I. PRIMARY JURISDICTION

Primary Jurisdiction and Its Subsequent Effect on Judicial Review

In *Rosado v. Wyman*[1] the Supreme Court held that neither the doctrine of primary jurisdiction[2] nor that of exhaustion of administrative remedies[3] precluded federal court jurisdiction of an action brought by welfare recipients seeking to determine whether a 1969 amendment to New York's Social Services Law[4] was inconsistent with the requirements of section 402(a)(23) of the Federal Social Security Act.[5] That statute is concerned with the Aid to Families with Dependent Children (AFDC) program, a federal-state public welfare program under which matching funds aid needy children who have been deprived of the support of one or both parents.[6] In order to take advantage of the substantial federal funds

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1. 397 U.S. 397 (1970), *rev'g* 414 F.2d 170 (2d Cir.), *vacating and rev'g* 304 F. Supp. 1356 (E.D.N.Y. 1969).

2. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19 (1958, Supp. 1965) [hereinafter cited as DAVIS]; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121-51 (1965) [hereinafter cited as JAFFE].

3. *See generally* 3 DAVIS § 20; JAFFE 424-58.

4. N.Y. Social Services Law § 131-a, ch. 184, § 5 [McKinney 1969] N.Y. Sess. Laws 217, *as amended*, N.Y. SOC. SERVICES LAW § 131-a (McKinney Supp. 1970). After the Supreme Court decision in *Rosado*, the New York Legislature revised section 131-a, declaring its intent to comply with federal requirements. Ch. 517, § 1 [McKinney 1970] N.Y. Sess. Laws 1158-59.

5. 42 U.S.C. § 602(a)(23) (Supp. V, 1970).

6. *Id.* §§ 601, 606. *See generally* Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555 (1970); Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143 (1970); Comment, *Section 402(a)(23) of the 1967 Social Security Act Amendments: A False Hope?*, 58 GEO. L.J. 591 (1970).

available for AFDC, a state must submit a plan for the approval of the Secretary of Health, Education and Welfare[7] which conforms with several requirements of the Social Security Act[8] and with rules and regulations promulgated by HEW;[9] if the state fails to comply with any provision of section 402(a), the Secretary of HEW, after notice and hearing, may terminate federal payments.[10] The affected state may seek judicial review from such a finding of nonconformity in the federal courts of appeal.[11]

In March, 1969, New York amended section 131-a of its Social Services Law by adopting a system which based maximum AFDC allowances upon the number of persons in a household.[12] This new plan abandoned a computation of "standard of need" on an individualized basis and made no provision for items previously covered under "special" grants for regularly recurring expenses.[13] At the time the welfare recipients initiated their suit challenging this scheme, HEW had already commenced administrative proceedings, although not a hearing, to determine whether New York's AFDC amendment was in compliance with the Social Security Act. The *Rosado* plaintiffs were not involved in the HEW proceedings, however, for neither the Social Security Act nor HEW regulations provides a means for AFDC recipients to challenge the legality of a state statutory scheme before the federal agency.[14] The plaintiffs urged that section 402(a)(23) of the Social Security Act requires cost-of-living increases to be taken into account in computing welfare payment schedules and that this requirement precluded any computation of an individual's "standard of need" which reduced the total cost estimated necessary for basic subsistence.[15] The district

7. 42 U.S.C. § 601 (Supp. V, 1970).

8. *Id.* § 602.

9. *See, e.g.*, 45 C.F.R. §§ 233.20-.140 (1970).

10. 42 U.S.C. § 604(a) (Supp. V, 1970). Alternatively, the Secretary in his discretion may restrict federal payments to categories of the state plan not affected by its failure of compliance. *Id.*

11. 42 U.S.C. § 1316(a)(3) (Supp. V, 1970).

12. Ch. 184, § 5 [McKinney 1969] N.Y. Sess. Laws 217, *as amended*, N.Y. SOC. SERVICES LAW § 131-a (McKinney Supp. 1970).

13. 397 U.S. at 416, 418.

