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DECLARATORY ACTIONS*

by

BERNARD B. GOLDNER†

Although the concept of a declaratory action is not new, the application of declarations by administrative bodies is a recent development. Declaratory judgments in the federal government date formally from 1934, when the Federal Declaratory Judgments Act[1] was passed, and effectively from 1937 when the United States Supreme Court upheld its constitutionality[2]. Since 1938, the Bureau of Internal Revenue has been empowered to consumate "closing agreements", a form of declaratory order, and other federal agencies have operated under statutes granting them power to issue advisory opinions and declaratory rulings. In 1946, Section 5(d) of the Federal Administrative Procedure Act[3] provided that "the agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty". The declaratory ruling or order is the device whereby administrative agencies make decisions in advance of affirmative action so that rights and duties are declared, and affected persons can regulate their conduct and actions accordingly.

The administrative process in the United States, although as old as the nation, has developed most extensively in the past 30 years. New methods and techniques of government have arisen in response to pyramiding public problems which have been termed administrative law. "It is administrative because it involves the exercise of legislative and judicial powers of government by officers who are neither legislators nor judges. It is law because what they do is binding upon the citizens exactly as statutes or judgments are binding."[4] The President's Committee on Administrative Management issued a report in 1937 which declared that the executive branch and administrative bodies had developed haphazardly, possessed uncoordinated powers, were almost autonomous "governments", have administrative duties to perform but are doing important legislative and judicial work, and "constitute a headless 'fourth branch' of the Government."[5] The need for improvement and increased certainty in adminis-

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[1] 28 U. S. C. § 2201 (Supp. 1951)

[2] *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937).

[3] Public Law 404, 79th Congress, 2nd Session, approved June 11, 1946, 5 U. S. C. §§ 1001-1011 (Supp. 1951).

[4] *Administrative Procedure Act, Legislative History*, Senate Doc. No. 248, 79th Cong., 2nd Session, 1946, p. 349.

[5] *Investigation of Executive Agencies of the Government*, Senate Report 1275, 75th Congress, 1st Session, 1937.

trative procedure was clearly recognized and a chain of events was initiated which culminated in the present Act and wider possibilities for application of declaratory rulings. Courts have definitely recognized the values inherent in declaratory judgments and have resorted to that form of relief with increasing frequency. The administrative process has been slow and rather reluctant to adopt a form of proceeding which grants a similar measure of certainty in dealings with administrative agencies. Many writers have pointed out the benefits of declaratory judgments and indicated that the idea and theory of the judgment should be carried over to administration.[6]

Unquestionably the case which started the tide running in favor of predictability and giving citizens some assurance of what is expected of them or what their liabilities are or will be, was the one of *James Couzens v. Commissioner of Internal Revenue.*[7] Couzens owned a rather large block of Ford Motor Company stock which the company desired to purchase in order to secure 100% control. Before the sale, an attorney for the company wrote to the Commissioner of Internal Revenue, Mr. Daniel Roper, asking the value of the stock as of March 1, 1913 so that the tax consequences might be known and analyzed. After investigation, Mr. Roper stated that the Bureau was "disposed to regard $9,489.34 as a fair market value of the stock as of March 1, 1913 and one which should be used in computing any profit made on the sale." On that pronouncement the deal was closed, Senator Couzens receiving about $30,000,000 for the stock and paying approximately $8,000,000 as income tax on the profit. Almost six years later, however, a new Commissioner, Blair, advised Couzens that subsequent investigation showed each share of stock to be worth only $3,547.84 on March 1, 1913 and an additional $9,500,000 in tax was being assessed. Although Couzens ultimately was not required to pay the additional assessment after engaging in long and costly litigation, it was held that an earlier finding or decision by one Commissioner did not bind his successor, nor indeed did it bind the office itself.

Because of their significant regulatory powers and considering the many ways administrative decisions affect daily lives and business dealings, many administrative agencies have issued various orders such as advisory opinions or rulings in an effort to grant some measure of repose to harried citizens. These orders have been categorized in many ways and given various names, but all of them could be termed "advisory" or non-binding in nature until the passage of the Federal Administrative Procedure Act in

[6] Borchard, "Declaratory Judgments" (1941 rev. ed.), pp. 919-924; Oliphant, "Declaratory Rulings", 24 A. B. A. J. 7 (1938); Vogeler, "Declaratory Rulings in Administrative Agencies", 31 Ky. Law J. 20 (1942); Gellhorn, "Declaratory Rulings by Federal Agencies", 221 The Annals 153 (1942).

[7] 11 B. T. A. 1040 (1928).

1946.[8] Advisory rulings or opinions must be clearly distinguished from declaratory rulings. The advisory ruling is issued by a number of agencies, such as the Bureau of Customs, the Post Office Department, and the Securities and Exchange Commission, answering an inquiry from a particular individual concerning a proposed act or form of conduct. The advisory opinion may be issued with or without a hearing and invariably implies, or states explicitly, that the agency is not bound by its own decision.[9] Although advisory opinions do eliminate some uncertainty and reduce risks, they do not afford the measure of predictability which is both desirable and necessary in the administrative process.

