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# Constitutional Law - Declaratory Judgments - Relaxation of Requirements - Powell v. McCormack, 395 U.S. 486 (1969)

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Court found that Georgia's congressional districting scheme, with a maximum deviation from the ideal of 108.9 per cent, was unconstitutional. In *Kirkpatrick II*, the Court now holds that even a three per cent maximum deviation from the districting norm fails to satisfy the "as nearly as practicable" limitation. While the districting statute invalidated in *Wesberry* grossly discriminated against voters in the larger congressional districts, the same cannot be said of the Missouri districting scheme. Where the greatest disparity among districts produces a situation in which one citizen casts a vote that was 97 per cent of the vote of a citizen in another district, it is doubtful whether such a differential can amount to a constitutional injury except in a purely abstract sense.

It would seem, therefore, that the Court rejects the Missouri plan because the state legislature considered factors other than population in discharging the command of article 1, § 2 of the Constitution. Thus, what is really involved in *Kirkpatrick II* is not a discriminatory denial of the right to vote, but rather a violation of the judicially created right to a system that recognizes numbers as the only basis for representation. Consequently, constitutional rectitude in congressional districting must be achieved in the following manner:

Straight indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote.<sup>109</sup>

This "Draconian pronouncement" can lead to only one result: "abject surrender of jurisdiction to the mindless computer."<sup>110</sup>

*Stephen L. Schar*

#### CONSTITUTIONAL LAW—DECLARATORY JUDGMENTS— RELAXATION OF REQUIREMENTS?

During the 89th Congress, a special House subcommittee organized to investigate the expenditures of the House Committee on Education and Labor, and in particular, those of its chairman, Adam Clayton Powell, released a report charging Powell and members of his staff with deceptions as to certain travel expenditures and with making illegal salary payments to Powell's wife.<sup>1</sup> Formal action was postponed until the convening of the 90th Congress; Powell was then asked to step aside when the oath

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109. *Supra* note 67, at 550 (Harlan J., dissenting).

110. Wells I, *supra* note 37, at 989.

1. H.R. Rep. No. 2349, 89th Cong., 2d Sess. 6-7 (1966).

of office was administered to the other Representatives-elect. House Resolution 1 was subsequently adopted, which provided that a committee be organized to investigate Powell's eligibility to be seated.<sup>2</sup> The committee report found that Powell met the qualifications of age, residency, and citizenship enumerated in article I, § 2 of the Constitution.<sup>3</sup> The report, however, went on to charge Powell with wrongful diversion of House funds for personal use, unwarranted assertion of privilege and immunity from process of the courts of New York, and with falsification of expenditure reports to the Committee on House Administration.<sup>4</sup> The report recommended that Powell be admitted to membership of the 90th Congress, but that he be censured, fined, and stripped of his seniority.<sup>5</sup> A motion to bring the committee recommendation to a vote was defeated 222 to 202.<sup>6</sup> After passing an amendment to the committee resolution which called for Powell's exclusion,<sup>7</sup> the Speaker ruled that the resolution, as amended, required only a majority vote for passage.<sup>8</sup> The House then adopted House Resolution 278 by a vote of 307 to 116,<sup>9</sup> thereby excluding Powell from the 90th Congress and declaring his seat vacant.

Powell and thirteen voters of the 18th Congressional District of New York filed suit in the United States District Court for the District of Columbia, naming as defendants five members of the House of Representatives.<sup>10</sup> The complaint alleged that House Resolution 278 violated the Constitution—specifically, that article I, § 2 sets out the *exclusive* qualifications (age, residency, and citizenship) for membership in the House and therefore does not provide that the Representatives are free to

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2. 113 Cong. Rec. 14 (daily ed. Jan. 10, 1967).

3. H.R. Rep. No. 27, 90th Cong., 1st Sess. 31 (1967) The report was issued February 23, 1967. Article I, § 2 provides: "No Person shall be a Representative who shall not have attained to the age of twenty five Years and have been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

4. *Id.* at 31-32.

