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Pre-Enforcement Review of an Administrative Ruling

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PRE-ENFORCEMENT REVIEW OF AN ADMINISTRATIVE RULING

In exploring administrative law, every precaution should be taken. Fundamentals should not be presumed. Administrative law exists but defies coherent explication. It is not a single subject, but a whole congeries of separate subjects, each, moreover, so dynamic that it is almost impossible to write upon it without being out of date by the time of publication.[1]

Justice Clark in describing administrative law remarked: "From a functional standpoint the administrative agency is a hybrid. . . . 'They are part elephant, part jack rabbit and part field lark.' "[2]

Since its inception administrative law has met with profound criticism. However, its most articulate defender states:

> The power of judicial review under our traditions of government lies with the courts because of a deep belief that the heritage they hold makes them experts in the synthesis of design. . . . [D]ifficulties. . . have arisen. . . because courts cast aside that role to assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the "supremacy of law". Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man's destiny upon this earth.[3]

It is the purpose of this note to examine the relationship between the courts and administrative agencies. When viewed in an historical light, this relationship appears to be one of change and uncertainty. However, this is not surprising when one considers the metamorphic nature of administrative agencies. From simple beginnings as legislative aids, today some are practically entities in themselves. The focus of this paper is pri-

1. *See* Miller, Book Review, 34 GEO. WASH. L. REV. 970 (1965-66); Westwood, *The Davis Treatise: Meaning to the Practitioner,* 43 MINN. L. REV. 607 (1958-59).

2. Clark, *Administrative Justice,* 13 AD. L. REV. 6, 7-8 (1960-61).

3. J. LANDIS, THE ADMINISTRATIVE PROCESS 154 (1938).

marily aimed at the problem of when may the courts intervene in the administrative process and provide a forum for one who feels injured by an administrative ruling.

I. ADMINISTRATIVE REVIEW: JUDICIAL ATTITUDE

The early attitude toward administrative decisions was one of nonreviewability on the theory that interference would be productive of nothing but mischief and confusion.[4] In *American School of Magnetic Healing v. McAnnulty*[5] the Supreme Court first asserted that a limited review is appropriate unless Congress specifically provides against it or unless special reason appears for denying review.[6] Modern decisions have raised this assertion into a presumption in favor of review that may be rebutted by an affirmative indication of legislative intent against reviewability.[7]

The Administrative Procedure Act provides for judicial review to any person suffering a legal wrong because of agency action.[8] This is true unless a statute precludes such review or the action is committed by law to agency discretion.[9] For a statute to preclude judicial review there must be clear and convincing evidence of this intent and a failure to provide specifically for judicial review is not evidence of an intent to withhold review.[10] From this the courts have adopted a view of "hospitable" interpretation to expand the availability of judicial review.[11] Based on this standard the courts look directly to the statute before them.[12]

Generally, no one is entitled to judicial relief for supposed or threatened injury until prescribed administrative remedies have been exhausted.[13] This rule came into being simply as a policy

4. *See, e.g.*, Decatur v. Paulding, 39 U.S. 497, 516 (1840).
5. 187 U.S. 94 (1902).
6. *Id.* at 108.
7. *E.g.*, Rusk v. Cort, 369 U.S. 367 (1962); Heikkila v. Barber, 345 U.S. 229 (1953); Board of Governors v. Agnew, 329 U.S. 441 (1947). See 15 F.R.D. 411, 427 (1954) for an analysis of the *Heikkila* case.
8. Administrative Procedure Act § 10(a), 60 Stat. 243 (1946), as amended, 5 U.S.C. § 702 (1966).
9. Community Nat'l Bank v. Gidney, 192 F. Supp. 514 (E.D. Mich. 1961).
10. Rusk v. Cort, 369 U.S. 367, (1962).
11. Shaughnesy v. Pedreiro, 349 U.S. 48 (1955).
12. Levers v. Anderson, 326 U.S. 219 (1945).
13. *See* FCC v. Schreiber, 381 U.S. 279 (1965).

adopted by the courts,[14] and will be by-passed if there is good reason for making an exception.[15]

Another requirement before review—ripeness—is based on whether there is a justiciable conflict between the agency and the plaintiff. Both the Administrative Procedure Act [16] and the Declaratory Judgment Act[17] require ripeness.

