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JURISDICTIONAL QUESTIONS INVOLVING APPEALS OF INJUNCTIONS AND DECLARATORY JUDGMENTS UNDER 28 U.S.C. SECTION 1253, AND THE PROBLEM OF MOOTNESS

I. INTRODUCTION

In order that the rights of litigants may be speedily determined, Title 28 of the United States Code, section 1253[1] was enacted to allow direct appeals of injunctions issued by a three-judge district court to the United States Supreme Court. After passage of the Declaratory Judgment Act,[2] litigants began to seek declaratory and injunctive relief in order to protect their rights. Most of the litigation resulted from the civil and voting rights cases, where the parties sought both declaratory and injunctive relief. Appeals of these cases, for the most part, were taken under section 1253, which deals only with injunctions. This procedure raised questions as to the possibility of appealing both the declaratory and injunctive issues together directly to the Supreme Court.

Not only does the question concerning appeals prove to be difficult, but there is another compounding factor which enters into many of these appeals—mootness. Mootness will result in the dismissal of an appeal because of intervening circumstances which end the need for litigation. While the appeal is pending, the passage of election day, death of the parties, or a statutory amendment to a law being questioned, may render the case moot. The Court, however, has indicated that mootness may be overridden when policy requirements are paramount.

The jurisdictional question and problem of mootness was recently raised in *United Citizens Party* v. *South Carolina State Elections Commission*,[3] now on appeal to the United States Supreme Court under section 1253. This action arose when the United Citizens Party

1. 28 U.S.C. § 1253.

2. *Id.* § 2201.

3. Order filed October 28, 1970, Federal District Court in Columbia, South Carolina. Second order filed October 21, 1970, supplementing the first, also giving declaratory relief.

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sought declaratory and injunctive relief to have their candidates placed on the November 1970 state election ballot and have section 23-264 of the South Carolina Code of Laws[4] declared unconstitutional as violative of the fourteenth amendment to the United States Constitution.[5] A three-judge district court granted the relief sought, and the State filed a notice of appeal under section 1253. The appeal not having been docketed,[6] the Court has been unable to rule on jurisdiction to hear the case.

The appeal of *United Citizens Party* raises, first, the jurisdictional question of whether an appeal under section 1253 will be proper. Normally section 1253 contemplates only appeals of injunctions, however, the three-judge district court in this action also ordered a declaratory judgment. The issue to be resolved, therefore, is whether the granting of this declaratory judgment will destroy jurisdiction of the appeal under section 1253. This question has never been considered by the Supreme Court, and recent Court decisions, to be discussed *infra,* have narrowed the scope of appeals under section 1253, raising doubt as to the validity of appealing these issues together.

Secondly, the matter of mootness on appeals of injunctions is in question in *United Citizens Party* because the election day for which the injunction was ordered has passed. This, in many instances, will render an appeal moot even if jurisdiction is proper. The impact of the passage of a day certain and its effect on the issue of mootness along with the jurisdictional question will be analyzed and discussed in detail in this article.

II. APPEALS OF INJUNCTIONS AND DECLARATORY JUDGMENTS UNDER SECTION 1253

The Federal Declaratory Judgment Act[7] is used extensively by parties to have their rights and other legal relations declared by a court. Often it is used to attack the constitutionality of state laws which

4. S.C. CODE ANN. § 23-264 (1962).

5. *Supra* note 3.

6. An application for extension of time to docket an appeal was granted for a 60 day period to end on April 17, 1971.

7. 28 U.S.C. § 2201.

harass or threaten irreparable damage to the party.[8] The act expressly provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.[9]

The elements necessary for declaratory relief are that a "controversy" must exist of "sufficient immediacy and reality," and the rights must be determined at the time of the court's hearing rather than at the commencement of the action.[10] A declaratory judgment is ordinarily issued by a single federal district judge,[11] but must be issued by a three-judge court when the constitutionality of a state law or administrative order is being questioned or enjoined.[12] Appeals of declaratory judgments issued by federal district courts can only be appealed to a circuit court of appeals,[13] with subsequent appeals going to the Supreme Court.[14]