The need for advance determination of rights, and particularly liabilities, has been especially sharp in tax controversies, and Congress has made sporadic efforts since 1921 to meet the demands for certainty in transactions—past, present, and future. The clamor for advance assurances culminated in the passage of a provision for closing agreements in the Revenue Act of 1938—

> .... The Commissioner (or any officer or employee of the Bureau of Internal Revenue .... authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person .... in respect of any internal revenue tax for any taxable period .... such agreement shall be final and conclusive .... except, upon a showing of fraud or malfeasance, or misrepresentation of a material fact ....[10]

This provision "must be taken as a legislative suggestion of policy within the broad limits of which the Commissioner will exercise much circumspection."[11] By eliminating the phrase "ending prior to the date of the agreement" which appeared in the 1928 Revenue Act, the Act of 1938 made it possible for closing agreements to affect future tax liability—another step forward on the road to predictability. There is at present no method of setting aside closing agreements nor any provision for judicial review. The agreement relates only to the party or parties involved in the specific transaction and does not apply on a wide and/or uniform basis to matters which may affect a lot of taxpayers.

Although the closing agreement affords definite advantages, the de-

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[8] See Blachly and Oatman, "Federal Statutory Administrative Orders", 25 Iowa L. R. 582 (1940) who classified orders into 10 different categories; also note Vogeler, *op. cit.*, who discusses the "advisory rulings" issued by various federal agencies. The binding declaratory ruling was authorized by statute to all administrative agencies in 1946, discussed below.

[9] Also, it is entirely possible that the agency will analyze the problem in an altogether different light when the transaction is consummated, and arrive at a different conclusion. *Report of the Attorney General's Committee on Administrative Procedure,* Senate Document No. 8, 77th Congress, 1st Session, 1941, p. 31; See also *Attorney General Committee's Monograph* No. 13, "Postoffice Department", Sen. Doc. 186, 76th Congress, 3rd Session, Part 12, p. 39, 1940; Monograph No. 27, "Administration of the Customs Laws", p. 166; Senator King's statement concerning customs laws in 83 Cong. Rec. 4557 (1938).

[10] Sec. 801, 54 Stat. 447 amending Sec. 606, Rev. Act of 1928, 45 Stat. 791.

[11] Wenchel, "The Treasury's New Powers as to Closing Agreements", 16 Tax Mag. 651 (Nov. 1938).

claratory ruling is considered a much more effective device for achieving certainty and security.

> In any event the fact that the commissioner is bound, even though Congress may not be, is a firm stride toward the achievement of that predictability and repose in tax liability which would, however, be so much more effectively accomplished by the declaratory administrative ruling.[12]

A system for declaratory rulings in tax cases was suggested by a prominent writer in the field and is discussed briefly below.[13] A taxpayer would apply for a declaratory ruling in accordance with requirements established by the Commissioner. The Commissioner would decide if the subject matter is desirable and suitable and if he has enough data. He could hold hearings, secure more information if necessary and finally issue a ruling. The ruling would not be effective if the taxpayer did not complete the transaction, but the taxpayer could get a second ruling establishing his compliance if he did proceed according to the first ruling. "A declaratory ruling would enumerate and specify in detail the persons, taxes, taxable years and transactions to which it applied and any other terms and conditions which the Commissioner found necessary to provide."[14] One great limiting factor was that until consumation there was no appeal to the courts, not even for a declaratory judgment. Also, if the taxpayer contested the ruling, neither he nor the government was bound by it. There was the valuable suggestion, however, that declaratory rulings should be coordinated with the general scheme of tax laws.[15]

The Administrative Procedure Act[16] was enacted into law on June 11, 1946.[17] The Act provides for the issuance and publication of essential information, administrative operations, and judicial review. The Act may be said to have four basic purposes:

1. To require agencies to keep the public currently informed of their organization, procedures, and rules (sec. 3).

2. To provide for public participation in the rule making process (sec. 4).

3. To prescribe uniform standards for the conduct of formal rule making (sec. 4 (b)), and adjudicatory proceedings (sec. 5), i.e. proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).

4. To restate the law of judicial review (sec. 10).[18]

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[12] *Ibid.*, p. 654. See also Sen. Doc. 10, 77th Cong., 1st Sess., Part 9, pp. 29-35 (1941).
[13] Traynor, "Declaratory Rulings", 16 Tax Mag. 195 (April 1938).
[14] *Ibid.* p. 196.
[15] *Ibid.* p. 197.
[16] See footnote 3 *supra.*
[17] For a complete legislative history see Sen. Doc. 248, 79th Cong., 2nd Sess., 1946
[18] *Attorney General's Manual on the Administrative Procedure Act,* U. S. Dep't. of Justice, 1947, p. 9. This is intended as a guide to agencies in adjusting their procedures to the requirements of the Act and was prepared by the Attorney General expressly for that purpose.

Actually, "the entire Act is based upon a dichotomy between rule making and adjudication".[19] Section 5 of the Act is headed "Adjudication", and the introductory clause states:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court, (2) the selection or tenure of an officer or employee of the United States, (3) proceedings in which decisions rest solely on inspections, tests, or elections, (4) the conduct of military, naval, or foreign affairs functions, (5) cases in which an agency is acting as an agent for a court, and (6) the certification of employee representatives.

In these cases of adjudication, with the six exceptions as noted, the agency will give proper notice, explain its procedure, make provisions for separating its functions of investigating and deciding, and "is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."[20] Agencies are not required by the Act to issue declaratory orders whenever they are requested, but will issue them with "sound discretion" in appropriate circumstances and will refuse to do so where declaratory rulings are unsuitable to the circumstances or subject matter.

Role of Declaratory Rulings in Administration

Administrative agencies as arms of the legislature perform three main types of functions. First there is the "legislative function of issuing rules or regulations which are usually of general applicability and are supplementary to the statutes of Congress. There are for example substantive rules, such as the Federal Power Commission prescribing uniform accounts systems, which implement statutory policy.

