VIII. JUDICIAL REVIEW—ACTIONS REVIEWABLE

A. REVIEWABILITY: AN EXAMINATION OF FORMALITY, FINALITY AND RIPENESS

A significant portion of recent developments in administrative law relates to refinements of the standards governing judicial reviewability of agency action. At the outset, this section will attempt to separate and highlight the ambiguous and frequently overlapping component factors considered by the courts in determining reviewability—formality, finality, and ripeness. After the general inquiry into the nature of the factors of reviewability, three of the most significant cases in this area decided in 1971 will be examined in detail to illustrate approaches employed by the courts in reviewability cases. It is the theme of this section that a broadly defined concept of ripeness has been given a paramount position in recent decisions at the expense of the other concepts with a resulting shift in concern from the effective operation of the administrative process to an inquiry more traditionally viewed as directed at the justiciable nature of the controversy.

There is no well-defined test used by the courts for determining the judicial reviewability of an agency action. The decision to review such action involves a process of balancing the integrity of government agency operations against the need of private parties for judicial intervention. Traditionally, an analysis of formality, finality, and ripeness is conducted within the context of a widespread judicial desire to avoid premature intrusions into the administrative process. A court's predisposition toward avoidance of judicial-administrative clashes is premised upon considerations of economy, recognition of agencies as depositaries of expertise, and recognition of the appropriate judicial position in relation to administrative bodies. The countervailing force preventing the development of an outright presumption of noninter-

1. For a pertinent example of judicial recognition of agencies' peculiar abilities, see Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). In examining the appellate court's role on an appeal from an NLRB order, Mr. Justice Frankfurter noted that the NLRB is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge. . . ." This recognition is reflected also in the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1970), which allows judicial review of final agency action except so far as action is committed by law to administrative discretion.

ference is the need for a method by which an aggrieved party can secure protection through independent evaluation of the agency action.\(^3\)

Assuming that the threshold questions of case or controversy and standing are met by the plaintiff,\(^4\) judicial attention traditionally turns to the issues of the degree of formality, finality and the ripeness of the administrative action. Formality pertains to the procedural processes established to provide a method for systematic, orderly action by the agency.\(^5\) The focus of the formality inquiry is upon whether the agency action is the product of these prescribed procedures. Traditionally the courts have been reluctant to review informal agency action\(^6\) in part because of the high value placed upon informal methods. The flexibility of these informal techniques has been presumed to result in greater administrative efficiency and effectiveness.\(^7\) The primary purpose of the formality criterion, however, relates to aversion toward undue dissipation of judicial resources in examining informal action.

Judicial attention also traditionally centers on the nature of the agency's action to determine if certain criteria of finality were satisfied, inasmuch as "final agency action" is an express prerequisite of

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4. See National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 692 (D.C. Cir. 1971), wherein the court observes that the concepts of case or controversy, standing, finality, formality, ripeness, and exhaustion of administrative remedies are all "intermeshed in the overall determination of the appropriate occasion for judicial review." The factors of case or controversy, standing and ripeness, however, relate more broadly to the inquiry as to the justiciability of a dispute. Justiciability pertains to the character of the controversy between the plaintiff and the agency; it focuses upon the appropriateness of the conflict for judicial resolution and seeks sufficient adverseness to assure an effective presentation of the issues. Consequently, the characteristics of the agency's action are relevant in this determination to the extent that the action is substantial enough to warrant an adverse reaction on the part of the complainant. To this extent the different inquiries as to justiciability and reviewability overlap.
5. A rationale for this requirement is suggested in Helco Products Co. v. McNutt, 137 F.2d 681, 684 (D.C. Cir. 1943), in which the court observed: "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."
the APA. Final action denotes a want of additional steps or procedures necessary before enforcement or implementation can be undertaken. A recent case which illustrates the traditional application of the finality criteria is Lever Brothers Co. v. FTC. That case involved an FTC notice of proposed rulemaking in regard to information printed on the containers of phosphate detergents. A manufacturer filed an action to enjoin the Commission from conducting further proceedings on the ground that the FTC lacked statutory authority to promulgate its proposed rule by means of the procedures which the Commission allegedly intended to follow. Holding the action unreviewable, the court noted that only a proposed rule was in question; consequently, the FTC action lacked finality within the meaning of the APA.