14. *Id.* at 406 & n.8. HEW has freely admitted the validity of this statement. *Id.* at 429-30 (Appendix to opinion of Douglas, J., concurring); National Welfare Rights Org. v. Finch, 429 F.2d 725, 731 n.21 (D.C. Cir. 1970); Catholic Medical Center, Inc. v. Rockefeller, 305 F. Supp. 1268, 1270 (E.D.N.Y. 1969), *vacated and remanded*, 397 U.S. 820, *reinstated district court opinion aff'd*, 430 F.2d 1297 (2d Cir.), *appeal dismissed*, 400 U.S. 931 (1970). *See also* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 91 (1967).

15. For a discussion of the "standard of need" computation required of states participating in the AFDC program see 118 U. PA. L. REV., *supra* note 6, at 1144-45 & n.6.

court found jurisdiction and granted relief on the merits,[16] but the Second Circuit reversed, finding neither jurisdiction nor substance in the claims presented.[17] The Supreme Court reversed the court of appeals, determining that the district court had properly retained jurisdiction and was not required to defer hearing the welfare recipients' petition, despite the fact that HEW had not yet held conformity hearings nor determined the validity of the New York statute.[18]

In deciding not to require deferral of judgment to HEW, the Supreme Court considered two doctrines which might influence a court to await agency determination. The first doctrine involved is exhaustion of administrative remedies, which provides that recourse to a federal court is proper only after all available administrative remedies have been exhausted.[19] If no remedy exists, the doctrine is not applicable;[20] therefore, AFDC claimants probably would not fall within the doctrine, since HEW has not established procedures to hear recipient challenges to the legality of state welfare programs.[21]

Primary jurisdiction is the second doctrine which might prompt a court to yield to an agency before deciding an issue. It provides that, in cases raising issues of fact not within the conventional experience of judges or requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter involved "should not be passed over."[22] The purpose of this wholly judge-made doctrine is not to divide powers between courts and agencies but to determine which tribunal should take *initial* action.[23] Thus, a court may have jurisdiction and yet stay its proceedings pending administrative determination of a particular issue[24] or dismiss the case

16. Rosado v. Wyman, 304 F. Supp. 1356 (E.D.N.Y. 1969).

17. Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969); *see* 397 U.S. at 414 n.18 (explaining how the Second Circuit found no jurisdiction yet "ruled" on the merits).

18. 397 U.S. at 406.

19. *See, e.g.*, Puhlic Serv. Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

20. *Cf.*, Moore v. Illinois Cent. R.R., 312 U.S. 630, 634-35 (1941); JAFFE 426.

21. 67 COLUM. L. REV., *supra* note 14, at 102. But if the rationale behind the exhaustion doctrine focuses upon ripeness for adjudication and deference to established administrative procedures, it could be argued that HEW administrative procedures—conformity hearings and informal conferences which would determine the same issue the claimants would raise in court—should be allowed to run their course prior to judicial action.

22. Far East Conf. v. United States, 342 U.S. 570, 574 (1952).

23. DAVIS § 19.09, at 53.

24. *E.g.*, General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 432-33 (1940); Ashland Oil & Refining Co. v. FPC, 421 F.2d 17, 20 (6th Cir. 1970).

even though the eventual agency decision will be subject to judicial review.[25] The rationale for the application of the primary jurisdiction doctrine is traditionally expressed in terms of both the necessity for uniformity of application of a law and the need for administrative expertise.[26] Commentators agree that the doctrine is primarily applicable to controversies arising in the so-called regulated industries[27] but disagree as to the major criteria triggering its invocation. Professor Jaffe emphasizes legislative intent, as implemented by a pervasive and systematic scheme of agency regulation, as the factor prompting deference to administrative determination.[28] Professor Davis contends that the principal criterion for determining the applicability of primary jurisdiction is whether there is judicial need for resort to administrative judgment.[29] The case law development seems to support both positions.

