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RIPENESS AND REVIEWABLE ORDERS IN ADMINISTRATIVE LAW

Louis L. Jaffe*

I. INTRODUCTION

THE requirement of "ripeness" as a condition for judicial review is not so much a definable doctrine as a compendious *port-manteau*, a group of related doctrines arising in diverse but analogically similar situations. In its most general sense ripeness is a requirement not of the administrative action to be reviewed but of the judicial controversy between the plaintiff and the agency. Consider the case where an agency has gone no further than to threaten a certain action which the plaintiff in an equity or declaratory proceeding claims would be contrary to law: here, in all strictness, the controversy concerns not the legality of an administrative action but the construction of a statute or of the Constitution.¹ Whether such cases are "ripe" for judicial intervention may involve not only the proper relation of agency and court but the existence of a controversy suitable for judicial determination. On the other hand, an agency may have taken definitive action; it may have, for example, promulgated a regulation or issued a complaint, served a subpoena or denied intervention. Whether these actions can be tested forthwith raises questions which are sometimes discussed under the rubric "ripeness," sometimes "exhaustion of remedies,"² sometimes "standing." Discussion under any of these rubrics may suffice, but in certain cases the issue is faced more squarely under one than under another. In the famous *Columbia Broadcasting System*³ case, I would say that the question was primarily one of "standing," since there were no administrative remedies available to the plaintiff; it was at least possible, though not likely, that those who could pursue such remedies might never invoke them. In short, the question was

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¹ Cf. Frankfurter, J., in *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939), referring to *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299 (1927): "Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play." 307 U.S. at 131.

² See Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963).

³ *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942), discussed *infra*. Similar is a case such as *Farmer v. United Elec. Union*, 211 F.2d 36 (D.C. Cir. 1954), in which the plaintiff union might never be able to appeal.

not so much whether the controversy was "ripe" but whether there was or at any time would be a justiciable controversy between the plaintiff and the defendant.

One must also distinguish cases which involve orders which are as "mature" as they are ever going to be; in that circumstance the issue is whether the action is reviewable at all. Such a case is *Joint Anti-Fascist Refugee Committee v. McGrath*.⁴ The function of the agency there was formally to designate organizations as "communist." This finding, it is true, might serve later as a predicate for further action against *members* of the organization, but as far as the organization was concerned the administrative process has reached its terminal point. Did an organization formally classified by the Government as communist, given the enormous defamatory consequences of the action, have a sufficient interest to secure review? The affirmative answer given did not go to the *timeliness* of review but to its availability *vel non*. On the other hand, the so-called "directive orders" of the National War Labor Board providing for an increase in wages were held not reviewable because, as the Court of Appeals of the District of Columbia put it, the order was "directive" rather than "mandatory." This interpretation was based on congressional intent: Congress had rejected proposals to make the Board's orders enforceable and reviewable.⁵ Another case which might engage our attention at this point is *Ramspeck v. Federal Trial Examiners Conference*,⁶ a class suit by the APA section 11 trial examiners attacking as invalid under section 11 the Civil Service Commission regulations governing the classification, salary, assignment, promotion and lay-off of trial examiners. Part of the difficulty was that, although these regulations were a prelude to a whole system of future applications, in a considerable number of these applications the affected individual would be unable to trace his predicament precisely to the regulations. It is this kind of situation, for example, which has led some states to allow public actions to test the validity of civil service regulations.⁷ There is, in short, a latent or concealed "standing" question. Although the trial court di-

⁴ 341 U.S. 123 (1951).

⁵ *Employers Group of Motor Freight Carriers, Inc. v. National War Labor Bd.*, 143 F.2d 145 (D.C. Cir.), *cert. denied*, 323 U.S. 735 (1944); *accord*, *National War Labor Bd. v. Montgomery Ward & Co.*, 144 F.2d 528 (D.C. Cir.), *cert. denied*, 323 U.S. 774 (1944).

⁶ 344 U.S. 853 (1952).

⁷ See Jaffe, *Standing To Secure Judicial Review*, 74 HARV. L. REV. 1265, 1299 (1961).

rected itself to the standing question,⁸ it was not thereafter raised by any of the parties and was not considered in the opinions of either the court of appeals or the Supreme Court. The case does illustrate, however, what will be the underlying thesis of this article: *ripeness should not be determined by formula but by a reasoned balancing of certain typical and relevant factors for and against the assumption of jurisdiction.*

The development and expression of ripeness concepts has become to some extent entangled with the definition of a "reviewable order." A statute may provide in particular situations for review of an "order" or a "final order"; such review is to be had in a named court pursuant to a specified procedure. The three or four most discussed "ripeness" cases involved the question whether the administrative action was an "order" under such a statute. Finally, an inquiry such as this, one primarily into the ripeness concept in *administrative law*, has become embroiled, obfuscated and distorted by the acute involvement of ripeness doctrines in constitutional adjudication.

The requirement that there be a "controversy" is applicable generally to the exercise of the judicial function. But the criteria for determining the existence of a controversy are flexible; the judgments are thus ones of degree and balance. Mr. Justice Frankfurter, a judge who is among those who have most insisted on the requirement of justiciability, has said, "Whether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."⁹ This flexibility, whatever particular judges and lawyers may think of the tactic,¹⁰ permits courts to insist more on the ripeness requirement in constitutional than in other cases. It will, of course, be resorted to by judges who are wary of exercising a court's power to adjudicate constitutional issues. Because the Supreme Court is so predominantly concerned with constitutional law, restrictive notions of ripeness are "in the air" and have sometimes been applied inappropriately to administrative law questions, and also to other areas.¹¹ State courts,

⁸ 104 F. Supp. 734 (D.D.C. 1952).

⁹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951).

¹⁰ See Douglas, J., protesting against the use of "ripeness" requirements to avoid constitutional adjudications, in *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962): "The approach we take today has often been used to abdicate the judicial function under resounding utterances concerning the importance of judicial self-denial." *Id.* at 117.

¹¹ One is entitled to view the very restrictive attitudes of Mr. Justice Brandeis

less badgered by the pressure of constitutional issues, are sometimes less doctrinaire about ripeness. In recent years, however, ripeness requirements have been relaxed in the administrative law field, in part because of a relaxation in the constitutional law field, in part because the distinction between the two fields has come to be felt if not always expressed. I suggest, therefore, that constitutional law cases be put more or less to the side¹² (though they need not be completely ignored) in constructing ripeness requirements in administrative law—the requirements, that is, in cases of judicial review of the legality of administrative action and controversies between citizen and agency concerning the construction of statutes.

II. THE FOUNDATION CASES ON RIPENESS

A handful of cases arising under the review provision of the so-called Urgent Deficiencies Act¹³ and its derivatives have done most to develop and shape the current concept of ripeness. The derivative of that act provides that “. . . the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.”¹⁴ Because this provision does not define “order” and because the language of equity is used, the courts have been apt to fall back on general principles of justiciability in defining the requirements of reviewability under this statute. To be sure, the requirement that there be an “order,” *i.e.*, that the agency’s action has been in some degree formal, may exclude

concerning justiciability, particularly his aspersions on the constitutionality of the declaratory judgment technique in general, as proceeding from his fear that relaxed notions of justiciability would increase immeasurably the reach of the Supreme Court in constitutional issues. See, *e.g.*, *Willing v. Chicago Auditorium Ass’n*, 277 U.S. 274 (1928). The *Rickover* case is an excellent example of the juxtaposition in citation and discussion of ripeness cases from all areas, and of the hopes and fears aroused by the practice. *Public Affairs Associates, Inc. v. Rickover*, *supra* note 10.

¹² Special considerations are also at work in cases involving state-federal relationships. This is an area which the Supreme Court may hesitate to enter before the processes of state law have worked out what may be a *modus vivendi* to accommodate a potential jurisdictional clash. See, *e.g.*, *Public Util. Comm’n v. United Air Lines*, 346 U.S. 402 (1953); *Public Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237 (1952). But despite the possibility of state-federal conflict, in cases where the exclusive character of the federal jurisdiction seems clear to the Court it may take jurisdiction where it would otherwise wait. *E.g.*, *Public Util. Comm’n v. United Fuel Gas Co.*, 317 U.S. 456 (1943). This is only to say that in such situations there is a special dimension not present in the usual administrative law case. See Jaffe, *supra* note 2, at 339.

¹³ 38 Stat. 219 (1913). This procedure and related provisions are now codified in 28 U.S.C. §§ 1253, 1336, 2284, 2321-25 (1958).

