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A Reexamination of Federal Agency Use of Declaratory Orders

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A REEXAMINATION OF FEDERAL AGENCY USE OF DECLARATORY ORDERS

JEFFREY S. LUBBERS[*] & BLAKE D. MORANT[**]

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INTRODUCTION

In 1984, Professor Burnele Powell conducted a study for the Administrative Conference of the United States of federal agency use of declaratory orders under § 554(e) of the federal Administrative Procedure Act (APA).[1] The study resulted in two leading articles on the subject.[2] He concluded that there was a "generally unreceptive, if not hostile view of the device" on the part of the agencies, a "sense of apprehension on the part of the public," and "a lack of elaboration in Supreme Court opinions that have discussed the procedure."[3] He also pointed to agencies' misconception of their advice-giving function,[4] and their failure to implement effective advice-giving through clearly defined regulations.[5]

Despite Powell's invitation for more "scholarly attention to the device,"[6] declaratory orders under § 554(e) remain curiously ignored. This tendency becomes particularly noticeable in light of the comparatively large attention given to petitions for rulemaking.[7] While most administrative law texts devote a separate section to cases involving petitions for rulemaking, few

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1. 5 U.S.C. § 554(e) (2000) ("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.").

2. Burnele V. Powell, *Sinners, Supplicants and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act*, 63 N.C. L. REV. 339 (1984-85) [hereinafter Powell I]; Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L REV. 277 (1986) [hereinafter Powell II].

3. Powell I, *supra* note 2, at 372.

4. *Id.* at 348-49 (noting agencies' view that advice giving is better provided in rulemaking).

5. *Id.* at 344 n.18 (demonstrating the scarcity of agency procedural regulations governing declaratory orders by the fact that only two of seven major regulatory agencies had adopted such regulations).

6. *Id.* at 374.

7. *See* William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1 (exploring the processes for consideration and disposition of rulemaking petitions). Another example includes a recent Animal Law Conference at American University that featured a panel on use of petitions for rulemaking. (Co-sponsored by the District of Columbia Bar Association's Animal Law Committee of the Environment, Energy, and Natural Resources Section; the Association of the Bar of the City of New York Committee on Legal Issues Pertaining to Animals; and the Washington College of Law, American University) (Apr. 18, 2004).

provide significant coverage of declaratory order cases.[8] This is true, despite the Supreme Court's acknowledgment of the remedial effect of § 554(e).[9] Moreover, the low degree of interest in declaratory orders seems less rational in light of the minimal transaction costs associated with their issuance.[10]

Twenty years after Professor Powell's original study, this Article attempts to supplement his work by examining contemporary uses of declarative orders, reviewing their procedural requirements and judicial treatments, and proffering arguments for their expanded use. It also seeks to place declaratory orders properly within the continuum of agency formal and informal policymaking activities. This continuum consists of a broad spectrum of administrative agency actions that include adjudication and rulemaking. Each of these two procedures has its petition process. An agency rulemaking, for example, can be initiated by the agency itself or from the outside via a petition for rulemaking under § 553(e). Similarly, an agency's declaratory order can either be initiated *sua sponte* or from the outside by a petition under § 554(e). The procedural flexibility of declaratory orders, which fit squarely within the continuum of administrative processes, supports their prudent use by agencies.

Part I of this Article reviews the potential uses of declaratory orders, concentrating on resolution of jurisdictional disputes, as well as some judicial interpretations of § 554(e). Part II examines the procedural requirements for issuing declaratory orders. Part III discusses issues related to judicial review. Part IV suggests an amendment to the procedures for declaratory orders in § 554(e), borrowing substantially from the 1981 Model State APA. The Article concludes by offering suggestions and emphasizing the merits of Professor Powell's recommendations.

This Article does not constitute a comprehensive examination of the utility of declaratory orders. Instead, it attempts to serve as a catalyst for

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8. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 596-609 (rev. 10th ed. 2003) (the leading text which includes a section on petitions for rulemaking, but nothing about declaratory orders). Powell also lamented that:

> 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.

Powell I, *supra* note 2, at 374.

9. *See* Powell I, *supra* note 2, at 359 (explaining the Supreme Court's interpretation of § 554(e) as a "procedure to control bureaucratic excesses and defy the dilatory").

10. Declaratory orders can be issued in the context of an ongoing adjudication, or they can be issued in a separate proceeding. The courts have ruled that such proceedings need not necessarily have all the attributes of formal adjudication. Thus, the transaction costs associated with the implementation of declaratory orders remain low.

the discussion of lingering issues that Professor Powell insightfully raised in his work during the 1980s.

As a fundamental premise in this exercise, we note that declaratory orders constitute flexible, procedural tools with significant utility, benefiting both agencies and private parties. Agencies (and regulated parties) should therefore consider using declaratory orders to resolve preliminary matters involving jurisdictional questions. In such cases, the declaratory order can efficiently and expeditiously determine the appropriate venue of pending claims or disputes, thereby reserving resources for subsequent litigation of substantive issues associated with a claim. Declaratory orders may also serve to quickly settle disputes with minimal costs. These more focused uses of this procedural tool may benefit the private party and the agency.

I. THE FUNCTIONALITY OF ADMINISTRATIVE DECLARATORY ORDERS

A. Context and Background

The relative disuse of declaratory orders is curious given that they exist on the menu of administrative procedures available to agencies. The adjudicative functions and procedures of federal administrative agencies often mirror those of their judicial counterparts. For example, agency adjudications,[11] which constitute administrative processes that affect individualized rights or interests,[12] often resemble judicial trials. Administrative adjudicative proceedings often include such typical trial-like tools as discovery, pretrial motions, and subpoena requests.[13]

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11. The federal statutory definition of "adjudication" relates more to process constraints and resultant agency action. Section 551(7) of the APA, 5 U.S.C. § 551 (2000), states that "'adjudication' means agency process for the formulation of an order." The term "order" consists of some final agency disposition generated in a process "other than rule making but including licensing." 5 U.S.C. § 551(6) (2000); *see also id.* § 554 (providing the required procedures in a federal agency adjudication). For more information on what constitutes an agency adjudication, see A GUIDE TO FEDERAL AGENCY ADJUDICATION (Michael Asimow, ed., ABA Section of Administrative Law and Regulatory Practice 2003).

12. *See* Joanne Constantino et al., *Concern With Private and Public Rights*, 2 AM. JUR. 2D *Administrative Law* § 2 (2002) (defining the exercise of private rights through the Executive branch as defined by the Legislative branch while not intruding on the constitutional domain of the Judicial branch); *see also* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that a pre-termination evidentiary hearing is required before public assistance benefits can be cut); Wheeler v. Montgomery, 394 U.S. 970 (1969) (mem.) (noting probable jurisdiction where the adequacy of an informal conference prior to the termination of welfare benefits was at issue); Lamb v. Principi, 284 F.3d 1378, 1381 (Fed. Cir. 2002) (finding that the court had jurisdiction over the plaintiff's constitutional claim regarding the termination of his veteran's benefits without notice); Kelly v. Wyman, 294 F. Supp. 893, 903 (S.D.N.Y. 1968) (noting that the proposed termination of welfare benefits requires the determination of adjudicative facts); CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 11.10 (1997 & Supp. 2d 2003-04) (explaining the general principles of administrative adjudication).

13. *See* A GUIDE TO FEDERAL AGENCY ADJUDICATION, *supra* note 11 (explaining the

Although adjudication by executive branch agencies was once controversial,[14] the Supreme Court approved it in 1932,[15] and it is now a familiar activity of most administrative agencies,[16] both in the "formal" and "informal" varieties.[17]

Agencies' adoption of the judicial model of decisionmaking through adjudication has not, however, been complete. Generally included in a court's arsenal of judicial authority is the power to grant declaratory relief.[18] For many years, courts have willingly exercised their declaratory authority where sufficient justification exists. This largely equitable action might include injunctive relief[19] or some other action that may not necessitate a full trial or hearing.

