Judicial Review of Administrative Determination of "Reason To Believe"

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JUDICIAL REVIEW OF ADMINISTRATIVE "REASON TO BELIEVE"

The cardinal principle of the relationship between courts and administrative agencies is that agency action is presumably subject to judicial review.¹ This presumption applies unless Congress clearly and unambiguously intends to withhold review or commit the action to agency discretion.² Thus, the question involved when agency action is challenged in the courts generally is not whether, but when, judicial review will be exercised.

In order to prevent premature interference with the administrative process, courts employ the often overlapping doctrines of ripeness,³ finality,⁴ and exhaustion of administrative remedies⁵ to deny


3. [The] basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.


judicial review. Application of these concepts by the courts involves balancing the inconvenience and cost of piecemeal review against the hardship to the parties of withholding review. Courts, therefore, should apply these doctrines pragmatically; the application of the doctrines should not cause the loss of valid claims and thus destroy the presumption of judicial review.

In FTC v. Standard Oil Co. of California, the Supreme Court addressed the appropriateness of interlocutory review of a complaint issued by the Federal Trade Commission (FTC) against the nation's eight major oil companies for violation of the Federal Trade Commission Act (FTCA). Standard Oil of California (SOCAL) alleged that issuance of the complaint violated a statutory restriction on the FTC's discretion and was therefore unlawful. The Supreme Court held that the issuance of a complaint was not "final agency action" and was thus unreviewable until completion of the agency's adjudication.

This Comment will explore the finality doctrine and underlying principles of judicial review of agency action and will conclude that Standard Oil may have been decided wrongly. The Court applied finality criteria in a mechanical rather than pragmatic fashion and thereby caused the loss of a crucial statutory claim to freedom from arbitrary agency action. In practice, the Court's decision insulates an unlawfully instituted complaint from judicial review and abrogates the essential function of judicial review in assuring the regularity of the administrative process. By its narrow application of finality, the Court avoided the critical questions presented by Standard Oil: the limits on, and reviewability of, agency discretion.

note 1, at 424-58.


11. 101 S. Ct. at 493.
In July 1973, the FTC issued a complaint against SOCAL and seven other oil companies for violation of section 5 of the FTCA.\textsuperscript{12} The complaint issued pursuant to section 5(b) of the FTCA, which provides:

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition and if it shall appear to the Commission that a proceeding by it would be in the interest of the public, it shall issue a complaint stating its charges in that respect.\textsuperscript{13}

In January 1974, SOCAL filed a motion with the FTC requesting that the FTC either withdraw or dismiss the complaint. SOCAL alleged that the FTC prematurely terminated its investigation into the oil industry and that the FTC issued the complaint solely as a result of political pressure from Congress.\textsuperscript{14} SOCAL argued that

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  \item 13. 15 U.S.C. \textsection 45(b) (1976) (emphasis added).
  \item 14. SOCAL alleged that, on December 21, 1971, the FTC issued a resolution stating its intention to institute an investigation of possible unfair trade practices in the petroleum industry. For 17 months the FTC made no effort to investigate SOCAL. On May 31, 1973, before any investigation of SOCAL had been conducted, Sen. Jackson wrote to the FTC, requesting a report within 30 days on the possible involvement of the oil companies in causing the 1973 oil shortages. The FTC immediately subpoenaed three SOCAL officers to testify. On June 27, a newspaper story, citing “congressional sources,” reported that the FTC was about to bring an anti-trust action against the oil companies. On July 6, the FTC issued a subpoena duces tecum directing SOCAL to produce corporate records. On the same day, the FTC sent to Sen. Jackson a “Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry,” noting that the report had not been evaluated by the Commission and requesting that it not be made public. On July 9, Sen. Jackson notified the Commission that he intended to publish the report as a congressional committee reprint unless the FTC explained why publication would be improper. Petition for Cert., app. at 6-9, FTC v. Standard Oil Co. of Cal. 101 S. Ct. 488 (1976). On July 11, the FTC replied that the report was merely an “internal staff memorandum” and that “[d]isclosure of such a document to Congress must be contrasted with its public release, which the Committee views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation,” thereby implying that no decision to act had been made. \textit{Id.} at 9. On July 13, Sen. Jackson released the report. On the second business day thereafter the FTC issued a new release stating that
\end{itemize}
the "reason to believe" language of section 5 of the FTCA created a statutory restriction upon the exercise of the Commission's discretion, and that by instituting the complaint for political reasons, without completing its investigation and without substantial evidence of a violation, the Commission violated a specific limitation embodied in the Act. Therefore, SOCAL maintained, the complaint was unlawful.

The FTC denied SOCAL's motion to dismiss the complaint. SOCAL then applied for reconsideration, which also was denied. In October 1974, the administrative law judge recommended that the FTC withdraw its complaint pending further investigation, but they were filing a complaint. Id.

After the FTC issued the complaint, the Office of Energy Advisor of the Treasury Department issued an analysis of the complaint and the investigative report, stating that the FTC was wrong and that the complaint should be withdrawn. On August 30, 1973, the FTC supplied all the evidence it had compiled to Sen. Jackson for a congressional inquiry. At the conclusion of the hearings, Sen. Jackson stated that no "hard evidence" existed to indicate oil company involvement in the oil shortage. Id. at 11.

Furthermore, on May 7, 1974, in response to an order by the administrative law judge, FTC counsel admitted that they "had no intention whatever regarding specific evidence to be used at trial," that they could not list a single witness that they intended to call at trial, and that the "great majority of documents which we expect to offer at trial are not in our possession but will be obtained through forthcoming discovery." Id. at 12. On October 24, 1974, the administrative law judge recommended that in light of discovery problems the FTC withdraw the complaint pending further investigation. Id. at 13.