5. *Id.* at 33.

6. H.R. Res. 278, 90th Cong., 1st Sess., 113 Cong. Rec. 5020 (1967). The motion was defeated on March 1, 1967.

7. *Id.* at 5037.

8. U.S. CONST. art. I, § 5, cl. 1 provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide."

9. *Supra* note 6, at 5039.

10. Named in the action both individually and in their official capacities were the Clerk, the Doorkeeper, and the Sergeant-at-Arms of the House, as well as the Speaker.

establish additional qualifications. Thus, a member-elect could not be excluded on grounds other than failure to meet one or more of the enumerated qualifications. The plaintiffs sought coercive relief to restrain the Speaker and the ministerial House officials from denying Powell his seat in the House and prayed for a *mandamus* directing the defendants to seat him and restore his lost salary. The petitioners also requested that a declaratory judgment issue proclaiming Powell's exclusion unconstitutional. The District Court dismissed the suit "for want of jurisdiction of the subject matter."<sup>11</sup> The Court of Appeals for the District of Columbia acknowledged jurisdiction, but affirmed on the grounds that the questions presented were non-justiciable.<sup>12</sup> The Supreme Court granted *certiorari*. While the case was pending, Powell was reelected to the 91st Congress and seated (the 90th Congress having terminated), thereby raising the possibility that the controversy had been rendered moot. However, in a 7 to 1 decision, Chief Justice Warren writing for the majority, the Supreme Court found that Powell's claim for back salary prevented the case from being moot. The case was remanded, in part, to determine the salary issue. The Court also concluded that "Petitioner Powell is entitled to a declaratory judgment that he was unlawfully excluded from the 90th Congress." *Powell v. McCormack*, 395 U.S. 486, 489 (1969).

The issue of legislative exclusion for a failure to meet extra-constitutional qualifications was treated by the Supreme Court as one of first impression. Although House precedent would seem to indicate such exclusion could be effectuated,<sup>13</sup> its value is diminished by an absence of uniform House action, and one must ultimately look to sources reflecting the legislative intent in reaching the conclusion that article I, § 2 sets forth the *exclusive* qualifications for membership in the House. Aside from the literal interpretation of article I, § 2 requirements for House membership, *Powell v. McCormack* also indicates a relaxation of the criteria for issuance of a declaratory judgment. By implying that a declaratory judgment may be used to settle an otherwise moot question,<sup>14</sup> the Court adds a new dimension to that form of relief. In view of the doubt as to whether Powell's declaratory judgment can be practically implemented, serious questions are raised as to the propriety of issuing such a declaration. The purpose of this note is therefore twofold: to trace the Court's rationale in finding that a Representative-elect may not be excluded on grounds other than failure to meet the age, residency, and citizenship

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11. *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967).

12. *Powell v. McCormack*, 395 F.2d 577 (D.C. Cir. 1968).

13. See footnote 20 *infra*.

14. *Powell v. McCormack*, 395 U.S. 486, 497-98 (1969).

qualifications of article I, § 2, and to demonstrate the relaxation of requirements heretofore necessary to obtain issuance of a declaratory judgment.

The adoption of House Resolution 278 excluding Adam Clayton Powell from the 90th Congress for failing to meet qualifications other than those enumerated in article I, § 2 of the Constitution created a serious problem of Constitutional interpretation. If the enumerated qualifications (age, residency, and citizenship) are exclusive, to which the House may neither add nor subtract, Powell's exclusion was necessarily unlawful. Although article I, § 5, cl. 2 authorizes the House to *expel* a member for any reason whatsoever, providing a two-thirds majority concurs<sup>15</sup>—and Powell was in fact *excluded* by more than a two-thirds majority—the *exclusion was by no means tantamount to expulsion*. The Speaker had ruled that proposed House Resolution 278 in its amended form provided for exclusion,<sup>16</sup> and at the time the vote was taken members of the House were faced with the dilemma of either casting a vote for exclusion or of going on record as being opposed to the only punishment proposal that was likely to come before them.<sup>17</sup> It is questionable whether, if faced with a resolution expressly calling for expulsion, the members would have adopted it.<sup>18</sup>

The question remains, however, whether in excluding a Representative-elect, a House exercising that constitutional power is limited to judging the three qualifications enumerated in article I, § 2.<sup>19</sup> Article I, § 5,

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15. U.S. CONST. art. I, § 5, cl. 2 provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

16. *Supra* note 6, at 5020.