Injunctions in which the parties allege the unconstitutionality of a state statute or administrative order can only be issued by a three-judge federal district court under the Three-Judge Court Act.[15] Appeals under this act are taken directly to the Supreme Court according to section 1253. This section states:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.[16]

Problems arise when a three-judge district court issues both injunctive and declaratory relief. If the decision is appealed, the circuit courts apparently do not have jurisdiction to hear the matter,[17] and

8. Samuels v. Mackell, 91 S.Ct. 764 (1971).
9. 28 U.S.C. § 2201.
10. Golden v. Zwickler, 394 U.S. 103 (1969).
11. 28 U.S.C. § 2101 *by implication.*
12. *Id.* §§ 2281-2284.
13. *Id.* § 1291.
14. *Id.* § 1254.
15. *Id.* §§ 2281-2284.
16. *Id.* § 1253.
17. Appeals under section 1253 apparently are mandatory and review by the circuit courts under 28 U.S.C. § 1291 is improper.

section 1253 is the only avenue of appeal offered directly to the Supreme Court. Whether the Supreme Court can hear an appeal of both the declaratory judgment and the injunction under section 1253, in effect allowing both together in a package is an open question. This "piggyback" issue has never been ruled on directly by the Court, but it has been allowed at least by implication.[18] Although declaratory judgments and injunctions have both been afforded this speedy appeal treatment, there is some indication that the scope of appeal under section 1253 is being narrowed and the practice of appealing both forms of relief directly could cease.

The affirmative implication that section 1253 is the avenue for appeals of both injunctions and declaratory judgments issued simultaneously came in two cases arising out of the same litigation. In *Zwickler v. Koota,*[19] and *Golden v. Zwickler,*[20] the plaintiff sought declaratory and injunctive relief with respect to the New York State Election Law, seeking to have this law declared unconstitutional. In *Zwickler v. Koota,* the Supreme Court remanded the case to a three-judge district court where the plaintiff, Zwickler, was granted declaratory relief. This district court decision was appealed under section 1253 in *Golden v. Zwickler,* where the Supreme Court reversed the lower court, holding that Zwickler had not properly alleged the elements of a declaratory judgment.[21]

The real question, that of jurisdiction, was apparently overlooked by the Court in *Golden v. Zwickler.* The Court, without questioning the section 1253 jurisdiction,[22] based its entire opinion on the validity of the declaratory judgment, although the Court had earlier remanded the

18. Zwickler v. Koota, 389 U.S. 241 (1967); Golden v. Zwickler, 394 U.S. 103 (1969).

19. 389 U.S. 241 (1967).

20. 394 U.S. 103 (1969).

21. *Id.* at 110.

22. Jurisdictional Statement of Appellant in *Koota* at 1. This question was discussed in a telephone interview February 3, 1971, with Louis J. Lefkowitz, First Assistant Attorney General of New York, in New York City, who argued both *Golden* and *Koota* in the Supreme Court. He said that jurisdiction was granted under section 1253. His conversation was verified in a letter from Brenda Soloff, Assistant Attorney General of New York to Michael W. Tighe, Assistant Attorney General of South Carolina, Columbia, South Carolina, February 16, 1971, on file in the South Carolina Attorney General's Office. This letter indicated that because both injunctive and declaratory relief were requested and granted, this case was properly appealed under section 1253. From this information it could be said that if the injunction had not been at issue, jurisdiction would not have been granted under section 1253.

declaratory judgment for consideration in *Koota.*[23] It does not appear that the injunction was at issue, thus, the Court should have dismissed the appeal for want of jurisdiction. It seems wrong that the initial case, *Koota,* was appealed properly under section 1253 if the "piggyback" rule is proper. In any event, it was remanded by the Supreme Court for a determination on the declaratory relief question.[24] On the subsequent appeal in *Golden,* section 1253 was again the avenue used for jurisdictional purposes,[25] and no issue was raised as to it. Even applying the "piggyback" rule to *Golden,* jurisdiction under section 1253 appears improper.