The primary jurisdiction doctrine was first promulgated by the Supreme Court in *Texas & Pacific Railway v. Abilene Cotton Oil Co.*,[30] where a shipper contended that a published carrier rate was unreasonable and sued the carrier in a state court for the excess. The Supreme Court held that only the Interstate Commerce Commission could determine whether the carrier rate was reasonable. Although the Commerce Act provided for concurrent jurisdiction in the agency and the courts,[31] the Court reasoned that the purpose of the Act was to provide for uniform rates and that state court jurisdiction, without prior recourse to the agency, would render the act unenforceable.[32] Thus, the case creating the doctrine of primary jurisdiction did not mention agency expertise; rather, the Court sought to further the uniform application of a federal statute. In *Great Northern Railway v. Merchants Elevator Co.*[33] the Supreme Court limited the doctrine

25. Far East Conf. v. United States, 342 U.S. 570, 577 (1952).

26. United States v. Western Pacific R.R., 352 U.S. 59 (1956); Far East Conf. v. United States, 342 U.S. 570, 574-75 (1953); JAFFE 123-25.

27. DAVIS § 19.01, at 5; JAFFE 133. *See also* Chicago, R.I. & P. R.R. v. Furniture Forwarders Inc., 420 F.2d 385, 389 (8th Cir. 1970); Petruccelli & Long, *Antitrust and the Regulated Industries: The Role of the "Doctrine" of Primary Jurisdiction*, 1969 TOLEDO L. REV. 303. *But see* Catholic Medical Center, Inc. v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969) (suggesting that the doctrine of primary jurisdiction may be relevant to a consideration of the relationship between HEW and the courts).

28. JAFFE 124.

29. DAVIS § 19.09, at 53.

30. 204 U.S. 426 (1907).

31. 49 U.S.C. §§ 9, 22 (1964).

32. 204 U.S. at 441.

33. 259 U.S. 285 (1922).

by holding it inapplicable to the interpretation of a railroad shipping tariff containing words which were "used in their ordinary meaning"[34] since the construction of the document posed a legal issue determinable by a court without prior recourse to the agency. The question in *Great Northern* was solely one of law, with no disputed factual questions, nor any leeway for agency discretion; therefore, agency expertise was not required,[35] courts being quite experienced in the interpretation of the legal effect of writings.[36] This law-fact distinction was qualified by *United States v. Western Pacific Railroad*,[37] where the Supreme Court held that the doctrine of primary jurisdiction required a tariff first to be construed by the ICC to determine the applicability of an "incendiary bomb" shipping rate. The Court declared that considerations of uniformity and expert administration of the pervasive regulatory scheme compelled deference to the ICC, since the issue required a working knowledge of the transportation policies underlying the rate in question.[38] Relying on the language in *Great Northern*, the Court believed that the determination of the meaning of "incendiary bomb" involved factors which presupposed an "acquaintance with many intricate facts of transportation."[39]

The initial issue in *Rosado v. Wyman* involved the interpretation of section 402(a)(23) of the Social Security Act, which required a critical examination of the statute and its legislative history. After determining that section 402(a)(23) required New York to adjust upward its "standard of need" as computed for AFDC purposes, the Court was then confronted with the question of whether the New York statute had, in fact, lowered the "standard of need" by adopting a new system of computation. The Court resolved this problem by accepting the findings of the district court that significant

34. *Id.* at 291.

35. *See, id.* at 291 n.1.

36. The Court pointed out that the uniformity necessary to implement the Commerce Act would not be sacrificed by allowing a court to make the initial decision since the construction of interstate tariffs is a question of federal law which could ultimately be reviewed by the Supreme Court. *Id.* at 291-92.

37. 352 U.S. 59 (1956). *See* 55 MICH. L. REV. 864 (1957).

38. 352 U.S. at 65-66.

