

California Law Review

Volume XXVIII

JANUARY, 1940

Number 2

Statutory Roads to Review of Federal Administrative Orders

THE competing claims of the administrative to be free to perform its appointed tasks and of the courts to subject the actions of the administrative to judicial review involve nothing less than an allocation of the power to govern as between two quite different arms of government. It is easy enough to say that these claims should be resolved in such a fashion as will preserve to each the fullest opportunity to perform the functions which each is best suited to perform in our scheme of public affairs. The difficulties come in the accomplishment of this objective. In recent years the Congress has sought to play a greater part in this process than it has ever played before in the federal field of administrative action but it does not have the last word. The Supreme Court speaks that word and in some recent decisions it has had a lot to say.¹

The primary concern here is with one segment of the problem so broadly stated above. We shall look at the procedural arrangements, both statutory and judge-made, whereby a party aggrieved by some action, or threatened action, of the administrative may take his grievance into court and there secure whatever judicial scrutiny the courts hold out for him. It will also be important to ask at what stage in the course of administrative events this is possible or impossible. The fact that final results in particular cases are often expressed in terms of rules of procedure must not obscure the resolution of the competing claims to power that underlies this process. It is quite true that once a particular instance of governmental action has come into court the scrutiny to which it is there subjected, that is, the scope of judicial review, may likewise be viewed as a problem in the allocation of the

¹ *Myers v. Bethlehem Shipbuilding Corp.* (1938) 303 U.S. 41; *Utah Fuel Co. v. National Bituminous Coal Comm.* (Jan. 30, 1939) 306 U.S. 56; *Rochester Telephone Corp. v. United States* (April 17, 1939) 307 U.S. 125. These cases are picked out for special mention because taken together they illustrate the more important rules that the Supreme Court has worked out to deal with the problem with which this discussion is concerned.

power to govern, but the discussion that follows will not touch on such matters. The concern here will be with procedure. This requires an examination of a number of statutory schemes that have been created by the Congress to make possible judicial review of a great variety of different administrative activities and a consideration, as well, of a number of judge-made rules that play an important part in the working of these statutory schemes. So to the Congress first.

I

STATUTORY SCHEMES FOR SUBJECTING FEDERAL ADMINISTRATIVE ACTION TO JUDICIAL REVIEW

When the Congress has created governmental machinery to perform a particular task it has not always prescribed a procedure whereby an aggrieved party may secure judicial review of action that affects him but when it has made such provision it has done one of two things. It has either conferred jurisdiction on the district court to "enjoin, set aside, annul or suspend"² the administrative order or it has spelled out in more detail a special statutory procedure for subjecting the order to review.

The first type, which for convenience will be called the statutory injunction, originated with the Hepburn Act of 1906.³ A brief sketch of the background of this Act is necessary to an understanding of its importance. Under the Act to Regulate Commerce as adopted in 1887⁴ the orders of the Interstate Commerce Commission could be flouted with impunity by any carrier. In order to invest its orders with compulsion the Commission was required to petition a circuit court of the United States for an order of the court commanding obedience. As to this the Act directed the court "to hear and determine the matter speedily as a court of equity in such manner as to do justice in the premises. . . ."⁵ It was not too difficult for the courts to find in the words of this section an invitation to the judges to hear and determine anew and as an original matter each issue that had already been determined by the Commission before it issued its order. A lower court put the matter bluntly in an early case when it said that "the commission may be regarded as the general referee of each and every

² 34 STAT. (1906) 584, 592.

³ *Ibid.*

⁴ 24 STAT. (1887) 379.

⁵ *Ibid.* at 385, § 16.

Circuit Court of the United States.”⁶ The Supreme Court did little to change this view.⁷ It is not going too far to say that during this early period effective control of the railroads was in the hands of the federal judges. The important feature of the Hepburn Act was that it put the force of heavy penalties behind the Commission's orders. The shoe was definitely put on the other foot. If the carrier wished to contest the validity of “any order” it must itself initiate proceedings in equity to “enjoin, set aside, annul or suspend” it. The jurisdiction in equity of the circuit courts to entertain such proceedings was recognized as existing.⁸ This jurisdiction was transferred to the Commerce Court when it was created in 1910⁹ and then to the district courts by the Urgent Deficiencies Act when the Commerce Court was abolished in 1913.¹⁰ The procedure under this last Act is extraordinary in that the original hearing is before a special district court of three judges, a direct appeal as of right to the Supreme Court is allowed, and both courts are required to give precedence to these cases.¹¹ In making these provisions it is noteworthy that the Congress said not a word about the extent of the inquiry that the judges should make in such proceedings. No effort was made to endow the Commission's findings of fact with any degree of finality nor was there any expression of legislative disapproval of what had been done by the judges theretofore.

The extraordinary procedure just described has been incorpo-

⁶ *Kentucky & Indiana Bridge Co. v. Louisville & N. R. R.* (C. C. D. Ky. 1889) 37 Fed. 567, 613.

⁷ In opinion it disapproved a practice of carriers of withholding evidence from the Commission and producing it for the first time in the circuit court, but this homily was quickly negated with the assurance that “We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission. . . .” *Cincinnati, N. O. & T. P. Ry. v. Interstate Commerce Comm.* (1896) 162 U. S. 184, 196. In another opinion the Court made it clear that when the Commission petitioned the circuit court for the enforcement of its order “the court is authorized to ‘hear and determine the matter as a court of equity,’ which necessarily implies that the court is not concluded by the findings or conclusions of the Commission. . . .” *Texas & Pac. Ry. v. Interstate Commerce Comm.* (1896) 162 U. S. 197, 239. For a review of Supreme Court decisions under the Act prior to the Hepburn amendment see Tollefson, *Judicial Review of the Decisions of the Interstate Commerce Commission* (1937) 5 GEO. WASH. L. REV. 503, 504-519.

⁸ 34 STAT. (1906) 584, 590, § 5.

⁹ 36 STAT. (1910) 539, 542, § 3.

¹⁰ 38 STAT. (1913) 208, 219, 28 U. S. C. (1934) §§ 41 (28), 43.

¹¹ *Ibid.* at 220, 28 U. S. C. (1934) § 47. Particular mention of these extraordinary features is made in *United States v. Griffin* (1938) 303 U. S. 226, as being a factor in determining whether a particular “order” was reviewable under this procedure.

rated by reference in a number of later acts. It is found in a few of the many acts conferring added powers on the Interstate Commerce Commission.¹² It is applicable to all but certain excepted orders of the Communications Commission,¹³ to orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921¹⁴ and the Perishable Agricultural Commodities Act of 1930,¹⁵ to orders issued by the United States Maritime Commission¹⁶ and to certain orders issued by the Federal Power Commission under the Federal Power Act prior to its recent amendment.¹⁷

In a few instances jurisdiction to enjoin federal administrative orders has been specially conferred on the regular one judge district courts. This is found in the Federal Alcohol Administration Act of 1935,¹⁸ in the Longshoremen's and Harbor Workers' Compensation Act of 1927,¹⁹ and the Agricultural Adjustment Act of 1935.²⁰ There

¹² Emergency Railroad Transportation Act of 1933, 48 STAT. (1933) 211, 216, § 16, 49 U.S.C. (1934) § 266; Motor Carrier Act, 1935, 49 STAT. (1935) 543, 550, § 205 (h), 49 U.S.C. SUPP. IV (1938) § 305 (h).

¹³ 48 STAT. (1934) 1064, 1093, § 402a, 47 U.S.C. (1934) § 402a. The exceptions are detailed *infra* note 29.

¹⁴ 42 STAT. (1921) 159, 168, § 316, 7 U.S.C. (1934) § 217 (as to all orders affecting stockyards and stockyard dealers); 49 STAT. (1935) 648, 649, 7 U.S.C. SUPP. IV (1938) § 218c (as to orders relating to live poultry dealers and handlers).

¹⁵ 46 STAT. (1930) 531, 535, § 11, 7 U.S.C. (1934) § 499k. See also *ibid.* at 535, § 10, 7 U.S.C. (1934) § 499j, which makes the orders effective unless proceedings are brought under § 11.

¹⁶ 39 STAT. (1916) 728, 738, § 31, 46 U.S.C. (1934) § 830, 46 U.S.C. SUPP. IV (1938) § 1114.

¹⁷ 41 STAT. (1920) 1063, 1073, § 20, 16 U.S.C. (1934) § 813.

¹⁸ 49 STAT. (1935) 977, 984, § 5(e), 27 U.S.C. SUPP. IV (1938) § 205(e), conferring jurisdiction on the district courts, the Supreme Court of the District of Columbia and territorial courts of suits "to enjoin, annul, or suspend in whole or in part any final action by the Administrator upon any application under this subsection," relating to labeling.

¹⁹ 44 STAT. (1927) 1424, 1436, § 21 (b), 33 U.S.C. (1934) § 921 (b), conferring jurisdiction on the district courts and the Supreme Court of the District of Columbia of proceedings whereby "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise. . . ."

²⁰ The Agricultural Adjustment Act, 49 STAT. (1935) 750, 760, 7 U.S.C. SUPP. IV (1938) § 608c (15), confers jurisdiction in equity on the district courts to review a ruling of the Secretary of Agriculture on the petition of a handler subject to a marketing order. This review is by bill in equity which must be brought within twenty days from the date of the entry of the ruling of the Secretary. See *Wallace v. Hudson-Duncan & Co.* (C. C. A. 9th, 1938) 98 F. (2d) 985, involving the use of this procedure in connection with a walnut marketing agreement. Criminal penalties attach to violations of the orders of the Secretary if the review procedure is not invoked. 49 STAT. (1935) 750, 759, 7 U.S.C. SUPP. IV (1938) § 608c (14).

is also special provision for injunction in the district courts against the Comptroller of the Currency or a receiver acting under his direction.²¹ These provisions contain none of the extraordinary features of the statutes above mentioned. The ordinary bill in equity for an injunction has been accepted by the Congress as an appropriate mode of securing judicial review.

Secondly, the Congress has created new types of reviewing procedure. This is first found in the Federal Trade Commission Act of 1914.²² In section 5 it is provided that if any person fails to obey a cease and desist order issued by the Commission the Commission may apply to a circuit court of appeals for the enforcement of the order. This is done by certifying and filing with the court a transcript of the record in the proceeding. The court then has jurisdiction to review the transcript and may enter a decree "affirming, modifying, or setting aside the order of the commission."²³ In an attempt to limit somewhat the inquiry that the court may make it is further provided that "The findings of the commission as to the facts, if supported by testimony, shall be conclusive."²⁴ If for any reason either party desires to adduce additional evidence and can show some good reason why it was not adduced in the proceeding before the Commission the court may order such evidence to be taken before the Commission. Here is a deliberate effort to preserve the integrity of the fact-finding functions of the Commission and to avoid some of the troubles that had arisen under the Interstate Commerce Act. The decree of the court is declared to be final subject only to review by the Supreme Court by writ of certiorari. If any party to a Commission order desires to secure a review of it the same procedure is available. Thus review may be initiated by either the Commission or a party against whom a cease and desist order is directed. Finally it is declared that this jurisdiction of the designated reviewing courts is exclusive and they are directed to give precedence to these proceedings.

The striking feature of this scheme is that, as in the case of the original Interstate Commerce Act, the Commission order may be disregarded with impunity. It carries no sanction for disobedience until it has been subjected to judicial review and its commands have become those of the reviewing court. There the matter stood until by

²¹ 13 STAT. (1864) 99, 117, § 57, 22 STAT. (1882) 162, 163, § 4, 28 U. S. C. (1934) § 41 (16).

²² 38 STAT. (1914) 717, 15 U. S. C. (1934) § 41.

²³ *Ibid.* at 720, 15 U. S. C. (1934) § 45.

²⁴ *Ibid.*

a recent amendment the Congress put the force of heavy penalties behind the Commission's orders if no petition for review was filed under the statutory procedure.²⁵ The effect of this amendment is, of course, to require the party against whom an order has been directed to take the initiative to secure a petition for review but otherwise the statutory procedure remains as it was before.

The integrity of this statutory review procedure has been fully maintained by the courts in the face of a number of attacks. In an early case²⁶ a party against whom a complaint had been served immediately sought to enjoin the Commission from going ahead with its proceedings on the ground that the Federal Trade Commission Act was unconstitutional but the court looked at the statutory review procedure and was clear that the issuance of an injunction by the district court would be an usurpation of judicial power. The same result was reached when a party sought to secure judicial review in the circuit court of appeals of the denial by the Commission of motions to dismiss a complaint.²⁷ The court was clear that it had no power to review a proceeding until it had ripened into a cease and desist order. It could not step in and halt the inquiry at the threshold. The Supreme Court read the Act with an even more faithful eye in the famous case of *Federal Trade Commission v. Claire Furnace Co.*²⁸ when it found that the Commission's general power to investigate could not be tested by a bill in equity. This decision did not, of course, involve

²⁵ See amendments in 52 STAT. (1938) 111, § 3, 52 STAT. (1938) 973, 1023, § 1107 (f), 15 U. S. C. SUPP. IV (1938) § 45.