Apparent justification for allowing the first, *Koota,* to be appealed under section 1253, and for the Court to properly consider the injunction and the declaratory judgment as a "package" can be found in the recent case, *Perez v. Ledesma.*[26] In *Perez,* the Court found that a three-judge district court did not have jurisdiction to declare a local ordinance, not of statewide application, unconstitutional. Also, the declaratory judgment had been separately rendered by a single district judge not by a three-judge court. The injunction was issued by a three-judge court but it made no mention of the declaratory relief issued by the single district judge. This had the effect of taking the declaratory issues out of the direct appeal under section 1253, and "[t]he fact that the clerk of the District Court merged these orders into one judgment does not confer jurisdiction upon this court."[27] Here there was no significantly close relationship between the injunction granted and the declaratory relief ordered to invoke jurisdiction under section 1253. Further support for the proposition that injunction and declaratory judgment must be significantly close in relationship, both as to issues of fact and law, can be found in Justice Stewart's concurring opinion in *Perez*:

> This is not a case in which the District Court's action on the prayer for declaratory relief was so bound up with its action on the request for an injunction that this Court might, on direct appeal, consider the propriety of declaratory relief on *pendancy* grounds.[28]

23. 389 U.S. 241 (1967).
24. 290 F. Supp. 244 (E.D. N.Y. 1968).
25. *Supra* note 19.
26. 91 S.Ct. 674 (1971).
27. *Id.* at 678.
28. *Id.* at 679 (emphasis added).

He cited *Zwickler v. Koota* as being sufficiently analogous to this principle in order to support his conclusion. This indicates that where both declaratory and injunctive relief are requested a three-judge district court may render a decision on both, and if they are significantly related with each other in fact and law, they should be the proper subject of an appeal under section 1253.

From the implications in *Koota, Golden,* and *Perez,* the Court apparently is of the opinion that where an injunction and declaratory judgment are granted, both may properly be appealed under section 1253. This operation of the "piggyback" appeal of both types of relief would only be proper where they are significantly close in relationship, or very closely bound up in fact and law. According to this analysis *Koota* was correctly before the Court, where as, *Golden,* the latter decision, was not. This is true because *Golden* dealt only with the declaratory issues and not with the injunction, thereby divesting itself of the jurisdiction offered by section 1253.

From 1967 to 1969, the Court apparently was not concerned with direct appeals in accord with section 1253, as evidenced by *Koota,* and *Golden.* Since this decision, however, the Court has become more concerned with appeals of injunctive and declaratory decisions of three-judge courts under section 1253, and has limited the scope of appeal in this area.

III. Cases Narrowing the Scope of Appeal Under Section 1253

Appeals under section 1253 are narrowed in scope by the Court finding that no injunction is in issue. This was the case in *Goldstein v. Cox,*[29] where the appellants, Romanian aliens, sought their share of a New York decedant's estate. However, they were barred from doing so by a New York statute which prohibited payment to them, citizens of a communist nation, because it appeared that the appellants "would not have the benefit or use or control of the money or property"[30] constituting their share of the estate. The appellants challenged this statute on constitutional grounds and prayed for both temporary and injunctive relief against the operation of the statute. This relief was denied by a single judge district court. Appeal was taken, and a three-

29. 396 U.S. 471 (1970).

30. New York Surrogate's Court Procedure Act § 2218.

judge court was appointed.[31] The appellants then made a motion for summary judgment which was denied.[32] The appeal was taken under section 1253, and the Supreme Court noted probable jurisdiction.[33]

Upon hearing, the Court concluded they lacked jurisdiction of the appeal under section 1253.[34] The Court was faced with the question of "whether the District Court's order denying summary judgment to a plaintiff who has requested injunctive relief is an order . . . denying . . . an . . . injunction within the meaning of section 1253."[35] In answering this question, the Court took a narrow view of section 1253 and concluded, "that the only interlocutory orders which we have power to review under that provision are orders granting or denying *preliminary* injunctions."[36] The Court based this decision on a review of the Three Judge Court Act,[37] concluding that review of a three-judge court action is limited "to (1) final judgments granting or denying permanent injunctions and (2) interlocutory orders granting or denying preliminary injunctions."[38]

This decision was in keeping with the policy of narrow construction being given to the Three Judge Court Act to keep within the limits of appellate review.[39] This also upholds the long term policy of Congress in avoiding piecemeal appellate review.[40] This narrow construction of section 1253 limits its application to orders granting or denying a preliminary injunction, and as here, where such relief is not prayed for, there is no jurisdictional basis in section 1253.

