OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

SUPREME COURT, U.S.
LIBRARY
WASHINGTON, D.C. 20543

CAPTION: R. GORDON DARBY, ET AL., Petitioners v. HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

CASE NO: 91-2045

PLACE: Washington, D.C.

DATE: Monday, March 22, 1993

PAGES: 1 - 54

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'93 MAR 30 P2:20

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -X

R. GORDON DARBY, ET AL., :

Petitioners :

v. : No. 91-2045

HENRY G. CISNEROS, SECRETARY :

OF HOUSING AND URBAN DEVELOPMENT, :

ET AL. :

- - - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, March 22, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

STEVEN D. GORDON, ESQ., Washington, D.C.; on behalf of the Petitioners.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(10:02 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 91-2045, R. Gordon Darby v. Henry Cisneros.

Mr. Gordon.

ORAL ARGUMENT OF STEVEN D. GORDON

ON BEHALF OF THE PETITIONERS

MR. GORDON: Mr. Chief Justice, and may it please the Court:

In enacting the Administrative Procedure Act, Congress provided a general authorization for judicial review of administrative actions. In section 10(c) of the act, it prescribed when and under what circumstances someone who is aggrieved by an agency action may seek recourse in Federal court. Congress provided that a litigant need not exhaust available administrative remedies before proceeding to Federal court, unless such exhaustion is expressly required by statute or by agency rule.

The question presented in this case is whether, notwithstanding that Congress has spoken, a Federal court can impose additional exhaustion requirements and deprive a litigant of judicial review under the APA because he failed to pursue an administrative appeal that was not

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

required by statute nor by the agency's own regulations. The answer to this question, we submit, is no.

The facts of this case are straightforward. In 1989, HUD initiated administrative sanctions against petitioners, Mr. Darby and his affiliates. Mr. Darby contested those sanctions in full conformance with HUD's regulations. He litigated the matter before the agency for some 10 months through a process which included discovery, a 4-day evidentiary hearing, and the submission of post-hearing briefs.

Ultimately, a HUD administrative law judge issued a lengthy written decision which upheld the sanctions. Pursuant to HUD's regulations, the ALJ's decision became the final agency action unless the Secretary chose to review it. In this case, neither party sought such secretarial review.

Mr. Darby then filed this suit in Federal district court. He challenged the sanctions on the grounds that they violated the Administrative Procedure Act and the Due Process Clause. The Government moved to dismiss for failure to exhaust administrative remedies. The district court denied this motion and proceeded to grant relief to Mr. Darby, holding that the sanctions were not rationally supported by the facts and that they had been imposed for forbidden punitive reasons.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The Government appealed to the Fourth Circuit, challenging only the district court's ruling on exhaustion. The Government contended that HUD's regulation providing for secretarial review of an ALJ's decision required Mr. Darby to seek secretarial review as a prerequisite to filing suit in Federal court.

The Fourth Circuit rejected that contention. The circuit court recognized that no statute and no regulation required Mr. Darby to seek secretarial review. Nonetheless, it decided that as a, quote, rule of judicial administration, Mr. Darby was required to exhaust this administrative remedy. Since he had not done so, the court ruled that the district court should have dismissed his suit and left the administrative sanctions in effect.

QUESTION: Mr. Gordon, what if your client had, in fact, taken an appeal within the agency? Your position then is, I take it, that still and all, you would be able to come to court and prosecute an appeal both in court and before the agency.

MR. GORDON: Simultaneously, sir?

QUESTION: Yes.

MR. GORDON: Justice Scalia, I believe that -- that under the line of decisions, including particularly ICC v. Brotherhood of Locomotive Engineers, that at the point that the ALJ's decision became -- was issued, that

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Mr. Darby had an option, and that he could have either pursued and administrative appeal or proceeded to Federal court.

QUESTION: Why -- why is that? Because -- I mean the text of section 704 reads "whether or not there has been filed."

MR. GORDON: And there was an interesting line of cases during the 1950's where the Federal courts, the circuit courts, wrestled with whether, if you pursued an administrative appeal, the time for your appeal to Federal court would meanwhile expire. The Ninth Circuit, in a case called Consolidated Flowers, as I recall, held that you could lose your right to judicial review if you pursued the administrative appeal. The D.C. circuit ruled to the contrary and ultimately the Ninth Circuit reversed course.

And I believe this Court has recognized ever since a decision in the early sixties, CAB v. Delta Airlines, that if you do pursue an administrative appeal, that the agency action is, pending that appeal, not final and therefore not appealable to Federal court.

QUESTION: But why isn't that contrary to the language of 704? It says whether or not there has been filed. What I'm saying is maybe we've been playing with 704 up to now; why don't we continue to do that?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORDON: Justice Scalia, I would submit that that is simply a practical and common-sense application or construction of the statutory provision.

QUESTION: Well, because it would -- it would seem ridiculous to be prosecuting an appeal both before the agency and here, right.

MR. GORDON: Simultaneously, yes, sir.

QUESTION: Yeah, but couldn't a court consider it ridiculous for you to come complaining to the courts when you haven't completed complaining to the agency? Why isn't -- why couldn't I consider that ridiculous too and say I certainly don't want to interpret 704 to provide for that?

MR. GORDON: Well, the Court is not writing on a clean slate here. It seems to us that the fundamental principle is that it is for Congress to prescribe the jurisdiction of the Federal courts. And this Court has recognized repeatedly, and as recently as last term in McCarthy v. Madigan, that when Congress has prescribed that jurisdiction, that Federal courts are not to decline such jurisdiction on exhaustion principles unless it's consistent with the expressed intent of Congress.

QUESTION: But I'm suggesting we've given that away. The language of 704 does not permit what you've just said we've done. The language of 704 says that it's

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

final, whether or not there has been lodged an appeal within the agency. But you tell me that if there has been lodged an appeal within the agency, we will not consider it final, despite the language of 704, right?

MR. GORDON: That's correct, Your Honor.

QUESTION: The Government is arguing, well, this is just another extension of the same principle.

MR. GORDON: I disagree, Your Honor. The Congress, if one examines the final sentence of section 704 which is what is at issue here, has clearly dealt with the issue of exhaustion, and not simply finality as the Government contends. The final sentence --

QUESTION: Well exhaustion and finality aren't the same thing, are they?

MR. GORDON: No, Justice O'Connor, they are not. They are closely related.