The third traditional factor pertaining to reviewability is ripeness, a concept close to finality. Ripeness is a judicial construct involving consideration of the legal controversy between the litigants rather than the administrative action to be reviewed. The principle relates to the timing of the litigation and is concerned with whether, at the time the judicial process is invoked, the controversy is sufficiently substantial so as to avoid depletion of judicial resources by examining hypothetical disputes. In 1967 the Supreme Court in Abbott Labo-

8. “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.” 5 U.S.C. § 704 (1970).
11. Id. at 373. For a similar holding, see Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).
12. 325 F. Supp. at 373. “[I]t can hardly be contended that the pending rule-making proceeding constitutes ‘final agency action’ within the meaning of the Administrative Procedure Act. The rule-making process is far from complete.” Id. The court employed the approach established in Abbott Lab. v. Gardner, 387 U.S. 136, 149-52 (1967), wherein the Supreme Court examined finality, as required by the APA, as a component of a bifurcated test of ripeness requiring an examination of both the fitness of the issues for judicial decision and the hardship on the parties if court consideration is withheld.
14. Since both finality and ripeness relate to concern for preventing an unwarranted dissipation of judicial resources, the two concepts seem particularly difficult to distinguish. Indeed, Professor Jaffe implies that ripeness may perhaps be meaningfully discussed only as a group of related doctrines, rather than a definable, independent principle. JAFFE 395. Nevertheless, the concepts are distinct. Ripeness is strictly a judicial construct designed to eliminate premature
propounded a bifurcated view of ripeness. Whether an issue is ripe demands, first, an evaluation of the fitness of issues for judicial resolution and, second, a determination of the hardship to the plaintiff of withholding judicial review. Satisfaction of both parts of the test results in the successful fulfillment of the ripeness requirement. The Abbott approach was applied in General Motors Corp. v. Volpe, where an automobile manufacturer instituted an action to set aside an order by the Secretary of Transportation requiring it to notify owners of certain vehicles of defects relating to vehicle safety. The court determined that the defect notification order constituted final agency action within the meaning of section 704 of the APA, but nevertheless concluded that the section was not reviewable because neither facet of the Abbott test for ripeness was completely satisfied. First, the questions presented involved complicated factual as well as legal issues, so that the action was not suitable for judicial resolution. However, little significance was attached to this aspect since the issues were otherwise fit for judicial determination and the effect of the order was sufficiently direct to render the issues appropriate for judicial review. More importantly, the court determined that there was no substantial hardship to the manufacturer in withholding judicial consideration since the company could present its grievances at an enforcement action being brought by the agency.

Also illustrative of the determinative quality of the second prong of the Abbott test is National Helium Corp. v. Morton, in which judicial action, while finality pertains as well to the integrity of agency processes and demands consideration of the administrative-judicial separation of power. See Comment, Administrative Law: Agency Press Release Allegedly Misinterpreting Statute Held Sufficiently Final for Declaratory and Injunctive Relief, 112 U. Pa. L. Rev. 135, 136 n.10 (1963).

16. Id. at 149.
20. Id. at 1125.
21. Although not expressly invoking Abbott, the District of Columbia Circuit Court of Appeals in Tatum v. Laird, 444 F.2d 947, 954-55 (D.C. Cir.), cert. granted, 404 U.S. 955 (1971), examined the alleged hardship placed upon plaintiffs, namely the present inhibiting effect of the military’s gathering and distributing information regarding civilian political activities, in determining that the controversy was ripe.
22. 326 F. Supp. 151 (D. Kan.), aff’d, ____ F.2d ____ (10th Cir. 1971). The court held that companies which had been awarded contracts for the extraction and sale of helium to the government were entitled to judicial review of the termination of the contracts.
the court held that once it is established that a legal wrong is being suffered as a result of agency action, the availability of judicial review is presumed. Similarly, in *Air Line Pilots' Association International v. Department of Transportation*, a pilots' association sought review of an FAA determination that the construction of three multi-story buildings would not constitute a hazard to air navigation. Although the agency determination had no enforceable effect, hardship sufficient to meet the second prong of the *Abbott* test was located in the fact that the determination removed a potential barrier to approval of the construction, as a result of which opponents to the proposed buildings suffered what the court considered to be a "significant setback." Although the court's analysis would arguably result in allowing review regardless of the agency's determination, it is understandable that considerations of hardship were of decisive importance in determining the result.

