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So, unless and until some future Court borrows Justice Black's phrase from *Gideon* and describes *Moffitt* as "an abrupt break with its [the Court's] own well-considered precedents,"¹⁰⁴ the *Griffin-Douglas* line stops at the first appeal of right for the appointment of counsel. When one is seeking a second or discretionary review of a criminal conviction, wealth will make a difference.

William E. Brew

The Continued Vitality of the Standing Doctrine in Challenges to Federal Government Action

Recent litigation¹ in the federal courts has resulted in substantial erosion of the barriers which had formerly denied standing to citizens and taxpayers seeking to challenge action by the federal government.² So marked has been this erosion that one court has indicated that, in its circuit, the concept of standing "has now been almost completely abandoned."³ Indeed, one could have predicted that the United States Supreme Court would take advantage

ness" Janus-like, facing both towards the language of due process and to equal protection. Historically, however, the courts became fixated exclusively on the first part of the definition: if the trial is not "unjust," it could not be "unfair." Nonetheless, the second part of the definition is equally vital and constitutes a natural bridge from the historicity of due process to the latter day strictures of equal protection. "Without undue advantage to any" commands a clear, simple, workable test of treatment in lieu of the fuzzy tautology that the "process" meted out to a defendant was "due," because neither "fraudulent" nor "unjust." The very term "justice" thus comes for a redefinition: could that be just which unduly advantages one party over the other?

Id. at 659 (footnotes omitted).

104. This is Justice Black's characterization of *Betts v. Brady*, 316 U.S. 455 (1942), in overruling it in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

1. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968).

2. It should be noted that state courts are generally much more amenable to taxpayer suits than have been federal courts. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 722 (Supp. 1970); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 *YALE L.J.* 895, 918-19 (1960).

3. *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833, 839 (D.D.C. 1971), *rev'd sub nom. Schlesinger v. Reservists Comm. to Stop the War*, 94 S. Ct. 2925 (1974).

of its next opportunity to sound the death knell of the standing doctrine. That opportunity presented itself in *Schlesinger v. Reservists Committee to Stop the War*⁴ and in *United States v. Richardson*.⁵ In neither case did the Court choose to toll the knell. On the contrary, the decisions indicate that the doctrine has and will continue to have vitality. At the same time, however, the cases reveal a Court troubled by its past treatment of standing and willing to explore new avenues in implementing the doctrine.

In *Reservists Committee*, the Court was faced with the question of whether the Committee and its members had standing as citizens and taxpayers to pursue their claim that membership by Congressmen in the armed forces reserve violated the incompatibility clause⁶ of the Constitution. Alleging that such membership subjected Congressmen to undue influence from the executive branch, the Committee claimed that its right to have elected officials faithfully discharge their duties free from such influence had been infringed.⁷ The Committee sought broad injunctive, declaratory, and mandatory relief.⁸

The United States District Court for the District of Columbia granted the plaintiffs standing as citizens and, on the merits, granted declaratory relief.⁹ The court of appeals affirmed in an unpublished opinion. The Supreme Court, in an opinion by the Chief Justice, reversed in a 5-4 vote and found that the Committee lacked standing either as citizens or taxpayers to bring its action.

In *Richardson*, the question was whether the plaintiff had standing as a taxpayer to challenge the constitutionality of the Central Intelligence Agency Act.¹⁰ Richardson claimed that the Act violated the statements and accounts

4. 94 S. Ct. 2925 (1974).

5. 94 S. Ct. 2940 (1974).

6. U.S. CONST. art. I, § 6, cl. 2 provides in relevant part: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

7. See 94 S. Ct. at 2928. At the time the suit was filed, 130 members of the 91st Congress were members of the Reserves. By the end of the 92d Congress, 119 members were Reservists. See *id.* at 2927 n.2.

8. The Committee sought relief in the nature of mandamus requiring the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force to strike all Members of Congress from the Reserve rolls; to discharge any Reserve member who subsequently became a Member of Congress; and to seek to reclaim from present and former Members of Congress any Reserve pay received during their term of office. The Committee also sought a permanent injunction preventing the Secretaries from placing any other Congressmen on the rolls of the Reserves. Finally, the Committee requested a declaratory judgment that membership in the Reserves by Members of Congress was prohibited by the incompatibility clause. See *id.* at 2927.

9. 323 F. Supp. 833 (D.D.C. 1971).

