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The Struggle for Standing to Secure Judicial Review of the Elementary and Secondary Education Act of 1965

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PRECIS

This is a case study of the attempts of ordinary taxpayers, as well as of a United States Senator, to resolve an issue through the judicial process. Ordinarily, individuals bring questions of contemporary significance to the Supreme Court, seeking an interpretation of the Constitution which favors their particular interests. Seldom, however, do individuals have occasion to question the adjudicatory powers of the Court itself--a debate of the separation of powers doctrine older than the Constitution itself.

The struggle for standing to secure judicial review of the Elementary and Secondary Education Act of 1965 begins in Chapter 1 with its enactment and the futile attempt of Senator Sam J. Ervin to add an amendment granting taxpayers standing to sue to test its constitutionality. Chapter 2 outlines the judicial precedents for allowing taxpayer suits in federal courts. Senator Ervin in Chapter 3 holds hearings on independent judicial review legislation at which representatives from the executive branch voice their opposition. A House Committee's failure to schedule hearings on his bill forces Senator Ervin in an abortive effort to attach the judicial review provision as a rider to a House-passed bill in Chapter 4. Finally, the Supreme Court in Chapter 5 corrects an anomalous situation and grants to taxpayers standing in the federal courts to challenge a law "respecting an establishment of religion."

Beneath the surface throughout this noble and dramatic effort creak the joints of America's great constitutional structure--its system of three co-equal branches of government.

Departmental Honors Project

THE STRUGGLE FOR STANDING TO SECURE JUDICIAL REVIEW
OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

Prepared by

Donald E. Garrison

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CHAPTER 1

THE ENACTMENT OF ESEA-- A BREACH IN THE WALL OF SEPARATION BETWEEN CHURCH AND STATE?

The controversy over the constitutionality of federal aid to parochial schools relates to the First Amendment, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."¹ Scholars of constitutional law have long disputed the extent to which the authors of this amendment intended to guarantee freedom both of private worship and from a state-endowed religion and how they envisioned the relationship between these two sections of the amendment.² Sanction for the existence of parochial schools rests in the freedom of religion clause; debate over federal aid to the schools revolves around the "establishment" clause. This church-state issue had been one of the major causes of the failure of Congress to enact education bills in recent years.³

Congress and President Johnson in 1965 broke through the impasse that had long stymied legislation to provide federal aid to elementary and secondary schools. The Elementary and Secondary Education Act that resulted authorized the first general school aid in the nation's history. The President's victory was made possible after he abandoned traditional proposals--across-the-board aid for school construction and teachers' salaries for all of the public school systems--in favor of more specialized types of aid for districts with a number of children from low-income families. In an effort to avoid opposition by either advocates or opponents of federal aid

to parochial schools. President Johnson sought to offer nonpublic schools some participation in his proposed program, justified in terms of its benefits to students. The President did this by tying aid to education into the broad package of programs designed to wage the war on poverty; by utilizing the concept of "impacted areas"⁴ aid, which had proved popular in Congress in the past; and by offering indirect aid to parochial students, rather than to their schools. Specifically, three titles of the Administration's elementary and secondary education bill included provisions for assistance to students of nonpublic schools.⁵

Title I authorized a program designed to encourage and support the establishment, expansion, and improvement of special programs, including where necessary the construction of school facilities, to meet the needs of educationally deprived children of low-income families. Funds made available under Title I could be used for a variety of purposes, all intended to meet the educational needs of students in school districts with high concentrations of disadvantaged children. Such programs could include, ^{tional} radio and television broadcasts, remedial education, pre-school or after-school programs, hiring of additional instructional personnel, acquisition of equipment and other projects judged necessary by local school boards, and approved by the states, for improving the education of disadvantaged children. The bill left up to the states the extent of the aid to be provided private school children, subject to regulations set by the U. S. Commissioner of Education. However, the school districts were required to provide some services--such as "shared time"⁶ classes or educational broadcasts--that would be available to children in private as well as public schools.⁷

Title II established a program to make available for the use of school children library resources and other printed instructional materials, including textbooks. It provided that books and materials could be furnished "for the use of children and teachers in public and nonprofit private elementary and secondary schools"⁸ in each state. However, materials purchased with federal funds could not be used for sectarian instruction or religious worship, and when made available for the use of students in nonpublic schools, had to be the same as those used or approved for use in the public schools of the state. The assistance was not restricted to areas with large numbers of impoverished children.⁹

Title III authorized a program of grants needed educational services not available in sufficient quantity or quality,"¹⁰ that is, supplementary community-wide education centers to provide services that individual schools could not provide, and to assist in the "development and establishment of exemplary elementary and secondary school educational programs to serve as models for regular school programs."¹¹ Unlike funds made available under Title I, those under Title III, as under Title II, would be used to establish special programs for the benefit of all students, not just educationally deprived students in areas with high concentrations of disadvantaged children. Projects, which could be similar to those under Title I, could include guidance and counseling, remedial instruction services for those in isolated rural areas, after-school study halls, and the making available of specially qualified personnel, such as artists and musicians, for instruction. Grants could also be used to lease or construct necessary facilities. As under Title I, parochial and other private school students could benefit from these

programs. However, their participation would generally take place at the separate educational centers, mobile learning units, summer schools, and other such facilities, rather than by having them share in programs at regular public schools.¹²

By using the "aid-to-children"¹³ approach, by providing specialized rather than across-the-board aid, and by permitting private school children to enjoy some of the benefits, the bill avoided much of the cross-fire over aid to parochial schools that had helped to kill school bills in the past. Vigorous disapproval of the President's program was expressed, however, by some traditional opponents of aid in any form to parochial schools, but they failed to generate strong opposition in Congress.¹⁴

The Administration's draft of the bill was introduced January 12, 1965, in the House (H.R. 2362) by Representative Carl D. Perkins (D-Ky.), chairman of the General Education Subcommittee of the Committee on Education and Labor, and in the Senate (S. 370) by Senator Wayne Morse (D-Ore.), chairman of the Education Subcommittee of the Committee on Labor and Public Welfare. The General Education Subcommittee held hearings on the bill from January 26 to February 11. The basic objections to the proposal centered upon who would retain title to the materials made available under Title II and who would control the centers established under Title III of the legislation. The witnesses recommended that in both instances responsibility should reside with public educational agencies.¹⁵

Dr. Edgar Fuller, executive secretary of the Council of Chief State School Officials, an organization composed of the state commissioners and state superintendents of education, generally supported the objectives of the Administration's program but objected

to two titles of the bill. He said that Title II, which provided funds for library resources, would "use federal funds, in the face of constitutional uncertainty, to reverse most state constitutions, laws, and policies in education"¹⁶ by allowing the Commissioner of Education to provide funds directly to school districts where state agencies were not allowed to do so. While a similar arrangement existed under the national school lunch and other programs, Fuller said "this title appears to go further...The Council's policies do not favor direct federal-local administration in any programs..."¹⁷ Fuller also opposed Title III of the bill, which provided for community-wide supplemental educational centers. He said the broad federal administrative discretion under this title in the location, establishment, and financing and operation "vest more federal authority than is appropriate in education."¹⁸ Fuller, however, did not mention the breach of church-state separation as a basis for his opposition to Title III.¹⁹

Howard M. Squadron, a spokesman for the American Jewish Congress, reaffirmed that organization's commitment to federal aid for education but stated: "There are three aspects of H.R. 2362 which cause us grave concern. Indeed we find ourselves opposed to the measure in its present form."²⁰ This opposition was based on the following reasoning: (1) that the shared-time program would provide a form of financial assistance and subsidy to parochial schools; (2) that there is no difference between the grant of federal funds to sectarian schools to purchase materials and the grant of such materials themselves--both are contrary to the principle of separation of church and state; and (3) the establishment of centers under Title III must be under control of a public body.²¹ "The idea of a partnership

between church and state...is directly contrary to the entire philosophy of the First Amendment."22

Leo Pfeffer, professor on constitutional law at Long Island University, testified as an individual with no organizational ties. He indicated that he did not detect any serious constitutional problem in Title I but that the granting of funds for purchasing educational materials to be used in parochial schools and for special educational centers could not be justified constitutionally on the child-benefit theory basis²³ because funds would be used to support religious schools.²⁴

