

Draft Project Outline: Declaratory Orders in Administrative Adjudication

April 16, 2015

Emily S. Bremer

Researcher Biography: Emily S. Bremer is the Senior Attorney and Research Coordinator of the Administrative Conference of the United States. She joined the Conference in 2010 as an Attorney Advisor and was the in-house researcher on Recommendation 2011-5, *Incorporation by Reference*, and (with Professor Jonathan R. Siegel) on Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*. Prior to joining the Conference, Ms. Bremer worked in the telecommunication and appellate practice of Wiley Rein LLP in Washington, D.C., and served as law clerk to Hon. Andrew J. Kleinfeld of the U.S. Court of Appeals for the Ninth Circuit. She earned her undergraduate and law degrees from New York University.

Comments, suggestions, and questions about this outline and the Declaratory Orders project are welcome. Ms. Bremer can be reached at ebremer@acus.gov or 202.480.2086.

I. Introduction

II. Background

- A. *Statutory Basis for Declaratory Orders.* The Administrative Procedure Act (APA) provides that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e).
- B. *Legislative History and Purpose of the APA’s Declaratory Orders Provision:* This section will briefly explore the agency practices that were used as the model for the APA’s declaratory orders provision. It will also explore why Congress included the provision in the APA and examine what the Attorney General’s (AG) Manual on the APA has to say about the proper interpretation of the provision and the scope of agency authority to issue declaratory orders.
- C. *History of Agency Use of Declaratory Orders:* Since the APA’s adoption in 1946, agencies have made little use of the declaratory orders provision. Scholars have consistently argued that agencies should expand the use of declaratory orders,¹ to little effect. This section will discuss possible

¹ See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 ADMIN. L. REV. 1097 (2004); 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); Burnele V. Powell, *Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative*

explanations for the agencies' apparent reluctance to use declaratory orders.

- D. *Related Administrative Conference Recommendations and Research.* This section will discuss any previous Administrative Conference recommendations and research that may be relevant to the subject of declaratory orders or agency advice-giving.
- E. *Research Methodology.* The basic methodology of the report will include:
1. Review and analysis of relevant statutes and legislative history, judicial opinions, and administrative materials (e.g., agency regulations, orders, guidance);
 2. Review and discussion of the scholarly literature; and
 3. Discussion and analysis of information obtained through interviews with personnel from agencies known to use declaratory orders (e.g., the Federal Communications Commission, Federal Energy Regulatory Commission, Federal Maritime Commission, Food and Drug Administration, and Surface Transportation Board (successor to Interstate Commerce Commission)).

III. The Current State of the Law Governing Declaratory Orders

- A. *What is a Declaratory Order?* This section will identify and analyze the key characteristics of a declaratory order.
1. Purpose. First, this section will evaluate the purpose of a declaratory order, which may be to "terminate a controversy" or "resolve uncertainty." 5 U.S.C. § 554(e).
 2. Legal Effect. Second, it will examine the legal effect of a declaratory order. Although a declaratory order binds only those party to it, and only in the factual circumstances on which the order is based, the order may also have broader precedential value. Finally, in the absence of any manifest injustice, a declaratory order may have retroactive effect.
 3. Placement among Agency Advice-Giving Devices. Third, building on the first two points, this section will consider the advice-giving

Procedure Act, 63 N.C. L. REV. 339 (1985); Walter Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 153 (1942).

function of declaratory orders and compare and contrast declaratory orders with other legislative approaches to advice-giving (e.g., interpretative rules, policy statements, advisory opinions, and other forms of non-binding agency guidance).

B. *Formal vs. Informal Adjudication.* This section will consider the difficult preliminary question of whether agencies have the authority and discretion to issue declaratory orders in proceedings that are not subject to the APA's formal adjudication requirements (i.e., in informal adjudications).

