

The Burger Court Opinion Writing Database

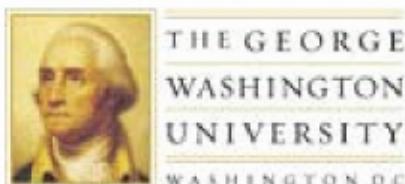
Schlesinger v. Reservists Committee to Stop the War

418 U.S. 208 (1974)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



To: Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: The Clerk of the Supreme Court

Circulated: MAY 21 1974

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1188

James R. Schlesinger, Secretary of Defense, et al.,
 Petitioners,
 v.
 Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 411 U. S. 947 (1973), to review the judgment of the Court of Appeals affirming, without opinion, the District Court's partial summary judgment for Respondents declaring that "Article I, Section 6, Clause 2 of the United States Constitution renders a Member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office." 323 F. Supp. 833, 843 (D. D. C. 1971). We hold that respondents do not have standing to sue as citizens or taxpayers. The judgment of the Court of Appeals is therefore reversed.

I

Article I, § 6, cl. 2, of the Federal Constitution provides:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United

*Stylistic changes
and see 8, 9, 12, 14, 20*

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 72-1188

Recirculated: JUN 6 1974

James R. Schlesinger, Secretary of Defense, et al.,
Petitioners,
v.
Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 411 U. S. 947 (1973), to review the judgment of the Court of Appeals affirming, without opinion, the District Court's partial summary judgment for respondents declaring that "Article I, Section 6, Clause 2 of the United States Constitution renders a Member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office." 323 F. Supp. 833, 843 (D. D. C. 1971). We hold that respondents do not have standing to sue as citizens or taxpayers. The judgment of the Court of Appeals is therefore reversed.

I

Article I, § 6, cl. 2, of the Federal Constitution provides:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Fahnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 72-1188

Circulation: 2-6

James R. Schlesinger, Secretary of Defense, et al.,
Petitioners,
v.
Reservists Committee to Stop the War et al.

Recirculated
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The requirement of "standing" to sue is a judicially created instrument serving several ends: (1) It protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens. (2) It sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, *viz* the so-called political question. (3) It is at times a way of ridding court dockets whether of abstract questions or questions involving no concrete controversial issue.

Our leading case is *Frothingham v. Mellon*, 262 U. S. 447, decided in 1923, where a taxpayer challenged the constitutionality of an Act of Congress that gave grants to States which agreed to a plan to reduce maternal and infant mortality. The Court said,

"The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1188

Circulated: _____

Recirculated: 6/13/74

James R. Schlesinger, Secretary of Defense, et al.,
 Petitioners,
 v.
 Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The requirement of "standing" to sue is a judicially created instrument serving several ends: (1) It protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens. (2) It sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, *viz.* the so-called political question. (3) It is at times a way of ridding court dockets whether of abstract questions or questions involving no concrete controversial issue.

Our leading case is *Frothingham v. Mellon*, 262 U. S. 447, decided in 1923, where a taxpayer challenged the constitutionality of an Act of Congress that gave grants to States which agreed to a plan to reduce maternal and infant mortality. The Court said.

"The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is

May 31, 1974

RE: No. 72-1188 Schlesinger v. Reservists Committee

Dear Chief:

I have considered your proposed opinion in the above and agree with most of your discussion of the citizen-standing question and the absence of sufficient allegations of injury-in-fact to respondents as representatives of the class of all citizens. I have the other view, however, as to Part IIC, which goes beyond the injury-in-fact requirement and holds that respondents lack taxpayer standing because of failure to allege a "logical nexus" between their taxpayer status and the claim sought to be adjudicated.

But is Part IIC necessary to your opinion? As you note, the District Court expressly held that respondents lacked standing as Reservists, as persons opposed to the Vietnam War, and as taxpayers. Respondents did not appeal those rulings, and the Court of Appeals affirmed "on the basis of the memorandum opinion of the District Court."

The only possible basis for an inference that the Court of Appeals addressed the question of taxpayer standing is its statement that "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of Flast v. Cohen, 392 U.S. 83 (1968), and Baker v. Carr, 369 U.S. 186 (1962)."

