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ARTICLES

**Exhaustion of Administrative Remedies -
New Dimensions Since *Darby***

WILLIAM FUNK*

I. The Traditional Rule

In a nutshell, the doctrine of exhaustion of administrative remedies requires that prior to judicial review of agency action, you must first exhaust any administrative avenues of possible relief.

This doctrine has its origin in common law, or more accurately federal equity jurisdiction, which is the source of judicial review of federal agency action.¹ It is analogous to the general rule that equity provides relief only when the plaintiff lacks an adequate remedy at law – a requirement that is reflected today in Section 704's limitation, that review under the Administrative Procedure Act (APA) is available only for final agency action "for which there is no adequate remedy in court."² Exhaustion, however, implicates policies beyond merely staying one court's hand in favor of another, or one legal regime's forms of relief for another. The doctrine of exhaustion also implicates the different spheres of judicial and executive action, involving separation of powers con-

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1. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

2. Administrative Procedure Act, 5 U.S.C. § 704 (1994).

cerns on the one hand and relative competence and expertise on the other. Moreover, exhaustion is efficient from a judicial perspective.

In the leading Supreme Court case on the subject, *McCarthy v. Madigan*,³ the Court elaborated on these themes. Exhaustion, it said, is grounded in the notion that, because Congress has delegated the decision-making authority to an agency, the agency and not the courts ought to have the primary responsibility.⁴ This is particularly so "when the action under review involves exercise of the agency's discretionary power"⁵ or when the statute allows the agency to apply its special expertise.⁶ In addition, the doctrine allows an agency to correct its own mistakes and encourages adherence to agency procedures.⁷ Finally, requiring exhaustion fosters judicial efficiency in two ways. First, if the agency has the opportunity to correct its own errors, the case may become moot and never reach the courts.⁸ Second, even if the case is heard, requiring exhaustion may produce a better record for judicial review.⁹

At the same time, there are other interests that might lead a court to permit an exception to the exhaustion doctrine. As the *McCarthy* Court said:

[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.¹⁰

The Court has identified three circumstances where the interests of the individual are particularly strong. One involves the situation where requiring exhaustion of administrative relief may actually prejudice subsequent court action.¹¹ This could occur when the administrative procedure would delay resolution for an unreasonable time. Another involves the situation where the agency cannot grant effective relief, making exhaustion a futile en-

3. See 503 U.S. 140 (1992).

4. See *id.* at 145.

5. *Id.*

6. See *id.*

7. See *id.*

8. See *McCarthy*, 503 U.S. at 145.

9. See *id.*

10. See *id.* at 146 (alteration in original) (citing *West v. Bergland*, 611 F.2d 710, 715, cert. denied, 449 U.S. 821 (1980)).

11. See *McCarthy*, 503 U.S. at 146-147.

deavor.¹² An example would be where a party claims that the agency's statute is unconstitutional. A third situation is where the agency's procedure or decision-maker is shown to be unfair or prejudiced.¹³

Despite the identification of these general situations, the Court has recognized that the balancing of interests is extremely case-specific, because it turns on "the nature of the claim presented and the characteristics of the particular administrative procedure provided."¹⁴ The effect of such case-specific balancing has been a general indeterminacy of outcome in traditional exhaustion cases. In a notable 1985 law review article, Professor Marcia Gelpe exhaustively researched the application of the exhaustion doctrine and concluded that:

[T]he law governing exhaustion of administrative remedies is complex and confusing and fosters needless litigation: litigation that is burdensome to the courts and costly to defendants, that adversely affects agency decision making, and that by its very existence, wrongly influences courts to dispense with the exhaustion requirement. Exhaustion remains troublesome to the courts; many of the decisions are confusing and poorly reasoned.¹⁵

Her article is an excellent attempt to summarize the state of the law at that time. In addition, she called upon the courts to simplify and regularize the exemptions to the exhaustion doctrine, both to further its goals and to clarify the law.¹⁶ Like most law review articles, however, its effect on the courts has been indiscernible.

II. The *Darby* Revolution

This traditional doctrine of exhaustion of administrative remedies was in large part overruled by the Supreme Court's decision in 1993 in *Darby v. Cisneros*.¹⁷ In that case, an Administrative Law Judge (ALJ) of the Department of Housing and Urban Development (HUD) had debarred Darby from further participation in

12. See *id.* at 147-148.

13. See *id.* at 148.

14. *Id.* at 146.