10. 50 U.S.C. § 403 (1970).

clause¹¹ of the Constitution in that the Act did not require the Agency to account publicly for its expenditures.¹² He alleged injury in that without such an accounting he could neither intelligently follow the actions of Congress and the executive nor properly fulfill his obligations as a citizen in voting for candidates seeking national office.¹³ He sought injunctive relief.¹⁴

The Third Circuit, reversing the district court, granted Richardson standing as a taxpayer but did not express an opinion on the merits of his claim.¹⁵ Again the Supreme Court, by a 5-4 vote, overturned the decision in an opinion written by Chief Justice Burger.

Taken together, *Richardson* and *Reservists Committee* seem to put an abrupt end to the prior expansive trend that federal courts had been following on the standing question. On analysis of the minority opinions, however, the cases may be viewed not so much as an end to the prior expansion, but rather as the beginning of an effort to channel that expansion into new doctrinal dimensions. These dimensions become more apparent when the cases are examined in light of the origin and overall development of the standing doctrine.

I. ORIGIN AND DEVELOPMENT OF THE STANDING DOCTRINE

The doctrine of standing in federal courts has been variously described as a "complicated specialty of federal jurisdiction,"¹⁶ a "rule of self restraint,"¹⁷ and an "offshoot of the case and controversy rule."¹⁸ These descriptions at-

11. U.S. CONST. art. I, § 9, cl. 7 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."

12. 50 U.S.C. § 403j(b) (1970) provides: "The sums made available to the [Central Intelligence] Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director [of the Agency] and every such certificate shall be deemed a sufficient voucher for the amount therein certified."

13. See 94 S. Ct. at 2946.

14. Richardson sought a permanent injunction barring the government from publishing its annual statement of receipts and expenditures until that document included an accounting of CIA expenditures as required by the statements and accounts clause. See 94 S. Ct. at 2942-43.

15. *Richardson v. United States*, 465 F.2d 844 (3d Cir. 1972) (en banc).

16. *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

17. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

18. *Rescue Army v. Municipal Court*, 331 U.S. 549, 570 (1947). In *Baker v. Carr*, 369 U.S. 186 (1962), the Court defined the article III case or controversy requirements of standing: "the gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court

test to the difficulties the courts have had in agreeing on the origin of the doctrine.

The Supreme Court has taken the position that the doctrine has its origin both in the "case or controversy" requirement of article III¹⁹ and in judge-made rules of self-restraint invoked for policy reasons.²⁰ While there is substantial disagreement as to whether the doctrine is constitutionally mandated,²¹ the policy reasons behind the doctrine are generally two-fold. The first is the need to protect heavily loaded court dockets from inundation by a flood of litigants. The second is the need for self-restraint in order to prevent the courts from encroaching upon the prerogatives of the executive and legislative branches.²² The interaction of these constitutional and policy bases of the doctrine has given rise to much of the doctrine's development.

This development primarily has been a search for standards as to when a plaintiff has suffered sufficient injury for him to be a proper party to bring his action. In early cases, the Supreme Court showed little concern with the development of such standards. Questions of standing in which individuals sought to challenge government action were not explicitly resolved.²³

A. Citizen Standing

The Court's first explicit expression of a standard with regard to citizen standing was based upon an analogy to actions involving private individuals.

so largely depends for illumination of difficult constitutional questions." *Id.* at 204. The *Baker* definition was most recently used to deny standing in *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974).

19. U.S. CONST. art. III, § 2 provides in part: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority; . . . —to Controversies to which the United States shall be a Party;—to Controversies between two or more States"

20. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Court stated that "there are at work in the standing doctrine the many subtle pressures which tend to cause policy considerations to blend into Constitutional limitations." *Id.* at 99 (footnote omitted).

21. See, e.g., *Berger, Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *YALE L.J.* 816, 819-21 (1969); *Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. PA. L. REV.* 1033, 1043 (1968).

22. A good example of this rationale is contained in a statement by former Solicitor General Erwin N. Griswold, opposing a 1966 Senate bill which would have conferred standing on taxpayers to challenge certain federal programs. See Letter from Erwin N. Griswold to Senator Sam J. Ervin, Jan. 26, 1966, quoted in *Hearings on S. 2097 Before the Senate Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 496-97 (1966). See also note 68 *infra*.

