,[66] the defendant requested a writ of mandamus from the same court of appeals to review the original denial of the stay by the district court hearing the civil action, but the court refused the request.[67] The language of the court in its review of the criminal court injunction indicates that it believed that the defendant should have immediately sought appeal or mandamus from the original ruling, rather than an injunction in the criminal court.[68] However, on the later request for mandamus the same court summarily refused to undertake review, conceivably on the theory that mandamus was not an appropriate remedy.[69] The refusal to review the civil court's denial on the merits is unjustifiable if the basis of the reversal of criminal court injunction was that a peremptory writ, and not resort to another coordinate tribunal, was the proper procedure.[70] On the other hand, if the court in reviewing the criminal injunction was deciding the case

64. As *Simon* and *American Radiator* illustrate, the court of appeals may eventually review the propriety of a criminal court's injunction staying civil discovery. The appellate court, however, will normally reverse such an order only for an abuse of discretion, and thus the criminal court, admittedly in the best position to assess the possibility of prejudice to the criminal defendants, will generally find that its judgment is accorded substantial weight.

The reversals in *Simon* and *American Radiator* are difficult to evaluate. If, as Simon suggests, that reversal was predicated on the appellate court's reassessment of the prejudice involved and a resulting determination that there had been an abuse of discretion, the decision is proper. In *American Radiator*, by contrast, the court indicated that another remedy was more appropriate—*i.e.*, mandamus from the appellate court. The appellate court, however, is in a difficult position to determine prejudice in the abstract, and thus the criminal court would appear to be in the best position to make that judgment.

65. American Radiator & Standard Sanitary Corp. v. Philadelphia Housing Authority, (3d Cir. Jan. 1, 1968) (unreported), *appeal docketed*, 36 U.S.L.W. 3334 (U.S. Feb. 27, 1968) (No. 1069).

66. United States v. American Radiator & Standard Sanitary Corp., 5 TRADE REG. REP. (1967 Trade Cases) ¶ 72311 (3d Cir. 1967).

67. (3d Cir. Jan. 1, 1968) (unreported).

68. 5 TRADE REG. REP. (1967 Trade Cases) ¶ 72,311 (1967). Speaking through Justice Hastie, the Court said:

> The proper and orderly procedure, which the aggrieved corporations avoided in this case, is an appeal from the court which has first acted on the matter or an application to the reviewing court for a peremptory writ, not resort to another coordinate tribunal.

Id. ¶ 72,311, at 84,808.

69. (3d Cir. Jan. 1, 1968) (unreported), *appeal docketed*, 36 U.S.L.W. 3334 (U.S Feb. 27, 1968) (No. 1069).

70. *See* note 68 *supra*.

on the merits, it should not be required to hear what is essentially the same case twice.[71] Indeed, the possibility of courts of appeals having to review essentially the same question twice can be precluded by making the criminal injunction the exclusive remedy when it is available.[72]

Whatever the balance of merits among the three remedies, it is clear that one of them is required. The Federal Rules of Civil Procedure were not designed to undermine the Federal Rules of Criminal Procedure, and the criminal defendant deserves a reasonable opportunity to prevent them from doing so.

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71. In another part of its opinion, the Third Circuit in setting aside the criminal injunction appeared to be judging the case on the merits:

> [W]e know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him . . . . However, we recognize that widespread publication of such evidence in advance of the criminal trial might hamper the selection of an unbiased jury and thus prejudice the criminal defendant . . . .
>
> . . .
>
> The trial court has done no more than to reject blanket claims that procedurally the civil suits should remain at standstill and that no discovery whatever should be permitted until the criminal actions shall terminate.

5 TRADE REG. REP. (1967 Trade Cases) ¶ 72,311, at 84,809 (1967).

72. It is not altogether clear that an injunction will be available when the civil and criminal actions arise in separate states, a likelihood in the antitrust and security areas. Theoretically, the injunction will run against the plaintiff in the civil action and therefore the court cannot be enjoined in the absence of personal jurisdiction over the individuals. Whether the injunction is authorized in aid of the criminal courts jurisdiction, or under the court's inherent power over its own procedure, it is part of the criminal action. Thus the geographical limitations on service of process under FED. R. CIV. P. 4(f) would seem inapplicable. On the other hand, the Federal Rules of Criminal Procedure extend nationwide process to the warrant and summons under rule 4(c)(2) and to the subpoena under rule 17(e)(1). A reasonable inference might be that the Supreme Court intended to vest all of the criminal court's acts with nationwide reach.