15. Marcia Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 3 (1985).

16. See generally *id.*

17. See 509 U.S. 137 (1993).

HUD procurement contracts.¹⁸ HUD's regulations provided that the ALJ's decision would be final unless the Secretary, within 30 days of receipt of a request, decided as a matter of discretion to review the finding of the hearing officer.¹⁹ A party was allowed to request such a review within 15 days of receipt of the ALJ's decision.²⁰ Darby did not seek administrative review, but instead sued in district court under the APA alleging that the ALJ's decision was not in accordance with law.²¹ The government moved to dismiss on the ground that Darby had failed to exhaust his administrative remedies.²² The district court denied the motion, applying traditional exhaustion doctrine but finding that exhaustion would be futile and that available administrative remedies would be insufficient.²³ The Court of Appeals also applied traditional exhaustion doctrine but reversed, finding that Darby had failed to satisfy his burden of showing that he was entitled to an exception to the traditional rule.²⁴

The Supreme Court, however, did not apply the traditional doctrine. Instead, the Court looked to Section 704 of the APA.²⁵ That section provides:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.²⁶

By its terms, this language declares agency action to be "final" without regard to whether a person has sought any form of reconsideration or made an appeal to superior agency authority, *unless* a statute expressly provides otherwise *or* the agency has, by rule, required the person to appeal to superior agency authority *and* has provided that the agency action is inoperative during the ap-

18. *See id.*

19. *See id.*

20. *See id.*

21. *See Darby*, 509 U.S. 137.

22. *See id.*

23. *See Darby v. Kemp*, 957 F.2d 145, 146 (4th Cir. 1992), *rev'd sub nom. Darby v. Cisneros*, 509 U.S. 137 (1993).

24. *See id.* at 146-148.

25. *See* 5 U.S.C. § 704.

26. *Id.*

peal.²⁷ In *Darby*, the government conceded that no statute required persons to exhaust their HUD administrative remedies.²⁸ Moreover, the HUD regulation was not phrased in terms of *requiring* persons to invoke the appeals process as a pre-condition of seeking judicial review. It provided that a person "may request" review.²⁹ Even then, review was to be at the discretion of the Secretary.³⁰ Finally, the HUD regulation did not provide for automatically staying the effect of the debarment action pending agency review.³¹ Accordingly, the Court found that the ALJ's decision was a "final" agency action.³²

This, by itself, was not a surprising conclusion. The government did not contest that the agency's action was final within the meaning of the APA. Its argument was that, notwithstanding the fact that it was final agency action, the court should not review it because *Darby* had not exhausted his administrative remedies.³³ The Supreme Court acknowledged that "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality."³⁴ Nevertheless, the Court also noted that the *McCarthy* Court³⁵ had recognized that the availability of an exhaustion requirement was dependent upon congressional intent.³⁶ Because the doctrine of exhaustion is judicially created, statutory language could amend or repeal it. Consequently, the Court turned to the first sentence of Section 704, which states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."³⁷ Having decided that HUD's action was "final agency action," the Court found that Section 704's language precluded judicial imposition of an exhaustion requirement, because the language mandated without exception that "final agency action" be subject to judicial review.³⁸

This conclusion was surprising. First, as even the Court observed, it was surprising that it had taken over forty-five years for

27. *See id.*

28. *See Darby*, 509 U.S. at 144.

29. *See id.* at 141.

30. *See id.*

31. *See id.*

32. *See id.*

33. *See Darby*, 509 U.S. at 141.

34. *Id.* at 144.

35. *See McCarthy*, 503 U.S. 140.

36. *See id.* at 144-145.

37. 5 U.S.C. § 704.

38. *See Darby*, 509 U.S. at 147.

anyone to discover this meaning of Section 704.³⁹ Second, the Court also admitted that during this period there was “some dicta” in some of its cases that tended to support the government’s interpretation that Section 704 only addressed the timing of review, not the question of exhaustion.⁴⁰ Nonetheless, the Court believed that “the text of the APA leaves little doubt” that when an agency action is “final for the purposes of [Section 704],” it is then “subject to judicial review.”⁴¹ Section 704, “by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.”⁴² In the last sentence of Section 704, with its explicit reference to “any form of reconsideration” and “an appeal to superior agency authority,”:

Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available. If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency, the last sentence of § 704 would make no sense.⁴³

The effect of *Darby* is significant. In any judicial review of agency action under the APA, the traditional, judicially-derived doctrine of exhaustion is no longer applicable. If a statute does not expressly require exhaustion and the agency has not by rule *required* a party to appeal to a higher agency authority as a precondition to judicial review and stayed the effect of the agency action pending the agency appeal, then no exhaustion can be required. If, however, the case does not arise under the APA, then the traditional doctrine of exhaustion survives.