23. See Note, *Taxpayer Standing to Litigate*, 61 *GEO. L.J.* 747, 748 n.11 (1973). See also *Wilson v. Shaw*, 204 U.S. 24, 31 (1907); *Millard v. Roberts*, 202 U.S. 429, 438 (1906); *Bradfield v. Roberts*, 175 U.S. 291, 295, 300 (1899).

A plaintiff would have standing against a government official provided the alleged wrong would have had a remedy at common law had the challenged official been a private party.²⁴ Although this standard was developed in order for the Court to deal with the problem of sovereign immunity,²⁵ it nevertheless bore a close resemblance to the subsequent "legal right" standard which specifically dealt with the standing question. Thus, in *Tennessee Electric Power Co. v. TVA*,²⁶ the power company was denied standing to challenge the TVA Act when the company was unable to show that its legal rights had been infringed by allegedly illegal government competition. The Court stated that there could be no standing to sue "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."²⁷ The "legal right" definition was later broadened to include "an interest created by the Constitution."²⁸

While the "legal right" standard did permit aggrieved citizens standing to bring suit against the sovereign, it did no more. Without a congressional grant of authority, suit could not be maintained on behalf of the public interest.²⁹

Statutory grants of standing by Congress therefore formed the basis for the further development of standards. A number of such grants were made to enable individuals to challenge actions of the federal regulatory agencies.³⁰ Thus, in *FCC v. Sanders Brothers Radio Station*,³¹ the Court held that when

24. See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 650 (1973). As Scott mentions, this analogy is still used under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970), which provides that the district courts shall have jurisdiction over tort claims against the United States "under circumstances where the United States, if a private person, would be liable to the claimant. . . ."

25. See Scott, *supra* note 24, at 650. See generally *In re Ayers*, 123 U.S. 433 (1887); *United States v. Lee*, 106 U.S. 196 (1882).

26. 306 U.S. 118 (1939).

27. *Id.* at 137-38 (footnote omitted). Professor Davis has called this "legal right" test "palpably false." He argues that if this test were correct, "then no one could challenge a statute outlawing the Baptist Church, or prohibiting Republican speeches, or denying criminal defendants a jury trial, or authorizing unlawful seizures or compelling witnesses to testify against themselves." Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 361 (1955).

28. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring).

29. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

30. See, e.g., 15 U.S.C. § 77i(a) (1970) (Securities and Exchange Commission); 16 U.S.C. § 825(1)(b) (1970) (Federal Power Commission); 29 U.S.C. § 160(f) (1970) (National Labor Relations Board); 47 U.S.C. § 402(b)(6) (1970) (Federal Communications Commission); 49 U.S.C. § 1(20) (1970) (Interstate Commerce Commission).

31. 309 U.S. 470 (1940).

it was determined that an individual fell within a particular class sought to be protected by congressional action, an individual could sue as a representative of the public interest.³² As expressed by Judge Frank in *Associated Industries v. Ickes*,³³ citizens in such cases were given standing to sue as "private Attorney Generals [sic]."³⁴

Congress took an even bigger step when it included a broad standing provision in the Administrative Procedure Act.³⁵ The Act provided that when judicial review was not precluded by statute or committed by law to agency discretion,³⁶ "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."³⁷

Decisions under the Act tended to obliterate the "legal right" standard that had been earlier developed. In *Association of Data Processing Service Organizations, Inc. v. Camp*,³⁸ for example, private producers of data processing equipment sought to challenge a ruling of the Comptroller of the Currency authorizing national banks to make data processing services available to their customers. In holding that the Association had standing, the Court rejected the legal right standard as going to the merits of the controversy at hand.³⁹ The Court substituted a two-fold test. First, the plaintiff

32. *Id.* at 477.

33. 134 F.2d 694 (2d Cir.), *vacated*, 320 U.S. 707 (1943).

34. *Id.* at 704.

35. 5 U.S.C. §§ 551-76, 701-06 (1970).