Lawrence Speiser, director of the Washington office of the American Civil Liberties Union, expressed the opinion that the Administration's bill "could authorize the most dangerous subversion of the constitutional principle of church-state separation since... 1786."²⁵ In addition, he suggested that by easing the financial burden for private schools, the bill might encourage the establishment of private segregated schools to avoid the Supreme Court's 1954 school desegregation decision. Speiser said the ACLU believed that "as now written, Titles II and III are clearly unconstitutional."²⁶ The ACLU proposed a number of amendments to the bill. In part, these included a provision against segregation in the dual programs under Title I; a deletion of the section permitting the Commissioner of Education to provide funds for educational materials for private schools in states where no state agency was authorized to do so; a provision vesting title to such material in a public agency; and an amendment that no administrative authority over federally financed programs be given to any church or religious agency or institution.²⁷

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Although a few organizations criticized Title I on the grounds that it would subsidize and encourage the proliferation of private schools, the strongest and most persistent protests dealt with public ownership and control of instructional materials and structures made available under Titles II and III and the by-passing of state constitutions, where necessary, to provide educational material to private school students. In an effort to meet some of these objections, the House Subcommittee amended the Administration's draft bill to insure, among other things, that a public authority would retain title and administrative control over library materials and textbooks purchased for students attending nonpublic schools. Such material would be made available on a loan basis only, rather than given, to private school pupils and teachers. An additional amendment stipulated that the supplementary educational centers established to provide enriched educational opportunities for both public and nonpublic school students would remain under control of public agencies.²⁸

The full Committee agreed to Subcommittee changes and reported H.R. 2362 on March 8. The House on March 26, by a 263-153 roll-call vote, passed the bill and sent it to the Senate. Democratic leaders in the House, anxious to hold down controversy on the bill, particularly on the church-state issue, succeeded, except for one minor change, in defeating all amendments. Representatives who opposed aid to church schools gave their support to floor amendments designed to guarantee a court test of the constitutionality of the bill's aid for private schools. Representative Edith Green (D-Ore.), urging that a judicial review amendment be adopted, cited letters from, among others, the American Civil Liberties Union, the American Jewish Congress, the American Jewish Committee, the National School Boards

Association, and the United Federation of Teachers. It was widely understood that Catholic groups' support for the bill would change to opposition if a judicial review amendment were adopted, and Administration forces worked to prevent this change.²⁹

The principal amendment calling for a judicial review provision was offered by the Southerners' leader, Representative Howard W. Smith (D-Va.), chairman of the Rules Committee. His amendment provided that any portion of the Act would be subject to judicial review with respect to its constitutionality. The amendment was opposed by Representative Emanuel Celler (D-N.Y.), who said it was unnecessary because judicial review was already available "under general principles of law, regardless of whether it is expressly provided for in this bill."³⁰ Smith said his amendment would "allay ...misgivings" about "whether there would be opportunity under the law to test the ...constitutionality of this Act."³¹ Before the House voted on Smith's amendment, a substitute was proposed by Representative John B. Anderson (R-Ill.) which specifically provided that a suit challenging the constitutionality of any provision could be brought by a state, a state or local education agency, or any affected public or other non-profit institution or agency in a three-judge district court in the state where the plaintiff was situated. Anderson said that "very real doubts"³² existed among many members of Congress about the meaning of the bill. The House rejected Anderson's amendment by a 154-204 teller vote, then rejected Smith's proposal by a voice vote.³³

The Education Subcommittee of the Senate Labor and Public Welfare Committee held hearings on the Administration bill from January 26 to February 11. Testimony did not reveal any alterations

in the alignment of the major interest groups. Consequently, the hearings before both congressional committees indicated that those organizations supporting the Administration's legislation included most of the long-time secular proponents of federal aid, with the major exception of the Council of Chief State School Officers, which favored Title I but objected to sections of Titles II and III. In addition to these groups, such as the National Education Association, American Federation of Teachers, AFL-CIO, and Americans for Democratic Action, the bill gained the general approval of the Catholic groups, most of the principal Protestant organizations, and a number of Jewish groups. The sectarian opposition was led by the American Jewish Congress, plus a number of other Jewish organizations, and the Protestant and Other Americans United for the Separation of Church and State. They were joined in their resistance by the American Civil Liberties Union, which also stressed the constitutional "weaknesses" of the bill. The groups opposed to the legislation on church-state grounds received virtually no support from other non-religious organizations which traditionally have opposed federal school aid on the basis of fiscal considerations, federal control, and necessity for federal assistance. Such organizations as the U. S. Chamber of Commerce, the various state chambers of commerce, the National Association of Manufacturers, the American Legion, the D. A. R., and the American Farm Bureau did not take their usual active parts in opposing the school-aid bill. None of these groups testified on the bill in 1965. Consequently, the handful of religious groups, the American Civil Liberties Union, and the Council of Chief State School Officers were the only major organizations openly opposed to the legislation.³⁴

The full Committee reported H.R. 2362 without amendment on April 6. The majority in its report stated that it had considered the addition of an "explicit provision" to the bill "to afford judicial review of the constitutionality of the Act."³⁵ The majority said that it believed such a provision unnecessary because: past Supreme Court decisions "suggest the possibility of a test of this Act in the absence of specific language"; the bill already contained "three specific and limited judicial review provisions"³⁷; insertion of a judicial review clause "might be construed as an invitation to a multiplicity of time-consuming suits"; and litigation raising "analogous suits"³⁸ was already pending before the courts of at least one state (Maryland).³⁹ In the report of the minority were the individual viewpoints of Republicans Peter H. Dominick (Colo.), George Murphy (Calif.), and Paul J. Fannin (Ariz.), who said the bill failed to avoid "the very significant difficulties of the First Amendment and many state constitutions with respect to aid to private schools."⁴⁰

The Senate passed H.R. 2362 on April 9 by a 73-18 roll-call vote and cleared it for President Johnson's signature. Passage of the bill in the exact form in which it had been approved by the House avoided a House-Senate conference and any possible problems that might have blocked enactment of the bill. In the past, general school aid legislation had run into trouble in conference committees. A major amendment, rejected on April 9 by the Senate by a 32-53⁴¹ roll call, represented an effort by Senator Sam J. Ervin (D-N.C.) to add a judicial review provision to the bill. Ervin's amendment required the Commissioner of Education to give thirty days' notice in the Federal Register of any proposed payments under the bill, permitted a taxpayer to challenge the constitutionality of payments

in the U. S. District Court for the District of Columbia, and directed the Commissioner to withhold any payments being challenged pending final determination of the suit.⁴² Ervin said there was "grave doubt as to whether a judicial determination" could be made of the constitutionality of disbursements "for the benefit of sectarian schools or their pupils."⁴³ In reply, Senator Jacob Javits (R-N.Y.) said the question to be resolved was whether citizens could obtain "such an adjudication without jeopardizing the passage of this bill or delaying its effectiveness so long as to materially defeat its total effect."⁴⁴ Javits said he believed "they could get such an adjudication under existing law."⁴⁵ Senator Morse, floor manager of the bill, asserted that "the amendment happens to be the rock which can wreck the ship in which this bill is riding if the amendment should be adopted."⁴⁶ He further explained his position as follows: "As one who is not opposed to a general judicial review bill, an independent bill, I am at a loss to understand why we would wish to single out an elementary and secondary school bill and run the risk of jeopardizing its enactment by Congress."⁴⁷ By adoption of this amendment, Senator Robert F. Kennedy (D-N.Y.) had pointed out, the Senate would provide the means to hold up for some years the implementation of projects and programs encompassed in the bill.⁴⁸ "I've been willing to support an individual judicial review bill not attached to some segment of education," Senator Morse reiterated, "but a bill which would take into account the whole question of grants and loans by the federal government to religious institutions in connection with the whole series of federal aid programs, not limited entirely to education aid."⁴⁹

President Johnson signed H.R. 2362 into law (PL 89-10) on April 11. On the very same day, the American Jewish Congress said that it would challenge the constitutionality of certain provisions of the new law "as soon as tax-raised funds begin to flow to church-related schools."⁵⁰ Howard M. Squadron, chairman of the organization's Committee on Law and School Action, said a court test of the new law could come either in a taxpayer suit in a state court or through legal action taken by a local school board against the allocation of "state funds to church-related schools."⁵¹ The suits would challenge funds distributed for the purchase of textbooks and library materials for students in parochial schools, the provision of teachers and equipment to parochial schools for special courses and services, and establishment of "shared time" arrangements to the extent that they resulted in the co-mingling of public and parochial school faculties, facilities, or administration. On April 12 the Protestants and Other Americans United for the Separation of Church and State, an organization established specifically "to assure the maintenance of the American principle of separation of church and state,"⁵² became the second group to announce that it would file a suit challenging the constitutionality of what was now PL 89-10.⁵³ Glenn L. Archer, executive director of that separatist group, declared that "the American people deserve a judicial review of certain provisions of this bill which would appear to undermine church-state separation in the United States."⁵⁴ He added, "They are going to get it."⁵⁵

NOTES

¹U. S. Constitution, Amendment I.