15. 101 S. Ct. at 490-91.
16. Id. at 490 n.5.

[T]he adequacy of the Commission's "reason to believe" a violation of the law has occurred [goes] to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation had in fact occurred.

Id. at 1760. But see Dunlop v. Bachowski, 421 U.S. 560, 571 (1975). ("[T]o enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide a statement of reasons supporting his determination. [The reasons must be sufficient to show whether] 'the discretion has been exercised in a manner that is neither arbitrary nor capricious.'") (quoting DeVito v. Shultz, 300 F Supp. 381, 383 (D.D.C. 1969) (De Vito I)); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("The court may require the administrative officials who participated in the decision to give testimony explaining their action."); Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964) ("[W]here a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable.").
the FTC again refused.\footnote{18}

Having exhausted its administrative remedies regarding withdrawal of the complaint,\footnote{19} SOCAL filed suit in the United States District Court for the Northern District of California for a declaratory judgment that the complaint was issued unlawfully.\footnote{20} The district court dismissed the complaint on the grounds that the court lacked the authority to interpret the term “reason to believe.”\footnote{21} The Court of Appeals for the Ninth Circuit reversed, holding that, although a determination of reason to believe that a violation of the FTCA had occurred is committed to agency discretion by law, the district court could inquire into whether the FTC actually made the “reason to believe” determination before issuing a complaint.\footnote{22} The Supreme Court then reversed the court of appeals and dismissed SOCAL’s complaint.\footnote{23}

\textit{FTC v. Standard Oil Co. of California} involved two issues: first, whether SOCAL’s claim was ripe for review; and second, whether the decision to institute a complaint was reviewable, or was committed to agency discretion. Applying the criteria of ripeness and finality established by the Supreme Court in \textit{Abbot Laboratories v. Gardner},\footnote{24} the Court held that the issuance of the complaint was not final agency action, and therefore was unreviewable until completion of the agency’s adjudication.\footnote{25} The Court thus avoided deciding the crucial issue: whether SOCAL was entitled to judicial review of the issuance of an allegedly unlawful complaint. For reasons discussed below the Court permanently insulated the FTC action from judicial review.

**The Ripeness Doctrine**

\textit{The Abbott Laboratories Criteria}

In \textit{Standard Oil}, the Court primarily relied upon application of

\begin{itemize}
\item \footnote{18} See note 14 supra.
\item \footnote{19} 101 S. Ct. at 495.
\item \footnote{20} Petition for Cert., app. at 3-4, FTC v. Standard Oil Co. of Cal., 101 S. Ct. 488 (1976).
\item \footnote{21} Id. at 51-52.
\item \footnote{22} Standard Oil Co. of Cal. v. FTC, 596 F.2d 1381, 1385-86 (9th Cir. 1979).
\item \footnote{23} 101 S. Ct. at 496-97.
\item \footnote{24} 387 U.S. 136 (1967).
\item \footnote{25} 101 S. Ct. at 493.
\end{itemize}
the finality criteria established in *Abbott Laboratories v. Gardner*. In *Abbott Laboratories*, drug manufacturers challenged a labeling order promulgated by the Commissioner of Food and Drugs. The Court reasoned that a determination of whether administrative action is ripe for review involves an evaluation of the fitness of the issues for review and the hardship imposed on the parties by withholding review until a final order issues. Determining the fitness of the issues for review further requires inquiry into whether the issue presented is a legal one and whether the agency action is final.

In *Abbott Laboratories*, the manufacturers alleged that the Commissioner misconstrued the enabling act and lacked the authority to issue the order. The Court concluded that the question of statutory interpretation was a purely legal issue, and even without attempted enforcement of the order, the order was final agency action.

The Supreme Court in *Abbott Laboratories* stated that the finality doctrine requires that finality be determined pragmatically. The Court then noted several factors that indicated the agency action was final. First, the Court noted that the order was promulgated in a formal manner and was definitive; the manufacturers were expected to comply. Second, the order resulted in direct and immediate impact upon the parties; they either had to expend

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27. The order required that drug labels and advertising include the generic name of the drug every time its trade name was used. 387 U.S. at 137-38.

28. *Id.* at 148-49; *see* cases cited note 6 *supra*.

29. *Id.* at 149.

30. *Id.* at 139.

31. *Id.*

32. *Id.*

33. *Id.* *See* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). The Court stated: "[O]ur cases have long recognized that whether a ruling is "final" is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction.""

34. 387 U.S. at 151.
large sums to change their business conduct or face prosecution. Third, the Court recognized that the drug manufacturers were engaged in a sensitive industry in which public confidence in their product was essential. The prospect of a government enforcement action might impose irreparable harm upon the manufacturers' businesses. Finally, the Court concluded that pre-enforcement review would not impede or interfere with the administrative action; rather, review would speed enforcement of the order.

The Court devoted considerable attention to the possibility of interference with administrative enforcement. The government argued that judicial review would lead to a multiplicity of suits challenging every regulation, but the Court emphasized that sufficient safeguards existed to prevent impairment of the agency process. The courts may consolidate suits, stay other suits pending the outcome of the case, or dismiss a suit for declaratory judgment if the same issue is pending in another jurisdiction. Furthermore, declaratory judgment is generally in the nature of an equitable remedy, and if plaintiffs file a multiplicity of suits merely "to harass the Government or to delay enforcement," a court can deny relief on the ground of delay or harassment alone. Most important, the Court emphasized that institution of a declaratory judgment action does not stay the effectiveness of the agency order pending the outcome of judicial review.