17. Eckhardt, *The Adam Clayton Powell Case*, 45 TEX. L. REV. 1205, 1209 (1967).

18. *Id.* See also Comment, *Exclusion of a Member-Elect by a House of Congress*, 42 N.Y.U. L. REV. 716, 717-18 (1967).

19. To term the qualifications of U.S. CONST. art. I, § 2 "exclusive" is perhaps misleading. At least four other disqualifications may be found at other points in the Constitution. U.S. CONST. art. I, § 3 provides that no one convicted in an impeachment proceeding shall subsequently "hold and enjoy any Office of honor, Trust, or Profit under the United States." U.S. CONST. art. I, § 6 prohibits a person from being a member of either House while "holding any Office under the United States. . . ." U.S. CONST. art. VI, cl. 3 requires Senators and Representatives to be bound by oath or affirmation to support the Constitution, and it was held in *Bond v. Floyd*, 385 U.S. 116, 132 (1966), that such oath or affirmation may be required as a condition precedent to holding office. The fourteenth amendment provides at § 3: "No person shall be a Senator or Representative in Congress, . . . who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

cl. 1 provides that "Each House shall be the Judge of the . . . *Qualifications* of its own Members, and a majority of each shall constitute a Quorum to do Business." The question is raised as to whether "Qualifications" includes something other than age, residency, and citizenship. The history of the House of Representatives is rich with both successful and unsuccessful attempts at legislative exclusion for failure to meet other than constitutionally enumerated qualifications,<sup>20</sup> and the discussions of the issues during such proceedings reflect a diversity of opinion as to the constitutionality of such action.<sup>21</sup> Apparently none of the exclusions were judicially contested, however, resulting in an absence of judicial precedent.

The Supreme Court treated the issue of legislative exclusion for extra-constitutional qualifications as one of first impression,<sup>22</sup> and, due to the inconsistency of House precedent, grounded its opinion that article I, § 2 sets forth exclusive qualifications on reflections of the draftsmen's intent.<sup>23</sup> Of much importance is the dialogue between members of the Constitutional Convention pertaining to the qualifications provision. The three qualifications of article I, § 2 were unanimously adopted on August 8, 1787.<sup>24</sup> On August 10, the Committee of Detail proposed that Congress should have power to impose uniform property qualifications upon its members,<sup>25</sup> to which James Madison strongly objected, warning that such authority would be

an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution.<sup>26</sup>

The proposal was subsequently defeated, thereby leaving article I, § 2 an unqualified provision.

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20. 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §§ 414-17, 448-52, 464-84 (1907). Precedent seems to establish that a state may not impose qualifications supplementary to those established by the Constitution (§§ 414-17), but that a member-elect may be excluded where his national loyalty is not directed toward the United States (§§ 448-52). Precedent is contradictory regarding exclusion for criminal activity. In 1870, B. F. Whittmore was excluded for commission of bribery (§ 464). In 1870, the House declined to exclude John C. Connor whose moral character had been impeached (§ 465). George Q. Cannon of Utah was excluded in 1882 for the practice of polygamy (§ 473), as was Brigham H. Roberts in 1900 (§§ 477-80).

21. *Id.*

22. *Supra* note 14, at 546-47.

23. *Supra* note 14, at 532-41; *see also* Myers v. United States, 272 U.S. 52, 175 (1926); Note, *The Power of a House of Congress to Judge the Qualifications of its Members*, 81 HARV. L. REV. 673, 679 (1968).