²⁶ T. C. Hurst & Son v. Federal Trade Comm. (D. E. D. Va. 1920) 268 Fed. 874.

²⁷ Chamber of Commerce v. Federal Trade Comm. (C. C. A. 8th, 1922) 280 Fed. 45.

²⁸ (1927) 274 U. S. 160. In this case the Commission, purporting to act under sections 6 and 9 of the Act, had served notice on twenty-two corporations to submit a large amount of information as to their business in connection with a general investigation into the high cost of living. These corporations sought to enjoin the Commission from taking any steps to enforce compliance with its demands. The Supreme Court held that the bill should have been dismissed for want of equity because under sections 9 and 10 of the Act a procedure was set forth for enforcing compliance with orders of the Commission under sections 6 and 9 and the parties would in such proceedings have ample opportunity to raise every issue sought to be raised by the bill in equity. To the same effect, *Federal Trade Comm. v. Maynard Coal Co.* (App. D. C. 1927) 22 F. (2d) 873. But see *Federal Trade Comm. v. Millers' Nat. Federation* (App. D. C. 1927) 23 F. (2d) 968, in which a different result was reached when the Commission's subpoenas were directed to individuals who would be personally subject to the heavy penalties fixed in section 10. But in a later case under the same name [(App. D. C. 1931) 47 F. (2d) 428], and involving the same problem, the court made no mention of the penalties under section 10 and denied an injunction on the ground that the witness would have an adequate remedy when the Commission sought to enforce its subpoena under section 9.

the statutory procedure for review of cease and desist orders but it illustrates a judicial regard for orderly statutory procedure. The issue was simply whether the questions of power raised by the bill in equity should be answered in that proceeding or whether answers should await enforcement of the demands of the Commission under the procedure set out in the Act.

With this record behind it the Congress has written this same type of statutory review procedure into a large number and variety of statutes.²⁹ The catalogue of statutes in the footnote reveals many

²⁹ (1) Packers and Stockyards Act, 42 STAT. (1921) 159, 7 U.S.C. (1934) § 181. Orders of the Secretary of Agriculture under the sections of the Act relating to packers, *ibid.* at 162, § 204, 7 U.S.C. (1934) § 194. Appeals may be taken to a circuit court of appeals or the Court of Appeals for the District of Columbia and the jurisdiction of these courts is declared to be "exclusive." The judgment of the court is final subject only to review by the Supreme Court on writ of certiorari. Severe penalties are imposed for violations of orders but only after the time for appeal has expired or after an order has been sustained on appeal. *Ibid.* at 163, § 205, 7 U.S.C. (1934) § 195.

(2) Securities Act of 1933, 48 STAT. (1933) 74, 15 U.S.C. (1934) § 77a; Securities Exchange Act of 1934, 48 STAT. (1934) 881, 15 U.S.C. (1934) § 78a; Public Utility Holding Company Act of 1935, 49 STAT. (1935) 803, 15 U.S.C. SUPP. IV (1938) § 79. These acts are grouped together because they are all administered by one Commission. The provisions for the judicial review of "an order" of the Commission by "Any person aggrieved" by it are almost identical in the three acts. See 48 STAT. (1933) 74, 80, § 9, 15 U.S.C. (1934) § 77i; 48 STAT. (1934) 881, 901, § 25, 15 U.S.C. (1934) § 78y; 49 STAT. (1935) 803, 834, § 24, 15 U.S.C. SUPP. IV (1938) § 79x. Review may be had in a circuit court of appeals or in the Court of Appeals for the District of Columbia. In the last two acts it is said that the jurisdiction of the court is "exclusive," but that phrase does not occur in the first act. The judgment of the reviewing court is final subject only to review by the Supreme Court on writ of certiorari or certification. Violation of a Commission order does not subject the violator to criminal penalties though violation of the provisions of the act or of rules and regulations of the Commission does. 48 STAT. (1933) 74, 87, § 24, 15 U.S.C. (1934) § 77x. Similar provisions are found in the Securities Exchange Act, 48 STAT. (1934) 881, 904, § 32, 15 U.S.C. (1934) § 78ff, and in the Public Utility Holding Company Act, 49 STAT. (1935) 803, 836, § 29, 15 U.S.C. SUPP. IV (1938) § 79z-3. Under this last Act the violation of some Commission orders constitutes a criminal offense.

(3) Communications Act of 1934, 48 STAT. (1934) 1064, 47 U.S.C. (1934) § 151. Statutory appeal may be taken but only to the Court of Appeals for the District of Columbia "from decisions of the Commission" in any of the following cases: "(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application" and (3) by any radio operator whose license has been suspended by the Commission. *Ibid.* at 1093, § 402, 47 U.S.C. (1934) § 402.

(4) Federal Power Act, 49 STAT. (1935) 838, 16 U.S.C. SUPP. IV. (1938) § 791a. "Any party to a proceeding under this Act aggrieved by an order issued by the Commis-

sion in such proceeding may obtain a review of such order" in a circuit court of appeals or in the Court of Appeals for the District of Columbia. On the filing of the transcript of the Commission's proceedings the jurisdiction of the court is said to be "exclusive." *Ibid.* at 860, § 213, 16 U. S. C. SUPP. IV (1938) § 8251. The judgment of the reviewing court is final subject to review by the Supreme Court on writ of certiorari or certification. The willful and knowing violation of an order of the Commission carries criminal penalties. *Ibid.* at 862, § 213, 16 U. S. C. SUPP. IV (1938) § 8250(b).

(5) The "Hot Oil" Act, 49 STAT. (1935) 30, 15 U. S. C. SUPP. IV (1938) § 715. If a petroleum tender board created under this Act denies a certificate of clearance for the interstate movement of oil the person whose application has been denied may "obtain a review of the order denying such application" in a district court. *Ibid.* at 32, § 5 (c), 15 U. S. C. SUPP. IV (1938) § 715d (c). This statutory review is in other respects similar to that provided for in other acts listed in this footnote. There is no mention of the "exclusive" jurisdiction of the district court.

(6) National Labor Relations Act, 49 STAT. (1935) 449, 29 U. S. C. SUPP. IV (1938) § 151. The Board is empowered to petition a circuit court of appeals or the Court of Appeals for the District of Columbia for the enforcement of its order and a similar proceeding is available to "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought. . . ." *Ibid.* at 455, § 10 (f), 29 U. S. C. SUPP. IV (1938) § 160. The jurisdiction of the reviewing court is exclusive. No penalty attaches to the violation of an order of the Board. The reviewing court is required to hear these proceedings expeditiously and if possible within ten days after they have been docketed.

(7) Commodity Exchange Act, 49 STAT. (1936) 1491, 7 U. S. C. SUPP. IV (1938) § 1. Statutory review in a circuit court of appeals of an order of the Secretary of Agriculture excluding a person from trading privileges on a "contract market" is provided in this Act [42 STAT. (1922) 998, 1002, § 6 (b), 7 U. S. C. (1934) § 9, as amended 49 STAT. (1936) 1491, 1498, § 8, 7 U. S. C. SUPP. IV (1938) § 9], and the same review is available of an order suspending or revoking the registration of a commission merchant or broker. *Ibid.* at 1496, § 5, 7 U. S. C. SUPP. IV (1938) § 6g. In another section provision is made for an appeal to a circuit court of appeals from an order suspending or revoking the designation of a board of trade as a "contract market" or from an order refusing such designation. The court is required to expedite these cases in every way. 42 STAT. (1922) 998, 1001, § 6 (a), 7 U. S. C. (1934) § 8. See also 49 STAT. (1936) 1491, 1499, § 9, 7 U. S. C. SUPP. IV. (1938) § 10a (1). The violator of an order after the time for review has passed is punishable criminally. *Ibid.* at 1499, § 9, 7 U. S. C. SUPP. IV (1938) § 13a.

(8) Bituminous Coal Act of 1937, 50 STAT. (1937) 72, 15 U. S. C. SUPP. IV (1938) § 828. "Any person aggrieved by an order . . . may obtain a review of such order" in a circuit court of appeals or in the Court of Appeals for the District of Columbia. *Ibid.* at 85, § 6 (b), 15 U. S. C. SUPP. IV (1938) § 836 (b), (c), (d). The jurisdiction of the reviewing court is exclusive and its judgment and decree is final subject to review by the Supreme Court on writ of certiorari or certification. Similar provisions are available to the Commission to secure the enforcement of its order. *Ibid.* There are similar provisions governing review of an order directing a code member to cease and desist from violating the code. *Ibid.* at 84, § 5 (b), 15 U. S. C. SUPP. IV (1938) § 835 (b).

(9) Natural Gas Act, 52 STAT. (1938) 821, 15 U. S. C. (1934) § 717. The provisions are almost identical with those in the Federal Power Act, *supra* (4).¹ See 52 STAT. (1938) 831-833, §§ 19-21, 15 U. S. C. SUPP. IV (1938) §§ 717r (b), 717s, 717t (b).

(10) Fair Labor Standards Act of 1938, 52 STAT. (1938) 1060, 29 U. S. C. SUPP. IV (1938) § 201. This Act provides for a statutory review in a circuit court of appeals or

variations in details. In all but three³⁰ statutory review takes place in a circuit court of appeals or in the Court of Appeals for the District of Columbia though in one case review is limited to the latter court.³¹ In all but a few instances³² it is declared in terms that the jurisdiction of the designated reviewing court shall be "exclusive." In all cases where the reviewing court is a circuit court of appeals or the Court of Appeals for the District of Columbia the decree of the reviewing court is final subject only to review by the Supreme Court on writ of certiorari or in some cases certification. There are many other varia-

in the Court of Appeals for the District of Columbia of a wage order by "Any person aggrieved" and the jurisdiction of the reviewing court is exclusive. Its judgment is final subject to review in the Supreme Court on writ of certiorari or certification. *Ibid.* at 1065, § 10 (a), 29 U.S.C. SUPP. IV (1938) § 210. Violation of a wage order is punishable criminally. *Ibid.* at 1062, § 6, 1068, § 15, 1069, § 16, 29 U.S.C. SUPP. IV (1938) §§ 206, 215, 216.

(11) Agricultural Adjustment Act of 1938, 52 STAT. (1938) 31, 7 U.S.C. SUPP. IV (1938) § 1281. Any farmer who is dissatisfied with his farm marketing quota may have his quota reviewed by a local review committee and if he is dissatisfied with the action of the committee he may file a bill in equity against the review committee in a district court or institute proceedings for review in a state court of general jurisdiction for the purpose of obtaining a review of the committee's action. The jurisdiction of these courts is exclusive. *Ibid.* at 62-64, §§ 362-367, 7 U.S.C. SUPP. IV (1938) §§ 1362-1367.

(12) Civil Aeronautics Act of 1938, 52 STAT. (1938) 973, 49 U.S.C. SUPP. IV (1938) § 401. Under this "Any order, affirmative or negative, issued by the Authority" with one exception is subject to statutory review in a circuit court of appeals or in the Court of Appeals for the District of Columbia. *Ibid.* at 1024, § 1006, 49 U.S.C. SUPP. IV (1938) § 646.

(13) Federal Alcohol Administration Act, 49 STAT. (1935) 977, 27 U.S.C. SUPP. IV (1938) § 201. Under this "An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit" to a circuit court of appeals or to the Court of Appeals for the District of Columbia. *Ibid.* at 980, § 4 (h), 27 U.S.C. SUPP. IV (1938) § 204 (h). The jurisdiction of the reviewing court is exclusive and its judgment is final subject to review by the Supreme Court on writ of certiorari or certification.

(14) Federal Food, Drug, and Cosmetic Act of 1938, 52 STAT. (1938) 1040, 21 U.S.C. SUPP. IV (1938) § 301. This permits an appeal from "an order" of the Secretary of Agriculture refusing to permit a new drug application to become effective or suspending the effectiveness of the application. Appeal is to a district court and the jurisdiction of the court is "exclusive." *Ibid.* at 1052, § 505 (h), 21 U.S.C. SUPP. IV (1938) § 355 (h). There is another provision permitting review of an order of the Secretary issuing, amending, or repealing or determining not to take such action as to regulations under certain sections of the Act. Review is in a circuit court of appeals. *Ibid.* at 1055, § 701, 21 U.S.C. SUPP. IV (1938) § 371 (f).

³⁰ The exceptions are the "Hot Oil" Act, the Agricultural Adjustment Act of 1938, and the Federal Food, Drug, and Cosmetic Act, *supra* note 29, (5), (11), (14).

³¹ See the Communications Act of 1934, *supra* note 29 (3).

