INTERIM RELIEF AND EXHAUSTION OF ADMINISTRATIVE REMEDIES: A STUDY IN JUDICIAL CONFUSION

Two 1972 cases, Murray v. Kunzig, *462 F.2d 871 (D.C. Cir. 1972)* and PepsiCo., Inc. v. FTC, *472 F.2d 179 (2d Cir. 1972), provide an opportunity to explore the confused and often contradictory case law concerning the proper relationship between the doctrine of exhaustion of administrative remedies and the power of a federal district court to grant interim relief to maintain the status quo pending a final administrative decision.*

The proper relationship between the judiciary and the quasi-judicial administrative agency is a topic of continuing controversy in administrative law. One of the most significant and puzzling problems which has arisen in this area is the timing of judicial intervention in the administrative process—at what point and to what extent may the court give relief to a party aggrieved by administrative action. As a general rule, a party must exhaust available administrative remedies before judicial relief will be granted.[1] Universally applied, the doctrine of exhaustion of administrative remedies precludes an applicant from challenging the validity of administrative actions prior to seeking relief via prescribed administrative procedures.[2] A different, though related, problem arises when a party seeks judicial intervention not to challenge the validity of the agency's action, but rather merely to maintain the status quo during the administrative process. Interim relief ordinarily is granted in order to prevent irreparable harm to the party pending the agency's final decision.[3] This Note will examine judicial treatment of the exhaustion and

1. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

2. *See generally* 3 DAVIS §§ 20.01-.10; JAFFE 424-58. Professor Davis has stated: "[T]he most important fact about the federal law of exhaustion is that the Supreme Court has never attempted to write an opinion integrating its holdings for and against exhaustion." Davis, Book Review, 66 COLUM. L. REV. 635, 657 (1966).

3. The granting of interim relief pending final administrative action is analogons to the judicial power to preserve the status quo pending judicial review since each power seeks to ensure that the final determination of the merits will not be undermined or rendered ineffective by irreparably changed conditions. For a general discussion of the justification of interim relief, see Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-11 (1942).

On the issue of interim relief pending an administrative determination on the merits, see JAFFE 667-72; Note, *Interim Injunctive Relief Pending Administrative Determination,* 49 COLUM. L. REV. 1124 (1949).

interim relief issues, analyze the significance of differentiating between the two similar and yet quite distinct situations, and attempt to delineate their respective parameters in order to ascertain which doctrine, with its attendant tests and remedies, should appropriately be applied in any particular factual context.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Doctrine Defined. A desire for orderly and efficient procedure[4] and an implicit recognition of the requirements of comity[5] underlie the exhaustion doctrine. Properly applied, exhaustion performs a function which can be analogized to that performed by federal judicial statutes which severely limit the availability of interlocutory appeals.[6] As a practical matter, premature interruption of the administrative process often leads to additional delay and expense; moreover, the disputed issue is frequently rendered moot or insignificant as a result of the final administrative decision. Considerations of comity also lie behind the doctrine. Administrative agencies function as entities quite separate from the judiciary—they are essentially an arm of the executive branch with legislatively conferred powers and duties; accordingly, courts are relatively reluctant to interfere with prescribed administrative procedure in the absence of unusual circumstances, particularly where the disputed question is one which is within the agency's special expertise.[7] While the doctrine has been said to be one of discretion,[8] arguably its application is mandatory

4. United States v. L.A. Tucker Lines, Inc., 344 U.S. 33, 36-37 (1952); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 232 (1908); 37 U. CIN. L. REV. 861, 862-63 (1968).

5. *See* JAFFE 426; Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 984-85 (1939). *Cf.* Railroad & Warehouse Comm'n v. Duluth St. Ry., 273 U.S. 625, 628 (1927); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 203 (1924); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 229 (1908).

6. *See, e.g.*, 28 U.S.C. §§ 1291-92 (1970).

7. JAFFE 424-26; Comment, *Exhaustion of Administrative Remedies*, 39 CORNELL L.Q. 273, 292-93 (1954). *See, e.g.*, McKart v. United States, 395 U.S. 185, 194 (1969); Wolf Corp. v. SEC, 317 F.2d 139, 142-43 (D.C. Cir. 1963).

8. JAFFE 425. Professors Jaffe and Davis contend the exhaustion doctrine should be discretionary as to its application, depending upon a balancing of several factors. *See* DAVIS § 20.03; JAFFE 432-37. Supporting this theory, Judge Magruder has said:

> This [exhaustion] doctrine had its origin in a *discretionary* rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief. Smith v. United States, 199 F.2d 377, 381 (1st Cir. 1952) (emphasis added).

For an opposite view, Professor Berger has stated:

where a statute prescribes a specific administrative procedure, limits the judicial review from such procedure to a specific court, and denominates such review as "exclusive."[9]

Consistent with the rationale behind the doctrine, the courts will not require exhaustion either where the available administrative remedy would be inadequate to prevent irreparable injury[10] or where to exhaust the prescribed administrative procedure would be an exercise in futility.[11] These are not exceptions to the exhaustion requirement but rather are in accord with it, since the logic which supports the doctrine presupposes the availability of an adequate administrative remedy which offers substantial protection of the asserted right. Thus, exhaustion is not required where an intermedi-

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> Judicial relief is today conditioned upon exhaustion of the administrative remedy largely because courts of equity believed that the preseuce of that remedy, like the availability of an adequate remedy at law, defeated equity jurisdiction. . . . [T]lie logic of the development of the rule demands a crystallization of its nou-discretionary nature in all branches of the doctrine. Berger, *Exhaustion of Administrative Remedies, supra* note 5, at 1006.

For an analysis of the discretionary-uondiscretionary conflict, see Comment, *Exhaustion of Administrative Remedies as a Prerequisite to Judicial Review—Discretionary Treatment by Federal Courts,* 44 MICH. L. REV. 1035 (1946). The Supreme Court seems to accept the discretionary theory. *See* McKart v. United States, 395 U.S. 185, 193 (1969).

9. *See* McAllister, *Statutory Roads to Review of Federal Administrative Orders,* 28 CALIF. L. REV. 129, 151-64 (1940).

10. *See* Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961). The court did not require exhaustion where the petitioner contended he was being irreparably injured by agency delay. The court noted that in such a case:

> [T]here is no available administrative remedy. If hearings are held before a trial examiner pursuant to the second remand order, the plaintiff will have no right to attack there the propriety of the Board's action in again remanding the case. Nor will it there have any effective right to assert its contention that the second remand order and the holding of extended additional hearings pursuant to it constitute a present denial of its rights under . . . the Administrative Procedure Act. Indeed, the Board does not here contend that there is any administrative remedy available to the plaintiff for the protection of the right asserted. It contends only that the right may be ultimately asserted, after the delay is done, in a review proceeding . . . . *Id.* at 866.

But such review, the court held, would be insufficient to protect against the injury caused by the delay; accordingly, exhaustion was not required.

11. That "futile" exhaustion will not be required is made clear in Williams v. Richardson, 347 F. Supp. 544 (W.D.N.C. 1972).

> Where administrative review is certain to be fruitless and is calculated neither to afford relief nor even to afford a *review* of the one point at issue . . . failure to pursue administrative remedies should not be a bar . . . . *Id.* at 548.

