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SINNERS, SUPPLICANTS, AND SAMARITANS: AGENCY ADVICE GIVING IN RELATION TO SECTION 554(e) OF THE ADMINISTRATIVE PROCEDURE ACT

BURNELE V. POWELL†

Section 554(e) of the Administrative Procedure Act provides an administrative declaratory order that parallels the traditional declaratory judgment. This device, although technically limited to questions presented during formal agency adjudications, is a potentially dynamic tool that neither the agencies nor the public has embraced. Professor Powell argues that recent Supreme Court decisions have eliminated the section's technical limitations and have expanded section 554(e) so that it may be used whenever an agency adjudicates an issue. Additionally, the Court's recent holding that declaratory orders may be used in conjunction with administrative summary judgment presents agencies with a strong declaratory order that may streamline agency adjudication. After reviewing agency procedures and the results of interviews with agency personnel, Professor Powell concludes that both agencies and the public historically have shunned the declaratory order. Agency advice-giving procedures therefore reflect an unwillingness to generate binding advice, with a resultant uncertainty over the precedential value of the advice that is given. To combat this ambiguity, Professor Powell argues that agencies should make more effective use of section 554(e) declaratory orders and establish regulations delineating when the device is available. He concludes that the certainty and efficiency gained by obtaining a binding determination prior to adjudicatory proceedings warrants a critical scrutiny of the means now employed and a revamping of current agency advice-giving procedures.

Western legal scholars long have sought to provide an easy means of settling questions concerning legal rights and duties in a manner that does not expose the disputants to the coercive powers of the state.¹ A labor union, for example, may seek to discharge an employee under a collective bargaining

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1. In his seminal work on the history of declaratory judgments, Professor Edwin Borchard, codraftsman of the Uniform Declaratory Judgments Act of 1922, traced the modern English-law declaratory action to the "declarator" of the Scottish Middle Ages, circa 1541. Scotch institutional writers were said to have defined the action as one "in which the right of the pursuer (plaintiff) is

agreement that requires union membership as a condition to continued employment and also provides that the employee suspend himself from the union when dues arrearages exceed a specified period. The employee is likely to protest the union's actions and threaten an unfair labor practice charge for violation of the union's duty of representation. The union, faced with a colorable claim by the employee, is confronted with a dilemma: it can desist in the face of the employee's threat or proceed against the employee with the hope that its conduct is protected by applicable labor laws. The prospect for guidance from the National Labor Relations Board is not good; the Board probably will refuse to advise the union about the validity of its conduct or, at best, the Board will provide such general advice that no court would deem the issue ripe for review.²

The union needs a way out of this quandary that does not expose it to the risk of a reinstatement and back pay order. The need for a procedural solution is clearer when the situation is generalized beyond the case of the union—and the employer caught in the middle—and includes the plights of the many shippers, broadcasters, pharmaceutical manufacturers, and others who desire judicially reviewable determinations from the government or the courts whether proposed actions would be legal.

The search for a procedural solution has been protracted. Concerns initially focused on whether the judiciary could or should resolve disputes in which the plaintiff did not seek to invoke the powers of the state to require the defendant to conform his conduct to a declared standard.³ When the relief sought merely was *declaratory* of the rights and duties of the moving party, it was asserted that courts were not being asked to resolve legal disputes, but rather to allow litigants to avail themselves of the courts' wisdom as a means to address abstract, philosophical, or hypothetical concerns.⁴ Thus, the early judicial response to requests for declaratory orders was to wait until the point

craved to be declared, but nothing is claimed to be done by the defender (defendant).'" E. BORCHARD, *DECLARATORY JUDGMENTS* 125-26 (2d ed. 1941).

The declarator had a number of other points in common with its modern counterpart, the declaratory judgment. The declarator was discretionary; the plaintiff had to have a substantial interest in a real dispute; the requested declaration had to "serve some useful purpose in settling disputed or doubtful legal relations;" and the decision was *res judicata*. *Id.* at 127.

2. See Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 277-82, 328 n.6 (1971) (White, J., dissenting) (majority failed to use declaratory judgment despite dissent's stated preference for it); see also *infra* notes 8, 27.

3. See *Piedmont & N. Ry. v. United States*, 280 U.S. 469 (1930), in which a suit to enjoin the Interstate Commerce Commission (ICC) from proceeding against the railroad was dismissed on grounds that the ICC's order refusing an exemption from the ICC's certificate of convenience requirement lacked the necessary finality for review. The Court held that the order—one that was negative in form, but which did not command petitioner to take any affirmative action—was unreviewable. *Id.* at 476. The Court reasoned that mere denial of an exemption did not determine the railroad's status; it simply gave petitioner a further challenge to the validity of the trial court's construction of the particular statute. *Id.* at 477.

4. In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), Justice Harlan, considering the courts' traditional reluctance to grant injunctive and declaratory judgment remedies affecting administrative determinations, concluded:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and

at which the defendant allegedly had breached a duty for which the plaintiff needed an immediate remedy.⁵ In these latter instances, the court was said to be engaged in *adjudicating*, with all of that term's inherent safeguards,⁶ and not issuing mere advisory pronouncements that never would be applicable to a concrete dispute⁷—or worse yet, that later might impair a more thorough examination of the issues in the context of a concrete case.⁸

also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Id. at 148-49.

5. For example, in *Anway v. Grand Rapids Ry.*, 211 Mich. 592, 179 N.W. 350 (1920), the Michigan Supreme Court reviewed and rejected the first state statute that had provided for a declaration of rights "where there is a present possibility of immediately creating a cause of action . . . but the parties have not done so." *Id.* at 594, 179 N.W. at 351. The court first noted that the legislature might have to increase the number of justices before the court could efficiently take up "the work of advising three million people" about "what the law is, or will be, in the event of future breaches, future contingencies which may or may not happen." *Id.* at 595, 179 N.W. at 351. The court went on to declare: "It is . . . beyond the authority of the legislature to confer upon [courts] either power not judicial, or to require the performance of functions not judicial in character [e.g., the granting of advisory opinions and the deciding of moot cases]." *Id.* at 622, 179 N.W. at 361.

6. Professor Davis has emphasized that administrative hearings involve many of the same safeguards, but also involve a basic contrast—that between trials and arguments. Beginning with the premise that, "[a] 'hearing' is any oral proceeding before a tribunal," Professor Davis concludes that trial-type hearings, like judicial ones, provide for the presentation of evidence, cross-examination, rebuttal, and a determination made by a trier of fact solely on the basis of the record produced at the hearing. "The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side . . ." 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 701, at 407 (1958); *infra* note 17; see also W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 148-50 (7th ed. 1979) (general discussion of adjudication); C. MCCORMICK, *MCCORMICK ON EVIDENCE* § 348, at 836-837 (E. Cleary 2d ed. 1972) (contrasting the judicial trial and the administrative adjudication).

7. Professor Davis has observed that the doctrine of ripeness—the need for courts to conserve their energies for real, present, and imminent problems rather than to squander such energies on abstract, hypothetical, or remote problems—has contributed to an instability in Supreme Court opinions, in part because of the anachronistic judicial notion that a judgment that cannot be executed in fact amounts to no judgment at all. 3 K. DAVIS, *supra* note 6, § 21.01, at 116-18. He notes that courts today accept the appropriateness of decisions about which Chief Justice Taney declared: "The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it." *Id.* at 122 (quoting *Gordon v. United States*, 117 U.S. 697, 702 (1865)). Professor Borchard also noted this enforcement requirement:

The assumption that courts act only after accomplished or threatened wrongdoing is probably responsible for the frequent statement that the judicial power compels or coerces (or penalizes) wrongdoers, "cures" wrongs, or, at most, prevents their imminent commission. Hence also the assumption that the execution or enforcement of a judgment is the essential characteristic of judicial power.

E. BORCHARD, *supra* note 1, at 8; see *infra* note 23.

8. Professors Jaffe and Nathanson have raised as illustrative the hypothetical situation in which an entrepreneur is about to make a financial commitment. Under such a circumstance, questions about the legal ramifications of an action are likely.

A multitude of questions may arise as to whether certain employees are within the Wage-Hour Act: if they are they would be entitled to certain overtime treatment with consequent penalties for failure to obey. To be sure, there is some feeling that persons should not be enabled to cut the pattern of their action to the minimum requirements of legality. Equity has sometimes refused to specify the exact letter of performance in order to leave a margin of doubt to promote generous compliance. Undoubtedly agencies will be loath to advise an applicant who wants to know how much he can 'get away with,' and there will be agencies which will deliberately trade on the margin of doubt to extend regulation. There will, furthermore, be situations which cannot be defined in advance, either because the factors are dynamic or in part imponderable.

The basic assumptions of this no-advisory-opinion limitation were not surmounted by statutes that allowed courts to resolve disputes without regard to whether the court also might provide a coercive remedy until the mid-1800s in England⁹ and some one hundred years later in the United States.¹⁰ The Declaratory Judgment Act of 1934¹¹ made federal courts available for the noncoercive resolution of questions of legal rights and relationships in a variety of cases involving actual controversies.¹²

Three developments were critical to the evolution that opened the federal courts to declaratory judgments. The first development was the recognition that society's interest in justice often could be served by procedures that provided disputants a statement of their specific legal duties before they acted. The removal of legal doubts and uncertainties eventually came to be viewed as a way to encourage disputants to proceed with socially useful conduct and to

L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW CASES AND MATERIALS* 307 (4th ed. 1976).

Borchard has described the Kafkaesque dilemma of such citizens, who merely wish to ascertain the applicability and validity of orders or regulations, as being "forced into a mystic maze." Borchard, *Declaratory Judgments in Administrative Law*, 11 N.Y.U. L. REV. 139, 140 (1933); *see infra* note 27.

9. Professor Borchard traced the modern evolution of England's declaratory action through the Chancery Act of 1850, 13 & 14 Vict., ch. 35, §§ 1, 14 (1850); the Chancery Procedure Act of 1852, § 50; the Judicature Act of 1873; Order XXV, Rule 5 of the Supreme Court Rules of 1883, 7 Statutory Rules and Orders 54 (1883); Order LIV, A, Statutory Rules and Orders 552 (1893). E. BORCHARD, *supra* note 1, at 128-131.

10. *See infra* note 11 and accompanying text.

11. The federal Declaratory Judgment Act was adopted in 1934 and revised in 1948. It provides in part:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes [unless otherwise provided], . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

62 Stat. 964 (1948), amended, 63 Stat. 964 (1949), 28 U.S.C. § 2201; *see also* E. BORCHARD, *supra* note 1, at 132-36 (legislative history of the Act).

12. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (authorizing preenforcement review of proposed FDA regulations alleged to exceed statutory scope); Saint Regis Paper Co. v. United States, 368 U.S. 203, 213 (1961) (authorizing stay from continued forfeiture payments sought by the United States for noncompliance with an FTC order, pending determination of the validity of the order); Davis v. Romney, 490 F.2d 1360, 1369-70 (3d Cir. 1974) (authorizing suit for a declaration that the Federal Housing Authority had insured home mortgages illegally); R.A. Holman & Co. v. SEC, 299 F.2d 127, 131 (D.C. Cir.) (authorizing district court review of an SEC rule suspending exemption from a registration that posed a risk of immediate harm to plaintiff's going business), *cert. denied*, 370 U.S. 911 (1962); United States v. Various Articles of Obscene Merchandise, 514 F. Supp. 463, 471 (S.D.N.Y. 1981) (authorizing relief against future seizures of Swedish pornography by customs officers); Little v. United States, 489 F. Supp. 1012 (C.D. Ill. 1980) (authorizing a businessman to seek declaratory relief from the Small Business Administration's alleged racial discrimination); Puerto Rico v. Alexander, 438 F. Supp. 90, 94 (D.D.C. 1977) (authorizing Puerto Rico to sue to establish the inapplicability of federal water pollution laws); Pharmaceutical Mfrs. Ass'n v. Richardson, 318 F. Supp. 301, 303 (D. Del. 1970) (authorizing drugmakers' association to sue for relief from standards for clinical investigation required in "new drug" regulations); Pharmaceutical Mfrs. Ass'n v. Finch, 307 F. Supp. 858, 859-62 (D. Del. 1970) (same); *see also* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 618 (1973) (authorizing FDA to hold administrative summary judgment procedure, whereby a panel created by the FDA determines the "efficacy" of drugs); *infra* text accompanying notes 133-60 (discussing use of declaratory orders to end disputes).

desist from conduct that could lead to sanctions.¹³ Second, a judicial explanation came to be recognized as an important remedy independent of the need for appeal to the courts for coercion. Last, the proposition that the value of declaratory relief rests in the probability that disputants generally will conform their actions to a known standard rather than open themselves to later charges of willful wrongdoing was accepted.¹⁴ These changed points of view have been rewarded in all respects by the proven value of the declaratory judgment to the judicial process.¹⁵

Despite this success, complete acceptance of the declaratory device as a means of prelitigation dispute resolution has not been realized. Oddly enough, expansion of the concept to aid federal tribunals that act with less than article III constitutional authority¹⁶—the so-called quasi-judicial operations of administrative agencies¹⁷—has proven even more difficult than appli-

13. One of the Supreme Court's earliest pronouncements on the Declaratory Judgment Act spoke to the value of removing uncertainty. In *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 228-31 (1937), the Court held that an actual controversy arose within the meaning of the Act and the Constitution when a policyholder asserted the insurer's liability, notwithstanding the nonpayment of premiums, the denial that a disability existed, and the company's claim that the policy had lapsed. The Court required neither an injunction nor allegations that irreparable injury was threatened.

Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Id. at 241. Professor Borchard has suggested the value of such decisions:

Only a highly developed society appreciates the need for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the *status quo* It seems to have been overlooked that the social equilibrium is disturbed when rights of property or status are made insecure by attack or challenge, and that the judicial process should afford protection not only from physical injuries and violence, but also against the denial of established rights and against unfounded claims which challenge cherished values, *i.e.*, against uncertainty, peril and insecurity.