QUESTION: So I don't see how 704 deals with exhaustion at all.

MR. GORDON: If I may, Your Honor, the first sentence of section 704 clearly imposes the finality requirement. The second section -- sentence of the section provides that intermediate rulings, or procedural or preliminary rulings, are not directly appealable, but may be heard when the final agency action is appealed.

The third sentence, which is what's at issue

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

here, presupposes final agency action and goes on to address whether there are additional procedural requirements that a litigant must follow. We would submit that there are -- that it is clear that this provision deals with exhaustion and not simply the finality.

QUESTION: Well, it certainly isn't clear to me, because all it talks about is finality. And I would have thought that 704 simply doesn't address exhaustion.

MR. GORDON: I believe that there are -- beyond the construction of the provision itself, that the sentence, Justice O'Connor, we submit, would be superfluous and inexplicable if it deals simply with finality. The finality requirement is already clearly set out in the first sentence.

Moreover, in the legislative history, and in particular in a -- a explanation of the APA that the Justice Department did, and which was provided to Congress at the time it was considering the APA, the Justice Department said explicitly that the last sentence of section 10(c) dealt with the issue of exhaustion. And that legislative history is quoted in our brief.

QUESTION: Well, Mr. Gordon, the opening clause of the last sentence, what you're talking about, says except as otherwise required by statute, agency action otherwise final is final for the purposes of this section.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

That is surely dealing with finality. I mean it says so in so many words and it says nothing about exhaustion.

MR. GORDON: Mr. Chief Justice, when it speaks -- it uses the word finality twice. It says except as otherwise provided by statute, agency action that is otherwise final is final for purposes of this section. And that phrase, "final for purposes of this section," that is the same thing as saying it is reviewable, because in the first sentence the Congress said it's reviewable.

QUESTION: Well, I don't agree with you. Why should we read it that way? It certainly doesn't say so in so many words.

MR. GORDON: Well, among other things, 5 years ago in Bowen v. Massachusetts, the Court stated that the primary thrust of section 704 was to codify the exhaustion requirement.

QUESTION: That was just an offhand remark in that case.

MR. GORDON: I agree that it was dictum, sir, but not -- I believe it was the correct interpretation. It's consistent with the legislative history. It is also consistent with the interpretation that scholars have placed on this uniformly, including, most particularly, Professor Davis in his text, and also other commentators in various law reviews that we've cited in our briefs to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the Court.

The view that has been expressed uniformly is that that sentence deals with exhaustion of administrative remedies. It is true, and Professor Davis and this Court in Bowen have noted, that the courts have tended to ignore that sentence in many decisions, but that doesn't change the fact that that is what's being addressed there.

QUESTION: Well, let's just assume that the -- that 704 deals with finality. But it does deal with finality and it says that -- it seems to say that -- that there was final agency action here. Now, is there a time limit on when you can resort to the courts to review a agency -- a final agency action?

MR. GORDON: Justice White, I'm not aware of any specific time limit under the APA for filing suit once you do have final agency action.

QUESTION: And so it might be final for purpose of going to court, unless. Well, it'd still be final for the purpose of going to court, but you might -- may be barred from going to court by the exhaustion principle. That's the argument on the other side, is it, I guess.

MR. GORDON: Yes, Your Honor. And the difficulty we have with the Government's position is that it turns section 10(c) into a trap for the unwary litigant. The exhaustion requirements must be consistent

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

with the will of Congress.

Congress, in the last sentence, has said that you -- has said, in section 704, you must have final agency action in order to seek judicial review. It says that if you've got -- whether or not you have that action, it deals specifically with an administrative appeal. And it says that you don't need to pursue that appeal in order to have finality, which it defines as the prerequisite for judicial review, unless you are expressly required to do so by statute or by agency rule.

It insists, therefore, on clear procedural ground rules that are spelled out in advance. And what the Government has done here is come in and sought to obtain through litigation what it never got through rule making.

There is no statute, that's agreed. There is no regulation, it's agreed, that requires a litigant to pursue this appeal to the Secretary. And yet the Fourth Circuit said, propounding a rule that was completely inconsistent with -- with existing law, that there is this hidden requirement that it has been a rule of judicial administration that you must exhaust all available administrative routes.

QUESTION: Well, Mr. Gordon, let me ask you this. Suppose we think that 704 deals with finality, not

exhaustion, and that courts do retain the equitable discretion to decide to require exhaustion in a given case; would your argument then go to whether the court properly exercised that discretion?

MR. GORDON: Yes, Your Honor.

QUESTION: And if so, is that question here or would the court have to send it back for that inquiry?

MR. GORDON: Your Honor, I -- the question presented in the cert petition dealt with whether or not Congress has disposed of the issue in section 10(c).

QUESTION: And suppose we disagree with you on that?

MR. GORDON: I don't believe that it would be necessary to return the case to the Fourth Circuit, although we'd certainly be prepared, if that was the Court's view of the appropriate procedural device, to do it.

Even if section 704 dealt only with finality, which we do not agree with, it is at a minimum an expression of congressional intent and purpose in the area. And to impose an exhaustion requirement that is 180 degrees in conflict with what Congress has indicated there, we believe would be completely inconsistent and at odds with this Court's jurisprudence saying that courts must defer to -- be careful to search for congressional

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

intent in the area and to follow it, and not to impose an exhaustion requirement unless it is clearly consistent with what Congress wanted.

QUESTION: Suppose -- I suppose you get relief from an agency action sometimes by appealing to the court of appeals, don't you, from some agency?

MR. GORDON: Under some statutes.

QUESTION: Under some statutes.

MR. GORDON: Yes, Justice White.

QUESTION: Well, suppose the agency in that situation had exactly this kind of a nonrequired appeal to the Secretary, and yet the agency order would be final just like it is here. Is there a time limit, usually, to go to the court of appeals?

MR. GORDON: Justice White, I'm not aware of any provision under the APA that would permit an appeal directly to the court of appeals. I believe that any appeals directly to the court of appeals would be under other statutory schemes, and therefore outside the context of the APA, and I do not know whether there are normally time limits that are imposed in those statutes.

QUESTION: But how do you know, in those cases, when an agency action is final?

MR. GORDON: If those are separate statutory schemes, they wouldn't be controlled by the APA. We are

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

not contending that section 704 governs exhaustion of administrative remedies in review contexts that are outside the APA.

QUESTION: I take it that you have to, under your view, even wait for 30 days before you can go to court, to determine whether or not the Secretary is going to appeal.