36. *Id.* § 701(a) (1970). There has been much litigation over the question whether in specific instances this section of the Act precludes judicial review. After the Court's decisions in *Data Processing* and *Barlow*, see notes 38 & 42 and accompanying text *infra*, lower courts liberally construed this section to allow judicial review. See, e.g., *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 955 (9th Cir. 1972); *Francis v. Davidson*, 340 F. Supp. 351, 369 n.30 (D. Md. 1972). However, the Supreme Court's decision in *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 4 (1974) (*Amtrak*) seems to have limited this trend. There, the Court found that private individuals were prohibited from bringing suit under § 547(a) of the *Amtrak* Act, 45 U.S.C. § 547(a) (1970). 414 U.S. at 456-58. The Court therefore never reached the question of whether the petitioner had standing. *Id.* at 465 n.13. The decision thus inserted the right of action issue as a threshold consideration before standing could be addressed. *Amtrak*, *Richardson*, and *Reservists Committee* seem to have the combined effect of sharply limiting not only standing of individuals to challenge government action, but also limiting which statutory schemes are reviewable in federal court. *But see* *Ash v. Cort*, 496 F.2d 416, 421 (3d Cir. 1974), in which the court distinguished *Amtrak* and permitted corporate shareholders a right of action against the corporation for violations of a federal statute on corporate campaign spending, 18 U.S.C. § 610 (Supp. II, 1972).

37. 5 U.S.C. § 702 (1970).

38. 397 U.S. 150 (1970).

39. *Id.* at 153.

had to allege "injury in fact." Second, the interest he sought to protect had to be "arguably within the zone of interests to be regulated by the statute or constitutional guarantee in question."⁴⁰ Because the Association did allege economic competitive injury, the first test was satisfied. The second was fulfilled when the Court found the Association's competitive interest to be arguably within the zone of interests protected by the Bank Service Corporation Act⁴¹ on which the Association had relied.

Some members of the *Data Processing* Court would have gone even further. In *Barlow v. Collins*,⁴² the companion case, Justice Brennan, joined by Justice White, would have made standing dependent only upon whether the plaintiff had alleged "injury in fact."⁴³ Such injury, in his view, was sufficient under the Constitution to render a party "adverse."⁴⁴

Further expansion of the kinds of injury cognizable in federal court came as a result of an environmental suit against the Government in *Sierra Club v. Morton*.⁴⁵ Although the plaintiff in that case was denied standing, the Court stated that when a plaintiff alleged that his aesthetic enjoyment of the environment had been impaired by Government action, there could be sufficient "injury in fact" to confer standing.⁴⁶

B. Taxpayer Standing

The law of taxpayer standing has developed separately from that of citizen standing. The Court first directly addressed the issue in *Frothingham v. Mellon*.⁴⁷ There, the plaintiff sought to challenge a federal statute which made money available to states that chose to participate in a program designed to reduce maternal and infant mortality. She alleged these appro-

40. *Id.* at 152-53.

41. 12 U.S.C. § 1864 (1970).

42. 397 U.S. 159 (1970).

43. *Id.* at 168 (Brennan, J., concurring in the result and dissenting). The Third Circuit has taken a similar position. In *Merriam v. Kunzig*, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973), the court granted standing to an unsuccessful bidder for a federal contract to challenge the government's award of the contract to another contractor. After finding that the petitioner had fully satisfied both *Data Processing* tests, the court stated: "Even assuming that [petitioner] did not fall within a zone of interest protected by [the statute] we would be inclined to hold his standing as a litigant should nevertheless be recognized." *Id.* at 1242 n.7 (dictum).

44. 397 U.S. at 173 n.6.

45. 405 U.S. 727 (1972).

46. *Id.* at 734-35 (dictum). In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the appellees alleged that they themselves had been injured by harm to the environment. *Id.* at 678. The Court granted them standing.

47. 262 U.S. 447 (1923).

priations would have deprived her of property, under the guise of taxation, without due process of law. The Court denied her standing. The test adopted by the Court required the taxpayer not only to show that the challenged enactment was invalid, but also that "he has sustained . . . some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."⁴⁸ Since the Court regarded Mrs. Frothingham's interest as a federal taxpayer to be "comparatively minute and indeterminable," she had not sustained the requisite "direct injury" in order to bring her case to court.⁴⁹ The Court also outlined its policy reasons for denying standing: "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion we have reached" ⁵⁰ Moreover, were the Court to decide the issue, it would "assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."⁵¹

The absolute bar to taxpayer suits imposed by *Frothingham* stood for forty-five years. Despite attempts by Congress to override the case,⁵² and notwithstanding the fact that the Court itself decided the merits of state taxpayer challenges,⁵³ *Frothingham* was very much in force in 1968 when the Court

48. *Id.* at 488.

49. *Id.* at 487-88.

50. *Id.* at 487.

51. *Id.* at 489.