³² See the Securities Act of 1933, the Communications Act of 1934, the "Hot Oil" Act of 1935, and the Commodity Exchange Act of 1936, *supra* note 29, (2), (3), (5), (7).

tions in the details of the statutory language but in substance they all follow the pattern laid down in 1914 in the Federal Trade Commission Act. It will be noted that this statutory review shares one of its extraordinary features with the statutory injunction type of review procedure and that is that the original hearing is before a three judge lower court. Under the statutory review type it is a circuit court of appeals or the Court of Appeals for the District of Columbia while under the statutory injunction type it is a special three judge district court. There is not, however, a similar appeal as of right to the Supreme Court but some of the statutes require the reviewing court to expedite the hearing of these review proceedings in every way.³³ This it will be recalled is one of the extraordinary features of the statutory injunction type.

At this point it is necessary to state again that in setting forth these two types of statutory provisions we are concerned only with the efforts made by the Congress to set out a procedure under which administrative orders may be brought into court. The particular procedure that is employed seems to have nothing to do with the extent of review to which the order will be subjected when it is properly in court. A few words will make this abundantly clear. It will be recalled that the Congress made no effort to limit the extent of judicial review of orders of the Interstate Commerce Commission when it conferred jurisdiction on the district courts to "enjoin, set aside, annul or suspend any order" of that Commission but that when it conferred jurisdiction on the circuit courts of appeal to review orders of the Federal Trade Commission it attempted to give a degree of finality to the findings of fact of that Commission. In spite of this the orders of the Federal Trade Commission have been subjected to a far more searching judicial scrutiny than have the orders of the Interstate Commerce Commission.³⁴

³³ The Federal Trade Commission Act requires the reviewing courts to give these cases precedence and expedite them in every way. 38 STAT. (1914) 717, 720, § 5, 15 U. S. C. (1934) § 45. Similar provisions are contained in the Packers and Stockyards Act, *supra* note 29 (1). The Communications Act of 1934, *supra* note 29 (3), requires the reviewing court to hear the appeal at the earliest convenient time. The National Labor Relations Act, *supra* note 29 (6), requires review petitions to be heard expeditiously and if possible within ten days after they have been docketed. Under the Commodity Exchange Act, *supra* note 29 (7), the review of orders suspending or revoking a designation as a contract market must be made preferred causes and expedited in every way. Otherwise the acts listed in note 29, *supra*, contain no provisions on this subject.

³⁴ For an excellent discussion of the extent of judicial review of the orders of these two Commissions during the period from 1920-1930, see MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION,

In the actual working of these two types of statutory provisions some judge-made rules have played an important part. Access to the court was barred entirely under the late negative order rule and it was deferred under both the primary jurisdiction rule and the rule requiring exhaustion of the administrative remedy, and to these we now turn.

II

THE LATE NEGATIVE ORDER RULE

The negative order rule was one under which administrative orders that were found to be "negative" in the sense that they denied whatever relief or action was sought by a party were deemed non-reviewable by the courts. Whatever the pros and cons of this rule may have been it is now a fitting subject for an epitaph. It was laid to rest by Mr. Justice Frankfurter in *Rochester Telephone Corporation v. United States*.³⁵ The words he employed in performing this rite—"obfuscating," "unilluminating and mischief-making," "seemingly technical" and the like—are quite in keeping with judicial amenities on such an occasion. Others have hankered to perform the same task³⁶ and in the Supreme Court only Mr. Justice Butler and Mr. Justice McReynolds thought the occasion was not a proper one. In addition, they thought that the words of Mr. Justice Frankfurter confused rather than clarified the whole matter.³⁷

It is not necessary to trace the story of this rule through its life span of twenty-seven years.³⁸ It has had many experiences. In the words of Mr. Justice Frankfurter it has not had "wholly plain sail-

1920-1930 (1933). The author remarks that "the sparing control of the courts is undoubtedly one of the more important factors which have made the Interstate Commerce Commission the foremost example of administrative justice in the United States." *Ibid.* at 167-168. At a later point he says: "The restraining influence of the courts upon the Federal Trade Commission has turned the efforts of that body from authoritative regulation to investigation, conciliation, and publicity. The review of the Interstate Commerce Commission orders, on the other hand, has been such that the transportation system of the nation has been brought under authoritative regulation, and contests in the courts are comparatively rare." *Ibid.* at 175. For similar comments see 1 SHEARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 7-8.

³⁵ *Supra* note 1, at 140, 141, 142.

³⁶ See 2 SHEARFMAN, *op. cit. supra* note 34, at 406-417; Notes (1939) 52 HARV. L. REV. 522; (1939) 6 U. OF CHI. L. REV. 277; (1938) 47 YALE L. J. 766, 786-790. A note in (1934) 34 COL. L. REV. 908, is non-committal.

³⁷ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 148.

³⁸ This has been done fully in the discussions cited *supra* note 36.

ing.”³⁹ When it was formulated in 1912 in *Proctor & Gamble Co. v. United States*⁴⁰ it was then and for a long time thereafter applicable only to orders of the Interstate Commerce Commission. By 1939 it would have been definitely applicable to all of the other administrative orders that were later made subject to the same power to “enjoin, set aside, annul or suspend.”⁴¹ It would have been an easy work of analogy to apply it to orders of a large number of administrative bodies that are subject to the special statutory review procedure.⁴² Mr. Justice Frankfurter seems to have been determined to stop this new life that the rule might have gained.

The rule did perform a function. It served to mark off a certain type of administrative “order” that was not reviewable under the extraordinary procedure available under the Urgent Deficiencies Act. Not all orders will now be reviewable and any appraisal of the effect of the *Rochester Telephone* case requires consideration of the rules that will take up where it has now left off. The effect of the application of the negative order rule to an order was to bar judicial review under the Urgent Deficiencies Act procedure and in cases where the primary jurisdiction rule was also applied this meant that access to any court was likewise barred. There was thus marked off a

³⁹ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 129.

⁴⁰ (1912) 225 U. S. 282.

⁴¹ For a list of these see notes 13-21, *supra*.

⁴² For a list of these see note 29, *supra*. In a few instances the Congress has sought to forestall the application of the negative order rule. Thus, under the Civil Aeronautics Act, *supra* note 29 (12), “Any order, affirmative or negative” is subject to the statutory review procedure; under the Motor Carrier Act, 1935, it is provided that if the Commission has issued “a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under The Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission’s taking of jurisdiction” [49 STAT. (1935) 543, 550, § 205 (h), 49 U. S. C. SUPP. IV (1938) § 305 (h)]; under other acts where the statutory review applies to an order denying an application for a license the negative order rule could not be applied because the act expressly permits review of what might otherwise have been considered to be negative orders. See Communications Act of 1934, *supra* note 29 (3) as to orders refusing licenses; the “Hot Oil” Act, *supra* note 29 (5), as to the denial of a certificate of clearance; the Commodity Exchange Act, *supra* note 29 (7), as to orders refusing designation of a board of trade as a “contract market”; the Federal Alcohol Administration Act, *supra* note 29 (13), as to an order denying an order denying an application for a basic permit; the Federal Food, Drug, and Cosmetic Act of 1938, *supra* note 29 (14), as to an order refusing to permit a new drug application to become effective. Perhaps the negative order rule would not have been applied in all these instances but at least it can be said that the acts are specific enough to foreclose even the consideration of the rule.

large field where complete administrative impregnability prevailed. In casting aside the jurisdictional bar of this rule Mr. Justice Frankfurter substitutes something else. He would view the reviewability of an administrative order not in terms of the form of the particular order but rather in terms of the allocation of power that should be made between the administrative and the courts. As an aid to this he puts the decisions that have applied the negative order rule into three categories and proceeds to analyze them in these terms.

In the first category he puts cases in which review is sought of an order that does not of its own force forbid or compel conduct by the party seeking review though it may look to a later order that will have that effect. As an example of this he gives cases involving tentative or final valuation orders of the Interstate Commerce Commission. It is curious that in the two cases in which review of such orders was denied no mention was made of the negative order rule.⁴³ In two other cases cited as belonging in this category the rule was discussed in one of them only to be put aside,⁴⁴ and in the other it was merely mentioned in the course of a general discussion and played no part as a ground of decision.⁴⁵ Two other cases are cited⁴⁶ but their presence in this category is questionable and they will be discussed more fully later. Since none of the first four decisions involved the use of the negative order rule the demise of the rule is irrelevant to the holdings in those cases. No useful purpose was served by this kind of a post mortem.

In the second category he puts cases "Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part"⁴⁷ and gives as an example the denial of permission for a departure from the long and

⁴³ *Delaware & Hudson Co. v. United States* (1925) 266 U.S. 438; *United States v. Los Angeles R. R.* (1927) 273 U.S. 299.

⁴⁴ *United States v. Illinois Cent. R. R.* (1917) 244 U.S. 82. Here an order setting a case for a hearing was held not reviewable. The Court said that "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding. . . ." *Ibid.* at 89.

⁴⁵ *Federal Power Comm. v. Metropolitan Edison Co.* (1938) 304 U.S. 375. This case, like the previous one, involved an order setting a date for a hearing and directing respondents to appear and present information on certain specified matters. The "order" was described as "nothing more than a notice." *Ibid.* at 386.

⁴⁶ *Shannahan v. United States* (1938) 303 U.S. 596; *Shields v. Utah Idaho Cent. R. R.* (1938) 305 U.S. 177.

⁴⁷ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 129.

short haul clause.⁴⁸ In this class of cases the road to the Court is now open. There is a clear constitutional "case" or "controversy"; equity jurisdiction exists where oppressive penalties are the price of a disregard of the Commission's negative action and there is an "order" of the Commission within the terms of the jurisdictional act.

In the third and last category are put cases "Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person."⁴⁹ The *Proctor & Gamble* case is given as an example and in this class of cases the road to review is also now open. There is a "case" or "controversy," equity jurisdiction exists because the bill sought to avoid a multiplicity of suits, and there is an "order."

This opinion must not be taken as one that creates three categories where before there was one distinction. The only purpose in the formulation of the last two categories must have been simply to group the cases in which the negative order rule has been applied in the past for the purpose of demonstrating the lack of wisdom that underlay the discredited rule. If this is correct then these categories are not to be taken as marking new verbal tests to determine the reviewability or non-reviewability of future "orders."⁵⁰ Reviewability of "orders" may still be barred for want of a constitutional "case" or "controversy" or for want of proper equity jurisdiction. But where Commission action takes the form of an "order" its negative or affirmative character will no longer be a factor to be considered in determining reviewability.

The precise holding in the *Rochester Telephone* case involved an order of the Communications Commission denying the telephone company's claim that it was not subject to the Act and finding that it was subject to it and as such owed obedience to a series of orders issued by the Commission. The determination of the status of the company with all that that carried with it was found to be a reviewable order. In one companion case, *United States v. Maher*,⁵¹ decided the same

⁴⁸ The cases cited and discussed are *Intermountain Rate Cases* (1914) 234 U.S. 476 (in which the refusal to grant permission for a departure from the long and short haul clause was held to be reviewable); *Lehigh Valley R.R. v. United States* (1917) 243 U.S. 412; *Piedmont & Northern Ry. v. United States* (1930) 280 U.S. 469.

⁴⁹ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 130.

⁵⁰ A note, *Reviewability of "Negative" Administrative Orders* (1939) 53 HARV. L. REV. 98, seems to take a different view. At least, the three categories are set forth as though they were designed to play some part in determining reviewability.

⁵¹ (April 17, 1939) 307 U.S. 148. The "grandfather clause" of the Motor Carrier Act, 49 STAT. (1935) 543, 551, § 206 (a), 49 U.S.C. SUPP. IV (1938) § 306 (a), pro-

day, a similar order had been issued by the Interstate Commerce Commission when it determined the status of a motor carrier as not being within the "grandfather clause" of the Motor Carrier Act, 1935. After this the carrier might not engage in interstate operations without a certificate of public convenience and necessity from the Commission. Mr. Justice Frankfurter was clear that here was an "order" and that the party was properly in court to "set aside" and "annul" it. In one more companion case, *Federal Power Commission v. Pacific Power & Light Company*⁵² the order before the Court was one issued by the Federal Power Commission denying the application of two power companies for the necessary permission under the Act to transfer the assets of one company to the other company. The Federal Power Act contains provisions for the statutory review of orders by designated reviewing courts⁵³ and Mr. Justice Frankfurter felt that if the negative order rule was dead when review of an order was sought under the statutory injunction type it was certainly lifeless when review was sought under this other statutory method. There was an "order" and the power companies were "aggrieved" by it under the terms of the statutory provision.

It must not be supposed that after these decisions every "order" is now reviewable. In a recent case it was said that "substantially every decision, and every other kind of action . . . is expressed in, or is followed by, an order. . . ."⁵⁴ This is, of course, perfectly true and the problem as to what kind of administrative action constitutes a reviewable order is not solved by the elimination of the negative order rule. This matter will be discussed later.