MR. GORDON: Actually, Justice Kennedy, I believe it would be 15 days. Under the HUD's regulations, the parties have 15 days to petition for secretarial review. In this case, neither side petitioned within the 15-day period, and therefore at that point we believe that it became final.

QUESTION: If there had been a petition, in your view what would then be the posture of the case, so far as judicial review, if the Secretary -- if the Department had petitioned the Secretary for the Secretary to review?

MR. GORDON: That's a very interesting question, if I may. If we had had the normal situation where the -- or I shouldn't -- a situation where the sanctions were not in effect until there was a final decision and the sanctions were going to be stayed pending secretarial review, clearly we would not have a final agency decision that could be appealed to Federal court pending the secretarial review.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

The interesting twist that you have in the administrative sanction context, the suspension debarment context here, is that the sanctions are effective, are in effect during the period that you're litigating before the agency. And therefore, I think that that is a crucial distinction between this circumstance, for example, and the one presented in FTC v. Standard Oil, where this Court has held that simply filing an administrative complaint is not, in and of itself, appealable final agency action.

QUESTION: Would the sanctions have remained in effect, I take it, if the agency had petitioned to the Secretary for review?

MR. GORDON: The LDP would have. You get into some technicalities. The debarment did not -- would not have been effective until the secretarial was completed. But there was -- there were simultaneous sanctions here, and there was a limited denial of participation that had been in effect from day 1 and remained in effect throughout the administration -- the litigation before the agency.

QUESTION: And I take it, the agency could appeal to the Secretary to impose a more severe sentence or more severe sanction.

MR. GORDON: Yes, sir. In fact, the agency had sought an indefinite term of debarment. The ALJ had

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

granted them only 18 months, so they had not gotten the period that they'd asked for, and therefore they would have had a basis for asking for a heightened sanction.

QUESTION: But I take it even under your view, the regulated party could not avoid the possibility of the Department appealing to the Secretary by rushing into court, because you have to wait for that 15-day period.

MR. GORDON: That's correct, Your Honor.

And we have noted, also, that the Government has suggested that to follow our position and construction of 10(c) would invite sort of piecemeal, haphazard judicial review. And we don't believe that that's the case at all, and we have cited a variety of other doctrines that we believe give the courts full power to keep appropriate control over litigants who would rush into court prematurely.

And those include the doctrine of ripeness, the doctrine of finality, the requirement that in order to have -- when you're seeking review under the APA, that your record is limited to the record you've created before the administrative agency itself.

QUESTION: Well, what about the Government's argument, as I understand it, Mr. Gordon, that you may -- if you adopt your position, a litigant can obtain judicial review before getting a fully fleshed out decision from

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the agency. That you might -- you might get a more comprehensive decision from the agency if you -- if you exhausted your remedies.

MR. GORDON: Mr. Chief Justice, I suppose to some extent it's a truism that you may get a more fleshed out decision if you proceed further within the agency. That's always at least a possibility. Under HUD's regulations, secretarial review is limited to the record that's been created before the ALJ. And so in this case, all you could have gotten would have been some further elaboration of -- of the rationale for proceeding from those facts that had already been found by the ALJ.

QUESTION: But, Mr. Gordon, wouldn't the logic of your position even apply to the case in which there has been no record made at all? Would it not apply to a structure, for example, in which debarment can be announced without a hearing by a -- by an agency officer, whereupon the contractor has the right, if it wishes, to request an ALJ review of that debarment?

All right, now under -- with an appeal later to the Secretary, the rest of it just like the current system. In that situation, wouldn't you maintain that you don't have to go through the hearing at all? You could get debarred, simply not go to the ALJ, and come right into court.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORDON: Well --

QUESTION: Isn't -- wouldn't that be your position?

MR. GORDON: No, Your Honor.

QUESTION: Why not?

MR. GORDON: Justice Scalia, it would not. First of all, in a decision announced 2 weeks ago, that you wrote, in Reiter v. Cooper, you noted that exhaustion -- that to completely bypass an administrative remedy would violate the exhaustion requirement.

10(c) of the APA deals with pursuit of administrative appeals. We do not contend that 10(c) deals with a complete -- it talks about an appeal to superior agency authority. We do not contend that it covers a situation in which there is a complete failure to contest before the agency, a complete bypass of the agency.

And the district -- the D.C. Circuit dealt with that sort of a case, we believe, in the Peter Kiewit Sons' case, which is cited in the Government's brief. But beyond -- beyond that distinction within the exhaustion doctrine itself, between a basic failure to go into the agency at all versus pursuing an administrative appeal, which is what we are talking about here, if you didn't -- if you simply left the debarment in effect in your

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

scenario, you would have no administrative record, other than what the agency has created, to go forward on in appeal.

Under the L.A. Truck Lines case, what arguments have you advanced before the agency. The court is going to hold you to those that you advanced before the agency. And there are doctrine -- you know, the ripeness doctrine might -- might be invoked there as well by a court, and we do not contend, and we have made this very clear, that we think that section 10(c) controls the exhaustion doctrine. It does not. It simply deals with the issue of procedural defaults. That's, in our view, what exhaustion is all about, procedural defaults as opposed to whether or not a case is ripe for review by a court and a court is in the appropriate position to rule.

I would note that Senator McCarren, who was the principle sponsor of the APA in the Senate, described it as a charter of private liberty and a solemn undertaking of official fairness, at the time it was enacted. He said that it was intended to provide, quote, a guide to him who seeks fair play and equal rights under law.

In this case, it is undisputed that the HUD sanctions were arbitrary and unlawful. Mr. Darby followed the guide that the APA set out. He did everything that HUD required him by regulation to do, and he did

everything that the APA instructed him to do. Yet, when he sought redress in Federal court, the Fourth Circuit said that he had not done enough and that he had forfeited any opportunity to seek to right the wrong that HUD did to him.

The Fourth Circuit's decision, we submit, nullifies the promise of fair play that Congress made in the APA, and we would ask this Court to affirm that promise that Congress made 50 years ago.

Thank you very much. I would like to reserve my remaining time, if I may, Mr. Chief Justice.

QUESTION: Very well, Mr. Gordon.