It has been noted that exhaustion does not require parties to be "buffeted from 'pillar to post' in a vain search for a tribunal that can vouchsafe to them their rights." Randolph v. Missouri-Kansas-Texas R.R., 85 F. Supp. 846, 847 (W.D. Mo. 1949), *aff'd,* 182 F.2d 996 (8th Cir. 1950).

ate agency decision subjects the petitioner to immediate harm which the prescribed course of administrative review is inadequate to prevent; here it may be said that the petitioner has exhausted all available remedies *vis-a-vis* the particular injury asserted. In addition, where the available administrative remedies are more of form than substance, the petitioner will not be required to exhaust procedures which are in fact meaningless.[12] In sum, exhaustion, where applicable, is designed to allow the administrative agency to perform the task delegated to it by the legislature—the application of its specialized understanding to problems within a specified area—free from the disruption of judicial intervention in its established procedure. It is based not only on respect of one branch for the integrity of another, but also on the practical considerations of avoiding additional delay and expense by allowing problems to be resolved in an orderly and efficient manner when the ordinary course of judicial review will adequately protect the rights of the private parties.

The Doctrine and Its Exceptions. In the leading case of *Myers v. Bethlehem Shipbuilding Corp.*,[13] the Supreme Court held that a district court did not have jurisdiction to determine the applicability of provisions of the National Labor Relations Act[14] to a party which had been charged with a complaint by the National Labor Relations Board (NLRB) and was seeking to enjoin a subsequent NLRB hearing based on the complaint. Bethlehem contended that the proposed action was *ultra vires* and denied that it was involved in either interstate or foreign commerce, which was a prerequisite for the Board's jurisdiction to attach; therefore, jurisdiction lay in the district court to enjoin the hearing. In denying the requested relief, the Court ruled that such judicial intervention would be "at war with the long settled rule of judicial administration that no one is entitled to

12. *E.g.*, Williams v. Richardson, 347 F. Supp. 544 (W.D.N.C. 1972). In *Williams*, the plaintiffs brought an action in a district court to have a portion of the Social Security Act which denied certain benefits to illegitimate children declared unconstitutional. The plaintiffs brought suit without waiting for decision by the Secretary of Health, Education and Welfare with respect to their pending request for reconsideration of the administrative ruling terminating their benefits. Immediate judicial review was granted on the basis that the Secretary was specifically required by statute to deny plaintiffs' claims. Accordingly, there was no "practical prospect that the statutory administrative review procedure would be more than an empty formality." *Id.* at 548.

13. 303 U.S. 41 (1938). For a discussion of *Myers*, see DAVIS § 20.02; JAFFE 433.

14. 29 U.S.C. §§ 141-68 (1970).

judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[15]

The *Myers* principle is subject to several important exceptions. For example, exhaustion was not required in *Leedom v. Kyne*,[16] where the petitioner contended that an order issued by the NLRB was beyond its statutorily delegated powers. In *Leedom*, the Supreme Court held that the district court did have jurisdiction because the Board's order was invalid on its face as an attempted exercise of power that was contrary to a specific statutory prohibition. However, the *Leedom* exception has been held to be very narrow, encompassing only egregious agency errors, such as the assertion of a power specifically denied by statute. A mere claim of *ultra vires* agency action is insufficient to avoid the exhaustion requirement,[17]

15. 303 U.S. at 50 (citation omitted). Although the doctrine did not receive general recognition until the landmark case of Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), it had been applied by the Supreme Court in United States v. Sing Tuck, 194 U.S. 161, 168-70 (1904). For earlier federal manifestations of the doctrine, see Altschul v. Gittings, 86 F. 200 (C.C.D. Ore. 1898); Dundee Mortgage Trust Inv. Co. v. Charlton, 32 F. 192 (C.C.D. Ore. 1887).

16. 358 U.S. 184 (1958). The National Labor Relations Act provides that, in determining the unit appropriate for collective bargaining purposes, "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b) (1970). Having refused to hold an election among the professional employees of a labor organization to ascertain whether a majority of them would vote for inclusion in such a unit, the Board included both professional and nonprofessional employees in the bargaining unit. The professional employees thereafter brought suit in a district court, asserting that the Board had exceeded its statutory power by including the professional employees, without their consent, in a unit with nonprofessionals and asking that the Board's action be set aside. *Id.* at 185-86.

17. Leedom v. Kyne represents only a narrow and rarely successfully invoked exception to the doctrine that exhaustion of administrative procedures is a condition precedent to federal court jurisdiction. Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts. United States v. Feaster, 410 F.2d 1354, 1368 (5th Cir.), *cert. denied*, 396 U.S. 962 (1969) (citations omitted).

See, e.g., Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965); Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964); International Bhd. of Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196, 204-05 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); Modern Plastics Corp. v. McCulloch, 400 F.2d 14, 17 (6th Cir. 1968); Frito-Lay, Inc. v. FTC, 380 F.2d 8 (5th Cir. 1967); Teamsters Local 690 v. NLRB, 375 F.2d 966 (9th Cir. 1967); UNA Chapter Flight Eng'rs' Int'l Ass'n v. National Mediation Bd., 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962); International

otherwise exhaustion would not have been required in the landmark *Myers* case.[18]

The Supreme Court enunciated another exception to the exhaustion doctrine in *McCulloch v. Sociedad Nacional de Marineros de Honduras,*[19] where prompt judicial review was given to a challenge of NLRB jurisdiction, even though no specific statutory prohibition had been violated by the Board. In *McCulloch,* the Court permitted review of an NLRB election order because of international overtones involved in the Board's application of the National Labor Relations Act to foreign maritime crews.[20] Exhaustion was not required because of "the presence of public questions particularly high in the scale of our national interest because of their international complexion."[21] Thus, *McCulloch,* although involving an atypical factual situation, implies that prompt judicial review will be permitted where agency action raises questions of such a public nature as to affect significantly the national interest.

A third exception was formulated by the Second Circuit in *Fay v. Douds,*[22] where a labor union complained that its status as exclusive bargaining agent had been terminated by an NLRB hearing examiner without benefit of a hearing. Finding that the district court had jurisdiction to hear the complaint, the Court of Appeals held that

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Ass'n of Tool Craftsmen v. Leedom, 276 F.2d 514 (D.C. Cir.), *cert. denied,* 364 U.S. 815 (1960).

Professor Davis has offered a proposed guide for determining the applicability of the exhaustion doctrine to a particular case where the administrative agency's jurisdiction is challenged. He believes the decision should be reached by a careful balancing of three factors—"extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction." DAVIS § 20.03, at 69 (citations omitted).

18. *Compare* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 47-48 (1938) *with* Leedom v. Kyne, 358 U.S. 184, 188-89 (1958).

19. 372 U.S. 10 (1963).

20. Although the members of the crews of vessels owned by a foreign subsidiary of an American corporation were foreign and represented by a foreign union, *id.* at 14, the NLRB held that the Act extended to them, and it ordered representative elections. This assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags aroused vigorous protests from foreign governments and created international problems for the Government. *See id.* at 17.

21. *Id.* at 17.

22. 172 F.2d 720 (2d Cir. 1949); *accord,* Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962). However, this exception has been narrowly construed. *See* McCulloch v. Libby-Owens-Ford Glass Co., 403 F.2d 916, 917 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969); Boire v. Miami Herald Publishiug Co., 343 F.2d 17, 21 n.7 (5th Cir. 1965).

exhaustion is not required when the petitioner has made a substantial showing that an agency action has violated his constitutional rights and the assertion of such rights is not "transparently frivolous."[23]

INTERIM RELIEF

In theory, the exhaustion doctrine and the doctrine of interim relief pending administrative action are conceptually distinct and involve different considerations as to their application; however, the distinction is more difficult to make in practice. In many instances a judicial failure to draw this distinction will not lead to an improper result[24] in that there is a common factor in determining whether to grant interim relief or whether exhaustion is not required and review on the merits may be granted—that is, the presence and extent of irreparable injury. Nevertheless, such cases serve as misleading precedent, thereby further confusing the proper application of each of the doctrines.