This question focuses on the nature of the judicial process and the basic principle that judicial machinery should be conserved for real and imminent problems, not squandered on abstract and hypothetical ones.[18] "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, . . . from judicial interference. . . " until formal and concrete action is taken by the agency.[19]

The scope of judicial review was broadened in the recent cases of *Abbott Laboratories v. Gardner*[20] and *Gardner v. Toilet Goods Association*,[21] in which the Supreme Court allowed review prior to the enforcement of an administrative ruling.

The Federal Food, Drug and Cosmetic Act provides that label or advertising material relating to prescription drugs will be deemed "misbranded" unless the "established name" is printed on the label and other printed material "is printed prominently and in type at least as large as that used thereon for any proprietary name or designation for such drug."[22] The Commissioner of Food and Drugs, after inviting and considering comments submitted by interested parties, promulgated regulations that require the established name to be displayed *each time* the brand name appears.[23]

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14. Smith v. United States, 199 F.2d 377 (1st Cir. 1952).

15. United States v. Harvey, 131 F. Supp. 493 (N.D. Texas 1954); *see* Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 328-29 (1962-63).

16. Administrative Procedure Act § 10(c), 60 Stat. 243 (1946), as amended, 5 U.S.C. § 704 (1966).

17. Declaratory Judgment Act 28 U.S.C. § 2201 (1964).

18. 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 21.01 (1958).

19. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

20. 387 U.S. 136 (1967).

21. 387 U.S. 167 (1967).

22. Federal Food, Drug, and Cosmetic Act § 502(e)(1)(B), as amended, 76 Stat. 790 (1962), 21 U.S.C. § 352(e)(1)(B) (1964) (label and labeling); Federal Food, Drug, and Cosmetic Act § 502(n)(1), added by 76 Stat. 791 (1962), 21 U.S.C. § 352(n)(1) (1964) (advertisements).

23. 21 C.F.R. §§ 1.104(g), 1.105(b) (1966).

In *Abbott*, a group of drug manufacturers and a drug manufacturers' association brought suit for a declaratory judgment that these regulations were void and for an injunction against their enforcement. Plaintiffs contended that the "each time" requirement went beyond the scope of the act and that without immediate judicial relief, they would be confronted with the dilemma of choosing between costly compliance with the regulations or evasion of the regulations, involving the risk of criminal prosecution.[24] The district court granted the relief sought,[25] but the court of appeals reversed.[26] In allowing pre-enforcement review the Supreme Court held that the Federal Food, Drug and Cosmetic Act did not preclude such review, and that the controversy was ripe for judicial resolution.[27]

In the companion case of *Gardner v. Toilet Goods Association*,[28] the plaintiff brought suit for pre-enforcement declaratory and injunctive relief, contending that the Commissioner of Food and Drugs exceeded his statutory authority in regulations prescribing conditions for the use of color and additives in food, drugs, and cosmetics.[29] Of the three challenged regulations, one extended the definition of "color additives" to include certain finished products, such as lipstick, and rouge, as well as color components.[30] Another defined "all diluents" to include non-color ingredients of cosmetics as well as those actually serving to dilute colors.[31] The third regulation limited the scope of a statutory exemption of hair dye products from normal clearance requirements.[32] The Supreme Court held that the challenge was ripe for review because the issue was a straight forward legal question, consideration of which would not necessarily be facili-

24. It should be noted that the threat of criminal sanctions for noncompliance was unrealistic. The Solicitor General had represented that if court enforcement became necessary, the Department of Justice would proceed only civilly for an injunction or by condemnation.

25. Abbott Labs. v. Celebrezze, 228 F. Supp. 855 (D. Del. 1964).

26. Abbott Labs. v. Celebrezze, 352 F.2d 286 (3d Cir. 1965).

27. Abbott Labs. v. Gardner, 387 U.S. 136 (1967).

28. 387 U.S. 167 (1967).

29. *See* Federal Food, Drug, and Cosmetic Act, §§ 706(a)-(c), 21 U.S.C. § 352 (9)(c) (1964). Four regulations were in issue, the fourth asserting the agency's right to inspect cosmetic formulae and process was decided against plaintiff and will not be discussed here. Toilet Goods Ass'n. v. Gardner, 387 U.S. 158 (1967); 21 C.F.R. § 8.28(a)(4) (1966).

30. 21 C.F.R. § 8.1(f) (1966).

31. 21 C.F.R. § 8.1(m) (1966).