Mr. Feldman, we'll hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE RESPONDENTS

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

In our view, petitioner makes -- petitioner's argument makes a wrong turn because it relies on the wrong provision of the APA. Section 10(c), by its terms and by its intent, deals with the doctrine of finality. Section 10(a) of the APA, 5 U.S.C. 702, which is the basic provision providing a private right of action for those aggrieved by agency action, that provision provides the sufficient conditions for obtaining judicial -- for

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

judicial review.

There -- in 1976, Congress determined --

QUESTION: Is it your view that 10(a) creates the exhaustion doctrine, codifies the exhaustion doctrine?

MR. FELDMAN: It's my view that -- it's our view that section 10(a) is the -- is the basic provision that gives you a right of action for judicial review.

QUESTION: Well, before the -- and that's what requires exhaustion.

MR. FELDMAN: Well, and then --

QUESTION: And what language in 10(a) requires exhaustion?

MR. FELDMAN: Right, I would --

QUESTION: What is 10(a)? Could you give me a code number for 10(a)?

MR. FELDMAN: 702.

QUESTION: 702.

MR. FELDMAN: It's on 1a in the appendix to our brief.

QUESTION: 1a on your brief.

MR. FELDMAN: Yes.

QUESTION: It would help me if you tell me what language in that section talks about the exhaustion doctrine.

MR. FELDMAN: I think prior -- if you talk about

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

prior to 1976, I think the first sentence -- well, I think the statute didn't specifically, in terms, address the exhaustion doctrine prior to 1976.

QUESTION: Unless it did it in 10(c).

MR. FELDMAN: Right. It didn't address it by its terms.

QUESTION: Yeah.

MR. FELDMAN: But I think the understanding was, not only with respect to exhaustion but, as counsel conceded, with respect to ripeness and primary jurisdiction, other doctrines which have traditionally been equitable doctrines that govern the timing and availability of judicial review, I think everyone believed that those doctrines were available and limited judicial review in the period --

QUESTION: But my question is is there any language in 10(a) that talks about exhaustion?

MR. FELDMAN: Prior -- prior to 1976.

QUESTION: Either before or after.

MR. FELDMAN: Right. After 1976, there is -- the word exhaustion isn't mentioned, but I do think that when they added the proviso saying nothing herein affects other limitations on judicial review or the power of a court to dismiss or deny relief on any other appropriate legal or equitable ground -- when they added -- when

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Congress added that proviso, the doctrine of exhaustion of administrative remedies, like the other doctrines I've mentioned, are plainly encompassed within the terms limitation on judicial review or appropriate equitable grounds.

QUESTION: And where before this -- before '76, where did you find the exhaustion doctrine in the statute? Were we just plain wrong in the Bowen opinion saying we thought it'd been codified in 10(c)?

MR. FELDMAN: Well, I think -- the Bowen opinion was addressed to a different question, a different part.

QUESTION: I understand. Was that statement just plain wrong?

MR. FELDMAN: No. Actually, I think the -- insofar as -- insofar as it's -- I think it was not a full statement --

QUESTION: We said in that sentence that we thought 10(c) codified the exhaustion doctrine. You're telling me that's wrong; the exhaustion doctrine was in some other part of the statute or somewhere up in the sky.

MR. FELDMAN: I think it was in 702 at that time.

QUESTION: But no language mentioned it, did it?

MR. FELDMAN: But -- and I don't -- insofar -- it was an issue that was important in Bowen, but I would

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

say there was a footnote in Bowen which I think states our position precisely. On page 902 in footnote 35, the Court said, "It is certainly arguable that by enacting section 704," that's 10(c), "Congress merely meant to ensure that judicial review would be limited to final agency actions and to those nonfinal" --

QUESTION: Which is entirely consistent with the notion that the exhaustion doctrine determined when an action was final.

MR. FELDMAN: Well, that -- that would be --

QUESTION: It wouldn't be final until there was exhaustion.

MR. FELDMAN: Well, that would be --

QUESTION: So that's entirely consistent with the text on the next page.

MR. FELDMAN: I think that would be -- that would be an additional premise. But our position is that the exhaustion -- that finality and exhaustion are distinct doctrines. The Court has referred to them as distinct doctrines on a number of occasions. The Court did it last --

QUESTION: And the exhaustion doctrine is entirely nonstatutory.

MR. FELDMAN: Yes. Except -- well, except that I think 702 shows that the Congress in 1976, when it was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

amending the statute, plainly thought that exhaustion, as well as these other doctrines, still applied. There's nothing unusual --

QUESTION: Of course, that language would still have exactly the same meaning if the exhaustion doctrine were part of 70(c) -- 10(c).

MR. FELDMAN: I don't see --

QUESTION: The amendment in '76 didn't take away any defenses that were already in the books, including the requirement of finality.

MR. FELDMAN: Well for -- the amendment -- the legislative -- the reports and so on which explicated that phrase specifically mentioned exhaustion, as well as a number of other doctrines.

QUESTION: But it didn't -- did it mention exhaustion as something separate from what was in 10(c)?

MR. FELDMAN: No, but -- no, but it talked about traditional, equitable limitations and traditional defense. Under 10 -- under petitioner's view in this case, it's hard for me to see how -- what remains of the exhaustion doctrine after 10(c). There's now a codified rule that no longer governs.

QUESTION: Well, it remains that if the agency wants him to -- if every case, if they want the applicant to make the petition before the Secretary, they ought to

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

have a rule that says so.

MR. FELDMAN: Right.

QUESTION: And then they can require it.

QUESTION: In which event the -- in which event the agency action isn't final.

MR. FELDMAN: Right --

QUESTION: If the agency so provides by rule.

MR. FELDMAN: That's right. And that, I think, is a codification of the traditional rule of finality. Finality has to do with when an agency is satisfied that its decision can then -- can take effect at a certain point. It doesn't have to do with whether there's an additional administrative remedy that's available -- that -- available to a litigant to cure a defect in an agency action. That's traditionally the distinction between the two doctrines, and there's no reason in the language of section 704 to think that it was dealing with the latter situation.

QUESTION: Well, Mr. Feldman, if -- if you are correct that exhaustion is something that the court, in its discretion, can impose, do you think that the court can properly impose it in circumstances where it does become a trap for the unwary?

MR. FELDMAN: I think that that -- first of all, I would say I don't think that question has -- is

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

presented by this -- by this case. But I think it is an equitable doctrine, and the Court has repeatedly said you look at all the circumstances. There may be cases in which there was a trap for the unwary, where --

QUESTION: Well, like in this case. I mean it certainly came as a surprise to the litigant here, apparently, that exhaustion would be required. I think it would come as a surprise to me, reading the statutory scheme.