> Congress—if it had the time, the staff, and the organization—might itself prescribe these things. Because Congress does not do so itself and yet desires that these things be done, the legislative power to do them has been conferred upon administrative officers or agencies.[21]

Secondly, there is the "judicial" administrative operation of deciding upon cases or adjudication. In the operation of this function there results the final opinions or orders of any agency, such as an order by the Federal Trade Commission to cease and desist from unfair practices.

> What the agencies do in these cases is to determine, just as a court might determine, the liability of a party or the redress to which a party is entitled in a specific case on a specific state of facts and under stated law.[22]

The third function is investigative, and may be performed in con-

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[19] *Ibid.* p. 14.
[20] Adm. Procedure Act, Sec. 5(d). 5 U. S. C. §1004(d) (Supp. 1951).
[21] Sen. Doc. 248, pp. 352-353, footnote 4 supra.
[22] *Ibid.* p. 353.

junction with the other two or apart from them as an independent exercise. To obtain the necessary facts—for a report to Congress or in a particular case under consideration—many agencies have been given powers by Congress to (1) require reports, (2) inspect books, records and premises, and (3) subpoena witnesses and documents.[23]

It has been said that the rise of administrative tribunals and administrative adjudication began in the United States in 1887 with the creation of the Interstate Commerce Commission.[24] The rate-making powers of the Commission were an initial mechanism to determine reasonableness (of rates) in advance and not wait for a committed act or damages. Later, other commissions were established, and control extended beyond rates to the regulation of practices and procedures in an effort to prevent more harm. The prevention of all types of ill effects followed, such as the supervision and control exercised by the Securities and Exchange Commission and the prevention of unfair labor practices by the National Labor Relations Board. Licensing in various forms is one of the most significant of all preventive devices and has been used effectively by the Interstate Commerce Commission, the Federal Communications Commission, and the Civil Aeronautics Authority. The need for general preventive devices was thus clearly recognized; Congress understood that many individuals would be too weak or poor to secure redress of their wrongs, and it was in the public interest to eliminate, or minimize, particular harmful practices.

The administrative process in itself was adopted by Congress to achieve and emphasize prevention of undesirable and harmful activities. In our modern complex economy there is a need for carrying the policy of prevention a bit further. The Federal Trade Commission, for example, exercises authority over advertising matter and, by establishing standards of public health, safety, business methods, and ethics, it has prevented in the past much potentially harmful advertising, and the enforcement of its rules by prosecution of violators has further enhanced its preventive function. If the Commission can issue a binding declaratory ruling, however, on a proposed advertisement, it will fulfill the demand for predictability which is one step further along the road of prevention,

The variety of regulations, orders, opinions, decisions, rulings, and releases has been infinite.[25] The average citizen has had difficulty in discovering what rules have been established and regarded as precedents or at least guides to action. In order to aid laymen and lawyers alike in understanding the processes of administration, provision was made in 1933 for the publication of administrative regulations in the same manner as laws.[26]

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[23] See Attorney General's Report, footnote 9 *supra*, Appendix K, p. 414 ff. for a complete discussion of the procedure for issuing subpoenas.

[24] Pound, *Administrative Agencies and the Law*, National Industrial Conference Board Pamphlet, 1946, p. 8.

[25] See Blachly and Oatman, *op. cit.* footnote 8 *supra*.

[26] See *Code of Federal Regulations*, 1949 ed., preface, vol. 1.

The control organ for the promulgation of these regulations is the Federal Register. It provided for the daily publication of new "rules, regulations, and orders" having "general applicability and legal effect,"[27] up until 1946. But there was no mandate as to the issuance of other types of pertinent information. In 1941, therefore, the Attorney General's Committee found there was "a primary legislative need" for determining "the various kinds and forms of information which ought to be available and ... of the authority and duty of agencies to issue such information."[28]

Agreeing with the Committee's assertion, Congress wrote a comprehensive public information section into the Administrative Procedure Act requiring

> Every agency.... (to) publish in the Federal Register (1) descriptions of its.... organization.... and methods whereby, the public may secure information or make submittals or requests; (2) .... the nature and requirements of all formal or informal procedures available as well as forms and instructions....; and (3) substantive rules adopted as authorized by law and statements of general policy....

and

> Every agency.... (to) publish.... all final opinions or orders in the adjudication of cases....[29]

In the determination of rights or adjudication there are both formal and informal processes. The majority of administrative decisions are, however, made informally and by the mutual consent of citizen and government. Many administrative determinations are made by tests, such as a grade of grain, or inspections, such as the seaworthiness of a ship. The judgment of a skilled man is the decisive element, although it can be questioned and appealed. If informal methods are unsuccessful, formal adjudication is resorted to. Formal adjudication is the judicial functioning of an administrative agency and bears all the marks of court proceedings. Two general types of situations arise where formal procedures prevail. In the first category are those actual controversies between private parties or between them and the government where interests are not reconcilable, or where informal proceedings have failed or have been bypassed, or where the parties present evidence and arguments on strongly held positions concerning technical or involved issues. Secondly, there are those situations which the agency believes will have far-reaching effects of a general nature and feels the proceedings should be conducted formally and publicly.

These formal proceedings are characterized by testimony, cross-examination and argument. Everything goes into the record. Decisions are made by a hearing officer and are reviewable by the agency head. Sometimes they are made initially by the agency head himself. Appeals may be

[27] 1 Fed. Reg. 2269.
[28] Attorney General's Report, p. 26, footnote 9 *supra.*
[29] Adm. Procedure Act, sec. 3(a) and (b), 5 U. S. C. §1004(d) (Supp. 1951).

made, after administrative remedies are exhausted as to facts and statutory requirements,[30] to the courts on questions of law. One of the burning problems in administration has been the separation of the adjudicative or judicial function from other administrative activities and functions. In a broad sense, the Administrative Procedure Act establishes the fundamental distinction between rule-making which is the legislative function of administrative agencies, and adjudication which is the judicial function.[31] While rule making is associated primarily with the future and future effects,

> conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits.[32]

In addition, there are the possible future effects of adjudication and the need for predictability in the administrative process of the determination of private rights.

