In the

Supreme Court of the United States

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UNITED STATES, ET AL.,
Petitioners,
v.
WILLIAM B. RICHARDSON,
Respondent.

#72-885

Washington, D.C.

October 10, 1973

Pages 1 thru 41

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UNITED STATES, ET AL., Petitioners,	:	
v.	:	No. 72-885
WILLIAM B. RICHARDSON, Respondent.	:	

Washington, D. C.
Wednesday, October 10, 1973

The above-entitled matter came on for argument at 11:20 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; For the Petitioners

OSMOND K. FRAENKEL, ESQ., 120 Broadway, New York, New York 10005; for the Respondent.

C O N T E N T S

* * *

Afternoon session begins at page 28.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-885, United States Et Al., v. William B. Richardson.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BORK: Mr. Chief Justice, and may it please the Court:

This case presents at this stage only an issue of federal taxpayer's standing, and the question is whether the exception made in the rule of Frothingham v. Mellon by the later decision of Flast v. Cohen could be widened to grant standing in cases not involving the establishment clause and the free exercise clauses of the First Amendment.

The government will attempt to demonstrate that an affirmative answer, the answer the respondent here seeks, would effectively overrule all of Frothingham, which Flast did not purport to do, and would probably destroy the concept of standing altogether. That result we think is precluded by considerations rooted in Article III of the Constitution and by considerations relating to the role of this Court and other federal courts in exercising the power of judicial review.

The respondent brought this suit in the District Court

for the Western District of Pennsylvania to enjoin the publication by the Secretary of the Treasury of the combined statements of receipts, expenditures and balances of the United States government, on the ground that that document does not identify appropriations for and expenditures by the Central Intelligence Agency.

Now, this confidentiality of CIA funding and spending is expressly provided by statute as an exception to the general statute which requires that the Secretary of the Treasury annually lay before Congress the combined statement. The CIA budget, of course, is reflected in the total figures in the combined statement, but it is not identified as such.

The respondent's theory is that this congressionally provided confidentiality violates the statements and accounts clause of Article I, section 9, Clause 7, which reads: "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."

The District Court dismissed respondent's complaint on the ground that he lacks standing as a taxpayer. But the Court of Appeals for the Third Circuit, sitting en banc, reversed, with three judges dissenting.

I would like to approach this case initially through an examination of Flast v. Cohen in an attempt to show that

that case denies respondent's standing here.

And then I would like to turn briefly to issues of constitutional policy and argue that the standing concept in cases like this is an Article III concept, as Flast v. Cohen recognizes, and it is important to preserve that concept.

I think the majority opinion in Flast plainly denies standing in this case. Only if the limits set by that case to taxpayer standing are abandoned can respondent here be accorded standing. And, of course, Flast must be seen against the background of Frothingham v. Mellon.

In that case, in Frothingham, the taxpayer attacked the constitutionality of the Maternity Act of 1921 which set up a federal program to grant, make grants to states who would undertake programs to reduce maternal and infant mortality, and the taxpayer sued and challenged the constitutionality of the Maternity Act on the grounds that it exceeded the powers delegated to Congress under Article I, that it violated the powers reserved to the states by the 10th Amendment, and it deprived her through the taxing process of her property without due process of law under the Fifth Amendment.

Those are constitutional claims that at that time were certainly regarded as quite as important as any constitutional claim the respondent seeks to litigate here.

But this Court nevertheless denied standing and that rule against taxpayer standing stood inviolate until Flast.

But the Flast majority was very careful to state that it was leaving the Frothingham rule intact except for defined category of cases, and the exception it made in the Frothingham rule was for cases in which the taxpayer could show a logical nexus between the taxpayer status and the claim he sought to adjudicate. And that logical nexus test breaks down into two further tests in Flast:

First, there must be a logical link between the taxpayer status and the type of legislative enactment sought to be attacked, and second, there must be a similar nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged.

I do not think that respondent in this case can satisfy either of those tests.

The Flast opinion said of this first nexus, the one between the status of taxpayer and the enactment to this challenged, I quote:

"A taxpayer would be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, Section 8."

Respondent here, of course, is not attacking any exercise of the taxing and spending power under Section 8. He is attacking a reporting provision under Section 9.

The Court in Flast continued:

"It will not be sufficient for a taxpayer to allege

an incidental expenditure of tax funds in the administration of an essentially regulatory statute."

I would like to make two observations about that first test in connection with this case. The first is that here the respondent makes no complaint of any injury to his pocketbook. He is not saying that any tax money is being taken from him in violation of the Constitution, so that there is no link between the status he asserts, that of a taxpayer, and the statute permitting CIA funding to be placed in the budgets of other agencies or departments. It is apparent on the face of the matter that what he has is the interest common to all citizens; that is, as this Court has put it, merely a general interest common to all members of the public, and that he seeks to air his generalized grievances about the conduct of government.

