

WHO'S THE BOSS? SEVENTH CIRCUIT LIMITS EXECUTIVE BRANCH

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INTRODUCTION

Since the September 11 attacks on the United States, there have been numerous articles about President Bush's alleged expansion of executive authority – be it the warrantless surveillance of US citizens, detainment of enemy combatants, or signing statements on prisoner torture.¹ However, an opinion issued by the United States Court of Appeals for the Seventh Circuit introduced a fascinating method of executive authority curtailment. In *Freedom from Religion Foundation, Inc. v. Chao*, the Seventh Circuit expanded the doctrine of “taxpayer standing” to apply to executive branch actions funded by general congressional appropriations.² At first glance, the Seventh Circuit simply seems to be establishing a check on the executive and

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¹ Spencer S. Hsu, *Bush Balks at Criteria for FEMA Director; Signing Statement Asserts Right to Ignore Parts of New Homeland Security Law*, The Washington Post, October 7, 2006 Saturday, Final Edition at A02

² See *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), *rehearing, en banc, denied by Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006).

granting power to the taxpaying public with this ruling.³ However, a closer analysis of this case reveals the decision to be a double-edged sword, since the case also grants power to the federal courts – leading to potentially unaccountable, undemocratic results. With *Freedom from Religion v. Chao*, the gate has been opened for taxpayers to bring lawsuits challenging virtually any executive action.⁴ These challenges can effectively provide “judicial vetoes” of executive actions which might not easily be remedied by the democratic process. The judicial branch is now in a position of authority over the acts of the other branches of government.⁵ Furthermore, by disregarding Supreme Court precedent regarding the narrowness of taxpayer standing, the Seventh Circuit added additional confusion to the maze of taxpayer standing doctrine.⁶

This Note is divided into four Sections. Section I of this Note briefly describes taxpayer standing and its history in the courts. Section II discusses the Seventh Circuit decision in *Freedom from Religion*. Section III analyzes that decision in light of precedent, reasoning, and public policy. Finally, Section IV concludes that the decision was incorrectly decided.

I. A BRIEF HISTORY OF AMERICAN TAXPAYER-STANDING DOCTRINE

Based on Supreme Court interpretation of Article III of the U.S. Constitution, standing is required to invoke the power of a federal court.⁷ The “irreducible constitutional minimum of standing” has three

³ 433 F.3d at 996-97.

⁴ *Id.* at 1000 (Ripple, J., dissenting).

⁵ *Massachusetts v. Mellon*, 262 U.S. 447, 488-489 (1923)

⁶ Frank I. Michaelman, *Popular Law and the Doubtful Case Rule*, 81 Chi.-Kent. L. Rev. 1109 (2006) (“[W]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles.”)

⁷ US CONST. art. III, §2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

parts: (1) the plaintiff must allege an actual or imminent "injury in fact"; (2) there must be some causal connection between the injury and the conduct complained of; (3) the plaintiff must demonstrate that a favorable decision would likely redress that injury.⁸ Standing also consists of "prudential" principles, which deny standing to a plaintiff who has been injured as a result of the defendant's conduct but who is not the proper person to bring suit.⁹

The concept of standing as a limitation on judicial jurisdiction has had a tortured history in the Supreme Court.¹⁰ "Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law,"¹¹ although it is generally agreed that standing is one of the most important doctrines regarding judicial power.¹²

A. *Supreme Court Precedent Regarding Taxpayer Standing*

The taxpayer standing doctrine is "the principle that a taxpayer has no standing to sue the government for allegedly misspending the public's tax money unless the taxpayer can demonstrate a personal stake and show some direct injury."¹³ The taxpayer doctrine was established since the conduct of the federal government was found to

⁸ *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000); *United States v. Hays*, 515 U.S. 737, 742-743 (1995); *Ne. Fla. Contractors v. Jacksonville*, 508 U.S. 656, 663-664 (1993); *Lujan*, 504 U.S. at 560.

⁹ *Freedom from Religion Found.*, 433 F.3d at 990.

¹⁰ See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168 (1992) (noting that from 1965-1994, the Supreme Court addressed the issue of standing on 109 occasions)

¹¹ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 60 (2d ed. 2002).

¹² *United States v. Hays*, 515 U.S. 737, 742 (1995); *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("The Art. III doctrine that requires a litigant to have "standing" to invoke the power of a federal court is perhaps the most important of these doctrines.").