Agencies similarly possess the discretionary authority to "issue a declaratory order to terminate a controversy or remove uncertainty."[20] Yet, despite the Supreme Court's approval of this method,[21] and its significant

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processes of adjudication under the Administrative Procedure Act); *see also* Michael Cox, *The Model Adjudication Rules (MARs)*, 11 T.M. COOLEY L. REV. 75 (1994) (presenting the MARs as submitted to the Administrative Conference of the United States).

14. *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (chronicling the contentious history leading to the passage of the Administrative Procedure Act); Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. J. AM. U. 65, 65-68 (1996) (emphasizing that a controversy regarding formal administrative adjudication played an important part in the original drafting of the bill that would become the Administrative Procedure Act).

15. Crowell v. Benson, 285 U.S. 22, 50 (1932).

16. *Compare* Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 412 (1995-96) (discussing the widespread availability and use of administrative adjudication), *with* Jerry L. Mashaw, *Organizing Adjudication: Reflections on the Prospect for Artisans in the Age of Robots*, 39 UCLA L. REV. 1055, 1055-56 (1992) (pointing out that "adjudication, at least in the form of adversary, trial type proceedings, is profoundly anti-bureaucratic.").

17. *See* William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 94 (2001) *and* Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1975-76) (describing the use of informal adjudicatory actions as described by the Administrative Procedure Act); *see also* Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1116 (2001) (discussing formal adjudications as implemented by the Environmental Protection Agency); Rev. John J. Coughlin, O.F.M., *A Comparison of the Administrative Law of the Catholic Church and the United States*, 34 LOY. L.A. L. REV. 81, 82 (2000-01) (comparing different adjudication methods implemented in the United States). *But see* Lubbers, *supra* note 14, at 70-74 (discussing how federal agencies have "drifted" away from formal adjudication, using ALJs in favor of less formal "non-ALJ" adjudication).

18. *See* the Declaratory Judgments Act, 28 U.S.C. § 2201(a) (2000) (noting that such declarations will have the effect of a final judgment, subject to normal review).

19. *See id.* § 2202; *see also* Powell v. McCormack, 395 U.S. 486, 499 (1969) (holding that "[a] declaratory judgment can [] be used as a predicate to further relief, including an injunction").

20. 5 U.S.C. § 554(e) (2000).

21. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973) (upholding FDA authority to use a declaratory order to remove uncertainty over whether a particular drug is a "new drug"); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 367-73 (1969) (upholding an FCC declaratory order imposing "equal time" obligations on broadcast stations).

use by federal regulatory agencies such as the Federal Trade Commission (FTC)[22] and the former Interstate Commerce Commission (ICC),[23] many agencies have made little use of this procedural tool.[24]

An agency may issue a declaratory order on its own initiative or at the request of a petitioner. When issued, declaratory orders are as binding and judicially reviewable "as like orders," but whether to issue one is within the discretion of the agency.[25] In this respect, petitions to issue a declaratory order resemble petitions to initiate a rulemaking under § 553(e) of the APA.[26]

The fact that the declaratory order provision falls within the formal adjudication section of the APA (§ 554) would seemingly require agencies to use formal adjudicatory procedures to issue such an order.[27] In many such proceedings, however, the facts are not in dispute; therefore, the agency can use a summary decision process. Moreover, in recent years, numerous courts have upheld agency declaratory orders issued after more informal "paper hearing" processes that are not significantly different from the notice-and-comment rulemaking process.[28]

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22. The FTC has issued declaratory orders on occasion. *See* AMREP Corp., 100 F.T.C. 488, 488 (1982) (demonstrating jurisdictional findings and order issued pursuant to 5 U.S.C. § 554(e)); *see also Chesebrough-Ponds. Inc.*, 66 F.T.C. 252, 266 (1964) (finding that a cease-and-desist order was not appropriate where respondents had immediately discontinued the disputed practice when challenged by the FTC but, at respondents request at oral argument, the agency issued an order under § 554(e) to declare its view of what the law required); *Tavlor-Friedsam Co.*, 69 F.T.C. 483, 502 (1966) (Comm'r Elman, dissenting) (asserting that the Commission should have issued a declaratory order as an alternative to a cease-and-desist order).

23. *See* West Coast Truck Lines, Inc. v. Am. Indus., Inc., 893 F.2d 229 (9th Cir. 1990) (upholding the defendant's request for and reliance on ICC's declaratory order declaring basis for plaintiff's law suit contrary to law upheld); Merchs. Fast Motor Lines, Inc., v. ICC, 5 F.3d 911 (5th Cir. 1993) (upholding a series of ICC declaratory orders). Both cases are discussed below.

24. *See* Powell I, *supra* note 2, at 373 (1985) (speculating that this is because in many situations, regulatory agencies are reluctant to afford immunity on potential wrongdoers by defining the boundaries of permissible conduct).

25. *See* Climax Molybdenum Co. v. Sec'y of Labor, 703 F.2d 447, 452 (10th Cir. 1983) (upholding the Federal Mine Safety and Health Review Commission's denial of a declaratory order, and recognizing that in exercising its discretion, the agency provided reasonable justifications for the denial).

26. *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

27. The Attorney General's Manual on the APA so presumes: "This grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section [554] 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 Manual on the Administrative Procedure Act* (1947) at 59, *reprinted in* FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (William F. Funk et al. ed., ABA Section of Administrative Law and Regulatory Practice 3d ed. 2000).

28. *See* Am. Airlines, Inc. v. Dep't of Transp., 202 F.3d 788, 796-97 (5th Cir. 2000) (holding that the declarative order was properly issued after an informal adjudication process that included a form of note and comment); *see also Merchs. Fast Motor Lines, Inc.*, 5 F.3d at 914-15 (finding that an agency declaratory order, issued after it "requested and reviewed numerous comments," was not arbitrary or capricious); Texas v. United States,

Similar to the Declaratory Judgment Act, the declaratory order provision was included in the APA to develop predictability by authorizing binding determinations "which dispose of legal controversies without the necessity of any party's acting at his peril upon his own view."[29] Shortly after the enactment of the APA, Professor Kenneth Davis saw the potential of declaratory orders. He provided the example of the Federal Communication Commission's (FCC's) efforts to regulate radio programming as an arena for its use. Today, as the FCC seemingly enters into a new era of broadcast regulation,[30] Davis's insight seems more relevant than ever:

> The declaratory order may be even better suited to regulation of radio programs than the cease-and-desist order. The declaratory order may be either affirmative or negative, whereas the cease-and-desist order is

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866 F.2d 1546, 1555 (5th Cir. 1989) (holding that the APA's hearing requirements were satisfied without providing for a formal oral hearing and the cross-examination of witnesses).

29. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 30 (1941). The two leading drafters of the APA wrote in the 1940s of the need for a mechanism to declare the legality of planned commercial actions. *See* Walter Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 ANNALS AM. ACAD. POL. SCI. 153 (1942), *and* Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 228-34 (1949) (urging greater agency use of declaratory orders).

30. The FCC has recently commenced review of, and possible sanctions for, sensational programs that allegedly violate standards of indecency. Regarding litigation involving Howard Stern, see *In re* Infinity Broad. Operations, Inc., 19 F.C.C.R. 5032 (Mar. 8, 2004) (finding Infinity Broadcasting apparently liable for $27,500 for airing material during the *Howard Stern Show* (radio broadcast July 26, 2001) that violated restrictions against the broadcast of indecent materials); *see FCC Finds That Broadcast of "F-Word" During Golden Globe Awards Was Indecent and Profane* (Federal Communications Commission), Mar. 18, 2004, at 1 (reporting that the FCC issued an order concluding that the live broadcast of the phrase "f***ing brilliant" during *Golden Globe Awards 2003* was in violation of statutory prohibitions against indecency and profanity), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245133A1.pdf; *FCC Affirms Forfeiture Against Emmis for Violation of Indecency Rules* (Federal Communications Commission), Apr. 8, 2004, at 1 (reporting that the F.C.C. affirmed a $14,000 fine against Emmis Radio License Corporation for willfully broadcasting indecent material on the "Mancow's Morning Madness" program), *available at* http://hraunfoss.fcc.gov/ edocs_public/attach match/DOC-245908A1.pdf; *In re* Clear Channel Broad. Licensees, Inc., 19 F.C.C.R. 6773 (2004) (finding three Clear Channel subsidiaries apparently liable for $495,000 for willfully and repeatedly airing program material during two segments of the *Howard Stern Show* (radio broadcast Apr. 9, 2003) that violated federal restrictions on the broadcast of indecent material); *Commission Proposes Statutory Maximum Fine of $495,000 Against Subsidiaries of Clear Channel Communications, Inc. For Apparent Multiple Violations of Indecency Rules* (Federal Communications Commission), Apr. 8, 2004 (reporting that the FCC's April 8, 2004 Notice of Apparent Liability against Clear Channel suggests the statutory maximum fine available for the violations and constitutes the first time in which the Commission imposed fines based on separate utterances), *available at* http://hraunfoss.fcc.gov/edocs_pub lic/attachmatch/DOC-245911A1.pdf). For a description of the possible FCC sanction for Janet Jackson's alleged "wardrobe malfunction," see *FCC Chairman Powell Calls Super Bowl Halftime Show a 'Classless, Crass, Deplorable Stunt'* (Federal Communications Commission), February 2, 2004, at 1 (reporting that FCC Chairman Michael Powell has ordered the FCC to investigate Janet Jackson's Super Bowl halftime incident), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243435A1.pdf.