A number of agencies had exhaustion provisions similar to HUD’s when *Darby* was decided. These provisions generally provided for discretionary appeals or voluntary appeals, or did not provide for staying the effect of the agency action pending appeal. At the same time, many litigants were not aware of *Darby* and the possible benefit it could provide to them.⁴⁴ In cases where liti-

39. See *id.* at 145.

40. See *id.* at 146.

41. *Id.*

42. *Id.*

43. See *Darby*, 509 U.S. at 146-147.

44. See, e.g., *Glisson v. United States Forest Service*, 55 F.3d 1325 (7th Cir. 1995) (Posner, J.) (court admonishes both parties for arguing common law exhaustion in an

gants were aware, *Darby* provided them relief. For example, in *Coteau Properties Co. v. Department of Interior* ("DOI"),⁴⁵ an applicant for a surface mining permit filed an action seeking a preliminary injunction to prevent the Office of Surface Mining, Reclamation and Enforcement ("OSM") from enforcing a final agency decision.⁴⁶ DOI claimed the applicant had not exhausted his administrative remedies, but the court found that no statute or regulation required the person to exhaust his administrative remedies and ordered the injunction issued.⁴⁷ In *DSE, Inc. v. United States*,⁴⁸ the Small Business Administration (SBA) had denied the plaintiff a designation as a small business and, rather than appeal that decision within the SBA, the plaintiff sought judicial review.⁴⁹ The court held that the failure to stay the size determination precluded the regulations from satisfying Section 704's requirements for mandating exhaustion.⁵⁰ In *United States v. Menendez*,⁵¹ the defendants were charged with violating the Endangered Species Act (ESA),⁵² and administrative penalties were imposed.⁵³ The defendants failed to appeal those penalties within the agency, but the court held that the appeals were discretionary with the agency, virtually identical to the appeals in *Darby*.⁵⁴ Accordingly, the defendants did not need to exhaust those appeals before raising issues in defense to the government's case to collect the penalties in court.⁵⁵ The court also said that it made no difference whether the persons were trying to challenge the agency action as a defense to an enforcement action or by instituting litigation to review the agency action.⁵⁶

III. The Current State of the Law

Darby contained the possibility of simplifying the law of exhaustion, but the jury is still out. As might be expected when the

APA case two years after *Darby*, but court finds that U.S. Forest Service regulations do require exhaustion, satisfying Section 704).

45. See 53 F.3d 1466 (8th Cir. 1995).

46. See *id.*

47. See *id.*

48. See 169 F.3d 21 (D.C. Cir. 1999).

49. See *id.*

50. See *id.* at 27.

51. See 48 F.3d 1401 (5th Cir. 1995).

52. Endangered Species Act, §§ 2-11, 16 U.S.C. §§ 1531-1540 (1994).

53. See *Menendez*, 48 F.3d at 1401.

54. See *id.* at 1410-1411.

55. See *id.*

56. See *id.*

law changes abruptly after a long period, *Darby* left a number of questions unanswered.

A. The Need to Complete Exhaustion of Voluntarily Invoked Administrative Remedies

In *Darby*, the private party ignored the voluntary, discretionary administrative appeal system and proceeded directly to court. The Supreme Court, interpreting Section 704, found that the private party's action was proper because the agency action was final. The question quickly arose, however, whether, if a person did initiate a voluntary, discretionary administrative appeal, the person could abandon that appeal and bring a judicial action. In *Darby* itself, the Court had indicated in dictum that under the traditional exhaustion doctrine, even if an agency decision were otherwise final, if a person undertook an administrative appeal, this action rendered the agency decision non-final, requiring exhaustion of the appeal undertaken.⁵⁷ Similarly, two years after *Darby*, in *Stone v. Immigration and Naturalization Service*,⁵⁸ the Court again stated that under "both the APA and the Hobbs Act . . . [t]he timely filing of a motion to reconsider renders the underlying order non-final for purposes of judicial review."⁵⁹ The *Stone* Court did not cite *Darby*, but instead cited to pre-*Darby* traditional exhaustion doctrine cases.⁶⁰ In other words, the Court's dictum was likely made without considering how *Darby* might have changed the landscape. Nonetheless, a subsequent court of appeals case relied upon the dicta in *Stone* and *Darby* to conclude that if a voluntary or discretionary appeal is initiated, then the appeal would need to be exhausted before seeking judicial review under the APA, because filing the appeal would render the agency decision non-final.⁶¹ The cases uniformly reach this conclusion, although most do not even cite *Darby*.⁶² Accordingly, parties faced with an appeal system that does not meet *Darby*'s exhaustion requirements must choose whether they wish to invoke that system