¹³ BLACK'S LAW DICTIONARY 696 (2d pocket ed. 2001).

be too far removed from individual taxpayer returns for any injury to the taxpayer to be traced to the use of tax revenues.¹⁴

The Supreme Court laid out the boundaries on taxpayer standing in a series of cases which commentators divide into “eras.”¹⁵ Professor Chemerinsky divides these cases into four eras: 1) initial cases preventing taxpayer standing; 2) the Warren Court’s expansion of taxpayer standing; 3) the Burger Court’s virtual elimination of taxpayer standing; and 4) the Rehnquist Court’s decisions.¹⁶

In the early 1920s, *Frothingham v. Mellon*¹⁷ established that “the basic rule is that taxpayers do not have standing to challenge how the federal government spends tax revenue.”¹⁸ In *Frothingham*, the Court dismissed a taxpayer suit challenging federal expenditures under the Maternity Act.¹⁹ In that unanimous opinion, Justice Sutherland emphasized the basic function of limiting judicial review of congressional acts:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other . . . Looking through forms of words

¹⁴ *Freedom from Religion Found.*, 433 F.3d at 990.

¹⁵ See *supra* note 10, at 168-97 (Professor Sunstein divides American standing history into five distinct eras.); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 90 (Professor Chemerinsky divides American standing into four sets).

¹⁶ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 90 (2d ed. 2002).

¹⁷ 262 U.S. 447 (1923).

¹⁸ *In re U.S. Catholic Conference*, 885 F.2d 1020, 1027 (2d Cir. 1989).

¹⁹ 262 U.S. 447, 487-88.

to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. *To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.*²⁰

As such, taxpayer standing to challenge expenditures in general was denied in *Frothingham v. Mellon* because the impact of spending upon the taxpayer was deemed too tenuous, and impeded upon separation of powers principles.²¹

Up to 1952, the Supreme Court was consistently applying the taxpayer standing doctrine, as in *Doremus v. Board v. Education*²². In that case, the Court applied the *Frothingham* taxpayer-standing doctrine and dismissed the case for lack of standing when plaintiffs brought suit claiming a violation of the Establishment Clause through a New Jersey law which allowed public school teachers to read Bible passage in the classroom.²³ The Court held that the injury to the taxpayer was too remote from the federal treasury and too indeterminable to be a real injury.²⁴ The Court concluded that Article III's requirements were therefore insufficiently satisfied and federal courts lacked jurisdiction.²⁵

²⁰ *Commonwealth of Massachusetts v. Melon*, 262 U.S. 447, 489 (U.S. 1923) (emphasize added).

²¹ *Id.* at 489

²² 342 U.S. 429, 433-34 (1952)

²³ *Id.* at 430.

²⁴ *Id.* at 434.

²⁵ *Id.* at 434-35.

A major change occurred in the late 1960s when the Warren Court created an exception to the concept of taxpayer standing.²⁶ In *Flast v. Cohen*, the Court overturned a lower court's application of *Frothingham* when it created an exception stating that "a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power."²⁷ In *Flast*, taxpayers tried to stop the expenditures under the Elementary and Secondary Education Act of 1965.²⁸ Chief Justice Warren held that taxpayer standing depends on "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."²⁹ The Court explicitly distinguished *Flast* (involving an Establishment Clause violation through Congress's tax and spending power) against *Frothingham* (dealing with Tenth Amendment violation by Congress not on tax and spending power).³⁰ The *Flast* Court justified the exception stating that "the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general."³¹

In introducing the *Flast* exception, the Court developed a two prong test to determine whether the plaintiffs as taxpayers had standing to sue: (1) the taxpayer must "allege the unconstitutionality *only* of exercises of congressional power under the taxing and spending clause" and (2) the taxpayer must show that the challenged

²⁶ *Flast v. Cohen*, 392 U.S. 83, 101 (1968) ("We find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs.")

²⁷ *Id.* at 106.

²⁸ *Id.* at 85.

²⁹ *Id.* at 102.

³⁰ *Id.* at 85.

³¹ *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (U.S. 2006)

enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power.³²

In 1970s and 80s, under the Burger Court, the narrowness of the taxpayer standing exception introduced in *Flast* was revealed. In *Schlesinger v. Reservists Committee to Stop the War* and *United States v. Richardson*, the Court denied standing because the taxpayer plaintiffs did not challenge a congressional enactment under the Taxing and Spending Clause, but rather an action of the Executive Branch.³³ Another ruling emphasizing the narrowness of *Flast* occurred in *Valley Forge Christian College v. Americans United for Separation of Church and State*.³⁴ In that case, the Court dismissed a taxpayer suit attempting to challenge a federal grant of property to the Valley Forge Christian College.³⁵ The Court distinguished *Valley Forge* from *Flast* by stating that the allegedly unconstitutional action in *Valley Forge* was an executive action, not a congressional statute as it was in *Flast*.³⁶ Consequently, “[a]fter *Richardson*, *Schlesinger*, and *Valley Forge* the only situation in which taxpayer standing appears permissible is if the plaintiff challenges a government expenditure as violating the Establishment Clause.”³⁷

³² *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 478-79 (1982) (emphasis added).