An order or ruling is a final disposition and may be declaratory in form. Adjudication is the process of formulating an order.[33] However, adjudication is limited by section 5 of the Administrative Procedure Act to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[34] It is significant that formal adjudication can be employed only where there is such a requirement in some other statute pertaining to the agency and in which statute Congress has specifically required a hearing to be held. If an agency, therefore, is authorized by statute to issue orders after a hearing, it may issue a declaratory order on a presented set of facts. For example, if an administrative body can issue an order requiring a person to refrain from engaging in illegal activities, it can also under section 5(d) declare in advance by an order or ruling whether or not certain, specified facts will constitute illegal conduct.[35] Conversely, even though advisory or interpretative opinions are issued, based on long and customary practices, and there is no required statutory hearing procedure involved, section 5(d) does not and cannot authorize the issuance of a formal declaratory order.

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[30] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

[31] The Attorney General's Manual offers some working definitions (p. 30, note 3): "*Substantive rules*—rules other than organizational or procedural under section 3(a) (1) and (2), issued by an agency pursuant to statutory authority and which implement the statute as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to section 14 of the Securities Exchange Act of 1934 (15 U. S. C. 78n). Such rules have the force and effect of law. *Interpretative rules*—rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.... *General Statements of Policy*—statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."

[32] Attorney General's Manual, pp. 14-15, footnote 18 *supra.*

[33] Adm. Procedure Act, sec 2(d), 5 U. S. C. §1001(d) (Supp. 1951).

[34] With the six exceptions noted above, see footnote 20.

[35] See Attorney General's Manual, p. 59, footnote 18 *supra.*

The true declaratory ruling or order has six major characteristics. It is adjudicative in nature; it can only be issued where authorized by a statute and statutory requirements for a hearing exist; it is final, decisive, and binding; it pertains to the consequences of a proposed action; it is issued within the "sound discretion" of an agency; it is administratively and judicially reviewable. It is necessary to mention two other factors as to whether a declaratory ruling will or should be issued. Where the controversy is pending settlement by another agency, or another unit of the same agency, no ruling will be issued on a petition to clarify or adjudicate the case "once and for all." The same principle applies when there is a judicial proceeding not yet made final.

The ruling when issued is clearly stated by the agency to be a binding declaratory order after all evidence of record has been carefully reviewed. Under sections 5(c) and 8 of the Act, the officer who presides at the adjudicatory hearing must prepare the recommended decision. In such cases the agency must make a final decision and is not bound by the decision of its subordinate. It is free to make any determination it chooses, since the recommended decision by the subordinate officer, while a part of the entire record and not without weight, is considered advisory in nature.[36] The ruling will become a matter of record in accordance with provisions of section 8(b). However, pursuant to section 3(b), only such orders that have been published or made available to the public may be cited as precedents.[37]

A declaratory order, as in the case of other orders, is subject to both agency and judicial review. Each agency must decide whether the decision of the presiding officer (when hearing the evidence) is to be a "recommended decision" which is followed by an "initial"—possibly superseding—decision by the agency, or an immediate 'initial decision" which becomes the final decision of the agency in the absence of an appeal to or review by the agency.[38] Parties may appeal the hearing officer's "initial decision" to the agency and the agency may review it on its own action. Appeal to a superior agency authorized to hear appeals or review decisions of the first agency is not precluded by the Act. Judicial review is provided by section 10 "except so far as statutes preclude judicial review or agency action is by law committed to agency discretion." Administrative remedies must be exhausted before an appeal can be made to the courts. Section 10(e) states in detail the scope of judicial review. But it appears that Congress by this section did not intend to allow courts to perform administrative duties by authorizing them to substitute their discretion for that of an administrative agency.[39] Nevertheless, the "sound discretion"

[36] See *National Labor Relations Board v. Elkland Leather Co.*, 114 F. 2d 221, 225 (3rd Cir. 1940), cert. den., 311 U. S. 705 (1940).

[37] See Attorney General's Manual, p. 86, footnote 18 *supra*.....

[38] See Adm. Procedure Act, sec, 8(a), 5 U. S. C. §1007(a) Supp. 1951).

[39] See Attorney General's Manual, p. 108, footnote 18 *supra*.

is a reviewable discretion and administrative agencies are prevented "from giving inprovident declaratory orders or arbitrarily withholding such orders in proper cases."[40]

Present Status of the Declaratory Ruling

The declaratory ruling is recognized by investigators and law-makers alike to be an effective instrument for enhancing predictability and solving the problem of uncertainty in the administrative process.[41] Also, many writers state it to be very useful in any phase of administration where an advance determination of rights is necessary.[42] But apparently the very agencies which are supposed to apply them, and/or the businessmen and other individuals who should request their issuance, are slow to adopt this form of procedure in its particularized sense. It is possible that advisory and interpretative opinions are serving the purpose of advance assurances, or that the fact that a declaratory ruling is now possible may have induced the informal settlement of cases in the early stages.