¹⁴ 28 U.S.C. § 1336 (1958).

from the statute some controversies which are within other heads of jurisdiction, be it the general "equity" jurisdiction or the mandamus jurisdiction. But in the earliest of our brace of cases, *United States v. Los Angeles & S.L.R.R.*,¹⁵ the same considerations which were held to exclude review of the Commission's action as an "order" were held to exclude relief under "the general equity powers." This decision is one which in the light of subsequent developments must be considered more carefully than is sometimes now the case. Its pronouncements, taken I would suggest out of context, have occasionally been misused by some judges. Furthermore, if it be thought that Mr. Justice Brandeis overformulated the requirements of ripeness in the *Los Angeles R.R.* case, it does not follow that the decision was wrong or that it would not still be followed today.

In *Los Angeles* a railroad company sought review of the "final value" of its property determined by the ICC under the Valuation Act. It alleged that the valuation was ultra vires the act and contrary to the due process clause. It contended that the valuation was an "order," and, if not an "order," that it was reviewable under the equity jurisdiction because the valuation would impair its credit. Under the 1913 Valuation Act the Commission was "to investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to" the Interstate Commerce Act.¹⁶ Many reasons for such a valuation were urged in the congressional debates but none were stated in the act. The valuation would be prima facie evidence "in all proceedings under the Act,"¹⁷ but no particular proceeding was specified. In administering the valuation project, the Commission adopted valuation theories which it regarded as relevant to rate making. But even then railroad rate making had little relation to the capital account. Rates were based not on the total investment but on the immediate costs of shipment and on competitive conditions surrounding the carriage of particular commodities and classes of commodities. By 1933, rate making was formally divorced from the capital account. The valuations, therefore,—and Mr. Justice Brandeis estimated that there were 1800 railroads involved—were more or less theoretical constructions of the capital account quite without immediate relevance to or impact on any of the Commission's regulatory functions. The enormously complex and

¹⁵ 273 U.S. 299 (1927).

¹⁶ 37 Stat. 701, 49 U.S.C. § 19(a) (1958).

¹⁷ 37 Stat. 703 (1913), 49 U.S.C. § 19(i) (1958).

controversial attempts of the Supreme Court to establish and to administer concepts governing the so-called "rate base" (the capital account) in cases in which the rate base *was* one of the factors in an actual rate determination are quite familiar. Even in such cases the rate base was, together with operating costs and prospective income, but one of the factors in the equation.¹⁸ And a rate base was no sooner determined than changed circumstances required its correction. The whole valuation project involved the Commission in decades of work which came to nought. Its objectives were never clear and, in any case, the theories and assumptions on which it was based became obsolete before it was put to any use.¹⁹ It would be difficult to find in the books an occasion for judicial review more inappropriate and futile.

But this does not end our consideration of the case. In his opinion Mr. Justice Brandeis said the following:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; . . . which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."²⁰

In the first place, it must be remembered that this formulation is directed to the contention that the valuation is an "order." Not every administrative action having practical or potential legal consequences is an order. The formulation, therefore, is not meant to exclude the possibility of equity jurisdiction. Brandeis was surely as familiar as any judge with the bill in equity to enjoin the threatened enforcement of a statute where the remedy at law was conceived to be inadequate. However, if the statement was meant to be a complete and exclusive definition of the kind of actions which are reviewable as "orders," it is no longer accurate,

¹⁸ Cf. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), where the FPC had made findings as to the lawfulness of past rates "in aid of state regulation." "They are only a preliminary, interim step towards possible future action—action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings." *Id.* at 619, with the Court citing *Los Angeles*.

¹⁹ Professor Sharfman, the historian of the Commission, said, in 1935 [3-A SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 319 (1935)], that "the present status of the project constitutes in itself a monument to the Commission's genius for accomplishment." If this is meant to suggest that the "accomplishment" was useful, I can find nothing to support the conclusion in Professor Sharfman's chapter on "The Valuation Project." My characterization of the project is based on § 2 of this chapter of his book.

²⁰ 273 U.S. at 309-10.

at least if its formulations are given the meanings that would normally be put on them. I would hazard the opinion, however, that it was not meant as a complete formulary.²¹ The Court starts out, in the *Los Angeles R.R.* case, with an action which, for a thousand and one good reasons, should not be reviewed. It concludes by observing that the formal characteristics of the administrative activity are not of the definitive character which might compel review even though review is otherwise inappropriate. Even if the definition is open to criticism, it does not follow that its application in the context of the case led to an improper result. The same can be said for the short shrift given to the allegation that the valuation "injure[d] the credit of the carrier with the public," which incidentally was in all the circumstances a vague and implausible allegation. Critics point out that later cases have found defamation a sufficient "injury" on which to ground a right to review.²² But surely it does not follow that every action of a governmental official which impairs a person's credit is for that reason alone reviewable. Here, indeed, is the very bite of such doctrines as ripeness and exhaustion, *i.e.*, that, though an official action, be it an investigation, the filing of a complaint or what-not, may impair credit or reputation,²³ and though, assuming that the proposed action is *ultra vires*, such a consequence is unfortunate, there may be countervailing considerations against immediate judicial intervention.

The twenty-nine years between *Los Angeles* (1927) and the *Frozen Food Express* case²⁴ (1956) saw a movement away from the restrictive implications of Mr. Justice Brandeis' formulation of reviewability, at least insofar as *more or less formal actions* were in question. A few months after the decision in *Los Angeles*, the Court, Mr. Justice Brandeis again writing, decided *The Assigned Car Cases*,²⁵ a title given by the reporter to a group of cases seeking to "enjoin and annul an order of the Interstate Commerce Commission establishing a general rule of coal car distribution, including 'assigned cars'—*i.e.*, privately owned cars and railroad fuel cars placed at specified mines for the use of particular ship-

²¹ *But cf.* Frankfurter, J., dissenting in *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942): "The criteria governing judicial review of 'orders' under the Urgent Deficiencies Act were defined . . . in *United States v. Los Angeles & S.L.R. Co.*" *Id.* at 429.

²² As in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

²³ *Cf.* *Kukatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962).

²⁴ *Frozen Food Express v. United States*, 351 U.S. 40 (1956).

²⁵ 274 U.S. 564 (1927).

pers.”²⁶ No question, so far as one can tell, was raised whether this was a reviewable “order” under the Urgent Deficiencies Act. Distinguishing the case in his dissent in *Columbia Broadcasting System v. United States*, Mr. Justice Frankfurter noted that violations of the rules there promulgated subjected “the carrier to a fine of 100 dollars for each offense, [and] . . . since the failure to comply with the order would bring immediate legal sanction the order was held reviewable.”²⁷ In the same dissent he also distinguished the Court’s decision in *Rochester Telephone Corp. v. United States*,²⁸ in which he had written a justly celebrated opinion. The primary thrust of *Rochester* has been to do away with the so-called “negative order” doctrine, a doctrine which, riddled with illogical exceptions, had provided that certain determinations were not reviewable as “orders” because they did not go beyond *denying* relief and were thus not “directed against” anyone, *i.e.*, did not command (did not “order”). *Rochester* made clear that an order was ripe though it did nothing more than classify or establish a status, when the effect of the declaration of status was to make applicable forthwith a corpus of statutes and regulations.²⁹

The majority in *CBS*, however, rejected as a requirement of reviewability that a regulation carry with it a sanction automatic in form. This case involved an action by a “chain” or “network” contesting the validity of the FCC’s so-called Chain Broadcasting Regulations. The FCC has the power to license broadcasters on a periodic basis. Many of these licensees secure a large and important block of their programs from a so-called chain or network. The network is not, as such, a broadcaster, though each of the networks is itself a licensee of a certain number (limited by the Commission)

²⁶ *Id.* at 565-66.

²⁷ 316 U.S. at 434. But the question of reviewability was, as has been noted, not adverted to. Note also that some of the suits were brought by coal mine operators, coal distributors and large private coal consumers who were not within the command of the regulation.

²⁸ 307 U.S. 125 (1939).

²⁹ *Rochester* would appear to rob *Shannahan v. United States*, 303 U.S. 596 (1938), of all of its force. The latter was a determination of the ICC that a railroad was not “an interurban electric railway”; as a consequence it was subject to the Railway Labor Act. Refusing to review, the Court (per Brandeis, J.) said that this was but the determination of a “fact” and merely a “preparation for possible action” in the future, and thus was not an “order” under the Urgent Deficiencies Act. However, the Court thereafter entertained a bill in equity to review such a determination, saying that it “subjected” the railroad to “the requirements” of the Railway Labor Act. This analysis would seem to bring it within the *Rochester* formulation of a “reviewable order.” *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938).

of stations. The network and the licensee enter into a contract which obligates the network to provide programs under given terms and obligates the licensee to reserve a minimum amount of time or to take a minimum of programs. The Commission, concerned by the monopolistic power of the chains, issued regulations governing the terms of the network contracts. Because the Commission had no power directly to regulate the networks, the regulations were directed to the licensee. The regulations were, as stated by the Commission, nothing more than the expression of the general policy "we will follow in exercising our licensing power."³⁰ Furthermore, the Commission, after the filing of CBS's complaint, promulgated a supplementary "minute" to the effect that no licensee which litigated the validity of the regulation unsuccessfully would lose his license. The chain could suffer no more than a loss of its contractual advantage; a licensee would be required to obey the regulation only after an unsuccessful contest.

