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Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process

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ADMINISTRATIVELY DECLARING ORDER: SOME PRACTICAL APPLICATIONS OF THE ADMINISTRATIVE PROCEDURE ACT'S DECLARATORY ORDER PROCESS

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Section 554(e) of the Administrative Procedure Act permits agencies to issue administrative declaratory orders to terminate controversies or remove uncertainty. Such orders can operate as a summary judgment device to end unnecessary administrative proceedings or as a declaratory judgment device to allow agencies to declare the law in a final, judicially reviewable manner that will not subject an inquirer to agency sanctions. Professor Powell observes that although agencies have been willing to use the summary judgment application of the administrative declaratory order, they have been less inclined to employ it as a declaratory judgment device. After examining several situations in which the declaratory judgment aspect of the administrative declaratory order might be used effectively, Professor Powell argues that agencies should begin to use section 554(e)'s declaratory judgment power aggressively. The Article concludes with a set of proposed guidelines for agencies to follow in rendering advice and issuing declaratory orders.

Section 554(e) of the Administrative Procedure Act (APA)[1] empowers federal agencies to issue declaratory orders "to terminate a controversy or remove uncertainty."[2] The primary purpose of section 554(e) is to provide a mechanism by which persons who are subject to regulation by federal agencies can secure judicial review of disputed legal positions without risk of agency sanctions. This Article discusses what an administrative declaratory order is and when it might be used to achieve this purpose. The discussion proceeds from definitional to operational concerns: part I of the Article defines the summary judgment and

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1. The Administrative Procedure Act was originally enacted in 1946, Pub. L. No. 404, ch. 324, 60 Stat. 237 (1946), and was repealed and replaced in 1966. Pub. L. No. 89-554, 80 Stat. 381 (1966) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982)). *See* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59-60 (1947) (discussing how and when a declaratory order can be issued). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10, at 267 (1958) (distinguishing declaratory orders from other types of agency decisions).

2. 5 U.S.C. § 554(e) (1982) (originally codified at 5 U.S.C. § 5(d)) (An "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."). For an historical and policy examination of the provision, see Powell, *Sinners, Supplicants and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C.L. REV. 339 (1985).

declaratory judgment applications of declaratory orders; part II analyzes the relationship of administrative declaratory orders to the APA's scope of judicial review provision;[3] and part III examines several cases illustrating instances in which declaratory orders might be used to the advantage of agencies and the public. In part IV the Article makes recommendations for increased agency use of the advice-giving function of the declaratory order.

I. INTRODUCTION

The declaratory order is an adjudicatory procedure[4] for securing an administratively final,[5] judicially reviewable declaration of the law. Unlike interpretive rules,[6] policies, and guidelines, which indicate how an agency *might* apply the law in some future circumstance,[7] the declaratory order applies the law to a

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3. 5 U.S.C. § 706 (1982) provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions" that do not meet any of six standards. In every case agency action must be set aside if it is:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law.

Id. § 706(2)(A)-(D).

In certain other narrowly limited situations, the agency action must be set aside if it is not supported by "substantial evidence in a case subject to [§§ 556 and 557 of the APA] or otherwise reviewed on the record of an agency hearing provided by statute." *See id.* § 706(2)(E); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971) (discussing application of § 706 (2)(E)). In other situations involving equally narrow circumstances, the reviewing court engages in a de novo review of the action; if the action is determined to be "unwarranted by the facts," the court must set it aside. *See* 5 U.S.C. § 706(2)(F) (1982); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971) (discussing application of § 706(2)(F)).

4. 5 U.S.C. § 551(7) (1982) defines adjudication as the "agency process for the formulation of an order." An order is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). *See* United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973) (distinguishing between "proceedings for the purpose of promulgating policy-type rules or standards" (rulemaking) and "proceedings designed to adjudicate disputed facts in particular cases" (adjudication)).

5. Definition of "final agency action" is not difficult in the abstract. It simply means that the position of the agency has reached the procedural stage within the agency at which its application of the law to a person is not amenable to change by further substantive review. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-56 (1967) (discussing how "final agency action" has been defined and applied). As *Abbott Laboratories* shows, however, agencies and the public often disagree regarding whether an agency's position has a substantive impact or remains amenable to change. *See also* City of Miami v. ICC, 669 F.2d 219 (5th Cir. 1982) (court held, despite agency's protest, that a commission order issued under § 554(c) was a nonreviewable advisory ruling rather than a final reviewable order).

6. Interpretive rules are without legal effect; they simply indicate how an agency intends to apply the law if the appropriate occasion arises. In contrast, legislative rulemaking establishes standards that are immediately enforceable by sanctions against violators. *See* 1 K. DAVIS, *supra* note 1, § 5.05, at 314; *see also* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973) (court found respondents' reliance on U.S. Army Corps of Engineers regulations deprived them of adequate warning of potential misconduct); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (court held agency reliance on rulings under the Fair Labor Standards Act proper, but remanded for factual determination).

7. *See* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

concrete set of facts. Because the declaratory order determines the legal rights of specifically affected individuals, it is immediately ripe for judicial review.

Declaratory orders are issued at the discretion of the agency.[8] Under the APA, the only formal requisite for issuance of a declaratory order is the requirement that such orders be issued in aid of an adjudication required "to be determined on the record after opportunity for an agency hearing."[9] If this requirement is met, a declaratory order may be issued either before a person is formally threatened with agency sanctions or after the agency has begun the hearing process preliminary to such sanctions.

The declaratory order provides a mechanism for expeditiously resolving disputes between the agency and those subject to the agency's regulations. It is particularly valuable in the following situations: (1) when the continued use of trial type procedures in a hearing is no longer appropriate;[10] (2) when it is possible to avoid a formal adjudicatory hearing that may lead to agency sanctions by resolving disagreements about interpretations of the law;[11] and (3) when trial type procedures are inappropriate because collateral estoppel in an analogous case makes formal procedures unnecessary.[12] When the continued use of trial type procedures becomes inappropriate in agency proceedings, the declaratory order provision of the APA authorizes agencies to issue administrative summary judgment[13] orders. This use of the declaratory order provision is the one most favored by agencies. As a summary judgment device, the declaratory order

8. The availability of declaratory orders is limited by the provision allowing an agency to issue such orders "in its sound discretion." 5 U.S.C. § 554(e) (1982). This provision does not, however, give agencies absolute discretion. The decision whether to issue a declaratory order must be consistent with all other exercises of agency discretion: it should reflect a weighing of the relevant considerations and be free from arbitrary or capricious conduct by the agency. *See* Intercity Transp. Co. v. United States, 737 F.2d 103, 108 (D.C. Cir. 1984); Powell, *supra* note 2, at 358 n.70.

9. 5 U.S.C. § 554(a) (1982); *see also* Powell, *supra* note 2, at 360 (discussing interaction of § 554(a) and § 554(e)).

10. The United States Supreme Court made clear in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), that full use of the formal hearing procedures under the APA is not required in every case. Such procedures should be used only when they are likely to generate facts necessary to an understanding and determination of the dispute or to aid judicial review. *Accord* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); *see infra* text accompanying note 26.

11. *See infra* text accompanying notes 14-18.

12. *See infra* text accompanying notes 19-20.

13. The term "administrative summary judgment" has had a relatively short existence. It was first approved by the United States Supreme Court in Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 617 (1973). Previously the term had been used in U.S.V. Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455, 460-66 (D.C. Cir. 1972); *see also* American Cyanamid Co. v. FDA, 606 F.2d 1307, 1323 (D.C. Cir. 1979) (court remanded for further agency proceedings despite recognizing "a rather broad area in which FDA may properly enter administrative summary judgment"); Wisconsin Elec. Power Co. v. Federal Energy Regulatory Comm'n, 602 F.2d 452 (D.C. Cir. 1979) (court distinguished situations in which an administrative summary judgment order would be appropriate); National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 697-98 (2d Cir.) (court held that an agency "may follow streamlined procedures designed to avoid the endless delays that have tended to paralyze adjudicatory hearings and render them ineffective as means of utilizing agency expertise"), *cert. denied*, 423 U.S. 827 (1975); Hess & Clark, Division of Rhodia v. FDA, 495 F.2d 975, 982-83 (D.C. Cir. 1974) (court held that FDA "summary judgment" regulations must be applied consistently with basic fairness); E.R. Squibb & Sons v. Weinberger, 483 F.2d 1382, 1386 (3d Cir. 1973) (court stated that before a court of appeals may affirm an administrative summary judgment, it must be certain that no genuine issues of material fact are in dispute).

eliminates unnecessary evidentiary hearings when no genuine issue of material fact exists.