The appellants were unable to use section 1253 because they did not take a practical step in obtaining the injunctive relief, nor did they file a separate application for preliminary injunction or urge the appropriateness of this relief. Therefore, the Court had no choice but to find that the order of the district court was interlocutory and not an "order granting or denying a preliminary injunction . . . ."[41]

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31. 391 F.2d 586 (2d Cir. 1968).
32. 299 F. Supp. 1389 (S.D. N.Y. 1968).
33. 394 U.S. 996 (1969).
34. Goldstein v. Cox, 396 U.S. 471 (1970).
35. *Id.* at 475.
36. *Id.*
37. 28 U.S.C. §§ 2281-84.
38. 396 U.S. 477 (1970).
39. Phillips v. United States, 312 U.S. 246, 250 (1941).
40. 396 U.S. 471 (1970).
41. *Id.* at 479.

This was the first step taken by the Court in whittling down the scope of appellate review under section 1253. Here, a summary judgment was not the proper action which offered appeal within the purview of section 1253, nor was the motion for "the relief prayed for in the complaint" sufficient to invoke the jurisdiction offered by this section. This indicates that the party seeking relief must pray for an injunction and follow this action up, and specifically obtain, or be denied injunctive relief by the lower court before a section 1253 appeal is warranted.

Six months later, *Goldstein* was followed by *Mitchell v. Donovan*,[42] where the appellants sought declaratory relief, a temporary restraining order, and a permanent injunction. This action was instituted to have the Minnesota Secretary of State place certain Communist Party candidates on the 1968 Presidential Election ballot. The three-judge district court allowed the injunction and the names were placed on the ballot, but found the requirement for a declaratory judgment of a "case of actual controversy" missing and dismissed the complaint.[43] Appeal was taken under section 1253. The Court found that no jurisdiction existed because "[t]he order appealed from does no more than deny the appellants a declaratory judgment striking down the Communist Control Act."[44] The injunction requested had been granted, thus removing the case from the purview of appellate review offered by section 1253. The Court was only faced with the question of whether a declaratory judgment may be appealed under section 1253, and based on the recent case, *Rockefeller v. Catholic Medical Center*,[45] the answer was no. *Rockefeller* was a brief *per curiam* decision which held that a declaratory judgment could not be appealed directly to the Supreme Court under section 1253. Justice Douglas, dissenting in *Mitchell*, felt that a "declaratory judgment may well contain 'thou shall not' [language which is] as commanding as any injunction."[46] He was saying that because a declaratory judgment has in some cases the same force and effect as an injunction, it should be accorded the same treatment as an injunction under section 1253.

42. 90 S.Ct. 1763 (1970).
43. 300 F. Supp. 1145 (D.C. Minn. 1969).
44. 90 S.Ct. 1763 (1970).
45. 397 U.S. 820 (1970).
46. 90 S.Ct. 1763, 1764, 1765 (1970).

Another case which considered appeals under section 1253 was *Gunn v. University Committee to End the War in Viet Nam*,[47] where the Court again took the opportunity to limit review under section 1253. The appellants sought declaratory and injunctive relief to prohibit and enjoin the enforcement of a Texas statute, relief to which the district court found the appellants entitled in a short *per curiam* opinion.[48] Appeal under section 1253 was dismissed for want of jurisdiction by the Court because "there was no order of any kind either granting or denying an injunction—interlocutory or permanent."[49] The order of the three-judge district court which stated the appellants were entitled to an injunction was not followed by one granting the relief requested. Hence, no injunction was ever issued which could serve as a basis for jurisdiction in accord with section 1253. A mere order saying the appellants were "entitled" to relief is not sufficient to categorize the order as one granting an injunction contemplated in section 1253. The Court pointed out that Rule 65(d) of the Federal Rules of Civil Procedure requires injunctions to be "specific in terms" and be "in reasonable detail."[50] Therefore, the

47. 90 S.Ct. 2013 (1970).