24. 2 FARRAND, RECORDS OF THE FEDERAL CONSTITUTION OF 1787, 213 (1937).

25. *Id.* at 179.

26. *Id.* at 249-50.

The Colonial debates that considered adoption of the Constitution also offer some insight into the intent of its authors. Appearing before the ratifying convention of Virginia, Wilson Carey Nicholas (future Senator and House member) spoke on the subject of qualifications. Stressing the importance of having a wide strata of society from which to choose a legislature, Mr. Nicholas assured the convention that:

[T]his Constitution has amply attended to this idea. We find no qualifications required except those of age and residence, which create a certainty of their judgment being matured, and of being attached to their state.<sup>27</sup>

*The Federalist* was a series of essays written by Alexander Hamilton, James Madison, and John Jay between October, 1787 and August, 1788, which Thomas Jefferson considered

an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed and of those who accepted the Constitution of the United States, on questions as to its genuine meaning,<sup>28</sup>

offers additional ammunition to those who believe the House may not impose qualifications additional to those of article I, § 2. Hamilton stated: The qualifications of the elected . . . have been very properly considered and regulated by the convention. A representative of the United States, must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the state he is to represent, and during the time of his service, must be in no office under the United States. Subject to these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.<sup>29</sup>

In No. 60, Hamilton reiterated:

Its [the legislature's] authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose or be chosen, . . . are defined and fixed in the constitution; and are unalterable by the legislature.<sup>30</sup>

Aside from these indications of the draftsmen's intent, logic also dictates that the House may not impose additional qualifications to exclude a Representative-elect. Assume *arguendo* that the House may impose additional qualifications upon a member-elect and exclude him by a majority vote pursuant to article I, § 5, cl. 1. Since article I, § 5, cl. 2 provides for expulsion of a member for any reason whatsoever as long as the requisite two-thirds majority concurs, the expulsion power with its two-thirds safeguard requirement could be circumvented simply by with-

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27. 3 DEBATES ON THE FEDERAL CONSTITUTION 8 (Elliot ed. 1937).

28. THE COMPLETE JEFFERSON 8 (Padover ed. 1943).

29. THE FEDERALIST, No. LII at 269 (Beloff ed. 1948).

30. *Id.*, No. LX at 311.

holding a member-elect's seat under the pretense of determining extra-constitutional qualifications.<sup>31</sup> The framers realized the dangers of allowing the membership of either house of Congress a hand in determining its own composition;<sup>32</sup> the power of election was to be kept in the hands of the constituency—hence, the difficult two-thirds vote required for expulsion.

Since Powell was reelected to the 91st Congress while *Powell v. McCormack* was pending adjudication before the Supreme Court, respondents suggested that the case had been rendered moot,<sup>33</sup> citing *Alejandrino v. Quezon*<sup>34</sup> as authority. The facts in *Alejandrino* were essentially the same as in *Powell*. Jose Alejandrino had been appointed to the Philippine Senate by the Governor General, but was excluded pursuant to a Senate resolution because of an assault upon another Senator. Alejandrino brought an action against twenty-two elected members of the Senate, its President, Secretary, Sergeant-at-Arms, and Paymaster praying for an injunction restraining enforcement of the resolution, and for a writ of *mandamus* ordering the defendants to recognize the plaintiff as a Senator and grant him all rights, privileges, and emoluments of office. Before the case came to the United States Supreme Court, Alejandrino was reappointed to the Senate and seated as a member in good standing.