The least appreciated application of the declaratory order permits an agency to state the law in a manner that does not penalize noncompliance but merely sets forth the agency's view of the law.[14] Such noncoercive orders afford a means by which the agency's view can be tested judicially without subjecting the inquirer to punishment.[15] In these circumstances the declaratory order responds to the predicament of the individual who is uncertain about the requirements of a statute or regulation; it eliminates the need to choose between desisting from contemplated action to avoid threatened agency sanctions or purposefully disregarding the agency's views to initiate a legal test of the law's interpretation.[16] Like its judicial counterpart, the declaratory judgment,[17] the administrative declaratory order allows legal rights and duties to be resolved *before* disputants engage in conduct for which they may be held liable. The declaratory order thus overcomes delays that often arise when courts resolve administrative disputes.[18]

The declaratory order provisions of the APA also permit agencies to give adjudicatory decisions, including past declaratory orders, preclusive effect—the

14. *See* 1 K. DAVIS, *supra* note 1, § 4.10, at 268; City of Miami v. ICC, 669 F.2d 219 (5th Cir. 1982) (denying the Commission's power to issue judicially reviewable declaratory orders). *But see* Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 328 n.6 (1971) (White, J., dissenting) (arguing that NLRB has statutory authority to issue declaratory orders). For a hypothetical discussion based on *Lockridge*, see Powell, *supra* note 2, at 340.

15. Some commentators have suggested that agencies view this advisory aspect of the declaratory order as one of the procedure's most troubling characteristics. *See, e.g.*, L. JAFFE & N. NATHENSON, ADMINISTRATIVE LAW, CASES AND MATERIALS 307 (4th ed. 1976). Such agency guidance implicates the agency in the process of undermining and breeding disrespect for its own regulatory role by counseling would-be wrongdoers about just how far and in which directions they can go without technically being in violation of the law. The alternative, of course, is an agency that is able to usurp additional authority simply by threatening to seek sanctions against conduct that the agency dislikes, but which is, in actuality, at the vague outer boundaries of permissible conduct.

16. It is possible to argue that regulated persons are only rarely forced to risk agency sanctions to test underlying legal principles by judicial review because at least some agencies give informal advice freely and communicate with those they regulate to work out alternatives to confrontation. *But see infra* text accompanying notes 99-110 (detailing background of Bituminious Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), in which mining companies were forced to await sanctions and mount a lengthy court challenge to resolve a question of agency authority); *see also* Powell, *supra* note 2, at 347 n.36 (description of an informal agency study concerning the use and nonuse of the declaratory order).

17. Declaratory Judgment Act, Pub. L. No. 733, ch. 646, 62 Stat. 964 (1948) (codified as amended at 28 U.S.C. §§ 2201, 2202 (1982)); *see* 3 K. DAVIS, *supra* note 1, § 23.04, at 308-09 (discussing injunctive and declaratory judgment proceedings for review of administrative decisions in the United States in general and Declaratory Judgment Act specifically). *See generally* E. BORCHARD, DECLARATORY JUDGMENTS 128-31 (2d ed. 1941) (discussing history and evolution of declaratory judgment proceedings in England).

18. The doctrines of exhaustion of administrative remedies and ripeness pose two of the major hurdles delaying judicial resolutions of administrative disputes. Broadly speaking, the doctrine of exhaustion of administrative remedies requires completion of administrative action before a judicial forum is made available. *See* 3 K. DAVIS, *supra* note 1, § 20.02, at 57. The doctrine of ripeness seeks to ensure that courts adjudicate only real controversies and not mere hypothetical questions. *See id.* § 21.01, at 116. Unfortunately, courts often apply these doctrines capriciously. *See* Powell, *supra* note 2, at 341 n.7 (discussing Supreme Court treatment of the doctrine of ripeness); *id.* at 354 n.62 (discussing judicial treatment of exhaustion of remedies). For a succinct comparison of trial and administrative hearings, see G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 28-30 (1980).

effect of barring future litigation by all persons who were afforded an opportunity to participate in the hearing that generated the order.[19] When collateral estoppel is appropriate, the agency may employ the administrative summary judgment use of the order to avoid the delays of unnecessary evidentiary hearings.[20]

II. PROCESS CONSIDERATIONS

A. *In Relation to Civil Procedure*

1. Summary Judgment

Administrative declaratory orders have both summary judgment and declaratory judgment applications.[21] Reflecting its counterpart under rule 56 of the Federal Rules of Civil Procedure,[22] the summary judgment application pro-

19. Stare decisis and collateral estoppel applications of the declaratory order are not new. In NLRB v. Wyman-Gordon, 394 U.S. 759, 766 (1969), a plurality of the Supreme Court recognized that an order issuing from a formal adjudication may be used to establish the law for a subsequent adjudication. More recently and without elaboration, the Court approved the use of administrative summary judgment based on collateral estoppel, observing that a "single administrative proceeding in which *each manufacturer may be heard* is constitutionally permissible measured by the requirements of procedural due process." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 625 (1973) (emphasis added). Accordingly, so long as an individual is given an opportunity to be heard in an administrative proceeding, that individual will be collaterally estopped from protesting an order rendered in that proceeding or in a subsequent proceeding.

Even without § 554(e) of the APA, the due process requirement that like cases be treated in a like fashion would require that administrative declaratory orders be given preclusive effect in appropriate situations. What § 554(e) adds through its administrative summary judgment mechanism is statutory confirmation that the process of applying cases as precedent need not always entail a formal hearing.

20. In Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973), the Supreme Court found that considerations of efficiency, safety, and administrative expertise justified giving preclusive effect to administrative declaratory orders.

21. The terms "summary judgment" and "declaratory judgment" are used here to contrast the different circumstances in which an agency might issue a declaratory order. The former type of declaratory order is issued in the context of a hearing, and the latter is issued prior to the time the hearing process commences. Thus, the salient consideration is whether the agency is focusing on a current or future dispute. Because no factual dispute is present in either circumstance, however, a civil procedure purist might be tempted to characterize orders issued in both contexts as "summary judgments." Conversely it might be suggested that because both circumstances involve agencies in declaring the law and rights of a petitioner, "declaratory judgments" would be an appropriate single designation. Use of the single designation "summary judgment" is misleading, however, because the analogous judicial "summary judgment" carries the connotation of ending a trial proceeding, a disposition which is here associated with the agencies' sanctioning processes. Use of the single term "declaratory judgment" also may be misleading because declaratory orders—unlike declaratory judgments—are not limited solely to circumstances in which a neutral arbiter is petitioned for a determination of the law. The agency itself may act on its own inititative to terminate a dispute or remove uncertainty.

22. FED. R. CIV. P. 56 (summary judgment); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 75-83 (2d ed. 1983). Because "the principal judicial inquiry required by Rule 56 is whether a genuine issue of material fact exists," *id.* at 75, summary judgment is appropriate to resolve issues involving legal construction, legislative history, and legal sufficiency. Concerning the relationship between summary judgment and collateral estoppel, the authors of this treatise have observed that a "summary judgement, of course, is a decision on the merits of the case. Thus, a Rule 56 motion will be granted on the basis of former adjudication when an earlier summary judgement has disposed of the same issue between sufficiently related parties." *Id.* § 2735, at 445; *see also* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 625 (1973) (recognizing that an order issuing from a formal adjudication may be used to establish the law in a subsequent adjudication).

vides a formalized mechanism by which agencies can give advice in the adjudicatory context and permits avoidance of merely dilatory uses of the APA's adjudicatory procedures.[23]

The availability of declaratory orders allows agencies to balance the utility of conducting full, formal adjudicatory hearings against the actual needs of persons affected by agency action.[24] When there is no genuine issue of material fact and no need for formal evidentiary procedures, agencies can terminate cases by summary judgment. Additionally, when the agency is applying legal principles to claims that have been directly or collaterally adjudicated, the summary judgment application of the order obviates the need for formal evidentiary procedures.[25] The summary judgment use of the declaratory order, therefore, shares with rule 56 the objective of assuring that the process afforded for the resolution of disputes does not itself become the means by which disputes and disputed wrongdoing are prolonged. It ensures that neither members of the public nor federal agencies are allowed to gain unfair advantages as a result of meaningless procedural steps.[26] Judicial review of an agency's determination is made available quickly so that government cannot engage in prohibited conduct or delay in discharging its responsibilities.

2. Declaratory Judgment

The policies of avoiding delay and restraining government action also underlie the declaratory judgment application of the declaratory order. In addition to ensuring that government agencies do not overreach,[27] the declaratory judgment application prevents agencies from deterring lawful conduct by threatening to impose agency sanctions.[28] Whereas the summary judgment application of the declaratory order emphasizes the policy of timely judicial review to control agency conduct that exceeds legal authority, the declaratory judgment applica-

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23. *See supra* note 4 (distinction between adjudication and rulemaking); *see also supra* notes 10 & 20 and accompanying text (concerning the need to allow agencies to terminate disputes without using the full panoply of procedural safeguards usually available for formal adjudicatory proceedings).

24. *Compare* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973) (no individualized hearing is necessary when termination of a controversy is of prime importance) *with* 5 U.S.C. § 554(a) (1982) ("applies . . . in every . . . adjudication required to be determined on the record after opportunity for an agency hearing . . . .").

25. *See supra* note 19 and accompanying text.

26. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973) (discussing the need to free agencies from the bureaucratic straight-jacket of individualized adjudications); *see also* 5 U.S.C. § 706(1) (1982) (authorizing judicial action when an agency has unlawfully delayed action).