32. 21 C.F.R. § 8.1(u) (1966); Federal Food, Drug, and Cosmetic Act § 601(e), 52 Stat. 1054 (1938), as amended, 21 U.S.C. § 361(e) (1964).

tated if raised in the context of a specific attempt to enforce the regulation, and that the regulations were self-executing and had an immediate and substantial impact on the manufacturers.[33]

II. The Court's Handling of the Statute

The Federal Food, Drug and Cosmetic Act includes a specific procedure for review of certain enumerated regulations.[34] The government contended that other types were necessarily meant to be excluded. The Court concluded, however, after an extensive look into the legislative history, that there was no legislative purpose to eliminate judicial review of non-enumerated agency action. Also the "savings clause"[35] was interpreted to be in harmony with the policy favoring judicial review.

The confusion and general unreliability of using statutory provisions was summed up by a leading authority:

> When statutes are silent concerning judicial review, as many are, the administrative action is sometimes reviewable and sometimes not. When statutes provide that the administrative action "shall be final" the action is sometimes reviewable and sometimes not. When statutes provide that the action "shall not be reviewed," the action is sometimes reviewed and sometimes not.[36]

III. Exhaustion

The exhaustion doctrine requires that when a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. The doctrine determines at what stage a person may secure review and is instrumental in promoting proper relationships between the courts and administrative agencies.[37] The logic of the rule is that the remedy of administrative review is available on the

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33. Gardner v. Toilet Goods Ass'n., 387 U.S. 167 (1967).

34. Federal Food, Drug, and Cosmetic Act, §§ 701(e)-(f), 52 Stat. 1055 (1938), as amended, 21 U.S.C. §§ 377(e)-(f) (1964).

35. Federal Food, Drug, and Cosmetic Act, § 701(f)(6), 52 Stat. 1056 (1938), 21 U.S.C. § 371(f)(6) (1964); *see* Stark v. Wickard, 321 U.S. 288, 308 (1944) in which the Court used a similar savings clause in determining the availability of review.

36. 4 Davis, Administrative Law Treatise, § 28.01 (1958).

37. United States v. R.C.A., 358 U.S. 334 (1958); United States v. Western Pacific R.R., 352 U.S. 59, (1956).

litigant's initiative and will protest his claim of right.[38] Its principal application is to compel parties to take full advantage of the available administrative remedies and thus serves to prevent private litigants from ousting administrative bodies from the exercise of adjudication properly committed to them.[39]

In *Myers v. Bethlehem Shipbuilding Corp.*,[40] the Supreme Court said that the long settled rule is that no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted. However, the courts use wide discretion in applying the doctrine. In several cases the Court has passed upon questions of administrative jurisdiction without requiring exhaustion,[41] while invoking the requirement in others.[42] The two leading authorities also seem to be at odds over the exhaustion question.[43] Professor Davis contends that there is no rule of exhaustion, but rather a discretionary power used by the Court to refrain from having to offer a rational explanation of why in a particular case it goes one way and not the other.[44] On the other hand, Professor Jaffe insists that the rule is not discretionary but is applied in an absolute fashion by the Court.[45]

The South Carolina Supreme Court has recognized that the exhaustion requirement is not a rigid rule, but a discretionary matter left to the courts.[46] However, this is only a token recognition because the South Carolina Court has refused to hear an appeal until the agency has completed its proceedings.[47]

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38. Jaffe, *The Exhaustion of Administrative Remedies,* 12 BUFF. L. REV. 327 (1963).

39. *See generally* 2 AM. JUR. 2d *Administrative Law* § 598 (1962).

40. 303 U.S. 41 (1938).

41. Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919); Indeed, the Court by-passed the exhaustion question in Greene v. United States, 376 U.S. 149 (1964) by first deciding the substantive issue.

42. Franklin v. Jonco Aircraft Corp., 346 U.S. 868 (1953); Macauley v. Waterman S.S. Corp., 327 U.S. 540 (1946); Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943).

43. Davis, *Judicial Control of Administrative Action,* 66 COLUM. L. REV. 635 (1966); Jaffe, *The Exhaustion of Administrative Remedies,* 12 BUFF. L. REV. 327 (1963); Schulz, Book Review, 19 AD. L. REV. 217 (1967).

44. Davis, *Judicial Control of Administrative Action,* 66 COLUM. L. REV. 635, 657 (1966); *See also* 2 AM. JUR. *Administrative Law* § 600 (1962).