Although in theory the concept of "reviewability" can be separated into its critical component parts—formality, finality, and ripeness—and analyzed as above, it must be noted that any analysis confined to a rigorous, step-by-step examination of each of the factors will frequently ignore the realities of the judicial decision-making process. Cases decided in 1971 illustrate that courts will frequently ignore certain of these factors and concentrate upon the practical concern of the position of the complaining party, a consideration which theoretically is merely one component of the *Abbott* ripeness test. This new approach calls into question the vitality of the various components of reviewability as independent considerations.

*The Limitation of "Formality" as a Requisite for Judicial Review*

A recent decision by the Court of Appeals for the District of Columbia Circuit indicates that the traditional conception of formal-

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23. *Id.* at 154.
24. 446 F.2d 236 (5th Cir. 1971).
25. *Id.* at 241.
26. Under the Fifth Circuit's approach, the second prong of *Abbott* would have been satisfied by the proponents of the construction project had the FAA determined the proposed buildings to be hazardous. Therefore, no matter what course the agency took, by the court's analysis the FAA determination would have been reviewable. This result is further suggested by the court's deference to the *Abbott* caveat that "judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Lab. v. Gardner*, 387 U.S. 136, 140, cited with approval in *Air Line Pilots'*, 446 F.2d at 241.
ity may be significantly limited as an independent criterion of reviewability. Independent Broker-Dealers' Trade Association v. SEC\textsuperscript{27} held that suggestions made by the Securities and Exchange Commission to the New York Stock Exchange, which led to a vote by the Exchange to abolish customer-directed give-ups\textsuperscript{28} of brokerage fees, presented an action sufficiently final to entitle the Independent Broker-Dealers' Trade Association, a third party which questioned the legality of the action, to limited judicial review. In an extended series of communications between the SEC and the Exchange, the SEC expressed its displeasure with both the Exchange's commission rate schedule and the practice of customer-directed give-ups, but the Exchange exhibited reluctance to change either policy.\textsuperscript{29} Ultimately, the SEC accepted counter-proposals offered by the Exchange whereby customer-directed give-ups would be abolished. The Exchange proposals were adopted by its members, whereupon the Independent Broker-Dealers' Trade Association petitioned the District Court for the District of Columbia for review of the SEC action which led to the revision of the Exchange's policy. The district court dismissed the complaint, holding that since the SEC's action was merely a suggestion, the matter was foreclosed from

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\item \textsuperscript{27} 442 F.2d 132 (D.C. Cir.), cert. denied, 404 U.S. 828 (1971).
\item \textsuperscript{28} "Give-up" is the term used to describe 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 numbers 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. The Exchange upheld its rate structure and at the same time permitted the directly conflicting give-up practice.
\item \textsuperscript{29} 442 F.2d 136 (D.C. Cir. 1971). On July 18, 1966, the SEC wrote to all national securities exchanges expressing its concern over give-ups. In its December, 1966 report to the House Commerce Committee, the SEC reiterated this concern and recommended again that the exchanges abolish the practice. In the first major response from the president of the Exchange on January 2, 1968, Robert Haack stated in a letter to Exchange members that he supported the incorporation of a volume discount in the rate schedule but supported the continuation of give-ups. Shortly thereafter, on January 26, 1968, the SEC announced its intention to adopt a rule whereby give-ups would be prohibited unless the benefits of the practice accrued to the investment companies and shareholders. On May 28, 1968, the SEC issued an order directing a public hearing and investigation on several matters, including give-ups. At the same time, the SEC chairman wrote to President Haack making a written request pursuant to section 19(b) of the Securities and Exchange Act that the Exchange amend its rate structure either by following a fee schedule prepared by the SEC or by eliminating minimum rates entirely on substantial orders. The Exchange's president responded on August 8, 1968, and accepted the first proposal suggesting the abolition of give-ups. The SEC promptly accepted these counter-proposals in its letter of August 30, 1968.
\end{itemize}
judicial review. The Court of Appeals for the District of Columbia Circuit vacated the lower court's judgment dismissing the action, but found for the SEC on the merits.\textsuperscript{30}

The informality of the SEC's action in \textit{Independent Broker-Dealers} is troublesome for purposes of analyzing reviewability. Traditionally, courts have been reluctant to review any type of informal agency decision or interlocutory order and have hesitated in terming agency action "final" where it lacked formality,\textsuperscript{31} even though its effects upon regulated parties might be final. However, the Court of Appeals for the District of Columbia Circuit has recently held arguably informal action to be reviewable. In \textit{Medical Committee for Human Rights v. SEC}\textsuperscript{32} the SEC declined to compel Dow Chemical Company to include in its proxy statements various proposals by the Medical Committee, a Dow stockholder, concerning manufacture and sale of napalm. The court rejected the SEC's contention that since it took no affirmative action, its inaction could in no way constitute a reviewable order and held that the SEC's no action decision was reviewable.