27. Because declaratory orders are subject to review by federal courts of appeal, they provide a mechanism for judicial supervision of agency conduct. The authors of one treatise have observed:

> Oversight of the agencies by the three branches of government seeks to achieve both the political and legal accountability of agency action. . . . The ultimate goal is to assure the legitimacy in our governmental system of assigning important policymaking decisions to appointed bureaucrats. . . . In other words, in many ways it is the relationships the agencies have with the constitutional branches of government that gives them their warrant to govern us.

G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 18, at 27.

28. *See supra* note 16.

tion recognizes that an agency can also overreach by forcing members of the public to choose between desisting from arguably legal action or facing agency sanctions.[29] Attempting to persuade agencies to change their view of the law is arduous.[30] Indeed, agency resistance to such persuasion can chill even the most principled assertion of legal rights. The declaratory judgment use of the order prevents the chilling of lawful conduct by providing a mechanism by which members of the public can assert their legal rights and test the agency's legal authority judicially without first facing agency sanctions for engaging in disputed conduct.[31]

B. *In Relation to Section 706 of the APA*

Section 706 of the APA[32] specifies the scope of judicial review of agency action. When agency action is unlawfully withheld or unreasonably delayed, section 706 allows courts to compel agencies to act.[33] Section 706 also authorizes courts to set aside agency action, findings, and conclusions for any of six reasons.[34]

The scope of review criteria of section 706[35] broadly outlines the circumstances in which declaratory orders may be used appropriately. For example, when an agency concludes after initiation of the sanctioning process that it is ready to test the soundness of its view of the law,[36] the summary judgment use

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29. The threat of agency sanction is implicit in an agency's grant of authority to regulate a particular activity. The threat means that as regulated individuals make plans to act they must bear in mind that the regulators may take an entirely different view of the legitimacy of their proposed conduct. Whether it is an association of optometrists considering the Food and Drug Administration's likely response to their members' decision to begin providing contact lens fitting services; a group of Alaskan natives considering how the Federal Maritime Commission will react to its desire to initiate a small barge operation between Alaska's island villages; or a giant chemical manufacturer wondering whether the Occupational Health and Safety Administration could properly require it to label its paint products as arsenical, the planning need is the same. In each instance the regulated persons could benefit by use of a mechanism to obtain a quick, final agency determination as to the legality of the proposed conduct that can, if necessary, be immediately reviewed by a court of appeals. These and similar situations involving the uncertainties of planning in the face of government regulation were advanced by interviewees at the respective agencies during a 1983 study of the use and nonuse of the declaratory order. For a description of that study, see Powell, *supra* note 2, at 347 n.36.

30. *See* G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 18, at 29 (cataloguing the typical steps of an adjudicatory proceeding: complaint, answer, discovery, prehearing conferences, hearings on motions, presentation of evidence, cross-examination, rulings on issues, oral argument, written exceptions, and the agency's decision). The authors conclude: "In general, therefore, a lawyer experienced in litigating cases in state or federal courts will not find an administrative hearing to be unfamiliar." *Id.*

31. *See supra* text accompanying notes 16-18 (discussing necessity of disregarding agency's views to institute legal challenge to agency's approach when declaratory order is not used).

32. 5 U.S.C. § 706 (1982).

33. Section 706 was intended to codify the judicial practice of reviewing agency action existing at the time of its adoption. DEP'T OF JUSTICE, *supra* note 1, at 108. As Attorney General Tom Clark explained, "Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, . . . or to assume jurisdiction, . . . or to compel an agency or officer to perform a ministerial or non-discretionary act." *Id.*

34. *See Id.* at 108-10 (interpreting the judicial review provisions of the APA); *see also supra* note 3 (listing the six review considerations).

35. *See supra* note 3.

36. The declaratory order offers an expedited means of getting a dispute before a court for

of the declaratory order provides the appropriate route to judicial review. Likewise, when an agency seeks to preclude a dispute by the use of precedent or collateral estoppel, the lawfulness of the agency's action may be tested by judicial review of its summary judgment use of the declaratory order. Finally, when a dispute concerns only the lawfulness or factual appropriateness of proposed agency action and no sanctioning proceeding has been commenced, the declaratory judgment use of the declaratory order provides the appropriate vehicle for judicial review. In the first two instances, agencies are empowered to terminate controversies,[37] and in the third, they are authorized to remove uncertainties that might otherwise lead to such controversies.[38]

As a result of the United States Supreme Court's decisions in *United States v. Storer Broadcasting Co.*,[39] *Federal Power Commission v. Texaco*,[40] and *Weinberger v. Hynson, Westcott & Dunning, Inc.*,[41] agency use of the administrative summary judgment has won increasing acceptance.[42] This development should be applauded; no good reason exists for proceeding with a formal hearing in the absence of any genuine issue of material fact. Neither congressional intent nor due process requires a formal hearing when it appears from an applicant's pleadings that the claim is without merit.[43] Furthermore, as *Hynson* made clear,[44] the summary judgment policy denying formal hearings to pleaders who fail to allege any genuine factual issue can be applied to deny formal hearings to disputants who raise issues that have already been adjudicated by similarly situated disputants.[45]

Despite some willingness to embrace the summary judgment use of the declaratory order,[46] agencies remain generally unreceptive to the declaratory judg-

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judicial review. The determinations that are most amenable to declaratory order disposition are those in which no significant factual disputes are involved. Although use of the declaratory order is not explicitly limited to controversies involving undisputed facts, the declaratory order does not apply neatly to a hearing that turns on disputed facts. Under 5 U.S.C. § 556(d) (1982), the trier of fact may limit submission of evidence when the evidence would be cumulative, redundant, or irrelevant. Termination of a proceeding to avoid material evidence concerning disputed facts would probably constitute an abuse of discretion. Orders following the closing of a hearing after exclusion of nonmaterial evidence, therefore, would be described more properly as instances when the agency sufficiently developed the record and chose to issue its order accordingly.

37. *See* Powell, *supra* note 2, at 361-63 (detailed legislative history).

38. *See id.*

39. 351 U.S. 192, 205 (1956) (stating that Federal Communications Commission could refuse a hearing to a licensee under its valid rule, unless the licensee could demonstrate a reason for a waiver of the rule).

40. 377 U.S. 33, 39 (1964) (upholding Federal Power Commission's summary rejection of application without a hearing pursuant to agency's own guidelines).

41. 412 U.S. 609, 617-21 (1973) (upholding FDA's "administrative summary judgment" procedures pertaining to premarketing clearance for drugs).

42. *See also supra* note 13 (citing cases involving administrative summary judgment).

43. *Hynson*, 412 U.S. at 621.

44. In *Hynson* the Court upheld the application of a Food and Drug Administration order to pharmaceutical companies that were not the primary targets of the agency's original proceeding. *Id.* at 626.

45. *See supra* note 20.

46. *See infra* text accompanying notes 126-28 (concerning growing awareness of the summary judgment use of the declaratory order).

ment use of the order.[47] This coolness may be the result of agency unfamiliarity with the declaratory judgment application, inadvertent neglect,[48] concerns with ripeness,[49] or the inadvertent neglect, fear of encouraging wrongdoing.[50] In addition, agencies sometimes assert that the device lacks utility, either because it is procedurally cumbersome or because it is anachronistic in its view of the administrative process.[51] Scrutiny of these contentions, however, suggests that they are rationalizations rather than explanations. The result of agencies' reluctance to use the declaratory order to test legal positions is that the power of the agencies is enhanced at the expense of those who are regulated.[52] By avoiding issuing declaratory orders, an agency limits the opportunities for judicial review of its decisions and makes the process for obtaining such review costly and time-consuming. Thus, by refusing to issue a declaratory order an agency often can exercise authority without fear of judicial restraint.

Administrative and judicial endorsement of the declaratory order would have important salutary effects on the operations of administrative agencies and reviewing courts and, most importantly, on the public. Increased recognition of such orders would further the twin policies of judicial review under section 706—limiting agencies to lawfully exercised powers and avoiding delay.[53] Other potential benefits of the declaratory order are suggested by the following discussion of six dispute situations in which administrative and judicial expertise were or could have been utilized more effectively through use of a declaratory order.

III. Some Practical Applications

A. *Actions That Are Arbitrary or Capricious*

Ambach v. Bell[54] represents a situation in which agency use of a declaratory order might expedite resolution of a protracted legal dispute. The issue in *Ambach* was whether it was arbitrary and capricious for the Secretary of Education, proceeding under the Education Consolidation and Improvement Act of

47. *See* Powell, *supra* note 2, at 344 n.18, 348 n.37, 370 n.157, 371 n.159.

48. *See generally* Comment, *Declaratory Orders—Uncertain Tools to Remove Uncertainty*, 21 AD. L. REV. 257 (1968) (Report of the American Bar Association's Subcommittee on Declaratory Orders of the Administrative Process Committee of the Administrative Law Section) (most agencies studied had not adopted declaratory order regulations specifically pursuant to § 554(e)).

49. *See supra* text accompanying note 7; *supra* note 18. The Court in Skidmore v. Swift & Co., 323 U.S. 134 (1944), held that an agency's advisory opinions and policy statements are not binding because they are merely statements about how the agency will seek to apply the law in the future. *Id.* at 140. Absent an attempt by the agency to apply its view of the law through a legislative rule with substantive impact, therefore, the matter is not ripe for judicial review. *See also* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (policy statement by agency is not determinative but only announces agency's intended future policy).