45. Jaffe *The Exhaustion of Administrative Remedies, supra* note 43, at 328.

46. Pullman Co. v. Public Serv. Comm'n, 234 S.C. 365, 108 S.E.2d 571 (1959).

47. *E.g.,* DePass v. City of Spartanburg, 234 S.C. 198, 107 S.E.2d 350 (1959); Isgett v. Atlantic Coast Line R.R., 223 S.C. 56, 74 S.E.2d 220 (1953); American Surety Co. v. Muckenfuss, 172 S.C. 169, 173 S.E. 290 (1934).

Because of the discretionary character of the exhaustion rule, there are occasions for dispensing with the usual requirements. Court intervention otherwise premature, would be appropriate if the agency acted outside its scope of competence. Also exhaustion may not be required if an agency has inadequate administrative remedies so that the requirement would be futile.[48] It is often stated that exhaustion does not apply when an issue of constitutionality is raised. The precedents, however, present conflicting views. In *Aircraft & Diesel Equipment Corp. v. Hirsch*, [49] the Court applied the exhaustion requirement, invoking the rule that constitutional issues should be avoided. The Court tried to rectify the conflicting precedents by stating in *Public Utilities Commission v. United States*:[50]

> If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way for protecting the asserted constitutional right.[51]

Despite an abundance of statements that judicial relief is withheld until remedies are exhausted, the cases show that exhaustion is sometimes required and sometimes not. A guide might be to look to the extent of injury of a party if he pursues the administrative remedies. The Court illustrated this particularly well in the *Abbott* case. The clarity of administrative jurisdiction and the extent of specialized administrative understanding should be equally considered in applying the exhaustion rule.[52]

IV. Ripeness

> But my maturing view is that courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril

48. Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958); Levers v. Anderson, 326 U.S. 219 (1945).

49. 331 U.S. 752 (1947); Allan v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954). *Contra*, Lichter v. United States, 344 U.S. 742 (1948).

50. 355 U.S. 534 (1958).

51. *Id.* at 539-40.

52. 3 Davis Administrative Law Treatise, § 20.10 (1958); *see* Folk, *Administrative Law, 1961-62 Survey of S.C. Law*, 15 S.C.L. Rev. 2, 27 (1962-63).

and insecurity. What are courts for, if not for . . . adjudicating the rights of those against whom the law is aimed, though not immediately applied?[53]

As noted ripeness is based on the principle that only real and imminent problems are considered by the court in order to avoid premature adjudication. The Administrative Procedure Act provides that review, unless otherwise provided for under a given statute may be had only from "final agency action".[54] Courts have generally construed the requirement broadly, looking to the consequences of the agency's action.[55] It has been held that an agency order, although not the last order in an administrative proceeding, is "final" for purposes of review if it imposes an obligation, denies a right or fixes some legal relationship which may cause irreparable injury.[56] This "pragmatic" interpretation of the finality element is best illustrated in *Columbia Broadcasting System v. United States.* [57] The Court took a flexible view of finality by looking to the need for protecting the appellant from threatened injury by agency regulation. Two later cases extended further this flexible view by allowing review by determining the regulations at issue to be "self-executing" such that promulgation foreclosed any action except compliance or liability for noncompliance.[58].

V. Conclusion

The Supreme Court has often closed the judicial doors in the name of ripeness and exhaustion. It may have been hesitant to enter this area because of a fear that it might disrupt the administrative process. However, when the choice is between interrupting the administrative machinery and aiding a private litigant who has suffered a definite injury, the Court should not hesitate to follow the latter course. As the Court stated in *Abbott*:

53. Public Affairs Associates v. Rickover, 369 U.S. 111, 116 (1962) (Douglas, concurring).

54. Administrative Procedure Act § 10(c), 60 Stat. 243 (1946), 5 U.S.C. § 704 (1966); *See* Civil Aeronautics Bd. v. Delta Air Lines, 367 U.S. 316 (1964); *See generally* Comment, *"Final" Orders: Section 10(c) of the A.P.A.*, 6 Stan. L. Rev. 531 (1953-54).

55. *See* Lam Man Chi v. Bouchard, 314 F.2d 664, 670 (3d Cir. 1963).

56. Northeast Airlines Inc. v. C.A.B., 345 F.2d 662 (1st Cir. 1965).

57. 316 U.S. 407 (1942).

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

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted, absent a statutory bar or some other circumstance. . . .[59]

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59. Abbott Labs. v. Gardner, 387 U.S. 136, 153 (1967). The Court noted the day to day effect on business and also the "sensitive" character of plaintiff's business.