MR. FELDMAN: I think, actually, I would, with respect, differ with -- on that. I think that a seasoned litigant before an administrative agency shouldn't be surprised to know that he has to follow an internal appeals process that can -- especially up through an agency's ranks, before he can go to court. I think that has been an accepted rule, that people would be surprised to find they didn't have to follow.

QUESTION: Well, would it have been an abuse of discretion for the district court to entertain this action?

MR. FELDMAN: I think that if -- if a district court found -- let me add one other fact, and then I can answer that, which is petitioner has never claimed, that I'm aware of in this litigation, that he wasn't aware of the internal appeals process.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But if you take a case, for instance, where -- where a -- where a litigant honestly wasn't aware of the existence of an administrative appeal process, I think that would be a factor to be taken into consideration in the equitable weighing that -- that happens when you apply the doctrine.

QUESTION: But, the more you make it equitable and discretionary, Mr. Feldman, it strikes me the more likely it may be a trap for the unwary. I mean if you don't know until you get to court how a judge is going to decide as to whether you should have exhausted that last remedy, then the doctrine really does have some potential for mischief.

MR. FELDMAN: I would say that, in general, the doctrine -- the doctrine is not complex. It says if there's an adequate remedy that's not futile, the way -- the decision maker is not biased. If it meets some of those basic prerequisites, that you are required to undergo that before you go into court.

QUESTION: Well, then you're not talking about something that is discretionary in the sense you weigh all -- or the district court weighs all the facts in each case. You're talking about a general rule that might be subject to some exception.

MR. FELDMAN: Yes. But I would say, for

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

instance, in the question of what is an adequate remedy, the courts have discussed a number of different types of factors. There might be a case where a -- where the failure to publicize a process or impossibility for a litigant to find out it was -- it was even in existence.

QUESTION: But, Mr. Feldman, in this very case your position, as I understand it, is that the sentence that says "any party may request such review in writing within 15 days" really means every party must request review if that party wants judicial review.

MR. FELDMAN: That's right. That's right.

QUESTION: And you don't think that's misleading language.

MR. FELDMAN: No, I don't think so. I think that that is the -- that is the consequence of having an equitable doctrine such as exhaustion that has been applied for 100 years to administrative proceedings.

QUESTION: Yeah, but it hasn't been applied this way since the Administrative Procedure Act was enacted. Most of that 100 years was before it was codified in 704.

MR. FELDMAN: Well, we would disagree that it was -- that it is in 704.

QUESTION: Mr. Feldman, what -- what is the purpose of 704, if it isn't -- if it isn't that? I mean I agree that finality and exhaustion are different concept,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

but so are animal and dog different concepts, but one is a subspecies of the other.

Why isn't exhaustion one sort of lack of finality; it's not final because you haven't exhausted your administrative remedies? Why isn't that a perfectly way to explain why exhaustion is different from finality, but nonetheless makes sense of section 704?

MR. FELDMAN: Well, I think section 704 serves a different purpose, or this last sentence of section 704. What that does is it permits a litigant -- it permits an agency to create a role saying you have to take this internal agency appeal. And regardless -- and then at that point.

QUESTION: No, but that -- that's --

MR. FELDMAN: That is a pre --

QUESTION: That's not what the APA was meant -- the APA was sponsored by the American Bar Association to stop these newfangled agencies from jerking people around, and the purpose of 704 was -- was explicitly to stop agencies from making you go through one hoop after another hoop after another hoop before you could get to court. Isn't that the purpose of it?

MR. FELDMAN: Well, I --

QUESTION: I always thought it was.

MR. FELDMAN: Actually, I don't think so. I

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

think 704, first it -- 704, my reading of it, it is a -- it provides necessary conditions for taking advantage of the procedure for judicial review that was created in 702. And those are condition -- and among things -- I think it would be common ground in this case that among the effects that 704 has is if the agency were to adopt a rule saying you have to take an internal agency appeal before you can get into court, if an agency were to adopt that rule --

QUESTION: Right.

MR. FELDMAN: -- A litigant would have to do that regardless of any application of the exhaustion doctrine.

QUESTION: But you're saying they have adopted that rule.

MR. FELDMAN: No, I'm not saying -- no.

QUESTION: Yes, you say that's the fair reading of that last sentence.

MR. FELDMAN: No.

QUESTION: They must do that in order to get into court.

MR. FELDMAN: If they do it by rule. What 704 does, and I think this is probably consistent --

QUESTION: No, I'm saying that the Secretary's present regulation is, in your -- as you interpret it, exactly that kind of rule.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. FELDMAN: No. Well, if I said that, it was perhaps a little misleading. What I meant was --

QUESTION: Well, I said isn't your interpretation of this sentence that he must apply for the -- within the 15 days if he wants to go into court, and you said yes.

MR. FELDMAN: The legal consequence of that rule is that that --

QUESTION: Is exactly what I said.

MR. FELDMAN: Not -- I guess, sir. Perhaps maybe -- perhaps not exactly. The difference is the legal consequence of that rule, the rule that's currently in the regs, is if he wants to get into court, he should exhaust his administrative processes unless the -- there -- the administrative remedy is inadequate or futile or comes within one of the other exceptions to it.

If the agency had adopted the -- an -- a rule that said, in terms, you must take the internal agency appeal before you get into court, then the existence of those exceptions would be irrelevant. The agency would therefore have the power to say you have to do it, and assuming its rule was valid, you would have to do it. And that's what the power to have --

QUESTION: So what you say is it means is you must file within 15 days unless you want to take -- assume

the burden of proving that remedy is an inadequate remedy.

MR. FELDMAN: That's right.

QUESTION: That's what it means.

MR. FELDMAN: That's right. And I think that was a reasonable thing for Congress to do, to give agencies the power to do that, but without upsetting the exhaustion doctrine, which requires -- which gives agencies a chance, under the common law that had developed prior to the APA and which was preserved in section 702, to make -- to hear litigant's complaints and make rulings as to -- and make sure that their decisions are in accordance with agency policy before they go into court.

QUESTION: Mr. Feldman, do you know if this "may" language is common among the agencies in terms of internal review?

MR. FELDMAN: It's quite common. I can't give you a percentage.

QUESTION: Well, why would say -- I wonder why they use the word "may." It seems kind of silly to me.

