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In its larger social aspect, the question of whether Chapter XIII or ordinary bankruptcy represents a more desirable type of relief is a significant one. If the admittedly paternalistic provisions of the chapter, providing for strict court supervision of the economic life of the debtor for a period of years under the plan, are to be retained, the question of whether the discharged debtor will revert to his former habits is an important one. The hope of Chapter XIII lies in the conviction that, if a man is helped to pay his debts, but at the same time is made to suffer for his former improvidence by full payment, he will learn a lesson in the management of his finances and will not allow himself to face the same situation again. It is generally admitted that the relief given under ordinary bankruptcy has not achieved that purpose. The question whether Chapter XIII will achieve the desired result cannot be answered until the chapter has been in effect for a longer time, and then only if a larger number of cases are handled.

APPEALABILITY OF INTERLOCUTORY ORDERS OF INDEPENDENT FEDERAL ADMINISTRATIVE AGENCIES

While much of current controversy over administrative adjudication is concerned with limitations on the scope of judicial review of administrative findings of fact, difficulties have also arisen with respect to the time at which judicial review should be available. The "final order" rule today operates to prevent court review of administrative determinations until the final stage of an administrative proceeding has been completed. The irreparability at that time of injuries which litigants may have sustained in the course of proceedings suggests that so inflexible a rule may be undesirable. It is here proposed to examine the cogency of this criticism and to indicate the feasibility of permitting interlocutory appeals from certain determinations of independent federal administrative agencies. It is believed that such a course can be adopted, moreover, without serious impairment of administrative efficiency. The increased protection of private rights which this will afford may serve to alleviate some of the bitterness with which at present the business community regards the administrative process.

The constitutional requirement of "case or controversy" imposes a decisive restriction on the type of administrative rulings which may properly be brought

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1 For example, McDermott, To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?, 25 A.B.A.J. 453 (1939); Landis, Administrative Policies and the Courts, 47 Yale L.J. 519 (1938); Cooper, Administrative Justice and the Role of Discretion, 47 Yale L.J. 577, 588 et seq. (1938).

2 For a general discussion of the "time" problem see Appealability of Administrative Orders, 47 Yale L.J. 766 (1938).

3 Examples of interlocutory orders which may injure litigants are to be found in Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 545 et seq. (1932).
into the federal courts for review.4 Until the recent case of AFL v. NLRB,5 it was generally thought that only those administrative determinations which were issued in the form of a command could give rise to a justiciable controversy. It was said in that case, however, that the effect and not the form of an administrative adjudication was the test of justiciability, and that any administrative determination which of itself adversely affected a complainant or which gave rise to an immediate clash of interest between a complainant and an administrative agency could be made appealable.6 Such administrative determinations are generally termed "orders."7

Difficult problems of statutory interpretation have been engendered by the failure of legislatures in drafting statutory review provisions to enumerate and differentiate between those rulings which are properly reviewable as orders and those which are not.8 For example, failure specifically to exempt determinations reached in the course of non-adversary proceedings from review provisions governing determinations made by the same agency in adversary proceedings has imposed upon the judiciary the task of determining from the language of the statute, its purpose and legislative history, whether such exemption was actually intended or not.9 This problem has been raised with respect to a denial of a request for confidential treatment of information by the Securities and Exchange Commission10 and with respect to employee appeals from certifications and directions of election by the National Labor Relations Board.11

Thus preliminary to the question of finality is the question of whether or not the particular determination is an order. After a decision that it is, judicially imposed barriers to review must be overcome before an appeal therefrom is


5 308 U.S. 401 (1940).


7 This note is concerned only with those commissions the orders of which are appealable to the circuit courts of appeals and the Court of Appeals for the District of Columbia. For an exhaustive list of these agencies see Blachly and Oatman, Federal Statutory Administrative Orders, 25 Iowa L. Rev. 582, 609 n. 73 (1940).

Frequently review provisions of statutes setting up these agencies merely provide that "any order" shall be appealable, thus leaving the problems of which determinations are "orders" to the courts. See statutes cited in note 14 infra.

8 Several types of administrative determinations do not satisfy the requirements of justiciability and these may properly be termed "non-orders." For a discussion of these see Blachly and Oatman, Federal Statutory Administrative Orders, 25 Iowa L. Rev. 582, 583 et seq. (1940); Appealability of Administrative Orders, 47 Yale L.J. 766 (1938).