50. *See supra* note 15 and accompanying text.

51. Because courts in recent years have asserted authority to review an agency's informal expressions of opinion, *see* Powell, *supra* note 2, at 353 n.59, agencies may argue that there now exists no need for an administrative device such as § 554(e), which was intended to assure that an aggrieved party would, prior to suffering some significant injury, be able to secure judicial review.

52. *See* Powell, *supra* note 2, at 353-56.

53. *See supra* text accompanying note 26.

54. 686 F.2d 974 (D.C. Cir. 1982) (per curiam).

1981,[55] to allocate funds to states under a formula based on 1970 rather than 1980 Bureau of the Census data.[56] Concluding that time was of the essence in the allocation process and that he was likely to be sued by some disfavored recipient regardless of his decision, the Secretary decided to proceed.[57] Within two weeks of the notice of his decision to proceed and within a week of his issuance of a memorandum explaining his decision, plaintiffs sought a preliminary injunction to enjoin the Secretary's use of the 1970 census data. After a hearing approximately thirty days later, plaintiffs were granted an order barring disbursement of the funds.[58] The district court held that the Secretary's refusal to delay funding until 1980 data were available was arbitrary and capricious.[59] It was not until July 23, 1982—some seven months following the Secretary's recognition that the probable unavailability of the 1980 census data would require use of the 1970 data—that the Secretary succeeded in having the United States Court of Appeals for the District of Columbia Circuit vacate the injunction and vindicate his original legal position.

Ambach is troubling because the process—from identification of the dispute through injunction in the district court and review in the court of appeals—was predictable and, therefore, needlessly protracted. Such delays are characteristic of many cases in which a court enjoins an agency from acting arbitrarily or capriciously.[60] The Secretary apparently failed to realize that he could avoid this protracted delay by using a declaratory order. Because he had the authority to adjudicate terminations or reductions in entitlements,[61] the Secretary was empowered to issue a declaratory order setting forth the legal rights of grantees.[62] As soon as he decided to fix the legal relationships of fund recipients on the basis of the 1970 data, he could have tested his view of the law by issuing a declaratory order.[63] A declaratory order would have removed uncertainty about the legality of the Secretary's course of action by providing a final agency order that

55. 20 U.S.C. § 3801 (1982).

56. *Ambach*, 686 F.2d at 980.

57. *Id.* at 977.

58. The district court preliminarily enjoined any distribution of funds in excess of the amounts already guaranteed by statute. *Id.* at 978.

59. *Id.* at 981 (citing the district court's Memorandum Opinion at 7-8).

60. *See, e.g.*, American Petroleum Inst. v. EPA, 661 F.2d 340, 354-57 (5th Cir. 1981) (agency's arbitrary and capricious reclassification of oilwells from "coastal" to "on-shore" without a cost analysis resulted in a delay in implementing final effluent guidelines for the oil and gas extraction point source category); National Pork Producers Council v. Bergland, 484 F. Supp. 540, 544-47 (D. Iowa) (Secretary of Agriculture's use of traditional labels for uncured meats was arbitrary and capricious and delayed implementation of program to get cured meat labels into the market), *rev'd*, 631 F.2d 1353 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

61. *See* 20 U.S.C. §§ 2835-2836 (1982).

62. *See supra* text accompanying notes 8-9 (discussing agencies' authority to issue declaratory orders).

63. Either an agency or an aggrieved person can initiate the declaratory order process. *See* 5 U.S.C. § 554(e) (1982); *see also id.* § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action is entitled to judicial review thereof."). For a review of the legislative history concerning declaratory orders and a consideration of contrasting proposals that would have allowed issuance of declaratory orders only upon petition by aggrieved persons, see Powell, *supra* note 2, at 362.

could immediately be reviewed by the court of appeals. Given such a course, the dispute probably could have been resolved in one month.

Such a strategy can be beneficial to recipients of agency services as well as to the agency. For example, the declaratory order provides a means to test threatened terminations of benefits when a recipient requires expedited review, as was true in *National Welfare Rights Organization v. Mathews*.[64] *Mathews* involved an eight-month trek from denial of injunctive relief in the district court to invalidation of agency regulations in the court of appeals under section 706(2)(A) of the APA.[65] At issue was an attempt by the Department of Health, Education and Welfare to establish upper limits for property ownership by recipients of Aid to Families with Dependent Children.[66] The reviewing court held that the proposed rule conflicted with the Department's enabling statute by valuing property on an insufficient factual record and without regard to encumbrances.[67]

As did the agency in *Ambach*, it is likely that the Department of Health, Education and Welfare anticipated the suit in *Mathews*. The Department had received fifty-seven comments in response to its notice of proposed rulemaking.[68] In both cases only legal issues needed to be resolved. Under these circumstances, the issuance of a declaratory order to remove uncertainty would have provided a less dilatory route to appellate review.[69]

B. *Actions That Constitute an Abuse of Discretion*

Agency overreaching of another sort was at issue in *Phelps Dodge Corp. v. Federal Mine Safety & Health Review Commission*,[70] in which the United States Court of Appeals for the Ninth Circuit reviewed Phelps Dodge's alleged violation of a rule requiring "[e]lectrically powered equipment [to] be de-energized before mechanical work is done on such equipment."[71] Plaintiff did not question the facial validity of the regulation, but argued that it had been applied incorrectly to establish a violation. The Commission challenged Phelps Dodge's failure to install preventive-use electrical shutoff devices on an electrically powered steel conveyor belt.[72] At the time of the alleged violation, the corporation's employees were standing on the inoperative conveyor belt to reach and unclog

64. 533 F.2d 637 (D.C. Cir. 1976).

65. Section 706(2)(A) provides: "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (1982).

66. *See* 42 U.S.C. § 1302 (1982) (granting the Secretaries of Treasury, Labor, and Health and Human Services power to make and publish necessary rules and regulations under the Social Security Act); 40 Fed. Reg. 12,507-08 (1975) (implementing regulations for Aid to Families with Dependent Children program).

67. *Mathews*, 533 F.2d at 647-49.

68. *Id.* at 639.

69. *See supra* text accompanying notes 10-12 (discussion of situations in which use of declaratory order expedites review).

70. 681 F.2d 1189 (9th Cir. 1982).

71. 30 C.F.R. §§ 55.12-.16 (1983) (repealed 1984).

72. *Phelps Dodge*, 681 F.2d at 1192.

ore from a nonelectrically powered chute that fed the conveyor.[73] Phelps Dodge argued that the regulation did not apply in this circumstance because the true purpose of the regulation was to protect workers from the hazard of electrical shock, not from hazards resulting from attempts to remove rocks from the chute.[74]

More than three years after the alleged violation,[75] the court of appeals held that the Commission had abused its discretion in applying the regulation to the facts of *Phelps Dodge*.[76] Issuance of a declaratory order would have provided a more efficient way to resolve the dispute. If Phelps Dodge had obtained a declaratory order, the dispute, which involved no contested issues of fact, could have gone directly from the Commission to the court of appeals.[77] The matter could have been resolved in six months.[78] An alternative scenario is also conceivable. If Phelps Dodge had anticipated the Commission's enforcement action, the corporation could have asked for an immediate declaration whether the regulation in question applied to the practices challenged by the Commission. If such a request for a declaratory order had been made and granted, the parties' legal fees and time costs would have been greatly reduced.[79]

Charges of abuse of discretion arising from agency application of a facially applicable regulation to undisputed facts can also arise in more subtle ways, such as when an agency initiates a proceeding that is plainly beyond its jurisdiction as a matter of law or conducts a proceeding in a manner that cannot lead to a valid order.[80] Both abuses were alleged in *Pepsico, Inc. v. FTC*.[81]

In *Pepsico* the United States Court of Appeals for the Second Circuit rejected Pepsico's claim that the FTC was prohibited from prosecuting a cease and desist order to end practices that hindered competition in the distribution and sale of certain syrups and soft drink products. Although the FTC had failed to join 513 Pepsico bottlers through whom the company's alleged competitive restraints were implemented, the court held that Pepsico had not established that the proceeding was an administrative nullity.[82] In the court's view, Pepsico had

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73. *Id.* at 1191.

74. *Id.* at 1192.

75. The alleged violation occurred June 6, 1979, and was resolved three years later by the decision of the court of appeals on July 22, 1982. *See Phelps Dodge*, 681 F.2d at 1189, 1191.

76. *Id.* at 1193.

77. It is doubtful that an administrative law judge should have been involved in this dispute at all. Because the case concerned only the application of law to undisputed facts, the administrative law judge properly could have requested that the agency respond directly by declaratory order.

78. The court of appeals required less than six months to resolve the matter. *Phelps Dodge*, 681 F.2d at 1193.

79. As it was, resolution of the uncertainty required several administrative steps: citation, penalty hearing, petition for reconsideration of agency determination, and review by the court of appeals. *Id.* at 1191.