III

THE PRIMARY JURISDICTION RULE

This rule, as we shall see, really has no proper place in a discussion that is confined to the two types of statutory review procedures that have already been described. It must be discussed, however, because it was pointed to by Mr. Justice Frankfurter in the *Rochester*

vides that if any carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation. . . ."

⁵² (April 17, 1939) 307 U.S. 156.

⁵³ See note 29 (4), *supra*.

⁵⁴ *United States v. Griffin*, *supra* note 11, at 233.

Telephone case⁵⁵ as something that was "firmly established"⁵⁶ and that would be used together with the rule of administrative finality in fixing the proper spheres of power between the administrative and the courts.⁵⁷ If this is to mark the course of future events it is plain that it is being accomplished only by lifting the rule out of the administrative problem in which it is rooted and out of which it grew and by putting it to a use for which it is ill suited. Digress we must and that for long enough to demonstrate this point.

The administrative problem that brought about this rule grew out of the provisions of the Interstate Commerce Act under which the Congress put into the hands of railroad customers the right to recover damages from a railroad for violations of the Act.⁵⁸ This opened up a new and large field of litigation. In doing this the Congress gave to complainants the option of suing originally in a federal district court or of making complaint to the Commission.⁵⁹ If the latter course was elected and resulted in an order of the Commission awarding reparations to the complainant and the carrier against which it was directed did not pay, the complainant might bring suit in a district court⁶⁰ or in a state court of general jurisdiction.⁶¹ In this suit "the findings and order of the commission shall be prima facie evidence of the facts therein stated"⁶² but otherwise the suit proceeded like any other civil suit for damages. It is noteworthy that it has been held that these orders for the payment of money are beyond the extraordinary jurisdiction of the statutory three judge district court.⁶³

It was against this background that the primary jurisdiction rule was started on its way in 1907 in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*⁶⁴ In that case a shipper sued a carrier in a state court to recover freight charges alleged to be in excess of a reasonable rate. This was a well-recognized action at common law and by the language

⁵⁵ *Supra* note 1, at 138.

⁵⁶ This rule could at least claim five more years of life than the now discarded negative order rule. It came into being in 1907 in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426.

⁵⁷ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 139, 142.

⁵⁸ 24 STAT. (1887) 379, 382, § 8, 49 U.S.C. (1934) § 8.

⁵⁹ *Ibid.* at 382, § 9, 49 U.S.C. (1934) § 9.

⁶⁰ *Ibid.* at 384, § 16, 49 U.S.C. (1934) § 16. The original act, of course, provided for suit in the circuit court, the predecessor of the present district court.

⁶¹ This jurisdiction was extended to state courts by amendment in 1910. 36 STAT. (1910) 539, 554, § 13, 49 U.S.C. (1934) § 16 (2).

⁶² *Ibid.*

⁶³ *Standard Oil Co. v. United States* (1931) 283 U.S. 235, 241.

⁶⁴ *Supra* note 56.

of the Interstate Commerce Act it seemed clear that the shipper was free to pursue it,⁶⁵ but the Court was quick to recognize that if suits of this sort might be brought originally in the courts the Commission's control over rates would be seriously impaired, for the rates in issue had been published and filed with the Commission and the Commission had taken no action with reference to them. In fact the carrier would have violated the Act if it had charged any other rate. The issue boiled down to whether it was better to have a large number of federal courts determine the issue of the reasonableness of published rates and thus perhaps bring about the very discrimination condemned by the Act, or to let that be done by one body, the Commission, and so promote the desired end of uniformity of rates. The decision in favor of the latter alternative did not deprive the shipper of his claim for damages but rather sent him to the Commission first. The result, in short, was to deprive the complainant of the option of bringing suit originally in a district court. He might come into court only when armed with findings and an order of the Commission in his favor.

This rule has been applied to a great variety of cases but all of them have involved efforts by a shipper to secure damages from a carrier or some other form of relief against some action of a carrier. No exhaustive review of these cases is necessary.⁶⁶ It will be enough to indicate the general line that has been plotted out. It has been applied where a shipper seeks reparation after payment of a published rate that is alleged to be unreasonable and excessive,⁶⁷ but if the complaint simply involves a failure of the carrier to adhere to its published rate the result is different.⁶⁸ Likewise when the complaint involves

⁶⁵ Section 22 of the Act provided as follows: ". . . nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." 24 STAT. (1887) 379, 387, § 22, 49 U.S.C. (1934) § 22. In section 9 of the Act any person damaged by a violation of any provision of the Act by a carrier was given the choice of either filing a complaint with the Commission or bringing suit in a federal court. In the Abilene case the shipper was not pursuing either of these remedies and in bringing suit at common law in a state court was relying on the saving clause in section 22.

⁶⁶ For this see 2 SHEARMAN, *op. cit. supra* note 34, at 393-406; Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission* (1932) 1 GEO. WASH. L. REV. 49.

⁶⁷ *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, *supra* note 56; *Robinson v. Baltimore & Ohio R.R.* (1912) 222 U.S. 506; *Northern Pacific Ry. v. Solum* (1918) 247 U.S. 477.

⁶⁸ *Pennsylvania R.R. v. International Coal Min. Co.* (1913) 230 U.S. 184.

the validity of some rule as to car service the primary jurisdiction rule is invoked,⁶⁹ but it is not when the only issue is whether a carrier has adhered to its unquestioned rule or agreement.⁷⁰ If the issue goes to the obligation of the carrier to furnish a certain type of equipment⁷¹ or the reasonableness of the carrier's practice⁷² then the rule is invoked, but it is not when the shipper is simply seeking to enforce the general obligation to furnish cars under normal conditions.⁷³ The proper interpretation of a tariff has been said to involve an issue of fact that should be submitted first to the Commission under the rule,⁷⁴ but this has not been applied where the construction of the tariff is free from doubt or does not require any technical skill,⁷⁵ and the rule has not been applied in cases involving the construction of demurrage rules.⁷⁶

A shipper's complaint to recover damages suffered because a competitor has been granted a rebate by a carrier is not within the primary jurisdiction rule when the sole issue is one of the violation of a statutory prohibition,⁷⁷ but the result is different when the decision as to rebate or no rebate depends upon the reasonableness of a particular allowance made by the carrier.⁷⁸

This sampling of cases is enough to show the important function performed by the primary jurisdiction rule. It has served as a device for allocating this judicial business between the courts and the Com-

⁶⁹ *Baltimore & Ohio R. R. v. United States* (1910) 215 U.S. 481; *Morrisdale Coal Co. v. Pennsylvania R. R.* (1913) 230 U.S. 304.

⁷⁰ *Pennsylvania R. R. v. Puritan Coal Min. Co.* (1915) 237 U.S. 121; *Eastern Ry. of New Mexico v. Littlefield* (1915) 237 U.S. 140; *Illinois Cent. R. R. v. Mulberry Hill Coal Co.* (1915) 238 U.S. 275.

⁷¹ *Loomis v. Lehigh Valley R. R.* (1916) 240 U.S. 43.

⁷² *Midland Valley R. R. v. Barkley* (1928) 276 U.S. 482.

⁷³ *Pennsylvania R. R. v. Sonman Shaft Coal Co.* (1916) 242 U.S. 120.

⁷⁴ *Texas & Pacific Ry. v. American Tie & Timber Co.* (1914) 234 U.S. 138; *Standard Oil Co. v. United States*, *supra* note 63.

⁷⁵ *St. Louis, Iron Mt. & S. Ry. v. Hasty & Sons* (1921) 255 U.S. 252 (in which the rule was not applied to a state commission where the construction of the tariff was free from doubt); *National Elevator Co. v. C.M. & St. P. Ry.* (C.C.A. 8th, 1917) 246 Fed. 588; see also *Gimbel Bros., Inc. v. Barrett* (D.E.D. Pa. 1914) 218 Fed. 880, *rev'd*, (C.C.A. 3d, 1915) 226 Fed. 623.

⁷⁶ *Swift & Co. v. Hocking Valley Ry.* (1917) 243 U.S. 281; *Pennsylvania R. R. v. Kittaning I. & S. Co.* (1920) 253 U.S. 319; *Great Northern Ry. v. Merchants Elevator Co.* (1922) 259 U.S. 285; *Turner, Dennis & Lowry Lbr. Co. v. C.M. & St. P. Ry.* (1926) 271 U.S. 259; *Hite v. Central Ry. of N. J.* (C.C.A. 3d, 1909) 171 Fed. 370.

⁷⁷ *Wight v. United States* (1897) 167 U.S. 512; *Mitchell Coal & Coke Co. v. Pennsylvania R. R.* (1913) 230 U.S. 247.

⁷⁸ *Mitchell Coal & Coke Co. v. Pennsylvania R. R.*, *supra* note 77.

mission. The Commission's docket is crowded with these matters⁷⁹ and it has repeatedly complained to the Congress that this burden is a drain on energies that should be devoted to questions of more general importance in the performance of its regulatory functions.⁸⁰

A number of factors have been given weight by the Supreme Court in reaching its decisions in particular cases. It is easy to see, as in the *Abilene* case, that the rule should be invoked when the important powers of the Commission over rates would be impaired by permitting suits in the courts initially. On the other hand, when the question is clear-cut and does not call for any administrative action or technical skill in finding the answer there is no reason for imposing on the complainant the added cost of a proceeding before the already overburdened Commission.⁸¹ The opinions of the Court have frequently put in the forefront the distinction between questions of law and questions of fact with the *sequitur* that if the case involves only the former it may be heard initially in court but if it involves the latter as well it must be first submitted to the Commission.⁸² This has produced some strange results⁸³ but if it is cast against the background of the governmental problem of allocating this judicial business between courts and Commission it has the advantage of furnishing a flexible standard for doing this job. A rigid rule requiring all complaints to be submitted first to the Commission would neither strengthen the integrity of the administrative process in these cases, for the Commission does not seek that kind of strengthening, nor would it give to

⁷⁹ Available figures do not show the exact number of complaints in which damages are sought that are heard and determined each year, but the tables of informal and formal cases from 1900 through 1933 that appear in 3-A SHARFMAN, *op. cit. supra* note 34, at 6-11, show that since 1920 the Commission has received each year an average of 7,715 special docket applications and 1,303 formal complaints, and has held 1,464 hearings at which 233,242 pages of testimony were taken. *Ibid.* at 10-11.

⁸⁰ See I. C. C. ANN. REP. (1916) 75-78; *ibid.* (1919) 17-21, 53; *ibid.* (1920) 78; *ibid.* (1921) 58; *ibid.* (1930) 90-93; *ibid.* (1931) 93-94, 121; see 3-B SHARFMAN, *op. cit. supra* note 34, at 329-359, particularly 357-359.

⁸¹ See cases cited *supra* notes 68, 70, 75.

⁸² This approach has been used chiefly in the cases involving construction of a tariff. See cases cited notes 74, 75, *supra*.

⁸³ *Cf.* Great Northern Ry. v. Ry-Krisp Co. (D. Minn. 1933) 4 Fed. Supp. 358, in which it was held that the question as to whether "Ry-Krisp" is a "cooked cereal food" or "bakery goods" within the language of a railroad tariff was a question of fact that must first be determined by the Interstate Commerce Commission, but in *American Ry. Express Co. v. Price Bros.* (C. C. A. 5th, 1932) 54 F. (2d) 67, the question as to whether young onions were "Onions, Green" or "Plants, Strawberry and Vegetable" was said to be a question of law.

the complainant any surer or speedier remedy, for the Commission is already overburdened with these matters.⁸⁴

The Congress has created quite a large number of new causes of action for damages. In many cases it has not vested power to deal with these claims in the regulatory body but rather has conferred this power on "any court of competent jurisdiction." This is true with respect to civil liabilities created in the Securities Act,⁸⁵ the Securities Exchange Act,⁸⁶ The Public Utility Holding Company Act of 1935,⁸⁷ the Bituminous Coal Act of 1937,⁸⁸ and the Fair Labor Standards Act of 1938,⁸⁹ while under the Merchant Marine Act, 1936, one cause of

⁸⁴ A different view seems to be taken in Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J. 981. The author speaks of the primary jurisdiction rule as "the rule of exclusive preliminary administrative jurisdiction" and sees in it an identity with the exhaustion rule. *Ibid.* at 994-995. He later criticizes the law-fact distinction as employed in the primary jurisdiction rule and seems to feel that it should be abandoned. *Ibid.* at 1003. The Ry-Krisp and Price cases, *supra* note 83, are pointed to as examples of the uses to which the distinction has been put. In Alpert, *Suits Against Administrative Agencies Under N.I.R.A. and A.A.A.* (1935) 12 N.Y.U.L.Q. REV. 393, 394-405, the author simply assumes that the primary jurisdiction rule and the exhaustion rule are one and the same. In 2 SHARFMAN, *op. cit. supra* note 34, at 393-406, the rule is discussed and the author seems to be satisfied that it has been put to good use by the Supreme Court. Miller, *op. cit. supra* note 66, at 75-80, refers to the reparation "racket" and suggests that the function of fixing the amount of the damage sustained by the complainant should be put in the hands of the courts alone after the Commission has made the necessary determination as to the reasonableness of the rate, etc.