In discussing what constituted reviewable action, the court in \textit{Independent Broker-Dealers} emphasized that the issue could not be resolved by reference to "captions or labels."\textsuperscript{33} Thus the court declined to base reviewability on the frequent use of the word "direction" in the letter in which the SEC had accepted the Exchange's proposals to abolish give-ups. Consistent with this approach the court refused to characterize the SEC's action as a nonreviewable suggestion merely because it was based on a request rather than a formal order issued pursuant to exchange regulation procedure.\textsuperscript{34} The events were viewed "broadly" to determine the extent of the SEC's involvement in the process culminating in the Exchange's decision to abolish give-ups.\textsuperscript{35} The Commission's course of conduct was sufficiently definite and purposive to remove any impression that its actions were "devoid of legal materiality."\textsuperscript{36} Adopting the "pragmatic" approach to evalu-

\textsuperscript{30} 442 F.2d at 135.
\textsuperscript{31} See note 16 supra and accompanying text.
\textsuperscript{33} 442 F.2d at 139.
\textsuperscript{35} 442 F.2d at 137.
\textsuperscript{36} Id.
ating and categorizing agency action promulgated in *CBS v. United States*, the court noted that over an extended period of time the SEC had pressed the Exchange to amend its rate structure and to prohibit give-ups. The Exchange’s compliance with the SEC’s approved policy was hardly a voluntary submission to an agency request but was instead an attempt to salvage the rate schedule and assuage the SEC.

In this mode of analysis of agency action, the court clearly has created an exception to the formality requirement. If, in examining the process culminating in a change in behavior of the regulated party, a purposive and substantial agency involvement having a direct causal relationship to the modification is discerned, such involvement is significant enough to warrant judicial review regardless of the form in which the involvement is couched. Accordingly, the court noted that “order” or “request” may be terms of conclusion rather than analysis. By avoiding reliance upon such semantic touchstones, courts are forced to examine the most pertinent question, namely whether there has been a significant exercise of agency power causing such a change of behavior that the plaintiff suffers a judicially cognizable injury.

The exception created in *Independent Broker-Dealers* for the formality requirement, however, is very similar to the second prong of the *Abbott* test for ripeness. *Abbott* requires that the plaintiff suffer significant hardship while *Independent Broker-Dealers* requires that there be some “substantial agency involvement” causing the plaintiff’s injury. The result is to shift the focus of judicial attention from “formality” to the “ripeness” determination and thereby significantly limit “formality” as an independent restraint upon judicial review.

**The Demise of “Finality” as a Requisite for Judicial Review**

Just as *Independent Broker-Dealers* limited the formality criterion by emphasizing ripeness considerations, another recent case, *Aquavella v. Richardson*, similarly deemphasized the “finality” requirement by finding ostensibly temporary action to be sufficiently “final” to warrant judicial review. In that case the Court of Appeals for the Second Circuit held that the temporary suspension by the

37. 316 U.S. 407 (1942).
38. 442 F.2d at 140.
39. See notes 15-26 *supra* and accompanying text.
40. 437 F.2d 397 (2d Cir. 1971).
Secretary of Health, Education and Welfare of Medicare payments to a private hospital pending the outcome of a formal investigation constituted final agency action under section 10(c) of the APA\textsuperscript{41} and therefore was reviewable by the district court. The plaintiffs, doctors who operated a private 60-bed hospital, were directly reimbursed by the federal government for services rendered to patients eligible for assistance under the Medicare Act.\textsuperscript{42} After several years of operation,\textsuperscript{43} an HEW review of cost reports submitted by Glen Oaks Hospital revealed that unusually large amounts for ancillary services had been reported and received.\textsuperscript{44} When an on-site review allegedly uncovered irregularities, the Secretary in July, 1969, suspended payments until an audit could be completed to determine the existence and amount of any overpayments. The plaintiffs immediately filed a complaint to enjoin the Secretary from withholding payments, claiming the suspension was imposed without statutory authority and without the required guarantees of procedural due process. Soon thereafter Glen Oaks closed, allegedly because of its inability to operate without federal assistance. The district court dismissed the complaint for lack of jurisdiction on the ground that the suspension was intermediate action pending final determination and therefore was not a final action reviewable under the APA. The court of appeals reversed and remanded the case for a decision on the merits.\textsuperscript{45}