And those are precisely the phrases this Court has used to describe a litigant who has no standing.

The second observation I would like to make about this first test in Flast is that the theory of the majority of the Court of Appeals below, and I believe the theory of the respondent here, is that the first Flast test is satisfied because the respondent is injured by lack of knowledge about the CIA budget. As the respondent's brief puts it, it is the intimacy of the constitutional provision to the spending process that is relevant.

If that were the test, then Flast actually left no

vestige of Frothingham despite its protestations to the contrary. Taxpayers would have, I think, under that test, standing to litigate any grievance that is tolerably related to the appropriation process, and that in turn would inject the courts into every imaginable question bearing on the constitutionality of actions by the legislative and executive branches at the request of every disgruntled taxpayer who wanted to oppose some governmental program or procedure.

Q Mr. Jones, do I gather from your brief that no one can attack this?

MR. BORK: Mr. Justice Marshall, I am unable for the moment to imagine how this particular provision could be attacked, but of course, that is not --

Q In a court.

MR. BORK: -- in a court, yes.

But that, of course, is not an unusual situation with constitutional provisions for a variety of reasons, justiciability among them, a variety of constitutional provisions may not be enforced by a court.

Q Congress could require them to render an account down to the last postage stamp, if they wanted, could they not?

MR. BORK: Undoubtedly, Mr. Chief Justice, Congress could require them to specify the number and salary level of every secret agent throughout the rest of the world. There is no question about that.

Q Isn't the issue in this case who is to define what is a regular statement and account under --

MR. BORK: That --

Q -- whether it is Congress or whether it is the courts, or --

MR. BORK: That is the question we must get into at some degree, at least, Mr. Chief Justice; that also impinges upon the ultimate question if the respondent were found to have standing, but I think the second Flast test which talks about what is the purpose of a constitutional provision necessarily requires that we talk about that as well.

I think the history --

Q If we need to get to that at all, that's the point, is it not?

MR. BORK: Well --

Q If we reach that. Are you suggesting that it is not necessary to reach that?

MR. BORK: No, no. I was about, Mr. Chief Justice, to discuss that very point, and I will do so now.

The second Flast test is, of course, the question of whether the taxpayer has stated a relationship, a nexus between himself and the constitutional provision, and it is our position as we just suggested it might be, Mr. Chief Justice, that in fact this provision is designed for the protection of Congress. It is designed to give Congress control over executive spending

to find out what the executive is spending and what the executive is receiving.

I think that is apparent both from the history of this statute, although the history is not free from ambiguity in all candor, but I think it is even more apparent from the necessary construction of this clause in connection with other clauses.

In the history, the history is set forth in our brief, the opposition of George Mason and Patrick Henry to this clause of the Constitution was apparently founded upon the fact that it might allow secrecy in the expense accounts. In addition to that, in a phrase which is perhaps not entirely free from ambiguity but I think supports the Government's position here, in the debate in the Constitutional Convention on this clause, September 14, which is reported in 2 Farrand's records, at page 619, James Wilson of Pennsylvania supported the motion to change the provision before them from accounting year by year, an annual accounting, to an accounting from time to time, which is the present language of the clause, by saying that many operations to finance cannot be properly published at certain times. But I think we rely less upon that history, which I think is incomplete, than we do upon two other factors.

One is that after that history it became regular practice for the Congress to keep some appropriations secret when the occasion, the national interest, seemed to demand it. Our brief at page 26 points to the fact that there was a

secret appropriation in 1811 of $100,000, I believe, for the occupation of Spanish Florida, an act by the Congress which obviously had a great deal of sensitivity in Florida affairs. That appropriation was kept secret for seven years, until 1818, when it was published.

And, of course, the most famous example of this kind of procedure was the $2 billion secretly spent to develop the atom bomb and the Manhattan Project during World War II.

So I think there is a course of historic practice which supports the idea that this is the, the reporting is in the control of Congress and is intended to give Congress control over what the executive is doing with funds.

Q Just for the benefit of Congress, I would think Congress could have provided for that by a law; finding it in the Constitution, doesn't that suggest that it is designed to benefit somebody in addition to Congress?

MR. BORK: Mr. Justice Rehnquist, I would not think so. There are a number of things in the Constitution, I think, which give powers exclusively to Congress and are for the benefit of Congress and not for the benefit of others. The power to expell members, the power to pass on qualifications, and a variety of others. I do not think every constitutional provision is because it is a constitutional provision necessarily designed to be enforced by the citizens.

Q No, but by hypothesis information of the

Constitution is for the benefit of the American public, by hypothesis, I should say, is it not?

MR. BORK: Entirely true, Mr. Justice Stewart, by hypothesis.

Q And for every member of the American public.

MR. BORK: I beg your pardon?

Q And for every member of the American public.