48. 289 F. Supp. 469 (W.D. Texas 1969). The Supreme Court found this opinion faulty because the injunctive relief granted was uncertain as to against whom it was to run, and what the opinion really said. It did not have the effect of an injunction, nor in the months following the order was any injunction issued by the lower court. The final paragraph of the order as cited by the Court said:

> We reach the conclusion that Article 474 is *impermissibly and unconstitutionally broad.* The Plaintiffs herein are entitled to their *declaratory judgment* to that effect, *and to injunctive relief against the enforcement of Article 474* as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, *special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements.* (Emphasis added by the Court)

49. 90 S.Ct. 2013 (1970).

50. *Id.* at 2016. Rule 65(d) of the Federal Rules of Civil Procedure provides:

> (d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Court held that jurisdiction did not exist because an injunction had not been ordered as required by section 1253.

The problem of appeals under section 1253 has been narrowed and clouded by a series of recent decisions involving injunctions and declaratory judgments which limit their applicability before three-judge courts.[51] To a great degree, most deal with what are proper injunctions and declaratory judgments to be brought before a three-judge court, although one case does deal with appeals under section 1253. However, they should be briefly reviewed because if a matter is improperly brought to, and decided by a three-judge court, the resulting appeal would be without jurisdiction granted by section 1253.

In *Younger v. Harris*,[52] the appellant sought to enjoin an impending state criminal prosecution and get declaratory relief. The Court expressly disclaimed any attempt to "decide whether the word 'injunction' in section 1253 should be interpreted to include a declaratory judgment . . . ."[53] The Court went on to hold that persons

51. 28 U.S.C. §§ 2281 and 2282 set forth those types of relief which may be granted only by a three judge court. There are some other areas in which the Code calls for the impaneling of a three-judge court. All of these areas are enumerated in 7 MOORE'S FEDERAL PRACTICE § 65.16 (1969):

> Actions Required to Be Heard and Determined by a Three-Judge District Court.
>
> In summary, a specially constituted district court of three judges is required in the following cases:
>
> 1. In a civil (equity) action brought *by* the United States under the anti-trust and related statutes if the Attorney General files a certificate of public importance.
>
> 2. In a civil action wherein either an interlocutory or permanent injunction is sought to restrain the enforcement:
>
> of a state statute or administrative order upon the ground that the statute or order is contrary to the federal Constitution and this federal claim is substantial;
>
> of an Act of Congress for repugnance to the Constitution of the United States;
>
> of an order of the Interstate Commerce Commission "other than for the payment of money or the collection of fines, penalties and forfeitures"; and
>
> of an order of certain other federal administrative boards and agencies, where the method for judicial review of I.C.C. orders has been adopted.

52. 91 S.Ct. 746 (1971).

53. *Id.* at 748. To have equated "injunction" and "declaratory judgment" would have the effect of bringing both actions with appeals under section 1253. This would overrule the holdings in Mitchell v. Donovan, 90 S.Ct. 1763 (1970); and Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970).

seeking injunctive relief in federal courts will no longer be afforded it where they want to enjoin a state prosecution because it chills the exercise of their First Amendment rights, unless they are being prosecuted or threatened with prosecution under the statute. An additional requirement with regard to these injunctions was added in *Samuels v. Mackell*,[54] where the Court held that to get an injunction, the party must show that they "would suffer immediate and irreparable damages."

The most recent case construing the applicability of section 1253 was *Perez v. Ledesma*,[55] where the appellant sought declaratory and injunctive relief, which was granted. On appeal, the Supreme Court reversed, holding that the:

> [T]hree-judge court was not properly convened to consider the constitutionality of a statute of only local application, similar to a local ordinance. Under 28 U.S.C. section 1253 we have jurisdiction to consider on direct appeal only those civil actions "required to be heard and determined" by a three-judge court.[56]

Here, because the constitutionality of the ordinance was not "required to be heard and determined" by a three-judge court, no jurisdiction under section 1253 lies.[57]

IV. PRESENT STATUS OF SECTION 1253 APPEALS

It is difficult to state definite rules for determining when an appeal is properly brought directly to the Supreme Court. To blend this patchwork of a few cases into a single thread which will tie these results together is difficult, and future cases will have to develop this area and fill the gaps of doubt left by the decisions. An analysis of the case on appeal to the Supreme Court under section 1253, *United Citizens Party v. The South Carolina State Election Commission*,[58] might offer some insight as to the method by which the Court will dispose of these cases in the future.