⁸⁵ 48 STAT. (1933) 74, 82, § 11 (a), as amended 48 STAT. (1934) 881, 907, § 206 (a) - (d), 15 U.S.C. (1934) § 77k (relating to civil liabilities on account of false registration statements); *ibid.* at 84, § 12, 15 U.S.C. (1934) § 77l (relating to civil liabilities arising in connection with prospectuses and communications). It is also provided that these rights and remedies are in addition to any others that may exist. *Ibid.* at 84, § 16, 15 U.S.C. (1934) § 77p.

⁸⁶ 48 STAT. (1934) 881, 897-898, § 18, 15 U.S.C. (1934) § 78r, as amended 49 STAT. (1936) 1375, 1379, § 5, 15 U.S.C. SUPP. IV (1938) § 78r (relating to civil liability for misleading statements); 48 STAT. (1934) 889, § 9, 15 U.S.C. (1934) § 78i (relating to manipulation of security prices); *ibid.* at 896, § 16, 15 U.S.C. (1934) § 78p (relating to the liability of directors, officers and principal stockholders). It is also provided that these rights and remedies shall be in addition to any others that may exist. *Ibid.* at 903, § 28, 15 U.S.C. (1934) § 78bb.

⁸⁷ 49 STAT. (1935) 803, 829, § 16, 15 U.S.C. SUPP. IV (1938) § 79p (relating to misleading statements); *ibid.* at 830, § 17, 15 U.S.C. SUPP. IV (1938) § 79q (relating to profits in the purchase and sale of securities).

⁸⁸ 50 STAT. (1937) 72, 85, § 5 (d), 15 U.S.C. SUPP. IV (1938) § 835 (d), under which any code member injured in his business or property by any other code member by reason of the doing of something which is forbidden or the failure to do something which is required by the Act or by a code or regulation may recover treble damages.

⁸⁹ 52 STAT. (1938) 1060, 1069, § 16 (b), 29 U.S.C. SUPP. IV (1938) § 216 (b), under which an employer is liable to employees in the amount of their unpaid minimum wages or their unpaid overtime compensation and in addition an equal amount as liquidated damages.

action created by this Act may be maintained in any district court.⁹⁰ Under these provisions the Congress has allocated all of this business to the courts and the primary jurisdiction rule has no part to play. In other cases, however, the Congress has set up the same options that it set up in the Interstate Commerce Act. Almost identical provisions are carried into the Communications Act of 1934 in relation to telephone and telegraph companies⁹¹ and very similar options are given to complainants in the Perishable Agricultural Commodities Act of 1930⁹² and the Packers and Stockyards Act,⁹³ while under the

⁹⁰ 49 STAT. (1936) 1985, 2015, § 810, 46 U.S.C. SUPP. IV (1938) § 1227, under which agreements with other carriers are forbidden and any person injured in his business or property by any violation of the section may recover treble the damages sustained.

⁹¹ 48 STAT. (1934) 1064, 1072-1073, §§ 206-209, 47 U.S.C. (1934) §§ 206-209; *ibid.* at 1095, § 407, 47 U.S.C. (1934) § 407, relating to civil liability for violations of the Act.

⁹² 46 STAT. (1930) 531, 534, § 5, 7 U.S.C. (1934) § 499e, as amended 50 STAT. (1937) 728, § 7, 7 U.S.C. SUPP. IV (1938) § 499e, making commission merchants, dealers or brokers civilly liable for damages to persons injured by certain violations of the Act. The injured party is given the option of suing in any court of competent jurisdiction or of filing his complaint with the Secretary of Agriculture. If the latter course is pursued the Secretary is empowered to award reparations and from this order the party adversely affected is allowed a statutory appeal to a district court; the record, etc., made before the Secretary is certified to the court but it is then provided that "Such suit . . . shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated." 48 STAT. (1934) 584, 588, § 12 (c), 7 U.S.C. (1934) § 499g (c), as amended, 49 STAT. (1936) 1533, 1534, § 3 (c), 7 U.S.C. SUPP. IV (1938) § 499g (c), 50 STAT. (1937) 725, 729, § 10 (c), 7 U.S.C. SUPP. IV (1938) § 499g (c). An alternative procedure is also available if no appeal is taken as above and the award is not paid. In that case suit may be brought in a district court and the same provision as above applies. But this procedure is not likely to be used because by still another provision the license of the commission merchant, dealer or broker against whom a reparation order has been entered and who has neither appealed from the order or paid it in full is automatically suspended until payment is made. 46 STAT. (1930) 531, 534, § 7, 7 U.S.C. (1934) § 499g, as amended 48 STAT. (1934) 584, 587-588, §§ 11-13, 7 U.S.C. (1934) § 499g (b)-(d), 49 STAT. (1936) 1533, 1534, § 3, 7 U.S.C. SUPP. IV (1938) § 499g (c), 50 STAT. (1937) 725, 729, § 10 (c), 7 U.S.C. SUPP. IV (1938) § 499g (c), 52 STAT. (1938) 953, 7 U.S.C. SUPP. IV (1938) § 499g (a).

⁹³ 42 STAT. (1921) 159, 165, §§ 308-309, 7 U.S.C. (1934) §§ 209-210, making any stockyard owner, market agency or dealer liable in damages to any person injured by violations of certain sections of the Act. The liability may be enforced by suit in any district court or by complaint to the Secretary of Agriculture. If the latter course is pursued the Secretary is authorized to make a reparation award and if it is not paid suit may be brought in a district court or in a state court of general jurisdiction. This suit proceeds like any other civil suit for damages except that the findings and orders of the Secretary are prima facie evidence of the facts stated therein.

Shipping Act, 1916, the sole remedy of the injured party seems to be by complaint to the United States Maritime Commission.⁹⁴

The primary jurisdiction rule has a useful function to perform under these acts.⁹⁵ The rule has also been used to maintain the integrity of the civil liabilities created in these acts when parties have sought to recover treble damages under the Sherman Act. These remedies have been said to be exclusive and suits brought under the Sherman Act have been dismissed for want of jurisdiction in the district courts to entertain them.⁹⁶ These, it happened, were all instances in which the primary jurisdiction rule would have been applied to send the case to the Commission first if suit had been brought initially in a court under the statutory options. The fact that suit was brought in a court under another statutory cause of action created by the Sherman Act should make no difference in the application of the rule.

The outstanding feature of this rule is that it is flexible and permits the courts to make a workable allocation of this business between the administrative and the courts. When we come to the many and important instances in which the administrative exercises its powers to govern it is plain enough that a flexible rule might well work a destruction of these powers. In this context flexibility has no place. It is for this reason that Mr. Justice Frankfurter's reference in the *Rochester Telephone* case to the place of this rule in fixing the proper areas of power between the administrative and the courts is so disturbing. Let us hope that the court will see the error of its ways and that the primary jurisdiction rule will play no further part in the operation of statutory review procedures.

⁹⁴ 39 STAT. (1916) 728, 736, 737, 738, §§ 22, 23, 30, 46 U. S. C. (1934) §§ 821, 822, 829, under which a party complaining of a violation of the Act by any common carrier by water may file his complaint with the Commission and the Commission is empowered to award reparations. If the award is not paid suit may be brought in a district court and the findings and award of the Commission "shall be prima facie evidence of the facts therein stated." *Ibid.* at 738, § 30, 46 U. S. C. (1934) § 829. There is no provision comparable to that in the Interstate Commerce Act preserving other common law or statutory remedies. By the Merchant Marine Act of 1936, 49 STAT. (1936) 1985, 1987, § 204, 46 U. S. C. SUPP. IV (1938) § 1114, these powers are now exercised by the newly created United States Maritime Commission.

⁹⁵ It was applied in a case arising under the civil liability created by the Packers and Stockyards Act where suit was based on a claim that certain stockyards tariffs were discriminatory and while the Secretary of Agriculture had found them to be so he had not determined that any right to reparation existed. *Sullivan v. Union Stockyards Co.* (C. C. A. 8th, 1928) 26 F. (2d) 60. This is a questionable result.

⁹⁶ *Keogh v. Chicago & N. W. Ry.* (1922) 260 U.S. 156 (suit for treble damages under the Sherman Act based on an alleged conspiracy of competing carriers to fix rates;

IV

THE EXCLUSIVE JURISDICTION OF THE ADMINISTRATIVE
AND OF THE DESIGNATED REVIEWING COURTS

It has already been noted that in most of the instances in which the Congress has created a special statutory scheme for the review of particular administrative actions it has declared that the jurisdiction of the designated reviewing courts is "exclusive."⁹⁷ This is not only an effort to mark out a plain scheme for judicial review by the designated courts but it is also an effort to protect the administrative from the writs of other courts while it is engaged in the performance of its tasks.

The National Labor Relations Act contains provisions of this kind and in the recent case of *Myers v. Bethlehem Shipbuilding Corporation*⁹⁸ the Supreme Court gave full effect to the statutory scheme. The decision represents an important victory for the administrative. The Court declared that the district court was without power to entertain a bill in equity brought by the Bethlehem Shipbuilding Corporation to enjoin the National Labor Relations Board from conducting a hearing on a complaint charging the corporation with unfair labor practices. The corporation claimed that its activities were beyond the jurisdiction of the Board under the commerce clause and that the hearings would consequently be futile and would subject it to irreparable damage. Mr. Justice Brandeis answered for the Court that the Congress had vested exclusive power in the Board to determine whether the corporation had engaged in unfair labor practices affecting interstate commerce and in addition had restricted proceedings to review and enforce the orders of the Board to a circuit court of appeals. "Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest

but the rates in issue had been filed with the Interstate Commerce Commission and, after inquiry on complaint of plaintiff in this case, had been found to be reasonable and had been approved); *United States Navigation Co., Inc. v. Cunard Steamship Co., Ltd.* (1932) 284 U.S. 474 (suit to enjoin an alleged combination and conspiracy in violation of the Sherman Act but the acts charged were found to be within the exclusive jurisdiction of the Shipping Board and plaintiff was sent to the Board to seek a reparation award there); *Terminal Warehouse Co. v. Pennsylvania R.R.* (1936) 297 U.S. 500 (suit for treble damages under the Sherman Act by a party whose complaint before the Interstate Commerce Commission in a reparation proceeding that involved almost identical issues had been dismissed).

⁹⁷ See notes 22, 29, and 32, *supra*.

⁹⁸ *Supra* note 1.

exclusive jurisdiction in the Board and the Circuit Court of Appeals"⁹⁹ concluded Mr. Justice Brandeis on this point. This was quite enough to dispose of the case. Once it was admitted that the Congress had power to vest exclusive jurisdiction in the National Labor Relations Board to prevent persons from engaging in unfair labor practices and in the circuit of appeals to enforce or set aside any Board order then it was clear that this procedure must be followed for by hypothesis it then became the only available procedure. In short, it was exclusive. In view of what was said the district court simply had no jurisdiction to entertain the bill. There was still the claim that the Board had no jurisdiction over the corporation at all. To set this point at rest Mr. Justice Brandeis invoked "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"¹⁰⁰ and showed that this had been applied even where it was claimed that an administrative body lacked power over the subject matter. In this fashion the administrative machinery of the Board together with the statutory provisions for subjecting its orders to judicial review were maintained at full strength. The orderly procedure set out by the Congress must now be pursued. As a procedural matter the allocations of power made by the Act are unimpaired.

What is the effect of this decision on the other "exclusive" statutory schemes that have been set up by the Congress for the review of other administrative bodies? It should be noted that no penalties follow from the disregard of any order of the National Labor Relations Board until it has become, so to speak, an order of a reviewing court and then it acquires the sanctions that attach to an order of the court. There is thus ample protection to the party to the administrative proceeding if he pursues the course marked out for him by the Act. Administrative orders under three other acts may be disregarded with like impunity and all that has been said already applies with equal force to them.¹⁰¹ Only slightly different are three acts under

⁹⁹ *Ibid.* at 50.

