

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

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WASHINGTON, D.C. 20001-2866

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To: Administrative Conference

From: SFW

Recommendation on Issue Exhaustion

I think the proposal is helpful and well put. Raising the concern formally is itself valuable.

I have one suggestion, namely, that the word "extraordinary" on line 165 be replaced by "similar."

The preamble rightly notes at lines 16-17 that when Congress goes out of its way to insist on exhaustion it typically provides an exception for "reasonable grounds" or "exceptional circumstances." Here the Conference is bringing a problem to the attention of courts functioning in the manner of common law courts, and setting out a group of specific instances (subsections 4(a) through 4(e) of the recommendation) calling for an exception to the general rule. Common law courts look for similarity between prior cases and the case at hand. If it were the case that all the conditions in (a) through (e) qualified as extraordinary, then use of "extraordinary" in (f) would make sense. But that seems to me a stretch. Rather than assigning a label to the conditions that generally justify an exception, I think it would make sense to exhort the courts to act as they normally do, i.e., look for similarities.

It is improbable that I'll be able to attend the Plenary, as I'll be having a hip replacement tomorrow.