> necessarily negative . . . . They may be issued on the application of private parties or through proceedings instituted by the Commission on its own motion . . . . In every respect the declaratory order gives promise of being a thoroughly satisfactory procedural device for the regulation of radio programs; its use would assure appropriate procedural safeguards, opportunity for judicial review, and relief from the rigidity of deprivation of licenses as the sole sanction.[31]

Davis's enthusiasm was tempered by his caution that he was being circumspect in his proposal, limiting it to the suggestion that in the many situations where the Commission wishes to state its policy, declaratory orders can be more useful than advisory opinions, dicta, announcements or opinion letters.[32]

But despite Davis's early enthusiasm for the prudent use of declaratory orders and the commonplace nature of the declaratory judgment actions by Article III courts, agencies and interested parties have been slow to warm to the procedure. In fact, few scholars have followed Professor Powell to inquire into this seeming aversion.[33]

B. The Use of Declaratory Orders by Federal Agencies to Expedite the Resolution of Jurisdictional Disputes

Given the procedural simplicity of issuing declaratory orders, it is surprising that federal agencies are reluctant to issue them. When employed prudently, these orders can expeditiously resolve preliminary, yet foundational, issues related to jurisdiction in the context of adjudication.

Jurisprudential disputes often arise when potential targets of enforcement actions seek reassurance that they are not covered by a particular agency statute or regulation. The proactive use of declaratory orders by federal agencies could resolve these matters quickly and efficiently.

Professor Powell provided a concrete example of a situation where a declaratory order proceeding would have been more efficient for both parties than an enforcement adjudication. In that case, the court of appeals, three years after the alleged illegal conduct, held that the Federal Mine Safety and Health Review Commission (FMSHRC) had abused its

31. Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 203-04 (1950) (footnotes omitted).

32. *See id.* at 204.

33. *But see* Randolph May's series of articles suggesting that the FCC make greater use of declaratory orders instead of rulemaking in certain situations, *infra*, notes 57-61.

discretion in applying a regulation to a company's conduct.[34] Powell observed that:

> Issuance of a declaratory order would have provided a more efficient way to resolve the dispute. If Phelps Dodge had obtained a declaratory order, the dispute, which involved no contested issues of fact, could have gone directly from the Commission to the court of appeals. The matter could have been resolved in six months. An alternative scenario is also conceivable. If Phelps Dodge had anticipated the Commission's enforcement action, the corporation could have asked for an immediate declaration whether the regulation in question applied to the practices challenged by the Commission. If such a request for a declaratory order had been made and granted, the parties' legal fees and time costs would have been greatly reduced.[35]

Powell's example of FMSHRC's enforcement against Phelps Dodge presents several salient points. The concerned party may face potential losses or liability if she waits for administrative action that might answer or resolve the controversy. 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 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.[36] If the party attempts to challenge the unclear policy directly in an Article III court, she risks summary dismissal on the basis of standing, ripeness, or exhaustion of remedies. In such cases, a petition that seeks to compel the agency to determine the jurisdictional question might benefit both the concerned party and the agency, which may ultimately benefit from judicial endorsement of its jurisdiction over the matter.

Several cases decided after publication of Professor Powell's articles well illustrate the creative use of petitions for declaratory orders by

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34. Phelps Dodge Corp. v. Fed. Mine Safety & Health Review Comm'n, 681 F.2d 1189, 1193 (9th Cir. 1982) (finding that an agency safety rule pertaining to hazards of electrical shocks was incorrectly applied to hazards attendant to removal of rocks from a chute).

35. Powell II, *supra* note 2, at 288.

36. *Id.* (discussing the declaratory order's efficiency in eliminating other uncertainties in the case that would normally be left to be determined in the hearing).

regulated parties. In the first case,[37] a trucking company (West Coast) sued another company (American Industries) to recover "undercharges"[38] on its shipment. American Industries asserted that the recovery of undercharges violated federal law, and asked the district court to refer the issue to the ICC. The court declined to formally refer the issue, but stayed the proceedings to allow American Industries to file a petition for a declaratory order with the ICC. It did so, and the ICC ruled in American Industries' favor. The district court then dismissed West Coast's suit without prejudice on the grounds that it lacked jurisdiction to review the ICC's order. The Ninth Circuit first reviewed the district court's initial determination to stay the proceedings, and found it appropriate under the doctrine of primary jurisdiction. The court then found that, because the declaratory order was a final order reviewable directly in the court of appeals, and the time limit for such review had passed, the ICC order was no longer reviewable. The Ninth Circuit then decided that, under principles of res judicata (namely, that the agency was acting in a judicial capacity and the issue presented was actually litigated before the agency), the ICC's order had preclusive effect and the district court should grant summary judgment to American Industries.

In another ICC case,[39] an Association of Texas Warehousemen was concerned about a ruling of the Texas Railroad Commission concerning out-of-state shipments temporarily stored in Texas warehouses and then shipped to another Texas location. The state agency explained that it considered the second leg of the shipment to be within its jurisdiction because that leg did not constitute interstate commerce. The Association, fearing state rate regulation, petitioned the ICC for a declaratory order declaring that the entire shipment (both legs) was interstate. The ICC first found that the risk of imminent enforcement by the Texas agency presented enough of a controversy to warrant instituting a § 554(e) proceeding. The ICC then issued an order describing in some detail the nature of such shipments, and ruled that they were interstate. The Texas agency and some state trucking associations petitioned for review. They first argued that the ICC's declaratory order was "impermissibly broad"[40] and that it was a:

> [G]eneralized, global declaration of interstate jurisdiction based on an overly broad and vague record . . . [and that it] implicates an unknown multitude of shippers, carriers, products, and shipping patterns and that

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37. West Coast Truck Lines, Inc. v. Am. Indus., Inc., 893 F.2d 229 (9th Cir. 1990).

38. *See id.* at 230 (defining undercharges as "the difference between the rate [West Coast] filed with the ICC and the lower figure it negotiated with and collected from American Industries").

39. Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911 (5th Cir. 1993).

40. *Id.* at 915.

> the breadth of the order therefore makes any determination of shipper intent impossible.[41]

The court rejected this argument, explaining that the agency had not abused its broad discretion to grant or decline declaratory relief. In reviewing the merits, the court found the order to be adjudicatory,[42] with a record that supported the order. The court stated:

> Petitioners misunderstand the nature of the ICC's order. The declaratory order simply 'determine[s] the legal consequences of the factual predicate presented' by the warehousemen. The order would not insulate the warehousemen from a state regulatory proceeding if facts are presented which are different from those assumed in the declaratory order.[43]

A DOT case, *American Airlines, Inc. v. Department of Transportation*,[44] involved the use of Dallas' Love Field to serve as an airport for interstate service. A 1980 federal law banned most interstate service from Love Field. One of several exceptions to this law allowed commuter service that employed the use of an aircraft with a passenger capacity of no more than fifty-six passengers. Congress later made clear that this could include service by planes (below 300,000 pounds) that had been reconfigured to include only fifty-six or fewer seats. Various carriers proposed long haul service with such planes, and the city of Fort Worth sued in state court to block the service. While the state suit was pending, the city of Dallas filed a federal suit against DOT and Fort Worth requesting declaratory relief on essentially the same issues involved in the state action.