MR. BORK: That is entirely true.

Q -- the President has to be a natural born citizen or that a Senator has to be, what is it, thirty years old or whatever. It is presumably, it would not be there were it not by hypothesis for the benefit of each member of the public in the United States of America.

MR. BORK: That is entirely true. The question always is, is it enforceable by every member of the public --

Q Right.

MR. BORK: -- and our position here is that this is a provision enforceable by Congress and waivable by Congress and not enforceable by every citizen who may object to the way Congress enforces it. If he does object to the way Congress enforces it, I think his clear remedy is to deal with Congress and try, if he wants the CIA budget published, the simple matter is to go to a congressman and, go to his congressman and get other like-minded citizens to get Congress to require that the CIA budget be published.

Q Or to convince Congress even that it is their constitutional duty to do so.

MR. BORK: That is correct.

Q Even if they do not want to.

MR. BORK: That is correct.

But I think another aspect of this derived from a consideration of the structure which the Constitution puts together indicates that that is the correct reading of this clause.

It would be exceedingly strange, just in passing, if the Framers had believed there would never be matters relating to foreign affairs, would never be matters relating to military affairs and military intelligence that must not be disclosed to the world in full. That would be attributing to the Framers a lack of practicality, which I do not think we may attribute to them.

Now, respondent's brief attempts to find a negative pregnant in the fact that the Constitution explicitly authorizes in Article I, Section 5, Clause 3, each House to keep secret its debates and decisions on matters that it believes require secrecy, and respondent argues that they knew how to provide for secrecy when it was called for, and the fact that they did not provide for it in the statement and accounts clause explicitly means it does not exist, power of confidentiality does not exist.

I think the necessary inference runs quite the other way. It would be extraordinary if the Framers had intended the House and the Senate to be able to keep secret matters which they regarded as sensitive, but at the same time required the Executive to publish those same matters to the world.

Q What is the Congress now -- I am not at all clear on it -- this reference to publishing details of the expenses of the operation of the Congress itself? Perhaps it is not relevant.

MR. BORK: Well, Mr. Chief Justice, I hope it is not, because I cannot answer the question.

Q I have the impression that there are complaints from time to time uttered by various people that Congress does not ever publish any account of the detailed expenditures.

MR. BORK: I have heard those complaints. I have not inquired into the details here. Perhaps I should say something that that question brings to mind, and that is that these matters, the CIA funding, is not kept secret entirely from Congress. Obviously the matter is sensitive. The Appropriations Committees of both the House and the Senate have subcommittees to which the CIA budget and expenditures are reported and from time to time in the Senate there is joint membership between the Armed Services Committee and the Budget Committee. So there is a congressional check on this process. It is just that it is being wise, I suppose, that matters of this

sensitivity not be given to a body, or rather, bodies of the size of the House and the full Senate.

I think then, it is fairly plain, I think, that the respondent's claim to standing as a taxpayer does not meet either the first or the second Flast test requiring a logical nexus between his status and the enactment and his status and the Constitution. And when I think about his claim to standing here, it seems to me to be indistinguishable from the claim to standing made in ex parte Levitt, where a citizen and a member of the bar of this Court filed a motion, asking that Mr. Justice Black be required to show cause why he should not be disqualified to be a member of this Court because of Article I, Section 6, Clause 2. And the Court thought so little of that claim that they dismissed it in the precurium opinion, saying that they did not sit to discuss generalized grievances about the way government is operated.

I think this case is also indistinguishable from Laird v. Tatum. That was a case in which there was a citizen interest in the possible chilling effect of an Army intelligence system though there was no direct impact upon the plaintiffs, and they were denied standing. The case is really a standing case that cites ex parte Levitt for its main holding.

I would think that citizens in general would have as much interest in the possible and alleged chilling effect from an Army surveillance system upon First Amendment values as

citizens in general would have here upon the reporting of the CIA budget.

Q Mr. Solicitor General, if I may interrupt you and go back a moment, did you have a citation for the case arising under Article I, Section 6, clause 2 -- to the short procurium in this?

MR. BORK: Ex parte Levitt, Mr. Justice Stewart, is found at 302 US 633.

Q Thank you.

MR. BORK: I think Laird v. Tatum is also a direct holding and a more recent one than ex parte Levitt that there is no standing in this case. I think I should say why I think it is important, why I think standing is much more than a rule of judicial self-restraint or a discretionary rule as the respondent's brief puts it and as some of the cases put it. I think it is. We can see what the standing is in Article III doctrine. It is a doctrine that relates fundamentally to the way this Court and the lower federal courts operate in judicial review.

It is usually said that standing is an issue of whether the party is a proper one, whereas justiciability is a question of whether the issue is one that is suitable for a court to handle. I think that does not put it quite accurately.

