REVIEWABILITY OF ADMINISTRATIVE ACTION: THE ELUSIVE SEARCH FOR A PRAGMATIC STANDARD

INTRODUCTION

It is often stated that there is a presumption of a right to judicial review of administrative action.[1] Yet, no simple test has been devised to facilitate the determination of whether a *particular* administrative action is subject to judicial review. Rather, courts typically first examine whether the statute governing review of the actions of the particular agency restricts or expands the normal availability of judicial review.[2] Where this threshold inquiry is not determinative, courts generally consider the ill-defined and overlapping factors of ripeness,

1. The judiciary, Congress, and commentators have all recognized a modern-day presumption of reviewability. The most notable legislative statement on this subject is section 10 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06 (1970), which states, *inter alia*: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," *id.* § 702. Section 10 is applicable to all administrative bodies except to the extent that statutes preclude judicial review of an agency's action or that final authority over certain actions is exclusively committed to agency discretion by law. *Id.* § 701.

In Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967), the Supreme Court interpreted section 10(a) as reinforcing earlier case law supporting "the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a)." *Id.*; *accord*, Barlow v. Collins, 397 U.S. 159, 166 (1970) ("[J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156-57 (1970); National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 694-95 (D.C. Cir. 1971). *But cf.* Utah Int'l, Inc. v. EPA, 478 F.2d 126, 128 (10th Cir. 1973).

Professor Jaffe, in discussing the importance of this presumption, has stated, "[I]n cases of statutory ambiguity or silence, and in new situations in which there are factors pro and con, . . . the presumption of reviewability plays a decisive role." L. JAFFE 336. Professor Davis has also recognized the existence of this presumption. *See* Davis, *"Judicial Control of Administrative Action": A Review*, 66 COLUM. L. REV. 635, 650 (1966). However, Professor Davis has also warned that the strong endorsement of a presumption of reviewability embodied in the langnage of *Abbott Laboratories* and its progeny should not be read literally and that lower courts have not always followed Supreme Court proclamations. K. DAVIS § 28.08, at 946-47 (Supp. 1970). *See generally* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 112-13 (1970).

2. See notes 4-41 *infra* and accompanying text.

formality, and finality and apply them to the agency action in question to ascertain the propriety of judicial review.[3] This process of examination is designed to ensure effective judicial scrutiny of agency actions which have an immediate and adverse effect upon a party while avoiding undue judicial interference with the administrative decision-making process. This Note will examine the role each of these factors has played in 1973 in judicial determinations of the reviewability of administrative actions, will illustrate the current trend toward relaxation of these standards, and will conclude with the suggestion that these factors of ripeness, formality, and finality have become so commingled that many courts have, in effect, adopted a single reviewability standard which focuses primarily on the impact of the agency action upon the complaining party, with considerations of comity between the judiciary and the administrative agency relegated to the status of a secondary consideration.

STATUTORY MODIFICATION OF JUDICIAL REVIEW

In determining the reviewability of allegedly erroneous administrative action, the court must initially examine provisions of the particular agency's enabling statute.[4] The enabling statute may affect reviewability either by precluding or restricting review of otherwise reviewable actions or by expanding review to actions which would normally be unreviewable because of a lack of ripeness, formality, or finality.

Statutory Preclusion or Restriction of Judicial Review

Judicial review may be precluded by statutes which either commit the determination of particular issues exclusively to the discretion of the agency or explicitly prohibit review of certain administrative actions.[5] Such provisions are often grounded upon a belief that an ad-

3. *See, e.g.*, National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *dismissed as moot*, 404 U.S. 403 (1972); *1970 Developments* 281.

4. *See* 4 K. DAVIS § 28.01.

5. The Supreme Court has frequently upheld the constitutional validity of statutes which preclude judicial review. *See, e.g.*, Barlow v. Collins, 397 U.S. 159, 165-67 (1970); Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 156-58 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). In 1973, the constitutionality of a statute which barred review of the Veterans Administration's decisions as to pension benefits was upheld in Holley v. United States, 352 F. Supp. 175 (E.D. Ohio 1972), *aff'd mem.*, 477 F.2d 600 (6th Cir. 1973).

In 1973 statutory insulation of a particular administrative action from judicial scrutiny was illustrated in Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo. 1973).

ministrative body which has acquired valuable technical expertise is more qualified than the judiciary to determine the question with respect to which review is sought.[6] Moreover, insulating certain questions of relatively minor public concern from judicial inquiry in this fashion may greatly alleviate court congestion at a very slight cost to the litigants since, even in the absence of judicial review, their dispute will still be heard and passed upon by a knowledgeable, albeit administrative, tribunal.[7]

Nevertheless, in accordance with the modern day presumption of reviewability,[8] courts often utilize a very narrow interpretation of statutory terms to conclude that a statute does *not* preclude review.[9] The rationale for this means of avoiding statutory preclusion of judicial review is, as stated by Professor Jaffe, that judicial review "is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest."[10] Early cases suggested that review

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In *Barnhart*, the plaintiff alleged that the Secretary of Transportation and the Missouri State Highway Commission had failed to comply with the condemnation procedures set out in section 301 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4651 (1970). The court refused to review the case, finding review of the agency proceeding in this instance barred by subsection 102(a) of the Act, which states: "The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation." 42 U.S.C. § 4602(a) (1970). The court reasoned that since no rights were established "arising under" federal law, there was no basis for finding federal question jurisdiction. 362 F. Supp. at 472. *See* 28 U.S.C. § 1331(a) (1970). Although the APA suggests that any person aggrieved by final agency action is entitled to judicial review unless precluded by statute, 5 U.S.C. §§ 701-06 (1970), the court held that since no rights had been abridged, the plaintiff did not qualify as an aggrieved party. *Id.* Thus, in essence, the *Barnhart* court found that subsection 102(a) implicitly insulates procedural errors in such condemnation proceedings from judicial review.

6. *See, e.g.*, United States v. California E. Line, Inc., 348 U.S. 351 (1955). In *California Eastern* the Supreme Court considered the reviewability of a Tax Court decision where the Government sought to recoup excess profits received by a shipper of British war cargo. The Court attributed its finding, that review of excess profits cases was precluded by statute, to the Tax Court's "special familiarity with all kinds of business and accounting practices in regard to profits, losses, etc." *Id.* at 355. However, the decision was reviewable because the question of the amount of excess profits was not reached by the Tax Court. *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

7. *See* W. GELLHORN & C. BYSE, *supra* note 1, at 6.

8. See note 1 *supra* and accompanying text.

9. *See, e.g.*, Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663, 666-68 (2d Cir. 1973); Manges v. Camp, 474 F.2d 97, 101 (5th Cir. 1973); Aquavella v. Richardson, 437 F.2d 397, 402 (2d Cir. 1971); Berends v. Butz, 357 F. Supp. 143, 150-51 (D. Minn. 1973).

10. L. JAFFE 346. *Cf.* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

might be considered prohibited by the mere fact that a statute holds some acts reviewable and says nothing about others.[11] It seems reasonable to conclude, however, that in the absence of clear and convincing evidence of legislative intent to preclude judicial review, the modern day presumption of review[12] has made the above reasoning obsolete.[13] The 1973 decision of *Kingsbrook Jewish Medical Center v. Richardson*[14] graphically illustrates the current requirement that a statute must evince a clear and unmistakable legislative intent to insulate final agency action from judicial review.

In *Kingsbrook*, plaintiff claimed the formula being used for Medicare reimbursements to medical institutions provided inadequate compensation.[15] The Department of Health, Education and Welfare (HEW) had initially refused the formula suggested by the plaintiff, but one and a half years later HEW accepted it for prospective application only.[16] After meetings with various HEW officials failed to prove fruitful, plaintiff filed its complaint in federal court, seeking retroactive application of the formula. The district court dismissed the complaint on the grounds that section 405(h) of the Medicare Act, which stated that no findings of fact or decisions of the Secretary shall be reviewed "except as herein provided,"[17] prohibited review of such formula determinations.[18] Reading this provision of the statute as being addressed to the *availability* of judicial review of a given act of the Secretary, the district court in effect held that section 405(h) in-

11. *See, e.g.*, Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 305-06 (1943). Professor Jaffe has made his disdain for such reasoning clear, stating:

> The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent. L. JAFFE 357.