E. BORCHARD, *supra* note 1, at 4.

14. See *infra* text accompanying note 62.

15. Professor Davis has characterized the declaratory judgment and the injunction, with which it usually is combined, as the most important nonstatutory forms of proceedings for review of federal administrative action, noting that such actions account for more than 90% of all cases involving nonstatutory review. K. DAVIS, *ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS* 175 (6th ed. 1977).

16. The lower federal courts exercise only the jurisdiction assigned to them by act of Congress pursuant to article III, § 1 of the Constitution, which provides: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

17. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (1982)) [hereinafter cited as the APA] contemplates two broad categories of federal agency action: rulemaking and adjudication. 5 U.S.C. § 551 defines adjudication as the "agency process for the formulation of an order"; "order" means 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 rulemaking but including licensing." Therefore, all agency conduct that is not rulemaking is adjudication, but between types of adjudications, that which is most like the procedures of a trial is governed by 5 U.S.C. §§ 553, 556, and 557.

Professor Davis has urged that, despite the absence of judicial opinions crystalizing a rule, the following considerations should determine when the method of trial is appropriate:

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfat-

cation of the process to the federal courts. The declaratory device seldom has been used in the administrative context to resolve disputes and remove uncertainty¹⁸ despite Congress' assignment of the overwhelming share of adjudications to agencies¹⁹ and despite Congress' hope that by using administrative tribunals it could achieve efficiencies not otherwise available through the judicial process.²⁰ Thus, the irony is that these agencies—supposedly staffed with

avorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing.

1 K. DAVIS, *supra* note 6, § 7.02, at 412; see L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW, CASES AND MATERIALS* 4 (3d ed. 1968); J. MASHAW & R. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM* 325-28 (1975); cf. Verkuil, *The Search for a Legal Ethic: The Adversary System, Liberalism and Beyond*, 60 *SOUNDINGS* 54, 63 (1977) (empirical examination of the willingness of selected agencies to adopt ten adjudicatory procedures required by the Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

18. The 1968 Report of the American Bar Association's Subcommittee on Declaratory Orders of the Administrative Process Committee of the Administrative Law Section found that only two of seven major regulatory agencies it studied had adopted declaratory order regulations specifically pursuant to § 554(e). The agencies adopting such rules were the Federal Power Commission and the Federal Mining Commission. Those without such rules were the ICC, the FTC, the SEC, the FCC, and the FDA. Comment, *Declaratory Orders—Uncertain Tools to Remove Uncertainty*, 21 *AD. L. REV.* 257 (1968).

This pattern does not seem to have changed during the interim. About 20% of the agency lawyers interviewed volunteered that their offices generally were unaware of the existence of the procedures prior to receipt of correspondence from the author concerning agency use and nonuse of the declaratory order provision of the APA. For a description of the survey, see *infra* note 36.

19. Although many estimates of the comparative volume of adjudications between the judicial and administrative branches exist, the estimates tend to be anecdotal and lack anything more than illustrative value. It should suffice to say, however, that by design and by almost any serious measure, federal agencies do substantially more adjudicating than federal courts. Simply comparing the relative number of judges in the judicial and executive branches helps to illustrate the workload division. In 1983 there were 515 authorized positions for federal district court judgeships. *ADMINISTRATIVE OFFICE OF THE U.S. COURTS*, 1983 *ANN. REP.* 3. By comparison, in 1976 there were 1127 administrative law judges employed by only 29 Federal agencies. *FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS: STATISTICAL REPORT FOR 1976-1978*, 7-10 (1980); see S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1 (1979); 1 K. DAVIS, *supra* note 6, § 1.02, at 8-14; G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 29 n.8 (1974).

20. 1941 ATT'Y GEN'L FINAL REP. ON AD. PROC. 7-20 called attention to some of the reasons for the rise of administrative agencies. The Committee noted that the practical alternative was that Congress itself might have to undertake directly such mundane tasks as issuing passports or paying the nation's debts. Delegating these functions to agencies, however, freed Congress to act on more pressing matters, and also ensured "greater uniformity and impersonality of action." *Id.* at 11. Congress recognized that even when it possessed the technical expertise and was confident that its determinations were not likely to become anachronistic and rigid if codified in the form of a statute, time spent on the narrow details of enforcement might better be devoted to matters of broad public policy. Furthermore, without agencies Congress would be limited to the criminal law enforcement approach of correcting or addressing evils only after they have arisen, rather than being able to concentrate on preventing evils from arising. Ratemaking and licensing, for example, provide a more effective procedure than criminal processes for taking account of and enforcing regulatory standards. Congress might have realized that the prospect for uniform adjudications is structurally decreased because of the multitude of federal district and territorial courts; the chances for uniformity are greater with a single centralized agency. And even if uniformity were not a concern, administrative tribunals "represent an effort . . . to place upon the Government—rather than upon millions of people of often limited resources—a large share of the responsibility for making effective policies which the people through their Government have declared." *Id.* This latter notion also implies concern for economies of scale. Agencies are better suited, both in terms of the time they can devote and in their ability to establish routines for handling large numbers of cases, to resolve disputes in which each claimant's interest is normally so small and his fear of displeasing "the powers that be" so great that litigation ordinarily would be out of the question. If the law is to be enforced at all, official means of investigating and

experts armed with more flexible rules of procedure, deeper appreciation of the policy choices underlying legislative enactments, and discretion to act in the public interest—have recognized no meaningful role for the declaratory device in confronting the problems of the modern bureaucratic state.²¹ Arguments rejecting the use of declaratory procedures in the administrative context focused primarily on the same objection raised over the use of declaratory judgments in the judicial arena²²—the alleged lack of concreteness that would attend agency attempts to resolve disputes prior to the point at which the application of agency compliance sanctions would be appropriate.²³ Addition-

prosecuting the claims had to be developed. Finally, and most obviously, the volume of cases arising under certain laws often is too great for other than specialized staffs and procedures to provide the record on which the decision must be based. Courts simply are insufficiently staffed to do the job.

In addition, Donald Horowitz, former member of the Brookings Governmental Studies staff, has noted some inherent limitations of judicial adjudication, beginning with the contrast of relative expertise available through judicial as opposed to administrative tribunals. Career administrators tend to be highly specialized, while the typical judge's episodic involvement in agency programs works against development of in-depth knowledge. Thus, Horowitz sees significant policy implications arising from the structural limitation of the judicial adjudicatory system.

That judges are generalists means, above all, that they lack information and may also lack the experience and skill to interpret such information as they may receive. On many matters, after all, the expert may know nothing of the particulars before him; what he does know, however, is the general context, and he can locate the issue in its proper place on the landscape. Judges are thus likely to be doubly uninformed, on particulars and on context. This makes the process by which they obtain information crucial, for social policy issues are matters far from the everyday experience of judges.

D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 31 (1977).

21. Professor Richard Stewart has characterized this broad vision based on experts' use of discretion as the "traditional model" of the administrative process. Stewart views this model, however, as succumbing to a transformation wrought by the difficulties of maintaining a governing political consensus in an increasingly heterogeneous society. He identified four concerns that characterize the traditional model: (1) protecting against unauthorized agency interference with private individuals; (2) regularizing agency decisionmaking as a means of lessening agency opportunity to interfere with private individuals; (3) promoting agency decision processes as a means of enhancing the judiciary's ability to review agency actions; and (4) requiring judicial review as a means of affirming agency conduct as legitimate (i.e., authorized pursuant to legislative designed protections and procedures). Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

Other commentators have attributed the need for administrative as opposed to judicial tribunals to an enormous change in the underlying rationale for government intervention. Rather than simply a financing, franchising, or distributional role, "[t]he single most important characteristic of the newer forms of social intervention is that their success depends on affecting the skills, attitudes, consumption habits, or production patterns of hundreds of millions of individuals, millions of business firms, and thousands of local units of government." W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 6, at 4-5. As a result, the new boundaries of public administration are said to encompass "the far more vexing question of how to change some aspect of the behavior of a whole society." *Id.*

22. See *supra* notes 4-5.

23. Professor Davis has spoken succinctly to this concern:

A good deal of harm stems from a widespread misconception that a declaratory judgment or a declaratory order relates to abstract or remote questions and that other judgments and orders relate to concrete controversies. This idea is wholly erroneous. The only difference between declaratory orders or judgments and other orders and judgments is presence or absence of the element of coercion. All orders and judgments are either declaratory or coercive. If a tribunal orders *A* to pay *B* a sum of money or orders *C* to discontinue a practice, the order is coercive, because it is a command. But whenever a court or agency holds in favor of a defendant—that the defendant is not liable for money, or that the defendant should not be enjoined or ordered to cease and desist—the

ally, as with the declaratory judgment, statutory reform was viewed as the proper way to resolve the ripeness concern with the administrative declaratory procedures and make the declaratory device available.

Through enactment of the Administrative Procedure Act (APA) in 1946,²⁴ Congress provided a regularized process for the conduct of all federal agencies not specifically excluded by the APA or by other statutes.²⁵ More particularly, Congress gave its blessing to the use of the declaratory device by administrative agencies. Section 554(e) of the APA provides that an agency "in its sound discretion" could issue an order "to terminate a controversy or remove uncertainty" in aid of its formal adjudications.²⁶ This provision was intended to allow an agency to assess the impact of its statutes and regulations in light of the particularized circumstances of an affected citizen.²⁷ The proce-

determination is declaratory and not coercive. Whenever no command is made, the judgment or order is necessarily declaratory. And nothing in the principle of *res judicata* makes a declaratory order as such any less binding than a coercive order.

1 K. DAVIS, *supra* note 6, § 4.10, at 268.

24. Administrative Procedure Act, ch. 324, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (1982)). Despite unanimity at adoption, the APA "grew out of a most unpromising brew of widely divergent viewpoints on the future of the administrative agency and the administrative process." Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 FED. B.J. 267, 268 (1970). What eventually emerged was a compromise bill that in large part reflected the thinking of the Attorney General's Committee on Administrative Procedure, see S. Doc. No. 8, 77th Cong., 1st Sess. (1941) and the views of the American Bar Association. For a genealogical history of the various proposals on which the Act was based, see *Administrative Procedure: Hearings on H.R. 184, 339, 1117, 1203, 1206 and 2602 Before the House Comm. on the Judiciary*, 79th Cong., 1st Sess. 14-25 (1945) (statement of C.A. Miller); *infra* note 89.

25. The APA was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36, *modified*, 339 U.S. 908 (1950), but also was a legislative enactment that settled "long-continued and hard fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978); see also Williams, *supra* note 24, at 268 (discussion of APA as ending much confusion and variation between the different agencies).

26. 5 U.S.C. § 554(e) (1982) (originally codified at 5 U.S.C. § 5(d)) provides: "The 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." This section, however, is subject to the limitations of the introductory clause of § 554(a), which limits all the provisions of § 554, and provides that the "section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." See H.R. REP. NO. 1980, 79th Cong., 2d Sess. 31 (1946); 1 K. DAVIS, *supra* note 6, § 4.10, at 272.

27. Discussing WIS. STAT. § 227.06 (1943), one of the earliest state declaratory devices, Ralph M. Hoyt stressed that one of its purposes was to relieve perplexed businessmen from the uncertainties of government agency regulation. In particular, businessmen needed to determine whether their planned activities came within the purview of a regulatory statute or its implementing rules. Thus, a means was sought to relieve businessmen from the hazardous course of trial-and-error or from having to plan on the basis of "complete reliance on informal and non-binding advice given them by the administrative agency itself." Hoyt, *Wisconsin Administrative Procedure Act*, 44 WIS. L. REV. 214, 219 (1944).

A similar altruism motivated proponents of the federal declaratory order:

The purpose of declaratory judgments and declaratory rulings is to provide a method whereby private parties, when threatened with a definite situation such as the application of a rule or statute, may secure a declaration of rights and thereby settle the matter prior to incurring criminal or other penalties—a result devoutly to be fostered for the benefit of the public, the parties, and the administrative process.

Fair Administrative Procedure for Federal Agencies is Offered in Improved Draft of a Proposed Bill, 30 A.B.A. J. 6, 11 (1944).

ture shared with its judicial antecedent, the declaratory judgment,²⁸ the premise that the sole prerequisite to its application was that a real dispute be before the adjudicator.²⁹

Freed of the requirement that a decisionmaker act only in aid of an agency's sanctioning process,³⁰ section 554(e) shared the assumption of the Declaratory Judgment Act that for most disputants a statement of the law leads to compliance with the expected standard of conduct.³¹ Regrettably, the salutary hopes for section 554(e) have not been realized completely. Section 554(e) has been met with disregard, lack of awareness, and suspicion in the agencies,³² confusion in the lower courts,³³ and expressions of dissatisfaction among the commentators.³⁴ Thus, after almost forty years of refusals by most federal agencies to adopt declaratory order procedures consistent with section 554(e),³⁵ the need exists for an assessment of the declaratory order's place in the advice-giving operations of federal agencies.

This Article presents the general findings from interviews with attorneys from fourteen federal agencies about section 554(e).³⁶ The attorneys involved

28. "The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts." H.R. REP. NO. 1980, 79th Cong., 2d Sess. 31 (1946).

29. "The purpose of section 5(d), like that of the Declaratory Judgment Act, . . . is to develop predictability in the law by authorizing binding determinations 'which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view.'" ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59 (1947) [hereinafter cited as ATTORNEY GENERAL'S APA MANUAL] (quoting 1941 ATT'Y GEN. FINAL REP. ON AD. PROC. 30).

30. See *supra* text accompanying notes 9-15.

31. See *supra* note 27 and accompanying text.

32. See *supra* note 18.

33. For example, see *City of Miami v. ICC*, 669 F.2d 219 (5th Cir. 1982), which involved the ICC's issuance of an order declaring that an ocean terminal facility constituted a "line of railroad" under the Interstate Commerce Act. Although the ICC asserted that both its inherent authority and § 554(e) justified the order, the court of appeals dismissed the case for lack of jurisdiction, holding that the ICC's action was a nonreviewable advisory ruling rather than a final reviewable order. *Id.* at 222 n.12.

34. The following comments are representative.

"A sharp look at this section will disclose that it is not completely satisfactory." L. JAFFE & N. NATHANSON, *supra* note 8, at 307.