Interim relief is a proposition quite distinct from the doctrine of exhaustion. It concerns the propriety of a court exercising its power to preserve the status quo until the prescribed administrative action is completed. The court is not asked to make a binding determination on the merits of a particular proceeding, but rather to prevent irreparable damage while the administrative decision still remains pending and uncertain. Thus, when a court insures that the administrative process will continue without irreparable injury to any of the parties concerned by granting interim relief, the court is acting not in derogation of the administrative process, but rather in concert with it.[25]

The authority of a court to preserve the status quo by issuing a temporary injunction pending *judicial review* of a final agency action is well established.[26] Section 10(d) of the Administrative Procedure Act (APA) expressly recognizes this power,[27] and the All

23. 172 F.2d at 723.

24. *Compare* Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954) *with* Isbrandtsen Co. v. United States, 81 F. Supp. 544 (S.D.N.Y. 1948). See note 52 *infra*.

25. *See* Murray v. Kunzig, 462 F.2d 871, 875, *rehearing denied*, 462 F.2d 883 (D.C. Cir. 1972) (opinion rendered), *cert. granted*, 41 U.S.L.W. 3493 (U.S. Mar. 19, 1973).

26. *See, e.g.*, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942).

27. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or

Writs Act[28] has been used to justify the issuance of such relief.[29] Interim relief has been further justified on the basis of protecting the court's jurisdiction by preventing the situation from changing irreparably before the court is able to act.[30] The judicial power to maintain the status quo pending an *administrative decision* has not, however, been so uniformly recognized. Some courts have explicitly recognized such a power, justifying its use as an equitable tool to protect jurisdiction.[31] But relief is not granted as a matter of right in either situation, whether pending judicial review or administrative action; rather, the propriety of the issuance of the injunction is a matter of judicial discretion.[32] A four-factor test, first enunciated in *Virginia Petroleum Jobbers Association v. FPC*,[33] is often utilized to govern issuance or denial of interim relief in both situations: (1) Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties in the proceeding? (4) Would the issuance of a stay further the public interest?[34]

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other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve the status or rights pending conclusion of the review proceedings. 5 U.S.C. § 705 (1970).

28. 28 U.S.C. § 1651 (1970).

29. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 n.4 (1942). The All Writs Act, 28 U.S.C. § 1651 (1970), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

See also FTC v. Dean Foods Co., 384 U.S. 597, 604-05 (1966); Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000, 1004-06 (D.C. Cir. 1964).

30. No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appeal court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment . . . . [S]uch judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. 316 U.S. at 9-10.

31. Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965).

32. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1942); Virginia Ry. Co. v. United States, 272 U.S. 658, 672-73 (1926).

33. 259 F.2d 921, 925 (D.C. Cir. 1958).

34. The *Virginia Petroleum Jobbers* four-factor test has been employed in determining the propriety of granting interim relief pending judicial review. *See In re*

The power of a court to grant interim relief to maintain the status quo pending a final administrative decision has been denied by some courts as being contrary to the exhaustion doctrine. Although most of the comparatively meager case law dealing with interim relief pending an agency decision is fairly recent, early applications of such relief may be found in a series of cases involving the issuance of injunctions to restrain waste prior to the determination of land titles by an administrative agency.[35] The first significant federal case confronting the interim relief issue was *Avon Dairy Co. v. Eisaman*,[36] which involved the issuance of a marketing order by the Secretary of Agriculture. Avon had petitioned the Secretary for a rehearing and applied for an interim postponement of the effective date of the order pending the Secretary's decision. When the requested postponement was denied, Avon, relying upon section 10(d) of the APA,[37] sought a stay of the order's effectiveness in the district court. However, the court interpreted section 10(d) to apply "only when the final adverse action of the Secretary . . . is pending here on review."[38] Accordingly, the court held that it had no jurisdiction to issue the stay prior to a denial of administrative rehearing.[39] The *Avon* approach was also adopted by the Fourth Circuit in *Osmond v. Riverdale Manor, Inc.*,[40] where the plaintiff, while his appeal was pend-

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Penn Cent. Transp. Co., 457 F.2d 381 (3d Cir. 1972); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970); Long v. Robinson, 432 F.2d 977 (4th Cir. 1970); Belcher v. Birmingham Trust Nat'l Bank, 395 F.2d 685 (5th Cir. 1968); Eastern Air Lines, Inc. v. CAB, 261 F.2d 830 (2d Cir. 1958). The test has also been used to grant interim relief pending final administrative action. *See* Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965).

35. Olive Land & Dev. Co. v. Olmstead, 103 F. 568 (C.C.S.D. Cal. 1900); Northern Pac. Ry. v. Soderburg, 86 F. 49 (C.C.N.D. Wash. 1898); Elliott v. Rich, 24 N.M. 52, 172 P. 194 (1918).

36. 69 F. Supp. 500 (N.D. Ohio 1946).

37. 5 U.S.C. § 705 (1970). See note 27 *supra*.

38. 69 F. Supp. at 502.

39. There being no statute making reviewable the denial of the application for stay before the Secretary of Agriculture, there would seem to be no power here to entertain the matters of . . . the preliminary, procedural, or intermediate action . . . . This may seem harsh and a modern legislative departure from time-honored remedial process in the courts but the Congress apparently has willed it so by design or unintentional omission. *Id.* at 502.

Yet one year later a district court interpreted section 10(d) as authorizing the grant of interim relief, although the requested relief was denied since there was no finding of irreparable injury. *See* Wettre v. Hague, 74 F. Supp. 396 (D. Mass. 1947), *rev'd on other grounds*, 168 F.2d 825 (1st Cir. 1948).

40. 199 F.2d 75 (4th Cir. 1952).

ing before the Director of Rent Stabilization, sought a stay of rent reduction orders issued by the Area Rent Director under the Housing and Rent Act of 1947.[41] The appellate court, relying on the exhaustion doctrine, held that such relief could not be given.[42] The significance of the holding lies primarily in the rationale adopted by the court. The court placed great emphasis on a then-recent Supreme Court decision, *Aircraft & Diesel Equipment Corp. v. Hirsch*,[43] which the *Osmond* court felt had addressed precisely the same question.[44] The court stressed that the petitioners in both instances were seeking judicial intervention after initiation but before completion of administrative review. The *Osmond* court apparently felt this was the determinative aspect of the problem.[45] Yet, the court either failed to recognize or, if it did, attached no significance to the fact that the *type* of judicial intervention sought in each of the cases was conceptually different. In *Aircraft*, the petitioner had sought adjudication on the merits—judicial review prior to exhaustion—while in *Osmond* the petitioner had sought only the preservation of the status quo until

41. Ch. 163, 61 Stat. 196.

42. *Id.* at 80.

43. 331 U.S. 752 (1947). Pursuant to the First and Second Renegotiation Acts, the Secretary of War and the War Contracts Adjustment Board had determined that Aircraft had realized excessive profits on certain sub-contracts made with government contractors. Accordingly, it was directed that Aircraft's customers withhold and pay into the Treasury such sums due Aircraft equal to the excess profits. *Id.* at 757. In accordance with the Acts' review procedure, Aircraft appealed to the Tax Court. Simultaneously, Aircraft brought an action in the district court asking for a declaratory judgment that the Renegotiation Acts were unconstitutional and/or that they did not cover Aircraft's contracts. In addition, Aircraft requested a permanent injunction against any further action against it under the Acts. *Id.* at 757-58. The Supreme Court held that the district court was without power to grant such relief since the prescribed administrative review had been only initiated, not exhausted. *Id.* at 771.