57. See *id.*

58. See 514 U.S. 386 (1995).

59. *Id.* at 392.

60. See *id.*

61. See *Acura of Bellevue v. Reich*, 90 F.3d 1403 (9th Cir. 1996) (citing *Darby v. Cisneros*, 509 U.S. 137 (1993) and citing *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995)).

62. See, e.g., *City of New Orleans v. Securities Exchange Commission*, 137 F.3d 638 (D.C. Cir.1998).

or go directly to court. They cannot start the administrative appeal and seek judicial review of the same administrative decision.

It is probably futile to point out that the text of Section 704, which the Court in *Darby* thought controlling, explicitly states that an "agency action otherwise final is final for the purposes of [judicial review] whether or not there *has been presented* . . . an application. . . for an appeal to superior agency authority."⁶³ The use of the past tense more directly applies to the filing of an appeal, which the courts have uniformly held requires exhaustion, than it does to the failure to file any appeal, which the *Darby* Court held did not require exhaustion.⁶⁴ Thus, if the Court was serious about explicit text governing the issue, as it suggested in *Darby*, rather than rely on a long line of cases, it might hold that even filing an appeal would not destroy finality. If this seems unlikely, one can only note that the decision in *Darby*, rejecting past cases in favor of text, was quite a surprise.

B. Do the Traditional Exceptions to the Exhaustion Requirement Survive *Darby*?

Although exhaustion is generally required before seeking judicial review of an agency action, there are exceptions to the traditional rule. Because these exceptions were derived by common law to be applied to a common law doctrine of exhaustion, the question arises whether those exceptions would apply to a statutory exhaustion requirement. In *Darby*, the Court held that courts could not impose additional exhaustion requirements not contained in the statute.⁶⁵ That is, if exhaustion is not required by the terms of the statute, a court cannot in its equitable or common law power add such a requirement based upon its policy judgment. Analogously, it can be argued, because Section 704 specifies the situations in which exhaustion may be required (when required by statute, or by agency rule and the agency stays the effect of its decision pending appeal), it precludes a court from excusing someone from having to exhaust their administrative remedies where the statute provides for exhaustion. Such a conclusion would be supported by statements in *Darby* suggesting that the language of Section 704 represents a congressional statement of when exhaustion should take place.⁶⁶

63. 5 U.S.C. § 704 (emphasis added).

64. See 509 U.S. 137.

65. See *id.*

66. See *id.* at 146.

When a separate statute specifically requires exhaustion, some courts have held that the common law exceptions to the exhaustion requirement simply do not apply.⁶⁷ Other courts, however, have been less clear. For example, in one case the court found that the Surface Mining Control and Reclamation Act (SM-CRA)⁶⁸ explicitly required exhaustion in certain cases.⁶⁹ Nevertheless, the court considered the petitioner's claim of inadequacy, futility, and irreparable injury, but held that the petitioner's proof was not sufficient.⁷⁰ The court's approach suggests that with a better showing the court might have found a common law exception applicable notwithstanding the statutory exhaustion requirement. In particular, the common law exception for constitutional claims still seems available in several courts, which base their decisions on pre-*Darby* precedent.⁷¹ This may be explained on the basis that constitutional claims can be brought under the APA or under the Constitutional provision itself, in which case Section 704 would not be applicable.