Thus, Abbott Laboratories provides a useful synthesis of the doctrines of ripeness and finality. The factors applied were not declared to be preclusive, but the decision embodies presumptions and principles that appear throughout the Court's application of the ripeness standards. Therefore, the critical question in Stan-

35. Id. at 152.
36. Id. at 153.
37. Id. at 154-55.
38. Id.
39. Id. at 155.
40. Id.
41. Id.
42. Id. at 155-56.
43. As the Supreme Court stated in Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), the struggle of the courts in dealing with the concept of finality is:

[S]ometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declara-
Standard Oil is whether the Supreme Court, applying the finality doctrine in a pragmatic fashion, properly balanced the principle of administrative effectiveness against hardship and injustice to the parties.

Ripeness Doctrine Applied: Finality

Analysis of the Supreme Court's application of the ripeness doctrine in Standard Oil reveals that the Court ignored the balancing principles embodied in the doctrine. The Court focused on distinguishing the facts of Abbott Laboratories and refused to consider the broader implications of the ripeness doctrine.

First, the Court decided that, unlike the FDA order in Abbott Laboratories, the issuance of a complaint by the FTC was not a definitive statement of the Commission's position on whether SO-CAL violated the FTCA. Because the issue of whether the law was violated was subject to agency adjudication, the Court held that averment of a reason to believe was merely a prerequisite to a definitive agency position that results from completion of the agency proceeding. The Court admitted, however, that the issuance of the complaint was definitive on the issue of whether the FTC had reason to believe that a violation had occurred. By recognizing that the FTC's rejection of SO-CAL's motion to dismiss was definitive on the question of whether the agency prior to issuing the complaint had reason to believe that SO-CAL violated the FTCA, the Court apparently misconstrued the substance of SO-CAL's complaint. The issue in the case was not whether SO-CAL violated the FTCA, as the Court implied. Instead, the issue was

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Id. at 511.
44. 101 S. Ct. at 493-94.
45. Id. at 494.
46. Id. at 493-94 & n.9.
47. Id. By stating that the FTC's decision was merely a prerequisite to a definitive statement of whether SO-CAL had violated the FTCA, the Court focuses on the FTC's substantive decision on the merits of SO-CAL's violation. The Court views the FTC decision on the merits as the definitive ruling at issue in the case, not the antecedent question of the FTC's compliance with the FTCA when it brought the complaint.
whether the FTC violated a statutory limitation of its discretionary authority by issuing a complaint without the requisite reason to believe. Therefore, the abuse of discretion issue must be decided before any decision on the merits of the case.\textsuperscript{48} The Court, however, mistakenly concludes that the FTC's issuance of the complaint is definitive as to whether the FTC had a reason to believe the FTCA had been violated. Instead, the Court should have granted review to determine whether the FTC had reason to believe before it issued the complaint.

The Court further held that the issuance of a complaint has no legal force or effect comparable to the order in \textit{Abbott Laboratories}, in which the drug manufacturers were required to change their advertising practices, or risk criminal or civil penalties.\textsuperscript{49} In \textit{Standard Oil}, the FTC complaint merely imposed on the oil companies the burden of responding to the agency's charges; the action involved no changes in the companies' conduct.\textsuperscript{50} A distinction exists between the two situations, but the distinction perhaps is not as great as the Court suggests. In \textit{Abbott Laboratories}, the harm to the drug manufacturers was twofold. First, the manufacturers would have suffered pecuniary loss, either by changing their labels or risking assessment of penalties.\textsuperscript{51} Second, by risking prosecution, they also chanced serious damage to their reputations.\textsuperscript{52} Similarly, responding to an unlawfully issued FTC complaint imposes a twofold harm upon SOCAL and the other respondents. The oil companies estimated that compliance with the first discovery requests would require over 1500 man-years of effort at an expense in excess of forty million dollars.\textsuperscript{53} Furthermore, if the issuance of the complaint was inspired politically to create the impression that a violation had occurred, the oil companies might suffer the stigma of being labeled conspirators in monopolistic practices and contrivers of the 1973 oil shortages.

\textsuperscript{49} 101 S. Ct. at 494.
\textsuperscript{50} Id.
\textsuperscript{51} 387 U.S. at 152-53.
\textsuperscript{52} Id. at 153.
\textsuperscript{53} Standard Oil Co. of Ind. v. FTC, 475 F Supp. 1261, 1265 (N.D. Ind. 1979).
Finally, the Court attempted to distinguish *Abbott Laboratories* by discussing the practical effects of judicial review on the administrative process.⁵⁴ The Court reasoned that, unlike the situation in *Abbott Laboratories*, review of SOCAL's claim would delay ultimate resolution of the question of whether the oil companies violated the FTCA.⁵⁵ In addition, the Court noted that if it allowed review every respondent to an FTC complaint could make the same claim, thus impairing the agency's ability to function.⁵⁶ In finding these concerns determinative on the finality issue, the Court ignored the ameliorative judicial tools it had used to brush aside identical objections in *Abbott Laboratories*⁵⁷ and failed to focus on the critical inquiry: whether the FTC, not SOCAL, violated the FTCA.

SOCAL sought a narrow scope of review. The only question presented was whether the FTC made a determination before issuing a complaint that it had reason to believe that the law was violated.⁵⁸ Thus, SOCAL's claim presents a relatively simple factual and legal question which the courts could determine expeditiously.⁵⁹ Because regularity of the administrative process is presumed,⁶⁰ unless the FTC routinely mitigates complaints without a reason to believe a violation of the law has occurred, little danger exists of the multiplicity of suits that the Court fears.⁶¹

Additionally, by applying the ameliorative factors discussed by the Court in *Abbott Laboratories*, review would not delay, and in all likelihood would hasten, resolution of the case on the merits.