At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated a declaratory order proceeding, informing the parties that it intended to rule on the "federal law issues," and allowing the parties an opportunity to submit comments (later extended) on these issues. After extending the comment period, DOT ultimately issued a declaratory order that resolved five questions it had set forth, and basically upheld the rights of the applicants to provide the new service, within the parameters of the federal restrictions. The Fifth Circuit upheld the order against various procedural and substantive challenges.

The ICC and DOT cases described above document the utility of declaratory orders. In each case, the regulated parties secured their individual interests and simultaneously furthered the interest of the regulating agency that sought judicial endorsement of its jurisdiction.

In addition to these ICC and DOT cases, there are other, more

41. *Id.* (internal quotations and citations omitted).

42. *See id.* at 916-17 & n.9 (defining adjudication as the process of an agency resolving certain issues presented by petitioners in a specific factual context).

43. *Id.* at 918 (citations omitted).

44. 202 F.3d at 788.

contemporary controversies that illustrate the flexibility of the declaratory process. The Office of the Comptroller of the Currency (OCC), an agency within the U.S. Department of the Treasury, enforces the federal statute that authorizes national banks' real estate lending activities. This statute provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."[45] Recently, some states became concerned that the OCC was not doing enough to enforce against predatory lending practices, and enacted stronger fair lending statutes. A leading example is the Georgia Fair Lending Act (GFLA) enacted in October 2002,[46] which "restricts the ability of creditors or servicers to charge certain fees and engage in certain practices for three categories of loans defined by the GFLA: 'home loans,' 'covered home loans,' and 'high-cost home loans.'"[47]

In January 2003, National City Bank of Indiana requested a "determination or order" that the GFLA does not apply to National City because the state law is preempted by the OCC's statutory and regulatory authority over national banks. OCC's response was quite interesting. First, it issued two advisory letters setting forth standards "that should assure that national banks are not directly involved, or indirectly associated with, predatory or abusive lending practices." The OCC also published a "Notice of Request for Preemption Determination or Order" in the *Federal Register* and requested comments.[48]

Six months later, on August 5, 2003, after receiving 76 comments, the OCC issued its "Preemption Determination and Order,"[49] which concluded "that the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law."[50] Therefore, the OCC issued "an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia."[51]

The OCC noted, however, that it declined to make a broader ruling, which National City requested, to address "whether Federal law occupies the field of real estate lending regulation, such that no state real estate

45. 12 U.S.C. § 371(a) (2000).

46. GA. CODE ANN. §§ 7-6A-1-13 (2004).

47. This description is from OCC's Notice of Request for Preemption Determination or Order, 68 Fed. Reg. 8959 (Feb. 26, 2003).

48. *Id.* (creating a 30-day comment period as requested by National City Bank, NA and its subsidiaries).

49. 68 Fed. Reg. 46,264 (Aug. 5, 2003).

50. *Id.*

51. *Id.*

lending law applies to national banks or their operating subsidiaries."[52] The OCC explained:

> [O]ur Determination and Order does not take up that issue. National City's request asked us to review only one state's law, the GFLA. A conclusion that Federal law occupies the field of real estate lending regulation would have implications beyond the applicability of the Georgia law. For that reason, we believe it is appropriate to consider the question of occupation of the field, as that theory may apply in the case of real estate lending, in a rulemaking. Contemporaneously with the issuance of this Determination and Order, therefore, we are initiating a rulemaking that addresses that issue.[53]

In issuing the order, the OCC asserted that it was "expressly authorized by [12 U.S.C. § 371],"[54] quoted above. The agency, however, also cited 5 U.S.C. § 554(e). In doing so, the OCC argued that "considerable case law and agency practice of issuing orders" supported their view that no opportunity for a hearing was required.[55]

Interestingly, one interested party argued that the issuance of the order/determination should be delayed because the agency failed to meet the requirements of Executive Order 13,132, which requires intergovernmental consultation in a *rulemaking* if a rule preempts state law. The OCC seemed to accept that the Executive Order applied to its issuance, but claimed that "the consultative process [required by the Executive Order] ha[s] been met by our solicitation (and receipt) of comment from interested parties."[56]

Another example of the potential utility of the declaratory order is presented by the ongoing debate in the FCC over whether and how "Voice-over Internet Protocol" (VoIP) (often called "internet telephony") services should be regulated. As Randolph May has written, "[t]his is an important public-policy question with ramifications for the telecom industry's future as well as for our nation's economy."[57] In this situation, regulated parties have sought to invoke the declaratory order process, but the FCC may prefer a broader inquiry. May has reported that the FCC is presently considering four separate petitions for declaratory orders on aspects of this issue. One is from an internet telephony company that seeks a ruling that its service is not a regulated communications service, but rather an

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52. *Id.* at 46,265.
53. *Id.*
54. *Id.* at 46,281.
55. 68 Fed. Reg. at 46,281 n.113.
56. *Id.* at 46,281; *see also Am. Airlines*, 202 F.3d at 803-04 (finding that NEPA applied to a DOT declaratory order, but that an environmental impact statement was not required in the circumstances presented).
57. Randolph J. May, *The Metaphysics of VoIP*, CNET NEWS.COM, *available at* http://news.com. com/2102-7352_3-5134896.html. (last modified Jan. 5, 2004).

unregulated information service. Another is from a broadband-based VoIP service seeking a similar ruling. Two others are from larger long-distance providers seeking a declaration that calls made on regular phones that travel in part over facilities using the Internet be exempted from access charges normally paid to local phone companies.[58]

May points out that the FCC's response has been an announcement "that [the agency] intends very soon to open a comprehensive new rulemaking proceeding with the idea of developing an overall regulatory framework for VoIP."[59] He concludes that this may not be the best way for the FCC to proceed:

> In theory, this may sound good: Rather than make decisions about various VoIP issues in an ad hoc fashion, think globally!
>
> Here's the rub: While broad, generic rules often make sense for establishing new policies applicable to an entire industry, in this instance, this approach probably won't work well.
>
> Consistent with its recent practice, commission officials have indicated that the rule-making notice, soliciting public comment, will be framed in a very open-ended fashion, covering the entire range of potential issues. Among them are VoIP's regulatory status; whether access charges, universal service contributions and taxes apply; whether 911 services should be mandated; and whether VoIP phones can be tapped by law enforcement officials. But history has shown that open-ended comment invitations encourage parties to toss everything but the kitchen sink into the rule-making stew.
>
> The likely result will be to create a lengthy period of uncertainty. Opposing interests will have a ready-made forum for continually offering up new facts—and arguing fresh issues—in an effort to keep the agency from reaching definitive conclusions that regard all the potential issues identified . . . bringing unfocused regulatory proceedings to a timely conclusion.
>
> Moreover, an open-ended proceeding fosters a more regulatory outcome than desirable. With a potpourri of issues up for grabs simultaneously, the agency's five commissioners, egged on by the various competing interests, are more likely to engage in horse-trading compromises that ratchet up the level of regulation.[60]

In the end, May concludes that: "One practical way to proceed would be for the FCC to create a VoIP policy framework simply by deciding on the individual petitions brought before it in the least regulatory way. By

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58. *See* Randolph J. May, *VoIP Regulation: A Plea for Procedural Modesty*, CNET NEWS.COM, *available at* http://news.com.com/2010-7352-5152699.html (last modified Feb. 3, 2004) (discussing the petitions in front of the FCC).