²Leading constitutional authorities and publications in this field include: Paul G. Kauper, of the University of Michigan, Religion and the Constitution, (Baton Rouge: Louisiana State University Press, 1964); Philip B. Kurland, of the University of Chicago, Religion and the Law: of Church and State and the Supreme Court, (Chicago: Aldine, 1962); and Leo Pfeffer, of Long Island University, Church, State, and Freedom, (Boston: Beacon Press, 1967).

³"Education Bill Skirts Church-State Conflict," Congressional Quarterly, XXII February 5, 1965), 199.

⁴In 1950, Congress passed a law (PL 81-374) authorizing annual federal aid to school districts financially burdened by the presence of federal installations, such as military bases. This law, which provided relief in proportion to both the extra children brought into an area by federal installations and the reduced tax income resulting from federal purchase of land, established the principle of aid to "impacted areas." In his education bill for fiscal 1966, the President sought to broaden this concept to include school districts "impacted" by the children of low-income families. Ibid.,

⁵"First General School Aid Bill Enacted," Congressional Quarterly Almanac, XXI (1965), 275.

"Education Bill Skirts Church-State Conflict," p. 200.

⁶Shared time differs from released time in that it goes beyond the release of pupils from public school attendance for a short period of time each week. Basically, it amounts to the sharing of a pupil's time between two institutions, a public school and a private (usually religious) school. Undergirding the practice of shared time is the concept that while the state can require children to attend school, the right of the parent to rear and nurture his children is protected. William E. Griffiths, Religion, the Courts, and the Public Schools, (Cincinnati: W. H. Anderson Co., 1966), p. 121.

⁷"Education Bill Skirts Church-State Conflict," pp. 200-201.

⁸H.R. 2362, 89th Cong., 1st Sess., Title II (1965).

⁹"Education Bill Skirts Church-State Conflict," p. 201.

"Primary Education Bill Clears Congress, Becomes Law," Congressional Quarterly, XXIII (April 16, 1965), 665.

¹⁰H. . . , 89th Cong., 1st Sess., Title III (1965).

¹¹Ibid.

¹²"Education Bill Skirts Church-State Conflict," p. 201.

"Primary Education Bill Clears Congress," p. 665.

13The U. S. Supreme Court in Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930), upheld the right of the state to provide textbooks from tax funds for children attending sectarian schools on the grounds that not the church school but "the school children and the state are the benefit." This is the origin of the "child benefit theory."

14"First General School Aid Bill Enacted," p. 275.

15Philip Meranto, The Politics of Federal Aid to Education in 1965, (Syracuse, N.Y.: Syracuse University Press, 1967), p. 76.

16U. S., Congress, House, Committee on Education and Labor, Aid to Elementary and Secondary Education, 89th Cong., 1st Sess., 1965, 1118-1122.

17Ibid.

18Ibid.

19"First General School Aid Bill Enacted," p. 284.

20Aid to Elementary and Secondary Education, pp. 1531-1535.

21Ibid.

22Ibid.

23Leo Pfeffer noted the following objections to the child-benefit theory in "The Child-Benefit Theory and Church-State Separation," Church and State, XIX, April, 1966: "First, child-benefit is a fiction. It assumes some laws are for the benefit of children and that other laws are not. Second, the child-benefit theory permits and sanctions conduct by government through indirection which would be unconstitutional if done directly. The Supreme Court has said that what may not be done directly as a violation of the Bill of Rights may not be done indirectly. Finally, the use of this fiction manifests a hostility and opposition to the entire principle of separation of church and state.

24Meranto, p. 78.

25Aid to Elementary and Secondary Education, p. 1660.

26Ibid.

27Meranto, p. 78.

28Ibid., p. 79.

29"First General School Aid Bill Enacted," pp. 287-288.

Rufus Edmisten, Associate Counsel, Senate Subcommittee on Constitutional Rights, private interview, February 21, 1969.

30U. S., Congress, House, 89th Cong., 1st Sess., March 26, 1965, Congressional Record, CXI, 6133.

31Ibid., p. 6131.

32Ibid.

33"First General School Aid Bill Enacted," p. 286.

34Meranto, pp. 80-81.

35U. S., Congress, Senate, 89th Cong., 1st Sess., April 7, 1965, Congressional Record, CXI, 7317.

36Senator Wayne Morse during debate credited to Senator Jacob Javits the authorship of the majority's position on judicial review as contained in its report: "After the Senator from New York had set forth his reasons for joining the chairman in opposition to adding a judicial review amendment to the bill, it was agreed by the committee--even those who had reserved the right to offer an amendment later--that the Senator had performed a valuable service, which I had asked him to perform. I said that I agreed with everything the Senator said, and that I would like to have him sit down with counsel...and put in succinct form the argument that he made, which the chairman of the subcommittee completely supports." Ibid.

37Title I provided for judicial review of the Commissioner's actions, with respect to approval of state applications or the withholding of funds, in the U. S. Court of Appeals for the circuit in which the state is located; Title II, with respect to approval of a state plan; and Title V, with respect to approval of applications for grants. "First General School Aid Bill Enacted," pp. 277, 278.

38U. S., Congress, Senate, 89th Cong., 1st Sess., April 7, 1965, Congressional Record, CXI, 7317.

39Horace Mann League v. Tawes, in the Circuit Court for Anne Arundel County, No. 15,850, Equity.

40Senators Peter H. Radecki, George Murphy, and Paul J. Fannin as quoted in "First General School Aid Bill Enacted," p. 291.

41The break-down of the voting was as follows: Republicans, 16-14; Democrats, 13-5). A "nay" vote was a vote supporting the President's position. The voting indicates an ideological (liberal-conservative) split among both Democrats and Republicans. Ibid.

42Ibid.

43U. S., Congress, Senate, 89th Cong., 1st Sess., April 8, 1965, Congressional Record, CXI, 7573.

44Ibid., p. 7591.

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30U. S., Congress, House, 89th Cong., 1st Sess., March 26, 1965, Congressional Record, CXI, 6133.

31Ibid., p. 6131.

32Ibid.

33"First General School Aid Bill Enacted," p. 283.

34Meranto, pp. 80-81.

35U. S., Congress, Senate, 89th Cong., 1st Sess., April 7, 1965, Congressional Record, CXI, 7317.

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40Senators Peter H. Dominick, George Murphy, and Paul J. Fannin as quoted in "First General School Aid Bill Enacted," p. 291

41The break-down of the voting was as follows: Republicans, 16-14; Democrats, 16-39 (Northern Democrats, 3-34; Southern Democrats, 13-5). A "nay" vote was a vote supporting the President's position. The voting indicates an ideological (liberal-conservative) split among both Democrats and Republicans. Ibid.

42Ibid.

43U. S., Congress, Senate, 89th Cong., 1st Sess., April 8, 1965, Congressional Record, CXI, 7573.

44Ibid., p. 7591.

45 Ibid.

46 Ibid., p. 7593.

47 Ibid.

48 Ibid.

49 Ibid., p. 7595.

50 Howard M. Squadron as quoted in "Primary Education Bill Clears Congress, Becomes Law," p. 667.

51 "Jewish Unit Maps Suit on School Aid," New York Times, April 12, 1965, p. 23.