In a letter concerning rulings, the Bureau of Internal Revenue wrote:

> your attention is directed to Mimeograph 4963, C. B. 1939-2, page 459, for information in regard to the procedure relative to the consideration by this Bureau of requests by taxpayers for rulings or advice on matters affecting tax liability.[43]

This mimeograph sets forth the latest policy concerning rulings, which is that the Commissioner of Internal Revenue will not comply with requests for rulings on future transactions except where the Internal Revenue Code specifically provides for advance decisions. The exception concerns the transfer of stock or ownership to a foreign corporation for the purpose of avoiding tax liabilities. In no other case can a taxpayer learn his tax liability in advance, and this is not altered by the Administrative Procedure Act, since the tax function of the Bureau is a specific exception in section 5. A new approach was recently urged by an advisory group appointed to study the Bureau. They stated,

> finally your committee recommends a different point of view toward the goal of tax enforcement than that which appears to prevail in the government generally. There is too great an emphasis on 'protecting the revenue', too little on protecting the taxpayer.[44]

Notwithstanding the exception in the Administrative Procedure Act, there does not seem to be any bar to the Commissioner issuing a binding ruling in advance in the thousands of cases where uncertainty exists.

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[40] Sen. Doc. 248, p. 25, footnote 4 *supra.*

[41] See Attorney General's Report, pp. 30-33, footnote 9 *supra;* Sen. Doc. 248, pp. 25, 204, 227, 248, 265, 316, 362, footnote 4 *supra.*

[42] See Vogeler, Gelhorn, Oliphant, Traynor and Wenchel, *op. cits. supra;* also, note the letters to the author, *infra.*

[43] Letter to the author from Charles G. Suman, Treasury Department, dated March 15, 1949.

[44] *Report* to the Joint Committee on Internal Revenue Taxation by an Advisory Group appointed pursuant to Public Law 147, 80th Cong., 1948, p. VI.

The Veterans Administration is the largest administrative agency disbursing monetary benefits. It is not strictly a regulatory or enforcement agency but administers "wholly beneficial legislation." When both houses of Congress passed the Walter-Logan Bill in 1940, the Veterans Administration joined in recommending that the president veto the bill[45] because it believed the enactment of the Bill "would strait-jacket all administrative agencies and likewise deluge the courts with unjustifiable actions."[46] Congress did reenact a law recognizing the finality of decisions respecting gratuitous benefits[47] and subscribed to the principle of specifically authorizing some administrative tribunals to adjudge appropriate cases conclusively. The Administrative Procedure Act does not negate the finality of Veterans Administration decisions; in fact it embodies the principle of autonomy stated above, for section 10 provides for judicial review "except so far as (1) statutes preclude judicial review...." Declaratory rulings could feasibly be issued by the Veterans Administrator according to its Solicitor who stated

> it seems rather clear that subsection (d) [of the Administrative Procedure Act] is a general grant of authority and, therefore, would be applicable to the Veterans Administration. However, in our procedures it will rarely be necessary to issue a declaratory order inasmuch as such matters are usually adequately covered by the regulations or amendments thereto or by interpretation.[48]

The Securities and Exchange Commission is a true administrative agency with regulatory powers. It has in the past aided individuals, and its present policy is to provide guidance by an

> advisory service whereby responsible officers of the Commission's staff provide interpretations on a case by case basis to interested persons. Although not technically binding on the Commission.... a letter of this character is 'morally binding' on the commission as to propositions of law and policy involved.[49]

The commission does issue a form of declaratory ruling under the Holding Company Act of 1935[50] and the Investment Company Act of 1940[51] where declarations can be made concerning the status of companies. The Commission has made many determinations of status under the above two Acts and appeals were made to the federal courts with reference to these

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[45] The Walter-Logan Bill was the forerunner of the Administrative Procedure Act. It was vetoed by President Roosevelt because in the meantime he had appointed the Attorney General's Committee and he desired "to await their report and recommendations before approving any measure in this complicated field." See House Doc. 986, 76th Cong., 3rd Sess., p. 4, 1940.

[46] Veterans Administration, *Information Bulletin,* 2-10, August 30, 1946, p. 1.

[47] Public Law 866, Section 11, 76th Cong., 2nd Sess. 1940.

[48] *Info. Bull.,* p. 5, footnote 47 *supra.*

[49] Letter to the author from David Farber, Special Counsel, Securities and Exchange Commission, March 29, 1949.

[50] 49 Stat. 803 (1935), see sections 2(a) (3), 2(a) (6), 2(a) (7), 2(a) (8), 2(a) (11) (d) (2) (b), 5(d), 13(d).

[51] 54 Stat. 789 (1940), see sections 2(a) (9), 3(b) (2), 3(e) (2).

decisions.[52] The Commission's opinions on declaratory rulings were expressed in 1941 in connection with administrative procedure bills then pending[53] and the theme was repeated in May 1945, when it said:

> This subsection does not make clear whether procedures and conditions relating to declaratory orders may be prescribed by the agency.
>
> Since the language of this subsection is permissive and not mandatory, we have no objection to it. However, as we have pointed out in our 1941 comments, the issuance of a declaratory order presents problems concerning the possible effect of such an order upon rights of third parties, as well as the problem of modifying or terminating the order in the event of change of circumstances. The draft we recommended contained provisions designed to take care of these considerations (pp. 402-405, 407). If the Committee prefers a shorter and possibly more flexible grant of power, we suggest that this result could be achieved by inserting in the present text of Section 5(d), after the word 'discretion', the phrase 'and subject to such limitations, terms and conditions as it deems appropriate'.