However, Professor Jaffe does evince a belief that if the legislative history of the statute clearly supports an inference that the omission of an express provision granting review is designed to reflect an intent to preclude review, then that legislative history should be followed. *Id.*

12. See note 1 *supra* and accompanying text.

13. *See* Barlow v. Collins, 397 U.S. 159, 167 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970). *But see* PBW Stock Exch., Inc. v. SEC 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3610 (U.S. Apr. 29, 1974) (review precluded by such a statutory omission despite a lack of clear legislative intent that the omission have that effect). The *PBW* case is discussed at notes 60-78 *infra* and accompanying text.

14. 486 F.2d 663 (2d Cir. 1973).

15. *Id.* at 664-65.

16. *Id.* at 665-66.

17. 42 U.S.C. § 405(h) (1970).

18. Kingsbrook Jewish Medical Center v. Richardson, 355 F. Supp. 965, 970-71 (E.D.N.Y. 1973).

sulated all determinations of the Secretary of HEW concerning Medicare from judicial scrutiny, except certain actions for which the Act specifically provided for review.[19] The court of appeals, on the other hand, reversed, reading section 405(h) as governing the *method* of review, but not its availability.[20] Thus, where the Act dictates specific review procedures for certain actions, these were held to be the exclusive means of review for such actions;[21] however, as to those actions for which the Medicare Act is silent on the subject of review, section 405(h) was held not to bar judicial review. While the language of section 405(h) would appear sufficiently broad to support the district court's construction, the court of appeals' interpretation, by requiring a high degree of specificity to support a finding that Congress has immunized agency action from judicial consideration, is more consistent with the prevailing presumption of reviewability.

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19. *Id.*

20. 486 F.2d at 666-68. In choosing this statutory construction, the court placed great emphasis on Aquavella v. Richardson, 437 F.2d 397 (2d Cir. 1971), as controlling precedent. *Aquavella* also dealt with the question of judicial review under section 405 (h). After examining the legislative history of the Medicare Act, the *Aquavella* court concluded:

> Where the Medicare Act establishes procedures for review of the Secretary's decision, a court may not review that decision by any other means. However, where the Act does not provide such procedures, section 405(h) does not preclude review. *Id.* at 402.

21. The Second Circuit in *Kingsbrook* thus recognized in dictum that review statutes can set out specific procedures that must be followed in order for review to be granted and that failure to follow such procedures can result in either loss or delay of review. *See, e.g.*, Getty Oil Co. v. Ruckleshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), involving unusual review procedures under the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857 *et seq.* (1970), and Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.* (1970). Under these statutes, review of EPA promulgation or approval of state air and water implementation plans is granted to an aggrieved party as long as the party files for review within a limited time period. Failure to do so results in a loss of review. For a discussion of these statutes and *Getty*, and possible constitutional objections to such review limitations, see Note, *Reviewability: Statutory Limitations on the Availability of Judicial Review*, 1973 DUKE L.J. 253, in *1972 Developments.*

Probably the most frequent procedural requirement for review is a provision that all review of an administrative body's decision must take place in a given court, most often a circuit court of appeals. *See, e.g.*, Anaconda v. Ruckelshaus, 482 F.2d 1301, 1304-05 (10th Cir. 1973), also dealing with the Clean Air Amendments of 1970; Fort Worth Nat'l Corp. v. Federal Sav. & Loan Ins. Corp., 469 F.2d 47, 52 (5th Cir. 1972), dealing with the Savings and Loan Holding Company Amendments of 1970. In *Fort Worth*, the court noted that designating an exclusive forum of review prevents conflicting rulings and duplicative proceedings, thus promoting "efficient and timely resolution of disputes concerning agency actions and . . . uniformity in judicial decisions." *Id.* However, in the same opinion the court indicated that the right to review was still of such great importance that it may be allowable in a court other than that named by statute in certain exceptional circumstances, such as

It is clear that, if action is committed exclusively to agency discretion, the exercise of that discretion is not subject to judicial review.[22] However, this limitation upon review has also been narrowly construed. The court will rigorously examine the statute granting authority to the administrator, the congressional purpose, and other data, such as the pertinent adminstrative regulations, in order to delineate the parameters within which the adminstrator may permissibly exercise his discretion; if those bounds are exceeded, review will be granted.[23] This principle was effectively demonstrated in 1973 in *Berends v. Butz*,[24] where the Secretary of Agriculture, who, through the Farmers Home Administration (FHA), which has absolute discretion in deciding to whom certain emergency loans are to be granted,[25] announced it was terminating all such loans in the future. The court granted review of this termination, stating that the FHA had absolute discretion only as to *whom* the loans are to be granted, not as to whether the loans are to be granted at all. In terminating the loan program, the FHA had, in the court's view, exceeded its scope of discretion, and thus the decision was subject to judicial review.[26] In refusing to liberally con-

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where the statutorily prescribed method is found inadequate or where an agency has clearly exceeded its statutory or constitutional authority. *Id.*

A recent case demonstrating the great complexity of procedures that a statute may set out is Dow Chem. Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir. 1973). *Dow* deals with review under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135 *et seq.* (1970), where a party seeking review is given a choice of procedures to follow in pressing his claim. Appellant asked for an advisory hearing and sought review of the Secretary's refusal to follow the opinion of the advisory board. Review was denied, since under the procedure chosen, no final, binding reviewable order had yet been made. 477 F.2d at 1325-26.

22. *See, e.g.*, Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965); Palmer v. Rogers, 33 AD. L.2d 893 (D.D.C. 1973).

Courts are particularly reluctant to subject an agency's prosecutorial discretion to judicial review. *See, e.g.*, Newspaper Local 187 v. NLRB, 489 F.2d 416 (3d Cir. 1973); Harper v. Kleindienst, 362 F. Supp. 742 (D.D.C. 1973); Holly Farms Poultry Indus., Inc. v. Kleindienst, 1973-1 Trade Cas. 94,380 (M.D.N.C., May 10, 1973); Lentschke v. Nash, 33 AD. L.2d 1047 (S.D. Tex. 1973).

Section 10 of the APA specifically excludes from judicial review actions which are committed to agency discretion by law. 5 U.S.C. § 701(a)(2) (1970).

23. *See, e.g.*, Breen v. Selective Serv. Bd., 396 U.S. 460 (1970); Oestereich v. Selective Serv. Bd., 393 U.S. 233 (1968); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

24. 357 F. Supp. 143 (D. Minn. 1973).

25. Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. § 1961(a) (1970). *See* 357 F. Supp. at 150.

26. The Secretary is "authorized" to make such loans by the Consolidated Farmers Home Administration Act of 1961, 7 U.S.C. § 1961(b) (1970). The *Berends* court concluded that use of the term "authorized" was intended to make the exercise of such

strue the extent of the FHA's absolute discretion the court reached a result fully in harmony with holdings which, as a prerequisite to the barring of judicial review, have demanded a clear showing that the statutory provision alleged to prohibit review specifically applies to the particular action in dispute.[27]

Statutory Extension of Judicial Review

Although the APA provides for judicial review of only final agency action[28] and the great majority of statutes are couched in similar terms,[29] some statutes authorize judicial review of actions which would be deemed nonreviewable under the APA standard. For example, courts have frequently recognized that statutes granting review to any party "aggrieved" by an agency action provides for review of administrative action which would not otherwise be subject to review.[30]

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loans mandatory through a close examination of the legislative history of the Act, 357 F. Supp. at 149-51, and through comparison with the analogous case of Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972), involving a similar question of interpretation under the Disaster Relief Act of 1970. 42 U.S.C. § 4451 (1970).

27. See notes 8-21 *supra* and accompanying text. *See also* Manges v. Camp, 474 F.2d 97 (5th Cir. 1973). In *Manges*, the Comptroller of the Currency attempted to forbid from participation in bank affairs a person who had six years earlier been found guilty of making a false statement to the Small Business Administration. The Comptroller's order was based on 12 U.S.C. § 1818(g)(1) (1970), which not only gave him the right to prohibit all felons from participation in bank affairs, but which also placed such prohibition in his sole discretion. However, the statute allowed prohibitions from the time when a person "*is* charged" with a felony and was to remain in effect until the charge "*is* finally disposed of or until terminated by the agency." *Id.* (emphasis supplied). The court interpreted this as applying only to presently charged offenders, and, ironically, not also to offenders who had previously been convicted. Thus the conrt found the Comptroller's prohibition of a previously convicted felon beyond the authority committed to the exclusive discretion of the agency, and it therefore proceeded to review the case. 474 F.2d at 101. It could be argued, however, that the time limits of the statute dictated termination of the prohibition only when the individual is acquitted of the crime. The term "is finally disposed of" lends itself to such interpretation, and it is difficult to understand why a Comptroller shonld be able to prohibit a presumably innocent party merely charged with a crime from participation in bank affairs and not a convicted felon who has served his sentence. That the court refused even to discuss such a construction is further evidence of the judicial tendency to narrowly construe statutory preclusions of review.