"The APA declaratory order provision contains limits that make it ineffective to resolve the problem of making administrative advice reliable . . . Even more important is the limitation in the authorization to issue declaratory orders in the 'sound discretion' of the agency." B. SCHWARTZ, *ADMINISTRATIVE LAW* 140 (2d ed. 1984).

"[T]he declaratory order provision should be removed from section 5, and the agencies be given broad and flexible authority to grant declaratory relief in situations where it is proper." Note, *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 320 (1961).

35. See *supra* note 18.

36. Over a six-week period from June to August 1983 the author visited fourteen federal agency headquarters in and around Washington, D.C. and interviewed approximately thirty attorneys. Seven of the agencies at which interviews were conducted (see italicized agencies in list below) were selected because they previously had been surveyed by a subcommittee of the American Bar Association. See *supra* note 18. For each interview the agency was requested to designate the individual(s) with whom the author should speak. In all instances the person or persons designated (usually an attorney) had supervisory responsibility for, or familiarity with, the agency's procedures for advice giving, both in general and pursuant to § 554(e) of the APA. The interviews averaged one-and-a-half hours in length and in most instances were recorded. All recording was subject to the understanding that the interviewee's comments were not for specific attribution and did not necessarily reflect the agency's official position. These arrangements facilitated a free-

had either supervisory or direct responsibility for the law-related, advice-giving functions of their agencies. In each instance they were requested to consider their agency's use of section 554(e) declaratory orders. This Article outlines the generic agency advice-giving model suggested by the interviews and compares that model with the APA's section 554(e) model, as defined by the Supreme Court. Part I sets forth the advice-giving scheme currently in place in the agencies. Part II discusses the preadjudication advice-giving function reflected in Supreme Court cases that have litigated the terms and scope of section 554(e) and assesses the Court's view of the declaratory order in the context of ongoing adjudications. This examination concludes that a great distance currently exists between the agencies' advice-giving model and the Court's interpretation of the section 554(e) declaratory order. Part III offers some broad conclusions about, and recommendations for, the future of section 554(e).

I. ADVICE GIVING IN THE FEDERAL AGENCIES

A. *Advice Giving as Rulemaking*

The most striking characteristic of the advice-giving procedures of the agencies studied is that, except on the question of jurisdiction,³⁷ agencies view

flowing discussion and were made subject to the understanding that supplemental written responses would be provided if necessary. Interviews were conducted at the following agencies: the Consumer Product Safety Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Energy Regulatory Commission (successor agency to the Federal Power Commission), the Federal Maritime Commission, the Federal Trade Commission, the Food and Drug Administration, the Interstate Commerce Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Administration, and the Securities and Exchange Commission. Except where otherwise indicated, the observations in the text and footnotes concerning agencies' operations are based on information gained from these interviews.

37. This Article treats agency use of declaratory devices for purposes of determining agency jurisdiction as a special case. For example, under 29 C.F.R. § 102.105 (1984), the National Labor Relations Board (NLRB) provides that:

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a regional office of the Board, and the general counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, he may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases.

Such orders concededly are declaratory. Board determination of the jurisdictional issue constitutes a final agency action that is judicially reviewable. 29 C.F.R. § 102.110 (1983). In terms of § 554(e), however, the availability of such devices for other problems confronting a person who is subject to NLRB regulation is lacking. See *supra* note 2 and text accompanying notes 30-35. Moreover, even with respect to such jurisdictional orders the agency (as does the NLRB) may empower its general counsel rather than the regulated person to request the Board's interpretation. Given these limitations on the declaration's availability, such devices cannot be viewed as the equivalent of § 554(e) declaratory orders. Instead, they should be designated as what they are: "jurisdictional determinations" or "jurisdictional orders." See *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 328 n.6 (1971) (White J., dissenting); see also *infra* text following note 170 (concerning the need for clearer nomenclature).

In addition to the NLRB type of problem involving an explicitly restricted declaratory order provision, there is the problem of an overly narrow use of the declaratory order. The ABA Subcommittee on Declaratory Orders noted that the ICC, under Rule 1.102, "apparently considers declaratory order procedures most appropriate for resolution of jurisdictional issues, and discour-

advice-giving assistance to the public as part of their rulemaking, rather than their adjudicatory process. Thus, advice giving³⁸ is viewed as predating an actual dispute between the agency and a party with fixed interests that are directly and immediately at risk.³⁹ Absent such a conflict, requests for interpretations, clarifications, or advice trigger agency responses envisioned as rulemaking under the APA.⁴⁰ Because rulemaking contemplates both legislative and interpretive determinations,⁴¹ however, agency procedures are calculated to ensure responses from the agency that are commensurate with the importance that the agency attaches to the inquiry.⁴² This process⁴³ has subtle but important practical effects for a person seeking agency advice. The most important of these effects is substantive,⁴⁴ but the procedural implications can-

ages use of the petition procedures on finance matters (mergers, acquisitions, leases, issuances of securities, etc.)." Comment, *supra* note 18, at 259. The instant survey found no explicit reservation by the ICC, but was unable to affirm or contradict the Subcommittee's conclusions about the ICC's actual practice.

38. The term "advice giving" is used generically, as a type of rulemaking to be contrasted with "adjudication" under 5 U.S.C. § 551(7) (1982). "Attempted definitions of rule making usually try to differentiate between rule making and adjudication and do not attempt to draw a line between interpretive rules and various kinds of announcements, interpretations, opinions, releases, rulings, practices, usages, and policies." 1 K. DAVIS, *supra* note 6, § 5.01, at 289.

In the 1940s and 1950s, advice giving using one of the above means and carrying the threat of confiscation of property or prosecution frequently was held nonreviewable by way of a declaratory judgment action for want of the requisite controversy. For example, in *Helco Prods. Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943), a company about to ship poppy seeds that had been dyed blue was advised by the FDA that, because of the dye, shipping the seeds would violate a statutory prohibition against shipment of adulterated foods in interstate commerce. In affirming the district court's denial of a declaratory judgment, the court of appeals mused: "What a comfort it would be, if a declaratory judgment could be made as available as an interoffice memorandum, whenever a board of directors meets to consider a proposed new venture." *Id.* at 684; *see also* *Hearst Radio, Inc. v. FCC*, 167 F.2d 225 (D.C. Cir. 1948) (agency publication of report on broadcast licensees' public service responsibility not reviewable agency action); *Houston Post v. United States*, 79 F. Supp. 199 (S.D. Tex. 1948) (agency opinion concerning radio censorship of candidate for public office held not a reviewable order).

39. *See supra* note 3.

40. Whether an agency action is characterized as rulemaking or adjudication is key to application of the APA. The absence of a process by which an agency may issue an order containing a final disposition precludes a determination that the agency's action was an adjudication. *See* ATTORNEY GENERAL'S APA MANUAL, *supra* note 29, at 12-13, 40-41.

41. 1 K. DAVIS, *supra* note 6, §§ 5.03, 5.04.

42. *See* *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974), in which the court of appeals refused to review a decision by the Commission not to examine an informal staff determination. This informal determination had advised a stockholder that the staff would not recommend action by the Commission in response to a proposal to exclude the stockholder's proposals for action at the stockholders' meeting from mention in the management's proxy materials. Because the Commission advised the stockholder that it would not review the staff's position, hold an oral hearing, or issue an informal statement on the matter, the court of appeals held that assuming, without deciding, that such a refusal alone was reviewable, "[w]e 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.' . . . It follows that what petitioner seeks to have reviewed in this court is not an 'order issued by the Commission.'" *Id.* at 643-44; *cf.* *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970) (court measured indicia of "adversariness" and "formality" in determining appropriateness of judicial review of agency's proxy procedures), *vacated as moot*, 404 U.S. 403 (1972).

43. The process is technically designated "filtering" in the organizational behavior literature. *See* Adams, *Interorganizational Process and Boundary Activities*, 2 RESEARCH IN ORGANIZATIONAL BEHAVIOR 321-55, 337 (1980).

44. *See infra* text accompanying notes 58-59.

not be ignored.

Typically, the advice-giving process affords the opportunity for advice giving at four levels. The first level encompasses informal telephone or written inquiries to nonlegal staff by persons or their counsel.⁴⁵ If the inquiry requires a more detailed explanation or involves possible legal questions relating to the facts or the law, the agency will suggest presenting the question to level two, an agency lawyer.⁴⁶ A level-two decision that a new, novel, or important determination is required will lead to a referral to the third level, the agency's general counsel or its equivalent.⁴⁷ A similar determination at that level can result in a referral from the general counsel's level to the fourth level of secre-

45. As defined in 5 U.S.C. § 551(2) (1982), the term "person," includes "an individual, partnership, corporation, association, or public or private organization other than an agency." Here it is used synonymously with "inquirer," "questioner," "aggrieved person," and "citizen."

Most federal agencies must be able to process a large volume of informal inquiries quickly. Many seek expeditious determinations on the legitimacy of proposed conduct. See *Kixmiller v. SEC*, 492 F.2d 641, 645 n.29 (D.C. Cir. 1974); L. JAFFE & N. NATHANSON, *supra* note 8, at 307.

The surveyed agencies voiced satisfaction with their informal advice-giving mechanisms. Typical of such mechanisms is the FTC's expressed willingness to answer simple questions over the telephone and to use agency brochures and letters to explain its programs (e.g., the Equal Opportunity Credit Act). Similarly, the CPSC and FERC provide telephone responses to routine questions while requesting that callers submit written inquiries for nonroutine questions. Two of the surveyed agencies indicated even more systematic ways of providing telephone advice. The EPA has established a Reasonably Available Control Technology (RACT) clearinghouse to which persons may call for answers to such questions as: "What is the RACT for a blast furnace?" The ICC, on the other hand, has established a "Duty Day" system in which lawyers are required to give informal responses to phoned-in legal questions.

Although each of these opportunities for informal advice giving reflects, in large part, the mission of the particular agency, they have in common the factors of speed, high volume, and administrative reviewability. Agencies are prepared to extend themselves because they know that the risk of hamstringing the agency as a result of an incorrect answer to such questions is slight and that answering them often is of more benefit to the agency in reaching its goals—even though the answers usually are not accompanied by an agency disclaimer.

46. See *Kixmiller v. SEC*, 492 F.2d 641, 645 n.29 (D.C. Cir. 1974).

47. The agencies surveyed typically indicated that referral of questions to the general counsel is important for four reasons. First, it represents the exception rather than the rule—referral to the general counsel is available in some agencies only in response to new or novel questions of significant impact. Second, some agencies provide that the opinions of the general counsel are binding unless overruled by the commission. Third, at some agencies the opinions of the general counsel become part of the agency's interpretive rules. Last, in some agencies (e.g., the NLRB) only the general counsel is empowered to request a declaratory order from the board or commissioners. See, e.g., 10 C.F.R. § 501.140-143 (1983) (Department of Energy); 47 C.F.R. § 0.251 (1983) (Federal Communications Commission); 11 C.F.R. §§ 112.1 to .6 (1984) (Federal Election Commission).

The pivotal role of the general counsel, in light of the multilayered procedures at the SEC, was inferred in *Kixmiller v. SEC*, 492 F.2d 641, 645 n.29 (D.C. Cir. 1974) (quoting 17 C.F.R. § 202.1(d) (1984)), when the court of appeals summarized the agency's procedures:

"The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission In certain instances an informal statement of the views of the Commission may be obtained. The staff, upon request, or on its motion will generally present questions to the Commission which involve matters of substantial importance and where the issues are novel or highly complex, although the granting of a request for an informal statement by the Commission is entirely within its discretion."

Outside requests for Commission review—as opposed to general counsel-initiated requests—are made four to five times per year, but the Commission rarely reverses a position adopted by the general counsel.

tary, commission, or board.⁴⁸ An inquiry initially directed to a higher level also may be passed downward; the process easily accommodates routing inquiries past any particular level to the appropriate response level.⁴⁹

Although the agencies surveyed differed greatly in their missions, common characteristics existed for the most informal, level-one processes. First, the most informal type of request—a telephone call to the agency's nonlegal staff—originated from a person or from a person's representative, such as a lawyer or a business or union group. Inquiries from counsel were more likely to be made either initially or subsequently in writing. Whether in writing or not, requests for advice were welcomed by agencies, which viewed such inquiries as the best means of heading off or planning for future problems.

Furthermore, informal meant informal; telephone logs or written summaries of the discussions were not maintained. Agencies made no systematic attempt—although they did respond when asked—to read boilerplate disavowals concerning the reliability or finality of telephoned responses.⁵⁰ The general agency view was that callers were likely to have had dealings with the agency and to know that the information offered was for guidance, not attribution.⁵¹ The more formal the process of advice giving, however, the more likely was the determination to carry a disclaimer of finality or limitation

48. Opinions of the general counsel usually carry boilerplate stating the limited nature of the opinion and indicating that a formal request for review should be submitted to the commission if desired. For example, a typical FTC opinion pursuant to 16 C.F.R. § 1.1 (1984) concluded:

I hope that the information provided herein will enable you to more fully understand the Commission's *Tysons Corner* decision and the difficulty we have in answering your particular legal question without a full investigation. The opinions stated in this letter are not binding upon either the Commission or the staff with respect to this or any other inquiry. This matter has not been presented to the Commission for its consideration.

Sincerely,
Attorney
Bureau of Competition

Some agencies that typically use similar boilerplate suggested that the boilerplate itself might inadvertently encourage the appeals taken to the Commission—if a higher opinion is available, why not take it?

49. Review at the commissioner level generally will be available at the urging of the agency staff or directly at the request of a significant number of the commissioners. The importance of staff input follows from the fact that commission review is available only for lower level procedural or legal error. Thus, staff often will find themselves advising commissioners about whether the staff's position should be reviewed and possibly overridden.

50. The need for familiarity with an agency's practices was cited repeatedly. The picture painted at the FTC was remarkable more for its candor than its uniqueness. There, it was pointed out that analyses received from the agency by a person in the form of general correspondence (for example, a letter without formal caption of any sort) often will not contain a special warning against unqualified reliance on its advice. If a lawyer received it, he probably could be expected to know that he must exercise his own judgment to determine the reliance warranted and that the Commission's opinion would count more than the staff's. A nonlawyer, on the other hand, might not—probably would not—be so aware. Similarly, a large corporation would be expected to rely on its own counsel for an advisory opinion and to know that it would not necessarily be safe from an enforcement action. The small businessperson might not be in the same legal position, but in considering enforcement, the FTC would weigh the equities.