Similar confusion exists where an agency rule requires an administrative appeal and stays the agency decision pending appeal. The Fourth Circuit has suggested that *Darby* in effect eliminated any equitable exceptions to an exhaustion requirement imposed by regulation in accordance with the terms of Section 704.⁷² The D.C. Circuit, while not deciding the issue, indicated in dictum that the logic of *Darby* would suggest the unavailability of the equitable exceptions to exhaustion.⁷³ The court said:

One may wonder whether judicially-recognized exceptions to a judicially-created exhaustion requirement are still pertinent after *Darby*. If courts are forbidden from requiring exhaustion when § 10(c) of the APA does not, why should courts be free to

67. See, e.g., *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (Federal Crop Insurance Act contains explicit exhaustion requirement). See also *Volvo GM Heavy Truck Corp. v. Dep't of Labor*, 118 F.3d 205, 209-211 (4th Cir. 1997) (Federal Property and Administrative Services Act of 1949 requires exhaustion).

68. 30 U.S.C. §§ 1201, 1275-1276 (1994).

69. See *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement*, Dep't of Interior, 20 F.3d 1418, 1425 (6th Cir. 1994).

70. See *id.*

71. See *id.* (citing a case discussing *Leedom v. Kine*, 358 U.S. 184 (1959) (exception to statutory preclusion of review)).

72. See *Volvo GM Heavy Truck Corp.*, 118 F.3d at 209-210 (noting that the cases cited by plaintiff allowing for exceptions "pre-dated the Court's pronouncement in *Darby* that all APA claims are subject to an exhaustion requirement").

73. See *Marine Mammal Conservancy, Inc. v. Dep't of Agric.*, 134 F.3d 409, 411 (D.C. Cir. 1998).

excuse exhaustion when the next to last clause of § 10(c) demands it? If an agency rule requires, without exception, that a party must take an administrative appeal before petitioning for judicial review, on what basis may a court excuse non-compliance?⁷⁴

There are, however, a number of cases in which courts, apparently aware of *Darby*, although not addressing the argument above, seem to believe that the exceptions would apply.⁷⁵ Also, there are a number of cases where the availability of exceptions is discussed and even found, without even a citation to *Darby*.⁷⁶ In short, the case law is hopelessly confused.

An argument does exist for continuing the traditional exceptions to exhaustion, even in an APA case, where an agency rule requires exhaustion and stays the agency decision pending review. In *Darby*, the Court stated: "Congress effectively codified the doctrine of exhaustion of administrative remedies in [Section 704]."⁷⁷ Inasmuch as the text of Section 704 does not contain any exhaustion exceptions that existed in the common law in 1946, the Court's statement that the section codifies the doctrine can only be true if those exceptions are implicitly contained in the section.

C. When is Issue Exhaustion Required?

"Issue exhaustion" is a term that refers to the need to raise an issue with an administrative agency before raising it on judicial review. Prior to *Darby*, the question of issue exhaustion would not arise where a person exhausted administrative remedies by raising all possible issues. The person could raise all issues on judicial review. Moreover, if a person failed to exhaust administrative remedies, by failing to utilize the administrative appeals processes, issue exhaustion also would not arise, because judicial review would not be available at all. Finally, if a person failed to exhaust administrative remedies when exhaustion was *not* required because of one or more of the common law exceptions, issue exhaustion also would not arise, because there would be no requirement to have presented the case to an administrative process. Thus, the only time issue exhaustion would arise in the administrative law context would be when a person exhausts his

74. *Id.*

75. See *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) (citing pre-*Darby* cases. *Darby* cited, but exceptions considered).

76. See *Pavano v. Shalala*, 95 F.3d 147 (2d Cir. 1996) (Medicare suit).

77. *Darby*, 503 U.S. at 153.

administrative remedies in the sense of utilizing the existing administrative appeals process but does not raise all possible issues in that process. The question, then, is whether in that circumstance the person would be precluded from raising that issue on judicial review.

Darby, of course, did not address issue exhaustion, and because the question of issue exhaustion only arises when exhaustion of administrative remedies is required and satisfied, it is doubtful that *Darby* changes the legal landscape of issue exhaustion. Nevertheless, at least with respect to Social Security Disability cases, which constitute a significant percentage of all administrative law judicial review cases, the status of issue exhaustion was unclear with the circuits split on the issue.⁷⁸ In *Sims v. Apfel*,⁷⁹ the Court resolved that split, holding that under existing regulations and instructions Social Security Disability claimants were not required to raise an issue to the Social Security Appeals Council in order to raise the issue in judicial review of the denial of benefits.

