the court reflected an evolving temperament of increased judicial scrutiny of discretionary administrative standards:

> We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years courts have treated administrative policy decisions with great deference. . . . Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, the power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.[154]

Failure to appreciate this principle certainly contributed to the second *Nor-Am* decision. The facts were undisputed in *Nor-Am* that there was no evidence indicating that the products whose registration had been suspended were involved in any incidents or that the products had caused adverse effects in more than twenty years of use. Furthermore, a fair inference could be drawn that the one incident had been the sole motivating factor behind the suspension order and had been the result of negligence on the part of the injured persons.[155] Nothing in the FIFRA compels the conclusion that a suspension order issued without factual justification should be immune from threshold judicial review. For this reason, the second *Nor-Am* decision holding that the emergency suspension order was not a final order and therefore not reviewable appears erroneous.

*Exhaustion of Administrative Remedies*

In *Jewel Companies, Inc. v. FTC*[156] the Court of Appeals for the Seventh Circuit held that a district court has jurisdiction, prior to the completion of FTC proceedings and notwithstanding the doctrine of exhaustion of administrative remedies, to determine whether a commissioner in voting for the issuance of a complaint had improperly interpreted his statutory obligation. The FTC brought

154. __ F.2d at __. *Compare* FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970), discussed at DECISIONS section *supra*. For further indication from the same court of the increasing emphasis on collaboration between court and agency, see Greater Boston Television Corp. v. FCC, ____ F.2d ____, ____ (D.C. Cir. 1970).

155. The precise holding of the three-judge panel, reversed on rehearing, was stated as follows: "[W]e do not here purport to balance the conflicting interests of the public. Rather we hold that, at the present juncture, the finding of the district court that the suspension of the registration was arbitrary and capricious is adequately supported on the record." 435 F.2d at 1145.

156. 432 F.2d 1155 (7th Cir. 1970).

charges against retail buyers and "field brokers" alleging that the retail buyers directly or indirectly controlled the field brokers, who also were agents of produce sellers, thereby violating section 2(c) of the Robinson-Patman Act.[157] One of the three commissioners who voted for issuance of the complaint filed a separate statement indicating that he thought issuance was mandatory, rather than discretionary, when the Commission had "reason to believe" that the Robinson-Patman Act was violated.[158] The buyers and brokers sought to enjoin administrative proceedings pursuant to his complaint, alleging that the commissioner's separate opinion indicated that he misunderstood his statutory authority.[159] Three other grounds for relief were alleged but were summarily dismissed by the court: that the complaint did not state a cause of action under the Robinson-Patman Act; that the Commission did not find the issuance to be in the public interest; and that the Secretary of Agriculture had exclusive jurisdiction over the subject matter.[160] The district court, in denying the Commission's motion to dismiss, issued a temporary restraining order and certified the question to the appellate court.[161] The Seventh Circuit held that the district court had jurisdiction to make the determination.[162]

In order to conserve judicial resources, judicial review of administrative actions, including final orders, is generally limited in scope.[163] This policy is primarily implemented by two judicial inquiries, both of which reflect the desire to preserve the separation of the executive and judicial branches of government and the autonomy of independent agencies.[164] First, is there provision for statutory review? If so, Congress is deemed to have chosen the method of

157. 15 U.S.C. § 13(c) (1964).

158. Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of §§ 13, 14, 18 and 19, of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect. . . . *Id.* § 21(b).

159. Food Fair Stores, Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,850, at 21,177 (FTC 1969).

160. The exclusive jurisdiction allegedly was to be found under 7 U.S.C. § 499(a) *et seq.* (1964).

161. Bethlehem Shipbuilding Corp. v. Myers, 15 F. Supp. 915 (D. Mass. 1936), *aff'd*, 88 F.2d 154 (1st Cir. 1937), *aff'd*, 303 U.S. 41 (1938).

162. *Cf.* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

163. *See* Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFFALO L. REV. 327 (1962).

164. *Id.* at 328.

protecting the rights it has created and to have selected the precise machinery suited to achieve that end.[165] If not, the Supreme Court has held in a number of cases, the most notable of which is *Switchmen's Union v. National Mediation Board,*[166] that a district court has no power to review the action of an administrative agency.[167] In *Switchmen* the Court held that the district court was powerless to review the issuance of a collective bargaining certificate by the Board, reasoning that it would not furnish a method for judicial review if one were not provided by Congress, even where questions of law might have been involved.[168] The second judicial inquiry is: Has the plaintiff exhausted his administrative remedies? In *Myers v. Bethlehem Shipbuilding Corp.*[169] suit was initiated to enjoin the NLRB from holding hearings on a complaint filed by the Board alleging that the corporate defendant had engaged in unfair labor practices interfering with interstate commerce. The district court issued the requested injunction, reasoning that the specified portions of the NLRA[170] did not apply to the defendant since the corporation was not involved in interstate commerce. The Supreme Court reversed, holding that the district court was not empowered to enjoin the NLRB hearings, since substituting the court for the NLRB as the hearing tribunal would be "at war with the long settled rule of judicial administration" that no one is entitled to judicial relief for a supposed injury until the prescribed administrative process has been exhausted.[171] Subsequent cases have held that judicial review inures only when the decision is unwarranted in light of the record and lacking a reasonable basis in law.[172]

165. *See* Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 301 (1943). Of course, the provision may be in a statute other than the act establishing the agency under consideration. For example, the Administrative Procedure Act frequently is a source of jurisdiction for review.