9 AFL v. NLRB, 308 U.S. 401, 408 (1940).


permissible. Courts have said that judicial review of an administrative order will not be granted unless the applicant has exhausted all available administrative remedies. Likewise, in matters where technical knowledge is required, the court will not encroach upon administrative functions and will not hear appeals until the primary jurisdiction of the administrative body has been exercised.

If all these requirements have been met, only the rule denying appealability to orders which do not finally dispose of a controversy prevents review. Where statutes allow an appeal from "an order" or "any order" of an administrative agency, courts have applied the so-called final order rule to deny appealability to interlocutory orders. While the policy behind the rule as applied in cases at common law was to protect appellate tribunals against excessive litigation, when applied to administrative determinations the judicial purpose has been, in the main, the protection of the agencies themselves from the detrimental effects of too numerous appeals. In accord with this policy, legislatures have sometimes incorporated this rule within statutory appeal provisions, thus making only final orders appealable.

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13 McAllister, Statutory Roads to Review of Federal Administrative Orders, 28 Calif. L. Rev. 129, 143 (1940). See Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts, 5 Harv. L. Rev. 125 (1938); Rochester Tel. Co. v. United States, 307 U.S. 125, 131 (1939); Shields v. Utah I.C.R. Co., 305 U.S. 177 (1938); Myers v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938); Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922). It is suggested that uniformity of regulation can be obtained only through administrative determination where questions of reasonableness are involved. Conflicting decisions of various courts as to the reasonableness of rates or practices would lead to confusion. See, for example, Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481, 494 (1910); Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907). The "primary jurisdiction" doctrine is regarded by the Court as firmly established in Rochester Tel. Co. v. United States, 307 U.S. 125, at 139 n. 22 (1939).


Section 5(e) of the Logan-Walter Bill, S. 915, H.R. 6324, 76th Cong., 3d Sess. (1940), pro-
The final order rule has a universal operation and prevents appealability of every order issued in the course of an administrative proceeding except the last one. This function continues in complete disregard of the varying degrees and types of injury which an interlocutory order may impose upon a complainant and without regard to the specific needs of the administrative body which issues it. This arbitrary character of the final order rule has led courts to rationalize a refusal to hear appeals from interlocutory orders on the basis of the "primary jurisdiction" and "exhaustion of administrative remedies" doctrines wherever possible. Clearly these rules do not apply to all cases governed by the final order rule, but their close association has suggested the conclusion that if a petitioner has exhausted all available administrative remedies, and if the primary jurisdiction rule has been satisfied, appeal from an interlocutory order will be permitted. Thus a rationale advanced to support the result of the final order rule in curtailing appeals can be transformed into a theory providing a basis for evasion of the operation of the final order rule when convenient. In *Federal Power Com'n v. Metropolitan Edison Co.* a provision of the Federal Power Act that "no proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon" was held by the Circuit Court of Appeals for the Third Circuit to authorize review of any order, interlocutory as well as final, in respect to which a rehearing had been sought and refused. It seems clear, however, that such disregard of the final order rule was not authorized by this provision and the Supreme Court on appeal so held. A failure to distinguish sharply between the exhaustion doctrine and the final order rule thus led the lower court to an anomalous result. Properly applied, the exhaustion doctrine does not affect the operation of the final order rule except insofar as the former is an additional bar to the appealability of otherwise appealable final orders upon which a rehearing may be had. Only when a rehearing on an interlocutory order is available do both doctrines operate to prevent appeal.

That there should be a tendency to avoid the use of the final order rule as a rationale of decision indicates that the rule itself may not be a satisfactory method of dealing with appeals from interlocutory orders. This is further borne out by the fact that the effect of the rule is frequently evaded by permitting

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17 304 U.S. 375 (1938).
20 304 U.S. 375 (1938).
litigants to achieve review in equity before the final order has been issued.21 An analysis of the effects of interlocutory orders will serve to demonstrate the operation of the final order rule and to indicate the factors which are to be considered in a proposed alternative method of treatment.