The Medicare Act\textsuperscript{46} expressly provides procedures for judicial review of two types of administrative determinations, neither of which would include the temporary action involved in the instant case. Section 1395cc(b)(2) provides for the termination of an agreement with a provider of services, subsequent to the Secretary's giving notice specified in the regulations, if the Secretary determines that the provider of services is not complying substantially with the provisions of the agreement or statutory provisions, or if the provider has failed to cooperate with the Secretary in an agency investigation of its operations. Section 1395ff(c) in turn provides that an institution or agency

\textsuperscript{43} The hospital had become a nursing home almost exclusively for Medicare patients and depended upon Medicare benefits for virtually all of its revenues.
\textsuperscript{44} 437 F.2d at 400.
\textsuperscript{45} Id. at 399.
dissatisfied with any determination that it is not a "provider of services" is entitled to a hearing and to judicial review of the Secretary's final decision subsequent to such hearing. It further provides that any institution or agency dissatisfied with any determination under section 1395cc(b)(2) shall likewise be entitled to a hearing and judicial review. On its face, the Medicare Act appears to preclude any other means of judicial review since it incorporates section 405(h) of the Social Security Act which provides:

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.47

The Secretary argued that this section precludes review in this case since it states that no decision of the Secretary is reviewable except as provided in the Medicare Act and that Act does not provide for review of suspension of payments.48 Insofar as Congress selected the types of determinations to be reviewed, review of other determinations must be precluded. Relying upon Cappadora v. Celebrezze,49 however, the court rejected this argument. In that case the preliminary question was whether there was jurisdiction to review a decision of the Secretary not to reopen disallowance of a claim for benefits under the Social Security Act. In response to the contention that section 405(h) precluded review, the court observed that the provision merely forbids attempts to review certain types of agency decisions by any method other than that provided in section 405(g)50 and did not preclude judicial review of other types of decisions under the APA. Despite the fact that in Aquavella the Secretary's decision was made under the Medicare Act, "the interpretation of section 405(h) in Cappadora applies here as well."51 In short, so long as the Medicare Act does not

48. Suspension of payments, the action taken in Aquavella, is distinguishable from termination of an agreement with a provider of services on the basis of the permanent nature of the latter action, as compared with the presumably temporary nature of the former.
49. 356 F.2d 1 (2d Cir. 1966).
50. Section 405(g) provides in pertinent part:
Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States . . . . 42 U.S.C. § 405(g) (1970).
51. 437 F.2d at 402.
establish procedures for review of suspension of payments, section 405(h) does not preclude review.

Upon the court's determination that the Medicare Act did not preclude review, the question of reviewability under the APA became controlling. The district court had dismissed the amended complaint on the ground that the suspension of payments did not constitute "final agency action" under the APA. According to the Aquavella court, the "elusive" concept of finality, as well as the "related and overlapping" doctrines of ripeness and exhaustion of administrative remedies, had been typically employed by tribunals in determining reviewability. Recognizing that each doctrine has its own "nuances," the court indicated that an element common to each is the need for a "careful balancing of the need for effective judicial protection against the need for efficient and responsible administrative action." In its analysis, the court relied heavily upon the Abbott rationale, which viewed the question of final agency action as relevant to the first of its two-pronged test for ripeness—whether the issues presented were appropriate to judicial determination. Although this Abbott interpretation of ripeness subsumed the finality issue, Abbott still required that an independent examination be made to determine whether the APA requirement of final agency action was satisfied. The Abbott Court stressed the final or "definitive" nature of the regulation there in issue which had been "promulgated in a formal manner after announcement in the Federal Register. . . ." In short, viewed from the perspective of the agency itself rather than the complainant, the regulation at issue in Abbott appeared final. Aquavella altered the Abbott rationale considerably by conflating "finality" and the second prong of the Abbott ripeness test. The court merely examined the impact on the private party, thus failing to make an independent examination of finality from the agency standpoint. Aquavella's divergence from the Abbott approach is indicated by the court's observation that both aspects of the ripeness test are "relevant to the final agency action question." The result of the Aquavella rationale is to

52. Id. at 403.
53. Id.
54. See notes 15-26 supra and accompanying text.
55. 387 U.S. at 151.
56. 437 F.2d at 403.
make any agency action which is involved in a ripe controversy necessarily final.