Let it first be pointed out that at least in theory there are two distinct questions in the case. The network could *never* be "subject" to the order. It could no doubt intervene in any of the licensing proceedings in which the validity of one of its contracts was in question. But, since the licensee might without contest choose to accede to the regulation,³¹ the occasion for intervention might never arise. Thus, more acute than the question of "ripeness" is the question of "standing" *vel non*. To deny relief here may be equivalent to a denial of all relief, in sum to a decision that the network has no "legally protected interest."³² If it be thought, however, that it does have such an interest, there may be no later point significantly different from the present, *i.e.*, now, as later, the claim is that the network's freedom to negotiate is impaired. To be sure, as a practical matter, the Court could, if it seemed more appropriate, wait for a licensee challenge and then if none was forthcoming entertain the network's challenge.

The Court in *CBS* concluded that the Chain Broadcasting Regulation had "the force of law" and, having the force of law, was a reviewable order. The Commission itself had purported to be exercising the "rule-making power"; its order prescribed "rules

³⁰ Quoted in *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 422 (1942).

³¹ It is sometimes suggested that a network *qua* licensee could raise the point. But a network does not operate its own stations under contract. As to them it has complete freedom and so can *never* be directly affected by the regulation.

³² I consider the standing question in *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 261 (1961).

which govern the contractual relationships between the stations and the networks.”³³ To the objection that application of the rules—particularly in the form of a penalty or forfeiture—depended on a further proceeding (and thus, it is implied, on a further exercise of administrative discretion), Mr. Justice Stone replied, “Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions.”³⁴ Stone might have said with Holmes that law is nothing more than a prophecy of what a court will do in a particular case; and a formally adopted “regulation” rates pretty high in the scale of prophecy. To be sure, this reasoning does not prove that there need be or should be intervention before the actual imposition of sanction, but it is enough, I think, to bring *CBS* within the underlying premise of *Assigned Car*. Should the court intervene before the axe is on its way down? It is universally agreed that it should in some cases. Administrative law borrows from equity the notion that it may be unfair to require a person to incur the risk of punishment or forfeiture in order to learn whether or not a line of conduct is valid. The plaintiff in *CBS* could show no more than the loss of opportunity for the making of profitable contracts—in short, serious financial loss. Its position was similar to that of the coal miners and consumers who would, if the railroads obeyed the regulation in *Assigned Car*, lose prior economic advantages. To be sure, in the hierarchy of legal values such mediately imposed losses do not appear to count for so much as the loss decreed against a named individual by law: imprisonment, fine, forfeiture. The latter two, however, are in substance just another form of financial loss.

If it is posited that an administrative action is (a) illegal and (b) will interfere with the plaintiff’s pre-existing freedoms or powers, why should not present or imminent financial loss suffice? It should, I think, suffice, if the occasion is otherwise propitious.³⁵ It was not propitious in *Los Angeles*; it was in *CBS*. After due formality, after the taking of evidence and the hearing of interested persons, the agency’s policy had been given a precise form. It is doubtful that in any particular future licensing proceedings the record would have been more favorable for either administrative or judicial judgment. This does not mean that

³³ 316 U.S. at 417.

³⁴ *Id.* at 418.

³⁵ This assumes, of course, that it has been decided that the complainant does have a “legally protected interest.”

later proceedings and applications could not throw new light on the matter. Much administration is a continuous process, and it is always open to the new light of experience. The administrative process does not lend itself easily to terminal points. If there is to be review, a point must be chosen which may be in some measure arbitrary. Nor is this fatal. If the administrative process never has said its last word, neither must the court be put to the election of having only one occasion—and that the indisputably best occasion—to pronounce.

The truth is that the administrative process is often quite unlike an ordinary lawsuit in both form and function; it does not lend itself easily to the concepts of finality characteristic of the common-law action. Judicial review is a phase of the administrative process and thus must in some measure partake of its ongoingness. Consider how little like the judgment in a lawsuit is the determination by a court that, because an agency has given a wrong reason for its action, it must reconsider its action! No “rights” are as a consequence of such a decision “finally” adjudicated. Time and again the agency responds simply by republishing its action with the right reasons. If there are occasions when early review is inopportune, there is on the other hand an aspect of much administration which warrants review in situations lacking some traditional aspects of finality. I refer to administration which regulates in a fairly comprehensive fashion, in a fashion which determines, not isolated transactions, but the organization and operation of an enterprise. The public has an interest in early implementation of policy; the regulated person has a legitimate interest whether to plan, or not to plan, his operation on the basis of a regulation. This argues for review as soon as it becomes possible to frame the issues in a form on which the judicial power can act effectively. Behind the reluctance to accept this position has been the feeling—now more or less dormant—that the judicial power is at the worst an alien intruder and at best a clumsy resource—a necessary evil—to be avoided wherever and however possible. Now that the judiciary is no longer generally hostile to the administrative process and has established and accepted for itself a limited role, it need no longer operate in the gingerly self-deprecating manner of a guilt-conscious, barely-tolerated intruder. It need only ask how, given its limited role, it can provide efficiently, with due regard for its limited competence, the service which it is duly bound to give to those who have a legitimate interest in the legality of the challenged action.

*Storer Broadcasting Co.*³⁶ and *Frozen Food*,³⁷ both in the same volume of the Supreme Court reports, can be taken to extend somewhat further than *CBS* the notions of reviewable order and ripeness. Storer, as was true of *CBS*, involved a "legislative" regulation; it provided that no person could have more than a certain number of broadcasting licenses; and, under the subsidiary regulation, certain interlocking stock ownerships could constitute ownership. The basic regulation, of course, could operate only as to future additional grants, but a purchase of stock either in the Storer Company or in another existing licensed operation might bring to pass a holding by Storer in excess of the allowed maximum. Dissenting, Mr. Justice Harlan thought that the case was not within the principle of *CBS*, or even within the principle of the just recently decided *Frozen Food*;³⁸ the injury could accrue, he agreed, only if Storer applied for and was denied an additional station: the potentiality of a denial did not threaten the present investment.³⁹ The majority noted that "Storer cannot cogently plan its present or future operations. It cannot plan to enlarge the number of its standard or FM stations, and at any moment the purchaser of Storer's voting stock by some member of the public could endanger its existing structure."⁴⁰

Frozen Food extends *CBS* in another respect, in a respect which one may characterize as formal. The Interstate Commerce Act requires a license for motor carriage of goods but exempts from the requirement the carriage of "agricultural commodities."⁴¹ Controversy has raged over the years as to the meaning of "agricultural commodities." The great difficulty is to distinguish between exempt agricultural commodities and non-exempt "manufactured products thereof," more particularly to find the point at which "processing" becomes "manufacturing." The ICC undertook a full-scale "investigation" in which the carriers, the Secretary of Agriculture, state utility commissions, some states, etc., participated. It issued a "Report" entitled "Determination of Exempted Agricultural Commodities."⁴² This report stated the general prin-

³⁶ *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

³⁷ *Frozen Food Express v. United States*, 351 U.S. 40 (1956).

³⁸ From which he also dissented.

³⁹ Mr. Justice Harlan did not address himself specifically to the possibility of a stock purchase bringing on a violation of the regulation. He might say that this remote possibility does not in fact work any immediate loss of the present investment.

⁴⁰ 351 U.S. at 200.

⁴¹ Motor Carrier Act § 203(b)(6), 49 Stat. 545 (1935), 49 U.S.C. § 303(b)(6) (1958).

⁴² 52 M.C.C. 511 (1951).

ciples for distinguishing between processing and manufacturing. It applied the principles to certain "groups," "classes" and individual products; some of these applications did not command a unanimous vote. The final section of the report is headed "Findings" and embodies a list of exempted commodities (impliedly or expressly excluding certain others from the exempted class). The report concludes: "An appropriate order will be entered discontinuing the proceeding."⁴³ It is common ground that this is not a "regulation" in the sense that a disregard of it would be a punishable violation of the statute. It is a so-called "interpretive" regulation. It was to serve as a *prima facie* guide in Commission cease-and-desist proceedings or in Commission enforcement policy, *i.e.*, in its decisions to initiate judicial proceedings for the violation of the statute itself. Mr. Justice Harlan, in dissent, noted that despite the report the Commission in cease-and-desist proceedings was willing to hear new evidence and reconsider its determinations with respect to particular commodities.⁴⁴ The plaintiff in *Frozen Food*, at least in its complaint if not by later evidence, challenged the "order" in its applications to nearly all the classes, groups, and individual items insofar as it denied exemptions. The Secretary of Agriculture intervened, supporting the plaintiff, *Frozen Food*, as to eight or so of these items. The trial court dismissed the action, citing *Los Angeles*. The Court reversed. The order "has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The 'order' of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties."⁴⁵

Frozen Food is, in my opinion, correct in refusing to make an absolute distinction between a "legislative" and an "interpretive" regulation. I do, however, question the propriety of judicial review of the issues as actually framed in that case. Equity has been prepared to enjoin a "threat" of prosecution, a "threat," that is to say, in the sense of a decision or course of decision to initiate judicial enforcement based on an official interpretation. An interpretative regulation would seem capable of satisfying *both* the

⁴³ *Id.* at 557-58.