It is clear that the Commission, along with several other agencies, wants to control closely the issuance of declaratory rulings. Perhaps because of restrictive and unencouraging measures imposed by the Commission, together with the newness of the procedure, Mr. Farber wrote: "So far as I am aware the Commission has never issued a declaratory ruling pursuant to that Section nor indeed do there appear to have been any requests therefor."[54]

The Civil Aeronautics Board engages in adjudication and licensing, and it operates under a statutory requirement that hearings must be held prior to the issuance of certificates of public convenience and necessity. The Board has endeavored to help individuals in their dealings with it by informal methods and by the use of prehearing conferences. Section 5(d) of the Administrative Procedure Act does apply, but when inquiry was made as to the application of declaratory rulings by the Board, the reply was: "You may be advised that to the best of my knowledge no request has ever been made of the Board for a declaratory ruling as such."[55] It is again evident that interested persons seem loath to request guidance through this new technique.

The Department of the Interior is an executive department where the Secretary is authorized to make final administrative adjudications. These decisions relate to such matters as the issuing of grazing permits, oil and gas leases, and the classification of lands. The department is not a regulatory agency in the strict sense of the word, but it does determine private rights after hearings. It is of interest to note the impact of the Ad-

[52] *Pacific Gas & Electric Co. v. S. E. C.*, 127 F. 2d 378 (9th Cir. 1942), 139 F. 2d 298 (9th Cir. 1944), aff'd. 324 U. S. 826 (1945), and *Bankers Securities Corp. v. S. E. C.*, 146 F. 2d 88 (3rd Cir. 1944).

[53] *Hearings* before Subcommittee of the Senate Committee of the Judiciary, 77th Congress, 1st Sess., 1941, Part I, pp. 402-405, 407.

[54] See footnote 49 *supra.*

[55] Letter to the author from Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, March 31, 1949.

ministrative Procedure Act upon this agency, since it is affected by the general provisions of section 5. The Solicitor of the Department stated:

> The Administrative Procedure Act has had substantially less effect upon the activities of this Department than it has had upon the operations of the regulatory agencies of the Government.[56]

Remarking specifically about declaratory rulings, Mr. White said:

> No declaratory rulings have been issued by this Department under subsection (d) of section 5 of the Administrative Procedure Act, and no applications for such rulings have been received by this Department.[57]

The Department of Labor is an executing department and administers many statutes. Of these statutes, the only one which requires adjudication on the record after an agency hearing is the Walsh-Healey Public Contact Act.[58] The Solicitor of Labor, William S. Tyson, said:

> This agency has not had occasion to issue any declaratory rulings under that act up to the present time, nor has it adopted a procedure for handling applications for such rulings.

He went on to state that:

> In my opinion, however, it is desirable for administrative agencies to be empowered to issue binding declaratory rulings. Such rulings, like declaratory judgments in judicial proceedings, are a device for instilling greater certainty into the administrative process.[59]

The Federal Communications Commission is a regulatory agency controlling activities in the field of radio. It is authorized to issue declaratory rulings, but T. J. Slowie, Secretary of the Commission, writes that

> the Commission has issued no formal declaratory rulings since the adoption of.... the Administrative Procedure Act.

He continues:

> It should be understood, however, that the Commission frequently releases informal advisory rulings with respect to interpretations of its rules and regulations,

and

> it is the consistent practice of the Commission to refrain from passing on the propriety of particular program material of any kind prior to its presentation over the radio.[60]

Section 1.728 of the Commission's Rules and Regulations includes es-

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[56] Letter to the author from Mastin G. White, Solicitor, Department of the Interior, March 31, 1949.

[57] *Ibid.*

[58] 49 Stat. 2036 (1936), amended 56 Stat., 277 (1942), 41 U. S. C. §§35-45 (1946).

[59] Letter to the author from William S. Tyson, Solicitor, Department of Labor, April 7, 1949.

[60] Letter to the author from T. J. Slowie, Secretary, Federal Communications Commission, April 6, 1949.

sentially the same provisions as section 5(d) of the Administrative Procedure Act and has been interpreted in two cases.[61] The general policy of the Commission is apparently set forth in the closing words of the letter by Mr. Slowie:

> it is believed informal advisory rulings with respect to technical matters frequently are useful in removing uncertainty of interested parties with respect to the regulations of this Commission.

The desire to rely on non-binding advice is again present, although the Commission did issue a ruling on an inquiry initiated by itself. The ruling was rather unusual, however, for it declared a program to be a violation of the Communications Act of 1934 after the radio station had already cancelled the program and before it was ever presented. The argument for a declaratory ruling in the case shows its value and how it can be applied effectively.[62]

The National Labor Relations Board is an independent administrative agency created to prevent certain specified unfair labor practices by employers or labor organizations or the agents of either. The Board is empowered to issue orders requiring parties to cease and desist from unfair labor practices, to certify the results of secret ballots and employee representatives, to designate appropriate bargaining units, and to secure temporary injunctions preventing harmful practices. The certification of employee representatives is specifically exempted in Section 5 of the Administrative Procedure Act "because those determinations rest so largely upon an election or the availability of an election,"[63] but the board can issue declaratory rulings on other pertinent matters under its jurisdiction. In a recent letter, however, the Office of the General Counsel stated: "The Board, while authorized under the Administrative Procedure Act to do so, has not adopted a procedure for issuing declaratory rulings."[64]

The Federal Trade Commission is one of the oldest administrative agencies. It has a wide range of activities including the prevention of unfair competition and deceptive practices (especially advertising), the control over price discrimination and various corporate activities such as stock acquisition and interlocking directories, and the industry-wide elimination of unlawful practices. "From time to time the Commission issues statements of policy and administrative interpretations regarding certain trade practices, as a means of clarifying its position."[65] In addition the Commission initiates trade conferences and "these conferences constitute another method of providing certainty and predictability which has been

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[61] See Memorandum Opinion and Order, *In re Harry S. Goodman*, Federal Communications Commission, 15698 (FCC 48-420), Feb. 20, 1948.