80. *See, e.g.*, American Communications Ass'n v. United States, 298 F.2d 648 (2d Cir. 1962); Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960). In both cases, the FCC had not permitted interested parties to participate in hearings, and the courts required the FCC to allow the parties to intervene. Because necessary parties had not been included, the agency conduct could not have led to a valid order.

81. 472 F.2d 179 (2d Cir.), *cert. denied*, 414 U.S. 877 (1972).

82. *Id.* at 187-90.

failed to show the kind of waste of government resources and continuing economic threat necessary to trigger prehearing protection from an agency proceeding.[83] Nevertheless, the court's recognition of the possibility of protective prehearing injunctive relief suggests that a declaratory order could have served two useful purposes. First, a declaratory order determining the validity of Pepsico's proposed bottlers contract could have resolved the parties' pure questions of law concerning the validity of the allegedly anticompetitive contract provisions. Second, a declaratory order could have efficiently resolved the question whether a party's absence made the FTC's enforcement proceeding a nullity.[84] In either situation, use of the declaratory order would have promoted both parties' interest in using the most expeditious procedure to eliminate uncertainty.

C. *When the Agency's Actions Allegedly Are Not in Accordance With Law*

Obremski v. Office of Personnel Management[85] arose after John Obremski had spent nearly four years trying to secure administrative confirmation that his job as a corporate quality assurance manager for the Federal Prison Industries[86] qualified him for employer contributions to his retirement fund at the rate prescribed for "law enforcement officers."[87] As the United States Court of Appeals for the District of Columbia Circuit recounted in barely disguised irritation: "Unfortunately, although petitioner was already performing as a 'law enforcement officer' pursuant to a written job description, he faced a bureaucratic stonewall when he sought confirmation of his status."[88] The issue before the court was a narrow one: whether petitioner's duties required him to have "frequent . . . direct contact" with federal prisoners within the meaning of the relevant statutes defining law enforcement positions.[89]

Obremski contended that he was a "law enforcement officer" because job related visits to prisons consumed thirty percent of his worktime.[90] The Office of Personnel Management,[91] however, asserted that Obremski failed to meet the

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83. *Id.* at 187.

84. Although an appeal of a declaratory order determining whether all necessary parties had been joined would have been an interlocutory appeal, there is nothing in the legislative history of § 554(e) to prohibit use of the declaratory order resulting in interlocutory appeal. In fact, the legislative history is silent as to precise situations in which the declaratory order might be used. *See* Powell, *supra* note 2, at 364. Because declaratory orders are issued in the discretion of the agency, they should be available with respect to any substantive question an agency may designate, including questions leading to interlocutory appeals. This approach recognizes that when an agency is amenable to such a determination equity and efficiency usually support its availability. If the question is sufficiently troubling to gain the agency's support for early judicial determination, it is also likely to involve issues of sufficient gravity so that awaiting a final administrative resolution would be costly to those regulated.

85. 699 F.2d 1263 (D.C. Cir. 1983).

86. *Id.* at 1265 n.1. The Federal Prison Industries is a government corporation that provides current employment and job training to inmates of the federal prisons through a network of factories within the prison system. *See* 18 U.S.C. § 4121 (1982) (statutory authorization of Federal Prison Industries).

87. *Obremski*, 699 F.2d at 1266.

88. *Id.*

89. *Id.* at 1265.

90. *Id.* at 1267.

91. The Office of Personnel Management, which oversees the conditions of federal employment,

statutory requirement of "frequent direct contact" with federal prisoners because he was not "*primarily* in direct contact with individuals in . . . detention."[92] The court of appeals ultimately resolved the matter in Obremski's favor. Because the Office of Personnel Management did not contest Obremski's factual assertion that he spent thirty percent of his worktime in visits to prisons, the parties could have used the declaratory order's declaratory judgment application to expedite a resolution. Obremski could have sought immediate review of such a declaratory order in the court of appeals.

D. *When the Agency Allegedly Errs in Applying Constitutional Principles*

In *FCC v. Pacifica Foundation*[93] the United States Supreme Court indicated how the declaratory order[94] might be used to resolve a constitutional question.[95] At issue was whether the agency's license revocation procedures authorized it to prohibit the airing of a profanity-ridden comedy monologue entitled "Filthy Words."[96] Pacifica, the licensee, argued that the Commission's order prohibiting further broadcast was an invalid exercise of its authority to declare the law by declaratory order.[97] Significantly, the Court recognized the declaratory order as a means to resolve uncertainties about the meaning of an agency's statutory charter and regulations, but a more important principle of the case was implicit. The Court's affirmance of a declaratory order in a context that did not involve formal adjudication confirmed[98] that the declaratory order is available anticipatorily; an agency may avoid the use of its formal adjudicatory powers at a later date by issuing a declaratory order when the dispute arises. Likewise, in situations similar to the one in *Pacifica*, a licensee might initiate the declaratory order process to determine whether particular contemplated actions enjoy constitutional protection.

E. *When the Agency Allegedly Acts in Excess of Its Jurisdiction*

Bituminous Coal Operators' Association v. Secretary of Interior[99] illustrates a typical request for relief from agency action that allegedly exceeds authority delegated by Congress. Although the case reached the United States Court of Appeals for the Fourth Circuit on review of the lower court's refusal to grant declaratory relief,[100] the issue could have been raised more efficiently by use of a declaratory order. In dispute was the Secretary's statutory authority to impose

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was established by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 201(a), 92 Stat. 1119 (codified at 5 U.S.C. §§ 1101-1105 (1982)).

92. *Obremski*, 699 F.2d at 1267.

93. 438 U.S. 726 (1978).

94. Although the Supreme Court spoke in conclusory terms and failed to discuss the APA in detail, it specifically recognized the Commission's order as a declaratory order under § 554(e). *Id.* at 734.

95. *Id.* at 742.

96. *See id.* at 751 ("Appendix to the Opinion of the Court").

97. *Id.* at 734.

98. *Id.*

99. 547 F.2d 240 (4th Cir. 1977).

100. Bituminous Coal Operators' Ass'n v. Hathaway, 406 F. Supp. 371 (W.D. Va. 1975), *aff'd*

vicarious liability on mining companies for violations of health and safety standards by the independent general contractor construction companies they employed.[101] The mining companies sought a declaratory judgment to establish that the construction companies were "operators" within the meaning of the Federal Coal Mine Health and Safety Act of 1969[102] and were, therefore, directly liable for their own violations.[103]

After two years of litigation the court of appeals held that because the construction companies were statutory agents of the owners and lessees of the coal mines the mining companies could be held liable for construction company violations.[104] The two year delay is noteworthy because the Secretary of the Interior[105] was aware of the need for a judicial determination; contradictory interpretations of the Secretary's authority had previously been issued by the Board of Mine Operations Appeals and the United States District Court for the District of Columbia.[106]

The agency, either in response to a request for a declaratory order or on its own initiative,[107] could have expedited a determination by the court of appeals. No factual questions had to be resolved; there was substantial uncertainty about enforcement of the statute; and the planning considerations of the mine owners, the construction companies, and the mine workers suggested the need for a prompt answer. Furthermore, there was no good reason to await commencement of the agency's sanctioning process against the mining companies when removal of the uncertainty of prosecution would have allowed the mining companies to proceed with their business planning in an informed manner.[108]

Because no declaratory order was issued, the mining companies had to await the agency's attempted sanctions and then proceed to the district court for a declaratory judgment. The suit for injunctive and declaratory relief became the first judicial test of the agency's conduct. Issuance of a declaratory order

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sub nom. Bituminous Coal Operators' Ass'n v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977).

101. *Bituminous Coal Operators' Ass'n*, 547 F.2d at 243.

102. 30 U.S.C. §§ 801-878 (1982).

103. *Bituminous Coal Operators's Ass'n*, 547 F.2d at 246.

104. *Id.* at 247.

105. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-878 (1982), is enforced by the Secretary of the Interior through inspectors who are authorized to require operators of coal mines and their agents to withdraw miners from dangerous areas. *Id.* § 814(d). Inspectors' decisions are reviewable by the Board of Mine Operations Appeals, and the Board's decisions are reviewable by federal courts of appeal. *Id.* §§ 815-816.

106. The court in *Bituminous Coal Operators' Ass'n* noted that the Board of Mine Operations Appeals previously had held "that coal mine construction companies were subject to the health and safety standards of the Act and that they could be cited for violations." *Bituminous Coal Operators' Ass'n*, 547 F.2d at 243 (citing Affinity Mining Co., 2 IBMA 57, 1971-73 OSHD ¶ 15,546 (1973); Wilson v. Laurel Shaft Constr. Co., 1 IBMA 217, 1971-73 OSHD ¶ 15,387 (1972)). In contrast, the United States District Court for the District of Columbia had held "that the Secretary could not cite mine construction companies for violating the Act. . . . Complying with that court's decision, the Secretary ordered his inspectors to issue citations to mining companies for violations of the Act committed by the construction companies they [employed]." *Id.*

107. *See supra* note 63.