MR. FELDMAN: Well --

QUESTION: Why don't they either put up or shut up.

(Laughter.)

MR. FELDMAN: Well, one reason that they use the word "may" is, if you think about wording a regulation

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that accomplishes this purpose, they don't want -- they're not requiring litigants to do something, they're saying you may take an appeal if you're dissatisfied with -- with what you got from the ALJ, after you look at all things considered, you may take an appeal to the agency, superior agency, to the Secretary.

QUESTION: Well, why don't you -- yeah, but you've -- but -- but the agency, in using "may," bars them from going to court right away.

MR. FELDMAN: That's right. That's the -- but that is a standard application of the exhaustion doctrine which always has had the effect of barring people from going to court if there is an alternative administrative remedy. This case, in fact, is a very --

QUESTION: Well, 704 seems to say that if you want to postpone finality, the agency wants to postpone finality or hold up going to court, the agency should do it by rule.

MR. FELDMAN: Right --

QUESTION: Do it by rule and say that -- that the -- that the action -- what -- the rule that says that the action is meanwhile inoperative, so it isn't final.

MR. FELDMAN: As I said, an agency -- an agency can adopt a rule, and that has a rather different effect than the rule that they did adopt. The effect of a rule

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

like that under 702, under the authority of 702, is to make it an absolute requirement that you go to superior agency authority, regardless of whatever the equitable factors might be, or the exceptions to the doctrine of exhaustion.

The effect of just simply creating a remedy for a litigant, as in any other case where the agency creates a remedy for a litigant or, as here, where -- this, in fact, is a case, similar to what Justice Scalia mentioned earlier, where the procedure starts by the agency sending out a notice of proposed debarment. If the litigant doesn't do anything, he is debarred, I think, within 30 days, I'm not sure of the exact period.

Now, it permits the agency -- the litigant -- the litigant may ask for conference at that point. I think the rule uses the word "may" in that context as well. The litigant may go to the ALJ, he may present evidence or he may not. That doesn't mean that if he sits on his haunches he can go into -- he can go into court prematurely.

QUESTION: But, of course, as Mr. Gordon said, the ALJ before whom he would have the hearing cannot really be described as a superior agency authority in that context. So I don't know that 704 would -- would comfortably be applied to that situation.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. FELDMAN: There are such -- whether -- whether he would be a superior agency authority or not is -- maybe it isn't worth getting into on the facts of this particular case. But in any event, there would -- could easily be cases where that would be the case, where you get a proposed -- I know the Department of Energy has proposed remedial orders. It's a very common way of -- for administrative proceedings to run. In this case, it happens that the -- the notice of proposed debarment was sent, I think, by an assistant secretary.

QUESTION: But why -- why -- what is the great disaster about our just saying -- I, frankly, don't see what 704 was directed at unless it was the problem of the agencies setting up one obstacle after another after another before you can finally get to the -- get to court.

And what 704 says is you can do it, but if you want to do it your agency -- your action cannot be effective. You have to announce in advance, and the real bite is your action cannot be effective, you cannot debar, you have to just propose to debar. And then you can make me jump through as many hoops as you like, but nothing happens meanwhile.

MR. FELDMAN: And that, indeed, was what happened in this case.

QUESTION: Well -- well, no. He was -- the

final debarment had -- had not occurred.

MR. FELDMAN: But what had happened was --

QUESTION: But there -- but there was a disqualification from it.

MR. FELDMAN: There was a limited denial of participation which was issued by the local -- a local HUD office which had a very limited effect. It applied to just the local office and just the program that Mr. Darby was involved in. That took effect at -- before, even, the notice of proposed debarment went out, and that was simply a means for the agency to protect itself while anything else was being litigated.

To say if we suspect someone of having defrauded us or swindled us. or however you characterize what they suspected happened. If we suspect somebody of doing that, we need a way to protect ourselves while -- we can't just let this person go on and contract in the same program with us, until we can find out the facts and figure out what happened.

That -- the rationale for that, for limited denial of participation, is different, very different, from that of a debarment. And we could discuss whether that's a good idea or whether an agency ought to be able to -- permitted to do that, but if that limited denial of participation is sufficient to permit a litigant to go

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

directly into court, then he doesn't have to wait for anything. That happened actually even before the debarment proceedings had started here.

I mean, in fact, I think that that's a reasonable way -- that serves the purpose of protecting an agency's particular program while a debarment is being considered.

QUESTION: Well, you don't say that he -- that this permissive review wasn't available to this person, do you?

MR. FELDMAN: It was -- it was available.

QUESTION: Yeah.

MR. FELDMAN: It was available at the --

QUESTION: And suppose the Secretary had turned him down; he could go to court.

MR. FELDMAN: That's right.

QUESTION: Mr. Feldman, let me ask you a question Justice Scalia kind of asked you. That is isn't the legislative history against you?

MR. FELDMAN: I don't think it -- I don't think it is. I think there's about three or four different strands of the legislative history. One is the consistent statements that this was intended to codify existing law. I think that cuts strongly in favor of our position. Second, there was Attorney General Clark's statement --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, you're talking about 1945 now.

MR. FELDMAN: Yes. I'm talking now the earlier legislation. In that the exhaustion doctrine, as it applies -- as it applies to finality, I think is the word that he used, I -- then is codified in this section. I think what he indicated by that, plainly, was that he was talking about finality and not exhaustion. He wasn't saying the exhaustion doctrine, apart from concerns of finality. He was talking about finality.

QUESTION: Well, except that some of the language of the section itself is just as consistent with exhaustion as it is with finality, in a very narrow sense. I mean you yourself said 10(a) can be dealing with exhaustion though it doesn't mention it, and I suppose the same thing is true of 10(c). And when -- when you've got text that refers to -- to requests for reconsideration and appeals to superiors, I mean that smacks just as much of exhaustion as it does of -- of finality, in the narrow sense, doesn't it? So that would be consistent with that legislative history that you try to explain away.

MR. FELDMAN: I think that -- all I can say is that when Attorney General Clark, I think, used the words "as to finality," he was signaling that he was talking about finality and not exhaustion. And this court has, in a number of cases, distinguished between the two.

QUESTION: But the -- but the text still --

MR. FELDMAN: The other --

QUESTION: I mean the text, in references to reconsideration and superior authority, is dealing -- despite its finality language, is dealing with exhaustion concepts, is it not?