³³ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 3-4 (D.C. Cir. 1988) (“The Court has never recognized federal taxpayer standing outside these narrow facts, and it has refused to extend *Flast* to exercises of executive power.”)

³⁴ 454 U.S. 464 (1982).

³⁵ *Id.* at 486-87.

³⁶ The Court in *Valley Forge* held the taxpayers failed the *Flast* test in two respects: (1) the source of their complaint was not a congressional action - *Flast* limited taxpayer standing to challenges directed “only [at] exercises of congressional power” and (2) the property transfer was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. *Valley Forge*, 454 U.S. at 479-80.

³⁷ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 93 (2d ed. 2002).

Subsequently, under Chief Justice William Rehnquist, the Court reaffirmed *Flast* in *Bowen v. Kendrick*, permitting a taxpayer challenge to a federal grant program that funded teen pregnancy prevention through religious organizations³⁸

In 2006, in *DaimlerChrysler Corp. v. Cuno*, the Court rejecting granting standing to taxpayers for allegedly unconstitutional congressional actions under the Commerce.³⁹ Consequently, if previous Supreme Court rejections to expanding the narrow *Flast* exception were not explicit, *DaimlerChrysler* reinforced the idea that the Supreme Court was never comfortable with the *Flast* exception in the first place and wanted to keep it narrow.⁴⁰

B. Other Court Interpretations of Supreme Court Precedent

The narrowness of the *Flast* and *Bowen*, when applied to taxpayer standing, has been noted by sister Court of Appeals and some commentators. Notably, one commentator stated, "Fate has not been kind to the *Flast* decision. In the field of taxpayer standing, it has been limited to very narrow confines."⁴¹

The Court of Appeals for the District of Columbia Circuit reconciled Supreme Court precedent involving taxpayer standing by emphasizing the narrowness of the cases, "*Schlesinger, Valley Forge*, and similar cases must be understood as limiting the *Flast* exception to the Court's general rule against federal taxpayer standing."⁴²

In *In re Catholic Conference*, the Second Circuit had the opportunity to address an application of *Flast* to executive action. *In re Catholic Conference* involved a pro-abortion group bringing suit against the U.S. Government because the Internal Revenue Service

³⁸ *Bowen v. Kendrick*, 487 U.S. 589 (1988).

³⁹ *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1865 (U.S. 2006).

⁴⁰ *Id.*

⁴¹ *Rocks v. City of Philadelphia*, 868 F.2d 644, 649 (3d Cir. 1989) (citing 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3531.1 (2d ed. 1984)).

⁴² *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988)

granted tax-exempt status to the Catholic Church.⁴³ The plaintiffs alleged that the Catholic Church, through its campaigning against abortion, violated the IRS's prohibition on lobbying and campaigning for tax-exempt entities.⁴⁴ Citing Supreme Court precedent, the Second Circuit distinguished *In re Catholic Conference* with the *Flast* and *Bowen* opinions by noting that the plaintiff's complaint centered on an alleged executive branch action.⁴⁵ Thus, the Second Circuit made clear the narrowness of *Flast's* exception to *Frothingham's* rule against taxpayer standing.⁴⁶

The Court of Appeals for the Third Circuit also emphasized the narrowness of *Flast* and *Bowen* in its ruling denying standing in *Rocks v. City of Philadelphia*.⁴⁷ The court noted that *Flast* and *Bowen* serve as precedential authority only if establishment and free exercise clauses and congressional taxing and spending power are involved.⁴⁸

II. THE SEVENTH CIRCUIT'S APPROACH IN *FREEDOM FROM RELIGION FOUNDATION V. CHAO*

A. *The Majority Decision in the Three Judge Panel*

In *Freedom from Religion Foundation v. Chao*, the party claiming taxpayer standing was the Wisconsin-based Freedom from Religion Foundation, a non-profit tax exempt national association of nontheists that had been "working since 1978 to promote free thought and defend

⁴³ 885 F.2d 1020, 1028 (2d Cir. 1989).

⁴⁴ *Id.* at 1022.

⁴⁵ *Id.* at 1028.

⁴⁶ See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227-28 (1974); *United States v. Richardson*, 418 U.S. 166, 175-176 (1974).

⁴⁷ *Rocks v. City of Philadelphia*, 868 F.2d 644, 649 (3d Cir. 1989) ("*Flast* and *Bowen* are extremely limited holdings. They hold that federal taxpayers have standing to raise establishment clause claims against exercises of congressional power under the taxing and spending power of article I, section 8 of the constitution.").