39. *Id. See also* United States v. Chesapeake & Ohio Ry., 352 U.S. 77 (1956). The 1970 decisions indicate that courts continue to defer to the proper agency where special expertise is required to resolve an issue. *See* Chicago, R.I. & P.R.R. v. Furniture Forwarders, Inc., 420 F.2d 385, 388 (8th Cir. 1970); *cf.* Ratner v. Chemical Bank N.Y. Trust Co., 309 F. Supp. 983, 986 (S.D.N.Y. 1970).

reductions in both benefits and standards of need had been effected by New York.[40] Conceding great flexibility in the states to construct "standard of need" schedules which consolidated or averaged various items, the Court focused on a fact not disputed by New York: "special" grants had been eliminated from that state's AFDC program, and those grants had provided for recurring expenses formerly considered essential by New York.[41] Clearly, the majority of the Court felt themselves adequate to the task of analyzing the New York welfare amendment for its compliance with federal requirements. Justice Black, however, argued that the sensitive issues raised in *Rosado* were "exceedingly complex" and should have been considered first by HEW.[42] The dissent also concentrated on two other points: that the statutory scheme embodied by the Social Security Act contemplated HEW determination of a state's conformity with the federal AFDC statute *prior* to any judicial involvement, and that precipitous court action would not only increase already overloaded court dockets but would provide an incentive for HEW to evade its responsibilities by diverting sensitive questions to the judiciary.[43] The majority, however, was unwilling to find that Congress intended to preclude federal court jurisdiction where welfare recipients challenged the validity of a state statute.[44]

In finding this judicial power to make the initial factual determinations where federal welfare payments are involved, the Court relied, in part, on *Abbott Laboratories v. Gardner,*[45] a drug-labeling case which had rejected the proposition that explicit statutory provisions for judicial review of certain administrative regulations impliedly precluded judicial review of the agency's other regulatory activities.[46] While *Abbott Laboratories* actually concerned the review of agency decision-making and did not involve a primary jurisdiction

40. 304 F. Supp. at 1369, 1381. *See* 118 U. PA. L. REV., *supra* note 6, at 1162.

41. 397 U.S. at 417-18.

42. *Id.* at 433 (Black, J., dissenting), *quoting* 414 F.2d 170, 181 (Lumbard, J., concurring). Such issues might include problems of efficiency within a state program, as well as a determination of what constitutes items necessary for subsistence.

43. 397 U.S. at 434-35 (Black, J., dissenting). For a discussion of the importance of a "statutory scheme" in dictating the kind of judicial review available, see 67 COLUM. L. REV., *supra* note 14, at 121-23.

44. 397 U.S. at 422.

45. 387 U.S. 136 (1967). *See generally* Comment, *Pre-Enforcement Review of Administrative Regulations,* 42 S. CAL. L. REV. 505, 515 (1969).

46. 387 U.S. at 141, 144. *See* National Welfare Rights Org. v. Finch, 429 F.2d 725, 735 (D.C. Cir. 1970).

question, its import has been expanded to posit a basic presumption, absent express congressional provision to the contrary, that the federal courts are available to protect the interests of persons affected by federal legislative programs, despite concurrent administrative agency authority.[47] The statute involved in *Rosado* delegated state conformity issues to HEW but did not mention claims by aggrieved individuals; therefore, the Court declared: "[W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in the field."[48] Furthermore, the Court cited a number of cases in which welfare recipients had successfully invoked a judicial forum for the initial determination of nonconformity issues.[49] *King v. Smith*[50] is representative of the welfare cases adverted to and embraced the same statutory scheme as *Rosado*. The AFDC claimants in *King* were permitted to attack a state's so-called "substitute father" regulation, whereby payments were denied to the children of a mother who cohabited with an able-bodied man, without prior recourse to HEW. Plaintiffs in *King* and *Rosado* had no administrative procedures directly available to them, and even though a nonconformity hearing may be had by the state, the inability of welfare recipients to initiate or participate in such a hearing was a principal reason that the *Rosado* Court refused to invoke either the doctrine of primary jurisdiction or exhaustion of remedies.[51]

While it is difficult to draw any general conclusions from *Rosado v. Wyman* concerning primary jurisdiction, it does seem that the Court was influenced by the many facts unique to the particular case,[52] including HEW's decision to remain "aloof" from the early