51. Although the agencies' responses differed, responses based on assumed public knowledge were uniform. At the SEC, for example, it was pointed out that the sophisticated counsel with whom the agency dealt knew they could phone the SEC for a "gut" reaction and that if they wanted to rely on Commission determinations they needed to get a no-action letter. When it was

of its reliability as to the facts, circumstances, and purposes for which it was given.⁵² In particular, level-three opinions invariably carried statements alerting the recipient that the determination was not binding on the agencies' heads.⁵³

All agency headquarters that were visited had public information rooms in which an agency's prior determinations were made available to the public. These public records generally consisted of copies of the incoming request for information and the agency's response, which typically was at the commission level.⁵⁴ In some instances the public file also contained the determination of the next-lower level (typically the general counsel); usually, however, the final document simply summarized the position of the level to which the matter was referred.

An informal dissemination process has developed in connection with the advice-giving processes studied. Organized members of the public likely to be affected significantly by the agency's determinations—such as lawyers, businesses, or union groups—regularly send couriers to the public information rooms to review the docket of recent determinations. Alternatively, if the agency could accommodate it, an organized group might ask that the weekly agency determinations be forwarded on a regular basis.⁵⁵ Finally, the agencies themselves make systematic use of the electronic and print media to issue press releases, background reports, and other summaries and explanations of their positions.⁵⁶ This dissemination of information supplements the more formalized system for publishing rules, interpretations, and guidelines within

clear that an inquirer did not know this procedure, the office would make the procedure clear (and, just maybe, suggest the caller get private counsel).

At the CPSC, when the staff issued a letter in response to a request for information, that letter was subject to internal reviews before it was mailed. The requester only received a piece of paper labeled "staff determination" and was expected to know that the letter was an informal opinion.

Callers to the FCC were expected to know that any telephone ruling is subject to change. They were supposed to know that they were protected only in the particular case and that no precedent had been set for future cases.

At the EPA, the RACT (Reasonably Available Control Technology) clearinghouse was understood to give only guidance. Compliance with RACT did not mean agency approval of pollution; rulemaking is required for approval.

52. *See supra* notes 47-48. Nevertheless, some agencies act without any general warning. The FAA does not issue § 554(e) declaratory orders, but will issue advisory opinions based on its inherent authority to interpret its legal powers and duties. It provides a resolution that in effect says, "This is how the agency construes this rule, but proceed at your own risk!"

53. *See supra* note 49.

54. The APA provides that "[e]ach agency . . . shall make available for public inspection and copying . . . those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register" and that a public index to the documents must be maintained unless "unnecessary and impracticable." 5 U.S.C. § 552(a)(2) (1982).

55. Often what was reported was a variation on this pattern; a trade, business, or public interest group representative would visit the agency's public records office to collect the week's issuances, reproduce, or summarize them and then circulate them to its members. In addition, the agencies rely on commercial publishing houses such as the Bureau of National Affairs, Commerce Clearinghouse, and Pike & Fisher to collect and disseminate their issuances. *See infra* note 56.

56. Supplemental efforts to disseminate information are illustrated by the Federal Aviation Administration, the Federal Election Commission, and the Consumer Product Safety Commission.

The FAA aims to reach the public as well as the airlines, pilots, and manufacturers it regu-

the agency and in the Federal Register.⁵⁷

To gain sufficient perspective to understand the substantive implications of this advice-giving scheme, the information dissemination process must be viewed in a broad context. Viewed in terms of the APA's broad conceptualization of rulemaking,⁵⁸ the process implicitly emphasizes two policies—nonadjudication and interpretative rulemaking⁵⁹—to aid flexibility, a primary agency goal. The effects of this emphasis, however, are so strong that they virtually preclude agency sensitivity to alternative agency processes and create strong agency biases against the use of section 554(e) declaratory orders.

B. Advice Giving as a Rejection of Adjudication

Several results follow from positing agency flexibility as a primary goal of agency advice giving. First, the agencies favor those procedures that allow them the most control of their agendas. Flexibility requires that agencies be able to impose control to the extent possible over even unplanned events, such as requests for interpretations of its statutory mandate or regulations. In particular, agencies seek control over the timing of their responses and the significance that the public is allowed to attach to those responses.⁶⁰ Ideally, they seek resolutions that resolve inquiries at the least cost—generally measured in

lates. It uses an 18-month proposed regulation agenda and issues press releases in connection with proposed rulemaking.

The FEC maintains an information office that is charged with keeping abreast of new developments, including commission decisions. The agency also issues a monthly newsletter and provides a toll-free telephone line for informal—even anonymous—inquiries.

The Consumer Product Safety Commission's Office of Compliance has determined that the best way to enforce consumer product standards is to ensure that industry is aware of them. Consequently, the agency regularly mails regulations to trade associations and relevant manufacturers. When complex regulations or small manufacturers are involved, these efforts often are supplemented with field seminars conducted by the compliance staffs.

See 1 K. DAVIS, *supra* note 6, § 5.01, at 289, for an analysis of the possible consequences which hinge on the form that policy announcements take.

57. See generally 5 U.S.C. § 552 (1982) (rulemaking procedure established for federal agencies by the APA).

58. See *supra* note 40 and accompanying text.

59. It follows from cases such as *Kixmiller v. SEC*, 492 F.2d 641 (D.C. Cir. 1974), and *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), that the exercise of agency discretion to limit the use of its informal procedures ordinarily will be upheld if the agency has acted responsibly (for example, by published regulation) in making internal management decisions affecting the establishment of agency priorities. The agency's position is enhanced to the extent that the agency limits its response to requests for advice in a manner that avoids resolution of a particular controversy. Moreover, the agency's assertion of a willingness to address later by rulemaking the problems of the inquirer (and those similarly situated) raises questions involving judicial interference with reasoned administrative decisionmaking that most courts prefer to avoid. See *supra* note 70.

Several interviewees, however, expressed the view that in operation, rulemaking actually was a type of declaratory process. An advisory opinion can grant an "exemption by interpretation." Although the agency's response might be couched in general language, the inquirer could read between the lines to infer that an agency was unlikely to go after him if he acts in accordance with the interpretation. Proponents of this view also contend that conflicts in interpretations may be handled best by amending or petitioning for exemption from a rule. Advisory opinions were characterized as less adversarial than § 554(e) ("that dusty matter on the shelf") and the exemption process as considerably faster.

60. See *supra* text accompanying notes 45-49, 52.

terms of time consumed by the agency in resolving the matter—and at the lowest practicable level of authority. Cost savings translate into resources available for other matters, and lower-level resolutions promote flexibility by preserving the option of altering the decision at higher levels if events warrant. Moreover, given the multilevel, advice-giving structure, lower-level determinations necessarily mean that no fundamental reassessments of an agency's working assumptions about its statutory and regulatory views are needed.⁶¹ To this extent agencies are engaged in efforts to sift through and resolve inquiries in a manner that shifts the burden of noncompliance to the questioner as early as possible, while simultaneously placing the burden of seeking higher-level review on the inquirer.

Agency flexibility also is promoted in a more indirect, though critical, manner. Agencies actually increase the costs of disregarding their advice by rendering nonfinal determinations. Buttressed by the doctrine of exhaustion of administrative remedies,⁶² an agency's position is strengthened both by the threat of sanctions if the questioner were to proceed despite an adverse lower-level determination, and the questioner's own recognition that to proceed in the face of an adverse ruling subjects him to later charges of willful wrongdoing.

It also is significant that even when an agency responds at its highest level, by a commission ruling, for example, the value of the response to the questioner can be uncertain. If the commission agrees with the questioner's position, he is largely freed of concern. The consensus view among those surveyed was that conduct in accord with written determinations from the highest levels of the agency virtually assured protection from agency sanctions.⁶³ Even lower-level interpretations afforded protection against charges of willfulness;⁶⁴ at worst, an agency might change its position prospectively.⁶⁵

61. See *supra* text accompanying notes 46-49.

62. Simply stated, the exhaustion doctrine focuses on the completion of administrative action. In application, however, only the extremities of the doctrine are focused. Courts are unlikely to raise the doctrine to bar relief when to do so will impose irreparable injury at the hands of an agency that palpably is without jurisdiction, but when agency expertise is required to weigh the requested relief, courts are likely to insist upon it. 3 K. DAVIS, *supra* note 6, § 20.02. Professor Davis has observed: "In between these extremes is a vast array of problems on which judicial action is variable and difficult or impossible to predict." *Id.* at 57.

63. The safeguard of a written opinion is based on equitable and practical considerations. For a discussion of the growing application of the doctrine of estoppel, see M. ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* 37 (1973); 2 K. DAVIS, *supra* note 6, § 17.01, at 491. With respect to the practical concerns, however, no opinion carries more weight than the one endorsed at several agencies—according to an agency attorney, "It would look bad in court for the staff to act when it had said it wouldn't."

Thus, when a maker of disposable diapers secured one standard for flammable textiles from the FDA chairman and an insurance claims adjuster was given a conflicting standard from the agency's compliance director, the agency recognized both determinations. In contrast, litigation ensued when a manufacturer claimed that the federal government had ordered it to use the flame retardant Tris in the manufacture of children's sleepware to comply with the Flammable Fabrics Act, 15 U.S.C. § 1191 (1982), and the Consumer Product Safety Commission later banned Tris under the Hazardous Substances Act, 49 U.S.C. § 1761 (1976). See *Spring Mills, Inc. v. Consumer Product Safety Commission*, 434 F. Supp. 416, 418-19 (D.S.C. 1977).

64. Positions taken after deliberation by an agency to some degree define an area of agreed ambiguity. The hypothetical result described at the Federal Elections Commission is illustrative.

In most of the agencies surveyed, however, the immediate option of judicial review of an adverse agency interpretation, for conformity with the agency's organic statute and the Constitution, was not clearly available to a questioner. Because the advice-giving function was viewed as rulemaking, which is deemed to concern matters of future effect that implement, interpret, or prescribe the agency's laws or policies, it was not viewed by the agencies surveyed as encompassing determinations having specific effects on individualized matters. That latter class of determinations was viewed as within an agency's adjudicatory, rather than rulemaking, function. Thus, specific determinations required agency initiation of the sanctioning process to avoid consideration of merely abstract, philosophical, or hypothetical concerns.

Underlying this process was the surveyed agencies' general desire to avoid advice giving from an adjudicatory posture.⁶⁶ Agencies normally identify flexibility as a primary goal because they view advice giving in connection with an adjudication as introducing complicating, if not totally incompatible, concerns into efforts to secure a party's conformity to a given standard. These concerns arise because agencies view the parties' positions as fixed at that stage—the adjudication presupposes that the advice-giving processes of an agency already have failed. As a result, once the sanctioning process has been invoked, what might have been handled by a telephone call or a letter (including an appeal to the agency's highest level) prior to the disputed conduct, must be resolved through the enforcement and judicial-review processes.

As a practical matter, therefore, the formal process of adjudicating an agency order is viewed in sharp contrast to its advice-giving counterpart for rules interpretation. Adjudication, by its uncompromising insistence that issues be framed for bipolar determinations of rights and duties, serves as an inducement for persons to avail themselves of the less formal alternative when the agency has structured itself for flexible responses that preserve its manpower, agenda control, and interpretative options. Thus, the advice-giving scheme that can be generalized from the agencies surveyed is, in a word, "calculated." It envisions that advice is to be provided to the public, but only under the circumstances and to the degree that the agency itself believes appropriate. To the extent that a response costs the agency little in human resources, time, or ability to maintain its options in carrying out its duties, procedures for advice giving are made easily available. Furthermore, the ad-

If the Commissioners cannot agree by majority vote on an advisory opinion pursuant to 11 C.F.R. § 112.4 (1984), they are relieved of the duty to respond to a request within 60 days. If the requester then undertakes his activity without an opinion, he risks an agency enforcement action; he would not be guilty, however, of a "knowing and willful" infraction. Conversely, if an advisory opinion concluded that a described undertaking was *not* legal, the requester might be found to have committed a "knowing and willful" infraction. The FEC then might refer the case to the Department of Justice for criminal prosecution. See *supra* text accompanying note 14.

65. There is no guarantee that a change in the position of a commission (e.g., as a result of reconsideration of the question or the effects of the appointment process) will not result in a new agency interpretation. Such prospective changes of position should not be viewed as troublesome, however, as long as they are not arbitrary or capricious. Even in the case of an agency order, administrative law long has tolerated agency flip-flops. See 1 K. DAVIS, *supra* note 6, § 5.09.

66. See *supra* text accompanying notes 37-39.

vice received will be at an authoritative level, commensurate with the questioner's willingness to persevere; the advice will serve the basic needs of most inquirers about most concerns, most of the time.

This limited interpretative process works effectively. Its success is due in no small part to the fact that most requests for agency advice are generated by persons who are engaged in long-term relationships with the agencies of whom they inquire.⁶⁷ Confrontation and discord simply are not in the interest of either the agencies or their constituencies. Interviewees reported that it was rare that an inquirer sought to manipulate the agency in contemplation of later litigation. Ongoing relationships make it easier to avoid confrontations, especially when alternative means of business planning and agency procedures exist that might prove fruitful, such as waiver or legislative consideration. Furthermore, the alternatives are available without exposing the inquirer to an agency's sanctioning process.

As a result, most requests for advice can be viewed as confirmation-seeking; the inquirer already has a general idea of the agency's likely response but seeks to have it confirmed. Formal agency advice is sought primarily as a means of documenting the fact that the agency has agreed with a particular position. Thus, the value of even the most formalized agency rulings is not that the agency will be bound as a matter of law, but rather to evidence efforts at good faith compliance and to ensure that particular questions at least have received the appropriate level of agency consideration. All sides, however, understand that if the advice-giving process were to be foregone or fail, the agency's resort to coercive measures under its enforcement procedures is likely to be uncompromising, attempting to enforce the agency's interpretation and thus completely ruling out any attempt to clarify the law.