⁴⁴ It had indeed done so in the companion case, *East Texas Lines v. Frozen Food Express*, 351 U.S. 49 (1956), though it did not alter its earlier conclusion. That case did involve a cease-and-desist order forbidding the carriage of frozen poultry without a license.

⁴⁵ 351 U.S. at 44.

formal order requirement and the basic immediacy requirement of equity; but it does not follow that every formal interpretation should be forthwith reviewed, whether as an order or in equity. In *Frozen Food* the issues as framed were not well-adapted to review, and the plaintiff's need was not great. The plaintiff's pleading does not go beyond the assertion that the Commission had improperly classified a few dozen or so products. No doubt there is some common question running through a number of these controversies, although the Court does not explicate it. The Court does not isolate any general question for consideration. It simply throws back to the district court a job which threatens to duplicate the Commission's general investigation. Represented before the Court are the Commission, Frozen Food, the Secretary of Agriculture, and some trucking associations and railroads. The order does not rest on a formal record. Are the various agricultural interests to be summoned, evidence heard on each and every item, and then, as to each, decision made?⁴⁶ Given the awkwardness of judicial review of such issues, one is more amazed at the conclusion that it was urgently needed. In the companion case Frozen Food's right to carry frozen poultry was squarely raised by the Commission's cease-and-desist order. The question common to all the cases, the line between processing and manufacturing, was ruled on there by the Court. That case itself exposed the purely fictitious character of the risk of criminal prosecution: it made it clear that the Commission was proceeding case by case, using a prospective cease-and-desist order approach. And there was nothing in the pleadings to suggest that Frozen Food's plans for the future went beyond its current concern with chickens. The case, in my opinion, reflects a disposition, not uncommon in the decisions and discussion in this area, to decide on the basis of formal rather than practical criteria of ripeness: that at least is true of both the majority and the minority opinions in *Frozen Food*.

Frozen Food can be taken to embody the concept that an administrative action having a fairly formal aspect is reviewable (at least as an "order") despite the fact that its precise dispositive character is uncertain or ambiguous. If despite its inconclusive dispositive character an administrative action has evoked a clear-cut legal question as to its validity and if the plaintiff's interest is substantial, review, in my opinion, is not inappropriate. *Frozen Food*,

⁴⁶ In *Lester C. Newton Trucking Co. v. United States*, 309 F. Supp. 600 (D. Del. 1962), review was of an "interpretative order" as to certain products. The court refused to review general language in the order except as it applied to the products in question.

to be sure, is strictly, as is *Storer*, a decision as to whether the action is a reviewable order under the Urgent Deficiencies Act. But it would not be going too far, I think, to say that where no provision for review is made, the general principles deducible from those cases should govern a review of any formal act whether by declaration or equity procedure. The failure to provide for review may, of course, suggest a question of reviewability *vel non*. But if that obstacle is hurdled, the principles developed in the Urgent Deficiencies Act cases should govern.⁴⁷ On those principles I would think that *Eccles v. Peoples Bank*⁴⁸ was wrongly decided. That was a case of a completed, formal, dispositive order conditioning the sale of plaintiff's stock. It is very hard to follow Mr. Justice Frankfurter's demonstration that the plaintiff's concern was "too speculative to warrant anticipatory judicial determinations."⁴⁹

⁴⁷ In the following cases where relief was given, the precise legal effect of the action was uncertain. *Mid-Valley Distilling Corp. v. De Carlo*, 161 F.2d 485 (3d Cir. 1947) (construed as an order of "suspension, revocation or annulment"); *Parkhill Truck Co. v. United States*, 198 F. Supp. 362 (N.D. Okla. 1961) (the construction of plaintiff's license having been taken as a premise for the grant of a license to another, involved in effect an attack on the license grant, and plaintiff was held entitled to a hearing before grant); *Brigham v. FCC*, 276 F.2d 828 (5th Cir. 1960) (FCC declaratory ruling as to licensee's responsibility reviewable—both parties agreed to review, citing *inter alia* *Caples Co. v. United States*, 243 F.2d 232 (D.C. Cir. 1957), where, however, question of reviewability was not adverted to). Note that if the declaratory ruling is pursuant to § 5(d) of the APA, the ruling has "like effect as in the case of other orders," and is thus reviewable.

Quite difficult to place and judge in my scheme is *Hearst Radio, Inc. v. FCC*, 167 F.2d 225 (D.C. Cir. 1948). The FCC in its so-called "Blue Book," a "Report" on "Public Responsibility of Broadcast Licensees," cited plaintiff's record as a bad example. Plaintiff sued for declaratory relief under the APA. At the same time plaintiff's license was simultaneously undergoing renewal proceedings involving precisely the same issue. The court dismissed on the ground of no "agency action," after first holding that the FCC's remarks were an unprivileged libel. It was perhaps the court's view that the proper relief was an action in libel (plaintiff was seeking withdrawal of the remarks). But is this not a case of activity within the area of administrative investigation more or less ancillary to the performance of its licensing function? It is at best a doubtful case for review, and, since *Hearst* could canvass the same question in the renewal proceedings, there seems no reason for stretching reviewability concepts. One judge concurred, without opinion, in the result. *Hearst* is cited by Bazelon, J., in *Kukatash Mining Corp. v. SEC*, 309 F.2d 647, 652 (D.C. Cir. 1962), apropos of the publication of a list of securities being, in the opinion of the SEC, marketed in violation of the Securities Act. Both majority and minority, however, do give it as their opinion that the publication of this list without a hearing is not *ultra vires*. Cf. *Sun Oil Co. v. FPC*, 304 F.2d 290 (5th Cir. 1962).

⁴⁸ 333 U.S. 426 (1948). I do not regard *Continental Bank & Trust Co. v. Martin*, 303 F.2d 214 (D.C. Cir. 1962), as following *Eccles*. The court there interpreted the order to the bank to increase its capital as a preliminary to a later cease-and-desist order. It emphasized particularly the novelty of the Board's proceeding. It was obviously concerned with giving the Board further opportunity to develop its procedure. The court might have allowed review, but its decision is supportable as an exercise of discretion.

⁴⁹ 333 U.S. at 432. He emphasized that sanction for violation of the condition was

Now, criteria for determining "ripeness" are more difficult where the administrative action does not have the usual indicia of formality supplied by a "regulation," an "order," or a pleading. One can suppose that Mr. Justice Harlan's demand in *Frozen Food* for a more formal criterion was based on a belief that it was necessary in order that "the line be drawn" somewhere. If risk of legal sanction or doubt as to the future suffices, then will it not follow that whenever an agency indicates an adverse attitude the occasion is ripe for judicial action; indeed, would it not be enough that the plaintiff is in doubt and the agency is not prepared to relieve his doubt? To this, the response might be, why not indeed? Why not remove the plaintiff's doubt? The answer is that there are cases where, though no formal action has been taken, it is proper to grant relief and that there are cases where it is *not*; and this uncertainty does constitute an admission that the lack of a strictly formal test creates difficulties. But do these difficulties go beyond the intellectual burden thus placed on the courts, a burden which is not in itself a reason against flexibility? To this the answer must be that there remains the risk, which, if it should not be exaggerated, nevertheless has some weight, that interference with the administrative process at this early stage may be inappropriate. Individuals may be encouraged to run to the courts early and late with their fears, their doubts and their recalcitrance. Negotiation is *the* major mode of administration, of resolving the continuous uncertainties of fact and law. If it is made too easy to bring every administrative expression, however informal, into court, negotiation may be hampered. Those who feel that the public authorities have a basically unfair leverage will welcome this. Those who think that for the most part private and public power are fairly matched will not wish to put too many obstacles in the path of accommodation. I would conclude that presumptively informal expressions covering the meaning and application of a statute do not warrant judicial determination of the controversy, but that the presumption can be overcome.

III. THE APPROACH OF EQUITY

The proper approach at this point is the approach of equity. Let us refer once more to Mr. Justice Frankfurter's formulation.

a future matter. This hardly disposed of the claim accepted as decisive by the minority that the condition impaired the present marketability of the stock.