28. APA § 10(c), 5 U.S.C. § 704 (1970). For a discussion of the finality requirement, see notes 102-22 *infra* and accompanying text.

29. *See, e.g.*, 8 U.S.C. § 1105(a) (1970) (review of deportation orders); 42 U.S.C. § 2239(b) (1970) (review of AEC orders).

30. *See, e.g.*, ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966); Atlantic Seaboard Corp. v. FPC, 201 F.2d 568, 572 (4th Cir. 1953). In addition to statutes extending review to "aggrieved" parties, statutes may provide for review of an otherwise unreviewable order. *See, e.g.*, Indian Claims Commission Act, 25 U.S.C.

The implications of such differences in statutory language were effectively pointed out in the recent case of *Citizens for a Safe Environment v. AEC*[31] where the Third Circuit refused to review an Atomic Energy Commission order made in the context of a licensing proceeding in which the Commission had denied appellant's request for prepayment of their court costs.[32] In refusing to review the order, the court declined to follow the 1972 decision of *Greene County Planning Board v. FPC*,[33] where the Second Circuit granted review of a similar order by the FPC.[34] The Third Circuit distinguished the *Greene County* case on the basis that the AEC review sought in *Citizens for a Safe Environment* was controlled by the Administrative Orders Review Act[35] which provided for review in the court of appeals of "all *final* orders"[36] of the AEC, while in *Greene County* review of FPC proceedings was mandated by the Federal Power Act[37] which stated, "Any party to a proceeding . . . *aggrieved* by an order issued by the Commission in such proceedings may obtain a review of such order . . . ."[38] The court then held that though a party may be aggrieved by the prepayment of expenses for which he will eventually be reimbursed, no final order has been made in such a case and review is thus precluded.[39]

By restricting review to final orders, the Administrative Orders Review Act clearly mandates that review should be granted only where an agency action has such a direct impact upon a party as to conclusively inflict hardship.[40] Under such a stringent requirement, the court's refusal to grant review in *Citizens for a Safe Environment* would seem proper since the appellant had not alleged that the deci-

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§ 70s(b) (1970), which specifically provides for appeal to the Court of Claims from "any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery . . . ." For recent applications of the statute see United States v. Kiowa, Comanche & Apache Tribes, 479 F.2d 1369 (Ct. Cl. 1973), and United Sattes v. Fort Sill Apache Tribe, 481 F.2d 1294 (Ct. Cl. 1973), *petition for cert. filed*, 42 U.S.L.W. 3471 (U.S. Feb. 8, 1974) (No. 73-1220).

31. 489 F.2d 1018 (3d Cir. 1973).

32. The appellants requested $30,000 financial assistance for legal fees, technical experts, and witnesses to insure a full and complete hearing. *Id.* at 1020.

33. 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

34. Although review was granted in *Greene County* on the subject of fee prepayment, in its discussion of the merits of this question the court refused to order such prepayment. *Id.* at 426-27.

35. 28 U.S.C. §§ 2341-51 (1970).

36. *Id.* § 2342(4) (1970) (emphasis added).

37. 16 U.S.C. §§ 791a *et seq.* (1970).

38. *Id.* § 825*l*(b) (emphasis added).

39. 489 F.2d at 1021-22.

40. See notes 102-13 *infra* and accompanying text.

sion to deny fee prepayment had subjected him to a harm which judicial review of a final appeal at the conclusion of the proceedings[41] would be inadequate to prevent.

RIPENESS

When a party seeks judicial review of an agency decision (generally in the form of the promulgation of a rule or the issuance of an order) before the decision is applied specifically against that party, the court may deny review on the grounds that the controversy is not ripe for adjudication.[42] Ripeness involves a consideration of the fitness of the decision for immediate judicial resolution and the hardship to the parties of withholding review.[43] The basic principle which underlies this requirement of ripeness as a prerequisite to judicial review is that "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote."[44]

The leading example of a pragmatic application of the ripeness doctrine is the landmark case of *Columbia Broadcasting System, Inc. v. United States*,[45] where the Supreme Court allowed pre-enforcement review of a newly passed FCC order promulgating regulations governing radio broadcasting station licensing. The regulations provided that no license was to be granted to a station having certain chain broadcasting contracts with a network organization.[46] Appellant CBS, a network that had entered into 115 contracts which were proscribed by the regulations, alleged that, even though the regulations remained unenforced as of that time, their very existence was causing CBS to suffer severe business loss in that several stations were terminating their contracts or refusing to renew because of the regulations. The Court rec-

41. See notes 105, 106 *infra* and accompanying text. The court made clear that the denomination of the order as non-final was based solely on lack of impact upon the appellant by stating, "judicial review at this time might not disrupt the orderly processes of adjudication." 489 F.2d at 1022. Also, the opinion was expressly limited not to reflect on the reviewability of a fee prepayment denial where the complaining party alleges failure to allow such prepayment would deny him effective participation in the agency proceedings by virtue of indigency, thus arguably having such a substantial effect on the plaintiff as to be considered final. *Id.* at 1022-23.

42. *See* 3 DAVIS § 21; L. JAFFE ch. 10.

43. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

44. 3 K. DAVIS § 21.01, at 116.

45. 316 U.S. 407 (1942).

46. Chain broadcasting is the means by which radio programs are made available to a large nationwide audience by simultaneously broadcasting a program on several broadcasting stations. *Id.* at 410. For a discussion of the proscribed provisions disputed in *CBS*, see *id.* at 412.

ognized the regulations "would disrupt appellant's broadcasting system and seriously disorganize its business"[47] and stated that to deny review on the basis that the order did not directly affect the plaintiff until enforcement was sought would be to exalt form over substance.[48] The regulations had the force of substantive law before their sanctions were invoked, as well as after, since their very existence operated to force the stations either to sever their affiliation or to risk the loss of their broadcasting license.[49] At a minimum, the *CBS* holding suggests that where an administrative order forces a regulated party to either change its present course of everyday conduct or face possible prosecution, it should be subject to immediate judicial review.[50] The *CBS* Court thus rejected a "form over substance" approach and laid down a standard for determining the propriety of pre-enforcement review:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from 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, the results of which the regulations purport to control.[51]

In the 1967 case of *Abbott Laboratories v. Gardner*,[52] the Supreme Court reaffirmed the pragmatic approach suggested by *CBS*, setting forth a clearly delineated, two-pronged test of ripeness. Whether an issue is ripe for review demands, first, an evaluation of its fitness for judicial resolution and, second, a determination of the hardship the plaintiff would bear as a result of withholding judicial review.[53] The pragmatic standards of *Abbott Laboratories* have been widely accepted and have resulted in increased emphasis on ripeness as a factor determining reviewability.[54]

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47. *Id.* at 424.

48. *Id.* at 418-19.

49. *Id.* at 417.

50. *See* Frozen Food Express v. United States, 351 U.S. 40 (1956); *cf.* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

51. 316 U.S. at 415.

52. 387 U.S. 136 (1967).

53. *Id.* at 149.

54. *See, e.g.*, National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Koss v. SEC, 364 F. Supp. 1321 (S.D.N.Y. 1973). *But cf.* Florida v. Richardson, 355 F. Supp. 1027 (N.D. Fla. 1973).

Indeed, one commentator has gone so far as to infer that instead of examining the rather elastic doctrine of finality as a separate doctrine, see notes 102-22 *infra* and accompanying text, it should be considered part of the ripeness test set out in *Abbott Laboratories*. *See* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH L. REV. 1443, 1515-16 (1971). *See also 1971 Devel-*

However, the standards do not mandate judicial review of disputed agency action which has no immediate substantial effect upon the complaining party.[55] This was demonstrated by the 1973 case of *Holly Farms Poultry Industries, Inc. v. Kleindienst*,[56] in which the court denied review of an administrative action which displeased the petitioner but did not affect his legal rights in any substantial manner. In *Holly Farms*, the plaintiff had asked the Department of Justice for an advisory opinion regarding the antitrust implications of a *proposed* course of conduct which Holly Farms was considering.[57] The administrative action for which review was sought consisted of a letter from the Attorney General's office refusing to state an enforcement intention regarding Holly Farm's proposed course of conduct together with a subsequent press release and address by members of the Attorney General's staff which, though not specifically aimed at plaintiff, clearly reflected a negative attitude toward its proposed course of conduct.[58] In denying review, the court emphasized that judicial review of an administrative interpretation concerning a hypothetical course of conduct is improper.[59]

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opments 276, 292. If this assertion is combined with the present tendency to consider formality similarly, see notes 92, 93, 101 *infra* and accompanying text, this would make the *Abbott Laboratories* ripeness standards the sole determinant of direct reviewability.