⁴⁸ *Id.* at 649.

the constitutional principle of the separation of state and church.”⁴⁹ The target of the Freedom from Religion Foundation’s challenge was President Bush’s establishment of the White House Office of Faith-Based and Community Initiatives by an executive order.⁵⁰ In holding for Freedom from Religion Foundation on partial summary judgment, Judge John C. Shabaz for the U.S. District Court for the Western District of Wisconsin noted that the government⁵¹ had raised concerns over jurisdictional and prudential mootness and ripeness.⁵² However, Judge Shabaz dismissed these concerns stating that the “[d]efendants must bear the heavy burden to prove that there [was] no reasonable expectation that the wrong [would] be repeated.”⁵³ Judge Shabaz then concluded that the defendants failed to meet the burden.”⁵⁴

On appeal, the government raised issues concerning standing to the Seventh Circuit.⁵⁵ In finding for the plaintiffs, Judge Posner wrote the majority opinion for the divided panel⁵⁶, beginning with a statement of the issue as “whether a taxpayer can ever have standing under Article III of the Constitution to litigate an alleged violation of the First Amendment’s establishment clause unless Congress has earmarked money for the program or activity that is challenged.”⁵⁷ Judge Posner said that District Judge Shabaz’s opinion would have

⁴⁹Freedom from Religion Foundation Homepage, <http://ffrf.org>, (last visited Dec. 6, 2006).

⁵⁰ See Exec. Order No. 13199 (2001); Exec. Order No. 13198 (2001); Exec. Order No. 13342 (2004); Exec. Order No. 13280 (2002); Exec. Order 13279 (2002).

⁵¹ Jim Towey, Patrick Purtill, Brent Orrell, Bobby Polito, Ryan Streeter, John Porter, Juliete McCarthy, Linda Shovlain, David Caprara, Elaine Chao, Tommy Thompsen, Rod Paige, John Ashcroft, and Dr. Julie Gerberding

⁵² Freedom from Religion v. Chao, 2005 U.S. Dist. LEXIS 39444, 28 (W.D. Wis. Jan. 11, 2006).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Freedom from Religion Found. v. Chao, 433 F.3d 989. For a recent outline of this case, see 119 HARV. L. REV. 2260.

⁵⁶ The divided panel included Judge Posner and Judge Wood in the majority, with Judge Ripple dissenting.

⁵⁷ Freedom from Religion Found. v. Chao, 433 F.3d 989, 990 (7th Cir. 2006)

been correct under an “earlier view.”⁵⁸ He then discussed the cases that developed taxpayer standing doctrine in United States jurisprudence.⁵⁹ Judge Posner noted that Justice Frankfurter’s reading of the Article III flatly rejected taxpayer standing.⁶⁰ Frankfurter suggested that the Framers of the Constitution did not envision individual taxpayers filing lawsuits against the federal government due to the attenuated relationship between the taxpayers and federal government at the time.⁶¹ Judge Posner noted that standing principles developed by the Supreme Court was divided into two types: prudential and constitutional.⁶² Although Judge Posner was talking about principles created by Supreme Court precedent, he said that the prudential principles of standing were “protean and mutable.”⁶³ Judge Posner explained that the term “prudential” was “the very antithesis of a definite rule or standard.”⁶⁴ Moreover, the majority interpreted *Flast* as requiring a two prong test for challenges under Article I’s tax and spending clause including: 1) not an incidental expenditure of tax funds in the administration of an essentially regulatory statute and 2) the challenged enactment exceeds specific constitutional limitations imposed on the exercise of the congressional taxing and spending power that is generally beyond the powers delegated to Congress by Article I, §8.⁶⁵

Since the previous *Flast* and *Bowen* rulings dealt with statutes involving specified congressional funds, the majority had to note that this case involved no specific statutory program involved in this case.⁶⁶ Despite that, the court held that “the difference [between a

⁵⁸ *Id.*

⁵⁹ Similar to Section II of this paper, Judge Posner went into *Frothingham*, *Doremus*, *Flast*, and *Bowen*. *Freedom from Religion Found.*, 433 F.3d at 990.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 991.

⁶³ *Id.* at 992.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 994

specific statutory program and a general program] [could not] be controlling.”⁶⁷

Judge Posner set forth some interesting hypotheticals on the when taxpayer standing would not be necessary but could be used: “Suppose Homeland Security built a mosque to reduce the likelihood of terrorism, taxpayer standing would not be essential to challenge the violation of the Establishment Clause.”⁶⁸

Because of the present case’s similarity with the facts in *Flast*, Judge Posner noted that “the Court in *Flast* carved an exception for an incidental expenditure of tax funds in the administration of an essentially regulatory state.”⁶⁹ However, Judge Posner then said that he was going to put to one side the term “regulatory.”⁷⁰ He then focused on the term “incidental” and called that term relative.⁷¹ He never returned to the word “regulatory” that was in the controlling *Flast* precedent.⁷²