I think standing is a branch of justiciability because it does go, it examines the party only, to discover

whether he is a party who will put the issue in a form which is suitable for judicial resolution, and that makes it, I think, an aspect or a subdivision of justiciability. And I think the Flast opinion agrees that indeed it is an aspect of justiciability and is an Article III doctrine.

It is also said that the doctrine is one having to do with whether the issue will be presented with sufficient adverseness. I suppose extending standing to all citizens might result in a decline in the vigor of adversary presentation in some cases. It is also necessary to admit that it will not in many, because citizen standing will be used often by persons with ideological interest or groups with ideological interest who will press the case with great vigor.

I am not so sure that the decline in vigor of presentation is a general proble, although it may be in some cases.

What standing in the requirement of an injury in fact actually does is delay the presentation of the issue to the Court until the law challenged has some actual impact upon members of the society. I think that is important for a variety of reasons.

One is that we ought to examine cases, that the courts ought to examine cases in concrete factual settings because our constitutional law, too, is a law that has a common law tradition, a common law jurisprudence, and we like concrete factual settings because they qualify the rules announced in

the cases and they explain the meanings of the rules to people who must read the cases, and they help the Court in imagining the difficulties it can get into with a particular rule because it is presented with factual situations which indicate the complexities that are involved.

So the standing issue aside from being -- it also has an aspect of fairness to parties who may be interested. That is, a party may have a specific injury done to him and a rule of citizen or taxpayer standing might result in somebody who does not have such an interest or a factual setting getting to the courts first with his case and perhaps resulting in a rule that would not have been arrived at or arrived at in precisely that form has a person with a real personal stake been in the case.

But primarily I think the concept is important as a rule of fairness to the Court. I think not just fairness to the Court, but the ability of the Court to perform the awesome function of judicial review with maximum effectiveness.

When there is citizen standing and taxpayer standing generally, it is quite plain, I think, that we would have an increased number of groups and persons who would attack statutes the moment they were enacted, who would attack executive programs the moment they were announced, and having standing, they would find themselves in court debating abstract theorems instantly.

There are two things wrong with that. I have already

discussed, I think, what is wrong with it in terms of the fact that the issues are not framed well without a concrete factual setting, but there is also something wrong ideological litigation in that lawyers in such litigation often do not explore the issues fully. They are looking for a sweeping constitutional result and are likely not to explore narrower statutory or factual grounds that may be quite important to the Court, whereas a person with a personal stake wants to win the case and will explore every ground upon which he might win that case.

This kind of standing which would come immediately after a law is passed or statute or executive action announced means that the Court at the behest of such a litigant, an ideological litigant who does not want to explore all the concrete settings -- in fact there is no concrete setting -- would in effect repeat the legislative or executive decision-making process that had just concluded and would probably repeat it with fewer materials than were available to the legislature and to the executive in arriving at the decision. I do not think that that is the Court's task in a system of judicial review. It makes the Court into something like the Council of Revision that the Framers rejected. It puts the Court in something of the position of giving advisory opinions, and I think that would be most unfortunate for the function of this Court.

Thank you.

Q Thank you.

Q Mr. Bork, may I ask you a question that has nothing to do, really, I suppose, with the merits?

This case was heard en banc for the Third Circuit. I notice that District Judge Kraft sat on the en banc panel. Do you know on what authority he participated?

MR. BORK: I do not know the authority --

Q It could be that if he was on the panel, he is automatically on the --

Q Well, this is what I question, because Section 46(c) makes no reference whatsoever to a district judge who sat on the panel. It makes reference only to a circuit judge of the circuit who has retired sitting on the panel.

And my point, I guess, is that with an eight judge court, with Judge Rosen deceased, Judge Kraft's status, in my view, somewhat questionable, and Chief Judge Cytes not participating with the majority, I wonder where the five to three vote really comes out today?

MR. BORK: In our brief or in our petition, Mr. Justice Black, and I am sorry to say that I am having difficulty at the moment locating the footnote --

Q I think you will find that it makes no difference in the end result, but that there was some doubt perhaps about a district judge.

MR. BORK: I think, Mr. Chief Justice, that we did say that there was not only some doubt, but probably that was incorrect, but in this case we do not make a big point of it.

Q You are making no point of this, but I --

Q This is in footnote 5, Mr. General, of your petition. That is where you made reference to it.

MR. BORK: Page 6.

Q Mr. Solicitor General, you did not address yourself in the brief or in your oral argument to the question of justiciability. The district court said -- how do you feel the district court's decision to dismiss?

MR. BORK: Well, I think it was entirely correct, Mr. Justice White.

Q On what ground did he dismiss?

MR. BORK: The district court dismissed on both grounds of standing and political questions. The court of appeals sitting en banc addressed only the standing issue because it thought that the political question issue was so intertwined with the merits of the case.

Q Your suggestion is, if we disagreed with you on standing, I take it you anticipate we would remand the court of appeals to consider the political question, or --

MR. BORK: Or to the district court.