47. 397 U.S. at 420. *See* National Welfare Rights Org. v. Finch, 429 F.2d 725, 735-36 (D.C. Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1097-98 & n.19-20 (D.C. Cir. 1970); Coalition for United Community Action v. Romney, 316 F. Supp. 742, 746 (N.D. Ill. 1970); Leyden v. FAA, 315 F. Supp. 1398, 1403 (E.D.N.Y. 1970); Triangle Improvement Council v. Ritchie, 314 F. Supp. 20, 26-27 (S.D.W.Va. 1969), *aff'd per curiam*, 429 F.2d 423 (4th Cir. 1970).

48. 397 U.S. at 422.

49. *Id.* The Court noted, however, the "escalating involvement" by federal courts in welfare litigation and suggested that the area of welfare benefits should initially be "formally placed" under HEW supervision. *Id. See generally* Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1.

50. 392 U.S. 309 (1968).

51. See text accompanying note 14 *supra*.

52. The importance of a case's peculiar factual background in influencing the court's application of the doctrine of "primary jurisdiction" is illustrated by Catholic Medical Center, Inc. v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969), where plaintiff-hospitals sought to

judicial proceedings despite the district court's efforts to obtain the agency's opinions.[53] Much hinged upon the intangible issue of whether the New York amendment *clearly* contravened federal law or whether it would require HEW expertise to resolve the question. In light of Justice Harlan's feeling that HEW would probably serve as a better forum for welfare claimants,[54] *National Welfare Rights Organization v. Finch*[55] represents the natural extension of the *Rosado* decision. In *National Welfare Rights Organization* the District of Columbia Circuit required HEW to permit welfare claimants to intervene in agency proceedings where a hearing on the conformity of Nevada and Connecticut statutes with federal AFDC requirements had already been scheduled. The court distinguished *Rosado* as an instance where hearings had *not* been announced and declared its decision the first step in a solution to the problem of increasing welfare litigation in the federal courts.[56] Presumably, however, had HEW hearings not been imminent, the court of appeals in *National Welfare Rights Organization* would have allowed the AFDC recipients to seek a judicial remedy without having to await them, since the welfare recipients could not have initiated such HEW action.[57]

While *Rosado v. Wyman* was concerned with the question of whether the doctrine of primary jurisdiction was applicable at all, two other 1970 decisions considered the further question of the effect an agency ruling would have upon a court which had referred for administrative action an issue which clearly fell within an agency's "primary jurisdiction." In *Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc.*,[58] a carrier brought suit in a

invalidate a 1969 amendment to New York's Public Health Law which purported to "freeze" rates of payment to hospitals participating in the federal-state Medicaid program, allegedly in violation of federal law. The following faetors contributed to the court's proceeding directly to adjudicate the controversy prior to an HEW determination on the conformity issue: limitations on HEW's power to protect the hospitals, since, by agency admission, HEW could not order retroactive Medicaid payments; the relative simplicity of the facts presented, obviating any need for agency expertise; the lack of available procedure for the hospitals to obtain an administrative determination; the declaration by HEW in its *amicus curiae* brief that the New York statute violated federal laws; and an express intent by New York to conform to the federal requirements. *See also id.* at 1266.

53. 397 U.S. at 407. Yet, this does seem consistent with HEW's claim of primary jurisdiction, which would have given the agency priority in rendering a decision and would have required that the district court hold the action in abeyance pending HEW determination.

54. *Id.* at 422.

55. 429 F.2d 725 (D.C. Cir. 1970).

56. *Id.* at 738.