[62] *Northern Virginia Broadcasters, Inc.* (WARL), Docket No. 8559, Aug. 5, 1948.

[63] Sen. Doc. 248, p. 261, footnote 4 *supra.*

[64] Letter to the author from the National Labor Relations Board, May 3, 1949.

[65] Letter to the author from James W. Cassedy, Associate General Counsel, Federal Trade Commission, April 22, 1949.

fostered by the Commission in recent years."[66] The Commission, however, does not seem to be ready for binding rulings because James W. Cassedy, Associate General Counsel, states it

> has issued no declaratory orders under Section 5(d) of the Administrative Procedure Act of 1946 and has not established a set procedure for entertaining and handling applications for such orders.[67]

The Federal Security Agency was established in 1939 for the purpose of grouping under one administration those agencies designed to promote the social and economic security, educational opportunity, and health of the citizens of this country. These agencies include the Bureau of Employees' Compensation, the Food and Drug Administration, the Office of Education, the Office of Vocational Rehabilitation, the Public Health Service, and the Social Security Administration. Notwithstanding the number of offices involved, the Agency writes:

> This is to advise you this Agency has not adopted any declaratory judgment procedures for any of its constituent units. We have not had occasion to make any declaratory rulings.... and cannot, therefore, furnish you with any statistics.[68]

Despite some lack of precision in terminology, the use of declaratory rulings in an agency dealing in great measure with the personal status of individuals is non-existent.

Recommendations for Implementation of Declaratory Rulings

Few formal declaratory rulings have been issued by administrative agencies since they were empowered to do so under the Administrative Procedure Act. The overwhelming consensus of opinion of the counsels for the leading agencies, however, is that binding declaratory rulings are a desirable adjudicative device and can impart greater certainty to the administrative process. Most of the agencies emphasize the beneficial functions performed by their advisory and interpretative opinions which are designed to offer a measure of help and guidance to interested individuals. The underlying, recurrent theme of the letters received by the author is that the agencies who determine private rights are loath to issue a ruling which binds them conclusively. This position reinforces their respective presentations in the hearings which preceded the passage of the Administrative Procedure Act. The agencies wanted to be excluded from the binding nature of some of the provisions of the Act, and so restrict the application of rulings so as to make them inoperative. Individuals have not been encouraged to seek declaratory rulings and it is probable that the

[66] *Ibid.*
[67] *Ibid.*
[68] Letter to the author from Robert C. Ayers, Associate General Counsel, Federal Security Agency, April 25, 1949.

conference door has not been open. The permissive nature of the declaratory ruling has been underlined in the minds of some of the agencies, and they seem to believe that a liberal interpretation of "sound discretion" means to use the rulings as little as possible.

It is true that the settlement of disputes in the early stages has been the goal of most administrative agencies, and there has been a great emphasis on informal conferences, pre-trial hearings, and clarification of controversial issues on a man-to-man basis. The important drawback in these kinds of negotiations, however, is their non-binding nature. Although most agencies say they will not "go back on their word" (written or oral) and their opinions are "morally binding" with finality, business men have learned through bitter experience that these opinions are merely advice and subsequently are ignored, altered, set aside, or modified in such a manner that they have served no useful purpose. And when individuals have proceeded on the basis of the advice given, they have often come to grief and have railed against this insecurity.

The declaratory ruling is binding and was designed to offer the certainty and security that business men were seeking. It also enhances predictability by protecting persons who rely in good faith on the administrator issuing the order. But business men do not seem to know about the declaratory ruling and agencies have not developed specialized procedures for handling applications for them. Possibly there is no great need for rulings because of the increased use of informal processes to settle disputes in the early stages, and possibly there are too many restrictions on their effective application, but it is believed that declaratory rulings can definitely improve administrative adjudication and perform the functions for which they were developed and even be extended in scope.

The declaratory ruling cannot be issued by those agencies and in those circumstances where an agency hearing on the record is not required. This restriction narrows its field of application and prevents the issuance of a ruling in instances where there is no statutory hearing procedure. Disputes arise in every type of agency where there is a need for granting advice, binding determinations and where the agency would like to do so. But the only way to secure orders which are binding upon the agency and the individual, as well as the courts taking the same view of the legal issues involved as distinguished from the facts, is to have the basic enabling statute amended granting powers requiring hearings. The Securities and Exchange Commission, for example, issues advisory opinions concerning registration requirements for proposed issues of stock. There is no statutory hearing procedure for the Commission to decide on the question of the necessity of registration, and it cannot, therefore, issue a declaratory ruling as to whether or not particular securities must be registered under the Act.[69]

[69] See Attorney General's Manual, p. 59, footnote 18 *supra.*

The Commission can only institute civil or criminal proceedings, and the entire force and benefits of the predictability feature of the ruling are nullified by the hearing requirement. It is recommended that the statutory hearing requirement be eliminated and that some form of informal negotiation suffice for the issuance of a declaratory ruling. There could be opportunity for discussions and conferences and the presentation of evidence for a record, but rigidity would be minimized.

Notwithstanding the opinions and recommendations of some writers,[70] once a declaratory ruling has been issued, based on a set of facts, and the facts remain essentially the same when the transaction is consummated or even if it is not carried to completion, the ruling should remain in effect and be binding. Even if the interested party ignores the ruling, it is still binding both upon him and the government, and it should not be abrogated merely because one party to the agreement does not see fit to abide by it. If the ruling by the agency is not acceptable, the person may seek a court review before having to proceed at his peril. Ordinarily the court will accept, and should invariably accept, the factual issues decided by the administrative agency (unless there is clear evidence of error or additional, pertinent facts are introduced which were formerly not available). The court will decide legal issues only. If further facts of a significant nature are presented to the court which were deliberately withheld at the agency hearing or conference, the court should refer the case back to the agency for another ruling and not review the case at that time. It is recommended that a declaratory ruling based on a set of facts remain in effect and be binding on all parties to the agreement, whether or not the transaction is consummated. The ruling should be effective as long as is necessary and reasonable, and each ruling should definitely state the minimum length of its effective application in every case.