Q You do not address yourself to that issue here, I take it?

MR. BORK: No. I think, Mr. Justice White, I think the court of appeals was correct that the policital question issue could be resolved much more effectively if we were in the full merits of the case than we can at this stage. I think standing is all that really can be effectively discussed in the posture of the case now.

Q So the court of appeals did say that it did not reach the political question -- it must have reversed the district court on that, too. It must have.

MR. BORK: Well, in the sense that -- I suppose it did in the sense that it said political question was not properly considered until it got to the merits.

Q So that dismissal on that ground was reversed also?

MR. BORK: Yes. It was, Mr. Justice White, but not on the grounds that the district court was wrong about the political question, but --

Q Now, you agree with that, I take it you agree with that? That if we disagree with you on standing, the government agrees then that the case should go back to the district court?

MR. BORK: I think that is correct.

Q And how about the motion to dismiss for failure to state a cause of action? That would still have to be reached?

MR. BORK: That would be the merits. We would have to reach the question of whether --

Q Well, it would not be the -- it would be the --

MR. BORK: Be the meaning of Article I, Section 7, Clause 9.

Q -- satisfy us perhaps by that congressional --

Q -- on the books.

MR. BORK: That is correct.

Q Is the motion to dismiss properly raised as the issue of justiciability? Is resolution of that the resolution on the merits, even if he did not go to the -- on the justiciability issue?

MR. BORK: It is a little hard to tell, Mr. Chief Justice, exactly what the district court's reasoning process was, because the order and memorandum do not spell it out very well. Perhaps he thought, when he said it was a political question -- no, I do not think that when he said that he thought he was construing Article I.

Q Very well.

Q I thought a good part of your argument here has been that this really, that the Constitution really assigns the enforcement or the reaction to this provision, to the accounts provision to Congress, and that is part of your standing argument.

MR. BORK: That is true. I am --

Q And yet you do not say that, you do not make any separate point of, out of this as a political question.

MR. BORK: On the separate point at this stage, I am -- the Flast tests drive one into a consideration of what that -- I suppose I am saying --

Q You are saying that if you reject standing, reject your standing argument, we are also necessarily rejecting the political question side of the argument.

MR. BORK: I think that there may be more to the political question doctrine than that, and I would certainly like a chance to explore it below, if we find standing here.

Q That gets back to Mr. Justice White's original question: If we were to disagree with you on standing, ought not the thing go back to the Third Circuit on the issue of political question.

MR. BORK: Well, since the Third Circuit has already ruled, Mr. Justice Brennan, that the --

Q Do you think it is clear they have reversed --

MR. BORK: I think they have said that it is not appropriate in this form to discuss political question, because you have to go fully into the meaning of the clause in question, into the merits, in order to get the political question.

MR. CHIEF JUSTICE BURGER: Mr. Fraenkel?

ORAL ARGUMENT OF OSMOND K. FRAENKEL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FRAENKEL: Mr. Chief Justice, may it please the Court:

I think the Solicitor General has toward the end of his argument raised a man of straw. We are not claiming here the standing should be abolished, and we agree with that portion of the Solicitor General's argument that it is composed of two elements, one, a constitutional element, resting on the case in controversy clause; and, the other, on what this Court has itself described as a discretionary element in order perhaps to limit the kind of cases that come to the Court.

In passing, I perhaps should object to the reflection placed upon what my delightful friend called ideological lawyers as confusing the issues, I don't think that is a fair description of their function. I think ideological lawyers have done a great deal in the past to help this Court reach an understanding of the problems raised by the Bill of Rights particularly. But that is not this case.

We submit that in this case both tests are met. What plaintiff sought here was a compliance with the Constitution by the inclusion in the public reports of some reference, at least, to the finances of the CIA. That is what he asks for, and that is what was refused him, and we submit that that is a case in controversy. He was seeking information from the

government.

Now, clearly, if that information had been denied him, we will say, because he was a member of some minority group or was politically distasteful to the administration, information otherwise available, clearly the courts would have the right to pass on that. And if Congress had passed a law denying information on that score, clearly this Court could pass on that law.

Q Do you think, Mr. Fraenkel, that there would be the same standing and the same justiciability in a claim brought by a taxpayer, your client, for a full statement of accounts, receipts and disbursements on the building of the Rayburn Building, for example?

MR. FRAENKEL: No. No. I will agree that there must be some discretion vested somewhere as to the nature of the details. But it is one thing to say that information may be categorized; it is another thing to say that Congress can by law take out of what the Constitution says the public is entitled to have. And the question that this Court will have to consider, therefore, when we come back from lunch, is to what extent the constitutional provision does require some accounting by every branch of government, bearing in mind that history shows that the framers of the Constitution both in the convention and in the state conventions which considered it later, recognized that there might be delay in publication of certain

sensitive matters, as of course is the case with the two instances mentioned by the Solicitor General.

