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A Reexamination of Federal Agency Use of Declaratory Orders

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Section 554(e) of the Administrative Procedure Act (APA) provides a powerful tool agencies can use to streamline their adjudicative processes. In 1984, in a report for the Administrative Conference for the United States, Professor Burnele Powell commented on how infrequently agencies use declaratory orders even though these orders offer procedural flexibility in the administrative process. The APA authorizes agency use of declaratory orders to terminate a controversy or remove uncertainty. Declaratory orders are binding determinations, which courts may review, that dispose of legal controversies without forcing a party to act. These orders can expeditiously decide preliminary issues such as these related to jurisdiction in the adjudicative context.

The authors argue that federal agencies should make more use of declaratory orders. There are a number of reasons for this argument. One reason is that the APA does not require formal adjudication to issue a declaratory order. Agencies have the discretion to determine the procedures they will use to issue declaratory orders. Moreover, the authors argue that a declaratory order “functions similarly to a summary decision in a formal agency adjudication . . . [and also] matches the effectiveness and informality of informal adjudication, an interpretive rule, or a rule of particular applicability (or limited general applicability).” A review of relevant case law also shows that courts accept agency use of declaratory orders, condone the informal procedures used to issue them, and tolerate their preemptive effect on state action. The authors also discuss problems with declaratory issues regarding venue and deference as well as the reviewability of denials for declaratory orders. As part of their recommendations, the authors suggest amendments to the APA by either providing a new section for declaratory orders or revising § 554(e). Moreover, the authors suggest that Congress use the 1981 Model State APA as a guide in making these amendments. The authors conclude by arguing that increased use of these orders could save agencies from costly adjudication over their jurisdictional or enforcement authority, and that modest modifications to the APA can enhance the use of declaratory orders.