However, another commentator has contended that finality and ripeness are totally distinct doctrines. He argues that ripeness can be seen as strictly a judicial construct designed to eliminate premature judicial action, while finality pertains as well to the integrity of agency processes and demands consideration of the administrative-judicial separation of power. *See* 112 U. PA. L. REV. 135, 136 n.10 (1963).

For an example of pre-enforcement review in 1973, see Phillips Petroleum Co. v. FPC, 475 F.2d 842, 847-48 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3401 (U.S. Jan. 14, 1974), where immediate review was granted of an FPC order promulgating a rulemaking procedure for the fixing of rates of natural gas sales in interstate commerce.

55. *See, e.g.*, Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 171-74 (1967), considered by the Supreme Court as a companion case to *Abbott*.

56. 1973-1 Trade Cas. 94,380 (M.D.N.C. May 10, 1973).

57. 28 C.F.R. § 50.6 (1973) (empowering the Department of Justice, under the Business Review Procedure, to give advisory opinions as to possible antitrust violations).

58. The press release was issued by the Department of Justice. The address was made by the Chief of the Trial Section, Antitrust Division, Department of Justice, to a meeting of the Legal, Tax & Accounting Committee of the National Council of Farmer Cooperatives. Neither communique referred to the plaintiff, but both clearly implied that anyone engaging in the disputed conduct would be in violation of antitrust laws. 1973-1 Trade Cas. at 94,380-81.

59. *Id.* at 94,382-83. *See also* Helco Prods. Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); Floersheim v. Weinburger, 346 F. Supp. 950 (D.D.C. 1972).

Although the *Holly Farms* court primarily based its decision on a lack of ripeness, the opinion indicates additional bases for denying review. The action could be viewed as an exercise of prosecutorial discretion committed solely to the agency and thus non-

Such a refusal of review is consistent with the principles enunciated in *Abbot Laboratories*, particularly in light of the second factor of its ripeness test—the hardship to plaintiffs of withholding judicial review. Where a party is presently engaged in activity which an administrator determines to be illegal, delaying review may cause great hardship: the party must either change its present course of conduct, which may be extremely costly, or face possible punishment for continuing this course of conduct. However, where the administrative action complained of is merely an opinion as to the legality of a *proposed* course of conduct, the impact upon the aggrieved party is much less severe since he is not placed in the dilemma of either incurring the cost of changing his conduct or facing the threat of imminent prosecution.

A less satisfactory application of ripeness standards is found in *PBW Stock Exchange, Inc. v. SEC*,[60] a 1973 decision in which the Third Circuit, over a vigorous dissent,[61] held that the Securities Exchange Act of 1934[62] barred judicial review of a rule promulgated by the SEC which severely limits the participation of institutional investors in a national securities exchange.[63] The court based its decision on the fact that Section 19(b) of the Act[64] clearly gives the SEC the right to take action either by order, which is a quasi-judicial exercise, or by rule, a quasi-legislative exercise.[65] However, section 25(a) explicitly grants judicial review only to orders.[66] The court ex-

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reviewable. 1973-1 Trade Cas. at 94,382. Alternatively, the action could be viewed as insufficiently formal to constitute definite agency action and thus warrant review. *Id.* at 94,382-89. See notes 79-101 *infra* and accompanying text.

60. 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3610 (U.S. Apr. 29, 1974).

61. *Id.* at 733-51 (Adams, J., dissenting).

62. 15 U.S.C. §§ 78(a) *et seq.* (1970).

63. The rule in question, SEC Rule 19(b)(2), 17 C.F.R. § 240.19b-2 (1973), is premised upon the basic theory that a condition precedent to membership on a public exchange is a willingness to serve the investing public. Therefore, it conditions future membership of both present and potential member brokerage firms upon a manifestation of such willingness. For purposes of this determination, the rule establishes a rebuttable presumption that any brokerage company is serving the public if at least 80 per cent of its business volume is transacted for nonaffiliated persons. 485 F.2d at 720.

Because the rule requires the exchanges to supplement or alter their rules to conform to its terms, it first was submitted to the exchanges by letter, seeking voluntary compliance pursuant to section 19(b) of the Act, 15 U.S.C. § 78s(b) (1970). When voluntary compliance was not secured, the SEC held a rulemaking proceeding under section 4 of the APA, 5 U.S.C. § 553 (1970), this rule was then promulgated and was in effect when *PBW* was litigated. 485 F.2d at 719.

64. 15 U.S.C. § 78s(b) (1970).

65. *See* 1 K. DAVIS § 5.01.

66. 15 U.S.C. § 78y(a) (1970).

amined the legislative history of the statute and concluded that Congress intended to insulate exercise of the SEC's quasi-legislative rule-making powers from direct appellate review in order to prevent the judiciary from substituting its opinion for that of the SEC on legislative policy matters.[67] It therefore denied judicial review of the contested rule.

In denying review, the court explicitly rejected the contention that review should not depend upon the "label" which the SEC affixed to its action—that the content of the action rather than its form should determine its reviewability. Ignoring the broad implications of the *CBS* Court's "form over substance" approach, the *PBW* court distinguished that decision on the grounds that, unlike the rule contested in *PBW*, the FCC regulations challenged in *CBS* were not promulgated under a statutory design which distinguished between a regulation and an order in determining the availability of judicial review.[68] The *PBW*

67. *See* 485 F.2d at 723-26. The chief source from which the majority deduced this intent was a proposed amendment to section 19(b) at the time of its drafting which would have explicitly granted review of rules as well as allowing review of orders. Supporters of the amendment pointed out that the section, as it stood, gave no recourse to the courts to aggrieved parties when rules were promulgated under the section, 78 CONG. REC. 8092 (1934) (remarks of Representative Wadsworth). The opponents of the amendment made clear their desire to limit recourse to the courts under section 25(a) to a review of orders of the SEC. *See, e.g.*, 78 CONG. REC. 8090-91 (1934) (remarks of Representative Snell). This desire was fulfilled when the amendment was rejected and judicial review was restricted to SEC orders.

The court compared the above legislative history with the holding in AF of L v. NLRB, 308 U.S. 401 (1940). In *AF of L* the Court refused review of an NLRB collective bargaining unit certification. The review provisions of the NLRA provided review of final orders, 29 U.S.C. § 160(f) (1970). Review was so designed because the predecessor statute had allowed review of both final orders and orders of certification, but in drafting the NLRA, Congress clearly wished to preclude review of orders of certification and indicated this desire by changing the review statute to include only final orders. 308 U.S. at 409-11. The *PBW* majority described the relevance of *AF of L* to the *PBW* situation as "immediate and compelling." 485 F.2d at 727.

Compare 485 F.2d at 723-26 *with* note 75 *infra* and accompanying text.