In *United Citizens Party*, the appellants sought declaratory and injunctive relief to have the names of their candidates placed on the

54. 91 S.Ct. 764 (1971).
55. 91 S. Ct. 674 (1971).
56. *Id.* at 677.
57. *See* Moody v. Flowers, 387 U.S. 97 (1967), which held a three-judge court could not be impaneled to consider the constitutionality of a statute of only local application.
58. *Supra* note 3.

November, 1970 South Carolina General Election ballot. The district court gave the relief requested, and declared the statute unconstitutional.[59] The state then filed notice of appeal under section 1253 directly to the Supreme Court. If jurisdiction is obtained under section 1253, it will be a prime example of the "piggyback" or pendant rule in operation. As in *Zwickler v. Koota,*[60] the lower court had issued an order granting the relief requested. The *United Citizens Party* action was a proper case to be considered by a three-judge court under the Three Judge Court Act,[61] and it does not run afoul of the cases where specific orders were issued yet failed to grant an injunction on which a section 1253 appeal can be based as in *Gunn v. The University Committee to End the War in Viet Nam.*[62] There is no doubt as to the fact that the injunction was issued or its effect. Here, both issues are being appealed and the Court will have to deal with them. No question, as implied, in *Golden v. Zwickler,*[63] concerning the propriety of an appeal dealing only with a declaratory judgment and not the injunction will be considered; in *United Citizens Party,* both the injunctive and declaratory relief are at issue. Therefore, even in view of the narrow construction given section 1253, *United Citizens Party* should be a proper case for direct appeal because the injunction provides the basis here, and there is no doubt as to it being issued. The declaratory judgment should ride "piggyback" with the injunction under section 1253 and both matters ruled on by the Court. The questions of the injunction and the declaratory judgment are both before the Court and are so bound up in fact and law that they are pendant issues, only to be properly decided together. The injunction leaves no doubt as to the specificity requirement along with the fact that it was an order filed by the three-judge court. Section 1253 is the proper appeal route for *United Citizens Party.*

V. The Problems of Mootness on Appeal

Once appeals of injunctions are within the jurisdiction of the Court, there is the ever present problem of mootness. As a general rule, the purpose to be served by an injunction ceases to exist when the

59. *Supra* note 3.
60. *Supra* note 15.
61. 28 U.S.C. §§ 2281-2284.
62. *Supra* note 43.
63. *Supra* note 7.

"issue becomes moot and hence no longer justiciable [and because of] . . . intervening circumstances there are no longer adverse parties with sufficient legal interest to maintain the litigation."[64] There are many ways in which an injunction issue may become moot and these will be discussed with emphasis on the *United Citizens Party* litigation, as well as methods by which the mootness may be overridden in proper cases.

United Citizens Party, now on appeal, faces the problem of mootness because one of the purposes of the injunction was to have the names of the party's candidates placed on the November, 1970, ballot. Now that election day has passed, should the appeal be dismissed because the issue has become moot? The rule that the passage of election day will result in dismissal of an appeal because the purpose for which the injunction was to serve has ceased to exist is not without exception. There are circumstances, as indicated by several cases,[65] which may override the mootness caused by the passage of a day certain. These factors go beyond the test of looking at a particular day in question, and review the policy aspects such as cutting down on multiplicity of litigation.

Similar to the *United Citizens Party* case, the problem of mootness was considered in *Moore v. Ogilvie,*[66] where the parties sought declaratory and injunctive relief challenging the constitutionality of an Illinois statute. The statute required a number of names on a petition for candidates running for political office on an independent ticket. The appellees urged that the appeal should be dismissed because the election had already been held, and that there was no possibility of granting any relief to the appellants. An earlier decision, *MacDougal v. Green,*[67] refused to enjoin this same statute as unconstitutional, and the Court here overrruled *MacDougal.*[68] The Court found this to be important in relation to mootness urged by the appellees, because here the passage of election day did not render the case moot.