In dismissing the action as moot because of the reappointment, the Supreme Court considered the possibility that Alejandrino's claim for lost wages might save the case. However, the Court decided that the salary claim was a "mere incident" of the main issue<sup>35</sup> and was not pleaded with sufficient detail to enable the Court to consider it—namely, that the petitioner's brief did not address itself to emoluments other than by name, did not definitely describe the specific officer whose duty it was to pay the salary, nor did it direct the Court to any statute or Senate rule whereby the method and manner of salary payment could be ascertained.<sup>36</sup> The Court did recognize, however, that there existed some board whose ministerial duty was to pay Senators' salaries, and indicated that Alejandrino could secure relief through a clearly worded complaint naming such ministerial officials as defendants and praying for a *mandamus* to compel such officials to discharge their ministerial duty, in which case the pres-

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31. Eckhardt, *supra* note 17, at 1208; 2 FARRAND, *supra* note 24, at 254.

32. 2 FARRAND, *supra* note 24, at 250.

33. The principle that the Supreme Court will not decide a moot case is a function of the "case or controversy" requirement of article III of the United States Constitution. *St. Pierre v. United States*, 319 U.S. 41 (1943).

34. 271 U.S. 528 (1926).

35. *Id.* at 533.

36. *Id.*

ence of Senate members as parties defendant would be unnecessary.<sup>37</sup>

Chief Justice Warren, speaking for the majority in *Powell*, distinguished *Powell* from *Alejandrino* on procedural grounds. Pointing out that it was not the incidental character of *Alejandrino*'s salary claim that required the entire case to be judged moot, but rather that it was "his failure to plead sufficient facts to establish his *mandamus* request."<sup>38</sup> Warren stressed that *Powell*'s complaint named the Sergeant-at-Arms as the individual responsible for payment of *Powell*'s salary and prayed for both an injunction and a *mandamus* ordering such official to perform his ministerial duty.<sup>39</sup> It would seem, though, that even this falls short of the detailed allegations of legislative payroll procedure that *Alejandrino* indicated would be necessary.<sup>40</sup> The Court did avoid further confrontation with the salary issue by remanding it:

Since the court below disposed of this case on grounds of justiciability, it did not pass upon whether *Powell* had brought an appropriate action to recover his salary. Where a court of appeals has misconceived the applicable law and therefore failed to pass upon a question, our general practice has been to remand the case to that court for consideration of the remaining issues. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 704 (1967); *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U.S. 29, 34 (1956). We believe that such action is appropriate for resolution of whether *Powell* in this litigation is entitled to *mandamus* against the Sergeant-at-Arms for salary withheld pursuant to the House resolution.<sup>41</sup>

In proceeding beyond the issues concerning injunctive relief, the Court focused on *Powell*'s claim for declaratory relief and further distinguished *Powell* from *Alejandrino*:

Petitioner *Powell* has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. *Declaratory relief has been requested, a form of relief not available when Alejandrino was decided.* A court may grant declaratory relief even though it chooses not to issue an injunction or *mandamus*. See *United Public Workers v. Mitchell*, . . .; cf. *United States v. California*, 332 U.S. 19, 25-26 (1947).<sup>42</sup>

The Court concluded that *Powell*'s prayer for a declaratory judgment thus saved the case from mootness, notwithstanding insufficient averments for

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37. *Id.* at 534-35.

38. *Supra* note 14, at 498.

39. *Supra* note 14, at 498 n.11: "Paragraph 18b of petitioners' complaint avers that 'Leake W. Johnson, as Sergeant-at-Arms of the House' is responsible for and refuses to pay *Powell*'s salary and prays for an injunction restraining the Sergeant-at-Arms from implementing the House resolution depriving *Powell* of his salary as well as *mandamus* to order that the salary be paid."

40. *Supra* note 34, at 533.

41. *Supra* note 14, at 500-01 n.16.

42. *Supra* note 14, at 498-99 (emphasis added).

coercive relief. Is *Powell*, however, a proper case for declaratory relief? An investigation of the history and nature of declaratory relief is necessary to answer this question.