108. *See supra* text accompanying note 29 (discussing use of declaratory order to remove uncertainty).

arguably would have been a better litigation strategy on the part of the agency. Not only would such an order have given greater emphasis to the agency's role as Congress' expert delegee,[109] it also would have preserved the opportunity for initial judicial review in the court of appeals by judges, who are primarily responsible for reviewing agency actions.[110]

F. *When the Agency Allegedly Acts in a Procedurally Flawed Manner*

An affected member of the public who believes an agency is violating its own procedures in pursuing an administrative prosecution may employ the declaratory order to clarify the agency's procedural rules.[111] The potential class of such disputants is large and in some respects consists of persons with contradictory motives. It includes both persons who genuinely do not know of their obligations under a statute or rule and those who genuinely disagree about such obligations. This broad class is also likely to include persons who have not yet engaged in questionable conduct as well as persons who are seeking to plan their future conduct in light of past acts that might result in sanctions if discovered. Questions of honesty aside, this latter type of inquirer shares with the others an understandable assumption: the public is entitled to know what the law is.[112] Furthermore, the APA does not predicate procedural relief on moral uprightness. Instead, the APA extends judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[113]

United States v. Advance Machine Co.[114] illustrates the circumstances that can give rise to a request for a declaratory order to remove uncertainty about statutory procedures. In an enforcement action under the Consumer Product Safety Act[115] the government sought civil penalties against defendant company for violation of the Act's requirement that manufacturers report their defective or hazardous products.[116] Defendant had failed to report that it manufactured an automatic baseball pitching machine whose arm, "even when disconnected from its power source," could "unexpectedly swing forward and downward at great speed, striking any person within its range."[117]

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109. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (Agencies are "equipped or informed by experience to deal with a specialized field of knowledge" and their "findings within the field carry the authority of expertness.").

110. *See, e.g.*, NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951) (Courts of appeal have been charged by Congress "with the normal and primary responsibility for granting or denying enforcement of Labor Board orders.").

111. *See, e.g., supra* text accompanying notes 81-83.

112. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 613-14 (1971) (If state law fails to give persons adequate notice as to what specific conduct is prohibited, the prohibitions will be deemed unconstitutionally vague.).

113. 5 U.S.C. § 702 (1982). More importantly, attempts to distinguish nefarious individuals from their morally superior counterparts are not likely to be successful; generally, agencies have no practical basis for determining the ethical motivations of an inquirer.

114. 547 F. Supp. 1085 (D. Minn. 1982).

115. 15 U.S.C. §§ 2064, 2068, 2069 (1983).

116. *Advance Mach. Co.*, 547 F. Supp. at 1088.

117. *Id.*

Defendant argued that because the Commission had learned of the defect and of defendant's failure to report it eight years earlier, the Act's five year statute of limitations barred a civil penalty action.[118] In substance the claim was that the Act's requirement of immediate reporting created a complete violation once a manufacturer failed to inform the Commission of a defective or hazardous product.[119] Under this theory, defendant asserted that the government had to commence a penalty suit under the Act within five years of a manufacturer's failure to report a defective or hazardous product.[120]

The district court rejected defendant's claim. It held that "a manufacturer, possessing information that its product contains a defect which could create a substantial product hazard, has a *continuing duty* to inform the Commission unless the Commission has been adequately informed of such defect."[121] The district court pointed out, moreover, that defendant's interpretation of the Act would vitiate Congress' intent to increase the likelihood that the Commission would learn of substantial product hazards in a timely fashion.[122] As the court noted, "[u]nder defendant's interpretation, . . . a manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence of the product defect from the Commission for five years."[123]

One troublesome aspect of the *Advance Machine Co.* decision is that the district court, not the agency, initially addressed defendant's novel interpretation of the Act, an interpretation that was admittedly "not without merit and . . . limited support in the statute."[124] In addition, even though Advance Machine may not have acted in good faith, there is a legitimate question whether a company adopting Advance Machine's view of the reporting obligation would have had a practical alternative to resisting reporting and challenging attempted sanctions at the enforcement stage. It is possible that after some five years without threat of sanctions, Advance Machine believed the matter to be so far behind it that adverse publicity from reporting the stale claim would interfere with its legitimate planning for the future. The dilemma of the confused but well-intentioned person is not beyond the APA's contemplation. The APA provides the declaratory order as a declaratory judgment device to answer novel questions such as those raised in *Advance Machine Co.* As soon as the Commission learned of the statute of limitations issue in that case, it could have issued a declaratory order.

The existence of a declaratory order setting forth a formal comprehensive agency statement serves five purposes that are applicable to *Advance Machine Co.* and to each of the six situations discussed above. First, it preserves difficult

118. *Id.* at 1089.

119. *Id.*

120. *Id.*

121. *Id.* at 1090.

122. *Id. See generally* S. REP. No. 251, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 993, 994 (Act designed to reduce injuries caused by consumer products by promoting disclosure of possible hazards).

123. *Advance Mach. Co.*, 547 F. Supp. at 1090.

124. *Id.* at 1089.

issues for initial review by the court of appeals, a tribunal having more experience with agency oversight than the district court. Second, it serves as a disincentive to litigation. Expedited appellate review allows the agency's views to be tested without the delay created by trial court proceedings and thereby deters litigation that is sought only for its dilatory effect. Third, the declaratory order has res judicata effect in the event it is not appealed. Fourth, a declaratory order serves the agency's strategic purposes once appellate review has begun. Not only is the agency able to present a well-briefed legal order to the reviewing court, it is also able to defend concrete final action with known effects, rather than being forced to contend with the often hypothetical balancing of the equities common in suits for temporary injunctive relief.

Last, when uncertainty is involved, providing regulated persons an opportunity to know their legal obligations is a legitimate end in itself. The status of an agency is enhanced when it seeks enforcement penalties only after the agency has made well-publicized efforts to persuade regulated persons to conform to the law and to seek agency advice when in doubt. In a dispute about the rights and duties of a regulated person, it is not justifiable to regulate through intimidation when a determination on the merits can be secured easily. Moreover, when regulated persons are genuinely uncertain, the availability of a speedy and definitive judicial determination may induce earlier compliance. If the company in *Advance Machine Co.* had been able to secure a declaratory order,[125] it would have learned more quickly that as a continuing violator the only way it could put the matter behind it was to report the defect and face the possibility of a sanction.

IV. CONCLUSION

The declaratory order offers an opportunity for more efficient and equitable resolution of a variety of disagreements involving agencies and the public. It has gained increasing recognition as an administrative device for summary judgment disposition of disputes that involve no significant issues of material fact. Furthermore, it is likely that agencies' willingness to use the summary judgment application[126] of the order will increase. Prodding by the Supreme Court[127] and the Administrative Conference of the United States[128] has promoted greater awareness of this type of declaratory order. Recognition of the summary judgment use of the order, however, will realize only part of Congress' vision for the declaratory order—the part that is of more assistance to the regulators than to the regulated.

The remaining task is to bring the declaratory judgment use of the declaratory order out from the shadows. This undertaking will not be easy because in some respects the declaratory order is an anomaly. It reflects the delicate com-

125. To be meaningful, of course, an anonymous inquiry would have to be permitted.

126. *See supra* text accompanying notes 21-26.

127. *See* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (full use of formal adjudicatory procedures is not always required).

128. *See* Summary Decision in Agency Adjudication (Recommendation No. 70-3), 1 C.F.R. §§ 305.70–.73 (1984) (encouraging increased use of administrative summary judgment).

promise dictated by political concerns surrounding the enactment of the APA.[129] The declaratory order exists despite congressional concern about granting judicial review of agency actions prior to completion of the usual processes of administrative adjudication.[130] Even though it granted agencies the power to make preadjudicatory determinations of rights, Congress intended for agencies to retain the discretion to refuse declaratory judgment-type relief when the circumstances warranted it.[131] The resulting ambiguous provision that declaratory orders may be granted subject to the "sound discretion" of the agency has prompted dissatisfaction on the part of both agencies and the public.[132] Regrettably, however, in the absence of aggressive judicial oversight, only agencies have possessed the power to redress their dissatisfaction. The agencies' solution has been simple: ignore the declaratory judgment aspect of the declaratory order. As a result, Congress' cautious extension of declaratory administrative relief has become a hollow victory.[133] What was intended as a delegation of power coupled with suitable safeguards has produced agency inaction and disregard of congressional intent. In their sound discretion,[134] agencies generally have been more willing to declare the impropriety of declaratory judgment-type relief than to use section 554(e) to remove uncertainty.

Chance, rather than the agencies' systematic adoption of regulations implementing section 554(e), dictates whether declaratory relief will be available.[135]

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129. In Intercity Transp. Co. v. United States, 737 F.2d 103, 106 n.4 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit stated:

> The legislative history of 5 U.S.C § 554(e) does not provide definitive guidance on whether Congress intended the phrase, "sound discretion," to limit agencies' authority to decline to issue declaratory orders. Some concern, however, about allowing such decisions to remain entirely in the discretion of agencies is evident in the development of the Administrative Procedure Act.

130. *See* Powell, *supra* note 2, at 362 (congressional history of the APA); *see also* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 45 (D.C. Cir. 1974) (statements of agency policy and interpretive rules generally are not immediately reviewable).