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⁵⁴. 101 S. Ct. at 494.
⁵⁵. Id.
⁵⁶. Id.
⁵⁷. 387 U.S. at 154-56.
⁵⁹. Id; see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Jewell Companies, Inc. v. FTC, 432 F.2d 1155 (7th Cir. 1970).
Application of factors enunciated in *Abbott Laboratories* minimizes the danger of the use of judicial review to impair agency action and fulfills a function of judicial review: assuring the regularity of the administrative process. Several other lawsuits, most involving legal and factual issues identical to those in *Standard Oil*, were filed as a result of the FTC complaint. Arguably, consolidation of these cases and timely judicial resolution or dismissal of the complaint pending further investigation could expedite inquiry into the merits of the FTC’s charges. Furthermore, as the Court noted in *Abbott Laboratories*, judicial review of SOCAL’s claim does not stay the FTC proceeding. Thus, the agency’s adjudication continues while the court evaluates whether the FTC complied with the FTCA in filing the complaint. If the court determines that the FTC has acted unlawfully, then the proceeding ter-


Often, the Court is concerned with the practical effect of this voluminous litigation on the agency proceeding. In addition to the suits cited, the oil companies filed over 425 motions in the FTC adjudication. Standard Oil Co. of Ind. v. FTC, 475 F. Supp. at 1265 n.10. Of course, the extensive motion practice and multiple suits may be a direct result of the failure of the FTC to build its case prior to issuing the complaint and the FTC’s almost exclusive reliance on post-complaint discovery. The procedural restrictions on agency discovery are much more stringent in an adjudicatory proceeding than in an investigation; thus the agency’s legal difficulties may result directly from premature termination of the investigation. As the administrative law judge in the FTC proceeding noted in his recommendation to dismiss the complaint:

The continuation, within the existing adjudicative framework, of the “discovery” proposed by complaint counsel poses serious problems that require resolution. In view of these circumstances, the Commission may want to consider, as an alternative, the withdrawal of the case from adjudication so that it may be more fully investigated without the restrictions imposed by the existing rules governing adjudicative proceedings.


63. See note 62 supra.

64. 387 U.S. at 155-56.
minmates at a relatively early stage, preventing the waste of agency and private resources while preserving the integrity of the administrative system.\textsuperscript{65} If the court determines that the FTC issued the complaint lawfully, the agency proceeding continues and no delay is experienced. This assures that agency adjudication will be in accordance with the law and militates against the filing of unfounded claims by eliminating the possible benefit of delay.

\textit{Ripeness Doctrine Applied: Irreparable Harm}

The core principle of the ripeness doctrine is that considerations of ripeness must balance administrative convenience and efficiency against the hardship to the parties if the court withholds review.\textsuperscript{66} By so narrowly distinguishing the facts of \textit{Abbott Laboratories}, the Court placed unwarranted emphasis on the factors of administrative convenience and ignored the possibly irreparable harm to SOCAL by withholding review.

SOCAL contended that denial of review before completion of the agency's adjudication insulated the unlawful issuance of the complaint from review at any stage, causing irreparable harm.\textsuperscript{67} If, after completion of the agency proceedings, the FTC does not find a violation of the law, SOCAL's claim becomes moot.\textsuperscript{68} If the FTC finds a violation, SOCAL will be unable to obtain review of the lawfulness of the issuance of the complaint. Because the FTC deemed SOCAL discovery into the agency decision to issue the complaint, SOCAL cannot build a factual record to present for judicial review.\textsuperscript{69} Moreover, after the agency issues a cease and desist order, the reviewing court focuses primarily on the substantiality of the FTC's decision on the merits of whether SOCAL violated the FTCA.\textsuperscript{70}

In response to SOCAL's mootness argument, the Court held

\textsuperscript{67} 101 S. Ct. at 495; see Standard Oil Co. of Cal. v. FTC, 596 F.2d 1381, 1387 (1979).
\textsuperscript{68} 101 S. Ct. at 495 n.11.
\textsuperscript{69} Id. at 495.
\textsuperscript{70} Id.
that, because the ripeness doctrine purports to prevent judicial interference in the administrative process, the possibility that SOCAL's complaint might become moot presented a compelling reason to refrain from interlocutory review.\textsuperscript{71} Although recognizing that defense expenses burdened SOCAL, the Court noted that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."\textsuperscript{72} The Court's position amounts to virtual license to initiate unlawful adjudicative proceedings with impunity. The Court admonished the agency that "[b]y this holding, we do not encourage the issuance of complaints . . . without a conscientious compliance with the 'reason to believe' obligation in 15 U.S.C. § 45(b),"\textsuperscript{73} but judicial admonishment in the face of unlawful agency action is a weak substitute for effective judicial review.

If the FTC, upon completion of its proceeding, finds a violation of the FTCA, SOCAL's inability to present an adequate record of its claim of lack of reason to believe presents substantial difficulty.

\textsuperscript{71} Id. at 495 n.11. The Court cites McGee v. United States, 402 U.S. 479 (1971), and McKart v. United States, 395 U.S. 185 (1969), to support this proposition. Both of these cases involved the failure of selective service registrants to exhaust administrative remedies before requesting judicial review. As the Court noted in McGee, however:

"[T]he contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of a discrete analysis of the particular default in question, to see whether there is "a governmental interest compelling enough" to justify the forfeiting of judicial review." 402 U.S. at 485 (quoting McKart v. United States, 395 U.S. at 197) (emphasis added). In Standard Oil, the Supreme Court failed to make this assessment. In McKart, the Court stated that "[n]one of the other cases decided by this Court, stand for the proposition that the exhaustion doctrine must be applied blindly in every case." 395 U.S. at 200-01 (footnote omitted). Moreover, in McKart, where the draft board had an opportunity to make a determination of the registra nt's status, the Court held that exhaustion was not required. Id. at 197.