The federal judiciary received authority to issue declaratory judgments with the adoption of the Declaratory Judgment Act of June 14, 1934: In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the 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. Any such declaration shall have the force and effect of a final judgment or decree, and shall be reviewable as such.<sup>43</sup>

The Act was declared constitutional in *Ashwander v. Tennessee Valley Authority* (1936) as not changing the essential "case or controversy" requirement of a civil action.<sup>44</sup>

The Declaratory Judgment Act did not enlarge the jurisdiction of the federal judiciary, but merely created an additional remedy that had long existed on the state level.<sup>45</sup> The action is neither legal nor equitable, but *sui generis*.<sup>46</sup> It differs from an equitable remedy in that the absence of an adequate legal remedy is not required and the technicalities of equity procedure do not control.<sup>47</sup> It may be sought as sole relief or in conjunction with other relief, legal or equitable.<sup>48</sup> The purpose of a declaratory judgment is to "settle and to afford relief from insecurity with respect to rights, status, and other legal relations,"<sup>49</sup> and to provide prompt and efficient adjudication of legal rights before a breach has been committed.<sup>50</sup>

Judicial interpretation of the Act began in 1937 with the case of *Aetna Life Ins. Co. v. Haworth*,<sup>51</sup> wherein an insurance company sought a declaration as to whether the defendant insured had suffered a disabling injury prior to stopping payment of premiums. If the answer was in the affirmative, the defendant's policy was still in effect and plaintiff would be required to maintain reserves in excess of \$20,000 against possible claims. If in the negative, defendant's policy would have lapsed for non-payment of premiums, and the reserves would not have to be maintained.

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43. 28 U.S.C.A. § 2201 (1959).

44. 297 U.S. 288, 325 (1936).

45. *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937).

46. *Id.* at 324; see also Sen. Rep. No. 1005, 73rd Cong. 2d Sess. (1950).

47. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933); *Buromin v. National Aluminate Corp.*, 70 F. Supp. 214, 216 (D. Del. 1947).

48. 28 U.S.C.A. § 2201 (1959).

49. Declaratory Judgment Act, 28 U.S.C. § 12 (1964).

50. 1 C.J.S. *Actions* § 18(3) (1936).

51. 300 U.S. 227 (1937).

Directing itself to the "case or controversy" requirement, the Court explored the Act in this light. Since the Act was procedural in nature, certain substantive elements had to be present as in any other case. The declaratory judgment could not be used as a tool to circumvent the disabilities of mootness, nonjusticiability, or hypothetical disputes.<sup>52</sup> The Court held that a controversy did exist since determination of the facts would determine whether the plaintiff need maintain \$20,000 in reserves, thus terminating the controversy without plaintiff committing a possible breach of the defendant's rights, and without the necessity of the plaintiff having to wait until the defendant chose to file a claim.

Perhaps the most troublesome aspect of the declaratory judgment is that its issuance is discretionary with the court,<sup>53</sup> and although there are fairly clear guidelines, there are no concrete rules a court must follow in exercising discretion. Edwin Borchard, co-draftsman of the Uniform Declaratory Judgments Act and the Federal Declaratory Judgment Act stated the two principal criteria in favor of rendering a declaration:

(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.<sup>54</sup>

From this a general postulate is derived, namely, that where the controversy would not be terminated, or where notwithstanding a declaration, further proceedings would still be necessary for the plaintiff to obtain relief, a declaration should be denied.<sup>55</sup>

The term "settle the controversy" must be further delineated and defined if it is to be used as a gauge for the exercise of discretion. It is not necessary that the declaratory judgment settle all the "manifold and multifarious issues and legal relationships and interrelationships of the entire dispute, [but the controversy in question must be] an autonomous and independent dispute, involving issues of vital importance."<sup>56</sup> Therefore, declaratory relief has been denied where there was doubt as to

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52. *Id.* at 240; see also 6A MOORE, FEDERAL PRACTICE § 57.14 at 3078 (2d ed. 1964); BORCHARD, DECLARATORY JUDGMENTS 29-36, (1st ed. 1934).