57. *Id.*

58. 430 F.2d 334 (1st Cir. 1970), *cert. denied*, 400 U.S. 964 (1970).

district court to recover the difference between its published tariffs and the lower rates it had charged as a result of a complex contractual relationship with a larger shipping company. The district court initially directed the parties to seek an advisory opinion from the ICC and later ordered that proceedings be initiated for a formal declaratory order by the Commission.[59] Retaining jurisdiction pending agency action, the district court included in its order of referral certain "assumptions" upon which the ICC determination should be based.[60] The ICC trial examiner ruled that the carrier was required to charge its published rates. Yet, even after Commission adoption of this decision, the district court, substituting its own findings of fact and conclusions of law, held against the carrier, contrary to the ICC ruling.[61] On appeal, the First Circuit considered two principal issues: whether the doctrine of "primary jurisdiction" required that the ICC initially determine whether the carrier's published rates had to be levied and whether the ICC had rendered a formal judgment which was binding upon the district court. In answering the first question in the affirmative, the court of appeals properly considered the complexity of the factual situation involved and the lack of experience of courts in resolving intricate transportation issues.[62] The First Circuit found the second issue—the effect of the ICC order on the district court—more difficult. While the district court had failed to rule explicitly that the doctrine of primary jusisdiction applied, the court of appeals considered this implicit in the lower court's referral to the agency while retaining jurisdiction. Moreover, despite the district court's inclusion of "assumptions" in its order of referral, the ICC trial examiner had apparently made his own findings of fact, based partially upon extensive affidavits filed by the parties.[63] Therefore, the Commission's order had the character of a formal ruling rather than an advisory opinion, and it thus fulfilled the requisites of agency action which is conclusive under the primary jurisdiction doctrine.[64]

59. This action is consistent with a referral to the ICC under the doctrine of primary jurisdiction. See note 24 *supra* and note 81 *infra*.

60. 430 F.2d at 338 n.3.

61. *Id.* at 339.

62. Because of the broader issues of transportation policy raised and the need for uniformity, the court held the matter within the ICC's primary jurisdiction. *Id.* at 340; *cf. id.* at 340 n.5; Chicago, R.I. & P.R.R. v. Furniture Forwarders, Inc., 420 F.2d 385, 389 (8th Cir. 1970). See text accompanying note 39 *supra*.

63. 430 F.2d at 340-41.

64. Apparently the shipper, against whom the ICC order had gone, argued that the Commission's opinion was merely advisory in nature and not binding upon the district court.

Regretfully, by inartful language, the *Locust Cartage* court left unclear the proper method by which review of the ICC ruling could have been accomplished. Generally, where an agency has primary jurisdiction of an issue and a court suspends its determination pending agency action, the subsequent administrative order, if supported by substantial evidence, becomes conclusive on that issue.[65] However, a 1964 amendment to the Federal Judicial Code provided that when a district court refers a question for ICC determination, it shall have exclusive jurisdiction to review the Commission's order.[66] In *Locust Cartage* the First Circuit held that the ICC ruling in that case was binding upon the district court because no application for review had been filed within the required 90-day period,[67] perhaps suggesting that a *separate court action* would have been necessary to challenge the Commission order. This would be plainly contrary to the decision in *McLean Trucking Co. v. United States*,[68] where the Court of Claims interpreted the 1964 amendment to the Judicial Code as not requiring the "pointless duplication and needless expense" of a separate action.[69] Consequently, all that was required by the statute was the filing of an additional pleading before the same court which had originally referred the issue to the ICC.[70] Presumably, such additional pleading must be presented within the 90-day period.[71]

Even if the court of appeals had accepted this interpretation of the nature of the ICC opinion, precedent exists for not rejecting the determination of an administrative agency even under such circumstances unless it is arbitrary or unsupported by substantial evidence. Seaboard Airline R.R. Co. v. United States, 387 F.2d 651, 656 (Ct. Cl. 1967). *But see* Catholic Medical Center, Inc. v. Rockefeller, 305 F. Supp. 1268, 1270 (E.D.N.Y. 1969) (where the views of HEW were presented via *amicus curiae* brief and were deemed not conclusive by the court).

65. *See* Elgin, J. & E. Ry. v. Benjamin Harris & Co., 245 F. Supp. 467, 471 (N.D. Ill. 1965); Fremlin, *Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L.J. 733 (1967); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1055 & n.57 (1964); Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 GEO. L.J. 812, 813-14 & n.8 (1967).