Judge Posner even performed a law and economics analysis with taxpayer standing and the Establishment Clause:

Imagine a suit complaining that the President was violating the [Establishment] Clause by including favorable references to religion in his State of the Union address. The objection to his action would not be to any expenditure of funds for a religious purpose; and though an accountant could doubtless estimate the cost to the government of the preparations, security arrangements, etc., involved in a State of the Union address, that cost would be no greater merely because the President had mentioned Moses rather than John Stuart Mill. In other words, the marginal or incremental

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 995.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

cost to the taxpaying public of the alleged violation of the Establishment clause would be zero.⁷³

In the end, the Seventh Circuit ruled in a three judge panel that “[t]axpayers have standing to challenge grants by a federal agency to religious institutions pursuant to statutes that authorize grants to public and private institutions for services, even though the grants have not been made by Congress itself.”⁷⁴

In this expansion of established taxpayer-standing doctrine, the majority held that it should not matter whether the program was executive or congressional, or whether a program was funded through general appropriations rather than earmarked appropriations.⁷⁵ As such, the majority expanded taxpayer standing doctrine on two fronts: permitting taxpayer standing when the program at issue is created by the executive branch, rather than just those created by the legislative branch, and permitting taxpayer standing when the program is funded with general appropriations, rather than just specific congressional grants.

B. The Ripple Dissent in the Three Judge Panel

In a forceful dissent, Judge Ripple noted that although there might be an initial appeal towards limiting executive power by using federal judiciary power, the majority’s approach simply cuts the concept of taxpayer standing “loose from its moorings.”⁷⁶ Judge Ripple explained how the majority opinion was a dramatic expansion of standing doctrine that did not follow Supreme Court precedent.⁷⁷ He explained that the modern doctrine of standing was “hard-born” and “well-established” and “important” in the Nation’s jurisprudence.⁷⁸ He

⁷³ *Id.*

⁷⁴ *Id.* at 997.

⁷⁵ *Id.*

⁷⁶ *Id.* at 998 (Ripple, J. dissenting).

⁷⁷ *Id.* at 997.

⁷⁸ *Id.*

scolded the majority stating, “We cannot ignore or treat as malleable what the Supreme Court has mandated.”⁷⁹ The disagreement is not about the Tax and Spending Clause, but rather the constitutional provision.⁸⁰ He said that previous rulings apropos standing were “not simply prudential matters of judicial restraint but constitutional requirements” and required that the plaintiff show that he personally suffered actual or threatened injury due to the action of the defendant and that it would be favorably decided.⁸¹ A showing of concrete injury is an “irreducible constitutional minimum.”⁸² There must be a nexus between the taxpayer and the constitutional infringement alleged.⁸³ A mere disagreement with the government policy is hardly a case or controversy.⁸⁴

Judge Ripple said that the majority’s expansive standard made virtually any executive action subject to taxpayer suit.⁸⁵ Federal courts could now intrude on the decision-making prerogatives of the executive branch.⁸⁶ The judiciary would effectively be managing the executive.⁸⁷ He described the majority’s approach as inching toward the concept of citizen standing, which has been strictly forbidden by Supreme Court precedent.⁸⁸

Finally, Judge Ripple cited sister court cases such as *District of Columbia common Cause v. District of Columbia*⁸⁹ and *In re United States Catholic Conference*.⁹⁰ He said that the Seventh Circuit “ought

⁷⁹ *Id.*

⁸⁰ *Id.* at 998.

⁸¹ *Id.* at 997.

⁸² *Id.*

⁸³ *Id.* at 1000.

⁸⁴ *Id.* at 998.

⁸⁵ *Id.* at 1000.

⁸⁶ *Id.* at 996.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1000.

⁸⁹ 858 F.2d 1 (D.C. Cir. 1988).

⁹⁰ 885 F.2d 1020 (2d Cir. 1989).

to follow the same course and, in the process, adhere to the principles set forth in the Supreme Court's case law."⁹¹

C. *The Denial of En Banc Rehearing*

After the three judge panel reversed the lower court's ruling, the government petitioned the Seventh Circuit for a rehearing *en banc*.⁹² In a fascinating ruling, Chief Judge Flaum and Judge Easterbrook, in separate concurring opinions, agreed with a new dissenting opinion written by Judge Ripple that the Supreme Court needed to resolve the controversy.⁹³

Chief Judge Flaum also wrote a concurring opinion denying rehearing *en banc* but stated "the position set forth in the dissent is one which could eventually command high court endorsement."⁹⁴ And that "the needed consideration of this important issue by that tribunal would be unnecessarily delayed by our further deliberation."⁹⁵