\textsuperscript{72} 101 S. Ct. at 495 (citing Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974)). \textit{But see} Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); L. JAFFEE, supra note 1, at 429. Professor Jaffee notes:

"Mere litigation expense, even considerable and unrecoupable expenses is not "irreparable injury." \textit{But of course financial loss as a result of forfeiture of a right is.} Large litigation expense, if avoidable, should figure in the somewhat discretionary approach to exhaustion. It should figure as a makeweight when there is a question whether the usual remedy is adequate or not."

\textit{Id.} (emphasis added).

\textsuperscript{73} 101 S. Ct. at 496 n.14.
The Court noted that a record that is inadequate upon review can be made adequate by taking additional evidence, but that position ignores the practical difficulties involved in developing a record for review long after the complaint is issued. At that point, the evidence is stale and tainted because in the meantime the agency has found a violation, whether or not a reason to believe existed when the complaint issued.

Whether SOCAL can compile an adequate record is largely irrelevant, for although the Court held that a court of appeals has the power upon final review of the order to review whether the FTC complied with the law when the FTC issued the complaint, the practical and legal problems attendant upon such a review make exercise of that power unlikely. The Supreme Court declined to propose a possible remedy for an otherwise valid cease and desist order based on a complaint issued without a reason to believe determination.

The Court's inability to decide this question underscores the untenability of its holding. Clearly, a court would not allow SOCAL to continue to violate the law. Faced with a choice between condemning the illegality of the agency, or the illegality of the oil companies, a court probably will choose the latter.

The central issue in Standard Oil was whether an FTC complaint issued for political purposes and possibly without a determination of a reason to believe the FTCA was violated is subject to interlocutory judicial review. The Supreme Court reasoned that the issuance of the complaint by the FTC demonstrated that the FTC had reason to believe that the oil companies violated the

74. Id. at 495-96.
75. Id. at 496.
76. Id. at 498 (Stevens, J., concurring). Justice Stevens noted:

If the Commission ultimately prevails on the merits of its complaint, SOCAL surely will not be granted immunity because the Commission did not uncover the evidence of illegality until after the complaint was filed. On the other hand, if SOCAL prevails, there will be no occasion to review the contention that it now advances, because the only relief it seeks is a dismissal of the Commission's complaint. SOCAL is surely correct when it argues that unless review is available now, meaningful review can never be had.

Id.

77. 101 S. Ct. at 496.
FTCA. Moreover, the Court held that the issue was not subject to judicial review until the FTC issued a final order. The result, however, conflicts with the "core principle that statutorily created finality requirements should . . . be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." By its rigid application of finality criteria, the Court caused the loss of a crucial statutory and constitutional claim to freedom from arbitrary government action.

THE COLLATERAL ORDER DOCTRINE

The Supreme Court's refusal to recognize the FTC's action as "final" with regard to the reason to believe determination was not totally dispositive of SOCAL's claim. The collateral order doctrine, established by the Court in Cohen v. Beneficial Industrial Loan Corp., provides an exception to the general requirement of finality. Based on Cohen, SOCAL argued that the FTC's decision was appealable as a collateral order. Cohen involved an appeal from a district court's refusal to apply a state statute that required a plaintiff in a stockholder derivative suit to post a security bond to reimburse the defendant corporation for costs and expenses in the event the defendant prevailed on the merits. Even though the district court's order was not the final judgment in the proceeding, the Supreme Court upheld interlocutory review.

In Cohen the Court established three requirements for application of the collateral order doctrine. First, the decision must be a
complete and final determination of the issue.\textsuperscript{87} Because the decision of the district court with respect to the security bond was closed and not subject to further reconsideration at trial, the Court held that the ruling was final.\textsuperscript{88} Second, the decision cannot be merely a step toward final judgment on the merits into which the decision will merge.\textsuperscript{89} The decision must be collateral to, and separable from, the rights asserted in the action.\textsuperscript{90} This separability requirement serves two functions: it prevents duplication of review by the appellate court because the same evidence will not be relevant to the disputed decision and the final claim for relief,\textsuperscript{91} and it permits the trial to continue while the appeal is pursued.\textsuperscript{92} In \textit{Cohen}, even though the applicability of the statute was the dispositive issue and a ruling adverse to the plaintiffs would result in withdrawal of the complaint, the Court held that the district court order did not affect the disposition of the merits of the case and would not merge into the final judgment.\textsuperscript{93} Finally, the right asserted must present an important issue that will be lost if postponed until final judgment.\textsuperscript{94} In \textit{Cohen}, the Supreme Court reasoned that if review of the order were withheld until final judgment, "it will be too late effectively to review the order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."\textsuperscript{95}

Applying the \textit{Cohen} doctrine to claims of prosecutorial irregularity similar to that charged by SOCAL, courts have upheld interlocutory review. For example, in \textit{Abney v. United States},\textsuperscript{96} the Su-

\textsuperscript{87} 337 U.S. at 546.
\textsuperscript{88} \textit{Id}.
\textsuperscript{89} \textit{Id}.
\textsuperscript{90} \textit{Id}.
\textsuperscript{92} \textit{Id}.
\textsuperscript{93} 337 U.S. at 546-47; \textit{see} Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (\textit{Eisen} involved an appeal from a district court order imposing on the defendant 90\% of the notice costs in a class action suit. Even though resolution of the issue determined whether the suit would be brought at all, the Court held that the question was antecedent to and unrelated to the merits of the claim.); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963) (determination of proper venue).
\textsuperscript{94} 337 U.S. at 546-47.
\textsuperscript{95} \textit{Id} at 546.
\textsuperscript{96} 431 U.S. 651 (1977). Although \textit{Abney} was a criminal action, the Court said that "Co-
The Supreme Court considered an appeal from a district court pretrial order denying the petitioner’s motion to dismiss on double jeopardy grounds. Although the Court recognized that the lower court’s ruling was not final in the traditional sense, the Court nonetheless permitted interlocutory review. The Court noted that final rejection of the defendant’s double jeopardy claim by the district court was complete and definitive; no further steps could be taken in the district court to avoid trial. Moreover, the Court reasoned that the defendant’s claim of prosecution in violation of his rights, by its very nature, was separable from and collateral to the issue of the defendant’s guilt or innocence. The defendant claimed a right not only to protection from double punishment, but to freedom from double trials, and this right would be forfeited if review awaited final judgment.