59. *Id.*

60. *Id.*

deciding each one narrowly on its merits, the agency is more likely to avoid regulatory overreaching."[61]

As the cases and examples explained above demonstrate, declaratory orders potentially can be efficient tools that resolve pivotal issues related to jurisdiction and preserve resources for litigation of the substantive issues of a claim. The ensuing efficiency inures to the benefit of the agency, the individual claimant and, ultimately, the taxpaying public.[62]

II. THE PROCESS REQUIRED TO ISSUE DECLARATORY ORDERS UNDER § 554(e) OF THE APA

A fundamental question involves the process required to issue a declaratory order. As mentioned above, the declaratory order provision is placed in the formal adjudication section of the APA. This has led several treatise writers to observe that its use is limited to situations "when the agency decision must be based on a formal trial type hearing."[63]

Davis opined that the limitations caused by the statutory placement were unfortunate and "seem[ed] to have little rational foundation and [we]re probably the product of inadvertence."[64] In returning to his FCC example, Davis posed the following hypothetical:

> Suppose, for example, a broadcasting station wants to refuse to broadcast a particular political speech and, since such a refusal is sometimes

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61. *Id.*; *see also* Randolph J. May, *New Rules for New Tech: With emerging Internet phone services, the FCC should think about going step-by-step*, LEGAL TIMES (Mar. 29, 2004) (arguing that the FCC should rely on adjudication rather than rulemaking to set policies on evolving technologies like the VoIP).

62. *See* Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1245 (1985) (explaining that a declaratory order may also serve as a potential tool to facilitate an agreement between the agency and a challenger to settle pending litigation over the legality of a rulemaking); *see also* Environmental Protection Agency Policy on the Issuance of Comfort/Status Letters, 62 Fed. Reg. 4624 (Jan. 30, 1997) (stating that it is not unusual for parties to settle court challenges to agency rulemakings and that in exchange for the challenger's offer, the agency could agree to issue a declaratory order, a less formal staff advisory opinion, or a general counsel's letter agreement (sometimes called a "comfort letter") that pledges not to sanction the challenger for the spelled-out activities). "Comfort/status letters" are issued by the EPA to interested buyers of potentially contaminated property. The letters help interested buyers understand the potential for or actual agency involvement at the respective sites. *Id.* The informal and low-cost approach of the declaratory order, advisory opinion, or letter of agreement carries less risk of lengthy litigation and also secures the challenger's interests.

63. *See* ERNEST GELLHORN & RONALD LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 181 (4th ed. 1997); *see also* CHARLES H. KOCH, 1 ADMINISTRATIVE LAW AND PRACTICE § 2.40 (1985) ("Since this provision appears in the section on formal adjudication, the drafters must have envisaged this devise as auxiliary to formal adjudication."); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.21 (3d ed. 1991) ("The grant of authority to agencies is limited by the introductory language of the relevant APA section so that declaratory orders are authorized only with respect to matters that are required by statute to be determined on the record after opportunity for an agency hearing."). This is in accord with the original view of the Attorney General. *See supra* note 27.

64. Davis, *supra* note 31, at 230.

permissible and sometimes not, it seeks a clarification from the FCC. The FCC has power to give an advisory opinion, but can it give a binding determination which will be judicially reviewable? Does the Communications Act somehow require a hearing with a determination on the record? The Act requires such a hearing before the Commission may revoke or refuse to renew a license, and the refusal to broadcast the speech may be relevant to a license proceeding. But so may it be relevant to a rule-making proceeding which does not require a hearing. The declaratory-order proceeding is neither a license proceeding nor a rule-making proceeding. The Communications Act, having no provision for a declaratory order, has no provision for a hearing before issuing a declaratory order. Then must the legality of refusing to broadcast the speech be determined on the record after opportunity for an agency hearing? The answer is that the question falls into the middle of a statutory hiatus—the question does not fit the legislative arrangement. We are therefore forced to turn to the legislative history . . . .

The Senate Committee, referring to declaratory orders, said: "[S]uch orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section." The House Committee made an almost identical statement . . . The conclusion that the FCC may issue a declaratory ruling in our hypothetical case in spite of the introductory clause of § [554] is consistent with statutory language, is supported by legislative history, and is impelled by practical needs.[65]

As demonstrated below, courts have routinely sustained this practical interpretation.

A. Formal Adjudication Is Not Required

Courts have clearly ruled that agencies may issue binding, judicially reviewable orders without following all the formalities of APA formal adjudication.[66] The agency must, however, engage in some suitable measure of process to ensure that issued orders are properly granted. Informal adjudication allows for procedural flexibility, and courts have

65. *Id.* at 231-32.

66. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 373, 380 (1969) (reviewing and upholding an FCC declaratory order imposing "equal time" obligations on a broadcast station, although "FCC did not comply with all of the formalities for an adjudicative proceeding"); *see also Weinberger*, 412 U.S. at 626, discussed *supra* note 21; Powell I, *supra* note 2, at 359 n.75 (discussing *FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978), and *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) to illustrate the agencies' use of a "paper hearing" process, i.e., notice-and-comment procedures, to obtain the views of affected parties and other interested persons was upheld). *See, e.g.*, Texas v. United States, 866 F.2d 1546, 1555 (5th Cir. 1989) (finding the "paper hearing" provided the parties with adequate opportunity to comment and was well within the APA guidelines for hearings).

generally been supportive of the use of such procedures to issue declaratory orders.

Perhaps the most frontal, procedural challenge to a declaratory order occurred in *American Airlines*[67] the facts of which are discussed in Part I(A), *infra*. In *American Airlines*, the agency had basically provided a notice-and-comment process. The reviewing court approved the DOT's "informal adjudication" procedures, despite several challenges based on inadequate notice, improper ex parte contacts, and failure to treat its issuance as rulemaking under § 553 notice-and-comment procedures. The court also accepted the use of informal adjudication procedures without much discussion.[68]

DOT, the court ruled, properly disregarded the APA's notice requirements for formal adjudications. The court found that, in the absence of a statute requiring an agency to conduct its adjudication "on the record after opportunity for agency hearing," an agency could define its own procedures for conducting an informal adjudication.[69] The court ultimately concluded that DOT's procedures, which included identification of the legal issues and the allowance of comments during an extended period, met the minimum notice requirements for informal adjudications.[70] The court also found that Fort Worth's challenge of the DOT failure to notify the parties of its consideration of a factual issue (the effect of increased service at Love Field on DFW Airport) had no merit.[71]

The court similarly rejected claims based on improper ex parte contacts allegations. It noted that the APA's ex parte prohibitions do not cover informal adjudications. Moreover, the DOT did not violate its own rules governing this issue.[72]

Finally, the court rejected the argument that "DOT's order amounts to a substantive rule subject to the notice and comment provision of § 553."[73] The court, citing the familiar maxim that "(a)gencies have discretion to

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67. 202 F.3d at 788.

68. *Id.* at 796-97 (citations omitted) (stating that DOT issued its declaratory order after conducting an informal adjudication, pursuant to its authority under 5 U.S.C. § 554(e) to "'issue a declaratory ruling to terminate a controversy or remove uncertainty'" (citing 5 U.S.C. § 554(e)); *see also Texas*, 866 F.2d at 1555 (describing that the declaratory order "belongs to the genre of adjudicatory ruling").

69. *Am. Airlines*, 202 F.3d at 797 (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655-56 (1990)).

70. *Id.* (citing Indep. U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 923 (D.C. Cir. 1982)) (finding a court-inferred requirement of notice and comment "as a necessary means of carrying out" judicial review).

71. *Id.* (finding that the formal notice requirement in § 554(b) did not apply, the parties had effective notice, and Fort Worth had a sufficient opportunity to present evidence).

72. *Id.* at 798 (noting that communications fall outside of the regulations because they took place prior to the interpretation proceeding and did not involve the merits of the case).