52 "Second Group Plans Test of School Bill," New York Times, April 13, 1965, p. 26.

53 "Primary Education Bill Clears Congress, Becomes Law," p. 667.

54 New York Times, April 13, 1965, p. 26.

55 Ibid.

CHAPTER 2

LACK OF TAXPAYERS' STANDING TO SUE--

BARRIER TO JUDICIAL REVIEW OF ESEA

Article III, Section 2¹ of the Constitution extends the judicial power of the United States to specified categories of "cases" and "controversies." From the earliest days, this provision, arising out of the concept of the separation of powers, has been interpreted not only as granting but also as limiting the federal judicial power,² that is, confining federal judges to the business of deciding disputes between adversary parties. Chief Justice John Marshall, speaking of Article III, said:

The Article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to 'a case in law or equity' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity and no jurisdiction is given by the words of the Article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend.³

Judges may not determine the legal rights and duties of persons who are not parties to the "case" or "controversy." Moreover, the courts themselves will decide what is a "case" or "controversy" and who are the parties to it who, therefore, have "standing to sue"--that is, the right to set the court in motion. It is not sufficient that the issue presented be a live and not a moot one,⁴ that the parties be truly adversary,⁵ that the question argued be justiciable,⁶ and that the proceeding be one requesting the entry of a final judgment or decree.⁷ Historically, something more has been necessary to successfully petition the exercise of judicial power: parties before the

court must show the necessity for protection of rights which are personal to them--rights which are entitled to and susceptible of such protection.⁸ Accordingly, in every case coming to the Supreme Court, whether requesting the exercise of its original jurisdiction or seeking review of the decision of a state or lower federal court, the Court, as a jurisdictional prerequisite, must be satisfied that the suit involves vindication of rights personal to the parties thereto, which are entitled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.⁹

The extent to which the Supreme Court regards individual citizens, suing as such, or suing as voters, electors, taxpayers, or property owners, as having an interest sufficient to give them standing in that capacity to challenge the constitutionality of governmental action has long remained unclear. The question of the right of a federal taxpayer to enjoin a congressional appropriation alleged to be an unconstitutional exercise of power has come before the Supreme Court on a number of occasions.¹⁰ It had, however, never arisen in a manner which required its decision until 1923, at which time the Court enunciated the following doctrine in Frothingham v. Mellon:¹¹ A single taxpayer of the United States, contending that the effect of federal appropriation statutes will be to increase future taxation, has no such interest in the subject matter and exhibits no such definite and direct injury or threat of injury as enables him to maintain a bill of complaint in a federal court to enjoin the execution of the statute claimed to be beyond the authority of Congress to enact.¹²

The taxpayer in Frothingham attacked as unconstitutional the Maternity Act of 1921, which established a federal program of grants to those states which would undertake programs to reduce maternal and infant mortality. The taxpayer alleged that Congress, in enacting the challenged statute, had exceeded the powers delegated to it under Article I of the Constitution and had invaded the legislative province reserved to the states by the Tenth Amendment. The taxpayer complained that the result of the allegedly unconstitutional enactment would be to increase her future federal tax liability :

Attorneys for the appellant argued, "If these payments are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay her proportionate part of such unauthorized payments...Her relation to these funds is exactly that of a cestui qui trust¹⁴ to funds held by his trustee. Her injury would be irreparable because it cannot be calculated. She can resort only to equity to maintain her right."¹⁵ The Solicitor General, on the other hand, declared, "This tribunal is a court and not a council of revision, and as a court it requires that the litigant who invokes its judgment must have some direct, tangible, and practical interest in the question litigated."¹⁶

Mr. Justice Sutherland delivered the opinion of a unanimous Court. Distinguishing the status of a citizen with reference to a federal appropriation act from his status with reference to municipal acts, the Court said:

The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number

of state cases and is the rule of this Court...But the relation of a taxpayer of the United States to the federal government is very different. His interest in the moneys of the treasury...is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating, and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.¹⁷

As to the contention of the appellant that under the guise of taxation to provide for the appropriation in question, her property would be taken without due process

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.¹⁸

Pointing to the circumstances under which the courts will exercise their power to hold invalid, because unconstitutional, the acts of a co-equal legislature, Justice Sutherland asserted:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.¹⁹

Finally, the Court, dismissing the action for want of jurisdiction, said:

If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words 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 coequal department, an authority which plainly we do not possess.²⁰

Commenting upon the opinion, Harvard Law Review in 1924 stated: "The decision in the Frothingham case has made it very difficult, if not impossible, for the courts to exercise any check on the spending propensities of our legislators."²¹ One contemporary commentator, Maurice Finkelstein, suggested at the time that the standing rationale was simply a device used by the Court to avoid judicial inquiry into questions of wisdom of Congress.²²

~~There have been no actual court tests of the constitutionality~~ of federal programs that grant some form of aid to religious institutions. Adjudication of them has been considered difficult because the litigant would, in most cases, have to be a taxpayer. The cases most often cited to find precedents, therefore, are Court decisions determining the constitutionality of state laws regarding religion and education. Despite the strong language in Frothingham, which virtually prohibited access to federal courts for taxpayers whose complaint against federal legislation was based on alleged injury to them as taxpayers, there have been a series of cases in which taxpayers as such did initiate actions in state or federal courts

to test the constitutionality of municipal and state, as opposed to federal, uses of their tax funds. Many of these suits involved church-state legal problems.²³

In Cochran v. Louisiana State Board of Education²⁴ the appellants, as citizens and taxpayers of Louisiana, brought suit in the Louisiana courts to prevent the state from furnishing free textbooks to children attending parochial schools. They argued that the practice constituted a seizure by the government of their property for private purposes contrary to the due process clause of the Fourteenth Amendment.²⁵ The Supreme Court upheld such a use of tax funds on the ground that not the church school but "the school children and the state alone are the beneficiaries."²⁶ However, the question of standing was not even raised, although Professor Kenneth Culp Davis of the University of Chicago Law School has pointed out:

The case contributes to the orthodox and consistent theory that a state or local taxpayer who has standing under state law to challenge a substantial public expenditure may have his case considered. That question has arisen many times and the Court has always given the same answer.²⁷

In Everson v. Board of Education²⁸ the plaintiff, in his capacity as a school district taxpayer, filed suit in the New Jersey courts challenging the right of the school board to reimburse parents of parochial school students for sums expended in transporting their children to and from their schools on regular buses operated by the public transportation system. The Supreme Court dismissed the Fourteenth Amendment argument that legislation which reimburses parents for payment of their children's fares on public buses to and from schools does not fulfill a public purpose. However, the plaintiff argued, in addition, that state use of taxpayer funds to support

and maintain church schools is contrary to the establishment clause of the First Amendment. In a 5-4 decision, the Court said that the primary purpose of the New Jersey statute was public safety, not private education, and it, therefore, did not violate the First Amendment. The majority opinion, written by Justice Black, went beyond the immediate case to state that the First Amendment meant:

Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another... No tax in any amount, large or small, can be levied to support any religious activities or institutions.²⁹

The Court made no reference to, but simply assumed, standing.³⁰

In order to successfully maintain standing, the taxpayer must show that tax funds were actually misused. In Doremus v. Board of Education³¹ a New Jersey taxpayer tried to test the constitutionality of a state statute which called for the reading of the Old Testament at the opening of each public school day. The case hinged on standing and pointed out that a state taxpayer's action could be a case or controversy "when it was a good faith pocketbook action."³² The taxpayer in Doremus failed to show any connection between his payment of taxes and the injury involved in reading the Bible in the public school. He further could not show that he had children enrolled in any school involved or that the religious practices adversely affected him, and, therefore, the Supreme Court denied his standing to challenge the Bible reading.³³