Q I am puzzled then why you should have any difficulty with the costs of the Rayburn Building, Mr. Fraenkel. There is no basis for confidentiality or any public policy served by that, is there?

MR. FRAENKEL: I don't say that --

Q Why shouldn't you be able to get it? Why shouldn't your client be able to get that if he wanted it? Perhaps you could react on that and --

MR. FRAENKEL: Well, I will have to deal with that after lunch.

Q -- I am not sure how relevant it is, but I was just wondering why the clause does not reach the Congress and the courts, as well as the Executive Branch.

MR. FRAENKEL: Oh, I think the clause reaches all agencies of government, but the question, Mr. Chief Justice, which you have just raised as to what extent the particular details, as for instance whether it would be necessary to publish every appropriation made for every employee --

MR. CHIEF JUSTICE BURGER: We will resume that after lunch.

[Whereupon, at 12:00 o'clock noon the Court was recessed until 1:00 o'clock p.m.]

- - -

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Fraenkel, you may proceed.

MR. FRAENKEL: To come back to your question, Mr. Chief Justice, I suppose if we come to the merits of this case, I think if I am correct on my issue of standing, the District Court will come to, as in Mr. Justice Rehnquist's question earlier, I think that will go back to the District Court. Then the question will arise what constitutionally can Congress do in fulfilling the mandate of the Constitution, and I would suppose there would be some room for discretion as to details but not as to categories.

In other words, if the public is, as we believe, entitled under the Constitution to public information about what the government does, that at least has to be outlined in broad terms and no department of government can, in our view, be constitutionally excluded from the details account. Now, how detailed that would be, I don't think becomes a constitutional question.

The Solicitor General has relied on basically three cases. First, he says we are doomed by Flast. Well, we don't read Flast that way. Now, it is true, of course, that there is language in Flast, written with an eye to the particular problem that was presented by Flast, and that language has to be construed in relation to that problem which did arise

under the establishment clause of the Fifth Amendment. And when the court talked about that as being the consideration, of course it was the consideration. But I do not believe that the court intended to say that that is the only thing which a taxpayer could ever challenge. Certainly the Levitt case has no bearing on this whatever, because there is nothing in the Levitt case to indicate any connection between the individual who brought the proceeding and the appointment of Mr. Justice Black, whereas here it is the direct connection between the individual who brought the suit and the refusal to give him the information which he claimed he was entitled to under the Constitution.

Q Well, the applicant or the mover or whoever he was in Levitt was a member of the bar of this Court, interested in being an officer of this Court that was constitutionally valid.

MR. FRANKEL: Oh, yes, and there are many other questions which, as has been pointed out, for instance, the legality of the republican form of government which every individual citizen is interested in, but which can probably become a subject of litigation only when because of the denial of that form of government by some state the individual is subjected to impediments which the Bill of Rights protects him against, and he would then have redress.

Q But then that would be under the Bill of Rights

and not under the republican form of government clause.

MR. FRAENKEL: That is true, and that of course brings us to the question which I don't think can be decided or should be decided here, whether this provision of the Constitution is purely political, which was one of the grounds of the District Court's dismissal. I don't think we need reach that point or should reach that point, because it is unnecessary for a resolution of the standing question, if my view is correct that a request for information which is supposedly granted by the Constitution does create a judicial base. And that is all this standing amounts to.

Q If I may refer for a moment to the Levitt case, it would certainly be of considerably more than academic interest to the bar and to the public if one member of the court was not a lawful member of the court when it came either to the problem of grants of writs in the present day or in 5-to-4 decisions. Would that give the degree of concreteness?

MR. FRAENKEL: Well, I would say that I suppose it is a matter of general interest to the public of this country whether one of our present executives could be subject to impeachment perhaps, but I don't think anyone could contend that the individual could bring a proceeding towards that end, because the Constitution provides that Congress shall determine that and the Constitution provides that a Justice of this Court shall be approved by the Senate. And I think appointed

by the President and approved by the Senate, the constitutional provisions have been complied with, it seems to me.

Q Similarly, at least the claim of the government would undoubtedly be, if it isn't already, that the constitutional clause in question here has been implemented by Congress by a statute that permits a general rather than a detailed annual account or periodic account.

MR. FRAENKEL: With a particular statute which we say Congress had no power to enact, because it excluded, it didn't merely describe categories, but it excluded an important organ of government from any disclosure.

Q But couldn't it just disclose, as they did in Levitt, that the Senate had no power to confirm Justice Black because he had voted to increase the emolument of the office which was something that the Constitution then prohibited him from taking?