44. Osmond v. Riverdale Manor, Inc., 199 F.2d 75, 78 (4th Cir. 1952).

45. The court noted that "[t]he cases are legion holding that one claiming to be hurt by an administrative proceeding, where an administrative review is open and available, cannot, in lieu of, and without resorting to, this administrative review, appeal for relief to the courts." *Id.* at 77. The court recognized that the question presented by the case could be distinguished from the above situation. However, the language and the added italics quoted from the *Aircraft* case illustrate that the court felt the distinction lay not in the type of relief sought, but rather in its timing:

> The doctrine [of exhaustion], wherever applicable, does not require merely the *initiation* of prescribed administrative procedures. It is one of *exhausting* them, that is, of pursuing them to their appropriate conclusion and correlatively, of *awaiting their final outcome before seeking judicial intervention*. *Id.* at 78, *quoting* Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1946).

administrative review could be completed.[46] Reduced to its simplest terms, the *Osmond* decision thus stands for the proposition that the exhaustion doctrine precluded *any* judicial intervention prior to the final agency decision.[47]

However, the *Avon-Osmond* line of reasoning has not dominated the judicial approach to the problem of interim relief; an alternative line of cases has analyzed the issue in fundamentally different terms. Three Second Circuit cases have established the proposition that a court's traditional equitable powers justify the granting of interim relief to maintain the status quo in order to prevent irreparable injury while the final administrative decision is pending. These cases have specifically held that the granting of such relief was not in contravention of the requirement of exhaustion.[48]

The leading case which appears to provide the basis for the doctrine of granting interim relief to maintain the status quo pending administrative action is *West India Fruit & Steamship Co. v. Seatrain Lines, Inc.*[49] In that case, the United States Maritime Commission had intervened as a party plaintiff in an action to enjoin a

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46. Professor Jaffe has argued that *Aircraft* not only did not deny the power of interim relief refused in *Osmond,* but actually strongly implied the existence of such power. JAFFE 668-70. He points out, *id.* at 669, language in a footnote of the *Aircraft* opinion which implies the existence of judicial power to grant interim relief to preserve the status quo pending the administrative decision:

> . . . in the event of such action [a suit by Aircraft against its customers for the money being withheld pursuant to the directives of the Under Secretary of War], the court would have power to preserve, pending the administrative decision, the *status quo* and all rights of the appellant. Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 775 n.39 (1947).

47. The *Osmond* rationale was in accord with the holding of a similar case decided earlier that same year, Forrest Harmon & Co. v. Rottgering, 106 F. Supp. 993 (W.D. Ky. 1952). In denying petitioner's request for a temporary restraining order, the court said:

> [A]ll that is sought is restraint of the effectiveness of an administrative agency order reducing the rents until all administrative remedies within the agency can be exhausted.
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> It is manifest that there does exist the differentiation pointed out by the plaintiff in the procedure in cases cited by defendant from the procedural situation encountered here. But it seems obvious from a careful consideration of the opinions of the Supreme Court that no judicial relief from threatened injury may be granted, unless and until the prescribed administrative remedies have been exhausted. *Id.* at 995.

Professor Davis appears to accept the *Osmond* result. *See* DAVIS § 20.05.

48. It is interesting to note that the Second Circuit did not adopt the district court's approach in Wettre v. Hague, 74 F. Supp. 396 (D. Mass. 1947), *rev'd on other grounds,* 168 F.2d 825 (1st Cir. 1948), wherein the court interpreted section 10(d) of the APA as specifically authorizing such relief in appropriate cases.

49. 170 F.2d 775 (2d Cir. 1948), *petition for cert. dismissed,* 336 U.S. 908 (1949) (on motion of petitioner).

steamship company from putting rate reductions into effect pending a decision before the Commission as to the legality of the reduction. In rejecting the defendant's argument that the district court lacked the power to issue such an injunction, the Second Circuit emphasized that the stay, which was at the request of the agency itself, was not in derogation of the administrative process but rather in assistance of that process.[50] Citing *West India Fruit* as authority, the district court in *Isbrandtsen Co. v. United States*[51] granted interim relief to a steamship company which sought a temporary injunction to prevent implementation of a competitor's rate-fixing agreements pending a final decision by the United States Maritime Commission as to the legality of the agreements. (The Commission had already given temporary approval of the agreements, and had authorized their implementation until a final Commission review.)[52] In so doing, the court found an "equitable power . . . to preserve the status quo to protect the rights of all concerned," unless such power has been specifically withdrawn by statute.[53] Similarly, in *Reeber v. Rossell*,[54] the court dealt with the propriety of the issuance of in-

50. The court stressed that the district court had been asked to assist the Commission by preserving the status quo until the Commission could determine whether it had statutory jurisdiction, and if so, how it should act. Here the Commission itself lacked the power to grant relief pending its determination. *Cf.* SEC v. Long Island Lighting Co., 148 F.2d 252 (2d Cir.), *cert. granted*, 324 U.S. 837, *judgment vacated as moot*, 325 U.S. 833 (1945). This decision has been strongly criticized, *see* JAFFE 672-74, and the Second Circuit in *West India Fruit* felt constrained to observe that "[t]his court as at present constituted does not agree with that decision." 170 F.2d at 779.

51. 81 F. Supp. 544 (S.D.N.Y. 1948).

52. In almost identical circumstances, the District of Columbia Circuit granted similar relief to the petitioner who sought an injunction of the Federal Maritime Board's interim approval of a dual-rate system pending a formal hearing. The relief was justified on the grounds that the interim approval constituted a "final order" by the Board and hence was reviewable. Although temporary, the Board's approval imposed real, immediate and incalculable harm upon the petitioner. Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). The two cases illustrate clearly that where the maintenance of the status quo necessitates the temporary enjoining of agency action, such injunction may be issued only to prevent irreparable injury. But as the second *Isbrandtsen* case makes clear, if the "preliminary" order is such as to cause irreparable harm, it is a final order and accordingly reviewable. The administrative process *vis-a-vis* the alleged grievance *has* been exhausted. Thus, in such situations relief may be justified either as preserving the status quo to prevent irreparable injury *or* as reviewing a "final" agency order. *See* Murray v. Kunzig, 462 F.2d 871, 875 n.12 (D.C. Cir. 1972).

53. Isbrandsten Co. v. United States, 81 F. Supp. 544, 547 (S.D.N.Y. 1948).

54. 91 F. Supp. 108 (S.D.N.Y. 1950).

terim relief to a dismissed federal employee pending his appeal to the Civil Service Commission.[55] In granting such relief, the court reaffirmed its previous assertions of an equitable power to maintain the status quo, citing both its earlier opinion in *Isbrandtsen* and the Second Circuit's *West India Fruit* decision.[56] Subsequent cases decided in the Second Circuit have continued to recognize judicial power to maintain the status quo pending final agency action.[57] However, in determining the propriety of the exercise of the power, these courts often justified a denial with language indicating that interim relief was an exception to the exhaustion doctrine, to be granted only in the presence of unusual circumstances.[58] Such language il-

55. *Compare* Wettre v. Hague, 74 F. Supp. 396 (D. Mass. 1947), *rev'd on other grounds*, 168 F.2d 825 (1st Cir. 1948) (since exhaustion was not necessary, merits could be adjudicated by the court). *Wettre* involved a similar factual situation, but the court based its finding of the power to grant interim relief upon its interpretation of section 10(d) of the APA. Plaintiff-veterans alleged that they were about to be demoted by the Navy Department in violation of their rights under the Veterans' Preference Act. They asked the district court to enjoin the defendants from disturbing the status quo pending a final decision by the Civil Service Commission. The district court read section 10(d) as authorizing the grant of interim relief, although the requested relief was denied since there was no finding of irreparable injury:

> If plaintiffs plan to raise before the Commission and eventually, if necessary, before the courts an issue of the type embraced in subsections (1), (2), (3) or (4) of § 10(e) of the Administrative Procedure Act . . . there would be power in this court "to the extent necessary to prevent irreparable injury . . . to postpone the effective date" of the proposed demotions and to preserve the status of plaintiffs pending conclusion of the administrative and judicial review proceedings . . . . But I can not find that plaintiffs run the risk of serious irreparable injury of the type contemplated by the quoted statutory language. 74 F. Supp. at 400.

