

The Burger Court Opinion Writing Database

United States v. Richardson

418 U.S. 166 (1974)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

January 29, 1974

Re: No. 72-885 - United States v. Richardson

MEMORANDUM TO THE CONFERENCE:

Enclosed is a proposed opinion in the above case which I have been holding until the Conference acts in No. 72-1188 - Schlesinger v. Reservists Committee to Stop the War.

I invite comments since further "honing" and possible adjustments to conform to the Reservists opinion may be called for.

Regards,

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

Hold for [initials]

1st DRAFT

From: The Clerk's Office

Circulated, JAN 11, 1974

SUPREME COURT OF THE UNITED STATES

No. 72-885

Recirculated:

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

[February —, 1974]

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

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer¹ challenging certain provisions limiting public reporting of expenditures under the Central Intelligence Agency Act, 50 U. S. C. § 403 *et seq.*, as being in conflict with Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

¹ Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution."

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

CHAMBERS OF
THE CHIEF JUSTICE

February 14, 1974

Re: No. 72-885 - United States v. Richardson

MEMORANDUM TO THE CONFERENCE:

Potter's dissenting opinion prompts me to point out several relevant factors. Basically, he questions the relevancy of Flast and Frothingham to the issue presented in the petition for certiorari. This is a fundamental matter. The proposed opinion accepts Flast as the controlling and definitive holding on taxpayer standing. The grant of certiorari is limited to the claim as a taxpayer.

I fail to see how we can ignore Chief Justice Warren's carefully worded statement directed at all claims of standing that it is "both appropriate and necessary to look to the substantive issues . . . to determine status asserted and the claim sought to be adjudicated." Flast, at 102. In this case, the inquiry as to whether respondent meets the taxpayer test can be quite summary in nature. I treated the "citizen standing" issue only to point out the fallacy of the Court of Appeals approach on this score. It may be this could be truncated considerably since no issue of "citizen standing" is before us now.

Regards,

W. B.

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

SUPREME COURT OF THE UNITED STATES

No. 72-885

Circulated:

Recirculated: MAR 8 1974

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

[February — 1974]

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

We granted certiorari in this case to determine whether the respondent¹ has standing to bring an action as a federal taxpayer¹ alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act, 50 U. S. C. § 403 *et seq.*, violate Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

¹ Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution."

Re 72-885

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

CHAMBERS OF
THE CHIEF JUSTICE

Wait for my draft
in Schlesinger (as
to Reserve Officers
in Congress.) I'm
getting close to
a point on that
one.

Regards

WRF

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

CHAMBERS OF
THE CHIEF JUSTICE

3/14/71

Dear Lewis
After you look at
the most recent (No 2)
draft of Richardson
No 72-885, I'd
be glad to see if
I can accomodate
any ideas you
have in my opinion.
There is no hurry
since this ought to

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

Substantial changes throughout

3rd DRAFT

From: The Clerk ~~and Clerks~~

Recirculated: _____

APR 1 19

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

 No. 72-885

Recirculated: _____

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

[February --, 1974]

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

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer¹ alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act, 50 U. S. C. § 403 *et seq.*, violate Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

¹ Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 4. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution."

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

CHAMBERS OF
THE CHIEF JUSTICE

May 21, 1974

Re: 72-885 - U. S. v. Richardson
72-1188 - Schlesinger v. Reservists Committee to
Stop the War

MEMORANDUM TO THE CONFERENCE:

Enclosed is proposed opinion in Schlesinger and
a revised draft of Richardson with deletions indicated.

Given the time of year and the pressures on all
Brethren, I invite those who are in general agreement
and who have suggestions to let me see if other ideas can
be accommodated.

Regards,

LRB

Substantial changes throughout as indicated

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-885

Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice White
Mr. Justice Marshall
Justice Blackmun
Justice Powell
Mr. Justice Rehnquist

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

[February —, 1974]

Argued at MAY 21 1974

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

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer¹ alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act, 50 U. S. C. § 403 *et seq.*, violate Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

¹ Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution."

Stylistic changes throughout

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

5th DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 72-885

Recirculated: MAY 30 1974

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

[June 1, 1974]

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

We granted certiorari in this case to determine whether the respondent has standing to bring an action as a federal taxpayer¹ alleging that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act, 63 Stat. 208, 50 U. S. C. § 403 *et seq.* (1970), violate Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts

¹ Respondent's complaint alleged that he was "a member of the electorate and a loyal citizen of the United States." At the same time, he states, in his brief in opposition to the petition for writ of certiorari, that he "does not challenge the formulation of the issue contained in the petition for certiorari." Brief in Opposition, p. 1. The question presented there was: "Whether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Agency Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution." Petition for certiorari, p. 2.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 19, 1973

Dear Potter:

Would you want to undertake
the dissent in 72-885, U.S. v. Richardson?