We look to two aspects: (1) the posture of the question at issue—its reducibility to judicial determination, and (2) the predicament of the plaintiff—whether he, as equity traditionally puts it, has an adequate remedy at law. Let us canvass this approach by instantiating a few representative cases. Consider the equitable doctrine that, though normally the alleged improper enforcement of a criminal statute will not be enjoined, repeated threats of enforcement may suffice to ground jurisdiction. This rule seeks to preserve administrative discretion as to enforcement; but if the plaintiff is subjected to a continuing risk of substantial proportions, a risk which he is unable to terminate by appeals to the usual processes of the law, he makes a case for equitable relief. It would seem that it should not be a “threat” in its literal sense which is required, but a substantial and immediate risk of irreparable injury. The “threat” is ordinarily taken as evidence of the intent of the administrative agency to take action, but it should be considered as an instance of a broader category, as simply one kind of concrete manifestation of the likelihood of “irreparable injury.”⁵⁰ Thus, Mr. Chief Justice Hughes, in *Shields v. Utah Idaho Central R.R.*,⁵¹ said in support of plaintiff’s bill in equity that “it is essential to the protection of the rights asserted”; he noted “the peculiar difficulty which confronts” a plaintiff when subject to one of two competing jurisdictions. If “irreparable injury” is likely, a “threat” should not be required. Indeed, one might go farther and not invariably require the injury to be “irreparable.” Judgment should be keyed to the relative value of early and later review as determined by practical considerations of judicial competence, administrative efficiency and party need. Thus, in *Shields*, the “threat” of “criminal prosecution” was purely formal. If the

⁵⁰ *Embassy Dairy, Inc. v. Camalier*, 211 F.2d 41 (D.C. Cir. 1954), is a characteristic case. Plaintiff protested the validity of an order forbidding the processing of milk. Violation of the order was punishable as a crime. Cf. *Farmer v. United Elec. Union*, 211 F.2d 36 (D.C. Cir. 1954), in which a union was threatened with immediate disqualification as a lawful collective bargaining agent. This might result in exclusion from ballots and other irreparable injury. Note also the lack of any other remedy, and see *Keopke v. Fontecchio*, 177 F.2d 125 (9th Cir. 1949). With these cases is to be compared the hostility toward declaratory relief shown in *Eccles v. Peoples Bank*, 333 U.S. 426 (1948), discussed *supra*.

I do not deal with cases involving constitutional issues other than to repeat my suggestion that restrictive notions of justiciability displayed in declaratory and equity proceedings reflect caution in the exercise of the constitutional adjudication function. Cf. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). To what degree such caution is consistently displayed is a study in itself.

⁵¹ 305 U.S. 177, 183 (1938).

railroad were denied early review and required to present its defense in a prosecution for failing to post notices under the Railway Labor Act,⁵² it would be understood that the purpose of the lawsuit was to test the question of validity. It is unthinkable that a penalty would have been imposed on the railroad for raising an obviously bona fide claim. And the same is true of many so-called "threats." Of course, where vindictive officers threaten large and numerous penalties attempting thus to avoid judicial review, the "threat of irreparable injury" is very real. I make the point, rather, that, where as in *Shields* there are excellent reasons for immediate clarification and there are present neither "threats" nor "irreparable injury" in any realistic sense, the court should nevertheless take jurisdiction. On the other hand, not every "threat" suffices; the beginning of an investigation, the filing of a complaint is a "threat"; but clearly the administrative process must, other than in exceptional circumstances, be allowed to take its course,⁵³ and will ordinarily provide an "adequate remedy." It is well established that the potentially adverse consequences of litigation—expense, even loss of credit and reputation—may have to be borne.⁵⁴ It is hoped that, if the individual eventually prevails on the merits, at least his reputation if not his pocketbook will be refurbished. This, of course, will not always happen. If there is a clean-cut question of jurisdiction anterior to the merits and, despite later success on the jurisdictional question, trial of the merits will have worked irreversible loss of reputation, there

⁵² 44 Stat. 577 (1926), as amended, 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151-63 (1958).

⁵³ In this sense *Miles Lab., Inc. v. FTC*, 140 F.2d 683 (D.C. Cir. 1944), is a standard case. See also *Richfield Oil Corp. v. United States*, 207 F.2d 864 (9th Cir. 1953), involving a "threat" by the Maritime Administration to collect moneys allegedly owing by asserting a set-off against moneys owing to the plaintiff (which had brought a declaratory action). Plaintiff, of course, had the usual remedy in the Court of Claims to sue for sums owing. Furthermore, the claim of the United States was based on the renegotiation of a contract which plaintiff was attempting to contest in this way rather than by the statutory administrative and judicial procedure.

There is little point in trying to understand *Bata Shoe Co. v. Perkins*, 33 F. Supp. 508 (D.D.C. 1940). On one view of the pleadings the plaintiffs were being compelled to take an unwarranted risk. But it is impossible to determine from the confusing opinion what the issues were.

⁵⁴ Once more one must distinguish the problem in these cases from that in *Joint Anti-Fascist Refugee Comm.*, discussed in the text at notes 4-5 *supra*. That case involved a final action which threatened to injure plaintiff's reputation. The question was whether reputation is legally protected against an allegedly illegal exercise of public power so as to entitle the plaintiff to review. But the question in "ripeness" and "exhaustion" cases is whether injury to reputation and credit is sufficient to justify review now rather than later.

should be immediate review.⁵⁵ But such a case is by its definition exceptional.

IV. SOME DISPARATE RIPENESS CASES

There still remain for consideration a handful of cases—some typical, some not—which exemplify the difficulty of applying the general approach advocated here. They are all cases, as one would expect, in which the controversy has not yet been “firmed up” to a decisive administrative action. A number of them had substantial “administrative” significance. Consider *Houston Post Co. v. United States*.⁵⁶ This was an attempt by a stranger to a licensing proceeding to review statements in an opinion to which the licensee himself either could not or would not take exception. The FCC, in renewing the license of a certain station, declared that the licensee must not in the future “censor” political broadcasts. To obey this injunction involved some danger because of the then existing uncertainty as to whether the licensee was itself liable for all defamatory utterances broadcast by it.⁵⁷ The licensee, itself, was prepared to bow to the FCC’s view and promise to behave. The phenomenon was not a new one. Somewhat earlier, in the famous *Mayflower*⁵⁸ decision, the Commission had renewed a license on condition that the licensee would not “editorialize,” i.e., express its opinion on public issues. Is there any way of testing such resolutions short of “putting one’s license on the line”? The *Houston Post* tried to review such a pronouncement as an “order” applicable to all licensees. Judge Hutcheson could not find his way clear to hold that doctrinal pronouncements in the course of a decision were reviewable by non-parties, though he did go on to give an “advisory” opinion in the plaintiff’s favor. Perhaps plaintiff’s mistake was in seeking review of the “opinion” as an “order” under the Urgent Deficiencies Act. At that time *CBS* had, but *Frozen Food* had not, been decided. If *Frozen Food*’s umbrella does not cover “opinions,” perhaps equity should be

⁵⁵ I have so argued in *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1963).

⁵⁶ 79 F. Supp. 199 (S.D. Tex. 1948).

⁵⁷ The Supreme Court later decided that a licensee was not liable for defamatory broadcasts which it was without power to censor. *Farmers Educ. & Co-op. Union v. WDAY*, 360 U.S. 525 (1959).

⁵⁸ *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940). In its report on editorializing by broadcast licensees, the Commission abandoned its rule against licensee self-expression so long as the licensee gives fair representation to competing views. 1 P & F RADIO REGS. ¶ 91:21 (1949).

prepared to avoid the risk to plaintiff of a loss of license. Is there indeed such a risk? Would the Commission forfeit the license of one who sought a bona fide test of the issue? Should it not be made clear by the agency that the declaratory procedure of section 5(d) of the APA is available?

We are presented here with a phenomenon sometimes called "jawbone" administration. The FCC cannot be completely absolved of a suspicion that it uses the leverage of license risk to insulate from review doubtful applications of its powers. In a recent case, of some significance, revoking a license for alleged obscenities, an exercise of power raising questions under the first amendment, the FCC was careful to place its decision on an alternate ground which, with an apparent eye to judicial review, the Commission anticipatorily pronounced would alone have moved it to revoke.⁵⁹ It might at least, as it did in *CBS*, devise a procedure to eliminate the risk of challenge, and it may be that it is indeed developing procedures to that end.⁶⁰ There might still be a fear of retaliation, given the vague, highly discretionary powers of the Commission. However, our law-world is not a perfect one and some policy of inviting judicial review of basic questions would eliminate most of the risk. One might ask whether there is in fact a real problem here, and, if so, what it is. A great deal is said in administrative and judicial opinions by way of argumentation and example which awakens doubts and fears among lawyers and the public. To subject all the expressions and applications of an opinion to judicial review would increase the hazards of writing opinions, would constrict the desirable area of negotiation and would embarrass the courts. The answer may be not an absolute rule against review, but equitable discretion exercised along the broad lines developed here. In applying this discretion a court may well take into account the apparent disposition of an agency,

⁵⁹ *Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962).