But "also" cannot mean "additionally" in this situation, and I thus cannot read this as a ruling in disagreement with the District Court on taxpayer-standing. The Court of Appeals could not possibly be read that way because it affirmed the District Court order and obviously therefore did not sub-silentio reverse the holding adverse to respondents' taxpayer standing claim.

RE: No. 72-1188 Schlesinger v. Reservists Committee

I realize that ordinarily a winner below may rely on other grounds to sustain the judgment he won. But does that apply when the ground now relied on was expressly decided against him. I would think not, and since respondents neither appealed the question to the Court of Appeals, nor cross-petitioned for review of the Court of Appeals' order on the question of taxpayer standing, I would not think that the question need be considered here.

If you agreed and for that reason were to delete Part IIC, and the material in footnote 17 suggesting that Flast imposes special standing requirements in a taxpayer-standing case, I could join your opinion as now written. If you decide you should not, I will probably write a short dissent based on my view that, if the taxpayer question is properly before the Court, respondents have alleged sufficient facts to survive a motion to dismiss under the principles stated in my concurring opinion in Barlow v. Collins, 397 U.S. 159, 167 (1970).

Sincerely,

The Chief Justice

Mod	Thermal Conductivity	Specific Heat	Thermal Diffusivity
111	1.00	0.100	0.0100
112	0.90	0.100	0.0090
113	0.80	0.100	0.0080
114	0.70	0.100	0.0070
115	0.60	0.100	0.0060
116	0.50	0.100	0.0050
117	0.40	0.100	0.0040
118	0.30	0.100	0.0030
119	0.20	0.100	0.0020
120	0.10	0.100	0.0010

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-885

Received on 6/12/79

Reaktionstyp: _____

United States et al.,
Petitioners.
72-885 v.
William B. Richardson. } On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit.

James R. Schlesinger,
Secretary of Defense,
et al., Petitioners,
72-1188 v.
Reservists Committee
to Stop the War
et al.
On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit.

[June —, 1974]

MR. JUSTICE BRENNAN, dissenting:

The "standing" of a plaintiff to be heard on a claim of invasion of his alleged legally protected right is established, in my view, by his good faith allegation that "the challenged action has caused him injury in fact." *Barlow v. Collins*, 397 U. S. 159, 167-168 (1970) (concurring opinion). The Court's further inquiry, in each of these cases, into the connection between "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," and the "interest sought to be protected by the complainant," is relevant, not to "standing" but, if at all, only to such limitations on exercise of the judicial function as justiciability, see, e. g., *Baker v. Carr*, 369 U. S. 186 (1962), or reviewability, see, e. g., *Abbott Laboratories v. Gardner*, 387 U. S. 136, 140 (1967).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 22, 1974

72-1188, Schlesinger v. Reservists to Stop
the War

Dear Chief,

I shall probably write a brief concurring opinion in this case.

Sincerely yours,

PS.

The Chief Justice

Copies to the Conference

TO: The CH [unclear]
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES Stewart, J.

No. 72-1188

MAY 24 1974
Circulated: _____

Recirculated: _____

James R. Schlesinger, Secretary of Defense, et al.,
Petitioners,
v.
Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1974]

MR. JUSTICE STEWART, concurring.

I agree with the Court that the respondents lack standing to sue either as citizens or taxpayers in this case. Here, unlike *United States v. Richardson*, *post*, at —, the respondents do not allege that the petitioners have refused to perform an affirmative duty imposed upon them by the Constitution. Nor can there be taxpayer standing under *Flast v. Cohen*, 392 U. S. 83, since there is simply no challenge ~~raised~~ to an exercise of the taxing and spending power.