In *United States v. Griffin*, the Court of Appeals for the Ninth Circuit addressed an interlocutory appeal from a district court order denying the defendant’s motion to dismiss on the grounds of vindictive prosecution. Relying upon *Abney*, the court concluded that the denial of the defendant’s motion to dismiss was a complete and final determination of the vindictive prosecution claim in the trial court. The court also concluded that an allegation of vindictive prosecution is separable from the issue of the defendant’s guilt or innocence, and that a vindictive prosecution claim, like the double jeopardy claim in *Abney*, involves the right not only to be free from conviction on the merits, but to be free from the prosecution itself.

"Thus, the vindictive prosecution doctrine is a limit on prosecutorial discretion, and goes to the very authority of the prosecution to hale the defendant into court in the first place." This right to freedom from abuse of prosecutorial

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*hens* collateral-order exception is equally applicable in both civil and criminal proceedings." *Id.* at 659 n.4 (dictum).

97. *Id.*
98. *Id.* at 658-59.
99. *Id.* at 659.
100. *Id.*
101. *Id.*
102. 617 F.2d 1342 (9th Cir. 1980).
103. *Id.* at 1345.
104. *Id.*
105. *Id.* at 1345-46; accord, Blackledge v. Perry, 417 U.S. 21, 30 (1974); United States v.
discretion would be lost irreparably if review were withheld.

In *Elmo Division of Drive-X Co. v. Dixon*, the Court of Appeals for the District of Columbia reasoned that the decision of the FTC to initiate a complaint in violation of an earlier consent decree was reviewable on interlocutory appeal. The court concluded that the type of procedural error that the respondent asserted was unrelated to and did not affect the agency’s findings on the merits.

Thus the courts have applied the collateral order doctrine to uphold interlocutory review in cases procedurally similar to *Standard Oil*. These decisions hold that, in both judicial and administrative proceedings, a definitive ruling on a claim, not subject to further reconsideration, is sufficiently final to invoke review under the *Cohen* principles. Moreover, these decisions recognize that a claim of abuse of prosecutorial discretion is by its very nature collateral to, and separable from, the question of guilt or innocence.

In *Standard Oil*, the Supreme Court perfunctorily rejected the application of the collateral order doctrine, stating merely that the issuance of a complaint will merge into the final judgment. Comparison with *Cohen* and other cases applying the collateral order doctrine, however, indicates that review of SOCAL’s claim was equally appropriate. First, as the Court stated, the FTC’s decision on whether it had reason to believe a violation had occurred was definitive and would not be reviewed again during the administrative proceeding. Thus, even though the FTC’s decision was not the final judgment in the proceeding, it was nonetheless final as to that issue.

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Berrigan, 482 F.2d 171, 175 (3rd Cir. 1973).
106. 348 F.2d 342 (D.C. Cir. 1965).
107. *Id.* at 344.
109. 101 S. Ct. at 496.
110. *Id.* at 493-94 & n.9. The Court recognized that SOCAL had exhausted its administrative remedies as well. *Id.* at 495; see Abney v. United States, 431 U.S. 651, 659 (1977); United States v. Griffin, 617 F.2d 1342, 1345 (9th Cir. 1980).
Second, the FTC decision would not merge into the final judgment. Although whether the FTC had reason to believe is dispositive as to whether the adjudication could proceed at all, the issue was unrelated to, and separable from, the merits of the case, as were the orders in Cohen, Abney, Griffin, and Dixon. Similarly, SOCAL challenged the very authority of the government to commence the proceeding. Moreover, review of the FTC decision is consistent with the purposes behind the separability requirement. An appellate court will not duplicate its review because, if a cease and desist order issues, the court reviews only the merits of the cease and desist order, not the antecedent decision to bring the complaint. Furthermore, the separability of the claim permits the agency adjudication to continue while the judicial appeal is pursued.

Finally, SOCAL's contention that the FTC violated the law and issued a complaint for political reasons presents a serious question that will be lost if postponed until final judgment. Just as in Cohen, if review is withheld "it will be too late effectively to review the . . . order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." As noted above, the court will not grant immunity to SOCAL to continue to violate the law if the FTC proves a violation. SOCAL claims a right to administrative regulation in accordance with the law; judicial review of administrative action assures this right. By failing to analyze adequately its rejection of SOCAL's claim, and by mechanically rejecting the application of the Cohen doctrine, the

112. Unfortunately, the Supreme Court has misread, or avoided, the essence of SOCAL's claim. SOCAL does not attack the FTC decision on the merits. That issue remained to be adjudicated and would be reviewed upon final judgment. SOCAL argued that the FTC had not made the decision that a violation had occurred, and that, by failing to exercise its discretion and issuing its complaint for political reasons without reason to believe that the law had been violated, the FTC violated the law which authorized it to bring the complaint in the first place. Thus, like the defendants in Abney, Griffin, and Dixon, SOCAL's claim challenged "the very authority of the Government to compel [SOCAL] into court to face trial on the charge against [it]." Abney v. United States, 431 U.S. at 659.