68. Review of the FCC decisions in *CBS* was governed by the review provision of the Communications Act of 1934, ch. 32, 38 Stat. 219 (1913), *as amended*, 47 U.S.C. § 402 (1970). This section of the Communications Act incorporated the Urgent Deficiencies Act (UDA), ch. 32, 38 Stat. 220 (1913), *as amended*, 28 U.S.C. §§ 1253, 2101, 2284, 2325 (1970). The *PBW* court noted that "[i]t had long been a settled doctrine that *orders* of agencies subject to review under the UDA . . . could be reviewed whether they involved a quasi-judicial or -legislative exercise of that agency's powers." 485 F.2d at 729. However, under the UDA whether a *particular* order was reviewable depended upon its substantive impact upon the regulated parties. Thus, the *PBW* majority interpreted the broad pragmatic langnage of *CBS* as applicable only to whether the *order* in question in that case had a sufficient impact upon its regulated parties as to warrant review. Accordingly, the majority did not find that *CBS* stood for the proposition that where a statute insulates from judicial review the quasi-legisla-

court then concluded that where a statute such as the Securities Exchange Act does so provide, the *form* of action taken will determine its reviewability.[69]

In contrast, Judge Adams' dissenting opinion favored the frequently supported proposition that where an agency takes some form of final action on an issue—whether this action be in the form of adjudication of a dispute, promulgation of a rule, or any other procedure—which has a direct and immediate effect on a party's activities, immediate review should be granted unless *specifically* precluded by statute.[70] The dissent argued that the majority's rigid interpretation of the statutory language disregarded the presumption of reviewability suggested by the APA[71] and explicitly articulated in *Abbott Laboratories*.[72] Moreover, such a mechanical approach ignored the pragmatic principles enunciated in *CBS*. That decision, the dissent contended, had an "overarching significance" which extended well beyond its particular factual context.[73] In the dissent's view, *CBS* had established an approach which has since guided judicial determinations of reviewability of administrative actions: "The particular label placed upon . . . [the action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."[74] The validity of this approach was further supported by Judge Adams' examination of the statute's legislative history and his conclusion that there is no "clear and convincing" legislative intent to insulate otherwise reviewable SEC actions merely because they are framed in the form of rules rather than orders.[75] Ex-

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tive rulemaking activities of an agency, as opposed to a quasi-judicial "order," a court may nonetheless ignore the form of that action and determine its reviewability on the basis of its practical effect upon the regulated parties. *Id.* at 729-30.

69. 485 F.2d at 733.

70. *See id.* at 737-39.

71. See note 1 *supra.*

72. See note 1 *supra.*

73. 485 F.2d at 741. Judge Adams noted the large number of cases which interpreted *CBS* as dictating review to be based on the substantive effect of the agency action without regard to its form. *See id.* at 743-45.

74. 316 U.S. at 416.

75. 485 F.2d at 745-49. Judge Adams pointed to the lack of preclusionary language in the Act and took issue with the majority's statement that the Act's legislative history "reveals a clear and unequivocal intention to insulate Commission rules or regulations from review under § 25(a)." *Id.* at 745. He did not attempt to show that the legislature intended for the Securities Exchange Act to dictate review of the SEC's quasi-legislative action. He merely showed that the legislative debates over the Act, taken as a whole, do not make it at all clear that the legislative history necessarily requires an interpretation of statutory preclusion and, in light of the presumption of review, such a clear intent to preclude is required. *Id.* at 745-49.

amining the SEC action in light of these principles, the dissent found that its impact upon the legal rights of the regulated parties was so immediate and concrete that direct review should have been granted.[76]

The reasoning adopted by the dissent appears consistent with the prevailing judicial approach toward reviewability—that judicial review of final agency action is presumed unless clearly prohibited and that the test for determining reviewability should focus upon the substantive impact, not formalistic labels.[77] It is evident that denial of pre-enforcement review of the rule in question will impose substantial hardship upon PBW and similarly situated exchanges. Since prior to the promulgation of the challenged rule, the PBW Stock Exchange had a large number of institutionally affiliated members, now that the rule has become effective PBW will either have to revamp its membership and thereby suffer great pecuniary loss or disobey the rule and thereby risk subjection to enforcement proceedings.[78] An administrative action which places the regulated party in such a cruel dilemma meets the ripeness standards articulated in *CBS* and *Abbott Laboratories* and thus should be reviewable immediately.

FORMALITY

Courts have at times refused to review various forms of informal administrative action such as advisory opinions, recommendations, or policy statements.[79] The rationale for refusing judicial review of

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See notes 8-13 *supra* and accompanying text.

In his examination of the legislative history, Judge Adams pointed out that after the amendment to explicitly provide for review of rules was rejected, see note 67 *supra*, a compromise bill was passed which frequently has been interpreted as continuing the preclusion of review of quasi-legislative actions. However, he believed it was not at all clear that all Congressmen subscribed to this conclusion. For example, Representative Lea expressed a belief that rules used to carry out quasi-judicial functions should be reviewable. 78 CONG. REC. 8091 (1934). Representative Rayburn believed review would still be available if the SEC "exceeded its jurisdiction and authority under the Act," which was the precise contention of the petitioners in *PBW*. *Id.* Thus, Judge Adams concluded that the limitation of section 25(a) to orders was not dictated by a sufficiently clear legislative intent to preclude review of rules. *Compare* 485 F.2d at 737-39 *with* note 67 *supra* and accompanying text.

76. 485 F.2d at 749-51.

77. *See, e.g.*, Phillips Petroleum Co. v. FPC, 475 F.2d 842, 847-48 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3401 (U.S. Jan. 14, 1974).

78. *See* 485 F.2d at 735-37. The immediacy of the impact of the rule promulgation on PBW's activities is heightened by the rule's requirement that institutional members, within 30 days of the rule's effective date, file with the exchanges a statement of their intention to comply. Judge Adams believed that this made clear that the promulgation was of "immediate and concrete significance" and thus immediately reviewable. *Id.* at 749-50.

79. For a general discussion of some of the uses of informal agency action, see

such informal actions is that they have no immediate effect on the legal rights or obligations of a party; thus delay of review inflicts no substantial injury.[80] Also, the judiciary places great value on such informal procedures. It has been observed that "to permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue."[81]

This formality doctrine was initially applied in *Helco Products Co. v. McNutt*.[82] In *Helco* the plaintiff submitted a proposed course of conduct to the Food and Drug Administration (FDA) and asked for a statement as to its legality. The FDA responded by letter, stating the conduct would be illegal. The plaintiff then asked for immediate review of the agency position as reflected in the letter.[83] The Court of Appeals for the District of Columbia Circuit held that the letter was not subject to judicial review, pointing out that the letter was written by a party not qualified to initiate an enforcement action if the proposed conduct were undertaken[84] and that, since the letter pertained only to proposed conduct, the plaintiff's present activities were unaffected.[85] The court heavily stressed the benefits of such advisory opinions and evinced a clear dislike for any course of action that would discourage agencies from undertaking such practices.[86]

Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 53-67; Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1382-1419 (1973).

80. *See, e.g.*, Helco Prods. Co. v. McNutt, 137 F.2d 681, 683-84 (D.C. Cir. 1943); Third Ave. Ry. v. SEC, 85 F.2d 914, 915 (2d Cir. 1936).

81. Helco Prods. Co. v. McNutt, 137 F.2d 681, 684 (D.C. Cir. 1943). See notes 82-86 *infra* and accompanying text.

82. 137 F.2d 681 (D.C. Cir. 1943).

83. *Id.* at 681-82.

84. The court placed great emphasis on the need for immediate and definite threat of prosecution for the order to be reviewable. Since neither the party who made the order nor his superior, the Federal Security Administrator, had power to prosecute, but only to give an advisory opinion to the Attorney General, who would then have unfettered discretion to decide whether a violation had occurred and whether to prosecute, the order in the letter did not qualify for review. *Id.* at 683. *Cf.* Kixmiller v. SEC, 34 AD. L.2d 360 (D.C. Cir. 1974).

85. This distinction between proposed and pre-existing conduct was also demonstrated in Holly Farms Poultry Indus., Inc. v. Kleindienst, 1973-1 Trade Cas. 94,380 (M.D.N.C., May 10, 1973), where review of an advisory letter from the Department of Justice was denied because the opinion dealt only with proposed, hypothetical conduct. See notes 55-59 *supra* and accompanying text. Similarly, in Floersheim v. Weinburger, 346 F. Supp. 950 (D.D.C. 1972), review was denied from an advisory opinion dealing with a proposed course of business, *id.* at 956-57, but granted where the opinion dealt with an already established mode of business, *id.* at 953-56.

86. 137 F.2d at 684.

The limitations of this formality doctrine were clearly delineated in *Independent Broker-Dealers Trade Association v. SEC*,[87] where the Court of Appeals for the District of Columbia Circuit held that suggestions made by the SEC to the New York Stock Exchange, which led to a vote by the Exchange to abolish customer-directed give-ups[88] of brokerage fees, constituted agency action sufficiently final and definite to entitle an affected party to obtain immediate review of the legality of the action. The court made it clear that "captions or labels" should not be determinative of reviewability.[89] Rather, the court broadly viewed the extent of the SEC's involvment in the process which culminated in the Exchange's decision to abolish give-ups.[90] Noting that the SEC had long been pressing the Exchange to amend its rate structure, the court concluded that compliance was hardly a voluntary submission to an agency request, but rather an attempt both to respond to agency action and concurrently to salvage as much of the rate schedule as possible.[91] The rationale for determining formality expressed in *Independent Broker-Dealers* is thus very similar to that utilized in determining whether agency action is sufficiently ripe for adjudication.[92] Rather than depending on formalistic labels and simplified rules of thumb, the court focused its injuiry on whether the agency action had been of such a nature as to have an immediate and adverse effect upon the complaining party.[93]

However a 1973 decision, *Koss v. SEC*,[94] suggests that despite the broad language of *Independent Broker-Dealers*, which implied that identical considerations were involved in determining both formality

87. 442 F.2d 132 (D.C. Cir. 1971).