56. 91 F. Supp. at 113. In referring to West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948), the court rejected the argument that the decision rested upon the request of the agency for the issuance of the injunction:

> While it is true that the administrative agency sought the injunction on behalf of one of the parties in that case, the decision established the power of the Court to issue an injunction to prevent undue harm pending an administrative proceeding. The power should not be conditioned upon the granting or withholding of the approval of the administrative body. 91 F. Supp. at 113.

57. Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); United States Trucking Corp. v. American Export Lines, 146 F. Supp. 924 (S.D.N.Y. 1956); Akelmacker v. Kelly, 101 F. Supp. 528 (S.D.N.Y. 1951); Leeds v. Rossell, 101 F. Supp. 481 (S.D.N.Y. 1951).

58. In Leeds v. Rossell, 101 F. Supp. 481 (S.D.N.Y. 1951), the court denied the requested interim relief, stating, correctly but rather imprecisely, that such relief was granted only in "unusual circumstances" (which were neither enumerated nor illustrated). *Id.* at 484. The district court cited as authority two cases, Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1946); Breiner v. Wallin, 79 F. Supp. 506 (E.D. Pa. 1948), both of which did not deny interim relief but denied adjudica-

lustrated the still lingering confusion concerning the proper application of each doctrine and left a yet more muddled path for future courts to follow.

In the years since *West India Fruit* and *Reeber*, judicial acceptance of the power of granting interim relief to maintain the status quo has become more widespread.[59] It appears that the *Avon-Osmond* theory of denying interim relief on the basis of failure to exhaust has been largely discredited, nevertheless it has never been expressly overruled and appears to have retained at least limited viability.[60]

Although the Supreme Court has not explicitly answered the question, language in at least two cases implies the existence of judicial power to grant interim relief to maintain the status quo pending an administrative decision.[61] The Court apparently equates in-

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tion on the merits. *But compare* United States Trucking Corp. v. American Export Lines, 146 F. Supp. 924 (S.D.N.Y. 1956), a case in the same district which clearly articulated the distinction between relief to maintain the status quo and an adjudication of the merits.

59. The granting of interim relief to maintain the status quo pending administrative action—most fully developed, if not initiated, by the Second Circuit—was utilized in other circuits, which often cited Second Circuit decisions in justifying such holdings. *See* Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954) (a bond redemption and proposed dividend payment were enjoined at the request of the Public Utilities Commission pending an investigation by the Commission of the legality of such action); Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F. Supp. 910 (E.D. Pa. 1960) (conference agreements were enjoined pending administrative proceedings before the Federal Maritime Board to determine their legality). For cases dealing with the Agricultural Marketing Agreement Act which recognize the power to grant interim relief, see United States v. Brown, 217 F. Supp. 285 (D. Colo. 1963); United States v. Guimond Farms, Inc., 203 F. Supp. 471 (D. Mass. 1962); United States v. Ideal Farms, 162 F. Supp. 28 (D.N.J. 1958); United States v. Lehigh Valley Cooperative Farmers, 161 F. Supp. 885 (E.D. Pa. 1957). More recent cases recognizing judicial power to grant injunctive relief to maintain the status quo pending administrative action include Wheelabrator Corp. v. Chaffee, 455 F.2d 1306 (D.C. Cir. 1971); Brawner Bldg., Inc. v. Shehyn, 442 F.2d 847 (D.C. Cir. 1971); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965); Scarpa v. Smith, 294 F. Supp. 13 (S.D.N.Y. 1968); Justus v. Zimny, 250 F. Supp. 719 (N.D. Cal. 1965); Unglesby v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965).

60. *See* Johnson v. Postmaster General, 330 F. Supp. 1058 (D. Md. 1971); DAVIS § 20.05.

61. FTC v. Dean Foods Co., 384 U.S. 597, 604 (1965); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 n.22 (1963). The Court in *Dean* further observed that power to review agency decisions "includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." 384 U.S. at 604.

terim relief with the power to grant similar relief pending judicial review and describes both as "merely incidental to the courts' jurisdiction to review final agency action,"[62] since each serves to protect the courts' potential jurisdiction by ensuring that judicial review will be effective. While dicta, the Supreme Court's language strongly indicates a recognition of the existence of such power and tacit approval of the approach adopted in both *West India Fruit* and *Reeber*.[63]

Distinction Between Exhaustion and Interim Relief. The distinction between the doctrine of exhaustion and that of interim relief is clearest when a party asks not for a determination of his grievance on the merits but rather merely seeks maintenance of the status quo pending an ultimate determination by the agency.[64] In such an instance, the petitioner simply attempts to invoke the aid of the court to prevent irreparable injury which results from changing circumstances during the pendency of the administrative process. Such interim relief is not the judicial interference with prescribed administrative procedure that the exhaustion doctrine is designed to prevent,[65] but instead providing interim relief aids the effectiveness of the final agency decision by insuring that the impact of the decision will not be impaired by a previously irreparable change in the status of the parties.[66]

The distinction becomes factually and legally more difficult, however, when the seeking of interim relief is compared not with premature judicial review of the merits of the ultimate question before the agency, but rather with judicial review of an interlocutory agency decision. The rationale supporting exhaustion requires not merely the initiation but the completion of available administrative

62. FTC v. Dean Foods Co., 384 U.S. 597, 604 (1965), *quoting* Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 n.22 (1963).

63. Two cases, West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948); Board of Governors v. Transamerica Corp., 184 F.2d 311 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950), both of which allowed interim relief at the agency's request, were cited in *Arrow Transp. Co.* 372 U.S. at 671 n.22.

64. *E.g.*, Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972).

65. See notes 4-11 *supra* and accompanying text.

66. This is especially true where the administrative agency has no power itself to preserve the status quo while it is making its determination. *See, e.g.*, Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972); West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948); Isbraudsten Co. v. United States, 81 F. Supp. 544, 547 (S.D.N.Y. 1948).

remedies.[67] Accordingly, it might appear that only "final," rather than interlocutory, agency decisions should be subject to judicial review.[68] Thus, an apparent conflict arises between the two doctrines where an administrative agency has the power to grant the interim relief requested—maintenance of the status quo—but refuses to do so.[69] In such a situation, the judicial exercise of equitable power to grant interim relief would be, in effect, only a review of the agency's refusal to maintain the status quo. The exhaustion doctrine, then, is designed to allow the administrative agency to fulfill its congressionally defined responsibilities free from judicial interference. On the other hand, interim relief is justified on the same basis as the power of the court to stay administrative action pending judicial review—to protect the courts' jurisdiction by ensuring that ultimate review will be meaningful and not rendered wholly or partially nugatory by previously incurred irreparable injury.

Application of the Exhaustion Doctrine. Two recent cases provide an opportunity to examine this distinction and a basis for

67. See note 81 *infra.*

68. As has been noted, see note 52 *supra,* certain technically "intermediate" or "interlocutory" decisions may have such an immediate and adverse effect on a party so as to be considered "final" for review purposes. Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir. 1954). Moreover, the general rule has been formulated that a party may bypass established administrative review procedures where the issue in question cannot be raised from a later order of the agency. Further exhaustion is not required because *vis-a-vis* the particular question in controversy there are no available administrative remedies to pursue. *See* Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345 (D.C. Cir. 1972), where the court held that a district court's enjoining of administrative proceedings pending a judicial determination of the applicability of the Freedom of Information Act to documents involved in those proceedings did not contravene the requirements of the exhaustion doctrine. A technically interlocutory decision of an administrative agency (the Regional Renegotiation Board) not to release certain documents to a contractor contesting an excess profits determination was held to be reviewable, although the petitioner was concededly at the beginning of a "labyrinthine system" of administrative review. *Id.* at 350. But exhaustion was not required since the prescribed administrative remedies "would not prevent the irreparable injury which the contractors fear." *Id.* at 357.