> [T]he burden which *MacDougal v. Green, . . .* allowed to be placed on the nomination of candidates for statewide offices

64. 6A MOORE'S FEDERAL PRACTICE 3074 (1969).

65. These circumstances can be policy considerations, or the matter is capable of repetition or evades review. The cases following fully develop this concept.

66. 394 U.S. 814 (1969).

67. 335 U.S. 281 (1948).

68. 394 U.S. 814, 819 (1969).

> remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore capable of repetition, yet evading review. The need for resolution reflects a continuing controversy in the federal-state area where our one man, one vote decisions have thrust.[69]

Mootness was overshadowed by these important considerations which were capable of repetition and the presence of a continuing controversy. This is analagous to *United Citizens Party* in that the state statute set the times within which the parties must nominate their candidates, and the appellees did not comply with this requirement. The three-judge District Court[70] held this to be unconstitutional, and enjoined the state from enforcing it. This problem is continuing in nature, and capable of repetition because this same statute apparently remains in full force and effect placing a continuing burden on the state to enforce it as in *Moore v. Ogilvie.* It was apparently only to be disregarded for this particular election.[71] This same problem remains and controls future elections. Under the rule of *Moore v. Ogilvie,* the passage of election day should not render the *United Citizens Party* appeal moot because of the element of continuing controversy.

In *Golden v. Zwickler,*[72] mootness was also a consideration. The Court found mootness overridden even though the subject of Zwickler's handbills, a candidate for Congress, had since become a judge and election day had passed. The Court said:

> When this action was initiated the controversy was genuine, substantial and immediate, even though the date to which the literature was pertinent had already passed. The fortuitous circumstance that the candidate in relation to whose bid for office the anomyous handbill was circulated had, while vindication inched tediously forward, removed himself from the role of target of the 1964 handbill does not moot the plaintiffs further and far broader right to a general adjudication of unconstitutionality his complaint prays for . . . .[73]

This indicates that as in *United Citizens Party,* the parties have a genuine, substantial and immediate right to a determination of the

69. *Id.* at 816.

70. *Supra* note 3.

71. Interview with Michael W. Tighe, Assistant Attorney General of South Carolina, February 4, 1970, in Columbia, South Carolina; *supra* note 3.

72. 394 U.S. 103 1969.

73. *Id.* at 107.

constitutionality of the state statute which should remove the bar of mootness.

The Court suggested another way in which mootness could be overridden in *Brockington v. Rhodes*,[74] although this was not the result. The appellant attacked an Ohio statute which required candidates of independent parties to submit petitions containing names of 7% of the registered voters in that state before the candidate could be placed on the ballot. The lower court denied relief, and since that time the election day had passed, and the legislature amended the law changing the requirement from 7% to 4%.

The statutory amendment did not render the case moot because the appellee had only 1% of the voters on his petition,[75] however, the passage of election day did moot the case. The Court set out various factors influencing this decision, which could be used as guidelines for review in other cases involving mootness. They said:

> [I]n view of the limited nature of the relief sought, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future elections. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and others similarly situated as independent *voters*, as he might have under Ohio law. He did not seek a declaratory judgment, although that avenue was open to him.[76]

Using these factors, the Court said the passage of election day mooted the issues and the appeal was dismissed. Applying these standards to the *United Citizens Party*, the appellees sought broad injunctive and declaratory relief suggested by the Court as necessary. The party did not specifically allege they intended to run for offices in future elections, but this requirement would be satisfied in that there is a strong implication that they would because the party was formed to run candidates in future elections. This implication has proved to be correct.[77] The Party did bring the action as a class and not for one

74. 396 U.S. 41 (1969).

75. *Id.* at 43.

76. *Id.*

77. The United Citizens Party continues as a political party registered in South Carolina and active in political matters. Currently Mrs. Victoria DeLee is the party's candidate for Congress in the next election in South Carolina's First Congressional District.

particular candidate, as was the case in *Brockington.* Because the criteria suggested by the Court could be complied with in the *United Citizens Party* action, there is a strong argument for overriding the mootness resulting from the passage of election day.