A ripe controversy, however, does not necessarily entail existence of final agency action, if finality is considered in relation to the agency's internal processes. Cases such as Aquavella consider the finality issue from a different perspective than intra-agency functioning. The question then becomes whether the effect of the agency action upon the regulated party is merely tentative and uncertain, or whether the party is actually affected adversely by the action. If this approach reflects the developing judicial inquiry into final action, clearly the doctrine of finality merges with the second prong of the ripeness test propounded by Abbott. What is not clear is whether the congressional meaning of final action in section 10 of the APA harmonizes with the judicial definition, nor is it immediately apparent what impact the transition in the judicial focus will have on the administrative process.

A further illustration of the demise of the "finality" criterion as an independent factor in determining the reviewability of agency action is provided in National Automatic Laundry and Cleaning Council v. Shultz, in which the Court of Appeals for the District of Columbia Circuit created a presumption of finality. In Automatic Laundry the court held that a letter by the Administrator of the Wage and Hour Division of the Department of Labor stating that in his opinion coin-operated laundries are subject to the Fair Labor Standards Act constituted a final agency ruling amenable to judicial review.

57. Although, as the court observes, id. at 404, no statutory procedures existed in Aquavella whereby the aggrieved party could secure administrative review of the suspension, this fact alone does not warrant an assumption of finality. Suspension was employed as a temporary device prior to an administrative determination of misapplication of Medicare funds. Examining the events strictly in terms of whether the agency's procedures had run their course, the suspension would appear to be nonfinal action much in the same manner as the basic decision to examine Glen Oaks' operations.

58. "Under the 'pragmatic' approach developed in the case law, such harm alone is often sufficient reason to find final agency action." 437 F.2d at 404. See also Abbott Lab. v. Gardner, 387 U.S. 136, 149 (1967); Trans-Pacific Freight Conference of Japan v. Federal Maritime Board, 302 F.2d 875 (D.C. Cir. 1962).

59. 443 F.2d 689 (D.C. Cir. 1971).

60. 29 U.S.C. §§ 201-19 (1970). The Fair Labor Standards Act was enacted in 1938 to meet the economic and social problems of that era. Despite the ameliorative effects of the legislation, however, the FLSA's coverage became steadily less comprehensive as the economy grew. In 1966 the Senate Subcommittee on Labor found a "significant correlation" between poverty earnings and exclusion from the provisions of the FLSA. For example 41 percent of
review prior to its enforcement. The National Automatic Laundry and Cleaning Council (NALCC) had sent a letter of inquiry to the Administrator asking whether recent amendments to the Fair Labor Standards Act (FLSA) had any effect on the exempt status of employees of coin-operated laundries. The Administrator replied that the amendments extended the operation of the FLSA to include the previously exempt employees. The district court dismissed NALCC's following suit for declaratory judgment on the ground that the administrative action was not final because no enforcement proceeding had begun. The court of appeals reversed, holding that the lower court had jurisdiction to review the action but finding for the agency on the merits.

All children living in poverty were in families where there was a worker occupying a full-time job throughout the year. In light of the situation, President Johnson in his message to Congress on May 18, 1965, recommended that appropriate steps be taken to extend coverage of the FLSA. Accordingly, the amendments subsequently passed, Pub. L. 89-601 (1966), were designed to extend the benefits of the FLSA to an estimated 7.2 million workers and to raise the minimum wage. See generally S. Rep. No. 1487, 89th Cong., 2d Sess. (1966).

Prior to the passage of the amendments, two pertinent exemptions from the FLSA's coverage were provided in sections 213(a)(2) and 213(a)(3). Section 213(a)(2) provided for the conventional retail or service establishment exemption, while 213(a)(3) specifically exempted "any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics..." The court in the instant case observed that in 1963 the Administrator had ruled that coin-operated laundries were engaged in renting the service of laundry facilities rather than engaged in laundering or cleaning and therefore were not exempt under 213(a)(3). 443 F.2d at 692. However, such laundries could still qualify for the 213(a)(2) retail or service establishment exemption provided the enterprises satisfied that section's criteria. The amendments of 1966, effective February 1, 1967, repealed the specific laundry exemption of 213(a)(3) and added provisions specifying that establishments "engaged in laundering, cleaning or repairing clothing or fabrics" could no longer qualify for the general retail exemption set forth in 213(a)(2). 29 U.S.C. § 213(a)(2) (1970). Despite this development, NALCC presumed that its members were unaffected by the amendments since the Administrator had ruled in 1963 that such businesses were engaged in renting of machines, not in laundering or cleaning of clothing. The letter of inquiry sought the Administrator's confirmation of the NALCC viewpoint. Relying upon his interpretation of the legislative history of the amendments, however, the Administrator responded that a coin-operated laundry is engaged in laundering or cleaning clothing within the meaning of the Act and therefore is not exempted from coverage. The Administrator's response precipitated the institution of the action.