"Since appellees will not be able to assert a Freedom of Information Act violation on appeal from the Renegotiation Board decision, they must assert it now if they are to do so at all. It follows that their remedy at law is inadequate and that the traditional prerequisites for equitable intervention have been satisfied." *Id.* at 359. See note 81 *infra. Cf.* Bristol-Myers Co. v. FTC, 469 F.2d 1116 (2d Cir. 1972). *See also* Jewel Companies, Inc. v. FTC, 432 F.2d 1155 (7th Cir. 1970); Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965).

69. *See, e.g.,* Osmond v. Riverdale Manor, Inc., 199 F.2d 75 (4th Cir. 1952); Avon-Dairy Co. v. Eisaman, 69 F. Supp. 500 (N.D. Ohio 1946).

resolving the problem of which doctrine applies in a given factual context. *PepsiCo, Inc. v. FTC*[70] illustrates the application of the exhaustion requirement to a request for judicial review of an interlocutory agency decision. In *PepsiCo*, the Second Circuit held that the Federal Trade Commission's denial of a motion to dismiss a proceeding brought against a soft drink manufacturer—who allegedly was engaged in unfair methods of competition—for nonjoinder of individual bottlers was not a final order reviewable by federal courts prior to exhaustion of the prescribed administrative procedure. The FTC had instituted proceedings against PepsiCo and other soft drink manufacturers, alleging unfair methods of competition in violation of provisions of the Federal Trade Commission Act.[71] The complaint challenged the validity of exclusive bottling agreements between the soft drink manufacturer and its franchised bottlers whereby individual bottlers had agreed not to sell outside of their designated territories. In its answer, PepsiCo asserted that the complaint was fatally defective for failure to join the bottlers who had entered into the challenged agreements as indispensable parties—thereby, PepsiCo charged the FTC with ignoring both the property and procedural rights of the bottlers, whose economic interests would be most directly and adversely affected by the invalidation of the exclusive franchises.[72] The FTC hearing examiner denied PepsiCo's motion to dismiss, although he did permit intervention by three individual bottlers and the Pepsi-Cola Bottlers' Association. After PepsiCo's subsequent appeal of this motion to the Commission was denied, it instituted an action in the district court to enjoin the FTC from continuing the proceeding absent joinder of all the bottlers. The district court granted the FTC's motion to dismiss and held that it had no jurisdiction to consider the interlocutory order of the FTC because the plaintiff had not exhausted its administrative remedies.[73] PepsiCo and an intervening bottler appealed to the Court of Appeals for the Second Circuit, which affirmed the district court's ruling.

Although the Federal Trade Commission Act specifically limits

70. 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 41 U.S.L.W. 3449 (U.S. Feb. 20, 1973), *aff'g* 343 F. Supp. 396 (S.D.N.Y.). *See also* Coca-Cola Co. v. FTC, No. 72-2270 (5th Cir., Feb. 15, 1973), *aff'g* 342 F. Supp. 670 (N.D. Ga.) (several similar complaints were filed against major manufacturers of soft drink syrups).

71. 15 U.S.C. § 45 (1970).

72. The primary reason given for the denial was that, as a practical matter, an attempt to join all of the bottlers as parties would create an unmanageable situation for trial purposes. 472 F.2d at 183.

73. PepsiCo, Inc. v. FTC, 343 F. Supp. 396 (S.D.N.Y. 1972).

the review of a court of appeals to FTC cease and desist orders,[74] the court viewed this limitation as a mere prohibition against appellate review of interlocutory orders and not as absolutely precluding review by suit originally in a district court.[75] However, since the order in question was not one made expressly reviewable by statute, reviewability was to be determined by whether the order constituted "final agency action for which there is no other adequate remedy in a court."[76] After reviewing the Supreme Court cases where exhaustion of administrative procedure was not required,[77] the appellate court enunciated a test for determining whether final agency action can be said to have occurred. Under the Second Circuit's formulation, if an administrative agency refused to dismiss a proceeding which is either plainly beyond its jursidiction as a matter of law[78] or is being conducted in a manner that cannot result in a valid order, then the asserted error will be immediately reviewable.[79] However, the court held that the case did not fall within the above stated exception, finding that the bottlers were not indispensable parties to a valid cease and desist order.[80] Thus, PepsiCo was un-

74. 15 U.S.C. § 45(c) (1970).

75. 472 F.2d at 185; *see* Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342, 344 (D.C. Cir. 1965).

76. Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (1970). Although the Second Circuit opinion was couched in terms of the "final judgment" rule, such an analysis is, as has been noted, merely an adjunct to the exhaustion doctrine, since if the agency action complained of be deemed "final," *a fortiori* there are no further administrative remedies to exhaust.

77. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Leedom v. Kyne, 358 U.S. 184 (1958).

78. Leedom v. Kyne, 358 U.S. 184 (1958).

79. The court accepts this latter qualification upon the normal requirements "for the sake of argument," terming it "possibly over-generous." 472 F.2d at 187. *See* American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960) (holding that orders denying intervention in administrative proceedings are immediately appealable in circumstances where erroneous denial might invalidate any future order). This suggested exception to the exhaustion requirement would appear to be merely the application of the *Leedom* exception (as to patently unauthorized jurisdictional assertions) to the area of administrative procedure, *i.e.*, procedural errors which are of a "summa" or "magna" quality. See note 17 *supra*.

80. In so finding, the court held that an agency proceeding seeking to vindicate public rights against a respondent could determine the private rights of other parties if such parties were given notice and an opportunity to intervene. 472 F.2d at 188-90. PepsiCo had argued strongly that unless all the bottlers were joined, compliance with an eventual cease and desist order might subject PepsiCo to liability in a suit by an unjoined bottler whose territory had been violated by another to whom PepsiCo had sold syrup—an aet in derogation of the exclusive franchise

able to show either (1) irreparable injury which the prescribed administrative review procedure would be inadequate to prevent (since the issue in dispute would be subject to effective review by a court of appeals following a cease and desist order) which would in turn fulfill the requirements of exhaustion, or (2) an agency error sufficiently egregious as to fall within the previously delineated exceptions to exhaustion. Accordingly, *PepsiCo* illustrates the proper refusal of a court to decide the merits of an agency decision prior to the exhaustion of the administrative procedure.[81]

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agreements to which PepsiCo was a party. The court dismissed the argument summarily:

> The proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 234 (1938). The astonishment becomes greater in light of the Supreme Court's clear statement in National Licorice Co. v. NLRB, 309 U.S. 350, 363 (1940), that, in administrative proceedings devoted "to the protection and enforcement of public rights, there is little scope for the traditional rules governing the joinder of parties in litigation determining private rights . . . ." *Id.* at 187-88.

In Coca-Cola v. FTC, No. 72-2270 (5th Cir., Feb. 15, 1973), the Fifth Circuit rejected a similar argument, where the petitioners had also contended that it would be a denial of the due process rights of the non-joined bottlers to determine the validity of the bottlers' franchises without joining them as parties.

81. As observed above, see note 76 *supra*, the court analyzed the problem, not in terms of "exhaustion," but whether the FTC decision was final under § 10(c) of the APA. The result does not differ, since the final judgment rule is merely a necessary and logically harmonious corollary to the exhaustion doctrine. *See* note 68 *supra*. However, the court, while correctly noting the lack of consistency in prior exhaustion cases, feels the reason for such confusion lies in the failure of the courts to address themselves to "the crucial issue"—the proper interpretation of final agency action under section 10(c). While this rationale might have some merit, the following footnote by the court reveals a lack of perception regarding the logic of the exhaustion doctrine and corresponding failure to grasp the requirements of the doctrine:

> The courts speak of "exhaustion." This case shows how little help that term offers in the context here relevant. If the rule is simply that plaintiff must have "exhausted" administrative remedies with respect to the issue for which judicial review is sought, as he clearly must, PepsiCo has done that. 472 F.2d at 186 n.7.