The prevailing view is that the standard of review of a rule (or for that matter, the substantiality of the impact resulting from a rule) does not affect the rulemaking procedure an agency is required to use. Absent a statute requiring on-the-record rulemaking, the agency's standard is unvarying because it is not the intensity of judicial review, but the requirements of the statute that dictate agency procedures. Thus, in the usual case, an agency simply must avoid action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.6, at 465 (2d ed. 1979). The Administrative Conference of the United States recommends, however, that agencies voluntarily adopt the notice and comment procedures for substantive rulemaking set forth in § 553 of the APA when issuing interpretive rules of general applicability and statements of general policy to encourage "greater confidence in and broader acceptance of ultimate agency decisions." *Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy*, in 4 AD. CONF. U.S. 62 (1979). The Conference notes that courts have occasionally imposed such requirements. *Id.* For the proposition that interpretive regulations with great substantive impact are reviewable, see National Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys., 489 F.2d 1268, 1271 (D.C. Cir. 1974) (per curiam) (court determined that the interpretive regulation examined did not satisfy requirements for review).

131. Intercity Transp. Co. v. United States, 737 F.2d 103, 108-10 (D.C. Cir. 1984) (ICC's decision not to issue a declaratory order on the ground that to do so would be an inefficient allocation of agency resources was held to be supported by a rational basis).

132. *See supra* note 8; Powell, *supra* note 2, at 347 n.34.

133. Powell, *supra* note 2, at 347.

134. *See id.* at 346-47.

135. In the absence of clear action by agencies to implement § 554(e), courts have filled the void. When a court is uninformed, an agency may lose what should have been a valid declaratory order.

The availability of judicial review of agency action is similarly uncertain: either an agency must be too inept to craft its advice as hypothetical, tentative, and nonsubstantive so that judicial review can be avoided, or a judge must be determined to disregard such indicia of nonreviewable agency action.[136] Congress, however, intended a more certain course; it did not envision agency regulation by bluff and bluster. It provided the declaratory order as a flexible tool, for the benefit of the public and the agencies alike, to remove uncertainty and to terminate controversies.

In City of Miami v. ICC, 669 F.2d 219 (5th Cir. 1982), for example, the appellate court refused to extend its jurisdiction over litigation between the City of Miami and the Florida East Coast Railway. In an attempt to thwart condemnation by the City, the Railway had obtained a declaratory order from the ICC denominating its ocean terminal a "line of railroad" subject to the Commission's exclusive jurisdiction. The court of appeals, however, refused to recognize that the Commission's discontinuance of its proceedings was sufficient to render its order "final." The ruling, which relied on Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970), and Barnes Freight Line v. ICC, 569 F.2d 912, 916 (5th Cir. 1978), accorded finality only to agency actions by and from which "rights or obligations have been determined or legal consequences will flow." *City of Miami*, 669 F.2d at 221. By suggesting that only Commission action on an application for abandonment could render the "line of railroad" determination reviewable, the court prolonged what it recognized as "already . . . interminable litigation." *Id.* at 222.

136. *See* 4 K. DAVIS, *supra* note 130, § 25.12, at 389-93. Davis discusses the law of ripeness for judicial review in light of Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971), and concludes that what is critical to pre-enforcement judicial review determinations is the balancing of hardship to the plaintiff against the problems that such review is likely to cause the agency. 4 K. DAVIS, *supra* note 130, § 25.12, at 392. Note, however, that Davis' discussion focuses on what courts may do when confronted with a demand for judicial review of agency action. Section 554(e), on the other hand, responds to the authority of the agency, itself, to provide pre-enforcement relief. Nevertheless, these two institutional determinations have much in common. The catalogue of considerations that Davis mentions as instructive for purposes of identifying when courts should find ripeness also suggests how agencies might frame their actions so that ripeness probably will not be found. Read conversely as a catalogue of agency considerations to be addressed to increase the probability that agency answers to inquiries will not unintentionally be made reviewable, the catalogue suggests that the agency's responses ought to incorporate boiler plate language evidencing some or all of the following points: that the agency views its response as nothing more than a response to a hypothetical inquiry; that the agency is unsure about whether, as presented, the inquirer has raised a significant question of fact or law which would justify that agency's full analysis; that the agency views the inquiry as raising a mixed question of law and fact, which cannot fully be resolved within the constraints of the agency's available personnel and time; that the agency is addressing abstract issues that go beyond those specifically raised by the inquirer; that the agency invites the use of further opportunities for the inquirer to submit a more particularized statement of the problem, using available procedures and a particular format for the inquiry so that a more complete consideration of the issue might be provided; that the agency response lacks independent coercive effect; that the agency desires a fuller record, perhaps created through the formal adjudicatory process, to adequately examine the question; that the agency is intentionally preliminary in its response, because the necessity of having to be definitive would dissuade it from attempting to provide even the cautionary guidance it is offering; that the agency foresees no onerous scheme of penalties applying should a violation occur, while disclaiming any attempt to anticipate the results if and when a sanctioning effort should ensue; that the agency expressly reserves the possibility that its position might change if and when presented with more concrete evidence; and that the agency has not responded through the head of the agency, its board, or its commission. Finally, if all else fails and the agency finds itself in court urging that no injunction should issue, it should submit an affidavit from the head of the agency attesting, *post hoc*, that all of the above-mentioned conditions existed at the time of the agency response.

Thus, it is the ease with which an agency can obfuscate its informal determinations that makes the alternative availability of the declaratory order all the more important. Although the availability of a declaratory order does not require that an agency reach the merits of every inquiry, it offers the benefit of a specifically designed device whose format and consequences are known by the agency and public at the outset, rather than designed ad hoc by the judiciary on the basis of its own balancing of the equities.

The benefits of declaratory orders are easily recognizable. Declaratory orders are more authoritative than advice-giving through informal interpretive rulings because declaratory orders issue from the highest echelon of an agency. Furthermore, because declaratory orders test the legitimacy of an agency's actions, they contribute to a comprehensive statement of the agency's operations.[137] Relief may be obtained more expeditiously by seeking a declaratory order than by seeking to amend either a rule or statute. Finally, because declaratory orders are statutorily prescribed, they carry a statutory presumption of reviewability that agency advice-giving may lack.[138] By definition, section 554(e) declarations are to be treated "with like effect as in the case of other orders."[139]

Despite these benefits, some forty years after its enactment, no systemic procedural framework for the adjudicatory advice-giving function envisioned under section 554(e) has developed. The present limited circumstances in which final reviewable agency orders are made available prior to commencement of a sanctioning process circumscribe Congress' intent too narrowly. The availability of preadjudicatory, judicially reviewable agency relief cannot usefully be limited to strictly categorized, preselected questions that an agency deems it advantageous to resolve. Nor should suits under the Declaratory Judgment Act[140] be the public's primary means for securing binding determinations about the legitimacy of a proposed course of agency action. The failure to make declaratory order relief freely available promotes administrative inefficiency, invites judicial interference, and feeds public distrust.

The lack of administrative declaratory judgment relief, nevertheless, might be justified on the ground that agencies have eliminated the need for declaratory judgment-type relief by their general willingness to use interpretive and substantive rulemaking powers freely. Such an argument deserves dismissal on both conceptual and policy grounds. Conceptually, no process for rendering authoritative agency advice or opinions can be equivalent to declaratory orders under section 554(e) unless it meets three criteria. It must be: (1) available in relation to all formal adjudications without limitation as to subject matter; (2) available at the initiation of either an affected citizen or the agency; and (3) ripe for judicial review upon issuance.[141]

Measured against these criteria, so-called adequate substitutes for section 554(e) relief amount to no real substitutes at all. Consider, for example, the three most often touted alternatives: interpretive rules and guidelines, jurisdictional rulings, and advisory opinions. Interpretive rules and guidelines are by definition nonsubstantive and not ripe for judicial review.[142] They provide only

137. *See* 1 K. DAVIS, *supra* note 1, § 5.02, at 294 (discussing early distinctions among agency actions that could be termed declaratory).

138. 5 U.S.C. § 706(2)(A)-(D) (1982); *see* Powell, *supra* note 2, at 370 (discussing reviewability of the declaratory order).

139. 5 U.S.C. § 554(e) (1982).

140. 28 U.S.C. § 2201 (1982).

141. *See supra* text accompanying notes 5-9.

142. *See supra* note 130.

generalized knowledge about whether a proposed course of action is likely to be tolerated by an agency.[143] Jurisdictional rulings are final, but are limited to narrow, preselected questions that the agency has identified.[144] Advisory opinions from an agency's counsel provide no better alternative to declaratory order relief. Advisory opinions give protection to petitioners who comply with them, but provide neither protection nor an assured avenue to judicial review for individuals who choose to disregard them.[145] Currently, therefore, there are no adequate substitutes for Congress' extension of administrative declaratory judgment relief.