The declaratory ruling is best employed in those cases where the facts can be stated with some precision and a decision as to future consequences may be made quite readily. Although it has been said "that declaratory rulings may have no place in a complex, shifting problem like that of labor relations,"[71] it is in that very field that discussions and study for its application have been going on. In his letter, William S. Tyson, Solicitor, Department of Labor, stated some late developments in the labor field:[72]

> I might add that, in line with its policy of providing greater certainty in the administration of Federal statutes, this Department has recommended amendment of the Fair Labor Standards Act so as to grant a general rule-making power to the Secretary of Labor under which he would have the power to make binding rules and regulations, and so as to protect persons who rely on such rules and regulations in good faith. Section 4(c) of H. R. 3190, introduced in the House on March 3, 1949, provides such an amendment.

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[70] See Oliphant and Traynor, *op. cits. supra.*
[71] Attorney General's Report, p. 32, footnote 9 *supra.*
[72] *Op. cit.* footnote 59 *supra.*

> The bill has been reported favorably by the Committee on Education and Labor but has not been passed by the House. At the present time the Fair Labor Standards Act does not provide general authority to issue binding rules. The Administrator issues advisory interpretations in response to requests from employers or employees, as well as interpretative bulletins, press releases, and other statements. However, these interpretations are not binding on the courts, and there is no assurance that the courts will take the same view of the law if the matters are litigated. This has made for a great deal of uncertainty as to the applicability of the Act to various business operations. The furor resulting from the Supreme Court's decisions in the 'portal-to-portal' case (*Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680) and the longshore case (*Bay Ridge Operating Co. v. Aaron*, 334 U. S. 446) emphasize the problem thus created. These situations would not have arisen if there had been available to employers a procedure by which they could have obtained an authoritative ruling from the agency.

The problem stated in the last sentence arose in 1941 concerning the administration of the Fair Labor Standards Act, when employers complained that they "don't know where they stand."[73] The difficulty still has not been resolved since that portion of the amendments to the Fair Labor Standards Act providing for the grant of general rule making powers to the Secretary of Labor was not included in the Bill as finally passed by Congress.[74] The Department of Labor should not be required to seek an amendment to the Fair Labor Standards Act in order to be empowered to issue binding rulings, but, although the Administrative Procedure Act grants general authority, this agency and other agencies are unduly restricted by the narrow provisions of section 5 of the Act. The "shifting, complex" labor relations field is ripe for the declaratory ruling which can enrich the ground and increase productivity.

It is recommended that a declaratory ruling be applicable only in specific cases as to subject matter, but the principles involved in cases which are cited as precedents (like any other order under section 3(b) of the Administrative Procedure Act) should be used to develop a body of "common administrative procedure." These principles can be used as a guide to other agencies when similar circumstances are presented. The facts in each case will be the ultimate determinant, but if a declaratory ruling has been issued previously on a similar set of facts or circumstances, it is reasonable to expect a ruling will be issued again. The interchange of procedural principles as they affect the issuance of a declaratory ruling will permit each interested agency to know what other agencies are doing in applying the provisions of section 5(d). A guiding policy or principle has been issued by the Federal Communications Commission in dismissing a petition for a declaratory ruling:

> Aside from any limitations placed upon us by the Administrative Procedure Act, the necessities of sound administrative policy require us to limit the issuance of declaratory orders to substantial controversies involving parties who have a substantial present interest in the relief sought.... It is obvious that the Commission could not in any event assume the onerous administrative burden of

[73] Senate Document 10, 77th Cong., 1st Sess., 1941, p. 66, fn. 88.
[74] See 1949 Code Cong. Serv. p. 2246.

> making advisory rulings on the infinity of possible programs and schemes which may be devised for the purposes of interesting licensees in their presentation. For even where the provisions of the Administrative Procedure Act and the Commission's Rules and Regulations dealing with declaratory rulings more generous in their scope, such a task would impose on us an administrative burden that from the standpoint of personnel alone we are unable to assume.[75]

These statements of policy and problems are true of other agencies. Since the declaratory ruling is important, with far-reaching possibilities, it is further recommended that a coordinating committee composed of officials who understand rulings be established to develop equitable rules of procedure in handling petitions for rulings and to interchange mutually profitable experience and information.

It is finally recommended that further studies be made so that rulings may be issued by more agencies, with or without the necessity for a formal statutory hearing, in those types of circumstances which were formerly considered too complicated or mutable. There appear to be wide possibilities in the fields of labor relations, trade practices, taxes, customs, finance, and ancillary activities where certainty is essential and predictability is becoming more imperative every day. Corollary to this is the suggestion that the declaratory ruling be given more encouragement and publicity by interested agencies. The business man and his representatives should know what the declaratory ruling is, what it can do for him, and what benefits may accrue to him by the proper use of it. It is desirable for administrative agencies to issue declaratory rulings because they promote the public interest, are to the advantage of the agency, and provide guidance and security to the interested parties in each case.

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[75] Memorandum Opinion and Order, *In re Harry S. Goodman,* Federal Communications Commission 15698 (F C C 48-420), Feb. 20, 1948.