53. Public Service Comm'n of Utah v. Wycoff Co., 344 U.S. 237 (1952); Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286 (3rd Cir. 1948); Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677 (1942); Vannaman and Kutner, *Declaratory Judgments in the Federal Courts*, 90 OHIO ST. L. J. 209 (1948); 6A MOORE, *supra* 52, § 57.41.

54. BORCHARD, *supra* note 52, at 107.

55. Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren, 204 F.2d 256, 258 (7th Cir. 1953); Maryland Casualty Co. v. Consumers Finance Service Inc., 101 F.2d 514, 515 (3rd Cir. 1938); *supra* note 45, at 325; Public Service Comm'n of Utah v. Wycoff Co., *supra* note 53; 6A MOORE, *supra* note 52, § 57.08 at 3025.

56. 6A MOORE, *supra* note 52, § 57.08(4) at 3033.

whether proper adversary parties were present,<sup>57</sup> where a more appropriate or more effective remedy existed,<sup>58</sup> where initial determination of the issues had been committed to an administrative body,<sup>59</sup> and where statutory remedies had not been exhausted.<sup>60</sup>

*Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*<sup>61</sup> illustrates the above observations well. The plaintiff was an Illinois corporation which filed suit for a declaratory judgment seeking a determination that housing owned by it was a hotel and not subject to rent control under the Housing and Rent Act of 1947. Named as defendant was Norman B. Shogren, the chief administrative officer in Chicago, Illinois. In declining to issue the declaratory judgment, the court held that the Director of Rent Stabilization was a necessary party to the action, since he was responsible for national administration of the Act, and the named administrator was merely a subordinate official.

A declaratory judgment is appropriate only when it will terminate the controversy giving rise to the proceeding. . . . In the instant case, it is not discernible how a judgment could have sufficient finality to terminate the controversy, in the absence of the Director as a party.<sup>62</sup>

The court also noted that the Act provided for initial inspection of housing by the Director to determine its status under the Act. The fact that such administrative procedure had not been exhausted also mitigated against issuing the declaration: "It is not for the courts to bypass such administrative procedures by making the initial determination of fact in a suit for a declaratory judgment . . . ."<sup>63</sup>

Discretion to enter a declaratory judgment differs from other forms of judicial discretion with regard to appellate review. "Discretion" may be defined as

the power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.<sup>64</sup>

In this sense, discretionary judicial action is final and may not be upset on appeal unless it is shown that such discretion has been abused, that the

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57. *Channel Master Corp. v. JFD Electronics Corp.*, 263 F. Supp. 7 (E.D. N.Y. 1965).

58. *Mississippi Valley Barge Line Co. v. Bulk Carriers Ltd.*, 249 F. Supp. 743, 746 (S.D. N.Y. 1965).

59. *Public Service Comm'n of Utah v. Wycoff Co.*, *supra* note 53.

60. *Emmons v. Smitt*, 58 F. Supp. 869 (E.D. Mich. 1944).

61. *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, *supra* note 55.

62. *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, *supra* note 55, at 258.

63. *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, *supra* note 55.

64. *Bouv. Law Dict.* 305 (Baldwin ed. 1934).

"judicial action is arbitrary, fanciful or unreasonable, . . . [or] where no reasonable man would take the view adopted by the trial court."<sup>65</sup> When reviewing a declaratory judgment decision, however, the appellate court may substitute its discretion for that of the trial court and reverse the lower court if it feels the decision erroneous, although not arbitrary.<sup>66</sup>

The subject of discretion was thoroughly discussed in *Delno v. Market St. Ry. Co.*,<sup>67</sup> where the plaintiff sought a declaratory judgment that five \$1,000 first mortgage bonds of defendant railway held by him were superior to the lien of owners of other bonds who had agreed to extend their maturity in contravention of the mortgage agreement. After asserting that the appellate court could substitute its discretion for that of the district court, the Court of Appeals reversed the lower court's granting of the declaration. Noting that the other bondholders were not parties defendant and that any judgment rendered would not bind them, the court addressed itself to the issue of controversy settlement:

While such a judgment might terminate the issue between the parties now before it, it would not finally settle the issue because the absent bondholders would have the right to litigate the same question.<sup>68</sup>

While the lower court felt that an autonomous and independent aspect of the dispute would be settled by a declaratory judgment, the appellate court, though not willing to say the lower court abused its discretion, nevertheless thought that the Declaratory Judgment Act envisioned settlement of the *entire* controversy, and thus substituted its discretion for that of the lower court.