MR. FELDMAN: I think that those things could be relevant to either. There is certainly overlap between -- even between ripeness as well. The petitioner hasn't alleged -- hasn't said that section 10(c) eliminates the ripeness doctrine, but I actually don't see why it wouldn't have that effect, at least in many cases, under his reading of the statute.

But the other comments from the 1945 or 1946, they're perfectly consistent with our reading. What they say is it permits the agency, by rule, to require an appeal to superior agency authority. At that point, that is codified, it is a prerequisite, a necessary condition for obtaining judicial review under the statute. And an agency can do that regardless of --

QUESTION: Well, it provides for a necessary condition.

MR. FELDMAN: Right, right.

QUESTION: It does not impose it.

MR. FELDMAN: That's right, provides for it.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

And regardless of whether you would meet any of the -- what -- the traditional exceptions to the exhaustion doctrine, regardless of whether somebody would view it as inadequate or futile or whatever, an agency can require you to go through these processes, assuming its regulations are valid.

In 1976 --

QUESTION: In this discussion of legislative history, are you talking about the attorney general's manual?

MR. FELDMAN: I -- there was -- the attorney general's manual actually came afterwards.

QUESTION: That's right.

MR. FELDMAN: But there was one -- there was, I believe, one copy --

QUESTION: That's why I wonder how that's legislative --

MR. FELDMAN: Right. I was really talking about the attorney general's comments to -- that were prior -- that were submitted to Congress prior to the enactment of the statute, and there was one comment, I think, on the floor or in a committee report, that was similar to that. The attorney general's manual just said more or less the same thing.

But except -- all except -- all of those

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

comments, except for Attorney General Clark's first statement, are perfectly consistent with our view, which is it permits an agency to require someone to go -- appeal to superior authority without any of the limitations of the exhaustion doctrine. That's what it does and those are perfectly consistent.

In 1976, though, I'd add, I think that if you look at the legislative history -- first of all, 702 has something which 704 doesn't have. That is, 704 has no general term which could encompass the specific doctrine of exhaustion; 702 does. It talks about traditional limitations on judicial review and appropriate equitable grounds on which a court may deny relief or dismiss a case.

It seems clear to me that those -- those, even just on the language, apart from the legislative history, plainly apply to the exhaustion doctrine. It certainly is a tradition limitation on judicial review.

QUESTION: Well, they also plainly apply to the finality requirement. And if the finality requirement includes the exhaustion doctrine, they apply to both at the same time.

MR. FELDMAN: Right. Well it says "nothing herein," and I would take the "herein" to be with respect to the way this -- this statute -- to the work that these

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

provisions of the APA are doing, and therefore to refer also to 7 -- we have seen so far is 7 -- it says --

QUESTION: Well, "nothing herein" was meant to be this additional waiver of sovereign immunity. It isn't to -- it isn't to waive any other defenses.

MR. FELDMAN: It says "affects other limitations."

QUESTION: Well --

MR. FELDMAN: Actually, that was the term was I was trying to --

QUESTION: What does "herein" mean?

MR. FELDMAN: -- Other limitations.

QUESTION: I thought "herein" meant section 702.

MR. FELDMAN: Well, it probably refers to section 702. I don't think it really makes a difference because --

QUESTION: The waiver of sovereign immunity in particular. It's saying in waiving sovereign immunity, we're not waiving all these other things.

MR. FELDMAN: Right. And one of the --

QUESTION: But we're not talking about 702, we're talking about 704. The issue is what 704 provides.

MR. FELDMAN: I think what Congress intended by the "herein" is in -- in doing what 702 does, which is create a statutory cause of action for judicial review,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that in creating that we are not -- Congress did not intend originally, and certainly in 1976 made clear that it didn't intend to upset these traditional doctrines such as exhaustion and primary jurisdiction and lateness and so on.

QUESTION: Well, Mr. Feldman, on that point, what is traditional? Are there cases out there that were decided before the adoption of the APA that clearly said exhaustion is required in the situation of a discretionary agency appeal? I haven't spotted any and I wondered if you had.

MR. FELDMAN: I haven't -- I haven't spotted any. Actually, I haven't spotted cases that --

QUESTION: Well, they're a little hard to pinpoint under traditional, it seems to me.

MR. FELDMAN: Well, it depends --

QUESTION: In fact, wouldn't you agree that Meyers against Bethlehem Steel is the classic case on exhaustion?

MR. FELDMAN: Yes.

QUESTION: And isn't that a finality case? The holding of the court is "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." That's what the case held.

MR. FELDMAN: Right.

QUESTION: And that's what was codified in this -- you don't think so.

MR. FELDMAN: I don't believe it. I think that's actually a codification of the exhaustion doctrine. More, if you look at cases such as Aircraft & Diesel against Hirsch, that was a case where someone went to the renegotiation board, had a ruling against them, and instead of pursuing the -- what is very comparable to what happened here, which is an appeal to the tax court in that case, but to a superior authority, it went directly into court to complain about the administrative action.

This Court held that that was barred by the exhaustion doctrine. In fact, it was barred by the exhaustion doctrine regardless of whether he could ever have gotten an appeal from the tax court judgment in that, had he won it.

QUESTION: And it's still not clear to me what your position is as to whether it not it would have been error for this court to proceed, if it had chosen to do so.

MR. FELDMAN: It would have been error for the district court --

QUESTION: Yes.

MR. FELDMAN: -- To proceed here. My position

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

is the district court -- our position is the district court did not -- the district court -- well, I think there's nothing on the facts of this case that suggests that the Fourth Circuit decided it wrong. The kinds of things that petitioner raised --

QUESTION: Well suppose -- suppose the district court had proceeded with this case; is that an abuse of discretion or some other error?

MR. FELDMAN: I would say it is --

QUESTION: Because we're talking about an equitable doctrine, and I want to know if the district court -- or a district court situated in a case like this would have the discretion to proceed, if it chose to do so.

MR. FELDMAN: It's hard -- since discretion necessarily allows a range of judgments, it's hard for me to say that there would be no circumstances, especially if you filled in some additional facts, that a district court could have not proceeded on -- could have proceeded in this case.

But I don't think that the facts that were before the Fourth Circuit or the arguments that were made by petitioner were sufficient to excuse him from the exhaustion doctrine. The arguments that were made by petitioner about whether the doctrine applies were that --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that the -- that the administrative remedy was inadequate because the Secretary could extend the time period, even in the absence of any showing that the Secretary ever had extended the time period and even where the periods are relatively brief, 30 days or so. I think he could have had a complete judgment in 75 days.