113. See notes 79-80 & accompanying text supra.

114. See notes 64-65 & accompanying text supra.

115. 337 U.S. at 546 (emphasis added).

116. See text accompanying note 77 supra.

Court reached a decision that is inconsistent with the purposes of the collateral order doctrine and has subjected regulated industries to the possibility of arbitrary administrative action without redress.

**JUDICIAL REVIEW AND THE ADMINISTRATIVE PROCEDURE ACT**

Section 10 of the Administrative Procedure Act (APA) governs judicial review of administrative action. The APA embodies a presumption of judicial review, providing that any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" is entitled to judicial review. Courts will exercise review unless a statute precludes review or the agency action is committed to agency discretion by law. The Supreme Court has held that courts should give the "generous review provisions" of the APA a "hospitable interpretation," and refuse review only if evidence appears of a clear and convincing intent of Congress to withhold review. Consequently, the threshold question of the reviewability of the FTC action in *Standard Oil* is whether a statute precludes review. The FTCA does not contain an express prohibition of judicial review of the FTC's reason to believe determination. Therefore, the court must determine whether the agency action is so committed to the FTC's discretion as to preclude review.

Rather than addressing the applicability of the presumption in favor of judicial review, the Court relied upon section 10(c) of the

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118. 5 U.S.C. §§ 701-706 (1976). See generally 5 B. Mezines, supra note 1, § 44.03.
APA to deny judicial review.\textsuperscript{125} Section 10(c) provides that "[a]gency 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."\textsuperscript{126} The Court reasoned that the issuance of the complaint was not final agency action and that the action was not reviewable by statute.\textsuperscript{127} Section 10(c), however, should not have precluded review because the agency had determined finally whether it had a reason to believe when it issued the complaint.\textsuperscript{128} Moreover, the APA specifically evinces a congressional intent that claims such as SOCAL's shall be reviewed. Section 20(e) provides that a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;\textsuperscript{129} . . . in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right;\textsuperscript{130} [or] without observance of procedure required by law."\textsuperscript{131}

Thus Congress intended that courts would oversee administrative action such as that alleged by SOCAL. Because the Court's decision insulates the FTC's action from review at any time,\textsuperscript{132} the Court's mechanical application of finality criteria ignores a specific statutory requirement for review. Consequently, the decision conflicts with the "hospitable interpretation" that the Supreme Court has stated courts must give to the review provisions of the APA.\textsuperscript{133}

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\textsuperscript{125} 101 S. Ct. at 492.
\textsuperscript{127} 101 S. Ct. at 492-96.
\textsuperscript{128} See note 46 & accompanying text \textit{supra}.
\textsuperscript{130} Id. § 706(2)(C).
\textsuperscript{131} Id. § 706(2)(D).
\textsuperscript{132} See notes 75-80 & accompanying text \textit{supra}.
\textsuperscript{133} See \textit{Leedom v. Kyne}, 358 U.S. 184 (1958). The Court stated:

"While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

"Absence of jurisdiction of the federal courts" would mean a "sacrifice of a right which Congress" has given for there is no other means to protect and enforce that right. Thus Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.
The Reviewability of the Issuance of a Complaint by the FTC

A critical issue raised in Standard Oil is whether the language of the FTCA creates a statutory limitation on the discretion of the FTC to issue a complaint, or whether such action is so committed to agency discretion as to preclude judicial review. The question is not whether the FTC actually abused or failed to exercise its discretion in bringing the complaint; SOCAL's allegations must be assumed true for the FTC's motion to dismiss.\textsuperscript{134} Rather, the question is whether, assuming that SOCAL has made a prima facie case of institution of proceedings for political reasons, the agency action can be reviewed. If the action is so committed to agency discretion, the Court should have so held in order to maintain the integrity of judicial supervision of the administrative process. If, however, the statute creates an enforceable right, the Court should have permitted review of the action.

Recent Supreme Court decisions indicate that the FTC's decision is not committed entirely to agency discretion.\textsuperscript{135} Courts construe the "committed to agency discretion" exception from judicial review narrowly.\textsuperscript{136} The Supreme Court has held that this exception is applicable only if the discretion committed to the agency is so broad that the court has "no law to apply."\textsuperscript{137} In Standard Oil, however, there is law to apply because the "shall have reason to believe" language of the FTCA provides a specific limitation on FTC discretion.\textsuperscript{138} The agency must make a determination that it

\textsuperscript{134} Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
\textsuperscript{137} Id. In Overton Park, the plaintiffs challenged a decision by the Secretary of Transportation to build a highway through Overton Park. A federal statute provided that the Secretary "shall not approve any program or project" that required use of public parkland unless no feasible alternative existed. The Court held that the language of the statute created a limitation on the exercise of the Secretary's discretion, and therefore applicable law existed. Thus, the Secretary's decision was reviewable. Id. at 410-11.
\textsuperscript{138} See Union Mechling Corp. v. United States, 566 F.2d 722, 725 (D.C. Cir. 1977) ("[I]n order to have its decision escape review, the Commission must actually exercise its discretion. If an agency simply ignores issues whose relevance to the public interest is obvious, the

has reason to believe that the law has been violated and may not issue a complaint based on political factors if it has no reason to believe a violation has occurred.\textsuperscript{139} SOCAL alleged facts that provide a reasonable inference that the FTC violated this limitation,\textsuperscript{140} and therefore review is appropriate. The question is the standard of review that the court must exercise.\textsuperscript{141}

The actual determination of whether a "reason to believe" exists is left to the discretion of the agency, and a court may not substitute its judgment for that of the agency in evaluating the substantive basis for the agency's belief.\textsuperscript{142} Thus, the scope of review is narrow.\textsuperscript{143} The court must consider whether the decision actually

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\textsuperscript{139} See, e.g., Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966). In Pillsbury the court set aside an FTC divestiture order that resulted from impermissible political pressure.