MR. FRAENKEL: Well, I would say that if the Constitution, the provision of the Constitution that we are now considering, said that the accounts of agencies of the government shall be published to the extent that Congress may provide, then of course Congress' decision could not be subjected in the way that we are attacking here, and therefore it begs the question to say that Congress had the power to exclude an agency of government. That is what the Court has to decide. That is the issue, and it wasn't in my opinion anything like

such an issue in Levitt.

And then Laird v. Tatum was cited, but of course in Laird v. Tatum this Court was very careful to point out that the particular plaintiffs did not show any injury to themselves, as in the Sierra case, for instance, leaving open clearly the possibility that other persons who might be affected either by the surveillance of the Army or by environmental disturbances would have standing.

Now, that is not the situation here. No one would have any better standing here than this plaintiff, and this Court has on a number of occasions stated that standing can arise because of the circumstance that no one else could raise the issue.

For instance, in the Rhode Island so-called censorship case, this Court expressly said that the booksellers there who were not directly affected had standing because otherwise the basic issues of freedom of speech involved might never be presented to the Court. And of course the same is true in the NAACP v. Alabama, and in Barrows, where the question arose as to the impact of a restrictive covenant, whether a white person could raise the issue if such a covenant discriminated against Negroes. This Court ruled that he could because otherwise that issue couldn't be raised at all.

So we come back then to the basic issue here, is the right to know important not only to a taxpayer but to a

citizen. And I think that recent events in this country have clearly demonstrated how important it is for the people of this country to know what their government is doing.

Q Mr. Fraenkel, on the point of the right of the public to know about expenditures by the Congress, the Solicitor General mentioned a Manhattan project in World War II. Would it be your position that a taxpayer would have had standing to force a divulgence of the funds that were then being appropriated for that project at that time?

MR. FRAENKEL: I think that in time of war many considerations exist which do not otherwise. Certainly troop movements can be kept secret from the press, various things of that kind are tolerated in time of war, which would not be tolerated in time of peace.

Q Would you think it perhaps equally important to have information, our government to have information that might prevent war?

MR. FRAENKEL: Well, of course, it is important that they have information. The question of course is how much of that information can legitimately be kept secret from the people and then maybe a period of time during which it can properly be kept secret, as I think is recognized by some of the discussion in the conventions at the time of the adoption of the Constitution. But we are dealing here with an agency which has been in existence now for some twenty-five years.

Q Do you know -- I do not know; perhaps you do -- whether at present there is a detailed account filed by the Atomic Energy Commission on all its expenditures and how much is spent on --

MR. FRAENKEL: I do not know, Your Honor.

Q There is a special oversight committee of the Congress, is there not, which does have access to all the details?

MR. FRAENKEL: Of course, there are also specific appropriations enacted by the Congress for particular agencies of government which are public acts and therefore available to the public. But as far as the CIA is concerned, there is no such general appropriations act, as the appropriations come from other agencies of government and are hidden, and that is the thing that we say Congress had no right to do.

Q But you could win on your standing argument and still lose on that argument.

MR. FRAENKEL: We could lose in the court below, certainly --

Q I mean on the merits, on the merits because it wasn't violated.

MR. FRAENKEL: -- we could lose on the merits, certainly. I might point out that the plaintiff here asked this court to review, while this case was in the Court of Appeals, to bring up the merits right away and this Court refused. Of

course, we could lose on the merits. We haven't argued the merits fully, we just touched on it because the other side discussed it at some length, but that is true of almost any standing case.

Q Mr. Fraenkel, I still don't understand why you say we don't -- we would not be compelled to reach the political question issue if we agreed with you on standing.

MR. FRAENKEL: Well, if you --

Q Because the Court of Appeals did reverse the judgment of the District Court and at least dealt with standing, dealt with the political question to the extent of holding that it wasn't right that it was intertwined with the merits. Now --

MR. FRAENKEL: This Court has the -- I am at a loss to find the right word to say -- the privilege, may I say, of deciding anything that this Court thinks should be decided. That has happened before. I just don't think it need be decided --

Q Well, if we affirm the judgment of the Court of Appeals, we are also affirming their judgment that the political question doctrine did not justify the dismissal by the District Court.

MR. FRAENKEL: You are affirming their judgments as to two questions that are closely intertwined and should be reconsidered by the District Court in that light.

Q So we do then, even if we don't say anything

about it, if we affirm saying nothing we would at least be affirming their dealing with the political question to that extent?

MR. FRAENKEL: Yes, I would say so. Of course, if this Court thinks that the case is so clear that there can be no possible recovery on the merits because this is obviously a political question, I assume this Court will in its best judgment say so. I don't think it should, I don't think that it needs to. And since this Court on the whole tries to avoid things it doesn't need to do, I suggest we stick to the questions pending.

Q But don't you think at least we need to say something -- if we agree with you on standing, mustn't we at least then say at least something about political questions? Say we also agree with the Court of Appeals, that the political question is intertwined in the --

MR. FRAENKEL: You can say it, you don't need to say it. Affirming the judgment would accomplish the same result as saying it.