166. 320 U.S. 297 (1943).

167. *See* Louisiana v. McAdoo, 234 U.S. 627, 633 (1913); *accord,* Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963); *cf.* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Work v. Rives, 267 U.S. 175 (1924).

168. 320 U.S. at 303. *See also* Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1919); Bates & Guild Co. v. Payne, 194 U.S. 106 (1903).

169. 303 U.S. 41 (1937).

170. 29 U.S.C. §§ 152(6)(7), 158(1)(2) (1964).

171. 303 U.S. at 50-51. *Myers* has been criticized for denying district courts their injunctive powers. One commentator argues that the reasoning in *Myers* is circular and that the Court wrongly used "the exclusive power of the NLRB and the Court of Appeals *over unfair labor practices* as a reason for holding that a district court has no power *over action of the Board in excess of its jurisdiction.*" 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 59 (1958).

172. NLRB v. Hearst Publications, 322 U.S. 111, 131 (1943); *cf.* Lone Star Cement Corp. v. FTC, 339 F.2d 505 (9th Cir. 1964).

Several exceptions to the *Myers* exhaustion doctrine have arisen.[173] In *Skinner & Eddy Corp. v. United States*[174] a corporation sued to enjoin the ICC from authorizing a rate increase, basing its claim on the language of the Interstate Commerce Act which declared that no rate increase was to be permitted unless, after a hearing, the ICC found that the increase rested on changed conditions other than the elimination of competition.[175] The corporation alleged that because the prescribed statutory hearing had not been held prior to a Commission-approved increase in rates, the ICC had exceeded its statutory powers and the rate increase was void. The Supreme Court pointed out that the corporation would have to proceed first through administrative channels if it were contesting the reasonablenss of the increase. However, the Court reasoned that the corporation was not contesting unreasonable or discriminatory rates or an error in ICC action but rather was questioning the *power* of the Commission to act. Consequently, the district court had jurisdiction to enjoin the enforcement of the order, even if the plaintiff had not attempted to secure redress in a proceeding before the Commission.[176] This same reasoning underlies the *Leedom v. Kyne*[177] decision, wherein the NLRB determined that a particular bargaining unit was to include both professional and nonprofessional employees, although section 9(b)(1) of the NLRA clearly stated that the professional employees were not to be included unless a majority specifically voted for such inclusion.[178] In answering a suit seeking to vacate the NLRB determination as allegedly made in excess of its statutory powers, the Board argued that the district court lacked jurisdiction to entertain the suit. The Supreme Court held that the suit was not one seeking " 'review', in the sense of that term as used in the Act, [of] an order or decision made within its jurisdiction,"[179] but rather was instigated to strike down an order made in excess of the Board's enumerated

173. McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) (on foreign policy grounds); Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) (on grounds of invasion of federal jurisdiction by state agency); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) (on due process grounds).

174. 249 U.S. 557 (1919).

175. Cb. 309, § 8, 36 Stat. 547-48 [now 49 U.S.C. § 4(2) (1964)].

176. 249 U.S. at 562-63.

177. 358 U.S. 184 (1958); *accord*, Farmer v. UEW, 211 F.2d 36 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 943 (1954). *Contra*, Crown Zellerbach Corp. v. FTC, 156 F.2d 927 (9th Cir. 1946).

178. 29 U.S.C. § 159(b)(1) (1964).

179. 358 U.S. at 188.

powers. Further, the absence of review would have caused the loss of a legislatively bestowed right, since there was no other appropriate remedy to protect that right. In *McCulloch v. Sociedad Nacional*[180] judicial review of a NLRB determination prior to exhaustion of administrative remedies was upheld on the basis that the NLRB had no jurisdiction to determine a union representation question concerning foreign seamen aboard foreign-flag vessels. However, the Supreme Court stated that this decision was not to be regarded as an enlargement of the *Kyne* exception but rather was necessitated by complex questions of foreign relations.[181] In *Boire v. Greyhound Corp.*[182] this exception to the exhaustion doctrine was further limited. The Court rejected plaintiff's argument that, since an independent contractor is not an employee under the NLRA,[183] a Board finding that Greyhound was the employer of an independent contractor's employees was in excess of its statutory power. The Court reasoned that the question of Greyhound's status was factual, was not a determination solely dependent on statutory construction, and was therefore to be determined according to the administrative procedures set forth in the governing statute. The exception to the *Myers* rule, represented by the *Skinner & Eddy* and *Kyne* cases, is therefore clearly a narrow one, and the cases indicate that review is permissible only for a purely legal question, rather than a mixed question of law and fact.