73. *Id.* at 797.

choose between adjudication and rulemaking as a means of setting policy,"[74] stated:

> In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action.... Since the APA defines "adjudication" as the "agency process for formulating an order," 5 U.S.C. § 551(7), and DOT classifies its ruling as a declaratory order, we find that the agency engaged in adjudication rather than rulemaking. Furthermore, because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding.[75]

The DOT and ICC decisions establish that agencies retain considerable discretion to determine the procedures used to issue declaratory orders. They further demonstrate Professor Powell's point that "section 554(e) can free proceedings from the 'strait jacket' of individualized adjudications and can substantially reduce agency time commitments."[76]

B. The Declaratory Order Process Within the Administrative Procedure Continuum

It is apparent from the cases discussed herein that declaratory order proceedings have much in common with their policymaking cousins—rulemaking and informal adjudication. In fact, declaratory orders fit appropriately within the administrative process continuum. Rulemaking exists in an informal/formal hybrid, and adjudication varies along an informal/formal scale as well.[77] Thus, both of these decisionmaking processes establish an administrative process continuum, with informal procedures at one end and formal procedures on the other. To address specific factual or policy decisions such as jurisdictional authority, an agency may use either rulemaking or adjudication, and within the constraints of applicable statutes, may employ either informal or formal procedures as established within the administrative continuum. The selection of procedures that will have the appropriate level of formality raises several contextual questions: (1) Is the policy being considered a

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74. *Id.*

75. *Id.* at 797-98 (citing British Caledonian Airways, Ltd. v. Civil Aeronautics Bd., 584 F.2d 982, 992 (D.C. Cir. 1978)).

76. Powell I, *supra* note 2, at 371. Professor Powell found support for this comment in the Supreme Court's decision in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 625-26 (1973).

77. For an early article recognizing this, see Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 322-24 (1978). *See also* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466-68 (1992) (conceptualizing four types of administrative rulemaking that represent varying degrees of formality).

binding requirement or a non-binding policy statement?; (2) Are there underlying facts necessary for the analysis?; (3) Are there disputed issues of material fact necessary to resolve?; (4) Is it important to provide an opportunity for an oral hearing?; and (5) Is it important for the result to be accompanied by findings and conclusions and a reasoned decision?

Procedural flexibility, which can respond to the contextual questions noted above, transforms the declaratory order into a highly effective tool with tremendous utility. The order functions similarly to a summary decision issued in a formal agency adjudication, where no material facts are in dispute.[78] A declaratory order also matches the effectiveness and informality of an informal adjudication,[79] an interpretative rule,[80] or a rule of particular applicability (or limited general applicability).[81]

III. JUDICIAL REVIEW OF DECLARATORY ORDERS

A. *Judicial Tolerance of "Preemptive" Declaratory Orders*

A review of six significant cases where agency jurisdictional declaratory orders were upheld reveals a judicial tolerance for such orders and their preemptive effect on state action. The decisions also uphold the agencies use of informal procedures in the issuance of such orders.

Three of the cases (including *Merchants Fast Motor Lines, Inc. v. ICC*[82]) involved the former Interstate Commerce Commission (ICC) and rejected

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78. *See* Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1970-71) (exploring the possibility of using summary judgments to reduce delay in administrative adjudications) *and* James O. Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 9-26 (1972-73) (explaining situations in which summary actions pending an adjudicatory hearing are and are not appropriate).

79. *See* Warner W. Gardner, *The Procedures by Which Informal Action is Taken*, 24 ADMIN. L. REV. 155, 166 (1972) (presenting a draft of a future Informal Procedure Act that might "remove much of the personal and unconfined discretion, much of the simple mistake of fact, and much of the unexplained and possibly indefensible decision-making which is encouraged by the [] absence . . . of even the most rudimentary procedural requirements"); *see also* Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1975-76) (exploring ways for agencies to determine whether the due process requirements of informal adjudication are being met).

80. *See British Caledonian Airways*, 584 F.2d at 992 ("In the present case we have, moreover, the Board's own assertion that its order is purely interpretive, and this contention in itself is entitled to a significant degree of credence . . . . While declaratory orders differ in some respects from interpretive rules, the same rationale should apply equally to an agency's characterization of one of its rulings as a declaratory order.").

81. *See* Powell I, *supra* note 2, at 348-49 (finding that except with respect to jurisdictional questions, agencies tended to see their advice-giving function as part of their rulemaking function rather than their adjudicatory procedures). This Article acknowledges rulemaking's primary role in promulgation or policy of general applicability; the question is why more individualized disputes are not resolved through declaratory orders.

82. 5 F.3d at 918; *see also supra* note 39 and accompanying text.

challenges by the State of Texas.[83] The ICC had issued a declaratory order to the effect that goods passing through Texas on a portion of a longer trip moved in interstate commerce, and thus were subject to the ICC's exclusive jurisdiction—not that of the Texas Railroad Commission. In these cases, the ICC had instituted declaratory order proceedings by publishing a notice in the *Federal Register* providing an opportunity for interested persons to comment. It denied motions by Texas and competitors for oral hearings because no material facts were in dispute. In upholding the ICC, the courts ruled that broad ICC orders preempting state regulation were necessary for "resolving this controversy or [for] removing this uncertainty created by the [state] regulation."[84] Challenges to the agency's fact finding were denied because "[t]he declaratory order simply 'determines the legal consequences of the factual predicate presented'" by the parties.[85] "Paper hearing[s]"—i.e., written comments submitted on a public record—were held to be sufficient for the issuance of these declaratory orders.[86]

Courts upheld preemptive declaratory orders in three other specific cases—two involving the FCC. In *State Corporation Commission of State of Kansas v. FCC*,[87] the Florida Public Service Commission required Southern Bell to use a sampling period for determining costs that was different from that used by the FCC. Southern Bell petitioned the FCC for a declaratory ruling under the FCC rules to preempt the state commission's action. Notice was published in the *Federal Register* and a written comment period was provided. The FCC granted the petition and ordered that its sampling method was exclusive and preempted any contrary state rule. In upholding this procedure, the court found that the agency's discretion to choose rulemaking or adjudication also applied to preemption decisions.[88]

In the second FCC case, *Wilson v. A.H. Belo Corp.*,[89] the court similarly upheld a declaratory order, issued sua sponte, asserting the agency's exclusive authority to rule on complaints by political candidates who had filed suit in federal court to recover overcharges by television stations for their political advertising. The court squarely rejected the contention that

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83. The other two are *Texas v. United States*, 866 F.2d 1546 (5th Cir. 1989), and *Ctr. Freight Lines v. ICC*, 899 F.2d 413 (5th Cir. 1990).
84. Merchs. Fast Motor Lines, Inc. v. ICC, 5 F.3d 911, 916 (5th Cir. 1993).
85. *Id.* (citing *Texas*, 866 F.2d at 1551).
86. *Texas*, 866 F.2d at 1555.
87. 787 F.2d 1421 (10th Cir. 1986).
88. *See id.* at 1428 (finding that, consistent with the U.S. Supreme Court's precedent, the FCC had the authority to issue a declaratory ruling without a record after an opportunity for an agency hearing).
89. 87 F.3d 393 (9th Cir. 1996).

the order was invalid because it was not issued using formal adjudicative procedures.[90]

Finally, the Ninth Circuit upheld a Federal Energy Regulatory Commission (FERC) declaratory order in *California ex rel. Water Resources Board v. FERC*.[91] The Commission determined that it had exclusive jurisdiction over the setting of water flow rates for a hydroelectric power project and ruled that state permits for the project that affected the water supply were preempted. The State of California then moved to intervene in order to request a rehearing before FERC. FERC granted the motion to intervene but denied the rehearing request, and the court of appeals upheld the declaratory order on the merits because "[c]hanging the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license."[92]

These cases confirm that reviewing courts are not only prepared to accept the broad discretion of regulatory agencies in issuing (or declining to issue) declaratory orders, but are also quite tolerant of the informal procedures used to issue them. Moreover, although declaratory order proceedings usually involve named parties, courts have routinely upheld orders that have an effect on others who have had an opportunity to participate in the proceeding.[93] Attempts to overturn declaratory orders on the basis that the agency avoided APA formal adjudication or APA rulemaking procedures also have not succeeded.[94] The seeming judicial acceptance of declaratory orders confirms their utility, particularly in matters where jurisdiction is at issue.

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90. *Id.* at 397 (citing Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 625-26 (1973) as holding that "an agency need not conduct an individualized hearing and adjudication before issuing a declaratory ruling under 5 U.S.C. § 554(e)").

91. 877 F.2d 743 (9th Cir. 1989).