In *Sims*, Juatassa Sims had filed for Social Security disability benefits, but her claim was denied. She sought and received a hearing before an ALJ, who again found against her. She then requested the Social Security Appeals Council to review her case, but it denied review. Finally, she sued in district court, claiming three separate errors made by the ALJ, but the district court rejected her claims. The Court of Appeals affirmed the district court on the merits as to the first claim, but as to the last two claims it held that it lacked jurisdiction to consider them, because she had not raised them in her request for review by the Appeals Council.⁸⁰

Justice Thomas, writing for the majority, first noted that the government conceded that Ms. Sims had exhausted her administrative remedies by requesting review by the Council.⁸¹ Accordingly, under the judicial review provision of the Social Security Act and its implementing regulations she was entitled to judicial review of her claims.⁸² The government, however, argued that in

78. Compare *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994), and *James v. Chater*, 96 F.3d 1341, 1343-1344 (10th Cir. 1996) (holding issue exhaustion required), with *Harwood v. Apfel*, 186 F.3d 1039, 1042-1043 (8th Cir. 1999) (issue exhaustion not required), and *Johnson v. Apfel*, 189 F.3d 561, 563-564 (7th Cir. 1999) (same).

79. See 120 S.Ct. 2080 (2000).

80. See *id.* at 2082-83.

81. See *id.* at 2083.

82. See 42 U.S.C. § 405(g).

addition to exhausting her administrative remedies, she must also exhaust the issues, saying that “an issue exhaustion requirement is ‘an important corollary’ of any requirement of exhaustion of remedies.”⁸³

Requirements of administrative issue exhaustion, the Court said, “are largely creatures of statute,”⁸⁴ and no statute required it here. The Court recognized, however, that “it is common for an agency’s regulations to require issue exhaustion in administrative appeals. And when regulations do so, courts reviewing agency action regularly ensure against bypassing that requirement by refusing to consider unexhausted issues.”⁸⁵ Here, though, there was no regulation requiring administrative issue exhaustion. Finally, the Court acknowledged that “[i]t is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation.”⁸⁶ The Court explained that the “basis for a judicially imposed issue exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.”⁸⁷ Because of this justification for a judicially imposed issue exhaustion requirement, “the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.”⁸⁸ Appeals to the Social Security Appeals Council are, however, very informal. Usually the claimant is not represented by a lawyer, and the Council provides a form claimants may use to file an appeal that includes three lines for the claimant to state the basis for an appeal.⁸⁹ The Paperwork Reduction Act⁹⁰ notice estimates that filling out the form will take ten minutes.⁹¹ In light of this nature of Social Security Appeals Council, Justice Thomas, joined by Justices Stevens, Souter, and Ginsburg, concluded that the analogy to normal adversarial litigation was lacking and so an issue exhaustion requirement was not appropriate.⁹²

83. See *Sims*, 120 S.Ct. at 2084.

84. See *id.*

85. See *id.*

86. See *id.*

87. See *id.*

88. See *Sims*, 120 S.Ct. at 2085.

89. See *id.* at 2086.

90. See 44 U.S.C. § 3506(c)(1)(B)(iii)(III).

91. See *Sims*, 120 S.Ct. at 2086.

92. See *id.*

Justice O'Connor agreed that, in the absence of a statute or regulation requiring issue exhaustion, such a rule is not always appropriate. In those cases, there must be a "careful examination of 'the characteristics of the particular administrative proceeding provided.'"⁹³ However, rather than rely on general conclusions about the nature of Social Security Appeals Council appeals, Justice O'Connor concluded simply that here there was one particular characteristic that made issue exhaustion inappropriate. This characteristic was that the agency failed to notify claimants that issue exhaustion was required under circumstances where all the other information from the agency would likely lead one to believe that issue exhaustion was not required.⁹⁴

Justice Breyer, writing for himself, the Chief Justice, and Justices Scalia and Kennedy, began differently.⁹⁵ Without mentioning statutes or regulations requiring issue exhaustion, he wrote that "[u]nder ordinary principles of administrative law a reviewing court will not consider arguments that a party failed to raise in timely fashion before an administrative agency."⁹⁶ While the dissent agreed that the requirement for administrative issue exhaustion *in part* stemmed from an analogy to judicial practice,⁹⁷ it said the need to respect agency autonomy and expertise was even more important in the administrative context.⁹⁸ This was a separate justification for an issue exhaustion requirement, and one that argued here for enforcing such a requirement. The dissent acknowledged that the information provided by the Appeals Council to claimants "might make the claimant believe he need not raise every issue before the Appeals Council."⁹⁹ The government said it was their policy not to require issue exhaustion when the claimant was not represented by a lawyer, but here Ms. Sims was represented by a lawyer, who could be expected to know the general rule requiring issue exhaustion, and who in any case did not use the Appeals Council form but filed nineteen pages "of detailed legal and factual arguments challenging the ALJ's decision."¹⁰⁰ Accordingly, the dissent believed Ms. Sims should be subject to the issue exhaustion requirement.