¹⁰⁰ *Ibid.*

¹⁰¹ This was true as to orders under the original Federal Trade Commission Act [38 STAT. (1914) 717, 15 U.S.C. (1934) § 41] prior to its recent amendment, and is true today as to orders of the Securities Exchange Commission under the Securities Act of 1933 [48 STAT. (1933) 74, 87, § 24, 15 U.S.C. (1934) § 77x], the Securities Exchange Act of 1934 [48 STAT. (1934) 881, 904, § 32, 15 U.S.C. (1934) § 78ff], and as to certain orders under the Public Utility Holding Company Act of 1935 [49 STAT. (1935) 803, 836, § 29, 15 U.S.C. SUPP. IV (1938) § 79z-3].

which the administrative order is endowed with penal sanctions only after a designated time for invoking the statutory review procedure has elapsed and the procedure has not been invoked.¹⁰²

Where government is dispensing a privilege of some kind, such as a radio license under the Communications Act, it seems even plainer that a party aggrieved must pursue the statutory review procedure as marked out by the Congress as his exclusive remedy. He seeks a privilege and if the action of the administrative leaves the applicant unsatisfied or if the administrative has revoked a privilege it is only right to compel the seeker to pursue his statutory remedies. The dispenser of the privilege has assured to the seeker that there may be judicial review of the administrative before the party is subjected to the penalties that follow from carrying on certain conduct without benefit of the grant of privilege to do so. And under most statutes an administrative order that would bring about harsh results if left outstanding pending its review may be stayed in the discretion of the reviewing court.¹⁰³ What has been said applies to the radio licensing powers under the Communications Act of 1934, the permit requirements under the Federal Alcohol Administration Act, the new drug permits under the Federal Food, Drug, and Cosmetic Act of 1938, the registration requirements under the Commodity Exchange Act and the Securities Act of 1933, certificates issued under the Civil Aeronautics Act of 1938,¹⁰⁴ clearance certificates for the interstate movement of oil under the "Hot Oil" Act, and, perhaps too, the farm marketing quotas under the Agricultural Adjustment Act of 1938.¹⁰⁵ In all of these cases the Congress has set out a course to be pursued.

In some acts the Congress has clothed the administrative order itself with penal sanctions. It cannot be disregarded with impunity.

¹⁰² This is true under the recent amendments to the Federal Trade Commission Act. The Commission order carries heavy penalties if it is disobeyed after the sixty day period for securing statutory review has elapsed. 52 STAT. (1938) 111, § 3, 15 U.S.C. SUPP. IV (1938) § 45, as amended 52 STAT. (1938) 973, 1028, § 1107 (f), 15 U.S.C. SUPP. IV (1938) § 45 (a). It is also true as to orders of the Secretary of Agriculture relating to packers under the Packers and Stockyards Act, [42 STAT. (1921) 159, 163, § 205, 7 U.S.C. (1934) § 195], and to orders of the Commodity Exchange Commission under the Commodity Exchange Act [49 STAT. (1936) 1491, 1500, § 9, 7 U.S.C. SUPP. IV (1938) § 13a].

¹⁰³ See note 117, *infra*.

¹⁰⁴ The Act requires a certificate of public convenience and necessity before any carrier may engage in air transportation [52 STAT. (1938) 973, 987, § 401, 49 U.S.C. SUPP. IV (1938) § 481] and "any order, affirmative or negative" is subject to judicial review. *Ibid.* at 1024, § 1006, 49 U.S.C. SUPP. IV (1938) § 646.

¹⁰⁵ *Supra* note 29, (3), (13), (14), (7), (2), (12).

This is true of orders of the Federal Power Commission under the recent Federal Power Act and under the Natural Gas Act and it is also true of wage orders issued under the Fair Labor Standards Act of 1938.¹⁰⁶ In these cases the party subject to an administrative order is confronted with a choice of procedures. He may either pursue the statutory review procedure or he may await criminal prosecution for violation of the order and attempt to secure the same kind of judicial review in the criminal court. It is far from clear that the second alternative is available for this purpose. This point is discussed briefly later.

The exclusive jurisdiction idea, as expressed in the *Myers* case, has none of the flexibility of the primary jurisdiction rule. In fact, the administrative is permitted to say the first word as to all matters that fall within its province, even matters that go to its constitutional power to act at all, without let or hindrance from the writs of any court, and it is expressly recognized that when judicial review becomes appropriate it shall take place in the manner and under the procedure set out by the Congress. The jurisdiction of the designated reviewing courts is likewise recognized as exclusive. A flexible rule has no place here. The administrative may have the first and exclusive first word as to all matters within the ambit of its statutory powers. That is as it should be. There is no room for distinctions between questions of law and questions of fact and even, under the *Myers* case, as to questions of fact that reach into questions of the constitutional power of the Board to act at all. In this connection a disturbing feature of the opinion of Mr. Justice Frankfurter in the *Rochester Telephone* case is that when he mentioned the primary jurisdiction rule he very properly cited a large number of decisions involving the Interstate Commerce Commission but then added that the rule had been given general application. For this the *Myers* case was cited; yet the primary jurisdiction rule was not mentioned in the *Myers* case opinion. Doubtless it is pedantic to quibble about a phrase in a footnote,¹⁰⁷ but the pedantry, if such it be, is indulged in because it is plain enough that the *Myers* case opinion was written in words that point to the impregnability of the machinery of the Board in all cases. An opinion cast in terms of the primary jurisdiction rule would have carried with it no such assurances.

In the *Myers* case Mr. Justice Brandeis referred to the rule re-

¹⁰⁶ *Ibid.* (4), (9), (10).

¹⁰⁷ *Rochester Telephone Corp. v. United States*, *supra* note 1, at 139, n. 22.

quiring the exhaustion of the administrative remedy before resort to a court but this seems irrelevant to the decision that was reached.¹⁰⁸ Once it is recognized that the Congress may vest exclusive jurisdiction in the Board and the designated reviewing courts it seems irrelevant to talk about the exhaustion rule in that context. When the party has gone through the Board and the reviewing courts that is the end of the whole matter. No judicial relief follows. Everything has been exhausted when all that has been done. The exhaustion rule has meaning only when it requires a party to exhaust some administrative remedy before he may come into court in search of a further remedy of some sort.

It is important to recognize that in the *Myers* case the Court has explicitly recognized the power of the Congress to vest exclusive jurisdiction in an administrative body to perform its tasks without let or hindrance of any court until the point is reached where its action is ripe for scrutiny by certain designated courts. It remains to be seen whether the Supreme Court will recognize this same power in the Congress when it has before it other statutes that seek to do the same thing in connection with the orders of other administrative bodies.¹⁰⁹

V

REVIEWABLE ORDERS

If the special statutory review provisions are to be recognized under the *Myers* case as furnishing an exclusive remedy to a party aggrieved by an administrative order then it becomes important to determine just what kind of an "order" is reviewable. This is important because if reviewability is denied under the exclusive statutory procedure then, by hypothesis, there is no other available judicial remedy. As to this the statutes are of little help. In the case of the

¹⁰⁸ Curiously in the companion case of *Newport News Shipbuilding Co. v. Schauffler* (1938) 303 U. S. 54, 57, decided the same day, Mr. Justice Brandeis answered the contention that the Board lacked power over the subject matter by saying that the Act confers on the Board only "exclusive initial power to make the investigation" to determine its jurisdiction and the final determination of this question is not left wholly to the Board but may be reviewed judicially. If this had been said in the *Myers* case it is hard to see what place there would have been in that opinion for the mention of the rule of exhaustion of administrative remedies.

¹⁰⁹ There is real novelty in the exclusive jurisdiction idea as recognized in the *Myers* opinion and consequently there is little in the way of authority that can be turned to in support of it. Mr. Justice Brandeis cited only *Anniston Mfg. Co. v. Davis* (1937) 301 U. S. 337. In that case the Court recognized the power of Congress to provide a special and exclusive administrative procedure for the recovery of illegally exacted processing

Communications Act ¹¹⁰ there is an effort to spell out the kind of order that is reviewable but in nearly every other case the Congress has said, all too cryptically, that an "order" may be reviewed. This means

taxes. In reaching this decision the Court reviewed fully the administrative machinery that had been set up and found that it provided a full and fair hearing to the party and that it protected all legal rights by setting up statutory machinery for judicial review by designated reviewing courts. In the face of this exclusive remedy the Court dismissed an action at law brought against a collector of internal revenue to recover processing taxes.

In an early radio case, *White v. Johnson* (1931) 282 U.S. 367, involving the Radio Act of 1927, the Supreme Court talked as though the statutory review of Federal Radio Commission orders in the Court of Appeals for the District of Columbia was the only remedy open to one dissatisfied with a Commission order. Plaintiff had not pursued this statutory remedy but when he found himself dissatisfied with the Commission's order reducing the power authorized in his station license he sought to enjoin the Commission from enforcing the criminal penalties against him for operating in violation of the order. This was a clear attempt to frustrate the orderly review procedure set out in the Act and the Supreme Court dismissed the bill. This view was followed in *American Bond & Mortgage Co. v. United States* (C. C. A. 7th, 1931) 52 F. (2d) 318, in which the United States sought to enjoin the continued operation of a broadcasting station without a license. The station had not taken the statutory appeal from the order denying it a license and sought to attack the order collaterally in these injunction proceedings. The court held that the order could not be attacked except through the statutory appeal. *Sykes v. Jenny Wren Co.* (App. D. C. 1935) 78 F. (2d) 729, *cert. den.*, (1935) 296 U.S. 624, and *Monocacy Broadcasting Co. v. Prall* (App. D. C. 1937) 90 F. (2d) 421, are other decisions that have sustained the integrity of the statutory remedies. In some of these opinions the courts state that a bill in equity will be dismissed on general equity principles when there is an adequate remedy at law and the plaintiff has not exhausted it. The statutory appeal is pointed to as the remedy at law. This use of the exhaustion rule in this context is quite harmless but, as has already been pointed out, when this is combined with talk as to the exclusiveness of the statutory appeal remedy, as it is in these opinions, it makes the exhaustion rule quite irrelevant. If exclusive jurisdiction has been vested in certain designated courts that means just that and should deprive any other court of jurisdiction either at law or in equity. See the intimation to this effect in *American Sumatra Tobacco Corp. v. Securities & Exchange Comm.* (App. D. C. 1937) 93 F. (2d) 236, 241. The same view is supported in *Securities & Exchange Comm. v. Andrews* (C. C. A. 2d, 1937) 88 F. (2d) 441.

Compare the opinion in *Abe Rafelson Co. v. Tugwell* (C. C. A. 7th, 1935) 79 F. (2d) 653, involving the Perishable Agricultural Commodities Act of 1930, cited in full note 92, *supra*.

A group of cases involving the National Bituminous Coal Commission will be dealt with later in connection with reviewable orders. *Utah Fuel Co. v. National Bituminous Coal Comm.*, *supra* note 1, s.c. (App. D. C. 1938) 101 F. (2d) 426; *Mallory Coal Co. v. National Bituminous Coal Comm.* (App. D. C. 1938) 99 F. (2d) 399.

¹¹⁰ See note 29 (3), *supra*. Let it not be supposed, however, that this effort of the Congress has been entirely successful. See Caldwell, *Appeals From Decisions of the Federal Radio Commission* (1930) 1 J. AM. L. 274, for a discussion of some of the troubles growing out of the appeal provisions of the earlier Act. Even under the new Communications Act there has been a deal of litigation over the new appeal provisions. The cases are reviewed in Note (1939) 27 Geo. L. J. 783.

that, unless this is elaborated by statute, the reviewing courts must set themselves to the task of writing into this word a code of appellate procedure.

All kinds of orders will emerge from any administrative body while it is engaged in the performance of its tasks.¹¹¹ Thus there may be an "order" to make an investigation of some kind or an "order" setting a case for a hearing¹¹² or other orders that are purely incidental to the conduct of a proceeding.¹¹³ A letter has been said to be too informal to acquire the status of a reviewable order.¹¹⁴ The administrative may withdraw its order so that nothing remains to be reviewed and the matter is moot.¹¹⁵ The administrative process may be found to be still subject to correction by the administrative itself so that the time for judicial review has not arrived. Thus, there is the matter of petitions for rehearings before the administrative.¹¹⁶ If the administrative seeks to make its order effective while a review petition is pending relief *pendente lite* may be granted by the reviewing court and the operation of the order stayed until it has been reviewed. A stay is authorized by most of the statutes and rests within the discre-

¹¹¹ This whole subject is fully reviewed in an excellent note in (1938) 47 YALE L. J. 766.

¹¹² *United States v. Illinois Cent. R. R.*, *supra* note 44; *Federal Power Comm. v. Metropolitan Edison Co.*, *supra* note 45. In both of these cases reviewability was denied even though the jurisdiction of the administrative to enter upon the hearing was challenged. See also *Securities & Exchange Comm. v. Andrews*, *supra* note 109.

¹¹³ In *Jones v. Securities & Exchange Comm.* (C. C. A. 2d, 1935) 79 F. (2d) 617, reviewability was denied to the refusal of the Commission to permit the withdrawal of a registration statement.

¹¹⁴ *Third Ave. Ry. v. Securities & Exchange Comm.* (C. C. A. 2d, 1936) 85 F. (2d) 914, was such a case. *United States v. Corrick* (1936) 298 U.S. 435, should probably be put in the same class. There reviewability was denied to the action of the Secretary of Agriculture in refusing to accept for filing under the Packers and Stockyards Act certain rates submitted by market agencies. This action could scarcely be called an "order" of any kind.

¹¹⁵ *Atlanta v. National Bituminous Coal Comm.* (App. D. C. 1938) 99 F. (2d) 348. But it is not as easy for a private party to preclude review by abandonment of the conduct complained of by the administrative. Ordinarily this will not result in making the case moot. *Federal Trade Comm. v. Goodyear Tire & Rubber Co.* (1938) 304 U.S. 257.