W.O.D.
William O. Douglas

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 30, 1974

Dear Chief Justice:

I will in due course write a dissent in
72-685, U.S. v. Richardson.


William O. Douglas

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS
2nd DRAFT

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

SUPREME COURT OF THE UNITED STATES

No. 72-885

2-6

United States et al.,
Petitioners.
n,
William B. Richardson.

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

{ February —, 1974 }

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the Court of Appeals on the "standing" issue. My views are expressed in the *Schlesinger* case decided this day. There a citizen and taxpayer raised a question concerning the Incompatibility Clause of the Constitution which bars a person from "holding any office of the United States" if he is a Member of Congress, Art. I, § 6, c. 2. That action was designed to bring the Pentagon into line with that constitutional requirement by requiring it to drop "reservists" who were Members of Congress.

The present action involves Art. I, § 9, c. 7 of the Constitution which provides

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

We held in *Flast v. Cohen*, 392 U. S. 83, that a taxpayer had "standing" to challenge the constitutionality of taxes raised to finance the establishment of a religion contrary to the command of the First and Fourteenth Amendments. A taxpayer making such outlays, we held, had such a "personal stake" in the controversy. *Baker v. Curr*, 369 U. S. 186, 204, to give the case the

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 14, 1974

RE: 72-885, United States v. Richardson

MEMO TO THE CHIEF JUSTICE:

This is in response to your memo of February 14th respecting a standing issue. Theoretically it is easy to slice such concepts into three distinct questions: 1) Standing, 2) Cause of action, and 3) Political question. That, of course, would lead to three possible appeals to resolve what is in essence a unitary problem. While I disagree with you and would conclude, as you know, that the issue in Richardson is justiciable not political, I would agree with you that there would be no standing on the part of either the taxpayer or the citizens to tender a complaint in a federal court on a political issue.

cc
William O. Douglas

The Chief Justice
cc: The Conference

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-885

Circulated:

Recirculated:

6/13/74

United States et al.,
 Petitioners.
 v.
 William B. Richardson,

On Writ of Certiorari to the
 United States Court of Ap-
 peals for the Third Circuit.

[February —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment of the Court of Appeals on the "standing" issue. My views are expressed in the *Schlesinger* case, decided this day. There a citizen and taxpayer raised a question concerning the Incompatibility Clause of the Constitution which bars a person from "holding any Office under the United States" if he is a Member of Congress, Art. I, § 6, cl. 2. That action was designed to bring the Pentagon into line with that constitutional requirement by requiring it to drop "reservists" who were Members of Congress.

The present action involves Art. I, § 9, cl. 7 of the Constitution which provides:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

We held in *Flast v. Cohen*, 392 U. S. 83, that a taxpayer had "standing" to challenge the constitutionality of taxes raised to finance the establishment of a religion contrary to the command of the First and Fourteenth Amendments. A taxpayer making such outlays, we held, had sufficient "personal stake" in the controversy, *Baker v. Carr*, 369 U. S. 186, 204, to give the case the

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1974

RE: No. 72-885 United States v. Richardson

Dear Chief:

I will be preparing a dissent in the above but will not circulate it until after circulation of the Court opinion in No. 72-1188 - Schlesinger v. Reservists Committee to Stop the War. It may be that a single dissent will serve for both cases.

Sincerely,

W. J. B.

The Chief Justice

cc: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-885

6/12/74

United States et al.,
 Petitioners.
 72-885 *v.*
 William B. Richardson.

On Writ of Certiorari to the
 United States Court of Ap-
 peals 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 Ap-
 peals for the District of Co-
 lumbia 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

December 19, 1973

72-885 - U. S. v. Richardson

Dear Bill,

I shall be glad to undertake a dissent in this case, although it is quite possible that my views may not be shared by the other dissenters.

Sincerely yours,

Douglas

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 29, 1974

Re: No. 72-885, United States v. Richardson

MEMORANDUM TO THE CONFERENCE:

In due course I expect to circulate a dissenting opinion in this case.

P. S.
P. S.

To: The Chief Justice
 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

Court Calendar, 1974, p. 1374

No. 72-885

Received from: _____

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

[February —, 1974]

MR. JUSTICE STEWART, dissenting.