ORDERS DIRECTING HEARINGS OR INVESTIGATIONS

The first order of an administrative agency which may aggrieve a party is an order directing a hearing or an investigation. Several instances of the type of issue raised by the various commissions’ orders for hearing will suffice to indicate the character of the grievances created by such orders and the reasons advanced to support the operation of the final order rule under these circumstances. In one case,22 the Federal Trade Commission’s denial of a motion to dismiss a complaint, based on the commission’s preliminary investigation, raised the question whether a municipal chamber of commerce was subject to the commission’s jurisdiction. In declining to review the question raised by this interlocutory order until the final cease and desist order based on the hearing was entered, the court refused to “halt inquiry at the threshold,” although intimating that the commission’s inquiry might be in vain.23 In another case an appeal from a denial of a motion to dismiss a complaint where there was an allegation that no cause of action had been stated therein was also denied.24 Frequent challenges to National Labor Relations Board orders for hearings are based on the contention that the particular employer is not engaged in interstate commerce and is hence not subject to the National Labor Relations Act.25 Under

21 The final order rule has been amended by statute in some jurisdictions to allow appeals from specifically enumerated interlocutory orders. Thus, review of action of the federal district courts not involving final orders is specifically provided for in cases dealing with interlocutory injunctions, receiverships, and criminal appeals. 43 Stat. 937 (1925), 28 U.S.C.A. § 344 (Supp. 1939); 44 Stat. 233 (1926), 28 U.S.C.A. §§ 227, 345 (Supp. 1939). See Crick, op. cit. supra note 3, at 552 n. 64, where the state statutes containing similar provisions are compiled.

22 Chamber of Commerce v. FTC, 280 Fed. 45 (C.C.A. 8th 1922).

23 See FTC v. Gratz, 253 U.S. 421 (1920), holding that unless a complaint sets forth sufficient facts to show on its face a violation of law, an order based thereon will be set aside, even when the order was fully warranted by the evidence. In Hurst v. FTC, 268 Fed. 874 (1920), the court refused to enjoin proceedings under a complaint which allegedly did not state a cause of action, although there was also an allegation of unconstitutionality. For a criticism of the Gratz case see Henderson, The Federal Trade Commission 57 (1924). See also McFarland, Judicial Control of the Federal Trade Commission 74-77, 79-87, 92-93 (1933).

24 Ninety-five injunction suits were filed in the district courts to restrain the labor board from conducting hearings pursuant to the Wagner Act. In seventy-three suits of the ninety-five, the district courts denied injunctive relief. NLRB Ann. Rep. 31 (1938). Compare Heller Bros. Co. v. Lind, 86 F.2d 862 (App. D.C. 1936), with Newport News Shipbuilding & Dry Dock Co. v. Schaufieller, 91 F.2d 730 (C.C.A. 4th 1937). The Supreme Court in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), held that injunctive relief was properly denied. For an elaborate discussion of the Myers case see Conflict of Jurisdiction between Fed-
the final order rule the employer may not appeal from the order directing a
hearing on the merits of the case because of error in the decision of the jurisdic-tional point, but must wait until a cease and desist order is entered. Likewise, an order of the Interstate Commerce Commission assigning a reparation case for hearing is non-appealable until the final order is entered, although the commission is alleged to have no jurisdiction over the parties, or the parties and causes of action have allegedly been misjoined.

From the point of view of the litigant, mere issuance of this type of order may at times cause severe injury in the form of creating suspicion on the part of the consuming public, undermining investor confidence, or causing strained relations between employer and employee. More directly, attendance at a hearing or an investigation involves a loss of time or money and an extended absence of supervisory employees, which may result in organizational stress within the enterprise. When the hearing may possibly culminate in withdrawal of an operating license or other impairment of the earning power of the business, a

eral District Courts and the NLRB, 23 Wash. U.L.Q. 425 (1938). See also The Federal Courts and the National Labor Relations Act, 26 Georgetown L.J. 746 (1938). In Bradley Lumber Co. v. NLRB, 84 F.(2d) 97 (C.C.A. 5th 1936), a prayer for a declaratory judgment was also dismissed.


29 “Whether the Securities and Exchange Commission on final consideration will actually decide to enter a stop order is interesting, but not very important; for only a rare investor would purchase securities from an issuer threatened with an administrative bar. When the Securities and Exchange Commission actually delists a security, the news is important; but the market drops when the order for a hearing is announced.” Chester T. Lane, speech before the Association of American Law Schools (1938).