¹¹⁶ Communications Commission cases have treated this point. See *Saginaw Broadcasting Co. v. Federal Communications Comm.* (App. D. C. 1938) 96 F. (2d) 554; *Red River Broadcasting Co. v. Federal Communications Comm.* (App. D. C. 1938) 98 F. (2d) 282, *cert. den.*, (1938) 305 U.S. 625; *Southland Industries v. Federal Communications Comm.* (App. D. C. 1938) 99 F. (2d) 117; *Woodmen of the World Life Ins. Ass'n v. Federal Communications Comm.* (App. D. C. 1938) 99 F. (2d) 122. See Note (1939) 27 GEO. L. J. 783.

tion of the reviewing court.¹¹⁷ Even if an "order" emerges at the conclusion of a proceeding it may not carry compulsion in its train. It may, like the tentative or even the final valuation orders of the Interstate Commerce Commission, be but a step in a regulatory process that must await further steps before compulsion follows.¹¹⁸ Or it may, like the certification of representatives of employees for collective bargaining under the National Labor Relations Act, be but one step in a process of bargaining in which the commands of government play no further part. Reviewability of these certifications has been both denied and allowed in lower courts. The Supreme Court recently resolved the conflict in favor of denial and put it on the ground that the statutory review provisions of the Act were not written to cover review of these certifications.¹¹⁹

¹¹⁷ This was done as to orders of the National Bituminous Coal Commission and is fully supported by the provision in the Act that "The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 50 STAT. (1937) 72, 86, § 6 (b), 15 U.S.C. SUPP. IV (1938) § 836 (b). *Truax-Traer Coal Co. v. National Bituminous Coal Comm.* (C. C. A. 7th, 1938) 95 F. (2d) 218; *Saxton Coal Min. Co. v. National Bituminous Coal Comm.* (App. D. C. 1938) 96 F. (2d) 517. A similar provision appears in the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Federal Power Act, the National Labor Relations Act, the Natural Gas Act, the Fair Labor Standards Act of 1938, the Agricultural Adjustment Act of 1938, the Civil Aeronautics Act of 1938, and the Federal Food, Drug, and Cosmetics Act of 1938, *supra* note 29, (2), (4), (6), (9), (10), (11), (12), (14). Under the Federal Alcohol Administration Act the commencement of review proceedings operates as a stay unless the court orders to the contrary. *Supra* note 29 (13).

¹¹⁸ *Delaware & Hudson Co. v. United States*; *United States v. Los Angeles R. R.*, both *supra* note 43.

¹¹⁹ Prior to the Supreme Court decisions review had been denied in *United Employees Ass'n v. National Labor Rel. Bd.* (C. C. A. 3d, 1938) 96 F. (2d) 875, and in *American Federation of Labor v. National Labor Rel. Bd.* (App. D. C. Feb. 5, 1939) 103 F. (2d) 933. Review had been allowed in *International Brotherhood of Electrical Workers v. National Labor Rel. Bd.* (C. C. A. 6th, June 28, 1939) 105 F. (2d) 598. The last two cases were carried to the Supreme Court on certiorari and in decisions handed down on January 2, 1940 [*American Federation of Labor v. National Labor Rel. Bd.*, 8 U. S. LAW WEEK 52; *National Labor Rel. Bd. v. International Brotherhood of Electrical Workers*, 8 U. S. LAW WEEK 55], reviewability of certifications was denied. It is noteworthy that the lower court in the *American Federation of Labor* case, though it denied reviewability under the statutory review procedure, was clear that review might be had in an independent suit in equity in a district court. The Supreme Court left this question open yet the following language carries a slight intimation that such a suit might lie: "But that question is not presented for decision.... It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an inquiry on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy." 8 U. S. LAW WEEK at 54. The problem is much the same as that discussed in connection with *Utah Fuel Co. v. National Bitum-*

This matter of reviewability is important under both types of review procedure, that is, the special statutory review and the injunction under the Urgent Deficiencies Act.¹²⁰ There is, however, one important difference. If review is denied in the extraordinary three judge court set up under the Urgent Deficiencies Act it may still be available in some other court. This is well illustrated in *United States v. Griffin*,¹²¹ in which the Supreme Court denied reviewability in the three judge district court to an order of the Interstate Commerce Commission refusing to grant an increase in compensation for carrying the mail. The Court said that this kind of an order did not fall within the broad purpose of the Congress in setting up the extraordinary remedy under the Urgent Deficiencies Act. There was "no wide public interest in its speedy determination."¹²² Standing alone this is a broad criterion to apply in future cases but in the context of this decision the purpose of the Court is revealed when reference is made to other available remedies. The effect of the decision is to allot this type of case to the Court of Claims or the district court,¹²³ and thus to free the three judge court from the burden of these matters.

If, however, reviewability of an order is denied under a statutory review procedure and the Supreme Court stands by its position in the *Myers* case that this remedy is exclusive then there is no other available judicial review. That marks the difference between the two types of review procedures in this connection. The Supreme Court got itself into a muddle on this in connection with a case involving an order of the National Bituminous Coal Commission.

In *Utah Fuel Co. v. National Bituminous Coal Commission*,¹²⁴ the Court found that the district court had jurisdiction to entertain a bill in equity brought by a coal producer to enjoin the Coal Com-

inuous Coal Comm., note 126, *infra*, and the same criticisms apply with equal force. Note that in *Heller Bros. Co. v. Lind* (App. D. C. 1936) 86 F. (2d) 862, *cert. den.*, (1937) 300 U. S. 672, the court denied relief by injunction against the Board to enjoin it from holding hearings on a complaint and from conducting an election with a view to certification. The court stated that the remedy through statutory review was adequate. This ground is no longer tenable with respect to a Board election. It should not be assumed that the road to relief in equity in a district court is now open. The most that may be said is that it has not been shut off. If it turns out to be an open road the same situation will exist as now exists under *Utah Fuel Co. v. National Bituminous Coal Comm.*, a situation that is criticized in the text, *infra*.

¹²⁰ See notes 10 and 11, *supra*, and text thereto.

¹²¹ *Supra* note 11.

¹²² *Ibid.* at 234.

¹²³ The Court specifically mentioned these available remedies. *Ibid.* at 238.

¹²⁴ *Supra* note 1.

mission from making public in the course of a hearing on the establishment of minimum prices for the sale of coal certain confidential cost data and sales realization reports submitted by the producer pursuant to the provisions of the Bituminous Coal Act of 1937. That the Supreme Court denied the injunction on the merits is unimportant in this discussion. What is important is that it entertained the bill at all for this Act contains provisions almost identical with those in the National Labor Relations Act in the *Myers* case whereby exclusive jurisdiction is vested in a circuit court of appeals to entertain petitions to review orders of the Commission. If the Supreme Court had chosen to write an opinion along the lines of the *Myers* case opinion the conclusion would have been that the district court lacked jurisdiction to entertain the bill at all. What had happened was this. Another producer had sought to secure a review of an identical order by pursuing the statutory review procedure by petition in the Court of Appeals for the District of Columbia, but that Court had held that the order requiring disclosure of this confidential information was preliminary and procedural and hence not reviewable under the statutory procedure.¹²⁵ Deprived of this remedy it was then possible to allege that there was no available remedy other than by bill in equity in the district court. As to this the Court of Appeals for the District of Columbia had held that the district court was without jurisdiction to entertain it.¹²⁶ It was again stated that the order was merely procedural and that the producer was simply seeking to attain by means of a bill in equity what had been denied under the statutory review procedure. The *Myers* case had already been decided and the Court, taking its cue from the opinion in that case, referred to the exclusive jurisdiction of the Court of Appeals for the District of Columbia to review orders of the Commission and the exhaustion rule. This remedy was said to be adequate and must be pursued. In the Supreme Court Mr. Justice McReynolds explicitly rejected this view.¹²⁷ Mr.

¹²⁵ *Mallory Coal Co. v. National Bituminous Coal Comm.*, *supra* note 109; *cf.* *American Sumatra Tobacco Corp. v. Securities & Exchange Comm.*, *ibid.*, in which the court held that a reviewable order grew out of the refusal of the Commission to treat as confidential certain information filed in connection with a registration statement.

¹²⁶ *Utah Fuel Co. v. National Bituminous Coal Comm.* (App. D. C. 1938) 101 F. (2d) 426.

¹²⁷ The only case cited in support of the general equity jurisdiction of the district court in this kind of a case was *Shannahan v. United States*, *supra* note 46. That case presented a similar problem but it was in relation to the statutory injunction type of procedure under the Urgent Deficiencies Act and as to that we have seen that there

Justice Black alone concurred specially for the reasons stated in the opinion of the court of appeals.

As far as the producer was concerned in this situation the one and only thing it sought to prevent was the disclosure of the confidential

is a difference. In that case the National Mediation Board has requested the Interstate Commerce Commission to determine whether a particular carrier was exempt from the powers of the Board under the terms of the Railway Labor Act. The Commission found that the carrier was not within the exemption and it was this finding that the carrier sought to have reviewed under the Urgent Deficiencies Act procedure. Review was denied and it was said that the Commission had merely found a "fact," the status of the carrier; that "Its decision is not even in form an order"; that it "neither commands nor directs anything to be done," and is "as clearly 'negative' as orders by which the Commission refuses to take requested action." *Ibid.* at 599. It was intimated that this determination might be reviewable by some other procedure, and this intimation was translated into decision in *Shields v. Utah Idaho Cent. R. R.*, *supra* note 46, decided eight months later. In that case a similar finding had been made by the Interstate Commerce Commission and in reliance on it the National Mediation Board had ordered the carrier to post certain notices under the Railway Labor Act. The carrier then sought by bill in equity in the district court to enjoin the United States Attorney from prosecuting it for failing to post notices pursuant to the Board's order. In this way it sought a review that had been denied under the earlier decision. This review was allowed. The Court was satisfied that this determination of the Commission was part of a regulatory scheme and while it was not preparatory to further proceedings by that Commission it did, however, subject the carrier to the Railway Labor Act and the orders of the National Mediation Board. Such an order had been issued and the carrier was subject to the penalties that followed disobedience. Equity jurisdiction was found to exist. The Shannahan case apparently stands unimpaired by the Rochester Telephone case. Mr. Justice Frankfurter cited it as an example of a case that fell within the first category of negative order cases and as such the determination was not reviewable (*Rochester Telephone Corp. v. United States*, *supra* note 1, at 130), yet the holdings in the two cases are not easily reconciled. In the Rochester Telephone case the Communications Commission had ruled that the company was subject to its powers under the Act and as such owed obedience to its orders respecting a variety of matters. The company was seeking review of the order that it was subject to the Act. In the Shannahan case, the carrier sought a review of a similar determination. To base a distinction on the fact that in the Rochester Telephone case the Commission's decision subjected the carrier at once to existing orders of that Commission while in the Shannahan case it was a step in the subjection of the carrier to the orders of another body, the National Mediation Board, seems to disregard the realities of administrative action. The further fact that the Communications Commission put its findings in the form of an "order" while the Interstate Commerce Commission expressed its action in the words "We find" is trivial. *Shannahan v. United States*, *supra* note 46, at 598.

At any rate, we have as a result a situation in which administrative action is not definitive enough to invoke the reviewing power of the statutory three judge court but is to invoke the equity powers of the district court. This result is supportable but only if the considerations that governed the decision in *United States v. Griffin* are now to be written into the opinion in the Shannahan case. These considerations are worthy of explicit mention if a result such as this is to be supported for there is much to be said on both sides before this judicial business is apportioned as between the district court, on the one hand, and the statutory three judge district court, on the other hand.

data. The holding of the court of appeals in the first case that the order requiring disclosure was merely procedural and thus not reviewable under the statutory procedure reflected a judgment that any error in requiring disclosure could be adequately corrected when the Commission's proceedings had ripened into a reviewable order. If this decision had been carried to the Supreme Court it should have reversed the court of appeals for it is evident from its later decision that it regarded unauthorized disclosure as something for which there should be some available remedy. The fact that the order of disclosure was preliminary in the sense that it was but an incident, like a ruling on the admissibility of evidence, in the course of a hearing looking to a price order should make no difference. If the order was important enough to give the district court jurisdiction to entertain a bill in equity it surely was important enough to be treated as a reviewable order under the statutory procedure. It is no answer to label it merely procedural. In this view the Supreme Court should have stood by its opinion in the *Myers* case. No harm would have been done to the producer for the bill in equity was dismissed on the merits anyway. A reference to the adequacy of the remedy by statutory review would have made it clear enough that the court of appeals was wrong in its first decision and the result would have been that the integrity of the statutory scheme would have been maintained. There would have been no need to ignore the recent opinion in the *Myers* case and some degree of consistency would have been attained. As it is the best laid schemes of the Congress have gone astray. It is difficult to escape the conclusion that the decision in the *Utah Fuel Co.* case was an unfortunate misstep by the Supreme Court. In this day of overruling it should be put on the *Index*.