Q Are you suggesting that we really should decide something without saying so?

MR. FRAENKEL: Well, that happens all the time. Every time a judgment is affirmed, you decide that the lower court was correct, and sometimes you do it without saying anything.

Q Yes, I have your view, yes.

MR. FRAENKEL: It is not necessary, I think. Well --

Q The judgment is affirmed, if it is affirmed.

MR. FRAENKEL: That's right.

Q It is not the opinion that is affirmed.

MR. FRAENKEL: That's right. Well, the judgment is affirmed because the judgment is one remanding the matter to the District Court for further consideration of the whole issue.

Q Mr. Fraenkel, do you think there is a fairly sharp line between the concept of standing and the concept of political question?

MR. FRAENKEL: Well, I assume that if the question is purely political then the court will say no one has standing to raise it. That was of course the situation for a long time with the question of challenges to reapportionment. This Court said for a long time that that was a political question, and that was the end of it. Then came Baker v. Carr and this progeny and there, in the first really modern decision, this Court pointed out what standing meant, and it said that standing involves two things, the constitutional question of case of controversy and whether or not the individual really was sufficiently involved of course in some --

Q You indicated that Baker v. Carr was a reversal of a prior --

MR. FRAENKEL: No, no, no. I said it was the first

-- well, it was a ---

Q I don't think the Court ever held that the issue was political. Some members of the Court did, but --

MR. FRAENKEL: Well, that was the impression I think the bar had at the time. In any case --

Q I refer you to Brother Brennan's opinion.

Q The Illinois case.

MR. FRAENKEL: In any case, there are certain issues which I assume are so tenuous, that can be formulated with such difficulty in legal litigating terms, as for instance the question of the guarantee of the republican form of government, that ---

Q Well, that was pretty well exploded, wasn't it, in Hugh's opinion in Sterling v. Constantine?

MR. FRAENKEL: Well, yes and no. After all, there there was a denial of due process, very simply. It was the taking --

Q Well, it was a denial of republican form of government.

MR. FRAENKEL: But it was taking property without due process of law, in effect.

Q Well, that is part of the republican form of government, I suppose.

MR. FRAENKEL: Well, every violation of the Bill of Rights could be argued to be a denial of republican form of

government. In any event, to come back to what we consider to be the elements here, a demand for information, a refusal of that information, the refusal justified by an act of Congress which on its face at least appears to fly in the face of the direct demand of the Constitution. It is hard to say how there can be any clearer case of a person having an interest in obtaining important information.

Now, it is said by my opponents that he doesn't claim that his tax monies are directly involved, as did the taxpayer in Flast claim that his monies were being improperly expended. But of course any taxpayer is interested vitally in knowing how his tax monies are being spent, and in Flast he knew the facts which enabled him to make a constitutional challenge. We don't know here whether the facts might not just glow as a basis for some constitutional challenge with respect to the expenditure of the monies. But certainly a taxpayer is as much interested in knowing in order to properly perform his function as a citizen, which is involved as well as being a taxpayer, and what has happened in the past in order to determine how he should act in the future.

The suggestion by the Solicitor General that this would open the floodgates to all kinds of litigation I submit is without any justification. Here is no sudden rushing into court to get some basic principle established the minute the Executive had done something or a law has been passed. As I

said, this agency has been in existence for twenty-five years. Here is no ideological expedition into philosophic notions -- a very practical matter of a taxpayer wanting to know what has been done with his money, claiming that under the Constitution he has a right to know, claiming that Congress has arbitrarily interfered with that right by an exclusionary statute. Now, whether the right had the right to pass that exclusionary statute is something which the Court will have to determine on remand, as I think this Court will, I certainly hope it will affirm the decision below.

Thank you.

Q On the theory he has -- suppose, Mr. Fraenkel, he got everything that you think he ought to have and you were satisfied with it, then what?

MR. FRAENKEL: Then nothing.

Q What does he do with it?

MR. FRAENKEL: Maybe nothing. He is satisfied then that he need take no further action. It may be when he finds out it will disclose something which does justify further action. That is something which no one can --

Q Such as what, that is what I am probing for?

MR. FRAENKEL: Well, it might turn out that the CIA had acted unconstitutionally in some respects and might result in litigation for a declaratory judgment to that effect. As Your Honors well know, a good deal of discussion about the

possibility of the CIA having been involved in domestic surveillance which was beyond its supposed function, we don't know. We might learn, and that is what I am hoping this Court will let us do.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fraenkel.

Mr. Bork, you have a few minutes left, if you --

MR. BORK: I think not, Mr. Justice Burger.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, Mr. Fraenkel, Mr. Solicitor General. The case is submitted.

[Whereupon, at 1:22 o'clock p.m., the case was submitted.]

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