C. The Advice-Giving Model Critiqued

The generic agency advice-giving model described in this Article is some distance from a procedure designed to produce a judicially reviewable agency order; it actually is biased against the granting of such orders. Instead, it emphasizes concerns that are indicia of rulemaking while resisting concerns that are the hallmarks of the declaratory device. First, as rulemaking, the advice that is rendered does not focus on the specific facts of the questioner's situation, but responds in terms of the facts and law generally applicable to such circumstances. The facts are viewed as matters subject to change; thus, they do not provide reliable bases to determine legal obligations. It is implicit in this approach that in some future, more rigorous proceeding, at some future unspecified time, the full facts will be ascertained and a decision will be rendered based on those facts. Second, agencies prefer interpretative rulemaking determinations issued below the commissioner level. This preference requires that the inquirer fully exhaust the opportunities afforded by the agency to have the opinion reviewed. Last, and most important, the advice rendered as

67. See *supra* note 51 and accompanying text.

rulemaking may not be held out as substantively determinative of the inquirer's legal obligations; rather, it is likely to reflect the agency's probable position if a dispute based on such facts should arise. Accordingly, even when the agency has responded at the commissioner level, no guarantee exists that the agency will view its response as anything more than an interpretative rule that is not ripe for judicial review.

The emphasis of the rulemaking model of advice giving is at odds with the concerns that declaratory devices were intended to address. Chief among those concerns was the need for a procedure that would allow a disputant, such as a labor union, to secure a definitive agency explanation of the law applicable to its proposed conduct. As a declaratory device, such an explanation would have three minimum required elements: that the union not be required to risk an agency sanction before the agency could focus on its situation as a concrete dispute, that any determination be a final agency determination that the union would be entitled to have reviewed immediately by a court of law, and that the union possess some basis for insisting either that its inquiry be answered or that the agency provide a good explanation of why an answer would be inappropriate. Absent such a declaratory device, therefore, the advice-giving procedures generally available to terminate a dispute or to remove uncertainty are two—receiving nonreviewable advice prior to engaging in the disputed conduct, or being willing to act under the threat of agency sanctions so that the agency's view of the law might be tested in court on review. Thus, an individual can come before the agency as a supplicant or as a sinner.

II. ORDER ISSUING IN FEDERAL AGENCIES

A. *Declarations Removing Uncertainty*

To the options of supplicant or sinner, the section 554(e) declaratory order procedure adds what might be called the samaritan's option. This option emphasizes the interest of society in aiding the distressed. In place of an interpretation that is nonreviewable because it is not concretely applicable to the inquirer, section 554(e) offers an agency explanation that binds all parties, including the agency. Furthermore, the legality of the provided explanation is reviewable immediately by a court and is available either before the inquirer has engaged in the potentially sanction-invoking conduct or as a means of bringing such a sanctioning proceeding to an immediate end.

Understanding the relation between the agency advice-giving model and section 554(e) declaratory orders requires analogy to the Declaratory Judgment Act. That Act overcame congressional concerns about the inappropriateness of courts providing explanations rather than remedies.⁶⁸ Under the Act, explanation was selected as the remedy that best served the interests of both the disputants and the general public; as with declaratory judgments, the

68. See *supra* text accompanying notes 9-15. For the text of the Act and a history of its passage, see *supra* note 11.

procedure is adjudicatory.⁶⁹ Even though section 554(e) orders are available only in an agency's "sound discretion"⁷⁰ and only in the limited number of

69. See *supra* note 11.

70. See *supra* note 26 (full text of § 554(e)). The difficulty hidden beneath these seemingly direct four words ("in its sound discretion") is that of determining whether they were intended to make an agency's refusal to issue a declaratory order reviewable. This question is not clarified and indeed is obfuscated by the legislative history. The following congressional testimony provides an example:

The last incident of adjudication is the matter of declaratory orders. There seems to be general agreement that the agencies ought to have no authority to issue declaratory orders. But there has been one field of difference in connection with declaratory orders, and that is whether or not they should be mandatory or discretionary. However, declaratory orders will necessarily be given or withheld in the sound discretion of administrative agencies. They may be improvidently granted. They may be improvidently refused. The whole question is simply what form of language would best express the authority that ought to be conferred.

Administrative Procedure: Hearings Before the House Comm. on the Judiciary, 79th Cong., 1st Sess. 33 (1945) (statement of Carl McFarland, Chairman, ABA Committee on Administrative Law).

Some of the proposals for declaratory devices that appeared in the bills that were the APA's antecedents also were unclear. If the bills addressed the issue at all, they generally were in agreement that agencies could refuse to issue declaratory orders when the circumstances were inappropriate. See H.R. 184, 79th Cong., 1st Sess. § 401 (1945); S. 2030, 78th Cong., 2d Sess. § 5(D) (1944). But cf. H.R. 2602, 79th Cong., 1st Sess. § 6(c) (1945) (right to petition). On the question of the scope of review of an agency determination not to issue an order, however, the bills conflicted. H.R. 184, 79th Cong., 1st Sess. § 404 (1945), stated without qualification that "[r]efusal of a request that a declaratory ruling be made shall not be subject to review in any manner." H.R. 339, 79th Cong., 1st Sess. § 4(c) (1945) provided that declaratory orders would be subject "to the same review as in the case of other orders of the agency." H.R. 1206, 74th Cong., 1st Sess. § 112 (1945), identified in detail the scope of review and required courts to review all questions upon the whole record or such parts thereof as cited by any of the parties. It also required the court to set aside administrative orders whenever it found constitutional, statutory, or procedural error, or that the agency's position was not supported by substantial evidence or was arbitrary or capricious. H.R. 2602, 79th Cong., 1st Sess. § 6(c) (1945), merely called for review "as in the case of other . . . orders of the agency."

The Attorney General's statements regarding reviewability provide that "[w]here declaratory orders are found inappropriate to the subject matter, no agency is required to issue them." (Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945). Elsewhere it was explained that "[b]y 'sound discretion,' it is meant that agencies shall issue declaratory orders only under such circumstances that both the public interest and the interest of the party are protected. . . . More broadly, it appears that '[t]he administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in courts.'" ATTORNEY GENERAL'S APA MANUAL, *supra* note 29, at 59-60.

The legislative history makes only one point clear: Any attempt to resolve the scope of review question solely on the basis of the legislative record is doomed to become caught in the mire of contradictory statements, analytical omissions, and the conflicting intentions of the various proponents. Given this murky legislative history, the need is clear for a common-sense assessment of the proper role of a court asked to review a so-called discretionary agency determination. This effort is aided by analogizing the role of the reviewing judge to that of a judge reviewing any other agency order and a lower court's refusal to issue a declaratory judgment. The appropriate considerations, therefore, go to the factors of relative expertise between the agency and a court, the intent of Congress in vesting the decision making authority in the agency, and the likely impact of judicial interference. On these grounds, review of an agency decision declining to act ought to be governed by the kind of considerations voiced in *Exxon Corp. v. FTC*, 588 F.2d 895 (3d Cir., 1978), *aff'd after remand*, 665 F.2d 1274 (D.C. Cir. 1981). In *Exxon*, the United States Court of Appeals for the Third Circuit stated that when the district court declined to exercise its jurisdiction with respect to a requested declaratory judgment, it should not be reversed merely because the reviewing court would have decided differently. The decision to decline jurisdiction, however, was held to require closer scrutiny than that normally given on a review for abuse of discretion. *Id.* at 900. Accordingly, absent some misapplication of the law, the reviewing court should be permitted to disturb an agency decision only when that decision is arbitrary, capricious, or an abuse of discretion. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971); *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984). The reviewing

adjudications to which formal adjudicatory procedures apply,⁷¹ that limited set consists of those disputes required by statutes and the Constitution to have the highest level of process.⁷² Moreover, by virtue of judicial gloss, section 554(e)'s availability as a means to terminate controversy and resolve uncertainty has necessitated that it be available in situations that technically do not constitute adjudications,⁷³ and in circumstances not solely of the agency's choosing.⁷⁴

The Supreme Court has decided only three cases that have dealt substantively and in detail with section 554(e).⁷⁵ These cases have given added dimension to the sparse statutory formulation. The declaratory order emerges from these cases as an ill-defined, ill-appreciated procedure to control bureaucratic excess and defy the dilatory.

In the earliest case, *Frozen Food Express Co. v. United States*,⁷⁶ the Supreme Court reversed a district court's refusal to hold that an examiner's quasi-legislative report of "findings" and "conclusions" was a reviewable, declaratory order under section 554(e). The Court held that the Interstate Commerce Commission's determination constituted an order imposing higher

court still is at all times empowered to require that an agency clearly state the basis for its decision. See generally 1 K. DAVIS, *supra* note 6, § 4.10, at 277-78 (reviewability of agency declaratory orders). Moreover, because as a general rule the existence of discretion requires that it actually be exercised, when discretion is not exercised at all (e.g., when decisions instead are based on categorical rules limiting the options the decisionmaker will consider), the determination should be held to be impermissible. See *Dorszynski v. United States*, 418 U.S. 424, 443 (1974); *Yates v. United States*, 356 U.S. 363, 366-67 (1958); *United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983); *United States v. Daniels*, 446 F.2d 967, 972 (6th Cir. 1971); *United States v. Williams*, 407 F.2d 940, 945 (4th Cir. 1969).

71. "This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined 'on the record after opportunity for an agency hearing.'" ATTORNEY GENERAL'S APA MANUAL, *supra* note 29, at 59 (quoting APA § 554(d)).

72. In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-50 (1950), a case involving a challenge to deportation hearing procedures, the Supreme Court interpreted 5 U.S.C. § 554 as applicable both to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," and to hearings of more than statutory authority—"to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity."

73. See *infra* text accompanying notes 83-86; see also *supra* note 17 (definition of "adjudication").

74. See *infra* text accompanying notes 105-08; *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699-700, 702 (D.C. Cir. 1971).

75. The three cases are *Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); and *Frozen Food Express Co. v. United States*, 351 U.S. 40 (1955). *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), is a more recent case in which the Court discusses the declaratory order. In *Pacifica*, the Court reversed the decision of a three-judge panel of the court of appeals that forbade the FCC from using a declaratory order to impose an informal sanction on the broadcaster, *Pacifica*. The declaratory order discussion, however, was largely tangential to the case's primary concerns with § 326 of the Communications Act of 1934 (codified at 47 U.S.C. § 326 (1982)) and the first amendment as applied to broadcasters. *Pacifica* had argued that its right to air a profanity-ridden monologue, titled "Filthy Words," could not be prohibited by what amounted to improper rulemaking by the FCC. The Court responded in support of the FCC: "Its action was an adjudication under 5 U.S.C. § 554(e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations." *Pacifica*, 438 U.S. at 734.

76. 351 U.S. 40 (1955).

tariffs on Frozen Food Express' products by narrowly defining a certificate of convenience exemption for "agricultural products" under the Interstate Commerce Act.⁷⁷ Thus, the district court had erred in reasoning that the report was self-executing because it imposed no duty on plaintiff to act.⁷⁸ To the contrary, the Court concluded that the report clearly expressed the Commission's views regarding which products were entitled to the exemption.⁷⁹

The Court's analysis focused on the practical implications of the Commission's pronouncement. In light of section 554(e), the order was "in substance a 'declaratory' one . . . which touches vital interests of carriers and shippers alike."⁸⁰ It is notable, however, that the Court was willing to designate the Commission's conclusions as a declaratory *order*, even though the hearing from which the conclusions emanated was legislative rather than adjudicatory.⁸¹ The Court left unassessed the effect of section 554(a)'s prefatory language limiting declaratory orders to cases "of adjudication required by statute to be determined on the record."⁸² It must be determined, therefore, whether the Court intended to make section 554(e) declaratory relief available even when an agency was not engaged in an "on the record" adjudicatory hearing. Reading section 554(a) to limit section 554(e) strictly to "adjudications required by statute to be determined on the record" has the virtue of literalness. On the other hand, freeing section 554(e) from the prerequisite of a formal adjudication would allow for the vital predispute determination that characterizes a declaratory judgment. Thus, the basis of the Court's opinion in *Frozen Food Express* is unclear. In particular, the extent to which the Court was willing to equate a legislative hearing with a formal, "on the record" adjudicatory hearing is a matter of conjecture.

Whether by calculation or inadvertence, however, the Court's result advanced the policies of the declaratory order provision and can be read consistently with section 554(e)'s legislative history. The Court recognized the kind of double-edged declaratory order long envisioned by proponents of the device by acknowledging section 554(e)'s application to disputes involving legislative-type hearings. In addition to the declaratory order for which section 554(a)'s preface generally mandates a formal adjudicatory proceeding,⁸³ the Court approved a second type of order, one capable of issuance prior to the time any adjudication has commenced. This result is clear; the only unresolved issue is the explanation for the Court's position.⁸⁴ Thus, considera-

77. *Frozen Food Express*, 351 U.S. at 43-44.

78. *Frozen Food Express*, 351 U.S. at 43-44. The district court relied on *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299 (1927).

79. *Frozen Food Express*, 351 U.S. at 44-45.

80. *Id.* at 44 (quoting 5 U.S.C. § 1004(d) (1984)).

81. The *Frozen Food Express* hearing was "a public hearing at which various governmental officials and agencies and various producers, shippers, and carriers appeared and presented evidence." *Id.* at 41-42.

82. 5 U.S.C. § 554(a) (1982).

83. *Id.*; see also ATTORNEY GENERAL'S APA MANUAL, *supra* note 29.

84. Different theories have been advanced to explain the Court's departure from § 554(a)'s seemingly absolute language that restricts § 554 to proceedings in which the agency is involved in formal adjudications. Professor Michael Asimow has concluded that the Court acted pragmati-

tion of the declaratory order must focus on whether a plausible rationale supports the Court's apparently intuitive conclusion.