A study of the legislative history tends to substantiate the Administrator's interpretation. Congress viewed the amendments as extending "coverage to 505,000 employees in laundering and cleaning establishments." S. Rep. No. 1487, 89th Cong., 2d Sess. 12 (1966). An understanding of broadened coverage is suggested by committee reports; "This section repeals the minimum wage and overtime exemption applicable to employees in laundry and cleaning establishments." Id. at 28. The amendments provide "... for complete minimum wage and overtime protection for employees of such establishments." Id. (emphasis added).
Because the FLSA makes no provision for review of actions by the Administrator, NALCC relied upon the APA to obtain review of the Administrator’s interpretation. Interestingly, the court largely ignored the need for an interpretation of the APA in light of the factual situation involved and examined instead the factors of reviewability discussed above. In the course of explicating the ripeness principle as formulated in Abbott and the companion case of Toilet Goods Ass’n, Inc. v. Gardner, the court accepted the Abbott view that the APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action . . . within the meaning of a relevant statute’ . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion. . . .” In light of the presumption of reviewability, the remaining task was to examine whether the ripeness test was satisfied and whether other factors of reviewability, such as finality and formality, viewed in a “pragmatic,” non-doctrinaire manner were present.

It should be noted that under this approach the APA assumes minor importance in affecting the result; the determinative issue is whether the judicially created principles of reviewability are met in a particular case. The importance of this development cannot be over-emphasized since the congressionally prescribed method for permitting review under the APA is subtly overshadowed by the judicial inquiry as to the justiciable nature of a controversy. Clearly the Abbott approach emphasizes the judicial proclivity for vindicating a party’s claim of right. This function inevitably collides with the congressional desire to preserve the efficient operation of administrative

64. 443 F.2d at 696. NALCC’s reliance upon the APA is not expressly articulated by the court, but the opinion’s extended discussion of the APA, as interpreted by the Supreme Court in Abbott, implies such reliance.

65. Recent decisions to an increasing extent turn to an analysis of the judicial developments of the component factors of reviewability rather than to the relevant provisions of the APA. 5 U.S.C. §§ 701-06 (1970). See, e.g., Abbott Lab. v. Gardner, 387 U.S. 136, 140 (1968). In Abbott the Court construed the APA to embody a presumption of judicial review rebuttable only by statutory preclusion of review or statutory commitment to agency discretion. It seems therefore that by this construction the APA presents no independent obstacle to review and in most cases the court need only look to the judicial construction of finality, formality, and ripeness. Accord, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971), wherein the Court examined only section 701 and ignored section 704, which delineates those actions which are reviewable, including “final agency action.”


agencies, while providing avenues for judicial relief when agency action has reached a final stage.

Following the two-pronged rationale for ripeness in *Abbott*, the court in *Automatic Laundry* first found the substantive issue involved, namely whether the amendments were properly construed by the Administrator, to be aptly suited for judicial determination. The second aspect of ripeness, the hardship on the parties in deferring consideration, was found in the prospect of adverse financial consequences if NALCC's members complied with the Administrator's view and in the consequences of possible litigation for failure to comply. Further, the status of the "ruling" was strengthened by reference to the doctrine promulgated in *Udall v. Tallman* that the authoritative interpretation of an executive official has the legal consequence of commanding deference from a court if the interpretation is reasonable and consistent with legislative intent. The *Tallman* principle dictated that the Administrator's action "cannot be treated as a null, adding nothing to the Act."

The court then dealt with "finality" and held that an interpretation or ruling by an agency head will be presumed to be final. The reasoning underlying this novel presumption of finality logically flows from the pragmatic approach to reviewability, being based upon the anticipated effect of such action. If the order or ruling on its face does not appear to be tentative, it would likely be accepted as authoritative by persons to be affected and consequently should be given the kind of judicial deference contemplated by *Tallman*.