The Court's decisions in *Flast v. Cohen*, 392 U. S. 83 (1968), and *Frothingham v. Mellon*, 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7 of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money."¹ In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this lit-

¹"No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-885

United States et al.,
 Petitioners,
 v.
 William B. Richardson

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

[February —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court's decisions in *Flast v. Cohen*, 392 U. S. 83 (1968), and *Frothingham v. Mellon*, 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7 of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply a periodic report of the receipts and expenditures "of all public Money."¹ In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this lit-

¹ "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

1. The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

2, 3, 4, 5

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

 No. 72-885

Recirculated: ~~Mar 6, 1974~~

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

[February —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court's decisions in *Flast v. Cohen*, 392 U. S. 83 (1968), and *Frothingham v. Mellon*, 262 U. S. 447 (1923), throw very little light on the question at issue in this case. For, unlike the plaintiffs in those cases, Richardson did not bring this action asking a court to invalidate a federal statute on the ground that it was beyond the delegated power of Congress to enact or that it contravened some constitutional prohibition. Richardson's claim is of an entirely different order. It is that Art. I, § 9, cl. 7 of the Constitution, the Statement and Account Clause, gives him a right to receive, and imposes on the Government a corresponding affirmative duty to supply, a periodic report of the receipts and expenditures "of all public Money" ¹. In support of his standing to litigate this claim, he has asserted his status both as a taxpayer and as a citizen-voter. Whether the Statement and Account Clause imposes upon the Government an affirmative duty to supply the information requested and whether that duty runs to every taxpayer or citizen are questions that go to the substantive merits of this lit-

¹ "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 8, 1974

Re: No. 72-885 - United States v. Richardson

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 BYRON R. WHITE

May 29, 1974

Re: No. 72-885 - United States v. Richardson

Dear Chief:

I am still with you in this case.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 19, 1974

Re: No. 72-885 -- United States v. Richardson

Dear Potter:

Please join me in your dissent.

Sincerely,

J. M.
T. M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 17, 1974

Dear Chief:

Re: No. 72-885 - United States v. Richardson

Please join me.

Sincerely,

H. A. B.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 16, 1974

No. 72-885 U. S. v. Richardson

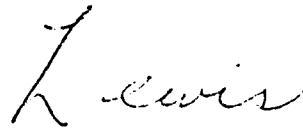
Dear Chief:

I have not replied earlier to your request for comments on your first draft in Richardson because I am not yet entirely at rest. I am, as indicated at the Conference, with you as to the result. My difficulty is with how one reaches it.

I think the "nexus" tests of Flast are virtually meaningless. Unless others perceive their meaning more precisely than I, these tests must be a continuing source of confusion to the lower courts and the bar. I quite understand your reliance upon Flast, as respondent sued as a taxpayer and the case was argued and briefed on the assumption that Flast was the controlling authority. Yet, I personally am drawn toward the rationale of John Harlan's dissent in Flast.

It may be that I will try to do a concurring opinion. In any event, I would like the opportunity to give this case some further thought - unless we reach the point where I am unduly holding up the Court.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

April 4, 1974

No. 72-885 U.S. v. Richardson

Dear Chief:

I am circulating today a concurring opinion.

You will note that I join your opinion for the Court but write separately for the purpose of taking a stronger position with respect to Flast than perhaps you could take writing for the Court - especially in view of the way the case was presented.

My hope is that the combined effect of your Court opinion and my concurrence will be to slow down what has become almost a pell-mell rush to Bill Douglas' point of view that standing is no longer an issue of any consequence.

Sincerely,

The Chief Justice

lfp/ss

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Floyd, Powell, J.

Circulated: APR 4 1974

No. 72-885

Recirculated: _____

United States et al.,
 Petitioners,
 v.
 William B. Richardson.

} On Writ of Certiorari to the
 United States Court of Ap-
 peals for the Third Circuit.

[April —, 1974]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particular insofar as it relies on traditional barriers against federal taxpayer or citizen standing. And, I agree that *Flast v. Cohen*, 392 U. S. 83 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part "nexus" test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, 392 U. S., at 99-101, yet it abruptly returns to

Stylistic
5-6

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

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 72-885

Circulated:

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

JUN 14 1974

[April 1, 1974]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court because I am in accord with most of its analysis, particularly insofar as it relies on traditional barriers against federal taxpayer or citizen standing. And, I agree that *Flast v. Cohen*, 392 U. S. 83 (1968), which set the boundaries for the arguments of the parties before us, is the most directly relevant precedent and quite correctly absorbs a major portion of the Court's attention. I write solely to indicate that I would go further than the Court and would lay to rest the approach undertaken in *Flast*. I would not overrule *Flast* on its facts, because it is now settled that federal taxpayer standing exists in Establishment Clause cases. I would not, however, perpetuate the doctrinal confusion inherent in the *Flast* two-part "nexus" test. That test is not a reliable indicator of when a federal taxpayer has standing, and it has no sound relationship to the question whether such a plaintiff, with no other interest at stake, should be allowed to bring suit against one of the branches of the Federal Government. In my opinion, it should be abandoned.

I

My difficulties with *Flast* are several. The opinion purports to separate the question of standing from the merits, 392 U. S., at 99-101, yet it abruptly returns to

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1974

Re: No. 72-885 - United States v. Richardson

Dear Chief:

Please join me.

Sincerely,

W^WW

The Chief Justice

Copies to the Conference