88. In *1971 Developments*, the "give-up" was described as

> the practice whereby a securities broker pays another broker-dealer a part of the minimum commission which, under the rigid minimum commission rate structure of the Exchange, he is required to charge his customer. The Exchange did not permit volume discounts on commissions based on number of shares sold in a transaction, and in order to circumvent the rate structure, brokers were willing to "give-up" large percentages of their commissions in order to execute high volume orders. *1971 Developments* 276, 281 n.28.

89. 442 F.2d at 139. *Cf.* Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 425 (1942); PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 741-42 (3d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3610 (U.S. Apr. 29, 1974) (Adams, J., dissenting); Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

90. 442 F.2d at 137.

91. *Id.* at 144.

92. See notes 42-78 *supra* and accompanying text.

93. 442 F.2d at 139-42. *See also* National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971); Holly Farms Poultry Indus., Inc. v. Kleindienst, 1973-1 Trade Cas. 94,380 (M.D.N.C., May 10, 1973); Florsheim v. Weinburger, 346 F. Supp. 950 (D.D.C. 1972).

94. 364 F. Supp. 1321 (S.D.N.Y. 1973).

and ripeness, the limitations of *Helco* are still viable, and formality does retain some utility as a separate factor to be considered in determining the appropriateness of judicial review. In *Koss*, the plaintiff was an underwriter against whom certain SEC actions were pending. While these proceedings were pending, six securities issuers who intended to use the plaintiff for their issues received comment letters from the SEC's Regional Offices, written by staff members responsible for reviewing offer circulars to be issued pursuant to the securities laws. The letters requested that the circulars be amended to disclose that the plaintiff was a respondent in an SEC administrative proceeding and the nature of the charges.[95] After two of the issuers thereafter changed underwriters, plaintiff brought suit for injunctive relief from the requests of the comment letters.

The court viewed the case from two perspectives. It first focused upon the two-pronged ripeness test of *Abbott Laboratories*—the fitness of the questions presented by the contested administrative action for judicial determination and the degree of hardship imposed on the aggrieved party by withholding review[96]—and concluded the comment letters were not ripe for review.[97] The court then stated that an alternative basis for denying review was the informal nature of the agency activity.[98] In so holding, the court compared the nature of the agency action in *Koss* with the nature of that in *Helco*. The SEC staff members who wrote the comment letters in *Koss* were totally incapable of enforcing the request contained therein.[99] Thus,

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95. *See id.* at 1323 n.7.

96. See notes 52-54 *supra* and accompanying text.

97. The chief difficulties with the action from a ripeness viewpoint were that the letters had been withdrawn and that they pertained only to a proposed circular that had not yet been issued. 364 F. Supp. at 1324-25. Agency action concerned only with proposed conduct has been held not ripe for review under the *Abbott Laboratories* test. The issues are not fit for review because the appellant is not forced to decide between changing his present course of conduct or facing possible punishment. Since such an appellant may continue his present course of conduct without any assertion of enforcement against him by the agency, there is little hardship in denying review. See notes 56-59 *supra* and accompanying text.

98. *Id.* at 1325.

99. Only their superiors could enforce such requests by acting on behalf of the SEC, and these superiors had expressed a definite lack of enforcement intention. *Id.* at 1325-26. Upon hearing of the regional office's comment letters, the SEC issued a "Minute Order" stating it neither approved nor disapproved of the staff's comments but viewed them as raising "significant questions of administrative policy" concerning disclosure. *Id.* at 1324 n.9. Pursuant to the "Minute Order," the Chief of the Branch of Small Issues of the Division of Corporate Finance of the SEC wrote the plaintiff's attorney, informing him the comment letters had been withdrawn but also stating that the plaintiff would be "requested" by the regional offices to make full disclosure to

as in *Helco*, there was a lack of immediate threat of prosecution for failing to comply with the comment letter requests. Rather, the action in question was merely advisory in nature in that it suggested a proper mode of future conduct.[100]

In *Koss*, the court recognized that its decision could have been based solely upon ripeness; the formality doctrine is discussed only as "[a]nother way of categorizing the events."[101] However, by using the formality doctrine as an alternative basis of its decision, the court indicated that the formality rule still retains some degree of independent significance as a factor to be considered in deciding whether to review. The validity of such an approach is questionable. As demonstrated in *Independent Broker-Dealers*, to determine reviewability on the basis of whether the disputed action is labeled "formal" or "informal" is to exalt form over substance. The significant factor is not what form the action takes, but rather its effect upon the rights and obligations of the affected party. Under this rationale, the formality of the agency action is irrelevant; rather, its reviewability should be determined by the functional approach established by *CBS* and *Abbott Laboratories*.

FINALITY

Courts have traditionally held that only final, as opposed to intermediate, administrative action is subject to judicial review.[102] This judicial requirement has been codified in section 10(c) of the APA which provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on review of the final agency action.[103]

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potential issuers. *Id.* at 1324.

In another recent decision analogous to *Koss*, Kixmiller v. SEC, 34 AD. L.2d 360 (D.C. Cir. 1974), review was denied of a letter from the SEC's Division of Corporate Finance stating the Division's intention not to urge action by the SEC for omissions of petitioner's proposals from a corporation's 1972 proxy statement. Since the Division had no authority to make orders and the SEC had not adopted the Division's position, the letter was held insufficiently formal to warrant immediate review. *Id.* at 362.

100. Such an order could, therefore, also be seen as unreviewable from a viewpoint of ripeness in that it is merely advisory and does not operate with any direct impact upon appellant as to cause hardship or injury. See notes 45-53 *supra* and accompanying text.

101. 364 F. Supp. at 1325.

102. 3 K. DAVIS §§ 20.01, 20.05; L. JAFFE 424-26.

103. APA § 10(c), 5 U.S.C. § 704 (1970). Earlier cases placed a very heavy em-

Thus, unless the particular action complained of has been made spe-

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phasis on the more general doctrine of exhaustion of administrative remedies rather than framing opinions in terms of finality requirements. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Railroad & Warehouse Comm'n v. Duluth St. Ry., 273 U.S. 625 (1927); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196 (1924); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); United States v. Sing Tuck, 194 U.S. 161 (1904); Altschul v. Gittings, 86 F. 200 (C.C.D. Ore. 1898); Dundee Mortgage Trust Inv. Co. v. Charlton, 32 F. 192 (C.C.D. Ore. 1887). However, limitations in the exhaustion doctrine subsequently became apparent. *See* Pepsico, Inc. v. FTC, 472 F.2d 179, 186 n.7 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973). *But cf.* Note, *Interim Relief and Exhaustion of Administrative Remedies: A Study in Judicial Confusion*, 1973 DUKE L.J. 275, 293 n.81 in *1972 Developments*. These limitations were effective demonstrated in 1973 in American Gen. Ins. Co. v. FTC, 359 F. Supp. 887 (S.D. Tex. 1973), where immediate review was sought of the denial of a motion to dismiss FTC proceedings concerned with a proposed merger of life insurance companies for lack of subject-matter jurisdiction. If the exhaustion doctrine were applied in this case, immediate review of the denial of the motion to dismiss would arguably have been allowable since appellants had exhausted all possible administrative remedies with respect to the jurisdictional issue for which judicial review was sought. However, exhaustion is really a meaningless consideration in deciding on reviewability. None of the considerations to be promoted by prohibiting interlocutory appeals such as avoidance of useless expense and delay, see notes 104-06 *infra* and accompanying text, would be served by blindly following the exhaustion doctrine in *American Gen. Ins.* Here the exhaustion doctrine would have allowed review of a mere preliminary order that could easily be corrected through one final appeal, but also could become moot before such final appeal. Thus, it has become recognized that a far more practical approach to this variety of reviewability questions is to approach the issue by inquiring whether the agency has acted with sufficient finality to warrant review.