31 In the Myers case the old labor relations board had instituted similar action against the plaintiff. Although the proceedings were eventually dismissed, the hearings consumed a total of 2,500 hours of working time of officials and employees and cost the corporation more than $15,000, none of which could be recovered. See Conflict of Jurisdiction between Federal District Courts and NLRB, 23 Wash. U.L.Q. 425 (1938). In Petroleum Exploration Co. v. Public Service Com’n, 304 U.S. 209 (1938), the cost of attendance at the hearing and preparation of the company’s case was alleged to be $25,000.
lower credit standing may immediately result from an order for a hearing.\textsuperscript{32} Moreover, some statutes insure compliance by providing penalties, civil and criminal, for failure to appear at a hearing so ordered.\textsuperscript{33} Although the challenge to the agency's jurisdiction may be sustained on appeal from the final order, the damage caused by attendance at the hearing is, by that time, largely irreparable. Furthermore, where jurisdictional challenges are sustained the commission's work is wasted. Indeed, it may be argued that the danger of hasty and ill-considered jurisdictional determinations is not acute, since administrative agencies may well be loathe to dissipate their meager appropriations in lengthy proceedings in which their jurisdiction is not clear.\textsuperscript{34} Nevertheless, jurisdictional challenges are frequent, and since administrative hearings are often lengthy and costly, both to the agency and to the party before it, determination of such challenges before these costs have been incurred may be desirable.

Denial of appealability to orders directing hearings has sometimes been supported on the theory that the primary jurisdiction doctrine permits court review only after the commission has exercised its jurisdiction at the hearing.\textsuperscript{35} But two stages of administrative proceedings must be distinguished before the applicability of this doctrine can be ascertained. The commission's original order for a hearing is based on an ex parte determination that it has jurisdiction over both the parties and the subject matter. If the commission's jurisdiction is challenged, a hearing will be held to determine the validity of this challenge. Until such a hearing is held, an appeal may reasonably be denied on the ground of a failure to exhaust administrative remedies as well as under the primary jurisdiction and final order rules. But if the merits of the jurisdictional arguments are decided adversely to a petitioner after a hearing, by denying a motion to dismiss the complaint against him,\textsuperscript{36} the commission has concluded its fact-finding function on the jurisdictional question. Hence, allowing an appeal at this stage from such a denial or from an order directing a hearing on the merits of the complaint would not conflict with the purposes of the primary jurisdiction rule. Where proceedings are conducted before trial examiners, of course, allowing an

\textsuperscript{32} For example, the FCC's order for a hearing to determine whether to revoke a license, and the SEC's order for a hearing to determine whether to suspend unlited trading privileges may both result in this type of injury.


\textsuperscript{34} Mansfield, Administrative Finality and Federal Expenditures, 47 Yale L.J. 603 (1938).

\textsuperscript{35} Myers v. Bethlehem Shipbuilding Co., 303 U.S. 41 (1938).

\textsuperscript{36} See NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 25 (1937): "Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer . . . . Notice of hearing was given and respondent appeared by counsel. The Board first took up the issue of jurisdiction and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of jurisdiction; and on denial of that motion, respondent . . . . withdrew from further participation in the hearing."
interlocutory appeal to the courts on the jurisdictional point would necessitate either an intermediate appeal to the board or a direct appeal to the courts from a ruling of the trial examiner. Although the latter course would be in derogation of the exhaustion of administrative remedies doctrine, it has the advantage of promoting an expeditious determination of the issue.

It is further suggested that review of the commission's determination at this stage coincides to some extent with the distinction, in the scope of judicial review, between so-called "jurisdictional facts" and all other facts as required by the Crowell v. Benson doctrine. If judicial review of commission determinations at this stage is to be de novo, there would seem to be little point in requiring an elaborate administrative proceeding to determine facts when such a determination is to be completely disregarded by the reviewing court. Apart from the merits of the "jurisdictional fact" doctrine itself, it seems that an appeal from orders directing a hearing would serve to clarify the type of issues which fall within its range. Benefit might also accrue from separating in the time for review of determinations reviewable de novo from those which are final merely if supported by substantial evidence. When both types of issues appear in a single record before the reviewing court, there are difficulties in accurately distinguishing the degrees of finality applicable to each.

On the other hand, an absolute right to appeal on jurisdictional grounds from orders directing hearings entails serious disadvantages. If administrative hearings and investigations could be postponed until jurisdictional questions were determined by appellate courts, administrative adjudication would tend to become ineffective, if not positively useless, since speed is often the raison d'être of administrative tribunals. Thus, the constantly changing character of employer-employee relations and of employee affiliations requires swift action if the National Labor Relations Board is to function effectively in the alleviation of industrial disputes. This indicates that appeals from hearings ordered by that board should probably not be allowed.