The starting point for understanding the "second edge" of the declaratory order is the phrase that was added in 1966 to the introductory proviso of section 554(a): "according to the provisions thereof."⁸⁵ Some basis exists to conclude that the Supreme Court already had interpolated the phrase by 1954, thus anticipating the so-called clarifying amendments. Because the amendatory phrase is in apposition, it modifies the major clause calling for an "on the record" hearing. The phrase directs agencies to the specific provisions of section 554(e).⁸⁶ Therefore, section 554(a), as modified, applies to formal adjudications under the Act, but only in accord with the specific terms of each subsection.

Two indirect considerations support the conclusion that such a double-edged view of the declaratory order lies behind the Court's conclusory holding in *Frozen Food Express*. First, if the introductory clause is not meant to modify section 554(a)'s general requirements for formality, the quoted clause is superfluous; nothing is added by requiring consideration "according to the provisions thereof," unless consideration is being urged of the provisions provided throughout section 554. This construction also would be consistent with the purposes of identical qualifying language used throughout the Act.⁸⁷

Second, resort to the plain meaning of the language⁸⁸ of section 554(e) reveals that the declaratory order should be available either to terminate con-

cally in *Frozen Food Express*, "dubbing administrative action as a declaratory order in order to establish its ripeness for review" and avoid the nonreviewability of an interpretive rule. M. ASIMOW, *supra* note 63, at 115. Roger Kapp and Robert Hart, on the other hand, suggest that the term "hearing" envisions either of two types of hearings—those for adjudications or those for rulemaking. Such hearings are required to be held "on the record" under § 554(a). Kapp & Hart, *A Case Against Administrative Restraint: Declaratory Status Orders Under the Investment Company Act of 1940*, 61 CORNELL L. REV. 231, 248 (1976). All three authors would require that the agency conduct a hearing as a prerequisite for the issuance of an order. All that the Court has required, however, is that the person be *entitled* to such a hearing. The requirement, therefore, is jurisdictional, not procedural. Procedurally, if the agency wishes to risk judicial reversal because of the inadequacy of the record it may do so—as is always the case, the agency bears responsibility for that record. From the person's point of view, a speedy court review holds brighter prospects than a protracted agency hearing.

85. Pub. L. No. 89-554, § 554(a), 80 Stat. 384 (1966) (amending 5 U.S.C. § 1004 (1946)).

86. It might be argued that because *Frozen Food Express* predated the 1966 incorporation of the "according to the provisions thereof" language, that language lacks relevance to the Court's holding in that case. This argument fails for two reasons. First, the so-called stylistic changes of 1966 merely had the effect of confirming the position already adopted by the Court in *Frozen Food Express*. Second, the pre-1966 legislative history supports the view that inclusion of the qualifying phrase, "according to the provisions thereof," was necessary to clarify what otherwise would have remained an ambiguously granted authority for agencies to act to "remove uncertainty" only when a formal adjudication was ongoing. The Court correctly recognized that such a reading was inconsistent with the legislative history calling for a declaratory order which is available prior to the time that a person has committed an act that could subject him to the coercive powers of the state; *see infra* note 157.

87. *See, e.g.*, 5 U.S.C. §§ 553(a), 555(a), 556(a), 557(a), 558(a), 701(a) (1982).

88. In the early case of *Market Co. v. Hoffman* the Court held that "[i]t is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. . . . 'a statute ought, upon the whole, to be constructed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) (quoting Bacon's Abridgment, § 2).

troversies or to resolve uncertainty. This interpretation raises the question whether Congress' identification of dual objectives for the declaratory order implicitly created the necessity for dual procedural rules such as those adopted by the Court. The legislative history and policy behind section 554(e), as well as the convergence of the statutory language with this judicial result, support the Court's reading.

It must be recognized, however, that the policies, terminology, and procedures that gave birth to the APA suggest that its genealogical line was at least of mixed pedigree. Five bills were considered by Congress as it moved towards passage of the APA.⁸⁹ Three of those bills adopted the premise that what was to be created was a *declaratory ruling*,⁹⁰ while the remaining two envisioned the creation of *declaratory orders*.⁹¹ Furthermore, four of the bills specifically contemplated that their proposed ruling or order was to be an adjudicatory procedure and placed it under that section heading.⁹² One of the earliest of these basic bills,⁹³ however, sponsored by Representative Celler, did not include its "declaratory ruling" as part of the bill's "Administrative Adjudication" provision. Significantly, this bill provided a separate title for its proposed *rulings* and specifically limited the bill's provisions relating to formal adjudications to those sections governed by a separate title.⁹⁴ Creation of the separate provision was in marked contrast to the other two declaratory order bills⁹⁵ and the two declaratory ruling bills.⁹⁶

Representative Celler's bill, like its principal rival, the McCarran-Sum-

89. Technically, seven bills were under discussion by the Committee on the Judiciary of the House of Representatives during the first session of the 1945 Congress. Two of the bills, however, were identical and two others were similar. In addition to Chairman Hatton Sumner's H.R. 1203, 79th Cong., 1st Sess. (1945), which was enacted as revised, the six additional bills were: H.R. 184, 79th Cong., 1st Sess. (1945), sponsored by Representative Emanuel Celler; H.R. 4782, 77th Cong., 1st Sess. (1941); H.R. 339 and 117, 79th Cong., 1st Sess. (1945), identical bills sponsored by Representatives Howard W. Smith and Fadjo Cravens; H.R. 1206, 79th Cong., 1st Sess. (1945), sponsored by Representative Francis E. Walter; and H.R. 2602, 79th Cong., 1st Sess. (1945), sponsored by Representative John Gwynne. See *Hearings on Federal Administrative Procedure Before the House Comm. on the Judiciary*, 79th Cong., 1st Sess., 6, 20 (1945) (statement of C.A. Miller, Chairman, American Bar Association Comm. on Administrative Law for the District of Columbia); H.R. REP. NO. 1980, 79th Cong., 2d Sess. 16 (1946).

90. H.R. 184, 79th Cong., 1st Sess. § 401 (1945); H.R. 1206, 79th Cong., 1st Sess. § 304 (1945); H.R. 2602, 79th Cong., 1st Sess. § 7(c) (1945).

91. H.R. 339 and H.R. 117, 79th Cong., 1st Sess. § 4(c) (1945); H.R. 1203, 79th Cong., 1st Sess. § 5(d) (1945).

92. H.R. 339 and H.R. 117, 79th Cong., 1st Sess. § 4 (1945) (identical bills); H.R. 1203, 79th Cong., 1st Sess. § 5 (1945); H.R. 1206, 79th Cong., 1st Sess. § 304 (1945); H.R. 2602, 79th Cong., 1st Sess. § 7 (1945).

93. H.R. 184, 79th Cong., 1st Sess. (1945). This bill was introduced to carry out the majority recommendations of the Attorney General's Committee on Administrative Procedure, established February 24, 1939. See *supra* note 24.

94. H.R. 184, 79th Cong., 1st Sess. § 301 (1945). The "Application of Title" provision provided that, "[t]he provisions of Section 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing . . ." *Id.*

95. H.R. 339 and H.R. 117, 79th Cong., 1st Sess. § 4(c) (1945) (identical bills); H.R. 1203, 79th Cong., 1st Sess. § 5(d) (1945).

96. H.R. 1206, 79th Cong., 1st Sess. § 304 (1945); H.R. 2602, 79th Cong., 1st Sess. § 7(c) (1945).

ners bill,⁹⁷ also differed from the other proposals in not limiting declaratory relief to instances in which a party in interest petitioned the agency.⁹⁸ Under the Celler and McCarran-Sumners bills the declaratory ruling or declaratory order was available simply "to terminate a controversy or remove uncertainty."⁹⁹ The provision was an attempt by Celler to establish a new and flexible administrative device in the form of a declaratory ruling—something independent of adjudicatory procedures, but indebted to both interpretive rulemaking and adjudication. Without the limiting petition requirement, the agency could act upon a request or on its own initiative. The agency could "terminate a controversy" and thereby end an adjudication or, in response to uncertainties that the agency anticipated might lead to an adjudication, could issue a declaratory ruling to remove the uncertainty. In either instance, the agency's *ruling* was to have "the same force and effect . . . as a final order or other determination."¹⁰⁰

Representative Celler's declaratory ruling device contrasted with the declaratory order provision proposed in the McCarran-Sumners bill, the bill that eventually formed the basis for the enacted version of section 554(e).¹⁰¹ Under the McCarran-Sumners bill's adjudicatory procedure, agencies were authorized to issue declaratory orders to terminate a controversy or remove uncertainty only in formal adjudications. By omitting the explanatory phrase, "according to the provisions thereof," the full impact of the bill's introductory language limited availability of the declaratory order solely to instances in which the agency *already* had invoked its adjudicatory powers. In such instances, McCarran-Sumners allowed an agency to end an adjudication under its powers to "terminate a controversy." Because the bill required that an agency commence an adjudication before terminating it, however, no binding remedy remained for an agency wishing to "remove uncertainty" without adjudication. This, of course, would have precluded one of the traditional uses of the declaratory order. Moreover, when an adjudication is viewed as a prerequisite for issuance of a declaratory order, the authority to "remove uncertainty" can be understood only as providing a redundant authorization to clarify a case by terminating it or a limited agency authority to resolve secondary issues arising from, but not dispositive of, the adjudication.¹⁰²

97. The route by which § 554(e) emerged was circuitous. The original S. 7, 79th Cong., 1st Sess. (1945), was introduced in the House of Representatives as H.R. 1203 by Chairman Sumners of the Judiciary Committee. Chairman Sumners also introduced H.R. 4941, which was the revised S. 7 as reported by the Senate Judiciary Committee (and subsequently passed by the Senate). Certain corrections and clarifications later were written into the text of the bill and it was reintroduced as H.R. 5988 by Chairman Francis E. Walter of the subcommittee. The text of H.R. 5988 then was substituted, as a committee amendment, for S. 7 as passed by the Senate. H.R. REP. NO. 1980, 79th Cong., 2nd Sess. 16 (1946).

98. The absence of a petition requirement makes the declaratory device more flexible because it becomes available *sua sponte* and in circumstances in which no parties exist who can initiate it because there is, as yet, no adjudication.

99. H.R. 184, 79th Cong., 1st Sess. § 401 (1945); H.R. 1203, 79th Cong., 1st Sess. § 5(d) (1945).

100. H.R. 184, 79th Cong., 1st Sess. § 402 (1945).

101. See *supra* note 97.

102. See *supra* note 86.

Four reasons suggest that the results which would follow from a literal application of the unqualified provisions of the McCarran-Sumners bill were not intended under section 554(e). First, a literal application would assign an irrational intent to Congress. Second, it is unlikely that Congress merely intended to make otherwise nonreviewable interlocutory orders reviewable. Nothing in the legislative history of the APA or section 554(e) reveals support for, or discussion of, such a limited intent. Third, given either interpretation, the result would be less useful than Representative Celler's preadjudication, declaratory-ruling construction.¹⁰³ Last, making declaratory orders available only when an agency already has assumed its adjudicatory posture abandons a fundamental historical objective of the declaratory device—preadjudication determinations.

By analogy to the Declaratory Judgment Act, what was sought in the administrative law's quasi-judicial context was a procedure through which the public could secure preenforcement agency advice that was final, binding, and judicially reviewable.¹⁰⁴ The declaratory ruling approach in Representative Celler's bill achieved this objective by allowing for a ruling that was independent of the traditional adjudicatory order. The McCarran-Sumners bill, on the other hand, failed to provide for preenforcement binding advice and, therefore, would have restricted declaratory orders to matters that already were in adjudication. Thus, for a true declaratory order—a device administratively analogous to the declaratory judgment—to emerge, a construction must be adopted for the final bill that gives effect to the common purpose of the Celler and McCarran-Sumners proposals.

The Court's choice in *Frozen Food Express*, therefore, was between the strong (preadjudication and formal adjudication) and weak (formal adjudication only) interpretations of the declaratory order provision. Most important was whether explanatory language such as the language in section 554(a)'s introductory clause would be interpolated or omitted, as in the McCarran-Sumners bill.¹⁰⁵ The Court chose to interpolate the phrase "according to the provisions thereof," a solution that had the virtues of simplicity, utility, and historical consistency. Reading the "according to the provisions thereof" limitation into section 554(a)'s introductory provision avoids the contradiction that otherwise would result from incorporating a provision for a declaratory ruling (to "resolve uncertainty") into a section concerning adjudications in which only orders are appropriate.¹⁰⁶ Such a construction of section 554 would enable each section to qualify the general provision of section 554(a) to give effect to its provisions.

103. See *supra* text accompanying notes 97-100.

104. See *supra* text accompanying notes 1-12, 16-23.

105. Congressman Celler's approach anticipated to some extent the problem that has led some to suggest that the APA be amended by removing § 554(e) from § 554. This amendment would ensure that such orders would be available generally—even when the agency has no authority to adjudicate on the record. See *supra* note 34 (suggested amendments). Celler, however, refused to tie the device to the rulemaking or adjudicatory procedures.

106. See *supra* note 94 and accompanying text.

Accordingly, the Court's affirmance of the strong declaratory order was a recognition that the congressional objectives of section 554(e), as the administrative counterpart of the judicial declaratory judgment, were satisfied by a strong view of the provision. The view that section 554(e) provided a strong declaratory order was the only interpretation that allows persons to secure judicially reviewable advice from agencies without first exposing themselves to agency sanctions. In effect, the Court concluded that the existence of Interstate Commerce Commission authority to determine by formal adjudication the appropriateness of Frozen Food Express' exemption also implied derivative agency authority to act to remove uncertainty prior to such an adjudication.

The Supreme Court's second declaratory order opinion, *Red Lion Broadcasting Co. v. FCC*,¹⁰⁷ was consistent with this distinction between the strong and weak uses of the declaratory order. In *Red Lion* the Court affirmed the United States Court of Appeals for the District of Columbia Circuit's authorization of Red Lion's suit for injunctive and declaratory relief. The court of appeals had concluded that a series of letters setting forth the Federal Communication Commission's (FCC) view of Red Lion's legal obligation qualified as a declaratory order. Although a panel of the court of appeals initially had ruled that Red Lion's request for review of the FCC's *declaratory ruling* was not ripe for consideration because it did not constitute an exercise of the Commission's power to issue orders,¹⁰⁸ that position was reversed after an en banc hearing. On remand the original panel handed down a decision in favor of the FCC¹⁰⁹ that regrettably was silent on the ripeness issue.