In the field of church-state relations, several leading cases have been brought by persons whose standing was not based on their role as taxpayers. In McCullum v. Board of Education³⁴ and Zorach v. Clausen³⁵ no actual expenditures of taxpayer supplied funds were involved. Justice Douglas in the Zorach case found no problem in

determining the Court's jurisdiction since "appellants here are parents of children attending schools subject to the released time program."³⁶ On the merits, the McCollum case involved the use of public school classrooms for a released time program of religious instruction. The Supreme Court held the practice unconstitutional as the force of the public school system was used to promote sectarian instruction. On the other hand, in Zorach the public schools did no more than accommodate their schedules to permit students to attend a program of outside religious instruction. The Court, therefore, finding no coercion inherent in the program, rejected appellants' claims respecting both the establishment and free exercise clauses. Standing in both cases rested on claims by parents of children actually in school that the practice constituted a denial of the free exercise clause. Thus, parents who claimed a violation of the right of freedom from state-sponsored religious practices in school systems as an infringement of the free exercise clause asserted sufficient standing for adjudication.³⁷

In McGowan v. Maryland³⁸ appellants contended that certain Sunday closing laws violated their rights to freedom of religion. The Court, however, observed:

Appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities...we hold that appellants have no standing to raise this contention.'³⁹

As Professor Kenneth Culp Davis observed, there is a difference between "standing" to initiate a court action, that is, to be a plaintiff, to "start the judicial machinery in motion" and "standing to take a particular position in a proceeding to which one is already

a party."⁴⁰ Since the appellants in the McGowan case could show a direct economic injury different from Maryland citizens in general, they had standing to test the constitutionality of a law respecting an establishment of religion. Satisfied that it had a genuine case or controversy involving a litigant with a special economic interest, the Court proceeded to the merits. The Sunday closing law, while originally religiously motivated, was now, said the Court, secular in fact, having lost its religious character.⁴¹

In Engel v. Vitale⁴² parents of public school pupils brought an action in the New York courts insisting that the required use of a prayer composed by the Board of Regents in the public schools violated both the establishment and free exercise clauses. The Court did not consider the standing question but proceeded to find the statute in question unconstitutional on "establishment" grounds. Justice Black said for the Court:

The establishment clause, unlike the free exercise clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.⁴³

In both Vitale and Schempp the Court recognized the constitutional right not to have one's children exposed to religious doctrination at the hands of the state, as well as recognition that a parent has standing to complain in the courts against such state action.⁴⁴

In Abington School District v. Schempp⁴⁵ the Schempp family contested the constitutionality of a Pennsylvania statute requiring the reading of the Bible in the public schools. The Supreme Court affirmed the ruling of a three-judge federal court holding the statute unconstitutional under the establishment clause. Justice

Brennan, in a concurring opinion, discussed the problem of standing in a case where, unlike Doremus, children were enrolled in an affected public school:

The free exercise claims of the parents alleged injury sufficient to give them standing. If, however, the gravamen of the lawsuit were exclusively one of establishment, it might seem illogical to confer standing upon a parent who--though he is concededly in the best position to assert a free exercise claim--suffers no financial injury, by reason of being a parent, different from that of the ordinary taxpayer whose standing may be openly questioned...These parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication.⁴⁶

Again, as Schempp shows, the individual can become involved in a case or controversy with the government even if he asserts standing on grounds other than the use of tax moneys.⁴⁷

In the past few years the Supreme Court has increasingly extended the federal Bill of Rights to state action. As a consequence, the states in their regular use of state actions duly apply the federal Constitution since it is part of the applicable law. Thus, the use of state public actions to test federal constitutional issues had created an anomalous situation. A citizen of a state which entertained such actions might secure a ruling from the Supreme Court regarding the constitutionality of the state's expenditures for uses which he alleged violated the establishment and free exercise clauses. Yet, no citizen, judging from the Frothingham doctrine, could attack similar federal legislation.⁴⁸

"The lack of standing to sue has often been used to keep the judicial door closed, except and unless a person is about to be hung or the law in some other tangible way has fastened its claws on him,"⁴⁹ Justice Douglas has declared. Taxpayers had no standing to challenge

federal laws making appropriations. "The result," Justice Douglas pointed out, "(was) that no matter how massive the public injury (might) be, as for example the making of large appropriations to religious schools, no judicial remedy (was) available to the taxpayers."⁵⁰ An extreme application of this rule, he has asserted, was made in Doremus. While the New Jersey courts gave the plaintiff standing to sue, the Supreme Court held otherwise and dismissed the appeal. The child of the parents involved had graduated before the appeal could reach the Court, and so as to them the case was moot. Yet, the taxpayers' suit, he noted, was held not to be a "good-faith pocketbook action."⁵¹ "It seems plain that if the claim of the taxpayers was correct and the First Amendment was being violated, taxes were being deflected from the constitutional purposes for which they were paid,"⁵² Justice Douglas observed. "All of the taxpayers in the town certainly would have standing to sue, for no others would have a greater interest. The fact that the interests of the individual taxpayers was small and minute did not make the suit any less real, substantial, and vital to the parties."⁵³ He summarized his argument as follows:

If Everson is right in noting jurisdiction, Doremus is wrong. The two cannot stand together, unless the law is to be capricious. It is possible to say, as in Everson, that First Amendment rights are by nature of the constitutional command so preferred that taxpayers should be given standing to protect them, and that the more vague, generalized rights of Due Process involved in other cases require that one who makes the challenge have a more specific, tangible interest at stake. Where a constitutional right is, by the place the Framers gave it in the hierarchy, a preferred right, standing to sue to vindicate it should be readily granted. That distinction could explain the difference between Everson and Frothingham but not between Everson and Doremus. Judicial rules are, indeed, often designed to protect preferred constitutional rights, though there can be no satisfactory reconciliation of all the cases.⁵⁴

"The cases on standing to sue show that the federal courts in general have been inhospitable to the adjudication of constitutional questions,"⁵⁵ Justice Douglas has further charged. "That reluctance, when added to the watered-down version of the Bill of Rights that we now have, explains the ascendancy of legislative power and the decline of judicial authority."⁵⁶ On the other hand, John Marshall Thayer, a constitutional scholar at the turn of the century, would have countered that judicial intrusion should be infrequent, since it is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors"; that the effect of a participation by the judiciary in these processes is "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."⁵⁷ In rebuttal, Justice Douglas has contended, "Yet the judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government, it is often the one and only place where effective relief can be obtained. If the judiciary," he conceded, "were to become a super-legislative group sitting in judgment on the affairs of the people, the situation would be intolerable. But," he stressed, "where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors."⁵⁸

Senator Sam J. Ervin, chairman on the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a former

Justice of the North Carolina Supreme Court, has made the following evaluation of Supreme Court rulings dealing with the church-state controversy:

These cases reveal little uniformity in the standards applied by the Court for determining the justiciability of the establishment cases. However, the interests maintained in these cases were at least sufficient to constitute a case or controversy within the meaning of the jurisdictional powers of the Supreme Court. If the Court ever felt constrained by the Frothingham principle, it did not refrain from appraising the merits of the constitutional issues embraced within these appeals from state courts.⁵⁹

Senator Ervin concluded, "One simple proposition is preeminent-- one who, in fact, is affected adversely by governmental action should have standing to challenge that action."⁶⁰

NOTES

¹"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State (See the 11th Amendment);--between citizens of different States;--between Citizens of the same State claiming Lands under Grants of different states, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects (See 11th Amendment). (Emphasis added)

²Included within the scope of this provision, however, are principles familiar not only as constitutional limitations, but also as rules of decision accepted by courts generally as governing the exercise of their jurisdiction. Reynolds Robertson and Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States, (St. Paul, Minn.: West Publishing Co., 1936), p. 405.

³Cohens v. Virginia, 6 Wheat. 264, 405, as cited in Ibid., pp. 410-411.

⁴In determining whether a cause is moot the test is whether, at all stages of the litigation, there is an actual controversy and adverse interests, capable of being acted upon by a judgment which can be carried into effect. Lord v. Veazie, 8 How. 251, 255; Mills v. Green, 159 U.S. 651, 653, as cited in Ibid., p. 432.

⁵Any attempt to obtain the opinion of the court upon a question of law which a party desires to know for his own interests or own purposes, when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse of the processes of the court. Lord v. Veazie, supra., as cited in Ibid., p. 414.