ORDERS REQUIRING PRODUCTION OF EVIDENCE AND SUBMISSION OF TESTIMONY

Frequently orders setting a case for hearing are accompanied by orders requiring production of evidence and submission of testimony. Some commissions are given authority to issue subpoenas enforceable by mandamus in the federal courts. Whether such subpoenas are appealable at the instance of the agg

37The Attorney-General's Committee on Administrative Procedure has considered the problem of interlocutory appeals from trial examiners to the heads of agencies. They have not, however, studied the question of interlocutory appeals from the boards to the courts.


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grieved party, before the commission attempts to secure enforcement in the courts, is the issue raised in the recent case of Federal Power Com'n v. Metropolitan Edison Co. It was there held that an order requiring the production of copies of contracts and statements of working agreements between the plaintiffs and persons controlling them, as well as statements of payments made and obligations incurred to such persons, was non-appealable under the final order rule. Since in this case statutory penalties were assessable only for contumacious disobedience of the commission's order, denial of an opportunity to contest the order until the commission sought enforcement in the courts was not an undue burden on one who disobeyed under a reasonable claim. It appears, however, that the final order rule operates as well to deny appealability where penalties accrue upon a reasonable but erroneous conception of the commission's investigatory powers. Thus, where civil penalties were accruing against one who had disobeyed an order of the Federal Trade Commission to submit detailed reports on the operation of his business, the Supreme Court held the order non-appealable.

It is submitted that orders requiring the production of evidence and testimony should not be reviewable until enforcement is sought by the agency issuing them because until enforcement is sought no real injury is suffered. But where penalties accrue upon any failure to comply, review at the instance of the respondent seems justified.

MISCELLANEOUS INTERLOCUTORY DETERMINATIONS

Additional interlocutory determinations are issued throughout the course of administrative proceedings. These vary with the nature of the proceedings and

42 304 U.S. 375 (1938).
43 The lower court permitted the appeal. Metropolitan Edison Co. v. Federal Power Com'n, 94 F.(2d) 943 (C.C.A. 3d 1938). Biggs, J., dissented in part, saying (at page 950), "The hearings before the Commission would be subjected to interminable interruptions by petitions for review to the Circuit Courts of Appeal to determine the legality of every order made by the Commission. Such a result inevitably would emasculate the Federal Power Act and render the Commission unable to pass upon the very matters for which it was created, matters greatly affecting the public interest. In my opinion such a result would be intolerable." Cases cited note 15 supra.
44 Section 307(c) of the Federal Power Act provides that "Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, . . . or other records . . . shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine or not more than $1,000 or to imprisonment for a term of not more than one year, or both." The Supreme Court has held that "willful" "fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled." Federal Power Com'n v. Metropolitan Edison Co., 304 U.S. 375, 387 (1938).
with the purpose that the particular order is to serve. The established position of
the final order rule would seem to have prevented judicial consideration of
the injuries to which interlocutory orders subject litigants, except insofar as
such consideration has been accorded in courts of equity. With this exception,
however, appeals reach the courts only where there is a question as to whether
the order complained of is interlocutory or final. These cases afford an opportu-
nity to study the type of injury which interlocutory orders may impose upon
litigants.

In *Sykes v. Jenny Wren Co.*, the plaintiff radio station petitioned for inter-
vention in a proceeding to determine whether the petition of a rival station for
an extended schedule of broadcasting hours should be granted. The plaintiff
claimed that, since financial ability to provide adequate service is required of a
licensee by the commission, and since an increase in a competitor's broadcasting
hours would result in a decrease in the plaintiff's advertising revenues, the plain-
tiff had a "substantial interest" in the proceedings and should be allowed to
intervene. The commission decided that the prospect of such injury was not
sufficient to give the plaintiff a "substantial interest" and denied the petition.
Since the final order rule patently barred an appeal from this clearly inter-
locutory ruling, review was sought by a bill in equity. It was held that review
in equity was foreclosed by the provisions of the statute, which provided for ex-
clusive review of commission orders in the circuit courts of appeals. The court
also said that the plaintiff's statutory remedies were adequate, since, as an "ag-
grieved" party, he could appeal from the final order granting the station li-
cense. But this remedy appears inadequate since, if the plaintiff were not per-
mitted to intervene and contest the evidence at the hearing, it would be a
stranger to the record on the appeal. The record would be filled with evidence
presented by the applicant favoring issuance of a license, and unqualified by
any evidence having a contrary tendency which might have been produced by
the plaintiff. Since the commission's findings of fact, if supported by substantial
evidence, are conclusive on appeal, the chances of a reversal would be corre-
spondingly reduced. It is recognized, however, that allowing appeals from a de-
nial of a petition for intervention would greatly encumber the commission in
this type of case. Parties with frivolous or unsubstantial objections could cause

47 *Bradley Lumber Co. v. NLRB*, 84 F.(2d) 97, 100 (C.C.A. 5th 1936); *Petroleum Exploration Co. v. Public Service Com'n*, 304 U.S. 209, 222 (1938).