Bearing in mind the criteria for exercise of discretion in a declaratory judgment action, the propriety of declaratory relief in *Powell* is dubious when one considers the extent to which the dispute was settled—or left unsettled. A blanket declaration that Congressional action was unconstitutional is of questionable legitimacy. That issue was decidedly moot but for Powell's claim to back salary, and it is far from certain that Powell can recoup his loss. If such claim be important enough to prod the Court into serious constitutional interpretation, it would seem that the Court would offer some definite guidelines for the molding of relief, especially since *Powell v. McCormack* was found to present a justiciable controversy<sup>69</sup> and effective molding of relief is one aspect of justiciability.<sup>70</sup>

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65. *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

66. *Id.* at 968; *accord*, Vanneman and Kutner, *supra* note 53, at 223; 6A MOORE, *supra* note 52, § 57.08(2) at 3030; *contra*, National Labor Relations Board v. Baltimore Transit Co., 140 F.2d 51 (4th Cir. 1944).

67. *Supra* note 65.

68. *Supra* note 65, at 968-69.

69. *Supra* note 14, at 550.

70. *Baker v. Carr*, 369 U.S. 186, 198 (1962).

The problems awaiting Powell should he attempt to utilize his declaratory judgment for recovery of his salary are numerous. There are three remaining defendants, only one of whom, the Sergeant-at-Arms, controls salary disbursements. It is uncertain whether a writ of *mandamus* directing him to pay Powell could be obeyed, since he is permitted by law only to release funds when presented with certificates signed by the Clerk<sup>71</sup> and the Speaker,<sup>72</sup> and the Speaker is no longer a party to the action. Furthermore, the office of Sergeant-at-Arms of the 90th Congress has expired, and the present Sergeant-at-Arms serves the 91st Congress.<sup>73</sup> All funds not used for the 90th Congress were presumably returned to the United States Treasury pursuant to custom,<sup>74</sup> so it is doubtful that the Sergeant-at-Arms of the 90th Congress has funds available or would be authorized to disburse salaries due a member of a previous session, whether directed to by *mandamus* or not. Such abundant uncertainty of final outcome is hardly the controversy settlement envisioned by the Declaratory Judgment Act. And since there is doubt as to whether all proper adversary parties are affected by the declaration so as to provide the foundation for recovery of Powell's back salary, a declaratory judgment could also have been properly refused for this reason.<sup>75</sup>

A declaratory judgment should be refused where a more effective or useful remedy is available. Since the Court held Powell's claim to salary the only viable issue of Powell's suit, a more appropriate remedy would have been an action in the Court of Claims for a money judgment against the United States.<sup>76</sup> That court would have had no authority to declare the action of the House of Representatives unconstitutional,<sup>77</sup> but the difficulties associated with coercive remedies against members and employees of the House would have been avoided, and it would not have been necessary to decide all the constitutional issues analyzed in *Powell*. Such a course would have more closely conformed to the Court's principle not "to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."<sup>78</sup>

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71. 2 U.S.C. § 34 (1965).

72. 2 U.S.C. § 48 (1965).

73. *Supra* note 14, at 570 (Stewart, J. dissenting).

74. *Supra* note 14, at 571 n.21 (Stewart, J. dissenting).

75. *See supra* note 57.

76. 28 U.S.C. § 1491 (1965).

77. *United States v. King*, 395 U.S. 1 (1969).

78. *Liverpool, N.Y. & Phila. S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39 (1885).