⁶⁰ The Commission has on occasion given "declaratory rulings," warnings, etc., to licensees. Some of these are asked for by the licensee; some are in reply to complaints. In two cases of declaratory rulings no objection was taken to review. *Brigham v. FCC*, 276 F.2d 828 (5th Cir. 1960); *Caples Co. v. United States*, 243 F.2d 232 (D.C. Cir. 1957). The Commission also has the power to issue cease-and-desist orders. In *Metropolitan Broadcasting Corp.*, 19 P & F RADIO REGS. 602 (F.C.C. Jan. 6, 1960), the Commission addressed a letter to a licensee "with reference to certain applications," concluding, "It is expected that in the future operations of all your stations you will be guided by the views which we have set forth above." How does the licensee cope with such a letter? Could he ask that it be denominated a "declaratory ruling," a "cease-and-desist order"? If formally denominated a "declaratory ruling," it should be reviewable under APA § 5(d).

by the latent threat of its power, to extend its reach into debatable areas by devices calculated to avoid judicial review.

A somewhat similar constellation of factors was involved in the well-known *Helco Products Co. v. McNutt*.⁶¹ Helco proposed a shipment of poppy seed with a "harmless vegetable dye." It sought an opinion from the Food and Drug Administration as to whether the product was "adulterated." The Commissioner gave his opinion that it was. Helco then sought to learn from the Attorney General whether he agreed and whether the United States would institute condemnation. The Attorney General replied that he was authorized "by law to give opinions only to the President and heads of Executive Departments."⁶² Helco then sought a declaratory judgment. The court was unwilling on this record to bring the case within the category of "threats" because the declaration of the Administrator was, several steps removed from a threat of prosecution; the Attorney General's action was not controlled by the Administrator's. Similar reasons have been used to deny declaratory relief in cases under the Fair Labor Standards Act, a law which, full of baffling questions of application, gives rise to the penalty of double wage payments. There is no formal administrative proceeding to help employers in doubt. In one case the court stated: "It cannot be said that the petitioner is seeking advice upon a purely hypothetical situation. The petitioner has a real problem, and a response by the Court would undoubtedly be of immediate benefit to it in a concrete way."⁶³

But "interpretative bulletins" by the Administrator, the court in *Helco* concluded, did not create an "actual controversy." The Administrator has not "threatened" enforcement and the Attorney General, who has the ultimate authority, has done nothing. This nice analysis of the imminence of the "threat" does not, of course, deal realistically with the likelihood of irreparable injury. It does, no doubt, have relevance to the opportunities for the exercise of discretion prior to enforcement or settlement which may be pertinent to a case of this sort, particularly if the case were thought to involve not a general question but one of application. It is just when the question raised is one of particular application to plaintiff that early declaratory procedure causes the most difficulty for

⁶¹ 137 F.2d 681 (D.C. Cir. 1943).

⁶² *Id.* at 682.

⁶³ *F. W. Maurer & Sons Co. v. Andrews*, 30 F. Supp. 637, 638 (E.D. Pa. 1939).

the courts. In *Helco* the court relied, for example, on *John P. Agnew & Co. v. Hoage*,⁶⁴ in which an employer sought to know whether certain persons were employees; if so, he would be obliged to take out compensation insurance. If he cannot find the answer he will, of course, have to spend money on insurance which may turn out to be unnecessary. This is surely unfortunate, and a legal system which does not provide machinery for such advance determination is to that degree defective. But it is at least a question whether the court's declaratory judgment procedure should fill up such a large and widespread procedural gap. One might see the translation of administration into the courts if each proposed application could be transferred there.

If, in *Helco*, a single pilot shipment of poppy seed were in question, the risk to plaintiff would not be a great one. But the Administrator has at times instituted multiple seizures prior to the trial of any of them. This tactic is obviously designed to put the product off the market before it is adjudicated to be offensive.⁶⁵ The trade, at least, feels that the threat of this exercise of power is used to bring it to book in doubtful cases. Perhaps the abuse of power, if any, is inherent in the statutory scheme. The leverage inherent in discretion to enforce the law is *to some extent* unavoidable and *to some extent* desirable in promoting negotiation and settlement in areas of legal or factual doubt. To intervene judicially at the point where discretion has not ripened into formal determination, either by general rule or by an order in the plaintiff's case, requires the exercise of a tactful and discriminating judgment. It would seem that what is needed in situations of this type, *i.e.*, where persons are required to make difficult legal judgments at the risk of penalties, is a flexible, perhaps discretionary, administrative procedure: one which permits the question to be "firmed up" for a declaratory order. It is at least a question whether, given the failure to provide such a procedure, the courts should fill the gap by allowing free and regular resort to the declaratory and equity power.

It remains to consider one case which most students, including myself, have found it hard to accept. It is, nevertheless, a case

⁶⁴ 99 F.2d 349 (D.C. Cir. 1938).

⁶⁵ In one such case, *Mytinger & Casselberry, Inc. v. Ewing*, 87 F. Supp. 650 (D.D.C. 1949), *rev'd*, 339 U.S. 594 (1950), by a six-to-two vote, a trial court, believing the multiple seizure provision to be misused and finding no danger to health, enjoined all but one suit. On appeal the majority held that the Government's statutory right to multiple seizure was absolute.

which when closely studied involves some subtleties which, if not determinative of the result, do create problems. This is *International Longshoremen's Union v. Boyd*.⁶⁶ The plaintiffs were a local union and two of its officers, both resident aliens. They sued on behalf of the union and all resident aliens. The action was one for injunction and declaration against the District Director of Immigration at Seattle. The union represented seasonal workers in the Alaska fish canneries who were resident in the continental United States. Resident aliens who leave the United States (even for a moment, unless it be as seaman on an American ship) are required on reentry to go through the same inspection process and, with certain exceptions, are subject to the same grounds of exclusion as a new entrant. The grounds of exclusion are much more numerous than the grounds for deportation. For example, a resident alien may be deported if he has been convicted of a crime involving moral turpitude committed within five years of entry or at any time after entry is convicted of two such crimes. A new entrant is excludable if he has at any time been convicted of one such crime. In this and in other respects involving disreputable or unpleasant characteristics, one not deportable is excludable on reentry. The Director of Immigration had taken the position that a permanent resident alien who had gone from the continental United States to Alaska was excludable on the same terms as one who had gone to a foreign country. The plaintiffs challenged the interpretation and, if correct, its constitutionality. They pleaded that "there is a present threat . . . to . . . status." The individual plaintiffs also alleged that they and three others were presently the object of deportation proceedings. The district court took jurisdiction and upheld the director's interpretation.⁶⁷ A majority of the Supreme Court—the opinion by Mr. Justice Frankfurter—held that this was not "a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."⁶⁸ Perhaps

⁶⁶ 347 U.S. 222 (1954). The lower court took jurisdiction and gave judgment for the defendant. 111 F. Supp. 802 (W.D. Wash. 1953). The Supreme Court vacated the judgment and gave directions to dismiss the complaint.

⁶⁷ This interpretation has since been held to be wrong. *United States ex rel. Alcantra v. Boyd*, 222 F.2d 445 (9th Cir. 1955).