66. 28 US.C. § 1336(b) (1964).

67. 430 F.2d at 341. *See* Nemitz v. Norfolk & W. Ry., 309 F. Supp. 575, 582 n.5 (N.D. Ohio 1969); 28 U.S.C. § 1336(c) (1964).

68. 387 F.2d 657 (Ct. Cl. 1967).

69. *Id.* at 660.

70. *Id.; see* Seaboard Airline R.R. v. United States, 387 F.2d 651, 655 (Ct. Cl. 1967).

71. This statutory requirement seems redundant, for it might be presumed that a party to a postponed judicial proceeding would naturally desire a court to review an adverse agency determination. And the failure to file the supplemental pleading may present a pitfall for the unwary, who understandably might assume that a court referring an issue would be inherently competent to review any agency action stemming from such referral. The court in *Locust Cartage* recognized the potential harshness of its decision. 430 F.2d at 341. Nevertheless, as the court further noted, had it felt that the ICC order was not based upon sufficient facts, it still

The Supreme Court in *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*[72] seems by implication to have accepted the *McLean Trucking Co.* interpretation but only where an ICC ruling is involved. *Port of Boston* concerned a dispute between ship owners and wharf operators over charges accruing from cargo stranded on the docks during a 1965 longshoremen's strike. Prior to 1964 the wharf owners had charged the cargo consignees a daily fee for cargo left unmoved after 5 days pursuant to a tariff approved by the Federal Maritime Commission. In 1964, without prior FMC approval, the Terminal Association revised its fees to assess part of the daily charge against the ship owners, certain of whom refused to pay. The state action filed by the Terminal Association to recover the fees was removed to a federal district court, which postponed the litigation while retaining jurisdiction, pending a FMC ruling on the legality of the new fee assessment plan. After the FMC upheld the revised fee structure, the association of ship owners sought review in the court of appeals, but its late petition was dismissed as untimely. Subsequently, an individual ship owner filed with the FMC for reconsideration of its order, but this petition also was dismissed as untimely. Choosing not to seek direct judicial review of the Commission's denial of a rehearing, the individual ship owner petitioned to intervene in the postponed district court litigation. Although this request was granted, the court refused to collaterally review the FMC order on the merits and, following the agency's decision, rendered judgment in favor of the wharf owners. The First Circuit Court of Appeals reversed on the grounds that the FMC decision contravened a prior Supreme Court decision and was reviewable collaterally on the merits in the district court.[73] In reversing the court of appeals, the Supreme Court rejected the power of the district court to review the Commission's order since, by statute, the courts of appeal have exclusive jurisdiction to review final orders of the FMC.[74] Distinguishing the review of ICC orders, whereby referring courts retain jurisdiction over appeals from subsequent Commission decisions,[75] the Court asserted that the

might have refused to abide by such order and could have remanded for further Commission proceedings. *Id.; see* Elgin, J. & E. Ry. v. Benjamin Harris & Co., 245 F. Supp. 467, 474 (N.D. Ill. 1965).

72. 400 U.S. 62, *rev'g sub nom.* Port of Boston Marine Terminal Ass'n v. Boston Shipping Ass'n, Inc., 420 F.2d 419 (1st Cir. 1970).

73. 420 F.2d at 422-23.

74. 400 U.S. at 69.

75. *Id.* See text accompanying note 66 *supra.*

statutory purpose of ensuring that the Attorney General would be able to participate precluded any review of FMC orders other than in the courts of appeal.[76]

Port of Boston suggests that where a district court retains jurisdiction and refers to the ICC an issue within the agency's primary jurisdiction, the subsequent agency order may be reviewed by the referring court in the same action; but, where a district court refers an issue to the FMC[77] and retains jurisdiction, review of the agency decision must be had in a *separate action* in the courts of appeal, before the postponed district court action may proceed. Failure to seek such direct review would mean the FMC's order would become binding upon the district court which had referred the issue to the Commission.[78]