The Fourth Circuit rightfully said well that's not a basis for excusing exhaustion, where you have no basis to say the Secretary wouldn't have just followed the time deadlines and the rules. I think the petitioner also claimed that it would be futile to pursue the administrative remedy, but there's no reason to think either that that was -- that that would have been a factor here. That's simply his speculation, that he would have been unsuccessful.

I think that, in fact, this case is a classic case where exhaustion should be required. The Court has said exhaustion is particularly potent where administrative discretion is at issue, and expertise. Well, the decision whether to debar is expressly made a discretionary decision, and -- and it involves weighing the seriousness of the acts against the mitigating circumstances and so on.

Those are decisions that the Secretary should have had a chance to make, if petitioner didn't like them,

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

before -- before the ALJ's decision was reviewed by a court. In addition, of course, there's a lot of expertise involved here in interpreting HUD's regulations and in interpreting the debarment procedure itself and the standards for debarment, as well as the substantive standards governing the program the petitioner participated in.

QUESTION: Your position is that this "may" type internal review suspends finality. I mean it destroys finality for purposes of judicial review.

MR. FELDMAN: I think the "may" in the regulation, it doesn't destroy finality, because the regulations specifically provide that the -- that things become final if no review is -- if no one seeks a further agency appeal. What the "may" does is it gives you an avenue to go to the agency so it can --

QUESTION: Yeah, but what if you don't -- you cant' go to court because it isn't final?

MR. FELDMAN: Well, I guess I would just characterize that differently, perhaps, and say you can't go to court because you haven't exhausted your administrative remedies, even if it becomes final. It's the same thing as if, where a district court judgment becomes final before an appeal -- an appeal, a timely appeal is not taken to the court of appeals. In those

circumstances, you can't then take an out-of-time appeal to the court of appeals on the ground that the district court judgment is now final.

That -- this "may" has the same effect as that. The agency action does become final if you don't do anything. That is, the agency is satisfied --

QUESTION: Yes.

MR. FELDMAN: And put it into effect if the -- if no one has complained to the Secretary.

QUESTION: But even though final, you can't get into court without -- without exhausting your remedies.

MR. FELDMAN: That's right. And I think that that is generally -- that's always been true of applications of the exhaustion doctrine, and actually numerous other doctrines. Petitioners' argument basically is that because a statute -- which in our view 704 sets a necessary condition for judicial review. Because you meet that one necessary condition, which is finality, you thereby can get into court, that's a sufficient condition.

And I think all of the Court's cases dealing with the whole range of doctrines that we discuss in our briefs, stand for the proposition that even where you meet the statutory prerequisites for suit, those are the cases precisely where these doctrines apply and can govern the timing and availability of --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: I had thought sometimes that -- that where exhaustion applies, a court in which a suit is filed would just stay its hand until the administrative remedy is exhausted.

MR. FELDMAN: That would -- I think that would be -- in appropriate circumstances, that would be an appropriate --

QUESTION: Except for the time limit.

MR. FELDMAN: That's right. If there's no reason to do it, it might not, although I'm aware that HUD, perhaps in an appropriate case, could provide for an extension of the time.

Thank you.

QUESTION: Thank you, Mr. Feldman. The Court notes from your admission papers that today is your birthday; you're 43 years old.

(Laughter.)

MR. FELDMAN: Thank you.

QUESTION: Happy birthday.

(Laughter.)

MR. FELDMAN: Thank you very much.

QUESTION: Mr. Gordon, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN D. GORDON

ON BEHALF OF THE PETITIONERS

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. GORDON: I'd like to address several points, if I may. The first is what I believe to be the absolutely erroneous contention that the Government has advanced that the decision of the Fourth Circuit here was consistent with the existing law of exhaustion.

The law of exhaustion, from the time of Meyers v. Bethlehem Steel up through this Court's decision last term in McCarthy v. Madigan, has always been that litigants are required to exhaust the prescribed administrative remedy, and that phrase "prescribed" is critical and it has always been there. And in our view, all that section 10(c) of the APA did was to ordain which remedies would be considered prescribed for purposes of judicial review.

Moreover, the law had always been that litigants need not exhaust permissive administrative appeals. In Levers v. Anderson, decided by this Court a year before the APA was passed, Justice Black, writing for the Court -- precisely this contention was made. The Government stood up and said that the litigant was out of luck because they hadn't pursued a permissive motion for reconsideration. And Justice Black said that the Court was not persuaded that "may" means "must,"

And yet that's what we hear from the Government, "may" means "must." And if you, as the litigant, if

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

you're sufficiently seasoned, if you can't figure that out, shame on you. That is nothing less than turning these administrative appeals into traps for the unwary, which was completely at odds with what Congress set out to do.

The -- I would note --

QUESTION: Do you know any cases, Mr. Gordon, in which the concept of finality was applied to failure to seek an appeal within the agency? Say it's not final because you've failed to seek an appeal.

MR. GORDON: No, Justice Scalia, I do not, sir.

QUESTION: Yeah, I don't either.

MR. GORDON: I would also -- on the facts here, the Government has pooh-poohed the notion that the LDP, which was in effect throughout, had much of an impact on Mr. Darby. The record reflects, and this is in an affidavit filed before the district court, that during the 10 months that he'd already been under the sanctions, he had lost a HUD contract that he anticipated would have been worth approximately a half a million dollars of profit to his business. So this is a litigant who diligently did everything that HUD told him to do pursuant to its regulations at the same time he was enduring a tremendous cost for doing so.

And the Government suggests that there was

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

little cost in him being required to jump through further hoops. If the additional 75 days for the secretarial appeal -- and that's under an optimistic time frame -- had gone by, the LDP could have expired, because it's limited to a year, and according to the Government in its pleadings before this Court, once it expires it becomes a moot issue because it doesn't have the continuing consequences that a debarment does.

So the Government propounds, in our view, nothing less than a catch 22 here, and we don't believe that the exhaustion doctrine is a catch 22 or should be construed by this Court to place litigants in that position.

If there are no questions from the Court, that concludes my presentation. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gordon. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: No. 91-2045

R. Gordon Darby, et al., Petitioners v.

Henry G. Cisneros, Secretary of Housing and Urban Development, et al.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lynn M. Mayo

(REPORTER)