52. There have been a number of unsuccessful attempts by the Congress to confer standing on taxpayers. One recent attempt in the Senate was sponsored by Senator Wayne Morse (D-Ore.). His bill would have granted taxpayers standing to challenge appropriations made under several federal programs. According to the bill, a plaintiff who had shown that he had paid any part of his federal income tax for the last preceding calendar or taxable year could bring a civil action against the federal officer making loans under any of the applicable programs. The challenge had to be brought under the first amendment. The bill also provided that "[n]o additional showing of direct or indirect financial or other injury, actual or prospective, on the part of the plaintiff shall be required for the maintenance of any such action." *Hearings on S. 2097, supra* note 22, at 2-3. Congressional antipathy to taxpayer suits is reflected not only by the failure of bills of the type discussed above but also in the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1970) (emphasis added):

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.

53. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Smiley v. Holm*, 285 U.S. 355 (1932); *Cochran v. Board of Educ.*, 281 U.S. 370 (1930). *But see Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

again considered the question of taxpayer standing in *Flast v. Cohen*.⁵⁴

In *Flast*, federal taxpayers challenged the constitutionality of federal aid to parochial schools under the Elementary and Secondary Education Act of 1965.⁵⁵ The Court granted the petitioners standing. It did not, however, overrule *Frothingham*. Rather, the Court distinguished it on the basis of a new test of taxpayer standing under which standing could be granted when a taxpayer could show a "logical nexus" between his status as a taxpayer and the claim to be adjudicated.⁵⁶ To establish this nexus, the taxpayer had to satisfy two criteria. First, his challenge had to be addressed to exercises of congressional power under the taxing and spending clause of article I, section eight. Second, the taxpayer had to show that the enactment he challenged "exceed[ed] specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment was generally beyond the powers delegated to Congress by Art. I, §8."⁵⁷ The Court found that the petitioners had satisfied both criteria. Their challenge was directed to an exercise of congressional power under the taxing and spending clause. In addition, the petitioners had alleged a violation of the establishment and free exercise clauses—determined by the *Flast* Court to be specific constitutional limitations on the exercise of the taxing and spending power.⁵⁸ In sharp contrast, the due process clause invoked by Mrs. Frothingham was not construed to be such a limitation.⁵⁹ Therefore, consistent with *Flast*, she had been denied standing.

Although *Flast* at the time may have seemed a distinct, if limited, break with the former absolute bar to taxpayer suits, its subsequent development did not parallel the steady expansion of standing that was occurring in non-taxpayer suits. On the contrary, *Flast's* subsequent application by the courts seemed more a further limitation on taxpayer suits than an open door to such actions.⁶⁰ By using a combination of the *Flast* criteria and the still extant *Frothingham* prohibition against airing generalized grievances, the Court

54. 392 U.S. 83 (1968).

55. 20 U.S.C. §§ 236-44 (1970). The Act was one of those to which the Morse bill granting taxpayer standing would have applied. See note 52 *supra*.

56. 392 U.S. at 102.

57. *Id.* at 102-03.

58. *Id.* at 103-04.

59. *Id.* at 105.

60. See, e.g., *Mottola v. Nixon*, 464 F.2d 178, 182 (9th Cir. 1972) (plaintiff's status as reservist not linked to taxing and spending power); *Velvel v. Nixon*, 415 F.2d 236, 239 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (Vietnam war spending not under taxing and spending clause); *Atlee v. Laird*, 339 F. Supp. 1347, 1354 (E.D. Pa. 1972), *aff'd mem.*, 411 U.S. 911 (1973) (Vietnam appropriations not under taxing and spending power); *Richardson v. Kennedy*, 313 F. Supp. 1282, 1286 (W.D. Pa. 1970), *aff'd mem.*, 401 U.S. 901 (1971) (compensation clause is a source of congressional authority independent of taxing and spending power).

developed a powerful weapon against taxpayer standing. The weapon was used with telling effect in *Richardson* and *Reservists Committee*.