⁶⁸ 347 U.S. at 224. All of his citations are to constitutional cases. It is true that the plaintiffs did raise a constitutional issue, but the issue of statutory construction was in the forefront. Not even Mr. Justice Black, who disliked the law, in dissenting (with

Mr. Justice Frankfurter is right in characterizing the case as "hypothetical" in a sense in which the other cases with which we have dealt are not, since no facts are pleaded as to the potential excludability of the plaintiffs, though one might suggest as an analogy to the contrary his own decision in *Rochester*, in which it was found sufficient that the Commission's action established a "status." However, the only *necessary* consequence of the facts pleaded by the plaintiffs is that, assuming that they do go to Alaska and do return, they will be put through inspection as new entrants. This procedural modification of one's status is perhaps nothing more than unpleasant. None of the plaintiffs alleges that he or any one of the class has been convicted of a crime involving moral turpitude, or has a loathsome disease, or is likely to become a public charge, or is engaged in anarchist or subversive activity, etc. But are such self-accusing allegations the price of a judicial determination as to whether one may leave the country without the risk of exclusion on such grounds? It might perhaps have been possible to take a middle course: to allege, for example, that there *were* some—would it be necessary to name them?—who had been convicted of a crime or in some other concrete way were in jeopardy. But it should be remembered that there were many "radicals" among the longshoremen, that a number were already the object of deportation proceedings or of suspicion, and that the discretion of the authorities to exclude is wider than to deport and thus might afford considerable additional leverage against alleged "subversives." No doubt an argument can be made that one whose freedom of movement is in question because of a disreputable past (though not all of these grounds *are* disreputable) is not entitled to know the precise limits of his freedom. On the other hand, one who is not wholly sympathetic with the Draconian character of this legislation would hesitate to push its strictures any farther than is necessary. In any case, even a wrongdoer is entitled to know his rights. It is at this point that I must insist again on the truism that the concept of a case is not a precise one. It is a concept for the administration of justice. It points to what a court can appropriately do and what in justice it should do. Each of these factors, as Mr. Justice Frankfurter said elsewhere, affects the other: "... whether 'justiciability' exists . . . has most often turned on evaluat-

Mr. Justice Douglas) had much hope of invalidating it on the constitutional issue. "Maybe this is what Congress meant. . . . And maybe in these times such a law would be held constitutional." *Id.* at 226.

ing both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."⁶⁹ In *Boyd*, hardship was clear despite the fact that its incidence with respect to any particular plaintiff was speculative; and the issue for decision *as made by the pleadings* was equally clear, namely, whether on his return a resident alien who has been to Alaska has the same status as an alien entering from a foreign country. This question was answered two years later in an actual exclusion case in precisely the same form as it was presented in *Boyd*, and nothing relevant to the issue had been added to the record by way of specific or general fact.⁷⁰ In determining whether an issue is ripe for decision one must focus his attention on (though not limit it to) the issue made. If it is an organically separate issue, it does not cease to be one because it implicates a further range of issues which are not yet ripe.⁷¹

V. REVIEWABLE ORDERS

Statutes establishing administrative powers, particularly those exercised by the full-fledged administrative agency, often provide for review. The statutes originally providing for review of ICC actions⁷² stated simply that suits to enjoin, etc., any "order" of the Commission should be brought in the district court. Later statutes dealing with other agencies are more specific and these specifics may operate in a restrictive fashion. The addition of the word "final" before the word "order" is not, however, restrictive, since finality is taken by the courts in a broad sense. Thus, approval of a protested rate pending a hearing is a "final order."

⁶⁹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951).

⁷⁰ But might a proponent of the *Boyd* case argue that, when finally a court was presented with an actual exclusion, as in the later case, the court was then led to pause and finally to reject a conclusion which would have so drastic an effect on the individual actually before them?

⁷¹ A perhaps extreme instance of deciding one issue isolated from a large group of implicated, but not yet ripe, issues is *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (opinion by Frankfurter, J.).

⁷² For the most part, ICC orders are still reviewed under this so-called Urgent Deficiencies Act procedure, the name coming from the Urgent Deficiencies Act of 1913, which established the form and venue of review. Later provisions, *e.g.*, those relating to review of actions under the Motor Carrier Act § 205(h), 49 Stat. 550 (1935), 49 U.S.C. § 305(g) (1958), were less laconic, but the additional definition probably added nothing of substance: "Any *final* order made under this chapter shall be subject to the same right of relief in court by any *party in interest* as is now provided in respect to orders of the Commission made under Chapter 1 of this title." (Emphasis added.) The italicized words embody concepts worked out by the Court for review of "orders" under the Urgent Deficiencies Act.

Finality depends, it is said, "upon a realistic appraisal of the consequences of such action"; the test is the "irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow."⁷³ But a statute which provides for review of an "order" following a stated course of procedure will preclude the statutory review of the action *qua* "order" where the stated administrative process has not been completed or is not a prelude to the action in question. This, of course, does not mean that review is excluded in such cases. If not reviewable under the statute, the action may be reviewed in "equity" or by mandamus or declaratory order. The difference may or may not be significant. If the "orders" of an agency are reviewable in a court of appeals, venue, of course, will be different, since "non-statutory" review will be in the form of an original action in a district court. Furthermore, whereas statutory review may be available as a matter of course, equity may require "irreparable injury," and a court may insist, in a mandamus proceeding, on a "clear" violation of law.

The great foundation cases with which we have dealt in defining the concept of ripeness were cases in which, strictly viewed, the question was whether the protested action of the ICC was an "order" under the Urgent Deficiencies Act. We have now come to see that under that procedure the questions of ripeness and reviewable order should be treated as almost, if not exactly, the same question; the statutory reviewing court is a district court which almost from the beginning has drawn its inspiration and its definitions from principles of equity. If an action of the ICC would satisfy the ripeness requirements of a court of equity, it would seem for the most part that it should qualify as an "order" under the Urgent Deficiencies Act. Of course, the notion of an "order" implies some formal characteristics. Thus, a refusal to take juris-

⁷³ *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir.) (Fahy, J., in dissenting, argued that one must proceed by bill in equity in a district court), *cert. denied*, 347 U.S. 990 (1954). *Accord*, *Trans-Pacific Freight Conference v. Federal Maritime Bd.*, 302 F.2d 875 (D.C. Cir. 1962) (agency action suspending assessment of fine on one of its members by a steamship association). Compare *Local 438, Constr. Union v. Curry*, 371 U.S. 542 (1963); *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962), applying the rule of substance rather than form in determining whether an order of a lower court is final.

Conversely, a statute making reviewable "any order" will be read to require "finality." *McManus v. CAB*, 286 F.2d 414 (2d Cir. 1961); *Eastern Air Lines v. CAB*, 243 F.2d 607 (D.C. Cir. 1956).

diction is not an "order," and so mandamus is the proper remedy.⁷⁴ When the so-called "negative order" doctrine prevailed, certain actions refusing relief on the merits were held not to be "orders." Yet, in one instance a so-called "negative order"—not reviewable as an "order"⁷⁵—was held reviewable in "equity";⁷⁶ but shortly thereafter *Rochester*⁷⁷ did away with the "negative order" doctrine, and such an order would, it seems, now be reviewable as an "order."

In the much-cited case of *FPC v. Metropolitan Edison Co.*,⁷⁸ the plaintiff sought review, as an "order," of the commencement by "an order" of an investigation to determine "the ownership, operation, management, and control" of the plaintiff. The plaintiff challenged the jurisdiction of the Commission. Review was provided by the statute for orders arising out of "proceedings under the Act"; there were requirements in the judicial review provision that there must have been a petition for "rehearing," that there be filed in a court a "transcript of records," that if findings were supported by "substantial evidence" they be affirmed, etc. It would, of course, have been sufficient to hold that the "order" was not reviewable because it was "preliminary," but the Court spoke in more general terms: "The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence"⁷⁹

This is a perfectly possible reading of the statute, but it has not been followed. It would mean that a great many orders of the FPC, which should be and will be reviewed, would have to be reviewed not in the regular statutory review courts (the courts of appeals) but by original bill in equity. There may, as has been suggested, be reasons for distinguishing the character of review afforded to different actions of an agency. Be that as it may, the earlier decisions were inclined to take a narrow view of a review-

⁷⁴ *United States ex rel. Louisville Cement Co. v. ICC*, 246 U.S. 638 (1918); *ICC v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474 (1912). At this time the venue of mandamus actions was restricted to the District of Columbia which was different from that as to proceedings to review an "order."

⁷⁵ *Shannahan v. United States*, 303 U.S. 596 (1938) (determination that plaintiff was not an "interurban electric railway" not an "order").

⁷⁶ *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177 (1938) (reviewing in equity an ICC determination that plaintiff was not an "interurban electric railway").

⁷⁷ *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939).

⁷⁸ 304 U.S. 375 (1938).

⁷⁹ *Id.* at 384.

able order under the statute. It has been held that a decision of the SEC refusing confidential treatment to documents in its files is not an order;⁸⁰ thus, though it is reviewable, it must be reviewed by a bill in equity.⁸¹ But by and large simplicity of system argued against such a distinction. Typical is *Phillips Petroleum Co. v. FPC*.⁸² This was an order suspending a rate filing. There had been no hearing, no record, no evidence, no findings. The test applied by the court was simply whether the order "finally determines the legal rights of the parties."⁸³ This is, perhaps, a somewhat elusive test, since interlocutory rulings can usually be reconsidered. But it implies finality in the sense that later review comes too late to protect the asserted right. In a more recent case in the same circuit contesting the *acceptance* of a rate filing, the court, making specific reference to the language quoted above from *Metropolitan*, which, read literally, would have barred review under the statute, said:

"Such language must be read in relation to the facts of the case and, so limited, does not establish an inflexible standard requiring a conventional hearing. . . . An order . . . is reviewable when action taken in advance of hearings or adjudication result in the setting of legal consequences."⁸⁴

In some cases, however, courts have refused to review FPC regulations as "orders," and in so doing have fallen back on the language of *Metropolitan* emphasizing the requirement of a hearing and a record. In one of these cases, Judge Bazelon goes so far as to say that "an appellate court has no intelligible basis for decision unless a subordinate tribunal has made a record fully encompassing the issues."⁸⁵ He distinguishes *CBS* on the ground that

⁸⁰ *Mallory Coal Co. v. National Bituminous Coal Comm'n*, 99 F.2d 399 (D.C. Cir. 1938) (citing the *Metropolitan* case).