Red Lion arose out of the FCC's longstanding "fairness doctrine," which requires that broadcasters present public issues and that each side of those issues be covered.¹¹⁰ When Reverend Billy James Hargis called writer Fred J. Cook a Communist during a broadcast over Red Lion-owned WGSB, Cook demanded reply time. A dispute ensued over whether Red Lion was obligated merely to make time available or, as Cook maintained, to make free time available. Cook's complaint ultimately resulted in a series of letters to Red Lion from the FCC's secretary "by direction of the Commission."¹¹¹ The letters, which were circulated publicly, culminated in a formal *order*¹¹² by the

107. 395 U.S. 367 (1969).

108. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969); *Red Lion*, 395 U.S. at 372 n.3.

109. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908, 910 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

110. *Red Lion*, 395 U.S. at 369-71.

111. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908, 911-17 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

112. The Supreme Court (*Red Lion*, 395 U.S. at 372 n.3) and court of appeals (*Red Lion*, 381 F.2d at 917) designated the FCC's determination an "order" even though the agency's regulations (47 C.F.R. § 1.2 (1963)) provided for "declaratory rulings." The "ruling" designation, however, is longstanding with the FCC. A previous regulation, 47 C.F.R. § 1.728 (1957), used the same designation, although it listed the procedure in subpart F—General Rules of Practice and Procedure—under the subheading "Petitions and Other Requests for Commission Action." The following year the FCC moved the declaratory ruling procedure to its present location in subpart A—General Rules of Practice and Procedure—and added the phrase "in accordance with section 5(d)

Commission pursuant to its declaratory ruling regulations.¹¹³ In essence, the letters and ruling summarized Red Lion's obligations under the fairness doctrine to make free time available to Cook and requested that the FCC be notified of the broadcaster's compliance efforts.¹¹⁴ Moreover, the FCC apparently conceded the letters constituted notice to Red Lion that its failure to comply with the summarized standard could subject it to revocation or forfeiture of its license, or other penalties.¹¹⁵

As in *Frozen Food Express*,¹¹⁶ the Supreme Court assumed the availability of section 554(e) as a device "to remove uncertainty"¹¹⁷ despite the lack of an ongoing adjudication. In *Red Lion*, however, the Court had been urged to construe the FCC's rule providing for declaratory rulings¹¹⁸ as equivalent to a section 554(e) declaratory order.¹¹⁹ Under the construction argued successfully to the Court, because section 554(e) authorized adjudicating agencies to issue declaratory orders, and because the FCC could have subjected Red Lion, by adjudication, to a cease-and-desist order or license revocation, the FCC could have issued a judicially reviewable declaratory order in the course of its adjudication.¹²⁰ In response to the anticipated rejoinder that the FCC had not invoked the formal adjudicatory procedures on which the Court sought to predicate its actions, the Court contended that Red Lion waived any objections it otherwise might have raised about the formalities of its adjudication by joining the government in its construction of the finality of the declaratory ruling provision.¹²¹

Although the Court properly concluded that the FCC's declaratory ruling in *Red Lion* was final and therefore reviewable, that conclusion can be harmonized with *Frozen Food Express* only if two points are noted. First, the Court in *Red Lion* was engaged in construing the FCC's regulation and not section

of the Administrative Procedure Act." 47 C.F.R. § 1.17 (1958). The declaratory ruling provision has remained in its present form since the general agency reorganization on November 22, 1963 (28 C.F.R. 12415).

In its 1968 survey, *see supra* note 18, the Administrative Law Section's subcommittee noted the possibility of confusion arising from the FCC's use of the term "ruling" instead of expressing its declaratory order in the language of § 554(e) of the APA. The subcommittee stressed the need "for distinction between rules specifically expressed in the language of Section 5(d) [namely, § 554(e)] and other 'analogous' rules to which members of the subcommittee were referred." Comment, *supra* note 18, at 258. That distinction is necessary because of the likelihood that the courts or the agency might confuse the declaratory order with mere interpretive rulings. *See* 1 K. DAVIS, *supra* note 6, § 5.01 at 290; *supra* note 38.

113. *See Red Lion*, 395 U.S. at 372 n.3; *Red Lion*, 381 F.2d at 917.

114. For example, *see* the FCC's letter to Red Lion Broadcasting Co. dated December 9, 1965. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908, 914 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969).

115. This was the position summarized by Red Lion Broadcasting Co.'s letter to the FCC, dated November 8, 1965: "It has been stated . . . that the Commission's letter of October 6, 1965 'constitutes a final order.' This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties." *Id.*

116. *See supra* notes 76-84 and accompanying text.

117. 5 U.S.C. § 554(e) (1982).

118. *See supra* note 112.

119. *Red Lion*, 395 U.S. at 372 n.3.

120. *Id.*

121. *Id.*

554(e) directly.¹²² Second, and more important, the Court's result is compatible with *Frozen Food Express*, but for an additional reason not stated by the Court. It was not only the FCC's designation of its declaratory ruling as final that was important, but also the Court's own willingness, as expressed in *Frozen Food Express*, to accept a double-edged view of section 554(e). If the Court's analysis of the declaratory order had not been reduced to a footnote, the acceptance of a strong declaratory order and not the government's waiver theory more appropriately justified the conclusion of the Court: "Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review."¹²³

Consistent with both the Court's intimation in *Frozen Food Express* and the purposes for the declaratory order device reflected in the legislative history of section 554(e), the Court properly designated the FCC's ruling in *Red Lion* a final, reviewable declaratory order. Although that ruling had not been issued in the context of an adjudication and, therefore, could not have been justified as an order "to terminate a controversy," it represented the Commission's fullest determination of the facts and the law relating to the dispute. As such, the FCC's position had become concrete and imposed a duty on Red Lion to conform its actions under the threat of an agency-adjudicated sanction.¹²⁴ Because the FCC had the right to adjudicate the dispute, it therefore had the derivative, alternative authority to remove the uncertainty giving rise to the anticipated adjudication through the use of a section 554(e) declaratory order.¹²⁵

In other words, cosuplicants Cook and Red Lion were offered agency interpretive advice premised on the FCC's rulemaking authority.¹²⁶ In the agency's view, that advice was generalized and explanatory, but not finally determinative of the company's duties.¹²⁷ Once the FCC began to focus on Red Lion as a sinner, however, the FCC had other authority available to it. The FCC could have proceeded with an adjudication and in its sound discretion¹²⁸ even could have terminated that "controversy" if it subsequently became appropriate to declare the rights and duties of the parties.¹²⁹

122. *Id.*

123. *Id.*

124. Professor Davis has stated that the test for concreteness should be "whether the magnitude of the injury was sufficient to justify the use of judicial machinery." 3 K. DAVIS, *supra* note 6, § 21.07, at 174.

125. This conclusion reflects the real meaning of the Court's conclusion that because an "adjudicating agency" such as the FCC is permitted by section 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty, "the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation." *Red Lion*, 395 U.S. at 372 n.3. It also explains the Court's holding that, but for Cook's waiver, "[s]ince the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review." *Id.*

126. See *supra* text accompanying notes 110-17.

127. See M. ASIMOW, *supra* note 63, at 113-14.

128. See *supra* note 70.

129. Cf. text accompanying notes 66-67, 104-06 (noting agency reluctance to use advice giving

Alternatively, like the Samaritan,¹³⁰ it could have given prejudgment relief without regard to whether Red Lion actually had engaged in wrongdoing.¹³¹ It could have announced the agency's position and thereby declared Red Lion's legal duties. Under this latter course, the FCC could, "with like effect as in the case of other orders, . . . issue a declaratory order to . . . remove [Red Lion's] uncertainty" about the validity of its proposed course of action. Unlike the mere interpretation of a rule, however, this latter declaratory order, like the order issuing from a full or terminated adjudication, would have been ripe for judicial review.¹³²

B. Declarations Terminating Controversies

Frozen Food Express and *Red Lion* demonstrate the Court's support for a strong view of section 554(e) declaratory orders. This view was underscored by *Weinberger v. Hynson, Westcott & Dunning*,¹³³ the Court's lone assessment of an agency's use of declaratory orders to terminate a controversy. *Hynson, Westcott & Dunning* is important both because it is instructive about the Court's view of the declaratory order as a summary judgment device and because it demonstrates the Court's willingness to sanction an aggressive use of the declaratory order in conjunction with other APA procedural devices.¹³⁴

In *Hynson, Westcott & Dunning*¹³⁵ the Court affirmed the Food and Drug Administration's (FDA) use of a declaratory order to resolve a dispute in which several pharmaceutical companies sought to prevent the FDA from withdrawing their licenses to market certain drugs. The dispute arose when Hynson's authorization to market Lutrexin as a "safe" drug was challenged under the "new drug" application procedures of the Federal Food, Drug, and Cosmetic Act of 1938.¹³⁶ The 1962 amendments to the Act¹³⁷ had directed the

in an adjudicatory posture); see also *infra* notes 157-60 and accompanying text (discussing ability of the agencies to bring on early termination to proceedings to enable parties to receive judicial review).

130. Appropriately enough, the Good Samaritan parable, *Luke* 10:30-37 (on the value of nonjudgmental neighborliness) was directed at a lawyer: "But a certain Samaritan, as he journeyed, came where he was and when he saw him, he had compassion on him." *Id.* at 10:33. Compare the underlying social investment notions of the Samaritan ("Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee." *Id.* at 10:35) and Professor Borchard ("the judicial process should afford protection not only from physical injuries and violence, but also . . . against uncertainty, peril and insecurity." See *supra* note 13). See also *supra* note 27 (discussing purposes behind the use of declaratory orders).

131. See *supra* notes 24-29 and accompanying text, notes 104-09 and accompanying text.

132. See *supra* text accompanying notes 68-70.

133. 412 U.S. 609 (1973).

134. Although *Hynson, Westcott & Dunning* involved the use of the declaratory order in conjunction with administrative summary judgment, other combinations invite scrutiny. For example, in combination with ad hoc adjudicatory rulemaking, a declaratory order might issue against similarly situated nonparties.

135. A cross-petition by Hynson, Westcott & Dunning challenging affirmance of the FDA's designation of the drug as a new drug because it was under a new drug application also was on certiorari.

136. Act of June 25, 1938, ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-392 (1982)).

137. Act of Oct. 10, 1962, Pub. L. No. 87-781 (1962) (codified at 21 U.S.C. § 321(p)(1) (1982)). Under the 1938 Act a "new drug" was one not generally recognized by qualified experts as safe for

FDA to refuse approval of new drug applications (NDAs) in accord with specific procedures,¹³⁸ and to begin to withdraw its prior approvals in 1964 "if substantial evidence that a drug was effective for its intended use was lacking."¹³⁹ This mandated review of effectiveness posed enormous problems for the FDA. Between 1938 and 1962 the FDA had permitted nearly 10,000 NDAs to become effective, and 4000 of the drugs were still on the market at the time of the suit.¹⁴⁰ In addition, there were thousands of drugs on the market known as "me toos" because they were similar or identical to drugs with effective NDAs. The FDA had allowed these "me toos" to be marketed in reliance on the so-called "pioneer" drug applications approved by the FDA.¹⁴¹

In carrying out the evaluations, the FDA announced its policy of applying its efficacy findings to all drugs, including the related "me-too" drugs.¹⁴² When Hynson was informed that its claims of effectiveness were supported by inadequate scientific documentation and that the Commissioner had published notice of his intention to withdraw approval of the NDAs covering Lutrexin, Hynson sought judicial review of the agency's withdrawal determination in the United States Court of Appeals for the Fourth Circuit.¹⁴³

The case involved two issues when brought before the Supreme Court. The first issue was whether the FDA's obligation to give notice and opportunity for hearing before withdrawing approved NDAs was satisfied if the FDA refused to provide hearings when a requesting applicant clearly raised no genuine and substantial issue of fact. The second issue was whether the FDA could withdraw the approval of "me-too" drugs by issuing a declaratory order governing all drugs covered by a particular NDA.¹⁴⁴

The Supreme Court sustained the FDA's procedures in both regards. The Court, in response to objections to the agency's use of summary judgment procedures, noted that in *United States v. Storer Broadcasting Co.*¹⁴⁵ and *FPC v. Texaco*¹⁴⁶ it had approved procedures requiring that an applicant make a threshold showing that "on its face" satisfied the statutory standards particularized by the regulations before the applicant was entitled to a formal hearing.¹⁴⁷ Moreover, the Court would not "impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclu-

its intended use. 21 U.S.C. § 201(p)(1) (1982). The 1962 Act amended § 201(p)(1) of the 1938 Act to define a "new drug" as a drug not generally recognized among experts as *effective* and safe for its intended use.

138. 21 U.S.C. § 355(d)-(e) (1982).

139. *Hynson, Westcott & Dunning*, 412 U.S. at 613.

140. *Id.* at 614.

141. *Id.*

142. The FDA turned to the National Academy of Sciences-National Research Council (NAS-NRC) to conduct reviews and to assist in establishing efficacy standards. *Id.* at 614-15.

143. *Id.* at 616-17.

144. *Id.* at 620, 623-25.

145. 351 U.S. 192, 205 (1956).

146. 377 U.S. 33, 39 (1964).