However, the exhaustion doctrine does retain some viability today. Many authorities claim it may be applied, but only at the court's discretion, to preclude review. *See, e.g.*, 3 K. DAVIS § 20.03; L. JAFFE 432-37. *But see* Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 1006 (1939); McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 CALIF. L. REV. 129, 162-64 (1940).

Furthermore, it has often been stated that exhaustion should not be required where its exercise would be futile. *See, e.g.*, Lodge 1858, Am. Fed'n of Gov't Employees v. Paine, 436 F.2d 882, 896 (D.C. Cir. 1970); Williams v. Richardson, 347 F. Supp. 544, 548 (W.D.N.C. 1972).

In American Fed'n of Gov't Employees v. Acree, 475 F.2d 1289 (D.C. Cir. 1973), plaintiffs sought review of a holding by the Customs Bureau that there was no merit in plaintiffs' claim that a Civil Service Commission regulation was unconstitutional. Plaintiffs appealed directly to the Court of Appeals for the District of Columbia Circuit, even though Civil Service regulations allow an appeal to the Civil Service Commission before recourse to the judiciary. 5 C.F.R. § 752.304 (1973). The court granted review, stating that it was "exceedingly unlikely" that appeal to the Civil Service Commission would have gained a reversal. 475 F.2d at 1292. The court stated it would be "blinking reality" to expect the Commission to hold an agency subject to its regulation to a higher standard of procedural protection than its own challeuged rule required. *Id.* Also, the court thought it "unlikely" that the Commission would act in advance of a court in overturning rules promulgated by itself and consistent with the applicable governing statute. *Id.* Therefore, the *Acree* court declined to apply the exhaustion doctrine and allowed immediate judicial review of the challenged regulation's constitutionality.

Finding exhaustion futile because it was "substantially unlikely" that exhausting

cifically reviewable by statute, the court must ascertain whether it constitutes a final agency action in order to determine its reviewability. The rationale which underlies the finality rule is similar to that which forms the basis for the final judgment rule in the federal court system.[104] As a practical matter, the finality rule prevents premature interruption of the administrative process[105] which could result in additional delay and expense for the purposes of reviewing mere procedural disputes of interlocutory orders which are often rendered moot by the final agency decision.[106]

Although the above considerations generally preclude immediate review of intermediate or interlocutory agency decisions, it is clear that a final order need not necessarily be the *last* order.[107] While earlier cases often rigidly applied the finality requirement whenever further agency hearings or proceedings were contemplated in the resolution

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all administrative channels would bring about a different result represents a considerable relaxation of the almost certain futility traditionally required for this type of avoidance of the exhaustion doctrine. The typical futility situation was exemplified by Williams v. Richardson, 347 F. Supp. 544 (W.D.N.C. 1972), where the plaintiff was allowed to bring an action declaring part of the Social Security Act unconstitutional. Although exhaustion would have required waiting for a decision of the Secretary of Health, Education and Welfare on the issue, the court granted immediate review on the basis that the Secretary was *specifically required by statute* to deny plaintiffs' claim. Accordingly, there was *no "practical prospect* that the statutory review procedure would be more than an empty formality." *Id.* at 548 (emphasis supplied). However, notwithstanding the increased availability of judicial review resulting from these developments in the exhaustion doctrine, the finality rule, because it focuses more directly upon the policies underlying the need for limitation of interlocutory appeals, remains the more desirable standard.

104. *See* 28 U.S.C. §§ 1291-94 (1970). It should be noted that in the area of judicial review of administrative action there is no counterpart to 28 U.S.C. § 1292 which allows appeals of important interlocutory orders when certified by the district court and accepted by the appellate court.

105. *See* L. JAFFE 425-26; Comment, *Exhaustion of Administrative Remedies*, 39 CORNELL L.Q. 273, 292-93 (1954).

106. *See* L. JAFFE 424. *See also* FPC v. Metropolitan Edison Co., 304 U.S. 375, 383-84 (1938). An additional advantage in refusing interlocutory appeals that was frequently pointed out in 1973 is that by waiting for a final appeal, the reviewing court receives a complete trial record which expedites its task by clearly delineating the disputed issues. *See, e.g.*, Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1972); Warner-Lambert Co. v. FTC, 361 F. Supp. 948 (D.D.C. 1973).

107. *See* Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334, 338 (1st Cir. 1953), where Chief Judge Magruder observed that some orders, although "in form titled as a part of the underlying proceeding . . ., really should be regarded as carved out of the main proceeding" and therefore are immediately reviewable; *accord*, Goodman v. Public Serv. Comm'n, 467 F.2d 375 (D.C. Cir. 1972); American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); Interstate Broadcasting Co. v. United States, 298 F.2d 539 (D.C. Cir. 1960); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

of a given dispute,[108] it has become generally recognized that finality should be determined on the basis of the impact of the agency decision upon the aggrieved party rather than its chronological position in the administrative process.[109] This view of finality has been cogently articulated by Judge Bazelon:

> Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action . . . . Thus administrative orders are ordinarily reviewable when "they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."[110]

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108. *See, e.g.*, United States v. Los Angeles & S.L. R.R., 273 U.S. 299 (1929); Canadian River Gas Co. v. FPC, 110 F.2d 350 (10th Cir.), *cert. denied*, 311 U.S. 693 (1940); SEC v. Andrews, 88 F.2d 441 (2d Cir. 1937).

109. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1971). The Court stated:

> [T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. *Id.* at 71, *citing* ICC v. Atlantic Coast Line R.R., 383 U.S. 576, 602 (1966); Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939).

A clear example of this conception of the finality rule was demonstrated in Goodman v. Public Serv. Comm'n, 467 F.2d 375 (D.C. Cir. 1972). In *Goodman*, review was allowed from an order made by the Public Service Commission (PSC) in response to a utility company's request for authorization of a rate increase. The order established a fair rate of return for the utility company, found that a rate increase was necessary, and directed the company to present a new rate schedule designed to meet this rate of return. The court granted review despite the need for a later order to be made by the PSC allocating the increase among several categories of customers in order for the increase to take effect.

In so doing, the court noted that while there remained the necessity of further action by the PSC, the validity of the increase had been conclusively established at that point and was not conditional upon future agency action. The court stated, "What remained to be done was not concerned with the validity of the increase in rates which had been granted . . . ." *Id.* at 378. Under such circumstances, legal consequences had clearly flowed from a technically interlocutory order. Also, since the appeal was concerned solely with the validity of the increase and, as stated above, the future agency action was not concerned with this, it is clear that allowing the immediate appeal on this issue did not have a disruptive effect on the underlying proceeding.

It should be noted that even under this pragmatic approach to the finality doctrine, review of orders that are merely procedural or preliminary in nature and inflict no irreparable injury is still denied. APA § 10(c), 5 U.S.C. § 704 (1970); FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938); *accord*, Ecology Action v. AEC, 34 AD. L. 2d 510 (2d Cir. 1974); Pepsico, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973); Eastern Util. Associates v. SEC, 162 F.2d 385 (1st Cir. 1947); Okim v. SEC, 143 F.2d 960 (2d Cir. 1944); Mississippi Power & Light Co. v. FPC, 131 F.2d 148 (5th Cir. 1942).

110. Isbrandtsen v. United States, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954),

Viewed in this manner, the test for finality is very similar to the considerations involved in determining ripeness;[111] review is granted where an interlocutory order has such an immediate and adverse effect that it inflicts irreparable injury on the petitioner.[112] Immediate review of agency action is allowed under a similar rationale where agency actions attach legal consequences to the everyday conduct of parties with sufficient finality to force the parties to change their conduct or face possible punishment.[113]

A 1973 case, *Harlem Valley Transportation Association v. Stafford*[114], illustrates the application of this functional approach in determining finality. In *Harlem Valley*, the plaintiffs sought immediate review of an Interstate Commerce Commission (ICC) determination that it was not required to file a draft environmental impact statement prior to conducting a hearing concerning a proposed railroad abandonment.[115] Rejecting the contention that such an order was interlocutory and therefore not subject to judicial review, the court held that the order was "complete [and] likely to wreak irreparable injury if

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citing Columbia Broadcasting Sys. v. United States, 316 U.S. 407, 425 (1942). *See also* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1917), where the court stated:

> The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right with consequences sufficient to warrant review. *Id.* at 589 n.8.