\textsuperscript{140} Standard Oil Co. of Cal. v. FTC, 596 F.2d 1381, 1386 (1979).

\textsuperscript{141} Id.


was based upon a consideration of the relevant factors and whether the FTC reasonably could have believed that a violation of the law had occurred.\textsuperscript{144} If the court concludes that the agency’s determination has a rational basis, further judicial inquiry is foreclosed.\textsuperscript{145}

To make an evaluation of the reasonableness of the agency’s decision, the court may require the agency to provide a statement of reasons for its determination.\textsuperscript{146} The Supreme Court, however, has held that affidavits filed by an agency are mere post-hoc rationalizations and may not constitute an adequate record from which to review the agency’s decision.\textsuperscript{147} Therefore, if the court lacks a formal record to review, the court may require agency officials to testify as to their reasons for the decision.\textsuperscript{148}

Thus, the “shall have reason to believe” language of the FTCA provides law to apply, and SOCAL’s claim that the FTC violated this statutory limitation was reviewable. Moreover, strong policy reasons support review of claims such as SOCAL’s. Abuse of prosecutorial discretion and arbitrary prosecution conflict with closely guarded statutory and constitutional guarantees. Congress has created specific statutory rights to freedom from action such as that alleged by SOCAL, both by limiting the agency’s discretion and by directing the courts to review abuse of that discretion.\textsuperscript{149} The courts carefully supervise agency action to assure conformity with these statutory and procedural norms.\textsuperscript{150}

\textsuperscript{144} Id., see Dunlop v. Bachowski, 421 U.S. 560, 572-73 (1975).
\textsuperscript{147} Citizens to Preserve Overton Park, Inc. v. Volpe, 421 U.S. 401, 420 (1971).
\textsuperscript{148} Id. In Morgan v. United States, 313 U.S. 409, 422 (1941), the Court ruled that inquiry into the mental processes of administrative decisionmakers was prohibited. In Overton Park, the Court rejected rigid application of that rule, holding that, in cases without formal findings, testimony by the decisionmakers may be the only way that judicial review can be exercised. Id. at 420; see note 18 supra.
\textsuperscript{149} See notes 21-36 & accompanying text supra.
Moreover, the Constitution requires that governmental action not be arbitrary or capricious.\textsuperscript{151} Due process assures an affirmative right to neutrality in both civil and criminal proceedings.\textsuperscript{152} The fundamental principles of procedural due process, the prevention of unjustified deprivations, and the preservation of fairness and participation, require agency neutrality and effective judicial supervision to assure that neutrality.\textsuperscript{153}

The Supreme Court has stated that "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law."\textsuperscript{154} Limiting abuse of discretion is fundamental to the integrity of the administrative process. When this integrity is questioned, courts should require administrators to provide the reasons for their decisions.\textsuperscript{155} Furthermore, courts should require that agencies establish precedents that clearly explain the procedures by which they operate, and to minimize the appearance of arbitrariness and irrationality courts should enforce adherence to those procedures.\textsuperscript{156} While such requirements may inconvenience the agencies, statutory and constitutional guarantees require that a neutral administrative system be maintained.

CONCLUSION

In \textit{FTC v. Standard Oil Co. of California}, the Supreme Court misread the fundamental issue: whether the FTC made a determination that it had reason to believe that SOCAL violated the law. Instead, the Court focused on SOCAL's allegations as if SOCAL attacked the substantive basis for the FTC's finding. If the FTC, by scrutinizing the relevant factors, actually made the determination that the FTCA was violated, the sufficiency of the evidence upon which it made that determination is committed to agency

\begin{footnotes}
\item[151.] U.S. CONST. amend. XIV, § 1.
\item[153.] Id.
\item[154.] \textit{Id.} at 1616-17.
\item[156.] 2 K. DAVIS, \textit{supra} note 150.
\end{footnotes}
discretion and is unreviewable. Bringing a complaint, however, without having formulated a reason to believe that the law has been violated is reviewable and, indeed, is unlawful. By treating SOCAL’s allegations as a challenge on the merits, the Supreme Court extinguished a crucial statutory claim of right.

The FTC’s decision to bring the complaint and its refusal to reconsider its action should have been considered final agency action so as to permit review. The decision by the FTC was definitive on the issue of whether it had reason to believe and was not subject to reconsideration during the course of the agency adjudication. Moreover, if the FTC issues a cease and desist order, the courts will review only the decision on the merits and not the issue of whether the FTC had reason to believe the law had been violated. In effect, the Court allowed the FTC to be the final judge of the legality of its action.

Even if the Court decided that the FTC decision was not final in the traditional sense, it should have permitted review under the collateral order doctrine. The allegation that the FTC failed to comply with the FTCA in issuing the complaint is collateral to the substantive issue of whether SOCAL violated the FTCA. The decision does not merge into the final judgement because upon review of a cease and desist order the Court addresses only the substantive basis for the final order, not the antecedent issue of whether the FTC violated the FTCA when it brought the complaint.

The decision by the Court is unsettling. By refusing to grant interlocutory review through a mechanical application of finality criteria, the Court insulated agency prosecutorial discretion from judicial review. This insulation grants the agencies license to institute politically motivated adjudicative proceedings with impunity. The Court’s decision is difficult to understand because the scope of review is narrow and the disruption to agency proceedings is minimal. In view of the strong policy considerations favoring review of agency abuse of discretion, the Court should have resolved any doubt in favor of reviewability.

A. J. V

157. The action may be reviewable, however, if the agency action clearly was irrational or capricious. See 5 U.S.C. § 706 (1976).