93. *Id.*

94. *See id.* at 2086-87.

95. *See id.* at 2087.

96. *Sims*, 120 S.Ct. at 2087.

97. *See id.* at 2088.

98. *See id.*

99. *Id.* at 2089.

100. *Id.* at 2090.

Apfel is hardly a blockbuster decision. It resolves, by a 5-4 vote, the split in the circuits by deciding that, under existing regulations and instructions, Social Security claimants need not raise an issue before the Appeals Council to raise it on judicial review. It expressly did not decide whether a claimant must raise an issue before the ALJ in order to raise it on judicial review, although given the analyses in the different opinions, it would appear likely that issue exhaustion would be required. Moreover, the Social Security Administration (or the Appeals Council) can effectively reverse the outcome in *Apfel* by the simple act of informing claimants that they *must* raise all issues, or even continuing their existing policy, by informing claimants that if they are represented by counsel they must raise all issues.

Outside the Social Security context, it is unlikely that *Apfel* has any force. Not only do the four dissenters indicate the view that issue exhaustion is the general rule, subject to only the rarest of exceptions, but Justice O'Connor clearly viewed the situation in *Apfel* as unique. Even Justice Thomas's opinion, by tying issue exhaustion to an analogy with adversarial litigation in the judicial context, suggests that in the vast range of formal and informal, *but adversarial*, administrative adjudication, issue exhaustion would be required.

One question remains, however, that is related to *Darby*. As discussed above, there is an outstanding question whether the common law exceptions from having to exhaust administrative remedies continue to apply in an APA case subject to *Darby*. If the answer to that question is "no," then the question further arises whether the common law exceptions to the normal requirement for issue exhaustion are likewise extinguished, or whether they survive *Darby*. If issue exhaustion is merely a lesser included aspect of the doctrine of exhausting administrative remedies, as suggested by the dissent in *Apfel*, then *Darby*'s effect on the common law exceptions to the general doctrine should carry over to common law exceptions to issue exhaustion. On the other hand, if issue exhaustion is its own *sui generis* common law doctrine, as suggested by the majority, then the common law exceptions would continue to apply without regard to *Darby*. As a practical matter, though, the failure of both the majority and the dissent to even cite, much less analyze, *Darby* in the course of deciding *Apfel* suggests a failure of the Court to see any connection between the two cases.

D. When Does a Regulation or Statute Require Exhaustion?

Agencies and statutes differ in their exhaustion requirements. Most, by now, are sufficiently explicit to satisfy the requirement of Section 704.¹⁰¹ However, there are agencies or programs that have not amended their procedures in light of *Darby*, and their statement of available appeal mechanisms may not be sufficient to require exhaustion. For example, in *Young v. Reno*,¹⁰² the Immigration and Naturalization Service's regulations provided that "[t]he petitioner may appeal the decision within fifteen days after the service of notice,"¹⁰³ and the court held that this language made the appeal permissible, rather than mandatory as required by Section 704.¹⁰⁴ Many agencies continue to have "may appeal" language in their regulations.¹⁰⁵ While the context in which that language appears may be sufficient to lead a court to rule that the regulation does indeed *require* exhaustion, generally agencies with simple "may appeal" regulations are at risk, especially in light of the number of agencies that have provided that exhaustion is required in clear and unmistakable terms.

101. See, e.g., 33 C.F.R. § 331.12 (Corps of Engineers):

No affected party may file a legal action in the Federal courts based on a permit denial or declined individual permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this Part. The appellant is considered to have exhausted all administrative remedies when a final Corps decision is made in accordance with § 331.10 of this Part.

Id.; 36 C.F.R. § 215.20 (Forest Service):

Unless waived in a specific case, it is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part.

Id.; 43 C.F.R. § 4.21(c) (Department of Interior):

Exhaustion of administrative remedies. No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. § 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

Id.

102. 114 F.3d 879 (9th Cir. 1997).

103. *Id.* at 882.