⁸¹ *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939). It was at this same time that the Supreme Court was going through the minuet of holding that a determination of the ICC which was not an "order" had to be reviewed by bill in equity. See notes 75-76 *supra*.

⁸² 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

⁸³ *Id.* at 474.

⁸⁴ *Cities Serv. Gas Co. v. FPC*, 255 F.2d 860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *accord*, *Sun Oil Co. v. FPC*, 266 F.2d 222 (5th Cir. 1959). The following are cases in which an order has been held not reviewable: *Sun Oil Co. v. FPC*, 304 F.2d 290 (5th Cir. 1962) (statements by FPC that escalation clauses in filed contracts would not be given effect—these are clauses providing for future increases in contract rates); *Amerada Petroleum Corp. v. FPC*, 285 F.2d 737 (10th Cir. 1960) (rejecting gas company's offer of a rate settlement).

⁸⁵ *United Gas Pipe Line Co. v. FPC*, 181 F.2d 796, 799 (D.C. Cir. 1950). To the

in that case review was in a district court which could make a record. The remedy, therefore, if any, is by an original bill in equity. It is of interest that it was just at this time (1950) that the Hobbs Act⁸⁶ was passed. This act transferred the venue for review of the particular orders of certain agencies from the district courts to the courts of appeals and provided that, in the absence of a record, the court, if a genuine issue of fact is presented, should transfer the proceedings to a district court. This act does not, however, cover the FPC, and again in 1956 it was held, in *Magnolia Petroleum Co. v. FPC*,⁸⁷ that "rules of general applicability" are not reviewable under section 19(b) of the Natural Gas Act. The court there underlines the absence of "definitive orders entered after hearing and upon completion of the administrative process."⁸⁸ But it also seeks to distinguish *CBS* on the ground that the order is not "self-executory and it does not command these petitioners to do or refrain from doing anything."⁸⁹ *Frozen Food* is not cited by the majority. "Whether," concludes the court, an original bill in equity can be brought "is not properly before us and consequently we need not resolve the apparent conflict in the authorities."⁹⁰ This can hardly be said to be a sensible solution of a practical problem!

The courts of appeals have been struggling valiantly with a comparable problem arising out of a recent amendment to the Immigration and Nationality Act.⁹¹ This act transferred the traditional review of deportation orders from the district courts to the courts of appeals. These courts are to review "final order[s] of deportation." The question has arisen whether orders supplementary or incidental to such orders, *e.g.*, a refusal to suspend an order of deportation, is directly reviewable in the court of appeals or must go by the old route of the district court. Is such a refusal a "final order of deportation"? Five of the nine judges of the Second Circuit said it is not.⁹² A minority accepted the Govern-

same effect is *Division of Prod., Am. Petroleum Institute v. Halaby*, 307 F.2d 363 (5th Cir. 1962).

⁸⁶ 64 Stat. 1129 (1950), 5 U.S.C. §§ 1031-42 (1958).

⁸⁷ 236 F.2d 785 (5th Cir. 1956).

⁸⁸ *Id.* at 791.

⁸⁹ *Ibid.*

⁹⁰ *Id.* at 793.

⁹¹ 75 Stat. 651 (1961), 8 U.S.C. § 1105(a) (Supp. III, 1961).

⁹² *Foti v. Immigration & Naturalization Serv.*, 308 F.2d 779 (2d Cir. 1962); *accord*, *Holtz v. Immigration & Naturalization Serv.*, 309 F.2d 452 (9th Cir. 1962). *Contra*, *Blagaic v. Flagg*, 304 F.2d 623 (7th Cir. 1962).

ment's argument that Congress had, in the words of a committee report, intended "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens."⁹³ But the majority was unable to see its way clear to holding that a refusal to suspend deportation was an order to deport. It saw procedural problems in the lack of a record that would contain everything relevant to a review; and it noted that not even under the statutory scheme were all questions involved in such proceedings reviewable by the court of appeals. This situation illustrates that in drafting review sections there should be a check list of the various possible administrative actions and a decision made as to where each type is to be reviewed. In the absence of such an effort, my own disposition would be that of the minority. I would strive to the greatest extent possible to consolidate review in a single court. There might be some awkwardness: the occasional lack of a record. But this is rare, and when it arises it can ordinarily be taken care of by affidavits or by a reference to a master or to the agency itself. It does seem to be the solution that is currently emerging by statute or decision.

There are, however, statutes which define a reviewable order with such limiting circumstantiality that a number of determinative agency actions cannot possibly be squared with the requirements. The National Labor Relations Act is such a statute. Experience prior to the adoption of the act led to a restrictive review provision. The work of the Board can be classified roughly into proceedings to certify collective bargaining representatives and proceedings to adjudicate unfair labor practices. The review statute is restricted to "final orders" in the unfair labor practice cases. In *Leedom v. Kyne*⁹⁴ the Supreme Court decided that certain actions taken in representation proceedings *were* reviewable; review in such cases would be under the original jurisdiction of the district courts in proceedings "arising under any Act of Congress regulating commerce. . . ."⁹⁵ And there have been a few cases arising out of unfair labor practice proceedings where, despite the absence of a final order, review has been allowed by an

⁹³ Quoted in *Foti v. Immigration & Naturalization Serv.*, *supra* note 92, at 783 (majority opinion).

⁹⁴ 358 U.S. 184 (1958), applied in *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962), *aff'd sub nom. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

⁹⁵ 28 U.S.C. § 1337 (1958).

original action in the district court. The most interesting of these is *Deering Milliken, Inc. v. Johnston*,⁹⁶ enforcing the provision of the APA that every agency "shall proceed with reasonable dispatch."⁹⁷

VI. CONCLUSION

An administrative action may be ripe for review despite the fact that the full impact of the action on the plaintiff may be delayed or the fact that the disputed legal issue could receive further consideration at a later stage of the same or a related proceeding. Presumptively, in such circumstances it should not be reviewed. Review is likely to interrupt and prolong the administrative proceeding. The administrative action may not yet have received as full consideration as it will later receive, and a reviewing court will thus lack some of the material for judgment. The relation between the action and the plaintiff's position may not have been brought into focus, so that the disputed legal issue may be more "abstract" than it need be. As a consequence the question may not be well-suited to judicial consideration. And finally, if the plaintiff were to wait, sanctions might not be invoked against him or he may eventually win the administrative proceeding itself; thus, the court will have been relieved of the burden of unnecessary decision-making. On the other hand, delay may work a substantial sacrifice of the plaintiff's protected interests, and it is this potential loss which should be weighed against the factors supporting the requirement of formal finality. For it should be remembered that every one of these factors is one of degree. Early review may in some cases be just as (or nearly as) administratively expedient, just as informed, just as well-tailored for judicial consideration as review at a more orthodox terminal point. Remember, too, that it is characteristic of many administrative situations that they are in flux. They may not present the full stops of ordinary civil litigation; the doctrines of finality drawn from the common law

⁹⁶ 295 F.2d 856 (4th Cir. 1961). See the excellent treatment of the *Deering Milliken* case in 72 YALE L.J. 574 (1963). Cf. Local 112, Int'l Union Allied Industrial Workers v. Rothman, 209 F. Supp. 295 (D.D.C. 1962), ordering that the Board hear an interested party before entering into a settlement. The Court in *Deering Milliken* rested its jurisdiction on the APA § 10(e), rather than on Title 28, § 1337 of the Judicial Code. As Judge Friendly suggests in *Empresa*, this enables a district court to avoid the jurisdictional limitations applicable to § 1331 of the Judicial Code. *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F.2d 222, 227 n.5 (2d Cir. 1962), *aff'd sub nom. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

⁹⁷ Section 6(a), 60 Stat. 237 (1946), 5 U.S.C. § 1005(a) (1958).

may not only be inapplicable but even alien to the needs of the administrative process. Where, for example, administrative regulation is concerned with creating the basic structure of an industry, early review may have positive advantages. In any case—to repeat—each of these factors is one of degree, as is true also of plaintiff's hardship. This argues for a flexible approach. It argues for the approach suggested by Mr. Justice Frankfurter, which I shall once more quote: "Whether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief."⁹⁸

⁹⁸ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951).