II. *Richardson* AND *Reservists Committee*:

THE EXPANSION HALTED

The *Richardson* Court was not hesitant in employing the undisturbed *Frothingham* doctrine. Acknowledging *Flast* as the "starting point" of its examination, the Court nevertheless indicated that "that case must be read with reference to its principal predecessor, *Frothingham v. Mellon*."⁶¹ It found that *Richardson* "neatly" fell within the *Frothingham* holding which prohibited a taxpayer's use of a federal court "as a forum in which to air his generalized grievances about the conduct of government"⁶²

The Court also rigorously applied the *Flast* standards. It found that *Richardson* had not addressed his challenge to the taxing and spending power, but merely to a statute regulating the CIA.⁶³ Moreover, he had not alleged that appropriated funds were being spent in violation of a specific constitutional limitation upon the taxing and spending power.⁶⁴

The Court, in contrast to the court of appeals, refused to apply the *Data Processing* "zone of interest" test. That test is only to be applied where Congress, as in *Data Processing* and *Barlow*, had conferred standing by statute. The Court appeared to constrain the test even more by making it applicable only when a plaintiff seeks standing to mount a nonconstitutional challenge to an administrative ruling.⁶⁵ *Richardson*, a constitutional challenge to a federal statute, was not such a situation.

The Court emphasized the policy reasons behind its decision. It rejected the argument that if *Richardson* could not have standing to litigate the issue, then no one could.⁶⁶ The fact that he had been denied standing did not

61. 94 S. Ct. at 2944 (citations omitted).

62. *Id.* at 2945.

63. *Id.*

64. *Id.* at 2945-46.

65. *Id.* at 2946 n.9. Previous lower court cases had liberally bestowed standing under *Data Processing* and *Barlow*. See, e.g., *Davis v. Romney*, 490 F.2d 1360, 1363-65 (3d Cir. 1974); *Virgin Islands Hotel Ass'n (U.S.), Inc. v. Virgin Islands Water & Power Authority*, 465 F.2d 1272, 1274-75 (3d Cir. 1972), *cert. denied*, 414 U.S. 1067 (1973); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 954-55 (9th Cir. 1971); *Curtiss-Wright Corp. v. McLucas*, 364 F. Supp. 750, 754-57 (D.N.J. 1973).

66. 94 S. Ct. at 2947. The Court did seem to accept the argument, however, in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). There the Court stated: "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. *We cannot accept that conclusion.*" *Id.* at 688 (emphasis added).

mean he was precluded from working through the electoral process, "[s]low, cumbersome and unresponsive" as it might sometimes be.⁶⁷ The Court also cited the increasing popular demand for the intervention of the courts and the consequent need to make such access available only to those with a personal stake in the outcome.⁶⁸

In *Reservists Committee*, as well, the Court rigorously and restrictively employed the tests of standing. Chief Justice Burger used the fact that the Committee had brought a class action on behalf of all citizens to show that the Committee's interest in the outcome was "undifferentiated" from that of all other members of that class.⁶⁹ The Chief Justice also found the injury alleged by the Committee to be "nothing more than a matter of speculation."⁷⁰ Such speculative injury and undifferentiated interest were not sufficient, under *Flast* and *Frothingham*, to confer standing. This was true, according to the Court, despite the broadening of the categories of judicially cognizable injury that had been accomplished by *Data Processing* and *Sierra Club*.⁷¹ The Court went further and seemed to restrict the applicability of the tests laid down in *Data Processing* even more than it had in *Richardson*. *Data Processing* involved judicial review of regulatory agency action under the Administrative Procedure Act. Moreover, the injury alleged there was private competitive injury.⁷² The *Reservists Committee* Court's discussion seemed to limit *Data Processing* and its tests for standing to those situations.⁷³

From a policy viewpoint, the *Reservists Committee* Court reasoned that should it have granted standing for the kind of non-concrete injury alleged

67. 94 S. Ct. at 2948.

68. *Id.* Several commentators have disagreed with the contention that relaxation of standing requirements will unleash a flood of litigants. According to Professor Scott, "[w]hen the 'floodgates' of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared." Scott, *supra* note 24, at 673. See K. DAVIS, *supra* note 2, at 724-25. But other commentators have shared the Court's fears. See, e.g., H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 16, 110-11 (1973).

69. 94 S. Ct. at 2930. See also *O'Shea v. Littleton*, 94 S. Ct. 669, 675-76 (1974).

70. 94 S. Ct. at 2930.

71. *Id.* at 2931.

72. See *id.* at 2935 n.16. The Court thus put a definite halt to the expansive use of the *Data Processing* standards by several lower courts. See note 65 *supra*. The outer limits of this expansion were reached by the Third Circuit in *Schiaffo v. Helstocki*, 492 F.2d 413 (3d Cir. 1974) (candidate in House election campaign had standing to challenge incumbent's use of franking privilege). There the court applied the *Data Processing* test even when the suit involved was not brought under the Administrative Procedure Act. The court interpreted *Data Processing* to be a new and generally applicable standing test within the "federal common law of standing." *Id.* at 421-22.