The presumption theory may have no functional effect upon the administrative process, since to avoid reviewability an agency arguably need only include a proviso in the communication indicating that the conclusions or opinions contained therein are tentative. The court's reliance upon *Tallman* to substantiate attributing finality to such opinion letters is ill-founded. *Tallman* did demand judicial defer-

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68. 380 U.S. 1 (1965).
69. 443 F.2d at 697.
70. Id. at 701.
71. The court indicates that the presumption could be defeated if the agency adopted a rule prescribing its procedure in a manner that would identify certain actions as tentative. 443 F.2d at 701.
ence to the statutory interpretation of officers charged with the statute's administration; however, that case involved an interpretation by the Secretary of the Interior which resulted in the development at great expense of a large number of oil and gas leases. Absent circumstances of severe hardship caused by reliance upon the administrative interpretation, the degree of deference in *Tallman* to the interpretation may have been considerably less; therefore, reliance upon *Tallman* to justify imputing finality to the agency interpretation in *Automatic Laundry* might be misplaced. The *Automatic Laundry* decision is further weakened by its dismissal of certain precedents on the grounds that each involved merely an "advisory ruling." In spite of the court's characterization of the actions involved in these decisions, the actions were substantially similar to the one in *Automatic Laundry*.

The test for determining finality is greatly simplified by *Automatic Laundry*’s innovative "presumptiveness" theory that, unless otherwise indicated on its face, an action by an agency head is presumed final. The obvious danger in such a relaxation of the finality standards, however, is the possibility of premature or unnecessary disruptions of the administrative process. It is possible that congressionally enacted programs designed to promote social or economic goals could be thwarted merely upon a showing of the possibility of injury, pecuniary or otherwise. The court purported to recognize this danger and offered the procedural device of a class action to offset the danger. This device, however, does not satisfy all of the screening criteria provided by the "finality" requirement because it is designed only to prevent undue proliferation of suits and does not prevent premature interruption of agency processes.

**Conclusion**

The decisions in *Independent Broker-Dealers, Aquavella* and

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72. 380 U.S. 1, 18 (1965).

73. Connecticut Importing Co. v. Perkins, 35 F. Supp. 414 (D. Conn. 1940); Denver Union Stockyard Co. v. Brotherhood of Ry. & S.S. Clerks, 48 F. Supp. 308 (D. Colo. 1942). The degree of formality and finality in *Connecticut Importing* was even greater than in the instant case, yet review was denied. In that case an "Interpretative Bulletin" containing legal opinions by the Administrator concerning the coverage of specified enterprises by certain statutes was considered inadequate agency action to warrant a sufficiently adverse response on the plaintiff's part to constitute an actual controversy. 35 F. Supp. at 416.
NALCC aptly illustrate the continuing trend toward relaxation of reviewability standards. The explanation of the development lies primarily, as suggested above, in the courts' attributing greater importance to the plaintiff's condition than to the independence of administrative processes. This policy choice is typically implemented by greater emphasis upon the judicial concept of ripeness, with its focus upon the aggrieved party's condition, at the expense of the concept of formality and finality as used in the APA. The danger lurking in these developments is that dogmatic reliance upon ripeness as the determinative touchstone of reviewability may result in undue disruptions of the administrative process.

B. PARTIAL REPEAL OF THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

The doctrine of exhaustion of administrative remedies, described by the Supreme Court as a "long settled rule," occupies a prominent position in administrative law. Yet, in United States v. Consolidated Mines & Smelting Co., the Court of Appeals for the Ninth Circuit, by recognizing a heretofore ignored sentence of section 10(c) of the Administrative Procedure Act, has caused a significant diminution in the scope of the doctrine's application. In four separate decisions the Bureau of Land Management, an agency within the Department of Interior, had decided that several mining claims held by Consolidated Mines & Smelting Co. (CMS) were null and void. After CMS ceased to pursue its claims before the administrative tribunals, the agency filed this action to quiet title to the land in question. The district court originally granted the agency summary judgment on the

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2. See generally 3 DAVIS § 20; JAFFE 424-58.
3. F.2d (9th Cir. 1971).
4. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. 5 U.S.C. § 704 (1970).
5. F.2d at Six agency decisions were at issue in this case. Because CMS had exhausted the available administrative remedies in the first two decisions, the court simply made a determination on the merits, sustaining the agency's position. See id. at Only the remaining four decisions are discussed in this note.