1. Statutory Text. The text of the APA suggests that declaratory orders are permissible only in "formal" adjudications, i.e., adjudicatory proceedings that are required by statute to be conducted in accordance with the APA's formal adjudication procedures. See 5 U.S.C. § 554(a)(1).
2. Legislative History and the AG's Manual. The APA's legislative history and the AG's Manual on the APA support the conclusion that declaratory orders may be issued only in formal adjudications. For example, the AG's Manual states that the APA's "grant of authority to the agencies to issue declaratory orders is limited by the introductory clause of section 5 so that such declaratory orders are authorized only with respect to matters which are required by statute to be determined 'on the record after opportunity for an agency hearing.'"² Examples provided in the AG's Manual further support the point.
3. Courts and Scholars Take a Different View. Courts have held, however, that agencies may issue declaratory orders in informal adjudicatory proceedings. Scholars have also consistently taken this view. This section will argue that agency discretion to establish procedures for informal adjudicatory proceedings includes the authority to issue declaratory orders in such proceedings.

C. *Judicial Review of Declaratory Orders.* This section will explore legal issues related to judicial review of agency declaratory orders. Rather than providing an exhaustive analysis of judicial precedent, it will focus on the

² Tom C. Clark, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 59 (1947), available at <http://archive.law.fsu.edu/library/admin/attorneygeneralsmanual.pdf>.

issues that may be most relevant to an agency that is considering whether, how, and in what circumstances to issue declaratory orders.

1. Reviewability. Declaratory orders are final agency action subject to judicial review. So too are agency denials of petitions or other requests for a declaratory order.
2. Case and Controversy Requirements, Ripeness, and Mootness. Although agencies are not subject to the Case and Controversy requirements of Article III of the U.S. Constitution, those requirements may sometimes limit judicial review of a properly issued declaratory order. A distinct but related issue involves the timing of an agency's declaratory order proceeding: in what circumstances might it be inappropriate for an agency to issue a declaratory order because the underlying controversy is either not yet ripe or has become moot.
3. Standard of Review. Judicial review is limited, and courts set aside agency action only if it is arbitrary and capricious or an abuse of discretion. *See* 5 U.S.C. § 706(2)(A). Courts generally defer to an agency's jurisdictional determination, statutory interpretation, interpretation of both judicial and agency precedent, and policy judgment.

IV. Agency Use of Declaratory Orders

- A. *To Address What Issues?* Drawing on agency interviews and documents, as well as judicial case law and legal scholarship, this section will identify the types of issues that agencies have typically used declaratory orders to address. The goal will be to establish a factual basis for recommendations addressing the kinds or characteristics of issues that agencies should consider addressing via declaratory order.
- B. *Agency Procedures for Issuing Declaratory Orders.* This section will survey existing agency procedures in declaratory order proceedings, with an eye towards identifying best practices. Subjects that will be considered include:
 1. Type of Proceeding. Initial research suggests that few agencies have procedural rules governing declaratory order proceedings. Most of these are agencies that conduct formal proceedings. In addition to identifying these agencies and examining their procedural rules, this section will seek to identify examples of agencies that have issued declaratory orders (even if that term is

not used) in informal adjudications. It will discuss the procedures used in such informal proceedings and will analyze judicial precedent to identify the required minimum procedural requirements that agencies must observe in informal declaratory proceedings.

2. Initiating the Proceeding. This section will consider the procedures agencies use to initiate declaratory order proceedings. Preliminary research suggests that a declaratory order may be issued in response to a petition or other request for such relief or on an agency's own motion.
3. Collecting Information. This section will consider the procedures agencies use to collect needed factual information and solicit data, views, and arguments from both parties and nonparties.
4. Final Decision and Administrative Appeal. This section will consider the procedures agencies use to issue the final declaratory order and process any permitted appeals within the agency.

C. *Should Agencies Expand the Use of Declaratory Orders?* Building on the discussion of the history of limited agency use of declaratory orders, *see* Part II.C., above, this section will evaluate modern explanations for continued agency reluctance. It will consider whether changed circumstances (such as expanded and sometimes unpredictable judicial review of non-binding guidance documents and increased acceptance of informal agency declaratory proceedings) may counsel in favor of expanding the use of declaratory orders.

V. **Summary of Suggested Recommendations**

VI. **Conclusion**