147. *Hynson, Westcott & Dunning*, 412 U.S. at 620.

sively from the applicant's 'pleadings' that the application cannot succeed."¹⁴⁸

The Court was equally emphatic, although somewhat less clear, about the use of the declaratory order: "[T]hat [section 554(e)] procedure is a permissible one where every manufacturer of a challenged drug has an opportunity to be heard. FDA under § 554 of the Administrative Procedure Act may issue a declaratory order governing all drugs covered by a particular NDA."¹⁴⁹ The Court's reference to "an opportunity to be heard" apparently was an oblique reference to the "on the record" requirement of section 554(a). The Court, however, did not address the Food and Drug Act's failure to provide expressly for adjudications to determine whether a drug is new.¹⁵⁰ Plaintiff argued that without such an adjudication the FDA lacked the kind of "on the record" determination necessary to trigger use of the declaratory order device.¹⁵¹ The Court, however, emphasized that under the circumstances practical concerns suggested that section 554(e) should be available to terminate such disputes. Declaratory orders allowed administrative controls over drugs "to be efficient" and avoided the paralysis of "case-by-case battles in the courts"; and their unavailability would suggest that Congress engaged in "an exercise in futility when it enacted the 1962 amendments."¹⁵² These sensible advantages also were supported by another consideration: as the expert agency that Congress created and vested with primary jurisdiction over drug safety and efficacy, the FDA needed "jurisdiction to determine whether it has jurisdiction[, which] is as essential to its effective operation as is a court's like power."¹⁵³

The Court might have noted, as the Attorney General did in his contemporaneous analysis of the APA, that when an act fails to require orders of denial or revocation of important rights to be made "on the record," the requirement for such formality is implied in the provision for judicial review of the orders in the courts of appeals.¹⁵⁴ Furthermore, the Court failed to apply its holding in *Wong Yang Sung v. McGrath*¹⁵⁵ that, in some instances, constitutional considerations might require that proceedings satisfy the formal adjudication procedures of the Administrative Procedure Act even without a statutory requirement of a formal, "on the record" proceeding.¹⁵⁶

Thus, having identified the requisite formal adjudicatory authority, *Hynson, Westcott & Dunning* sharply honed the second edge of the declaratory order. It reflected the less controversial¹⁵⁷ agency authority to "terminate a controversy" by cutting off adjudicatory proceedings to afford immediate judi-

148. *Id.* at 621.

149. *Id.* at 625.

150. See *supra* note 26 and accompanying text; see also *supra* note 71 (declaratory orders are available only for matters required by statute to be determined "on the record").

151. *Hynson, Westcott & Dunning*, 412 U.S. at 626.

152. *Id.* at 626.

153. *Id.* at 627.

154. ATTORNEY GENERAL'S APA MANUAL, *supra* note 29, at 41-42.

155. 334 U.S. 37, 48-50 (1948).

156. See *supra* note 72.

157. Interestingly, of the 28 reported lower court cases involving substantive review of an agency's use of a § 554(e) declaratory order, it is not this most straightforward use of the order

cial review.¹⁵⁸ Agencies were reminded that section 554(e) can free proceedings from the "strait jacket" of individualized adjudications and can substantially reduce agency time commitments.¹⁵⁹ Just as importantly, the

(i.e., to "terminate a controversy") that is at issue most often. An agency order "to remove uncertainty" is involved most often.

The ICC and FCC have the most cases involving declaratory orders, most of which are to remove uncertainty. The ICC has the most reported cases in which a declaratory order has been used to terminate a controversy. The uses of the declaratory order in, and the subject matter of, the cases reviewed by the courts of appeals are as follows.

To Terminate a Controversy.

Loveday v. FCC, 707 F.2d 1443, 1457 (D.C. Cir. 1983) (radio broadcasters had inquired diligently into identity of sponsors of advertisements); Atchison, T. & S.F.R.R. v. Union Tank Car Co., 611 F.2d 1184, 1187 n.7 (7th Cir. 1979) (tank car owner's removal of cars from domestic fleet made it unentitled to free transportation from Mexico to United States repair facilities); Ashland Oil & Refining Co. v. FPC, 421 F.2d 17, 20 (6th Cir. 1970) (company made proper filing under regulations to recover increased rates); Aikins v. United States, 282 F.2d 53, 59 (10th Cir. 1960) (declaring whether Kansas City stockyards dealers could engage in practices to control bidding); Southern R.R. v. United States, 306 F. Supp. 108, 111 (E.D. Va. 1969) (declaring whether ICC had power to order payment for delivery of empty boxcars pursuant to ICC emergency directions during car shortage); Elgin, J. & E.R.R. v. Benjamin Harris & Co., 245 F. Supp. 467, 469 (N.D. Ill. 1965) (used gunsights are subject to general commodity tariff or scrap metal rates); Boston & M.R.R. v. United States, 162 F. Supp. 289, 293 (D. Mass.) (ICC per diem rates for freight cars were legal), *appeal dismissed per curiam*, 358 U.S. 68 (1958).

To Remove Uncertainty.

FPC v. Louisiana Power & Light Co., 406 U.S. 621, 627 & n.5 (1972) (FPC jurisdiction to determine that proposed delivery curtailment plan of pipeline company was consistent with its contracts); Illinois Terminal R.R. v. ICC, 671 F.2d 1214, 1216 (8th Cir. 1982) (validity of "bridge toll" in agreement between railroads); New York State Comm'n on Cable Television v. FCC, 669 F.2d 58, 61 (2d Cir. 1982) (FCC able to preempt state regulation of master antenna television systems); Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1380 (D.C. Cir. 1979) (curtailment of gas deliveries unjust); Akron, C. & Y.R.R. v. United States, 586 F.2d 29, 30 (7th Cir. 1978) (railroad could withdraw concurrences to tariff before effective date); British Caledonian Airways, Ltd. v. CAB, 584 F.2d 982, 983 (D.C. Cir. 1978) (carriers must include in their tariffs provisions relating to penalties and damages for cancellation of charter flights); Chisholm v. FCC, 538 F.2d 349, 351, 365 n.33 (D.C. Cir.) (to apply longstanding administrative decision concerning equal time requirements for political candidates' debates and press conferences), *cert. denied*, 429 U.S. 890 (1976); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787, 790-91 & n.2 (4th Cir.) (FCC had jurisdiction over regulation of interconnection of customer-provided equipment to telephone equipment), *cert. denied*, 429 U.S. 1027 (1976); New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 994 (2d Cir. 1969) (broadcasts concerning lotteries would violate federal statute), *cert. denied*, 396 U.S. 1061 (1970); National Van Lines v. United States, 326 F.2d 362, 364 n.2 (7th Cir. 1964) (household goods carried by motor carriers were subject to tariff); Port Royal Marine Corp. v. United States, 378 F. Supp. 345, 347 (S.D. Ga. 1974) (three-judge court) (barge towing services rendered to ocean carriers involved interstate commerce subject to ICC jurisdiction), *aff'd*, 420 U.S. 901 (1975); Middle Atl. Conference Nat'l Motor Freight Traffic Ass'n v. United States, 265 F. Supp. 448, 449 (D. Md. 1967) (*per curiam*) (lawful to assess freight services at government rates when shippers or receivers are to be reimbursed by the government); Trans-american Freight Lines v. United States, 258 F. Supp. 910, 912 (D. Del. 1966) (common carrier may cross Canadian border under certificate allowing service between New England and Ohio); Service Trucking Co. v. United States, 239 F. Supp. 519, 520 (D. Md.) (carrier's shipments were in interstate and intrastate commerce), *aff'd per curiam*, 382 U.S. 43 (1965).

158. See *supra* text accompanying notes 68-72, 123-29.

159. *Hynson, Westcott & Dunning*, 412 U.S. at 626. A declaratory order is technically broader than the so-called administrative summary judgment, though at times they operate identically. Although the declaratory order is available when there has been no adjudication initiated by an agency, summary judgment always follows commencement of the adjudicatory proceeding. The Administrative Conference of the United States recently has recognized this difference and recommended formalizing it with explicit procedural guidelines that—going beyond the requirements of § 554(e)—would require notice to the opposing party and an opportunity to respond before issuance of a summary decision in an agency adjudication. See Recommendations of the Administrative Conference of the United States, 1 C.F.R. § 305.70-3 (1983).

Court specifically contrasted the separate and distinct uses of the declaratory order for the first time in a single opinion. The Court held that section 554(e) empowered the FDA to "issue a declaratory order to terminate a controversy over a 'new drug' or to remove any uncertainty whether a particular drug is a 'new drug'" ¹⁶⁰

III. CONCLUSION AND RECOMMENDATIONS

The major conclusion that emerges from this informal examination of agencies' use of declaratory orders is that the use of that term is both under- and over-utilized. This contradiction primarily reflects misunderstandings surrounding the procedural device. The procedure is under-utilized as a result of the continuing failure of most federal agencies to adopt explicit implementing regulations. It is over-utilized because, even when used by agencies, the term "declaratory order" may bear little or no relationship to the dynamic advice-giving device embodied in section 554(e). The so-called agency equivalents generally lack one, if not all, of the four essential characteristics identified in this Article: (1) applicability to a broad range of subject matter;¹⁶¹ (2) availability at the initiation of either a person or the agency;¹⁶² (3) availability prior to a person's actually having engaged in the conduct about which he has inquired;¹⁶³ and (4) availability of a resulting final agency determination that is ripe for judicial review.¹⁶⁴

This conclusion can be traced to a sense of apprehension on the part of the public,¹⁶⁵ a generally unreceptive, if not hostile, view of the device among the agencies,¹⁶⁶ and a lack of elaboration in Supreme Court opinions that have discussed the procedure.¹⁶⁷ The reluctance on the part of agencies to use the declaratory order procedure is a reflection of how they view the public's desire for it. Although information is primarily anecdotal, the impression reported by the surveyed agencies is that, as a practical matter, the public has little use for a device with the potential to alert agencies to conflicts that otherwise might go unnoticed or might accelerate agency proceedings. Conflict avoidance¹⁶⁸ and delay¹⁶⁹ are viewed as strategies to be used against, rather than by, the agencies.

Paralleling the problems and concerns that have been noted has been the development of another phenomenon. Under prodding by the Supreme Court, the section 554(e) declaratory order has been recast and embellished so that it now is capable of carrying out the purpose originally intended by Con-

160. *Hynson, Westcott & Dunning*, 412 U.S. at 626.

161. *See supra* notes 8, 13, 27, 37.

162. *See supra* text accompanying notes 97-100.

163. *See supra* notes 104-106 and accompanying text.

164. *See supra* text accompanying note 104.

165. *See supra* text following note 67.

166. *See supra* note 8.

167. *See supra* text accompanying notes 81-84, 116-17.

168. *See supra* text following note 67.

169. *See supra* text accompanying note 153.

gress. Although it has been advocated that the APA be amended to free section 554(e) of its restriction tying declaratory orders to formal agency adjudications,¹⁷⁰ such action no longer is required. Now that the Court has adopted what this Article has characterized as the strong declaratory order, preadjudicatory binding and reviewable orders are easily available. So long as an agency can formally adjudicate a matter at some stage, it has the discretion to declare its position as a final reviewable order whenever it believes such an issuance would be appropriate. As a consequence, for the most serious interests, the declaratory order provision is fully the equivalent of its judicial counterpart, the declaratory judgment.

The emergence of a strong declaratory order, however, is not without irony. The declaratory order began as an effort to provide the public a means to challenge agency authority without first requiring that the inquirer actually have breached the standard being challenged. The purpose was to spare the questioner the risk of an agency sanction and to allow him to order his conduct on the basis of a clear understanding of the law. Agencies recoiled at this idea; they believed that it tipped the balance too far in favor of would-be wrongdoers. In part, this agency reluctance to define the boundaries of permissible conduct underlies their unwillingness to adopt section 554(e) regulations. Nevertheless, as *Red Lion* makes clear, a person who is likely to be affected by agency conduct is entitled to a declaratory order in connection with the most serious kinds of disputes. The balance, however, has shifted after the *Hynson, Westcott & Dunning* Court's sanction of the use of declaratory orders in conjunction with administrative summary judgment. Armed with newly highlighted authority to terminate adjudications on the basis of evidentiary thresholds—administrative summary judgment—and then to issue declaratory orders in anticipation of similarly framed disputes, agencies now have available a powerful tool for streamlining adjudications. Determinations of whether this represents a swing too far in favor of the agencies, and of the extent to which the strong declaratory order can be restrained by the APA's limitations against arbitrary and capricious conduct and abuses of discretion, will require further analysis. Just as important, at this stage one cannot tell the extent to which other procedural devices also might be coupled with the declaratory order.

More immediately, what is required of the agencies, courts, and commentators should be considered. Initially, a systematizing of the nomenclature relating to advice giving is needed. Each agency should review thoroughly its advice-giving procedure and weed out such equivocal terms as "advisory opinions," "jurisdictional opinions," and "declaratory rulings." Ideally, each should aim for a uniform government-wide nomenclature. Particular care should be taken to distinguish agency devices for advice giving that are intended only to serve the purposes of interpretative rulemaking and those procedures intended to determine individual rights. The former should be codified as part of the regulations for rulemaking and designated only as *rul-*

170. See *supra* note 34.

ings. Such rulings should incorporate statements that their advice is generic and not intended to fix the legal rights of the inquirer or the responding agency.

Such changes also would necessitate that interpretative rulings include instructions on how and in what circumstances binding, presanction enforcing determinations may be secured from an agency. Regulations covering this latter form of advice giving should be codified under the agency's adjudicatory procedures and systematically labeled as *orders* to reflect their status as standard-applying, rather than standard-explaining mechanisms. In addition, each agency should identify in its regulations those considerations that it believes pertinent to its willingness to exercise its discretionary power to issue declaratory orders. Such factors could include that a substantial question of fact or law is involved, that the facts are unlikely to change, or that the agency or other government bodies are not engaged in proceedings which might be disrupted by issuance of a declaratory order.

In the context of judicial interpretation of section 554(e), however, there is little that can or should be done beyond awaiting the Supreme Court's next opportunity to place the declaratory order in historical context. The Court has been consistent in its interpretation of the scope of the device, at least as measured by the practical results it has endorsed.¹⁷¹ If anything has been lacking, it has been attention to the doctrinal framework underlying those results.

Finally, ample opportunity is afforded for academics to affect the future of section 554(e). There has been a decreasing amount of scholarly attention to the device, at least as reflected by casebooks currently in use. Although no study has been undertaken to determine the extent to which administrative law professors emphasize the existence of the device, discussions with colleagues over the course of the last year revealed no professor, including the author, who makes more than a passing classroom reference to the declaratory order. To this extent, therefore, it is not surprising that, in a world of supplicants and sinners, the samaritan needs help.

171. See *supra* text accompanying notes 105-07.