Judge Easterbrook hinted at a disagreement with Judge Posner throughout his opinion. He began his concurring opinion for denial of rehearing *en banc* by stating that his vote "[did] not imply that [he] deem[ed] the panel's resolution beyond dispute or the issue unimportant."⁹⁶ To the contrary, the subject is both recurring and difficult, and there is considerable force in Judge Ripple's dissent, and in the standing analysis of Judge Sykes dissent from *Laskowski v. Spellings*, which extends this panel's holding."⁹⁷ Even though both Judge Flaum and Judge Easterbrook noted the tension between Supreme Court precedent and Judge Posner's decision, they still voted

⁹¹ *Freedom from Religion Found.*, 433 F.3d at 1001.

⁹² *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006)

⁹³ *Id.* at 988-89 (Flaum, C.J., Easterbrook, J. concurring, with Ripple, J. dissenting).

⁹⁴ *Id.* at 988 (Flaum, C.J. concurring).

⁹⁵ *Id.*

⁹⁶ *Id.* at 989 (Easterbrook, J. concurring).

⁹⁷ *Id.*

to deny rehearing *en banc*, thereby letting Judge Posner's decision stand.⁹⁸

Judge Easterbrook criticized the Supreme Court decisions as arbitrary.⁹⁹ He stated that "comprehensiveness and rationality are not [the taxpayer standing] doctrine's hallmarks."¹⁰⁰ Judge Easterbrook stated that "Nothing we can do would eliminate the tensions between *Flast* and *Bowen v. Kendrick*, on the one hand, and *Frothingham* and *Valley Forge* (plus the many cases such as *Defenders of Wildlife*) on the other."¹⁰¹

In an interesting hypothetical application of the Seventh Circuit decision, Judge Easterbrook noted how the Supreme Court ruled in a prominent case that an atheist father had no standing to challenge the words "under God" in the pledge of allegiance.¹⁰² He then suggested that, according to the Seventh Circuit ruling, the atheist father might be able to overcome that hurdle.¹⁰³

In concluding his denial for rehearing *en banc*, Judge Easterbrook stated:

The problem is not of our creation and cannot be resolved locally. There is no logical way to determine the extent of an arbitrary rule. Only the rule's proprietors can bring harmony -- whether by extension or contraction -- or decide to tolerate the existing state of affairs.¹⁰⁴

In the denial of rehearing *en banc*, both Judge Flaum and Judge Easterbrook decided not to wade into the matter of taxpayer standing and noted that the Seventh Circuit was not the right forum to discuss

⁹⁸ *Id.* at 988.

⁹⁹ *Id.* at 989.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 990 (Easterbrook, J. concurring).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citations omitted).

this matter.¹⁰⁵ Instead Judge Flaum simply called both Judge Ripple and Judge Posner's opinions "scholarly" and said that the Seventh Circuit was not able to resolve this issue.¹⁰⁶

D. The Dissent in the Denial for En banc Rehearing

The denial of rehearing *en banc* drew another vigorous dissenting opinion from Judge Ripple, which was joined by Judges Manion, Kanne, and Sykes.¹⁰⁷ The dissenting opinion by Judge Ripple again stated that the majority's holding drastically expands the Supreme Court 1988 ruling in *Bowen v. Kendrick*, permitting "virtually any executive action to be subject to taxpayer suit."¹⁰⁸ The dissent compared *Bowen*, which granted taxpayers standing to challenge a specific congressional appropriation to pay a religious institution to help adolescent sexual problems with the present case, which involves an executive order which uses general appropriations.¹⁰⁹ Highlighting the circuit split, the dissent cited the Second Circuit case of *In re United States Catholic Conference* (which denied pro-choice supporters standing to challenge the Catholic Church's tax-free status) as an example of the appropriate method of applying the two part test developed in *Flast v. Cohen*.¹¹⁰

Instead of accepting the rationale of Judge Easterbrook, Judge Ripple stated his belief that:

[T]his case also reflects a view about the nature of Article III judicial power, the case has serious implications for judicial governance, and we, as officers of that branch, have a special duty to ensure that a decision expanding the authority that we claim

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 998 (Easterbrook, J. concurring).

¹⁰⁷ *Id.* at 990.