49 Section 59 of the commission's rules provides in part: " If the petition [for intervention] discloses a substantial interest in the subject matter of the hearing the Commission will grant the same. . . ."

50 Cf. cases cited in note 53 infra.


52 See *In re Deseret Mortuary Co.*, 78 Utah 393, 3 P.(2d) 267 (1931).
considerable delay and embarrassment, and the interest of each station in preserving itself from competition indicates that such appeals would be frequent, if only for the purpose of breeding delays. Yet, recent cases have held that economic injury such as was threatened in the *Sykes* case is sufficient to make a petitioner a "party aggrieved" within the appeal provisions of the act.\(^{53}\) Adequate protection against such injury seems to require that appeal be allowed from an order which denies a party the right to intervene in a proceeding where-in the entry of an order will aggrieve him.

It has been determined that there is an absolute right to withdraw a registration statement filed with the Securities and Exchange Commission until such statements have become effective by the running of the twenty-day period.\(^{54}\) A registrant’s desire to withdraw before this date may be prompted by a sudden change in market conditions which makes marketing of the securities inexpedient.\(^{55}\) A refusal to permit withdrawal, though no stock has been sold, may affect adversely a registrant's credit standing, and perhaps also affect its market for other issues. But since an order of the Securities and Exchange Commission denying permission to withdraw has been held interlocutory and hence non-appealable,\(^{56}\) a registrant in this position seems to have no adequate remedy to enforce his right.\(^{57}\) Only if the commission should seek to enforce a subpoena against him may he contest the commission’s refusal in the courts. The commission may, however, delay in filing suit to enforce the subpoena, or may publicly investigate without subpoenaing the registrant,\(^{58}\) and in such cases no remedy is available to him.

Neither employers nor employees may appeal from National Labor Relations Board directions of election, since determinations made in employee representation proceedings were not included within the review provisions of the act.\(^{59}\) But even if representation proceedings had been considered adversary proceedings and had been included within the review provisions, no appeal could be taken from directions of election under the final order rule, since they are but intermediate stages in representation proceedings. An employer’s desire to contest a direction of election might be based on the theory that such proceedings would tend to disrupt a harmonious employer-employee relationship and prevent em-


\(^{54}\) Jones v. SEC, 298 U.S. 1 (1936).

\(^{55}\) Resources Corporation Int’l v. SEC, 97 F.(2d) 788 (C.C.A. 7th 1938).

\(^{56}\) Jones v. SEC, 79 F. (2d) 617 (1936), cert. den. 297 U.S. 705 (1936).

\(^{57}\) Except perhaps by resort to equity, which, as will later appear, is an inadequate and unsatisfactory remedy.

\(^{58}\) The situation here is comparable to that in which the ICC makes a final valuation which may not be put in issue for several years. See argument of appellee in United States v. Los Angeles & S. L. R. Co., 273 U.S. 299, 314 (1927). For a discussion of this point see *Appealability of Administrative Orders*, 47 Yale L.J. 766, 771 (1938).

\(^{59}\) AFL v. NLRB, 308 U.S. 401 (1940).
ployees from giving full attention to their work. An employer may not appeal directly even from a certification order, but by refusing to bargain with the certified union, he can provoke the issuance of an order to cease and desist from the unfair labor practice, which order would be appealable. On appeal from such an order the certification can be put in issue. Although certifications may conceivably cause real injury to employee groups, even this circuitous method of reviewing certifications is beyond their reach. Since certification permanently entrenches in power a particular union group, the certification order seems of sufficient importance to employee groups to justify granting them the right to appeal from a challenged determination.

EQUITABLE REMEDIES

Otherwise non-appealable interlocutory orders may sometimes be attacked by resort to the general equity powers of the federal courts. Thus, in Mallory Coal Co. v. Nat’l Bituminous Coal Com’n the plaintiff sought to appeal from an order under which the commission was to publicize confidential information which the plaintiff had filed. The order was contested as beyond the commission’s statutory authority. An appeal to the Court of Appeals for the District of Columbia was denied on the ground that the commission’s order was interlocutory and could be reviewed only on appeal from a final order. Subsequently, another producer in the same situation was denied an injunction against enforcement of the order in the District Court of the District of Columbia. On appeal, the court of appeals upheld the lower court’s decision that it had no jurisdiction to enjoin the commission. The Supreme Court, however, reversed the court of appeals, thus allowing the petitioners to accomplish by an extra-statutory method—injunction—that which the court in the Mallory case held they could not do directly, by means of appeal.