⁶The fact that a proceeding is an adversary one is not alone sufficient to give it a "justiciable" character, Massachusetts v. Mellon, 262 U.S. 447, within the meaning and operation of the constitutional grant of judicial power. The doctrine of separation of powers imposes still further restrictions upon the domain properly exercised by the judicial branch of the government. Thus, questions purely of a political nature do not present justiciable issues; nor do proceedings which call for the exercise of legislative or administrative functions. Similarly, advisory opinions are not within the scope of the judicial power. Ibid., p. 416.

⁷The judgment of the Supreme Court must be the final and conclusive determination of the rights of the parties, subject to no revision by other departments of the government. Ibid.

⁸The injury must be personal to the party--litigants in federal courts are not entitled to champion the rights of third parties. Ibid., p. 478

⁹Carl A. Auerbach et al., The Legal Process, (San Francisco: Chandler Publishing Co., 1961), p. 200.

Robertson and Kirkham, pp. 467-469.

¹⁰Bradfield v. Roberts, 175 U.S. 291, 295 (1899); Millard v. Roberts, 202 U.S. 429, 438 (1906); Wilson v. Shaw, 204 U.S. 24, 31 (1907). In all three cases, the question was expressly recognized and left undecided, though in all three opinions there are expressions in accord with the principal case. Harvard Law Review, XXXVII (1924), p. 750.

¹¹Frothingham v. Mellon, 262 U.S. 447.

¹²Robertson and Kirkham, pp. 506, 508.
Harvard Law Review, XXXVII (1924), p. 750.

¹³Frothingham v. Mellon, supra., Opinion of Justice Sutherland.

¹⁴The person who possesses the equitable right to property and receives the rents, issues, and profits thereof, the legal estate of which is vested in a trustee. Black, Law Dictionary 289 (4th ed. 1951).

¹⁵Frothingham v. Mellon, supra., Brief of William L. Rawls for Frothingham, appellant.

¹⁶Ibid., Brief of Solicitor General Beck for Mellon, appellee.

¹⁷Ibid., Opinion of Justice Sutherland.

¹⁸Ibid.

¹⁹Ibid.

²⁰Ibid.

²¹Harvard Law Review, XXXVII (1923-1924), 753.

²²Maurice Finkelstein, "Judicial Self-Limitation," Harvard Law Review, XXXVII (1923-1924), 359.

²³Franklin C. Salisbury, "Not a Law to Stand On," (Washington: Americans United for the Separation of Church and State, 1965), pp. 3-4.

²⁴Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930)

²⁵Salisbury, p. 4.

²⁶Cochran v. Louisiana State Board of Education, supra.

27 Kenneth Culp Davis, "Standing to Sue in Religion Cases," as quoted in Congressional Record, CX, February 20, 1964, 3136.

28 Everson v. Board of Education, 330 U.S. 1 (1947).

29 Ibid.

30 Salisbury, pp. 5-6.

31 Doremus v. Board of Education, 342 U.S. 429 (1952).

32 Ibid.

33 Salisbury. p. 7.

34 McCollum v. Board of Education, 333 U.S. 203 (1947).

35 Zorach v. Clausen, 343 U.S. 306 (1952).

36 Ibid.

37 Salisbury, p. 8.

38 McGowan v. Maryland, 366 U.S. 420 (1961).

39 Ibid.

40 Davis, p. 3138.

41 Salisbury, pp. 9-10.

42 Engel v. Vitale, 370 U.S. 421 (1962).

43 Ibid.

44 Salisbury, p. 9.

45 Abington School District v. Schempp, 374 U.S. 203 (1963).

46 Ibid.

47 Salisbury, p. 7.

48 Louis L. Jaffe, "Standing to Secure Judicial Review: Public Action," Harvard Law Review, LXXIV (1960-1961), 1311-1312.

49 William O. Douglas, "The Bill of Rights Is Not Enough," The Great Rights, ed. by Edmond Cahn, (New York: Macmillan Co., 1963), p. 138.

50 Ibid., p. 139.

51 Doremus v. Board of Education, supra.

52 Douglas, p. 139.

53Ibid.

54Ibid., pp. 139-140.

55Ibid., p. 140.

56Ibid., pp. 140-141.

57John Marshall Thayer, as quoted in Ibid., p. 141.

58Ibid.

59Sam J. Ervin, Jr., "Mrs. Frothingham and Standing to Sue,"
North Dakota Law Review, XLIII (1967), 701.

60Ibid.

CHAPTER 3

SENATOR SAM J. ERVIN PROPOSES

JUDICIAL REVIEW LEGISLATION

GRANTING STANDING TO SUE

During Senate deliberation of the Elementary and Secondary Education Act, Senator Morse showed his willingness to support an independent judicial review bill. At that time, he declared:

If we are going to have a judicial review provision in our law, we should have it as a separate and independent bill. It should cover not only education legislation, but also all other federal programs involving federal grants and loans. I am satisfied that the bill would meet all the constitutional tests. I am satisfied that the bill, if enacted into law, would bring the First Amendment under a review by the U. S. Supreme Court. It would end up by giving us, as we lawyers say, 'a decision on the nose.'¹

True to his word, Senator Morse, with Senators Ervin, Joseph S. Clark (D-Pa.), and Ralph Yarborough (D-Tex.) as co-sponsors, on June 7, 1965, introduced S. 2097.

The bill allowed a taxpayer to bring a civil action for a declaratory judgment² in the U. S. District Court for the District of Columbia against the federal officer making such a loan or grant to enjoin him from taking any action under several acts,³ including the Elementary and Secondary Education Act of 1965, in order to obtain judicial review of their constitutionality under the First Amendment. The maintenance of any such action on the part of the plaintiff required no additional showing of direct or indirect injury, either actual or prospective. In addition, any public or other nonprofit institution or agency which was denied a loan or grant under the enumerated acts on First Amendment grounds or was

prejudiced by a loan or grant to another agency or institution because of a reduction in the amount of funds available might bring a similar civil action to obtain judicial review. When a court order finding a grant or loan invalid became final, S. 2097 required the repayment of the grant or the refund with interest of the loan, within a reasonable period. Furthermore, the bill in no way attempted to define a case or controversy but merely granted standing to the parties involved in any case or controversy which might arise under the establishment and free exercise clauses. Since a First Amendment interpretation was indispensable to the decision in actions which plaintiffs might bring under the bill, the sponsors alleged that a case or controversy within the meaning of Article III necessarily existed.⁴

On September 3, 1965, S. 2097 was referred to the Subcommittee on Constitutional Rights, of which Senator Ervin is chairman.⁵ His Subcommittee held open hearings during 1966 on March 8 to 10 and 15 to 17 at which both proponents and opponents of S. 2097 testified, in an effort "to give full recognition to the need for resolving the question of whether Congress has been legislating in a constitutional manner in its appropriation of federal tax moneys to assist the educational and welfare programs of nonsecular institutions" and "to discover an expeditious method of affording the judicial machinery necessary to answer this vital question."⁶ Senator Ervin, in his opening statement, noted that "our Founding Fathers intended to outlaw forever the congressional appropriation of funds for the direct or indirect support of any and all religious institutions and their activities." He further contended:

I cannot believe that those who drafted and ratified the Constitution which provided that Congress shall make no law respecting the establishment of religion would also decree that this same Constitution disables Congress from passing a law which would confer upon federal courts the power to determine whether that prohibition is being violated. •

In Senator Ervin, the self-proclaimed constitutional lawyer of the Senate, the American Jewish Congress and POAU had found an ally.