The Court's judgment in this case is wholly consistent with *United States v. SCRAP*, 412 U. S. 669. Standing is not today found wanting because an injury has been suffered by many, but rather because *none* of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III. Like the plaintiff in *Frothingham v. Mellon*, 262 U. S. 447, the respondents seek only to air what we described in *Flast* as "generalized grievances about the conduct of government." 392 U. S., at 106. Our prior cases make clear that such abstract allegations cannot suffice to confer Art. III standing, and I therefore join the opinion and judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

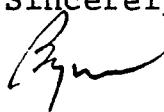
June 4, 1974

Re: No. 72-1188 - Schlesinger v. Reservists
Committee to Stop the War

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1974

Re: No. 72-1188 -- James R. Schlesinger v. Reservists Committee
to Stop the War et al.

Dear Bill:

Please join me in our dissent.

Sincerely,

T.M.
T.M.

Mr. Justice Douglas

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: JUN 19 1,74

No. 72-1188

Recirculated: _____

James R. Schlesinger, Secretary of Defense, et al.,
Petitioners,
v.
Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1974]

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother DOUGLAS that respondents have standing as citizens to bring this action. I cannot accept the majority's characterization of respondents' complaint as alleging only "injury in the abstract" and "'generalized grievances' about the conduct of government." *Ante*, at 8-9. According to their complaint, respondents are present and former members of the various armed forces reserves

"organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement."

The specific interest which they thus asserted, and which they alleged had been infringed by violations of the Incompatibility Clause, though doubtless widely shared, is certainly not a "general interest common to all members of the public." *Ex parte Levitt*, 392 U. S. 633, 634 (1937). Not all citizens desired to have the Congress

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1974

Dear Chief:

Re: No. 72-1188 - Schlesinger v. Reservists
Committee

Please join me.

Sincerely,

H. A. B.

The Chief Justice

Copies to the Conference

June 3, 1974

No. 72-1188 Schlesinger v. Reservists

Dear Chief:

I am prepared to join your fine opinion for the Court in the above case.

I do have a bit of a problem with one sentence on page 15, as marked on the enclosed draft. The sentence is a flat holding that the decision rests on the requirements of Article III. This sentence is not entirely consistent with my reading of the precedents, especially Baker v. Carr, as I have indicated in my concurring opinion in United States v. Richardson. While Article III undoubtedly hovers in the background, our more recent cases have addressed and turned on prudential rather than constitutional barriers.

I believe this one sentence could be eliminated without other changes in your fine opinion or without diluting its force.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

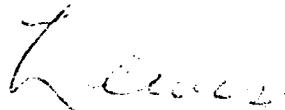
June 12, 1974

No. 72-1188 Schlesinger v. Reservists

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1974

Re: No. 72-1188 - Schlesinger v. Reservists Committee

Dear Chief:

I am thoroughly in accord with the merits of your opinion, and am prepared to join it. I do have a question as to the manner in which you treat the absence of a cross-petition for certiorari on behalf of respondents on page 8 of the opinion. My understanding of the holdings of Strunk v. United States, 412 U.S. 434, 437 (1973), and NLRB v. International Van Lines, 409 U.S. 48, 52 n. 4 (1972) is that a party who does not cross-petition for certiorari may not assert in this Court a ground which would lead to some result other than the affirmance of the judgment below. As you will recall, Bob Stern's recent letter to all of us suggests that even this is too stringent a limitation on the right of the respondent to assert alternative grounds for affirmance. Since the upholding of respondents' standing to sue on grounds other than those affirmed by the Court of Appeals would lead to an affirmance of its judgment, I am inclined to think that under these precedents respondents probably are entitled to make their contentions here. I am equally inclined to think that they should fail on the merits.

I realize you have given this more thought than I have, and if this altered treatment would create any problems for you, I will certainly reconsider my position and very likely end up joining you anyway.

Sincerely,

WHR

The Chief Justice

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE



NOTICE: THIS MATERIAL MAY
BE PROTECTED BY COPYRIGHT
LAW (TITLE 17, U.S. CODE)

...reproduced may not be further reproduced
or distributed without the specific authori-
zation of the Hoover Institution Archives.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1974

Re: No. 72-1188 - Schlesinger v. Reservists Committee

Dear Chief:

Please join me in your opinion for the Court in this case.

Sincerely,


The Chief Justice

Copies to the Conference