¹⁰⁸ *Id.* at 990 (Ripple, J. dissenting).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 991.

for ourselves represents the considered judgment of every judge on this court. Such a review is especially appropriate when the Government specifically charges, as it has here, that the court has "greatly exceeded its authority by ignoring the Supreme Court's own rules . . . and substituting its own views of what the law rationally ought to be."¹¹¹

Judge Ripple also stated that the Seventh Circuit "decided an important federal question in a way that conflicts with the relevant decisions" of the Supreme Court and has "entered a decision in conflict with the decision of another United States court of appeals on the same important matter."¹¹² Judge Ripple cited the requirements for certiorari and applied those requirements to the case; he concluded that the Supreme Court should accept certiorari.¹¹³

At the conclusion of his dissent, Judge Ripple reached a similar conclusion as Judge Flaum and Judge Easterbrook - that the Supreme Court needed to resolve the tensions created by this case.¹¹⁴ He ended his opinion by stating "the Government therefore has one last forum in which to seek a return to traditional principles governing the right of a taxpayer to challenge a decision of the executive."¹¹⁵

III. ANALYSIS

A. *Following Precedent*

Examining the three judge panel and the denial of rehearing *en banc*, there were five opinions written by four judges from the Seventh

¹¹¹ *Id.* at 990.

¹¹² *Id.* at 991.

¹¹³ *Id.* at 991.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

Circuit.¹¹⁶ Only the majority opinions which expanded taxpayer standing bemoaned the “tension which has evolved in this area of jurisprudence.”¹¹⁷ Although dissenting Judge Ripple also requested that the Supreme Court resolve the issues raised by the case, his opinion demonstrated how a narrow and faithful application of Supreme Court precedent would avoid the necessity of such another sweeping assessment of taxpayer standing doctrine by the Supreme Court.¹¹⁸ The Courts of Appeals for the Second Circuit and the District of Columbia similarly did not mention any difficulties in applying Supreme Court precedent to comparable cases.¹¹⁹ One reason that Judge Ripple found no need to mention the arbitrariness and tension was because his opinion was properly following Supreme Court precedent.¹²⁰

In this case, the Freedom from Religion Foundation has not suffered any concrete and particularized injury, but rather is seeking “to employ a federal court as a forum in which to air his generalized grievances about the conduct of government.”¹²¹ Both *Frothingham* and *Flast, supra*, reject that basis for standing as incompatible with Article III.¹²²

Regardless of the wisdom of permitting taxpayer standing or not in various situations, the Seventh Circuit is bound to follow the

¹¹⁶ *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988 (7th Cir. 2006), contained Judge Flaum, Judge Easterbrook, and Judge Flaum’s opinions; *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), contained Judge Posner and Judge Ripple’s opinions.

¹¹⁷ *Freedom from Religion Found.*, 447 F.3d 988.

¹¹⁸ *Id.*

¹¹⁹ See generally *D.C. Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988) and *In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir. 1989).

¹²⁰ See *Freedom from Religion Found.*, 447 F.3d at 997-1001 (Ripple, J. dissenting).

¹²¹ *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

¹²² *United States v. Richardson*, 418 U.S. 166, 175 (1974).

Supreme Court precedent. *Flast* was established as a narrow exception to the doctrine barring taxpayer standing.¹²³ Exceptions should be construed narrowly. Now the exception is threatening to swallow the entire doctrine of taxpayer standing in the method that Judge Posner applied.¹²⁴

B. Contrary to guiding principles

The standing doctrine serves four values: 1) enforcing separation of powers principles by restricting the availability of judicial review; 2) serves judicial efficiency by preventing a flood of lawsuits; 3) improves judicial decision by ensuring there is a specific controversy and an advocate with sufficient personal concern to effectively litigate a matter; and 4) ensuring judicial fairness in that people raise only their own rights and concerns.¹²⁵ The Seventh Circuit's expansion of the taxpayer standing doctrine in *Freedom from Religion v. Chao* forces an examination of the purposes of having standing doctrine in the first place.¹²⁶

First, the standing doctrine serves as an essential element to the separations of power doctrine.¹²⁷ The Seventh Circuit's expansion of taxpayer standing doctrine has shifted the allocation of power between the branches of government. The court is effectively inching towards a judicial veto on executive programs, enabling the courts, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing

¹²³ *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) ("Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since [*Flast*], we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing").

¹²⁴ *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 997 (Ripple, J. dissenting).

¹²⁵ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 60-62 (2d ed. 2002).

¹²⁶ *Freedom from Religion Found.*, 433 F.3d 997.

¹²⁷ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

monitors of the wisdom and soundness of Executive action.”¹²⁸ When a court interferes with a legislative act or the action of an elected executive, it thwarts the will or representatives of the actual people.¹²⁹ Or as Professor Sunstein points out, judges are removed from political accountability and selected from a highly educated elite.¹³⁰ Once a “constitutionalized” decision is issued by a federal court, as occurred in the disastrous *Dredd Scott* decision, very few democratic remedies remain.¹³¹

Justice Powell also saw the expansion of standing as a threat to the proper functioning of the system of checks and balances, as well as to democratic principles of government:

Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.¹³²

Second, the standing doctrine serves an important function in improving judicial efficiency by restricting a flood of lawsuits.¹³³ The Seventh Circuit decision expanded the doctrine of taxpayer standing to include executive actions and general appropriations, thereby expanding the avenues in which plaintiffs can bring suit.¹³⁴ Plaintiffs

¹²⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (citations omitted).