There is still the unresolved question of where judicial review of issues referred under the doctrine of primary jurisdiction to *other* federal agencies, such as HEW, must be sought, when no clear statutory guidance is available. While the district court in *Rosado* should properly have *dismissed* the suit had it decided to defer to HEW primary jurisdiction,[79] in *Catholic Medical Center, Inc. v. Rockefeller*[80] the district court conceivably could have postponed the litigation while retaining its own jurisdiction and submitted the question of the New York statute's conformity with the federal Medicaid requirements to HEW.[81] Had it done this and the agency's conformity ruling been rendered *adverse* to the plaintiff-hospitals,

76. 400 U.S. at 70. No indication was given by the Court why the Attorney General could not also participate in federal district court proceedings.

77. The statutory scheme for judicial review involved in *Port of Boston*, 28 U.S.C. § 2342 (Supp. V, 1970), applies to final orders of the FCC, Dept. of Agriculture, and AEC as well.

78. 400 U.S. at 72. See note 65 *supra* and accompanying text.

79. Since the welfare recipients were essentially seeking a determination of the New York statute's conformity with federal AFDC requirements, HEW could be able to provide all of the relief requested—in the form of a finding of conformity or nonconformity—and nothing would be gained by retaining court jurisdiction nor lost if a dismissal were granted. *See* JAFFE 137-41. See note 25 *supra* and accompanying text.

80. 305 F. Supp. 1256 (E.D.N.Y. 1969). See note 52 *supra* for a discussion of this case.

81. *Catholic Medical Center* differs from *Rosado* in that the former litigation involved a remedy which HEW alleged it was without authority to grant: requiring payment of the difference between what the plaintiff-hospitals had actually received and what they should have been paid. 305 F. Supp. at 1270. Since only the court could provide this remedy, it could properly postpone the litigation pending HEW determination of the conformity issue, yet retain jurisdiction over the action. See notes 24 & 79 *supra*. *See* General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 428 (1940); Chicago, R.I. & P.R.R. v. Furniture Forwarders, Inc., 420 F.2d 385, 390 (8th Cir. 1970).

how would they have been required to seek judicial review of the HEW order: in a subsequently-filed pleading in the district court where the action had originally been brought and was postponed, or in a separate suit filed under the review provisions of the Administrative Procedure Act?[82] Logic and considerations of judicial economy suggest that additional pleadings in the original court would be the more practical solution. But the statutory provision requiring *state* appeals from HEW conformity decisions to be taken to the courts of appeal[83] might lead the Supreme Court to require that a separate action be filed even by non-state litigants.[84]

II: FREEDOM OF INFORMATION

The Freedom of Information Act[1] (FOIA) remained controversial during 1970; it was followed with hesitancy by administrators and interpreted with difficulty by the courts. The Act was adopted to facilitate public awareness of the activities of the federal government, and it requires that certain materials, such as an agency's procedural regulations and general policy statements, be published in the *Federal Register*[2] and that other materials, including final agency rulings, be made available for public inspection and copying.[3] More importantly, however, the Act compels the release of existing agency records which have been sufficiently identified by the requester[4] and which are not within any of the FOIA's nine specific exemptions.[5] While some litigation has arisen over the sufficiency of agency publication of

82. 5 U.S.C. § 702 (Supp. V, 1970); *see* 305 F. Supp. at 1264 (suggesting the applicability of the APA to the plaintiff-hospitals as aggrieved parties).

83. 42 U.S.C. § 316 (Supp. V, 1970).

84. The Supreme Court has recognized the potential problems in the primary jurisdiction field caused by separate suits to review the subsequent agency action. Yet the Court neither prohibited such bifurcation of litigation nor offered clear guidance for preventing such duplication. *See* Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 85 (1962) (footnote marked with an asterisk).

1. 5 U.S.C. § 552 (Supp. V, 1970).

2. *Id.* § 552(a)(1).

3. *Id.* § 552(a)(2).

4. *Id.* § 552(a)(3).

5. *Id.* § 552(b)(1)-(9).