73. See generally 94 S. Ct. at 2935 n.16.

by the Committee, it would have been called upon to rule in the abstract upon a never-before-litigated constitutional issue. Such a course presented a potential for abuse of the judicial process and invited charges of "government by injunction."⁷⁴ Congress was the appropriate forum in which to consider grievances of the kind alleged by the Committee.⁷⁵

The majority opinions in both cases thus seem to have reaffirmed the validity of the *Frothingham* and *Flast* standards in the case of taxpayer standing and sharply limited the applicability of the *Data Processing* test in the case of citizen standing. They also recited the familiar policy arguments against grants of standing on anything but a restrictive basis.

The concurring and dissenting opinions, however, evidenced some discomfort with the validity of the tests the majority had ratified. Such discomfort was evident in Justice Powell's concurring opinion in *Richardson*. While he agreed with the denial of standing, he would have abandoned *Flast* as the means for achieving that result. He viewed the nexus test neither as a "reliable indicator" of standing nor as bearing a "sound relationship" to the question of whether a federal taxpayer should be allowed to bring suit.⁷⁶ Justice Powell then reasoned that if *Flast* were to be abandoned, the Court would be faced with three alternatives: affirmation of the pre-*Flast* doctrine, creation of new standing tests, or abolition of the doctrine altogether.⁷⁷ Because of his feeling that the "[r]elaxation of standing requirements is directly related to the expansion of judicial power" with an attendant "shift away from a democratic form of government," Justice Powell would have chosen the first alternative.⁷⁸

Justice Brennan and Justice Stewart would have chosen the second alternative. Dissenting in both cases, Justice Brennan restated his earlier position in *Barlow* that standing should be dependent only upon the plaintiff's good faith allegation that he had suffered injury in fact.⁷⁹ Further inquiry into "the zone of interest" test, as required by *Data Processing*, went, in his view, to questions of reviewability and justiciability as opposed to questions of standing.⁸⁰ While thus proposing to broaden the *Data Processing* test, Justice Brennan would have restricted the application of the *Flast* criteria to

74. *Id.* at 2933.

75. *Id.* at 2932 n.10.

76. 94 S. Ct. at 2948-49 (Powell, J., concurring). Justice Powell closely adhered to what he termed the "unanswerable" dissent of Justice Harlan in *Flast*. See 392 U.S. at 116-33 (Harlan, J., dissenting).

77. 94 S. Ct. at 2950 (Powell, J., concurring).

78. *Id.* at 2952.

79. 94 S. Ct. at 2962 (Brennan, J., dissenting).

80. *Id.*

situations where taxpayers sought to challenge alleged violations of the establishment and free exercise clauses.⁸¹ Used outside that sphere, *Flast* only caused "confusion."⁸²

In *Richardson*, Justice Stewart proposed his own test: "When a party is seeking a judicial determination that a defendant owes him an affirmative duty . . . he has standing to litigate . . . the existence *vel non* of this duty once he shows that the defendant has declined to honor his claim."⁸³ Based on this "affirmative duty" test, Justice Stewart dissented. Since the basis of *Richardson's* claim was that the statements and accounts clause imposed an affirmative duty on the government to provide complete information to taxpayers and citizens, and since such duty had not been honored, Justice Stewart would have granted him standing.⁸⁴ The Reservists Committee, on the other hand, had not alleged the violation of an affirmative duty.⁸⁵ Justice Stewart therefore concurred in denying standing to the Committee. As for the *Flast* criteria, Justice Stewart would have restricted their application to taxpayer challenges based on allegations of unconstitutional exercises of the spending and taxing power as had been made in *Flast*.⁸⁶

Justice Douglas seemed to choose the third of Justice Powell's alternatives: abolition of the standing doctrine. In an apparent reversal of his previous feelings about the validity of *Flast*,⁸⁷ Justice Douglas would have expanded, rather than abandoned, the *Flast* test in order to achieve the demise of the doctrine. In *Reservists Committee*, Justice Douglas found that the Committee had satisfied both *Flast* nexuses. The Committee's challenge under the incompatibility clause "implicated" the taxing and spending power as required by the first nexus.⁸⁸ Moreover, his analysis convinced him that the incompatibility clause, like the free exercise and establishment clauses, was historically intended to operate as a specific constitutional limitation on the taxing and spending power.⁸⁹

81. *Id.* at 2963.