92. *Id.* at 749. It is unclear from the opinion what type of procedure FERC used to issue this declaratory order. In any event, the procedures were not challenged. *Id.*

93. *See* Wilson v. A.H. Belo Corp., 87 F.3d 393 (9th Cir. 1996) (holding the FCC declaratory order, issued *sua sponte*, binding on political candidates not named as parties) (citing Frozen Food Express v. United States, 351 U.S. 40, 44 (1956) (ICC declaratory order applicable to all carriers, not just parties to the administrative proceeding)). Professor Levin suggests that the courts in *Wilson* and *Frozen Food Express* were mistaken in referring to the agency actions as "orders," and that they were really "policy statements" because there were no named parties and notice-and-comment procedures were used. E-mails to authors from Ronald Levin, May 18 & 19, 2004. As such, they may not be legally binding on non-parties. Nevertheless, he agrees that non-parties are "affected" because the Supremacy Clause, in effect, means that a lawful order of a federal agency in favor of federal preemption would allow covered companies to ignore state regulatory authorities, those challenging the federal order would have to intervene in the federal proceedings or "forever hold their peace." *Id.*, May 19, 2004.

94. *See* Viacom Int'l Inc. v. FCC, 672 F.2d 1034, 1042 (2d Cir. 1982) ("The choice between rule-making or declaratory order is primarily one for the agency regardless of whether the decision may affect policy and have general prospective application."); *see also* British Caledonian Airways Ltd. v. CAB, 584 F.2d at 992-93.

B. Other Issues Related to Judicial Review

A declaratory order would normally constitute a final, reviewable agency action. This is in contradiction to many interpretative rules, which may not meet current tests for "ripeness" of review.[95] Powell, in fact, points to this disparity in explaining some agencies' preference for use of rulemaking instead of declaratory orders.[96] An agency's decision to issue a declaratory order may, however, raise lingering questions regarding venue and deference.

1. Venue Issues

Some statutes provide for direct judicial review of certain types of enumerated agency actions. For example, the Clean Water Act provides for direct judicial review in the courts of appeals (enforced by a 120 day time limit) of various types of EPA performance standards, effluent standards and prohibitions, effluent limitations, permit decisions, or determinations concerning state permit programs.[97] Pending litigation[98] has, for example, raised the question whether the listing of cyanide as a listed toxic pollutant under the Act embraced a particular type of ferric ferrocyanide. Pursuant to a federal court's referral under the primary jurisdiction doctrine,[99] and after eight years of deliberation, the EPA issued a "determination" that the listing did include this particular type of ferrocyanide. When the EPA determination was challenged in the First Circuit, however, the government moved to dismiss the petition for lack of subject matter jurisdiction on the grounds that the "determination" was not one of the listed actions subject to review directly in the court of appeals.[100] This case illustrates how venue statutes may overlook declaratory orders and lead to confusion about the proper venue for review. This problem is

95. *See* ACLU v. FCC, 823 F.2d 1554, 1577 (D.C. Cir. 1987) (noting that "[i]nterpretive rules as a general matter raise ripeness concerns, given that questions often arise as to the binding effect of the rule, the absence of immediate enforcement, and the need for further factual development.").

96. *See* Powell I, *supra* note 2, at 356-57.

97. 33 U.S.C. § 1369(b) (2000).

98. Narragansett Elec. Co. v. EPA, Case No. 04-1127 (1st Cir. 2004).

99. The First Circuit ordered the referral on October 6, 1995 in *Massachusetts. v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 983 (1st Cir. 1995). The EPA issued its "determination" exactly eight years later. Final Administrative Determination Document on the Question of Whether Ferric Ferrocyanide is One of the "Cyanides" Within the Meaning of the List of Toxic Pollutants Under the Clean Water Act, 68 Fed. Reg. 57,690, 57,691 (Oct. 6, 2003) (codified at 40 C.F.R. 401.15, 40 C.F.R. 302.4, and table 302.4 at 40 C.F.R. 302.4) (issuing of the EPA's "determination"). The case arose under CERCLA, but the issue of whether the ferrocyanide is a hazardous substance subject to CERCLA's liability rules depends on whether it is a toxic pollutant under the Clean Water Act. *Id.*

100. Respondent EPA's Motion to Dismiss for Lack of Subject Matter Jurisdiction, (filed Mar. 25, 2004), Narragansett Elec. Co., Case No. 04-1127.

compounded if the governing statute specifies a time limit or precludes future review.

2. Chevron *Deference*

As previously noted, agencies possess considerable discretion in the choice of procedures used to issue a declaratory order. One might initially assume that, absent some unreasonable interpretation by the agency, courts would defer to the agency's choice of procedure. The Supreme Court's jurisprudence confirms that *Chevron* deference[101] should normally be granted to an agency's interpretation of its own statute when that interpretation is "embodied in a rule that has the force of law" or "was developed in the course of formal adjudication."[102]

Deference becomes questionable, however, when the interpretation was issued in the course of an *informal* agency adjudication. The ABA has summarized the caselaw on this point, stating that *Chevron* deference applies to informal adjudications if "the agency's conferred authority and other statutory circumstances demonstrate that 'Congress would expect the agency to be able to speak with the force of law' in taking such action."[103] How this test would be applied to an agency that issues a declaratory order pursuant to § 554(e) remains to be seen. In *Mead* itself (which involved a particular statute authorizing the Customs Service to issue classification rulings), *Chevron* deference was denied.[104]

The *Mead* decision at least implies that use of a notice-and-comment process would help the agency receive *Chevron* deference. The true issue, however, should boil down to whether the agency has the authority to make definitive interpretations. Interestingly, the Fifth Circuit in the *American Airlines* case, which approved DOT's use of informal adjudication

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101. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). In *Chevron*, the United States Supreme Court set forth the standard to be used by courts reviewing an agency's construction of the statute it is charged with administering:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.

102. ABA Section of Administrative Law and Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 38 (2002).

103. *Id.* (citing United States v. Mead Corp., 533 U.S. 218 (2001)).

104. 533 U.S. at 231 (stating that "[t]he authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here").

procedures to issue a declaratory order, granted *Chevron* deference to its statutory interpretation without any hesitation or comment on the nature of the procedure used by the agency.[105]

C. Judicial Review of Petitions for a Declaratory Order

Professor Davis noted in 1949 that declaratory orders, like other orders, would be judicially reviewable. He was, however, less sure about the reviewability of denials of petitions for declaratory orders. He points out:

> The Act provides that the agency may "in its sound discretion" issue a declaratory order. A Senate Committee Print states that the phrase "sound discretion" means "a reviewable discretion and will prevent agencies from either giving improvident declaratory orders or arbitrarily withholding such orders in proper cases." But committee reports of both House and Senate say merely: 'Sound discretion' . . . would preclude the issuance of improvident orders."
>
> The desirability of using declaratory orders in appropriate cases and the apparent reluctance of some agencies even to consider them might support an argument in favor of judicial review of a refusal to issue such an order.[106]

Of course, Professor Davis's commentary long preceded the developments in the area of judicial review of agency discretionary action.

In the one case that has directly opined on the matter, *Coalition for a Healthy California v. FCC*,[107] the Ninth Circuit opined that an agency's failure to issue a declaratory order could be reviewable. This statement, however, was dictum because the petitioner had asked the court to issue such an order itself in lieu of the agency's inaction.[108]

This decision generally conforms to established case law regarding the reviewability of an agency's actions or inactions on petitions for rulemaking. It would seem that the same considerations apply to the reviewability petitions for declaratory orders.[109] As noted in one of the leading cases regarding the reviewability of agency denials of petitions for rulemaking, *WWHT, Inc. v. FCC*,[110] a court will overturn an agency decision not to institute a rulemaking "only in the rarest and compelling of

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105. 202 F.3d at 813.
106. Davis, *supra* note 31, at 232-33 (citations omitted).
107. 87 F.3d 383 (9th Cir. 1996).
108. *See id.* at 386 (stating that the relief the court might have been able to give, i.e., compelling the FCC to issue a declaratory order, was declined by the coalition).
109. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (3d ed.) 354-56 (Am. Bar Ass'n 1998) (noting that although agency action or inaction on petitions for rulemaking is reviewable, courts remain highly deferential to the discretion of the agency).
110. 656 F.2d 807 (D.C. Cir. 1981).

circumstances."[111] Such circumstances may be presented if "a significant factual predicate of a prior decision . . . (either to promulgate or not to promulgate specific rules) has been removed,"[112] or if the agency was "mistaken in concluding that it lacked jurisdiction to promulgate [the requested] regulations."[113]

IV. SUGGESTED AMENDMENTS TO THE DECLARATORY ORDER PROCESS FOR FEDERAL AGENCIES

A. Deficiencies of the Process Provided in the Federal APA

Section 554(e) of the APA provides only a generalized process for declaratory orders. It fails to alert petitioners to the right or opportunity to request a declaratory order to resolve ambiguities in a situation where such ambiguity may be injurious to the party. Moreover, the vagueness of process afforded adds to the apparent amorphousness of these orders. As a result, Congress should consider amending § 554(e) to provide more definitive procedural guidance.