Even with the passage of election day raising the problem of mootness, there are other types of areas which can raise the mootness aspect even if the day certain mootness can be circumvented. As suggested in *Brockington,* and as was the case in *Hall v. Beals,*[78] intervening statutory amendment of the law being questioned can render a case moot. In *Hall,* the appellants questioned the Colorado residency requirement imposed in order to be eligible to vote. Their petition was denied in the lower court,[79] and during the time of the appeal to the Supreme Court, the Colorado Legislature reduced the residency requirement from six months to two months. The Court held that:

> [T]he 1968 election is history, and it is impossible to grant the appellants the relief they sought . . . Further, the appellants have now satisfied the six month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot.[80]

The amending act of the legislature did not render the matter moot in *Brockington* because the amendment did not affect the appellant's contention that 1% was sufficient. He still was below the 4% requirement imposed by the statute as amended.

There has been no statutory amendment with regard to the objections raised in *United Citizens Party*; however, if the South Carolina Legislature amended section 23-264 of the South Carolina Code of Laws[81] remedying the alleged wrong before the appeal was argued, it would render the case moot. There has been some speculation that this could be the result[82] in this case.

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78. 90 S.Ct. 200 (1969).

79. 292 F. Supp. 610 (D.C. Colo. 1969).

80. Hall v. Beals, 90 S. Ct. 200 (1969).

81. S.C. CODE ANN. § 23-264 (1962).

82. Interview with Michael W. Tighe, Assistant Attorney General of South Carolina, February 4, 1971. Mr. Tighe indicated that the Legislature is considering amending section 23-264 of the South Carolina Code of Laws, and this would render the case moot. *Supra* note 68. Also contemplated is enacting a new statute which would not amend section 23-264, but provide for other procedures to correct the alleged wrong.

These new rules governing mootness of injunctions on appeal cover most of the issues that will be raised in future cases. There are other less important rules which if applied will render a case moot. Circumstances such as the death of a party in the action,[83] failure to replace them with a proper party,[84] or failing to allege injunctive relief *in futuro*,[85] can all result in mootness.

There is another argument for making distinction between mootness because of the passage of election day on appeals of injunctions, and declaratory judgments. There is a stronger argument for overriding mootness in declaratory judgments when a day certain has passed than when this question is involved in an injunction. The nature of the relief sought is the basis of the distinction in that an injunction contemplates the happening of one particular event, where as declaratory relief goes much further in determining the rights of the parties. Generally, the Court has not made this distinction with regard to mootness questions.[86] Further, if the rules as suggested concerning appeals hold true, proper appeals under section 1253 will allow both types of relief to be appealed as a package and all rules governing mootness in both types of relief sought should apply equally.

VI. CONCLUSION

The scope of appeals from three-judge district courts under section 1253 is now being more narrowly construed. As the cases now indicate, only orders of a three-judge district court granting or denying an injunction are proper cases for direct appeal. Any decision which does not expressly order an injunction will not suffice, nor will any order which states the parties are "entitled" to injunctive relief. *United Citizens Party* will offer the Court an opportunity to decide the further question of whether or not a declaratory judgment issued with the injunction can be appealed directly along with the injunction issue under section 1253. Under the present rules it should be allowed as a pendant issue because it is sufficiently related to the prayer for injunctive relief. As a practical matter it would be very easy to amend

83. Pullman Co. v. Croon, 231 U.S. 571 (1913).

84. Richardson v. McChesney, 219 U.S. 498 (1911).

85. Association for the Preservation of Freedom of Choice v. Wagner, 298 F.2d 552 (1962).

86. The relief sought in Hall v. Beals, and Brockington v. Rhodes was an injunction and both indicated the mootness could be overridden.

sections 1253 and 1284 and provide that when three-judge courts are convened to hear an injunction they may also, when requested, issue a declaratory judgment, and that on direct appeal this declaratory judgment will also be an issue to be decided under a section 1253 appeal.

In many of these cases mootness intervenes before the appeal is perfected, and could well do so in *United Citizens Party* because the election day has passed. However, due to the overriding policy considerations and other rules suggested in the cases, the possible mootness could be circumvented, and the case heard by the Court.

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