82. *Id.*

83. 94 S. Ct. at 2959 (Stewart, J., dissenting).

84. *Id.*

85. See 94 S. Ct. at 2936 (Stewart, J., concurring).

86. 94 S. Ct. at 2960 (Stewart, J., dissenting).

87. In *Flast*, Justice Douglas indicated his desire "to be rid of *Frothingham* here and now." 392 U.S. at 107 (Douglas, J., concurring). As for the *Flast* test itself, Justice Douglas did not feel that it was "durable" and predicted it would "suffer erosion." *Id.* He concluded: "I would be as liberal in allowing taxpayers standing to object to these violations of the First Amendment as I would in granting standing of people to complain of any invasion of their rights under . . . any other guarantee in the Constitution itself or in the Bill of Rights." *Id.* at 114.

88. 94 S. Ct. at 2937 (Douglas, J., dissenting).

89. *Id.* at 2937-38.

In *Richardson*, Justice Douglas reasoned that the *Flast* decision logically required that Richardson be granted standing: “[H]ow can a taxpayer make [a] challenge unless he knows how the money is being spent?”⁹⁰ He concluded that any doubts or ambiguities concerning an individual’s standing should be resolved “towards protecting an individual’s stake in the integrity of constitutional guarantees rather than turning him away without even a chance to be heard.”⁹¹

The diversity of approach and viewpoint in the concurring and dissenting opinions indicates the degree to which the Court remains divided on the question of standing. Thus, while the majority may have breathed new life into the standing doctrine, the overall prognosis for the doctrine’s continued vitality may nevertheless be guarded.

III. THE STANDING DOCTRINE: A GUARDED PROGNOSIS

One may view *Richardson* and *Reservists Committee* in several ways. In one way, the decisions put a definite halt to what Justice Powell called the “revolution” in standing.⁹² An outgrowth of this may be the further case-hardening of the restrictive standing tests of *Frothingham* and *Flast*. Another outgrowth may be the distinct limiting of the *Data Processing* line of cases. In any event, it is certain that *Richardson* and *Reservists Committee* do little to ease the lawyer’s task in groping his way through the labyrinth of formulae and the intricate tests of the standing doctrine in an effort to get his client a day in court.

More fundamentally, the decisions may indicate that the Court views citizens and taxpayers who bring public actions not as “outraged citizens” but as unwelcome additions to an already overcrowded court system.⁹³ Such plaintiffs, in this view, have no place in attempting to raise their private differences with the Government—especially in the areas of foreign affairs and national defense. This is true not only because those fields are better left to the legislature and the executive, but also because judicial intervention is an undemocratic interruption of the normal operation of a representative government.

Taken another way, however, the decisions indicate a Court that is unhappy with the present standing doctrine. This is most apparent with the *Flast* criteria, in which members of both the minority and majority would ei-

90. *Id.* at 2957 (citation omitted) (Douglas, J., dissenting).

91. *Id.* at 2959 (Douglas, J., dissenting).

92. *Id.* at 2955 (Powell, J., concurring).

93. As to this overcrowding, see FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 1-9 (1972).

ther substantially limit or abandon the *Flast* nexus test. Some members would go beyond this and expand the liberal standing criteria of *Data Processing* as well. This unrest may indicate that the Court may yet be willing to re-examine again the constitutional and policy bases of the standing doctrine.

More certain is the observation that the minority in both cases may be willing, on policy grounds, to open the Court's doors more often to hear the complaints of individuals against their Government. This willingness seems to have its premise in the view that "the central and most realizable function of our courts is the protection and relief of the individual."⁹⁴ Under this view, therefore, the need to permit individuals to seek redress of injury allegedly inflicted by Government must take priority over the competing need to conserve the resources of the judicial system in a time of mounting demands upon that system.

Thus the ultimate significance of *Richardson* and *Reservists Committee* may not lie solely in the Court's attempt to reach agreement on the definition and scope of the standing doctrine itself. Their significance may also lie in the Court's effort to reach an accommodation between the need for judicial economy in a heavily burdened court system and the need for protection of individuals in a system marked by the steady expansion of governmental power. While *Richardson* and *Reservists Committee* may have reached agreement for the present as to the former issue, the decisions indicate that the Court is far from reaching an accommodation as to the latter.

Richard L. Guido

94. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 475 (1965).