The Subcommittee attempted to reach the three major bodies of thought on church-state relations by extending invitations to testify to representatives from the academic community, from religious and other interested organizations, and from the government. On the whole, the academicians confined their remarks to constitutional implications of the legislation rather than expressing personal policy preferences. "The principal change effected by S. 2097," submitted Professor Paul A. Freund of Harvard Law School, "would be the legislative overruling of Frothingham v. Mellon, in the limited context of federal taxpayers' suits to challenge under the First Amendment expenditures made pursuant to certain statutes providing aid for educational and related institutions."⁹ Accordingly, Professor Freund posed the following question: "Is the defect in a taxpayer's suit, under the Frothingham rule, one of lack of standing in the lesser sense (of justiciability), or is it so fundamental that Article III prevents any change in the prevailing federal rule?"¹⁰ As one who professed to subscribe wholeheartedly to the general philosophy of limitations on the judicial function, Professor Freund reasoned as follows:

Granted that we ought not to depend utterly on the courts for the marking of governmental powers or the safeguarding of basic rights, and that the Court ought not to be drawn lightly into political disputes cloaked in the guise of lawsuits, still the issues

here call for judicial settlement, or at least judicial delimitation. The authority of government to aid religious groups is an area of dispute that does not lend itself to political settlement. In fact, it was precisely to keep religious differences out of the arena of politics that the First Amendment was adopted. No decision of the Supreme Court is likely to conclude the whole debate over federal aid, but decisions can helpfully define the area that may be left for decisions of policy by the Congress and the President.¹¹

Indeed, then, Professor Freund answered his own question: "The defect in taxpayers' suits does not rise to the level of an Article III infringement...The present situation is not beyond repair through provision by Congress for a straight forward federal taxpayers' suit..."¹²

Professor Louis L. Jaffe of Harvard Law School had suggested that the Court would, without legislation, hear a taxpayer's suit challenging a federal appropriation which, in the words of the Frothingham case, was a "matter which admits of the exercise of judicial power."¹³ And Professor Jaffe in his testimony before the Subcommittee added: "But we know from Everson that the questions which would be adjudicated under the proposed statute are matters which admit of the exercise of judicial power."¹⁴ However, in such cases, according to Professor Jaffe, the Court might still refuse to take jurisdiction of such a suit not for constitutional reasons but on grounds of policy. In that event, he stated that if "Congress mandates jurisdiction the Court may well be prepared to accept the congressional action as a definitive expression of a policy favoring the assumption of jurisdiction."¹⁵

Dean Erwin N. Griswold of Harvard Law School, however, expressed disagreement with his colleagues. "In my opinion," he stated,

"We should not set up a situation where any one of 190 million people can bring any federal program before the courts, where things would inevitably be tied up for a period of one to three years or more."¹⁶ He continued, "The vice in the proposal to have taxpayers' suits lies in the idea that ultimate power in our country should reside with the courts."¹⁷ An avowed great believer in the courts who has worked hard to support them, Dean Griswold argued as follows:

The sorts of questions which arise with respect to the spending power are, in my view, better adapted for consideration and decision by the executive and legislative branches of the government than by the judiciary. These are questions which should be resolved in the hammer and tongs, give and take, of the legislative process...These are not the sort of questions on which we should then give the courts a second guess.¹⁸

Coming to the brunt of his argument and to the basis of his disagreement with his Harvard colleagues, Dean Griswold declared, "Such a change would, I think, be a serious mistake in the wise allocation of our governmental powers."¹⁹

In contrast, both representatives from religious and other interested groups and spokesmen from the government, unlike the academicians, advanced differing personal policy preferences regarding the church-state controversy, seeking to support their particular position with an advantageous interpretation of constitutional law. The Department of Health, Education, and Welfare, through its spokesman, Assistant General Counsel Theodore Ellenbogen, opposed enactment of S. 2097 as "unnecessary, not in the best interest of the nation, and in part unconstitutional."²⁰ Generally, the HEW representative pointed out that the law, including the Elementary and Secondary Education Act, "already affords a means for adjudicating the First

Amendment issue in the courts where there is a genuine case or controversy."²¹ The purpose of the bill, he stated, was not "to make more certain that this is true but, rather, to generate suits to test the First Amendment issue by creating novel classes of plaintiffs and thereby assuring that the issue will be adjudicated by the courts."²² Specifically, Mr. Ellenbogen objected first to the provision for taxpayer suits as "unconstitutional on the ground that an action to enjoin the expenditure of federal funds by one whose only legal relationship to the expenditure is that of a taxpayer would not present a case or controversy within the meaning of Article III, Section 2."²³ Another objection of HEW was that the bill, particularly the taxpayer-suit provision, would have a disruptive effect upon the operation of programs of the Department. "These are programs which the Congress has found of sufficient importance to the health, education, and welfare of the American people to warrant the expenditure of billions of dollars of federal funds,"²⁴ declared Mr. Ellenbogen. "We believe that enactment of S. 2097 would undo a substantial part of what has been accomplished; it would impair for many years to come the full operation of these programs to meet the urgent needs of the nation."²⁵ Mr. Ellenbogen expressed his conviction that if S. 2097 were passed as originally drafted, no sectarian institution could be expected to seek or accept a grant or loan under any of the acts to which the bill related. He reasoned as follows:

No matter how certain the institution might be that its use of federal funds would not contravene the First Amendment, it would still face the likelihood that, upon the mere bringing of a taxpayer's suit, it would be left with a building half built or with salaries half paid. And if it were anything less than certain of its legal position, it would face

the additional risk of having to repay the federal government the portion of the grant that it had already invested in the building or had already paid out as salaries. It is difficult to imagine a more effective means of discouraging the acceptance of such grants and loans.²⁶

Finally, Mr. Ellenbogen contended that Congress, in enacting these grant and aid programs, had the obligation to determine for itself that they were constitutional and that it could not divest itself of this responsibility by devising special judicial review provisions. "Yet it could, through the adoption of contrived judicial review provisions such as these," according to Mr. Ellenbogen, "lessen its sense of responsibility and alter radically the role of the courts in the federal system with respect to certain of these constitutional issues, and in practical effect convert the federal courts from a forum for the settlement of genuine cases and controversies to a supervisory agency over the Congress."²⁷

Exchanges between Senator Ervin and Mr. Ellenbogen reveal the difference in their perspectives regarding the proper allocation of powers among the branches of the federal government:

SENATOR ERVIN: Has it not been held in this country ever since the case of Marbury v. Madison that the ultimate power under the Constitution to determine the constitutionality of an act of Congress resides in the Supreme Court and not in the Congress?

MR. ELLENBOGEN: I think it is quite clear, and has always been clear and recognized by the Supreme Court itself, that the Court has no general revisory power over the other branches of government in constitutional matters. It can only act in cases or controversies coming before it. And only in that way does it pass on constitutional questions.²⁸

Mr. Ellenbogen emphasized that since the President and Congress had decided that the legislation to be subjected to review by the bill was constitutional, there was no need nor desirability of having the judiciary lend its approval or disapproval:

MR. ELLENBOGEN: In the programs listed in S. 2097, we are pursuing aims of high national urgency, and we are pursuing them in ways that both the Congress and the executive branch have found to be consistent with the First Amendment. We think it is far wiser, in the total national interest, to accept judgments of the Congress and the executive as working hypotheses unless and until the Supreme Court, in the normal discharge of its judicial functions, gives cause to modify any of these judgments in any respect.

SENATOR ERVIN: Will you please tell me under what circumstances you could get a determination by a Federal District Court on the question of whether he is being taxed for a violation of the First Amendment?

MR. ELLENBOGEN: I do not believe there is a sufficient connection between a tax that is levied on me and some appropriation out of general funds in the Treasury that I can say I am being taxed for this particular expenditure. So that I do not believe that, except as I express myself as a citizen, that I should have standing in court, unless our constitutional system were changed and the role of the Supreme Court changed to a kind of revisory role over the executive and legislative branches.²⁹

Strangely enough, the colloquy between the Senator and Mr. Ellenbogen found the former a proponent of the judiciary and the latter a booster of Congress:

SENATOR ERVIN: You think it is unwise to have a method, a procedure established by law, by which Congress can determine whether or not it is violating the First Amendment?

MR. ELLENBOGEN: Well, this assumes that the Supreme Court has a wisdom that is not given to Congress.

SENATOR ERVIN: I am not assuming a thing about the Supreme Court's wisdom; I am referring to its authorized power.

MR. ELLENBOGEN: The Supreme Court has no power except to decide cases or controversies, and only in that connection may it pass on the constitutionality of an act of Congress.³⁰

The Department of Justice, through its representative, Assistant Attorney General John W. Doulas, reinforced the position of HEW on S. 2097. Again, exchanges between Senator Ervin and Mr. Douglas indicate differing conceptions of the role of the judiciary:

SENATOR ERVIN: Don't you agree with me that under our system of government set up by our Constitution, the final power to make definitive interpretation of the meaning of the Constitution rests with the Supreme Court rather than in Congress or the President?