In addition, as a matter of governmental and judicial policy, there are significant drawbacks to agency determinations that are limited either as to subject matter or as to the applicable scope of judicial review. First, Congress' intent that agencies operate within properly delegated spheres of authority is undermined when improper agency action is allowed to go unchallenged. If agencies can dissuade regulated persons from proposed action by creating uncertainty about the likely consequences of such action, then agencies can operate under a

143. *See supra* note 130; *see also* 3 K. DAVIS, *supra* note 1, § 21.00, at 305-07 (Supp. 1982) (summarizing what Davis views as a departure from a series of holdings by the Supreme Court between 1919 and 1953 and the emergence of a "*fundamentally* different" view of the ripeness doctrine). As Davis sees it: "The key idea of the present law [of ripeness] is very simple: Controversies are ripe for judicial determination when the legal issues are appropriate for courts to decide and when hardship to private parties from lack of decision is substantial." *Id.* at 305-06.

The Davis view is helpful as far as it goes. What it does not address is the practical concern that the declaratory order was intended to resolve. Even under a more liberal view of the doctrine of ripeness, there remains the problem of securing an expedited determination of the law. Although a "fundamental" change of view might mean that a district court is likely to be more sympathetic in allowing challenges that previously would have been foreclosed until the agency actually sought to apply its policy or interpretation to a specific set of facts, the hoped for liberal interpretation must nevertheless be sought in the district court. For a definitive determination on an adverse ruling, the affected person must still face judicial review in the court of appeals. In addition, it will be difficult to convince the district court that "the legal issues are appropriate for courts to decide and . . . hardship to private parties from lack of decision is substantial." *Id.*

The declaratory order responds to these practical concerns. The agency itself—not the district court—must necessarily determine whether the circumstances warrant the order. Moreover, if the agency's decision on the merits is not favorable to the petitioner, review is immediate and "with like effect as in the case of other orders." 5 U.S.C. § 554(e) (1982).

144. For example, the National Labor Relations Board provides for a narrowly defined type of declaratory order in the form of a jurisdictional ruling, by which the Board may determine whether it will "assert jurisdiction on the basis of its current standards." 29 C.F.R. § 102.98(a) (1985).

145. The uncertain utility of devices that fall short of the statutorily defined declaratory order is evidenced by the confusion generated by the Securities and Exchange Commission's use of no-action letters. In Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 662-63 (D.C. Cir. 1970), *vacated*, 404 U.S. 403 (1971), the United States Court of Appeals for the District of Columbia Circuit held reviewable a Commission determination that it would take no action against the Dow Chemical Company's Board of Directors for refusing to include a shareholders' resolution in its proxy statement. On almost identical facts, however, the same court in Kixmiller v. SEC, 492 F.2d 641, 643-44 (D.C. Cir. 1974), held:

> We think members of the Commission's staff, like staff personnel of other agencies, "have no authority individually or collectively to make 'orders,' " and that, on the contrary, "[o]nly the Commission makes orders." Here the Commission made no order on the merits of petitioner's claim; rather, it emphatically "declined to review the staff's position." It follows that what petitioner seeks to have reviewed in this court is not an "order issued by the Commission."

The act of legerdemain in distinguishing the cases was possible in the court's view because in *Medical Comm. for Human Rights* the Commission actually affirmed the staff's conclusion, whereas in *Kixmiller* it refused to pass on the staff's decision. *Kixmiller*, 492 F.2d at 644.

de facto extension of their delegated authority. Such expansions can be resisted only if affected citizens risk the threat of agency sanction to test the legality of the agency's position on judicial review.

Second, agencies that rely solely on interpretive or jurisdictional determinations are unable to remedy the indirect injuries they inflict on those whom they regulate. No practical way exists to determine the extent to which regulated parties desist from otherwise legitimate activities because perseverance in the face of threatened agency sanctions is too costly. Beyond the shift of political power represented by unauthorized extensions of agency authority, therefore, a meaningful assessment of the unavailability of declaratory relief must include an analysis of opportunity costs. When an agency improperly lays claim to Congress' authority, it simultaneously precludes negotiations within the regulated market. Absent judicial willingness to treat nonsubstantive agency determinations as final reviewable agency orders, sole reliance by agencies on advice-giving based on their rulemaking powers assures that government will be injected into private planning processes in direct contravention of the political balance intended by the APA.[146]

Third, and probably least appreciated, sole reliance on agency rulemaking powers encourages agencies to ignore more efficient ways of resolving questions and potential disputes. Section 554(e) ought to complement formal adjudicatory powers when the agency confronts questions whose immediate resolution would either allow an end to formal agency adjudication of a dispute or facilitate removal of legal uncertainties that might later lead to formal adjudication. Some progress has occurred in the use of declaratory orders to end adjudication of disputes.[147] The summary judgment use of the declaratory order promises to expedite the resolution of disputes so that judicial review may be readily obtained. By contrast, agencies have failed to use the declaratory order to remove uncertainties and streamline their operations. They have refused to review recurring patterns of disputes to determine whether regulated persons are needlessly subjected to the costs of planning under threat of government sanctions. Instead, agencies have permitted judicial processes to fill the void left by the unavailability of definitive administrative determinations. This practice has forced regulated persons to divert resources from planning to achieve novel, but legitimate, ends to planning to avoid sanctions.

Ultimately, however, agencies must consider concerns that override even the instrumental considerations addressed here. What agencies often ignore by

146. The United States Supreme Court has said that the political accommodations reflected in the APA were aimed at reforming arbitrary and biased use of administrative adjudicatory power. Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950), *modified*, 339 U.S. 908 (1959). Although, in Justice Jackson's words, the APA is full of "compromises and generalities and, no doubt, some ambiguities," it is a "formula upon which opposing social and political forces have come to rest." *Id.* at 40. The purposes of the APA were to "introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs departed widely from each other" and "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." *Id.* at 41.

147. *See supra* notes 13 & 127-28 and accompanying text; *see also* Powell, *supra* note 2, at 370 (discussing the Supreme Court's recognition of the sensible advantages of summary judgment).

failing to make administrative declaratory judgments freely available is that section 554(e) is a congressionally created procedure. It responds to our lawmakers' perception of the need for an administrative procedure under which regulated persons could secure judicial review of disputed legal positions without risking agency sanctions. As yet, that objective remains unrealized, because the so-called substitutes for section 554(e) lack the significant requirements of general availability and reviewability that are characteristic of the declaratory order. These section 554(e) "substitutes" merely indulge the agencies' desire to assert their view of the law without the scrutiny of judicial review. What the agencies seek to avoid is nothing less than the critical issue whether their view of the law is legally authorized.

Although informal advice-giving and other devices by which agencies disseminate their views of the law are valuable aids to regulated persons, agency procedures that encourage the issuance of final, judicially reviewable declarations of the law prior to the commencement of sanctioning processes are badly needed. Agencies should be prepared to terminate controversies when judicial review is appropriate and to remove uncertainties that might otherwise lead to such controversies. To this end it is imperative that agencies authorized to issue declaratory orders under the APA undertake the initiatives outlined below.

A. *Agency Advice-Giving Responsibilities*

In appropriate circumstances and consistent with the availability of personnel, agencies should continue to give advice about their views of the law and agency practice to members of the public. Agencies should publish specific summaries of their advice-giving authority and procedures for circulation to the general public.

Agencies should explicitly declare that, subject to the requirements of the APA, disputes concerning an agency's legal authority may be resolved by declaratory order at the initiative of the agency or the regulated party, at any point (1) during a formal adjudicatory hearing for purposes of terminating a controversy; or (2) prior to initiation of the formal adjudicatory process, to remove uncertainty that might otherwise result in a formal adjudication. Moreover, agencies should identify and announce the policies governing circumstances in which rulemaking advice (*viz.*, interpretive and policy rules) and adjudicatory advice-giving (*viz.*, declaratory orders) generally will not be available.

B. *Procedures for Obtaining Declaratory Orders*

In particular, each agency should adopt and publish rules that describe two basic types of procedures:

(1) How to obtain oral and written nonbinding advice from an agency's local, regional, or national offices; and

(2) How to obtain a judicially reviewable agency adjudicatory determination pursuant to the declaratory order provision of section 554(e).

With respect to the first of these procedures, the agency should list specifi-

cally all the designations it uses for agency determinations that it deems to be nonbinding and, therefore, not subject to judicial review. With respect to the second of these procedures, the agency's statement should explain specifically and in detail how responses to requests for interpretive and policy advice that the inquirer deems unsatisfactory will be handled. At a minimum the statement should include the following information:

(a) The name, title, and address of the agency official who is authorized to receive petitions for declaratory orders;

(b) The special considerations, if any, that the agency thinks relevant to whether a declaratory order should issue (for example, that the matter raises a substantial question of law or involves a substantial financial interest; that the matter not be the subject of any other agency's investigations or proceedings; or that the facts be clearly settled);

(c) The court, if other than a federal court of appeals, that reviews orders issued by the agency;

(d) The recommended format, if any, for petitions for declaratory orders;

(e) Whether petitions for declaratory orders may be requested confidentially;

(f) The procedures (*viz.*, *ex parte*, notice and comment, oral presentations, affirmations, and so forth) governing the declaratory order process;

(g) The time frame in which the agency will attempt to rule on petitions for declaratory orders; and

(h) The source from which copies of previously issued declaratory orders may be obtained.