One of Powell's recommendations could be incorporated here. In his second article, he recommends that agencies promulgate procedures for giving advice and issuing declaratory orders. He advocates the adoption of rules that describe: (1) how to obtain oral and written nonbinding advice from an agency's local, regional, or national offices; and (2) how to obtain a judicially reviewable agency adjudicatory determination pursuant to the declaratory order provision of § 554(e).[114] These rather simple requirements could supplement the APA's prescriptions for declaratory orders, as provided in § 554(e).

B. The 1981 Model State APA's Declaratory Order Provision as a Reformative Model

The 1981 Model State APA provides detailed guidance regarding the use of declaratory orders and prescribes a clearly defined process for their issuance. Section 2-103 (Declaratory Orders) of the Model Act, inter alia, prescribes the specific circumstances in which declaratory orders can be issued, requirements for an agency to promulgate rules governing the issuance of these orders, time periods for notice and agency action on

111. *Id.* at 818.
112. *Id.* at 819 (citing Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979)).
113. *Id.* (citing NAACP v. FPC, 520 F.2d 432 (D.C. Cir.1975), *aff'd*, 425 U.S. 662, (1976), *and* Nat'l Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974)).
114. Powell II, *supra* note 2, at 300.

petitions, the legal and binding effect of these orders, and the effect of an agency's inaction on a petition.[115]

This provision of the Model State APA is far more detailed than § 554(e) of the federal APA and is truer to Professor Powell's admonitions regarding declaratory orders. Section 2-103 provides precise guidance on the appropriate use of these orders, and specific procedures required for their issuances. Congress, which we hope will eventually amend (and move) § 554(e) to enhance its utility, should consider adoption of language similar to that in section 2-103.[116]

CONCLUSION

Since its inception in the APA, the declaratory order has loomed as a potentially useful procedural tool that can expeditiously resolve ambiguous or troublesome questions of administrative law. Professor Powell's seminal articles on the matter clearly acknowledge this potential. He observes that the declaratory order provision was originally seen as a tool for the initiator to avoid "the risk of an agency sanction and to allow him to order his conduct on the basis of a clear understanding of the law."[117] Despite the administrative efficiency of declaratory orders, he further notes the agencies' original reluctance to embrace this tool as an efficient mechanism to resolve disputes and, commensurately, their failure to prescribe more precise regulatory guidance for their use.[118] He astutely observes:

> 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.

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115. For the complete text of the provision, see UNIFORM LAW COMMISSIONERS' MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2-103 (1981).

116. *See* CAL. GOV'T CODE §§ 11465.10-11465.70 (West 1992 & Supp. 2004) (demonstrating that legislative decisionmakers in California have also adopted a more precise procedure for petitions for orders). Disappointingly, the California provision appears to have also been largely ignored by the agencies and the public. *See* Telephone Interview with Melissa Meith, Chair, California Office of Admin. Hearings (Jan. 9, 2004) (stating that she neither knew of any such cases filed with her agency nor that the model regulations required by § 11465.70 had been issued). Meith also noted that under § 11465.50(a)(4), denials of such petitions are not judicially reviewable, and that perhaps agencies were unwilling to adjudicate such petitions (which in California normally requires a hearing by a central panel ALJ) when they could give advice more informally through opinion letters or rulemaking). *Id.* She also hypothesized that the private bar had other less visible opportunities to affect agency policy—through lobbying, for example. *Id.*

117. Powell I, *supra* note 2, at 373.

118. *Id.*

> 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.[119]

As our survey of more contemporary cases indicates, however, the use of declaratory orders has garnered some increased utility to resolve distinct questions of law, or even to settle disputed matters such as jurisdiction or regulatory applicability. Such prudent use not only takes advantage of the efficiency that declaratory orders offer in the form of informal decisionmaking, but also minimizes the litigation costs of both the party and the agency. It would be myopic to suggest that the willingness of some agencies, such as the former Interstate Commerce Commission, the Federal Communication Commission, and Department of Transportation, signals a general embrace of this administrative tool. Many other agencies could avoid substantial costs by issuing a declaratory order regarding their jurisdictional or enforcement authority over certain matters. Such orders can be reviewed expeditiously, without the protracted litigation that otherwise often engulfs all of the parties.

Our review of the utility of declaratory orders prompts us to agree with, echo, and modestly embellish Professor Powell's commentary on the subject. Declaratory orders constitute a highly efficient procedural tool that agencies *should* employ to resolve jurisdictional disputes or questions of regulatory applicability. The relative procedural ease associated with the issuance of these orders and their attendant expediency potentially benefit all parties, including the agency. Our endorsement of declaratory orders within these specific circumstances, however, comes with suggested modifications that provide more precise guidance for the use of these tools. This trend has certainly continued with the lower courts' willingness to allow informal adjudication and notice-and-comment procedures to suffice in the issuance of declaratory orders.

We share Powell's frustration with "the nomenclature relating to advice giving." The recommendation he provided twenty years ago has continuing validity. Agencies should reexamine such ambiguous terms as "advisory opinions," "jurisdictional opinions," and "declaratory rulings," and take great care to distinguish devices designed for interpretative rulemaking, and devices that determine individual rights. Agencies should promulgate regulations for both, with rules governing devices that

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119. *Id.*

determine individual rights, i.e., declaratory orders, falling within an agency's adjudicatory procedures.[120]

Furthermore, we believe the declaratory order provision in the APA should be amplified and its procedural context clarified. The Model State APA, which we noted in the previous section of this Article, provides excellent guidance on this point. Lastly, the basic suggestion that the declaratory order provision be removed from § 554(e) may be dated, but has considerable merit.[121] We suggest that Congress amend the APA to include a new section that contains more detailed explanation of applicability and process associated with declaratory orders. As a minimalist alternative to an amendment of § 554(e), Congress should move the applicable language in § 554(e) to § 555, and describe with particularity the procedures required to issue these orders.[122]

As the United States Court of Appeals for the Fifth Circuit succinctly stated in *Merchants Fast Motor Lines v. ICC*,[123] "Congress commits to the sound discretion of the agency the decision whether to grant requested declaratory relief."[124] Hopefully the commentary and suggestions proffered in this Article will contribute to the prudent exercise of that discretion, and more universal acceptance of declaratory orders as efficient tools for specific dispute resolution.

120. *Id.* at 373-74.

121. *See* Note, *Administrative Declaratory Orders*, 13 STAN. L. REV. 307, 320 (1960-61) ("[T]he declaratory order provision should be removed from section [554], and the agencies be given broad and flexible authority to grant declaratory relief in situations where it is proper.").

122. One cautionary note may be in order here. Professor Levin points out a potential fairness problem if an agency were to issue a declaratory order in an informal adjudication and then seek to use the order to foreclose a subsequent hearing, such as in an enforcement proceeding where the party would normally have a statutory right to a formal adjudication. *See* E-mail from Ronald Levin to authors, May 18, 2004. The problem would not arise if the agency were to issue the order using formal adjudication procedures. This "choice of process" issue is somewhat similar to that raised by the *Chevron* deference concerns discussed in Part IV.B.2, above.

123. 5 F.3d. at 911.

124. *Id.* at 915 (citations omitted).