VI

THE EXHAUSTION OF ADMINISTRATIVE REMEDIES RULE

This rule requires a party to first exhaust his available administrative remedy before he may resort to a court for relief against some actual or threatened injury growing out of administrative action of some kind. In the *Myers* case Mr. Justice Brandeis described it as a "long settled rule of judicial administration. . . ."¹²⁸ The rule might be stated as the first and last word rule for, after all, the rule is noth-

¹²⁸ *Myers v. Bethlehem Shipbuilding Corp.*, *supra* note 1, at 50. On the subject of this rule see Berger, *loc. cit. supra* note 84; Notes (1927) 27 *Col. L. Rev.* 450; (1935) 35 *ibid.* 230.

ing more than a device whereby the judges can see to it that the administrative is given a chance to enter upon the performance of its appointed task, to utter the first word, without being forestalled by the writs of the judges, and to complete that task in an orderly manner until its last word has been uttered and its final action is ripe for judicial scrutiny. The first word should be uttered by the administrative because the legislature has so decreed by the simple fact of having created the body and having vested it with certain powers. The administrative should likewise be given a chance to utter its last word for if it is given that chance the last word may dispense with the occasion for judicial action. And even if there remains something for the judges to do they should have the last word before them before they do anything.

It is only talking in terms of good management of public affairs to say that the administrative should not be subject to constant interruptions by the judges when it is engaged in the performance of a particular task. When the last administrative word has been said on the matter in issue, when the administrative has been given a chance to do its best or its worst, then the time is ripe for judicial scrutiny of what has been done. It is clear enough that this rule is but another instance of the allocation of the power to govern between the administrative and the courts. It is, of course, a judge-made rule.

What is its utility in connection with the statutory review procedures considered so far? The answer should be, very slight, but the language of some of the judicial talk does not quite bear that out. The basis for the answer suggested is that if the "exclusive" jurisdiction of the designated reviewing courts under one type of statutory review is recognized, as it was in the *Myers* case, then the exhaustion rule has no part to play. This point has already been made. The issue under those statutes is whether or not there is a reviewable order. Under the statutory injunction type of procedure the answer is substantially the same. The question is whether there is an "order" that is subject to the extraordinary remedy of the three judge court.

The exhaustion rule has been used to determine whether there is a reviewable order, but its utility in this connection is very slight, and in at least one instance it was misused and produced a poor result.¹²⁹ This rule is surely no more than one aid in determining whether administrative action has reached the point at which judicial scrutiny

¹²⁹ See the discussion of *Utah Fuel Co. v. National Bituminous Coal Comm.* and related cases, *supra* pp. 159-162.

is in order. It is simply an admonition to the judges to keep their hands off until the administrative has had its last word. Furthermore, it is apt to direct attention to only one point, and that is the finality of the administrative action. This may be decisive in most cases but should not be in all. The substance of the inquiry that should be made is whether the administrative action in question, no matter what form it may take or at what stage of some proceeding it is taken, is important and final enough so that some door should be open to subject it to judicial examination.

From what has been said it must not be supposed that the exhaustion rule has no useful function to perform. It has been put to good use when state administrative action has found its way into the federal courts,¹³⁰ and it is equally useful in the federal field when the Congress has been silent as to the road to be taken by a party in search of judicial review.¹³¹ It is useful, too, in the state courts.

The effort has been to plot out the statutory schemes that have been devised to point the way to court and whatever judicial review may be accorded when that goal is reached. These statutes have been cast against the judge-made rules that will be encountered under any road to review that may be devised. In this discussion the recognition in the *Myers* case of the power of the Congress to vest exclusive power in the administrative and in named reviewing courts stands out as the most important judicial pronouncement on this subject. If this is adhered to when similar statutory schemes come before the courts there is a real basis for the hope that order may be brought into the procedural relations between the administrative and the courts. The courts will still have the important task of determining whether a particular administrative action sums up into a reviewable order under the statutory procedure, but if this task is performed with a realistic regard for the interests of the administrative and the claims of the parties who are before it then there should be no need for confusing the procedural issue by invoking competing judicial remedies.¹³²

¹³⁰ A goodly number of these cases are cited in footnotes 9 and 10 of the opinion of Mr. Justice Brandeis in *Myers v. Bethlehem Shipbuilding Corp.*, *supra* note 1, at 51.

¹³¹ See Berger, *loc. cit. supra* note 84.

¹³² For a review of the procedural bogs in which a litigant may find himself when no path has been marked out by statute, see Alpert, *loc. cit. supra* note 84.

What has been said does not mean that there may be no other judicial remedy for there are two that are entirely consistent with this orderly procedure. Both of them stem from the fact that at nearly every turn the administrative must invoke the strong arm of the courts if it is to put force behind its commands. The command may take the form of a subpoena, and if that is disobeyed it is a typical statutory provision that requires the administrative to invoke the aid of a court to secure compliance. When this is done the power of the administrative to enter upon the inquiry may be challenged and this challenge may even go to the validity of the statute under which the administrative exists and seeks to act.¹³³ The command may be one to compel a recalcitrant witness to answer questions at a hearing. Again it is a typical statutory provision that requires the administrative to invoke the power of a court to punish for contempt, and in this proceeding the propriety of the particular questions may be reviewed and likewise the power of the administrative to make the inquiry.¹³⁴

Many regulatory statutes contain criminal provisions and if a party is charged with their violation the issue in court is usually the same as in any other criminal proceeding, but where criminality depends upon the violation of the terms of an administrative order,¹³⁵ then further questions are raised. If no form of statutory judicial review is available there is every reason to say that review should be had in the criminal court and two leading bridge cases point, though uncertainly, in that direction.¹³⁶ If, however, a statutory review pro-

¹³³ *Interstate Commerce Comm. v. Brimson* (1894) 154 U.S. 447; *Federal Trade Comm. v. American Tobacco Co.* (1924) 264 U.S. 298; *Federal Trade Comm. v. Claire Furnace Co.* (1927) 274 U.S. 160; *Jones v. Securities & Exchange Comm.* (1936) 298 U.S. 1.

¹³⁴ *Harriman v. Interstate Commerce Comm.* (1908) 211 U.S. 407; *Smith v. Interstate Commerce Comm.* (1917) 245 U.S. 33.

¹³⁵ See, for examples, the Federal Power Act, the Natural Gas Act, and the Fair Labor Standards Act, *supra* note 29, (4), (9), (10), and also certain orders under the Agricultural Adjustment Act, *supra* note 20.

¹³⁶ *Union Bridge Co. v. United States* (1907) 204 U.S. 364; *Monongahela Bridge Co. v. United States* (1910) 216 U.S. 177. Both cases involved criminal prosecutions of the companies for failure to obey orders of the Secretary of War issued pursuant to the River and Harbor Act of 1899. In the *Union Bridge* case the Court looked to see whether the Secretary had complied with the provisions of the Act in issuing his order and in a summary way simply declared that there was no reason to say that the Secretary was not "entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted." *Supra*, at 387-388. The language of the Court in the *Monongahela Bridge* case is more difficult to appraise. Again the Court asked whether the Secretary had complied with the Act in giving notice and a hearing to the company but on the crucial question as to the validity of the finding as to obstruction to navigation the Court first remarked

cedure is open and the order has been sustained then it is clear enough that the sole issue must be whether the order has been violated. But if the order has not been through that mill may it be subjected to a similar review in the criminal court or may the doctrine of *Ex parte Young*¹³⁷ be invoked and the bill in equity employed to secure a civil review in the face of threats of criminal prosecution? There are no clear answers to these problems. It is easy enough to say that a party has enough of a remedy if statutory review of the order is available and if he does not choose to employ that procedure he should be foreclosed from raising elsewhere the questions that could have been raised in that proceeding. The issue in the criminal case would then be simply whether the order has been violated. It is noteworthy that collateral attack of this kind has been denied in a civil case involving an order under the Packers and Stockyards Act,¹³⁸ but no definite answer can be given as yet as to a criminal case.¹³⁹

The omnipresent bill in equity in a district court has no place when a statutory review procedure has been set up. This statement is in direct conflict with pronouncements of many courts¹⁴⁰ with the result

that there was nothing to show that the Secretary "disregarded the facts, or that he acted in an arbitrary manner," and then added that "It was not for the jury to weigh the evidence" on this question. *Supra*, at 195. The Congress intended to give finality to the decision of the Secretary even as the decision of the Congress itself might have been final. Counsel paraded examples of reckless and arbitrary action by the Secretary and the Court answered that if such a case arose it could find "some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property." *Ibid*. With that pronouncement the opinion ends.

¹³⁷ (1908) 209 U.S. 123.

¹³⁸ *Supra* note 29 (1). In *Ingram v. Union Stock Yards Co.* (C.C.A. 8th, 1933) 64 F. (2d) 390, plaintiff stockyard sued defendant to recover charges fixed by order of the Secretary of Agriculture for stockyard services. Defendant sought to set up as a defense that the order was invalid but this defense was not allowed. It was said that the order could be challenged only by a direct proceeding to enjoin or annul it.

¹³⁹ See the discussion as to the possible collateral attacks on orders of the Federal Trade Commission under the Wheeler-Lea amendment making violations of an order after it has become "final" punishable by a civil penalty, in *Legis.* (1939) 39 *Col. L. Rev.* 259, 270-272. It is suggested that some "jurisdictional facts" going to the jurisdiction of the administrative to act may be examined collaterally in a case where the order has become "final" when no petition to review it under the statutory procedure has been filed.

¹⁴⁰ Good examples of this are *Board of Trade of Chicago v. Olsen* (1923) 262 U.S. 1, and *Bartlett Frazier Co. v. Hyde* (C.C.A. 7th, 1933) 65 F. (2d) 350, *cert. den.*, (1933) 290 U.S. 654, both involving the Grain Futures Act, 1922. Also *Moore v. Chicago Merc. Exchange* (C.C.A. 7th, 1937) 90 F. (2d) 735, *cert. den.*, (1937) 302 U.S. 710, and *Board of Trade of Kansas City v. Milligan* (C.C.A. 8th, 1937) 90 F. (2d)

that insistence on it is but the expression of a judgment as to the course that future events should take. The same flat statement should not be made, however, in relation to the statutory injunction type of procedure.¹⁴¹ The declaratory judgment, useful though it may be, has been unavailing in the face of a statutory review procedure,¹⁴² though it has been employed successfully when no statutory procedure existed.¹⁴³

Doubtless there are other judicial remedies that should be considered but they are important chiefly when no statute marks out the path to court and with these this discussion is not concerned.¹⁴⁴ It is plain enough that statutory devices are in the making, but if they are made without forethought as to what judges may do with the rules that are at hand they may fall short of their goal. That goal is clear enough. If we are to continue to have some form of judicial review of administrative action the road to review should be as simple as possible. Procedural bogs should have no place. And what is more important still, the attainment of the goal will serve to clarify and make more secure the parts that are to be played by the administrative and the courts in our scheme of government. Important powers of government are at stake. If these are to be allocated in the language of procedure it is a language that speaks, at least in this context, with a punch.

Breck P. McAllister.

SCHOOL OF LAW,
YALE UNIVERSITY.

855, both involving the Commodity Exchange Act. These acts contain provisions for statutory review of orders issued under them. See also *Dayton-Goose Creek Ry. v. United States* (1924) 263 U. S. 456, involving a suit to have the recapture provisions of the Transportation Act declared invalid. The Court expressed doubts as to whether the district court had jurisdiction to entertain a bill in equity but went ahead in the interest of a speedy determination of the important questions raised. *Ibid.* at 475.

¹⁴¹ This point has already been discussed. See *United States v. Griffin*, *supra* note 11, and the cases cited and discussed in note 127, *supra*.

¹⁴² *Newport News Shipbuilding Co. v. Schauffler*, *supra* note 108, was a case under the National Labor Relations Act. To the same effect, *Bradley Lbr. Co. v. National Labor Bd.* (C. C. A. 5th, 1936) 84 F. (2d) 97, *cert. den.*, (1936) 299 U. S. 559. In *John P. Agnew & Co. v. Hoage* (App. D. C. 1938) 99 F. (2d) 349, the court found that there was no case of actual controversy under the Declaratory Judgment Act [48 STAT. (1934) 955, 28 U. S. C. (1934) § 400] and passed over the point that the only jurisdiction of a district court is to review a compensation order under the District of Columbia Workmen's Compensation Act.

¹⁴³ See for example, *Currin v. Wallace* (Jan. 30, 1939) 306 U. S. 1, involving the Tobacco Inspection Act of 1935.

¹⁴⁴ For a review of the great variety of procedural devices that are available when no statutory scheme has been created, see *Alpert*, *loc. cit. supra* note 84.