The above passage demonstrates a lack of understanding of the purposes of exhaustion, for the doctrine seeks to require the party to follow the prescribed administrative procedure. It demands completion and not merely initiation of such review procedures. In the preseut case, PepsiCo will be able to raise on appellate review the issue of the indispensability of the bottlers. Any non-joined bottlers could seek review in a district court as a party aggrieved by any order forthcoming from the Commission. 5 U.S.C. § 702 (1970). If the reviewing court finds against the FTC, the order would be invalid, and the FTC would be required to join the bot-

Application of Interim Relief. The distinction between the judicial power to grant interim relief and the requirements of the exhaustion doctrine was more clearly drawn in *Murray v. Kunzig*,[82] which reasserted the power of the courts to grant interim injunctive relief to maintain the status quo pending final agency action. In *Murray*, the District of Columbia Circuit Court of Appeals held that a district court has jurisdiction to grant interim relief to prevent the discharge of a probationary federal employee whose appeal challenging the discharge was pending before the Civil Service Commission. The plaintiff, who was a probationary employee of the Public Buildings Service of the General Services Administration, had received written notice terminating her employment. Thereafter, she filed an appeal of her discharge with the Civil Service Commission, alleging that the discharge was invalid because, *inter alia*, it was based on conduct which had occurred in part prior to her employment with the GSA; therefore, she had been denied the additional rights which were statutorily appurtenant to a discharge on such grounds.[83]

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tlers in any new proceedings it might institute. This is the prescribed statutory path of review; this is what exhaustion requires. If the FTC order had been found to be a "final agency action," it would be reviewable under the APA; however, this is not in contradiction but rather in accordance with the exhaustion doctrine. In *PepsiCo*, judicial review at the conclusion of the administrative process would have been an adequate remedy for the harm alleged. It is true that PepsiCo would have been subjected to a needless hearing, but the expense and burden of litigation is not the type of irreparable injury which allows the circumvention of the exhaustion requirement. *See* Myers v. Bethlehem Shipuilding Corp., 303 U.S. 41, 51 (1938); Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209, 222 (1938). It is only where adherence to the prescribed administrative procedure will afford no meaningful relief for the harm alleged that the aggrieved party will be allowed immediate recourse to the courts. This is *final* agency action, because it inflicts harm for which there is no available administrative remedy to exhaust *vis-a-vis* the harm alleged. Thus, the logic of the final agency action requirement of § 10(c) of the APA is completely consistent with a proper application of the exhaustion doctrine.

82. 462 F.2d 871, *rehearing denied*, 462 F.2d 883 (D.C. Cir. 1972) (opinion rendered), *cert. granted*, 41 U.S.L.W. 3493 (U.S. Mar. 19, 1973).

83. Under applicable regulations, when a probationary employee is terminated for conduct during his probationary period, the agency is simply required to give him written notice of the effective date of his separation and "the agency's conclusions as to the inadequacies of his performance or conduct." 5 C.F.R. § 315, 804 (1972). When the termination is based in whole or in part on conditions arising before the beginning of employment, the employee must be given advance written notice detailing the reasons for the proposed termination and an opportunity to file a written answer to the notice and to furnish affidavits in support of such answer. Further, the agency is required to take such answer and affidavits into account in reaching its final decision on termination. *Id.* § 315.805.

Since the Civil Service Commission had no power to order a stay of the discharge,[84] the plaintiff instituted an action in district court seeking an injunction to prohibit the GSA from effecting her termination until the Civil Service Commission had acted on her appeal. The district court granted the requested relief, finding that unless the dismissal were enjoined the plaintiff might suffer immediate and irreparable injury.[85] The Government appealed on the ground that the district court lacked jurisdiction to issue such an injunction when an appeal was pending before the Civil Service Commission, essentially suggesting the rationale followed by the *Avon-Osmond* line of cases—that is, the exhaustion doctrine prohibits *any* judicial intervention prior to the completion of the administrative process.[86] Rejecting the Government's argument the court of appeals affirmed the district court decision.

In holding that the district court's assertion of jurisdiction had been proper to grant interim relief pending the administrative decision, the Second Circuit explicitly rejected the Government's argument. The court made an extended effort to distinguish between the issue of the propriety of the court's granting interim relief pending an administrative determination on the merits[87] where there is no statutory provision specifically authorizing such relief, and the necessity for the exhaustion of administrative remedies before an adjudication on the merits. Observing that such interim relief is not the interference with the administrative process that the exhaustion doctrine seeks to prevent,[88] the court noted that this type of relief simply insures that the final agency decision will not be undermined

84. 462 F.2d at 873.

85. *Id.* at 874.

86. See notes 36-47 *supra* and accompanying text.

87. The court apparently felt it necessary to reiterate those differences and issued a relatively lengthy opinion denying the Government's petition for rehearing which simply restated the court's view of interim relief. 462 F.2d at 883-86.

88. The *Murray* opinion observed the past judicial confusion between the issues of interim relief and exhaustion. 462 F.2d 871, 874. The confusion originated in such cases as *Avon* and *Osmond,* where the courts felt that *any* judicial intervention would circumvent the exhaustion requirement. For such courts the type of relief requested prior to the completion of the administrative process was irrelevant; it was a distinction without a difference. Although it is unclear whether this view has been completely discredited, *see* Johnson v. Postmaster General, 330 F. Supp. 1058, 1060 (D. Md. 1971), there have been numerous instances in recent years of judicial recognition of the power of courts to grant interim relief to maintain the status quo while an administrative decision on the merits is pending. See notes 57, 59 *supra.*

or rendered ineffective.[89] Having articulated this distinction, the court analogized the granting of interim relief pending an administrative decision with the universally conceded power of the courts to stay administrative decisions pending judicial review,[90] a traditional equitable power used to preserve the courts' jurisdiction.[91] In the court's view, the determination as to whether such interim relief should be granted was to be based upon an application of the *Virginia Petroleum Jobbers* four-point test.[92] Thus, *Murray* correctly portrayed interim relief as a complement to the administrative process, not in contravention with the requirements of the exhaustion doctrine,[93] and equated the power to grant such relief with the power to preserve the status quo pending judicial review.

Interim Relief Does Not Contravene Exhaustion. If there is a valid distinction to be drawn between exhaustion of administrative remedies and interim relief, it must be shown that the granting of

89. 462 F.2d at 874-75

90. See note 29 *supra.*

91. See Justice Frankfurter's analysis in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-11 (1942). *See also* Administrative Procedure Act § 10(d), 5 U.S.C. § 705 (1970).

92. See note 34 *supra* and accompanying text. The court in *Murray* found that temporary loss of employment may be irreparable harm sufficient to justify interim relief, even though back pay and full reinstatement would be granted to the employee upon a successful conclusion of her appeal—one of the four factors in the *Virgnia Petroleum Jobbers* test. The court observed that the inability to meet ongoing financial commitments because of an absence of present wages might well be irreparable damage. While referring to the four-point formula of *Petroleum Jobbers* for determining whether a stay should be issued in a particular case, the court appears to require a threshold showing of the posssibility of irreparable injury as a prerequisite for district court jurisdiction to grant the interim relief sought. The court also noted the statement of Justice Frankfurter that "[a] stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." 462 F.2d at 876-77, *quoting* Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10-11 (1942). However, the rationale for interim relief seems to require that prior to the exercise of such discretion "it must be shown that there is a possibility of irreparable harm." *Id.* at 877.