111. See notes 45-53 *supra* and accompanying text.

112. *See, e.g.*, Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345 (D.C. Cir. 1972), *rev'd*, 42 U.S.L.W. 4203 (U.S. Feb. 19, 1974); Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). In *Isbrandtsen*, the irreparable injury rationale was used as a basis for review of the Federal Maritime Board's interim approval of a dual rate shipping system pending a formal hearing where plaintiff alleged the use of such system would drive drive him out of business before such formal hearing was completed.

113. See notes 45-53 *supra* and accompanying text.

114. 360 F. Supp. 1057 (S.D.N.Y. 1973).

115. The plaintiffs claimed a threshold determination of whether an impact statement would be required was dictated by that National Environmental Policy Act, § 102 (2)(C), 42 U.S.C. § 4332(2)(C) (1970), which directs all agencies of the federal government to require the preparation of such statements for every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment. The statement is to accompany the proposal through the existing agency review processes. Thus, the plaintiffs alleged that the ICC was required to determine if the abandonment proceeding involved major or federal action affecting the quality of the environment and, if so, to require its staff to prepare and circulate a draft impact statement prior to the commencement of any hearing, so that evidence and argument could be adduced with reference to the draft. 360 F. Supp. at 1061. The ICC refuted this claim, contending that NEPA § 102(2)(C) required

wrong."[116] The Court emphasized that absent advance preparation of an impact statement, the plaintiffs would be unable to effectively present and analyze environmental considerations at the abandonment hearings. As a result, the hearing records on environmental aspects of the abandonment would likely be inadequate, thereby enhancing the probability of "improvident abandonments at unlawful costs in environmental injury."[117]

Harlem Valley thus exemplifies the recognized principle that finality does not turn upon whether the disputed order is the last administrative order contemplated by the agency process.[118] Rather, the appropriate test of finality for review purposes is whether the impact of the order is sufficiently harmful to the party to warrant review in the context of the particular situation.[119]

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no agency action in an abandonment proceeding until the initial decision, following a hearing, by the administrative judge. *Id.*

116. *Id.* at 1063-64.

117. *Id.* at 1064. Another significant aspect of *Harlem Valley* is its liberal view of what constitutes irreparable injury. Although the court held that the ICC decision not to issne an impact statement prior to hearing would likely result in "irreparable" harm, it conceded that its use of the term "irreparable" might be literally questionable, since the decision, if erroneous, could be repaired by ordering the hearings reheld after reversal of a "final" ICC decision on the merit of abandonment. *Id.* at 1064 n.9. *Cf.* Greene County Planning Bd. v. FPC, 455 F.2d 412, 425-26 (D.C. Cir.), *cert. denied*, 409 U.S. 849 (1972). *But cf.* Citizens for a Safe Environment v. AEC, 33 AD. L.2d 1068 (3d Cir. 1973). For a discussion of *Citizens for a Safe Environment*, see notes 31-41 *supra* and accompanying text.

118. *See, e.g.*, Foti v. Immigration & Naturalization Serv., 375 U.S. 217 (1963); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Folkways Broadcasting Co. v. FCC, 379 F.2d 447 (D.C. Cir. 1967); Amerada Petroleum Corp. v. FPC, 285 F.2d 737 (10th Cir. 1960); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954); American Broadcasting Co. v. FCC, 191 F.2d 492 (D.C. Cir. 1951); *cf.* United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

119. *See* Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 591 (D.C. Cir. 1971). See generally text accompanying notes 110-13 *supra*.

Despite the wide judicial recognition of this pragmatic application of the finality rule, some courts have persisted in utilizing the traditionally restrictive approach of judging finality by the mere chronological position of an agency order within the underlying proceedings. Such an attitude was exemplified in 1973 in Utah Int'l, Inc. v. EPA, 478 F.2d 126 (10th Cir. 1973), where the Tenth Circuit denied review of an order which disapproved certain previously approved sections of a state air quality standards implementation plan submitted under the Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1970). The review provision of the statute permitted "[a] petition for review of the Administrator's action in *approving* or *promulgating* any implementation plan . . . ." *Id.* § 1857(h)-5(b)(1) (emphasis added). Since the order in question had *denied* approval of a plan, it was not specifically subject to review under

Harlem Valley also illustrates a current tendency of many courts to neglect consideration of the interference which immediate review will cause the administrative decision-making process and instead to determine reviewability primarily on the basis of the impact of the action on the complaining party.[120] By providing immediate review of the question of whether an impact statement requirement determination should precede an ICC hearing, the *Harlem Valley* decision exposes the ICC to potentially great disruption. The delay inherent in such appeals would prolong abandonment proceedings and frustrate the ICC's attempt to abbreviate its procedures in recognition of the railways' critical need to abandon unprofitable lines.[121] When this need for a prompt final decision on the abandonment is combined with the court's express recognition that the harm caused by postponing review until the proceedings were completed could be repaired by ordering a new hearing at that time,[122] it would appear that in *Harlem Valley* the interests of avoiding undue interference with the administrative decision-making process should have outweighed the need to relieve a party directly harmed by agency action.

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the Act. 478 F.2d at 127-28. Although the APA provides for judicial review of a final agency order, section 10(c), 5 U.S.C. § 704 (1970), the court held that the denial of the plan was not a final order since further agency proceedings were to take place until a plan was adopted. 478 F.2d at 128. Thus, the court concluded that neither the Clean Air Act nor the APA provided a basis for review of the denial order.

The court's opinion reveals a mechanical rather than pragmatic application of the finality doctrine. In holding that denial orders did not constitute final administrative action, the court emphasized that by the mere act of disapproval no plan is placed into effect and the administrative process is simply reactivated until a final plan is approved. *Id.* at 127. However, as *Harlem Valley* clearly demonstrates, the mere presence of future administrative proceedings is in itself an invalid gauge of finality. A more practical basis on which the *Utah International* court could have refused review would have been to note that the mere denial of the plan imposed no legal obligations on the parties and had no direct impact upon appellant's activities. Rather, it was merely part of the continuing formulation of a valid state implementation plan which, when approved, would then be subject to judicial scrutiny.

120. *See, e.g.*, Phillips Petroleum Co. v. FPC, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3401 (U.S. Jan. 14, 1974); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Koss v. SEC, 364 F. Supp. 1321 (S.D.N.Y. 1973); Holly Farms Poultry Indus., Inc. v. Kleindienst, 1973-1 Trade Cas. 94,380 (M.D.N.C., May 10, 1973). While the opinions of each of these recent cases at least implicitly alluded to considerations of comity with the administrative decision-making process, the courts' primary inquiry focused on the degree of impact of the disputed actions on the complaining parties.

121. *See* Address by Fritz R. Kahn, General Counsel of the Interstate Commerce Commission, at a meeting of the Metropolitan New York Chapter of the Association of Interstate Commerce Commission Practitioners, in New York City, September 11, 1973.

122. *See* 360 F. Supp. at 1064 n.9. See note 117 *supra*.

CONCLUSION

Recent judicial application of the traditional touchstones of reviewability—the overlapping concepts of ripeness, formality, and finality—has focused on the effect of the administrative action upon the regulated party. Thus, the emphasis is upon the substantive impact of the action rather than its label, form, or chronological position in the administrative process. As the majority's opinion in *PBW* indicates, this approach is not universal. Yet, as courts generally place more reliance on the principles enunciated in *CBS* and *Abbott Laboratories*, the traditional concepts of ripeness, formality, and finality, which have always overlapped to some extent, appear to have been reduced to a single inquiry—the effect of the administrative action upon the party seeking review.[123]

Implicit in this approach is the relegation to secondary status of consideration of the degree of interference which immediate review will cause in the administrative decision-making process. While such an expansion in the availability of review is appealing because of its minimization of hardship to the parties, it is submitted that considerations of comity with administrative bodies should not be discarded in deciding whether a particular administrative action should be subject to judicial review. Administrative agencies function as entities quite separate from the judiciary—they are essentially arms of the executive which possess legislatively conferred powers and duties; accordingly, courts traditionally have been reluctant to interfere with prescribed administrative procedure through the premature granting of judicial review. Undue disruption and delay often substantially impair the efficiency and effectiveness of these coordinate entities.[124] Accordingly, in employing this functional approach to reviewability, courts should take care not to limit their inquiry to an examination of the hardship to the regulated party which denial of immediate review might inflict, but to consider also the possible adverse consequences to the administrative process which might flow from a precipitate interposition of the judiciary.

123. See notes 38-59, 77-93, 96-120 *supra* and accompanying text.
124. L. JAFFE 425.