¹²⁹ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (2d ed. 1986) (describing “The Counter-Majoritarian Difficulty” in judicial review of actions taken by other branches of government).

¹³⁰ *See supra* note 10, at 216.

¹³¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹³² *United States v. Richardson*, 418 U.S. 166, 188 (1974).

¹³³ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 60-62 (2d ed. 2002).

¹³⁴ *Freedom from Religion Found. v. Chao*, F. 433 F.3d 989 (7th Cir. 2006).

now need only frame their complaints in methods that comport with a violation of the Establishment Clause.¹³⁵

Third, the taxpayer standing doctrine serves to improve judicial decisions so that the judiciary only decides specific cases with particularized remedies.¹³⁶ In this case, the Seventh Circuit is permitting plaintiffs with no concrete or particularized injury to bring suit against the executive branch.¹³⁷ The harm alleged by Freedom from Religion Foundation is the executive branch's general use of tax revenue.¹³⁸ As a result, due to the unparticularized and unspecific claim of the plaintiffs, the only remedy possible by the judicial branch would be, in essence, a judicial veto.

Fourth, the taxpayer standing doctrine serves to ensuring fairness so that taxpayers only bring lawsuits for which there is a demonstrable personal and cognizable injury or imminent injury. With the Seventh Circuit's decision in *Freedom from Religion Foundation*, the purpose served by the doctrine is under fire.¹³⁹ By expanding the doctrine to encompass executive actions, taxpayers can bring lawsuits against the executive branch based on the potential harm done to others simply because they pay taxes. Such a fluid basis for standing has the possibility of becoming a method "to air his generalized grievances about the conduct of government."¹⁴⁰ The list of potential damages to hypothetical people is large. The court has further opened the door by not limiting lawsuits to those who have a nexus with the injury alleged.

¹³⁵ *Id.*

¹³⁶ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 60-62 (2d ed. 2002).

¹³⁷ *Freedom from Religion Found.*, F. 433 F.3d at 1000 (Ripple, J. dissenting).

¹³⁸ *Id.* at 994 (majority opinion).

¹³⁹ *Id.* at 989-1000.

¹⁴⁰ *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

C. Judicial Responsibility

Since *Marbury v. Madison*, the Judiciary's responsibility has been to interpret the Constitution and draw limitations on power for the branches of government, including the judicial branch itself.¹⁴¹ Yet in their concurring opinions denying rehearing *en banc*, both Judges Flaum and Easterbrook refused let the entire court review the issues concerning judicial self-government created by *Freedom from Religion Foundation v. Chao*.¹⁴² The denial of rehearing made Judge Posner's opinion the law of the land, unless the Supreme Court accepts certiorari. It is an abdication of its duty for an appellate court to close its doors¹⁴³ to resolve tensions that other circuits have answered faithfully without changing Supreme Court precedent.¹⁴⁴ In fact, Chief Judge Flaum suggested that "the position set forth in the dissent is one which could eventually command high court endorsement."¹⁴⁵

CONCLUSION

Taxpayer standing has been prohibited by a line of Supreme Court cases with one narrow exception – if it involves a specific congressional expenditure of funds that violates the Establishment Clause. In *Freedom from Religion Foundation Inc. v. Chao*, the Seventh Circuit improperly expanded Supreme Court precedent by permitting taxpayer standing in situations involving executive actions and use of general congressional funds. At first glance, the Seventh Circuit seems to be granting power to the taxpaying public to be a check on the executive branch. However, closer analysis of this case

¹⁴¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁴² *Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988-89 (7th 2006).

¹⁴³ *Flast*, 392 U.S. at 111.

¹⁴⁴ *See generally* D.C. *Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988); *In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir. 1989).

¹⁴⁵ *See generally* D.C. *Common Cause*, 858 F.2d at 4; *Catholic Conference*, 885 F.2d at 1028.

reveals the decision to be a power grab by the Seventh Circuit with potentially unaccountable, undemocratic results. As a result, the executive and legislative branches of the government may now be subordinate to the judicial branch rather than co-equal. By not following Supreme Court precedent narrowly and faithfully, like sister courts have done, the Seventh Circuit has also added a cloud of confusion over the complex doctrine of taxpayer standing. Furthermore, the majority and dissenting opinions agreed that the controversy warranted Supreme Court intervention, yet the denial of rehearing en banc made the divided three judge panel's precedent-changing opinion the law of the land unless the Supreme Court accepts certiorari.