In *Jewel Companies, Inc. v. FTC* the Seventh Circuit considered that the question of whether a commissioner misinterpreted the Robinson-Patman Act as calling for mandatory issuance of a complaint when there is "reason to believe" that the Act has been violated was purely a statutory question and reviewable by a district court. Upon reviewing the doctrine of exhaustion of administrative remedies and exceptions thereto, the court reasoned that the relevant inquiry necessary to determine if such review is permissible is whether the plaintiff would have an adequate remedy in the appellate court after agency action. The Seventh Circuit reasoned that on final appeal the standard of review would be different from the standard for testing the authority of the commissioner, for on review of a final order the appellate court only assesses the factual determinations made by the agency, to decide *only* whether the final order is supported by

180. 372 U.S. 10 (1963).
181. *Id.* at 17.
182. 376 U.S. 473 (1964).
183. 29 U.S.C. § 152(3) (1964).

substantial evidence.[184] The Commission's underlying authority to issue the complaint would not be questioned, the court reasoned, and therefore the review of a final order would be an inadequate remedy. The court concluded that granting review before the completion of administrative proceedings could be a dangerous precedent if it encouraged delaying tactics by wealthy parties. However, it recognized that under certain circumstances where there is a need for flexibility in judicial procedures,[185] review should be granted. Although not opposed to judicial review prior to exhaustion of administrative remedies per se, the dissenting judge asserted that inquiry into the reasoning process of a commissioner who votes as a member of a body is wholly improper in itself.[186] To support this contention he distinguished *Wilson v. United States*[187] where such an inquiry was made but the reviewing body consisted of *one* officer and not a group of individuals. Furthermore, the dissenter felt that the legal issue in *Jewel* was of too little significance to justify dissecting and re-examining the votes, especially since there was nothing in the Commissioner's concurring opinion to indicate that he would have voted differently if he had correctly interpreted the law.

The exception to the exhaustion doctrine applied in *Jewel* is a reasonable one. Where there is merely a question of statutory interpretation there is no need to wait for the application of the expertise of administrative bodies since no factual determinations are to be made. The only question before the district court is whether the agency has power to act under the circumstances of the particular case. The court mentioned that if review is permitted only after agency action, Jewel could have no adequate remedy since the appellate court "would not question the authority of the Commission in issuing the complaint."[188] There is no reason why an appellate court cannot inquire into the power of the Commission to determine if the agency acted outside the scope of its delegated powers,[189] but such a procedure would amount to a waste of agency time and plaintiff's money, since the agency would be making a complete investigation of the complaint when it may have no power to do so— a situation that could have been avoided by the procedure sanctioned by *Jewel*.

184. 432 F.2d at 1159.

185. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 432-37 (1965).

186. 432 F.2d at 1161-62; *cf.* United States v. Morgan, 304 U.S. 1, 18 (1938).

187. 369 F.2d 198 (D.C. Cir. 1966).

188. 432 F.2d at 1159.

189. 249 U.S. at 562.

However, this procedure could be abused; excessive court review prior to administrative hearings would destroy the agency's role as an autonomous executive or regulatory body. But the possibility of some review prior to agency action, particularly where prescribed statutory procedures have been disregarded, should serve to remind agencies of the limitations on their powers without impairing their effectiveness. Generally speaking this exception, if not abused, is beneficial. But should this exception have been applied under the circumstances of the *Jewel* case where the only evidence that tended to show that the agency had acted outside of its statutory authority was the concurring opinion of one Commissioner? The chief argument against review under these circumstances is that it would tend to discourage the writing of separate opinions and would thereby deprive the legal community of novel theories that may be the majority opinion in future cases. However, the likelihood of this happening seems remote since an erroneous concurring opinion will be considered harmless error unless the concurring commissioner is the "swing man"—his vote being decisive for the determination of the particular issue. This was arguably the case in *Jewel,* for had the concurring Commissioner applied the appropriate law the complaint might not have issued. Thus, the pressure against writing separate opinions seems not to be very great. The advantage of the procedure sanctioned by *Jewel* is the saving of agency time, since the complex factual determinations that must be made in Robinson-Patman actions would be avoided if the court later finds the agency powerless to issue a complaint. Of course the time of the district court might needlessly be expended if it is found that the Commission does have power to issue the complaint, negating one of the purposes for which administrative tribunals were created. However, it seems clear that in taking into account the agency savings there would be a net conservation of time and elimination of unnecessary delay if the *Jewel* procedure is followed. In summary, the exception applied by the *Jewel* court is a desirable one, if not abused, and its application in the instant case was correct for the Commissioner's vote was crucial to the ultimate determination of plaintiff's rights. No sufficient policy consideration outweighs the objective of providing plaintiffs with adequate remedies without unnecessary delay and expense.