93. Judge Robb in his dissenting opinion, 462 F.2d at 880-81, rejects this analysis and contends that the application of the doctrine of exhaustion is not limited to cases in which judicial relief on the merits is sought, citing two cases, Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752 (1947); Osmond v. Riverdale Manor, Inc., 199 F.2d 75 (4th Cir. 1952). *But see* Settle v. Brown, 345 F. Supp. 405 (S.D. Tex. 1972), a case where interim relief was sought to enjoin temporarily the dismissal of a federal employee. There the court specifically adopted the reasoning of the majority in *Murray*, noting that "exhaustion of administrative remedies is not a real issue where a plaintiff seeks interim relief pending an administrative determination on the merits." *Id.* at 407.

interim relief to maintain the status quo pending an agency decision does not contravene the logic underlying the exhaustion doctrine. To justify such interim relief on the basis that the litigant is not asking the court to adjudicate the merits of the proceeding pending before the agency is insufficient. The petitioner in *PepsiCo* was not suggesting that the district court resolve the ultimate issue under consideration by the FTC—the legality of the exclusive franchise agreements; neither, of course, was the employee in *Murray* contending that the district court should immediately review the merits of her claim of improper dismissal. Thus, neither plaintiff was seeking an adjudication on the merits; both were willing to exhaust the prescribed administrative remedies as to the ultimate question before the respective agencies. Yet each was dissatisfied with an intermediate aspect of the proceedings and sought relief only from allegedly irreparable injury arising from *that aspect* of the administrative proceedings.

The basis for distinguishing the two cases lies in the nature of the injury alleged and the type of relief requested. In *PepsiCo,* the plaintiff objected to an agency procedural decision and sought immediate judicial review of the agency determination of that procedural issue. The court quite properly held that, since the grievanee of which PepsiCo had complained would be subject to judicial review following any FTC order arising from the hearing in question, the plaintiff would be required to exhaust the prescribed adminisitrative procedure.[94] Thus, where the question raised by a party will be subject to *meaningful* review by either the agency or the courts during the course of the prescribed statutory procedure, the party will not be allowed immediate access to the courts unless the facts of his case fall within one of the established exceptions to the exhaustion doctrine. In *Murray,* the plaintiff asked for judicial maintenance of the status quo to protect her from irreparable injury while the administrative decision was pending. In holding that the district court had jurisdiction to grant such relief, the court of appeals observed that the Civil Service Commission had no power to order a stay of the employee's discharge.[95] While this fact lends support to the court's contention that the granting of interim relief is not interference with the

94. If PepsiCo had been able to show that the technically "interlocutory" administrative decision had such an immediate adverse effect as to inflict irreparable damage, the decision could have been reviewed as a "final agency action." See note 81 *supra.*

95. 462 F.2d at 873.

administrative process and thus not in contravention of the rationale for the exhaustion doctrine, it is also clear that a court may grant interim relief to maintain the status quo without contravening the exhaustion doctrine even where the agency has the power to grant such relief and has declined to exercise it.[96] Admittedly, if the administrative agency in *Murray* had possessed the power to maintain the status quo, access to the district court would have been denied until the employee had sought and been denied the requested relief from the Commission;[97] however, the district court would then have had the power to grant such relief. In each situation the relief would be justified as a protection of potential judicial review jurisdiction. Moreover, the issuance of relief in the latter situation is no more in contravention of the exhaustion doctrine than in the former.

CONCLUSION

Where an agency has no power to grant interim relief in order to maintain the status quo and thus prevent irreparable damage while the final outcome of the administrative determination is uncertain, the available administrative remedies have been exhausted. Likewise, where the administrative agency has declined to exercise its power to grant interim relief to prevent irreparable injury, the petitioner has no further administrative remedies to exhaust *vis-a-vis* the harm alleged.[98] The exhaustion doctrine implies that there must be an available administrative procedure to be followed. If there is none, it is no violation of the exhaustion doctrine for a party to seek relief in a district court.[99] The Supreme Court has termed the power of a court to stay administrative action pending judicial review as part of

96. *See, e.g.*, Osmond v. Riverdale Manor, Inc., 199 F.2d 75 (4th Cir. 1952); Avon-Dairy Co. v. Eisaman, 69 F. Supp. 500 (N.D. Ohio 1946).

97. *Cf.* Ensey v. Richardson, 469 F.2d 664 (9th Cir. 1972).

98. *See* Murray v. Kunzig, 462 F.2d 871, 875 n.12 (D.C. Cir. 1972).

99. If the denial of interim relief could be shown to cause substantial irreparable damage, the decision could be subject to immediate judicial review on the ground that as to the harm alleged the administrative remedies have been exhausted, and thus the denial of interim relief was a final agency action subject to immediate judicial review under section 10(c) of the APA. Jaffe contends that the granting of interim relief in such situations contravenes neither the exhaustion doctrine nor section 10(c) of the APA since the petitioner is not seeking review of the agency's denial of interim relief but rather is asking the court to issue its own relief. JAFFE 668 n.70. This distinction is important, since in the latter situation the court would be less constrained to defer to the previous agency findings as to the propriety of granting the interim relief, presumably according to the *Virginia Petroleum Jobbers* test. See notes 33-34 *supra* and accompanying text.

the courts' traditional equitable powers, justified as a means of protecting the courts' jurisdiction.[100] As stated, a court should not require exhaustion of administrative procedure if such procedure offers no meaningful remedy for the harm asserted. Immediate review should be granted, whether justified in terms of a final agency action or in completion of exhaustion, since the harm alleged, by definition, will not be subject to meaningful review at a later time. Thus, in such a case, by granting immediate review the court is protecting its jurisdiction (or that of the court system as a whole). Seen in this light it becomes apparent that the granting of interim relief to maintain the status quo pending the administrative decision likewise serves to protect the courts' jurisdiction, and can be justified as part of a court's traditional equitable powers when not specifically authorized by statute. In sum, the requirements of exhaustion preclude immediate recourse to the courts for an adjudication of the merits of either the ultimate issue facing the administrative agency or an interlocutory agency decision, unless the factual circumstances of the case are such as to bring it within one of the recognized exceptions to the exhaustion doctrine.[101] However, a technically interlocutory decision may have such an immediate and adverse effect as to be a "final agency action" reviewable under section 10(c) of the APA. Moreover, where a plaintiff seeks interim relief to maintain the status quo pending a final administrative determination, the district court has the power to grant such relief in appropriate cases to prevent irreparable injury.[102]

Although the power to grant interim relief pending a final administrative determination has been specifically recognized in several circuits,[103] and its existence has been strongly implied by the Supreme Court,[104] other courts have not accepted the doctrine.[105] Such courts have justified their holdings on the grounds that the granting

100. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9-10 (1942).

101. See notes 16-23 *supra* and accompanying text.

102. If the decision is deemed "final," the exhaustion requirement has been fulfilled. *See* note 81 *supra*.

103. Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965); West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948).

104. FTC v. Dean Foods Co., 384 U.S. 597, 604 (1966); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658, 671 n.22 (1963).

105. Osmond v. Riverdale Manor, Inc., 199 F.2d 75 (4th Cir. 1952); Johnson v. Postmaster General, 330 F. Supp. 1058 (D. Md. 1971). *See also* Murray v. Kunzig, 462 F.2d 871, 880-83 (D.C. Cir. 1972) (dissenting opinion).

of interim relief to maintain the status quo circumvents the requirement of exhaustion of administrative remedies. However, an analysis of the logic of the exhaustion doctrine inexorably leads to the conclusion that where the administrative agency has no power to maintain the status quo while its final opinion on the merits is still pending, or has declined to exercise the power, the granting of such relief in such cases as meet the *Virginia Petroleum Jobbers* guidelines does not contravene the requirement that one exhaust his administrative remedies prior to seeking judicial relief.