That there should be any possibility of review of administrative orders in a district court in the face of statutory provisions that all appeals must be taken


61 In the Matter of the NLRB, 304 U.S. 486, 493 (1938).


65 306 U.S. 56 (1939).

66 AFL v. NLRB, 103 F. (2d) 933 (App. D.C. 1939), suggests that equitable relief might be available to a union seeking to appeal from a certification order. Although the question of availability of such relief was argued before the Supreme Court, the issue was not decided, the Court remarking that the question was not properly before it on the record. AFL v. NLRB, 308 U.S. 401, 412 (1940). This question is raised in suits recently filed in the Federal District Court for the Northern District of Illinois by the manufacturing companies and some of their employees to enjoin the NLRB from holding run-off elections. Chicago Tribune, col. 1, p. 31 (Oct. 10, 1940). To present the issue squarely, however, the suit should have been brought by the union organization which was left off the ballot.
to the circuit court of appeals\(^6\) seems anomalous. Review of administrative orders by a single judge exercising equity jurisdiction is in the teeth of the legislative direction that such cases should be handled only by courts of three or more members.\(^8\) The development of equity review of interlocutory orders under these circumstances indicates clearly that a blanket denial of the right to appeal from all interlocutory determinations under the final order rule is not a satisfactory method of dealing with the complainant's rights. At the same time, the fact that review of certain interlocutory orders may be obtained by resort to equity is proof that the final order rule has not served to protect completely administrative agencies against interruptions of their proceedings at intermediate stages. Is review of interlocutory orders in equity a satisfactory solution, however, in the light of the needs of both complainant and the administrative agencies?

While it is generally said that equity will grant review where irreparable injury is threatened,\(^6\) what the courts consider irreparable injury is hardly capable of specific statement. Thus, while the Supreme Court in *Utah Fuel Co. v. Nat'l Bituminous Coal Com'n*\(^7\) held that unauthorized publication of confidential reports threatened irreparable damage and authorized the court to consider granting equitable relief, in a previous case it held that a showing by an employer of the substantial damage inevitably following from an unauthorized National Labor Relations Board hearing did not threaten irreparable injury.\(^7\) In suits to enjoin subpoenas duces tecum issued by the Federal Trade Commission, the Court of Appeals for the District of Columbia held that a statutory penalty of imprisonment for disobedience constituted a threat of irreparable injury.


Question may be raised as to whether Congress could expressly forbid review of interlocutory orders in equity while retaining the final order rule. No recent case has indicated whether such restrictions on reviewability will be permitted. Of course, if review in equity were absolutely prohibited there would be no problem of a bifurcated system of review. But the question of the desirability of permitting interlocutory appeals would still remain.

\(^{68}\) Note 7 supra.

\(^{69}\) Irreparable Injury in Constitutional Cases, 46 Yale L.J. 255 (1936).

\(^{70}\) 306 U.S. 56 (1939). The Court denied relief on the merits.

\(^{71}\) *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938).
injury, whereas the Supreme Court has previously held that a statutory penalty of forfeiture of $100 a day for disobedience did not. And the requirement of threatened irreparable injury has been held to be satisfied by an order requiring the production of evidence in a place far removed from the location of the business of the party subpoenaed.

Even when the requirement of irreparable injury is satisfied, equity will not grant relief unless the order complained of is challenged as unconstitutional or "void." Thus, subpoenas which violate the unreasonable searches and seizures provision of the Constitution are enjoinable, as are orders issued without prior notice and hearing in violation of a statutory requirement therefor. But orders which are "merely erroneous," i.e., abuses of discretionary powers which are conceded to exist, are not reviewable in equity. Examples of such orders are a Securities and Exchange Commission determination that permission to withdraw a registration statement after it had become effective was not in the public interest, and the Federal Communication Commission's determination that a competitor did not have sufficient interest in the proceeding to be allowed to intervene. The line of demarcation between mere abuses of administrative discretion in the interpretation of statutory provisions and abuses so flagrant as to approach the "void" category does not seem to be drawn clearly enough to serve as a practical guide for determining reviewability.