104. See *id.*

105. See, e.g., 25 C.F.R. § 23.61 (Bureau of Indian Affairs: "A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Area Director, or grants officer under subparts C or E of this part.").

E. Is There an Exhaustion Requirement as a Precondition to Judicial Review of Rulemaking?

Traditionally, courts have not imposed an exhaustion requirement on actions for judicial review of notice-and-comment rulemaking. This may have been because such rulemakings do not have “parties,” and the notion of requiring exhaustion was usually to assure that parties to a proceeding utilized the procedures available to them. Nevertheless, some statutes administered by independent regulatory agencies have required a form of exhaustion with respect to rules adopted under those statutes. For example, Section 405(a) of the Communications Act of 1934¹⁰⁶ provides: “The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any [FCC decision] except where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass.” This “issue presentation” requirement, rather than a traditional exhaustion requirement, does not require a party who was subject to an agency proceeding to appeal that proceeding so the agency can reconsider a decision it had already made. Rather, it assures that whoever brings a judicial challenge on a question of fact or law, new to the Commission, must first present it to the Commission. As a specific statutory requirement, it is fairly easy to apply, although it has been interpreted to be subject to equitable exceptions.¹⁰⁷ Unfortunately, some courts have ignored the specific statutory origin for this requirement and have applied a similar exhaustion requirement in cases totally unrelated to that statute, while citing cases involving application of that statute. For example, in *National Ass’n of Manufacturers v. Department of the Interior*,¹⁰⁸ the D.C. Circuit foreclosed challengers from arguing that the U.S. Department of the Interior’s Natural Resources Damage Assessment regulations were arbitrary and capricious because challengers had not raised that argument in the rulemaking proceeding.¹⁰⁹ The court cited two Communications Act of 1934 cases under Section 405(a) and a Supreme Court case involving an adjudication for the proposition that “[o]ur cases . . . require complainants, before coming to court, to give the [agency] a fair opportunity to pass on a legal or factual argu-

106. 47 U.S.C. § 405(a) (1994).

107. See, e.g., *Petroleum Communications, Inc. v. Fed. Communication Comm’n*, 22 F.3d 1164 (D.C. Cir. 1994).

108. 134 F.3d 1095 (D.C. Cir. 1998).

109. See *id.*

ment.”¹¹⁰ Other courts have seen the fallacy in this argument. For example, in *American Forest and Paper Ass’n v. United States Environmental Protection Agency*,¹¹¹ the court rejected a similar claim by EPA that persons were required to raise issues during the notice and comment proceeding, saying:

[W]e have never held that failure to raise an objection during the public notice and comment period estops a petitioner from raising it on appeal. EPA presented the same argument to us long ago, but we rejected it, observing that “EPA has cited no authority for the proposition that an argument not raised during the comment period may not be raised on review.”¹¹²

Again, the courts are hopelessly confused on the subject. None of these cases discuss *Darby* or Section 704 of the APA. Section 704’s requirements by their terms apply equally to judicial review of rulemaking and adjudication. The term used in Section 704 is “agency action,” which is defined to include both.¹¹³ If one applies Section 704 faithfully with the Supreme Court’s guidance in *Darby*, there could be no exhaustion required as a precondition of judicial review of rulemaking unless either a statute requires it (as in Section 405(a) of the Communications Act of 1934) or an agency has required it by rule and provided that the rule would be inoperative pending its reconsideration – a situation not present in *National Ass’n of Manufacturers v. Department of the Interior*.¹¹⁴

IV. Conclusion

Exhaustion, whether under the traditional rule in non-APA cases or under the new rule of *Darby* in APA cases, continues to be a highly-litigated issue. Surprisingly, government and private counsel have not been uniformly aware of *Darby* and its effect upon the applicable rules. Moreover, many agencies have not changed their regulations to reflect the new teaching of *Darby*. Hence, they are potentially insufficient to require exhaustion by parties. Informed counsel is likely to fare well in this area.

110. *Id.* at 1111.

111. *See* 137 F.3d 291 (5th Cir. 1998).

112. *Id.* at 295 (quoting *City of Seabrook, Tex. v. U.S. Env’tl. Prot. Agency*, 659 F.2d 1349, 1360 n.17 (Former 5th Cir. Oct. 1981)).

113. *See* 5 U.S.C. § 551(13).

114. *See Nat’l Ass’n of Mfrs.*, 134 F.3d 1095.