Thus, the elasticity of the concepts which form the basis of equity review makes such review at best an uncertain avenue of escape for a litigant suffering from the hardships of the final order rule. At the same time, an equity court neither does nor can assess the requirements of the public interest as represented by the efficient functioning of administrative tribunals. Furthermore, review in equity complicates and disturbs orderly procedures and militates against the creation of a unified system of appeals.

77 This order was contested in Resources Corporation Int'l v. SEC, 97 F.(2d) 788 (C.C.A. 7th 1938). The court refused to pass on the merits on the ground that the order was interlocutory and as such not reviewable. But in Resources Corporation Int'l v. SEC, 103 F. (2d) 929 (App. D.C. 1939), the court held that where stock had already been issued the commission could deny withdrawal of the issue. The Jones case was distinguished on the ground that there no stock had been sold.
CONCLUSION

The basic criticism of the final order rule is found in its indiscriminate denial of appealability to all interlocutory orders without regard for the variations between them both in type and in their effect upon litigants. A refusal of confidential treatment by the Securities and Exchange Commission or the National Bituminous Coal Commission may more severely injure a complainant than an order for a hearing by the Federal Trade Commission. Speed in administrative procedures may be sacrificed with fewer undesirable consequences when a radio station license is at stake than when an employee election under the National Labor Relations Act is pending. These problems involve achieving a balance between efficient regulation in the public interest on the one hand, and protection of private property rights on the other, and such questions are traditionally and properly for Congress to decide.

Legislative draftsmen should carefully specify in the review provisions of each statute setting up an administrative agency the orders, both interlocutory and final, from which an appeal may be taken and the scope of review to be accorded each order. That such specification is possible is evident from the statutory provision for interlocutory appeals from federal district courts, as well as from the numerous state statutes with similar provisions. The review provisions embodied in the Federal Communications Commission Act seem a step in this direction.

In determining which interlocutory orders are to be made appealable, Congress should in each case consider the following factors:

1) Importance of the individual rights asserted;
2) Magnitude of the injury threatened by the particular administrative action;
3) Urgency of the administrative adjudication;
4) Possibilities of nuisance appeals;
5) Reparability of the injury after the final order has been issued;
6) Increased burden which the hearing of interlocutory appeals will impose upon reviewing courts; and
7) The number of litigants affected by the particular type of order.

Specification of the non-orders would also aid in clarification. Note 8 supra.

Note 21 supra.

50 Stat. 197 (1937), 47 U.S.C.A. § 402(b) (Supp. 1939). "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By an applicant for a construction permit for a radio station, or for a radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission."

Although no provision is here made for interlocutory appeals, this classification of appealable orders indicates the feasibility of detailed statutory classifications of the various possible types of administrative orders for purposes of determining reviewability.
The Congress could gather evidence as to each of these factors both from the administrative agencies themselves and from attorneys whose practice before these agencies have acquainted them with the problems here involved. The amending process should be used as frequently as experience warrants it.

As has been shown, the indiscriminate operation of the final order rule, which results in a denial of appealability to orders which courts feel impelled by elementary considerations of justice to review, has fostered a tendency to extend the extraordinary remedies to provide relief from certain interlocutory orders. Careful draftsmanship of appeal provisions to provide relief from interlocutory orders causing the greatest hardship would stop this tendency. Today, equity courts may rightly feel that Congress has given no consideration to the plight of one who claims injury under an interlocutory order and therefore they may feel justified in extending their protection to such persons. Should Congress, however, after consideration of the above-mentioned factors, determine that in the public interest no appeal should be permitted in a particular type of case, it is reasonable to expect the courts to abide by such a decision. Some orders now reviewable in equity will be made appealable under the criteria previously suggested, others may be made specifically non-appealable. The disadvantages from the administrative standpoint would be in some degree compensated by the increased certainty that orders made non-reviewable by statute would actually not be reviewed, and those reviewable would be reviewed only by the statutory method.

A limited number of interlocutory appeals need not unduly hamper administrative agencies, nor unduly burden the courts. Statutory penalties for frivolous appeals, to be imposed by the courts of review, might well serve as a deterrent to those impelled primarily by a desire to hamstring the administrative agency. In this respect, determination of whether a petitioner has reasonable ground for appeal seems much more clearly a judicial task than, for example, determination of whether a particular type of damage constitutes irreparable injury, particularly in a field where, for the non-expert, facts are difficult to evaluate. Finally, specification of the stages at which review is allowed would tend to relieve both courts and administrative agencies from the burden of cases requiring interpretation of the final order rule.