MR. DOUGLAS: Yes, the final, ultimate power is there. It is binding on everyone else once it is pronounced. In that sense it is final and ultimate. But the cases get up there through the regular adversary type of proceedings. This is one of the aspects of our judicial system which has made it what it is.³¹

Moreover, as in the case of Mr. Ellenbogen, Senator Ervin questioned the authority of Congress as the final arbiter of the Constitution:

SENATOR ERVIN: Do you think that Congress ought to be allowed to interpret the First Amendment in the manner in which all the people of America, or a substantial part of the people think is a violation of the First Amendment, and that the people of America should have no way in which to call into question in a judicial proceeding the acts of Congress?

MR. DOUGLAS: No, I don't. My position would be that those can be called into question in a number of ways without expanding the traditional adversary system which is at the heart of our judicial setup.³²

In summary, Senator Ervin contended that wherever a controversy exists regarding a violation of the Constitution, and an interpretation of the Constitution is necessary to render a decision on such a claim, a controversy exists within the meaning of Article III, even though no one may exist who has the standing to sue in respect to that controversy. Continued Senator Ervin,

If federal tax moneys are taken to support religious purposes in violation of the First Amendment, and a multitude of citizens feel that that is a violation of the First Amendment, a claim asserted against the federal agencies which are dispersing the moneys undoubtedly is a case or controversy within the purview of Section 2 of Article III because you cannot decide that controversy as between those citizens and the federal administrators without interpreting the First Amendment.³³

The crucial question, the Senator declared, was whether those citizens could contest that claim, that is, whether they have standing to sue. "I am satisfied in my own mind," he emphasized, "that Congress has the undoubted power to expand the jurisdiction of courts of equity to give any citizen or taxpayer the right to bring a suit merely on a monetary basis, if it sees fit to amend the old equity rule that he must show a significant or substantial monetary interest."³⁴ The Senator concluded,

I think that any citizen should have the right to assert in an appropriate legal proceeding that the Constitution is being violated, and it is not in the public interest to allow that violation of the Constitution to be continued, and that he be given the right to sue as a representative of the public interest.³⁵

Professor Leo Pfeffer of Long Island University, a spokesman for the American Jewish Congress, whom Senator Ervin called "the most knowledgeable man in the United States in this particular field of law,"³⁶ supported enactment of S. 2097. Addressing himself to the question of whether citizens should be allowed to sue to challenge the constitutionality of federal expenditures under the First Amendment, Professor Pfeffer said, "I think the initial question should be 'why not?' The burden of proof, it seems to me, would be upon those who assert that there should be no such right."³⁷ In reference to the Frothingham case, he said, "This was a decision based upon judicial discretion, upon the Court's interpretation of judicial policy. It was not based upon any constitutional limitation on the Court's power to act."³⁸

Lawrence Speiser, a representative of the American Civil Liberties Union, noted that within the past few years, Congress has passed a number of laws, such as the Elementary and Secondary

Education Act, which included within their scope various kinds of aid and programs permitting the utilization of facilities directed, owned, and controlled by religious bodies, as well as grants to such institutions. In most cases, he pointed out, the kinds of programs and grants are spelled out only with the most general of guidelines. Programs may vary from state to state, as well as from community to community, both in plan and implementation, according to Mr. Speiser.³⁹ "The very immensity of the innovations made possible under these bills made all the more difficult and impossible the task and responsibility of congressmen in determining whether they were, in fact, constitutional either on their face or whether they would be administered in a constitutional manner,"⁴⁰ declared Mr. Speiser. "Even with the best intentions in the world, no member could state, at the time of debates on these bills, with absolute certainty, that they were constitutional."⁴¹

John Adams, a spokesman of the Protestants and Other Americans United for the Separation of Church and State, pointed out that while public school teachers who might be assigned to teach in parochial schools under Title I of the Elementary and Secondary Education Act could possibly challenge that title on the ground that it violated their "freedom of religion," these same teachers did not have standing insofar as a violation of their "free exercise of religion" to challenge, for instance, the granting of loans of textbooks and library resources to students in parochial schools under Title II.⁴² Mr. Adams submitted that "the proper people who do have ground to object are taxpayers, who, under the establishment clause, do not wish, as the U. S. Supreme Court has said, the public's tax funds to be disbursed in aid of religious institutions which teach religious doctrines."⁴³

Edgar Fuller, a representative of the Council of Chief State School Officers, declared that authoritative constitutional decisions in the field of education would be strongly in the national interest, regardless of how the Court might rule on the specific issues. However, he admitted that "under current conditions of doubt and frustration, the most practicable steps to oppose federal legislation that appears to violate the policies of the Council is to assist in bringing it before the courts for judicial tests to sort out the portions that may be unconstitutional."⁴⁴ According to Mr. Fuller, federal funds were being used in every state for educational programs that benefited sectarian educational institutions in ways that would be illegal and unconstitutional under their own respective state constitutions and laws if the programs were supported with state or local tax-raised funds. Mr. Fuller commented, "No real local-state-federal partnership in education can long thrive when intergovernmental funds originating in the federal government must be isolated from state and local funds in application to local programs of education and in local fiscal reporting to the states and thence to the federal government."⁴⁵ He further charged, "Those who are interested in receiving the federal money and in order to receive it formed a coalition of political support to get it enacted, want no judicial test now or later."⁴⁶ In conclusion, both the policy positions of the representatives of religious and other interested groups and of the government on judicial review legislation rested on a particular determination of the allocation of power within the federal system which each side deemed most advantageous to the interests of its constituency.

A central concern of critics and commentators regarding court tests of the legislation which S. 2097 enumerated was that court dockets would be flooded with lawsuits. As amended by the Subcommittee, S. 2097 sought to meet those objections by requiring that all suits be brought in the U. S. District Court for the District of Columbia and be filed within sixty days of the awarding of a federal grant or loan and by permitting the consolidation of similar suits. Another concern was over continuation of the federal aid during pendency of the lawsuit. The original bill required the aid to cease when the suit was filed, but the Subcommittee version only authorized the court to enjoin the grant or loan at its discretion. In addition, the Subcommittee added citizens and corporations as plaintiffs entitled to sue and added a provision permitting interlocutory injunctions⁴⁷ against grants or loans challenged at any time during the proceedings. When a court order finding a grant or loan invalid became final, S. 2097 as amended required the repayment of only the unexpended portion of the grant or the refund with interest of the loan, within a reasonable period.⁴⁸

The Committee on the Judiciary reported S. 2097 favorably and without amendment and recommended that the Senate consider it favorably. In its report the Committee foresaw "only a few and important cases" arising under the bill to settle the "serious doubts as to the constitutionality"⁴⁹ of the federal aid offered to denominational institutions by the nine acts which S. 2097 enumerated. However, Senator Philip A. Hart (D-Mich.), agreeing with Frothingham, asked how Congress could "resist the pressure" to enlarge the scope of the bill eventually to permit suits challenging the validity of "all other grants and all other appropriations..."; he said that the bill might open "a sluice gate"⁵⁰ in that regard.

The Senate on July 29 by a voice vote passed S. 2097 and sent it to the House. In debate Senator Ervin stated that S. 2097 had received the widespread support of the country's major religious denominations, educators, civil liberties organizations, and numerous professors of constitutional law. Opposing the bill, Senator Javits said that it would open the door to litigation involving an "enormous number of suits, many of them of a strictly harassing character."⁵¹ He also contended that the bill was unnecessary because the Supreme Court appeared to be ready to consider taxpayers' suits brought in state courts. Senator Ervin, however, contended that the Supreme Court, if it reviewed cases coming from state courts, still would not settle the question of the validity of acts of Congress.⁵²

Senator Ervin on August 4 sent a letter to Chairman Emanuel Celler, urging his House Committee on the Judiciary, to which the bill had been referred on August 1, to recommend House approval of S. 2097. Colleagues who co-signed the letter included Senators Morse, John Sherman Cooper (R-Ky.), Clark, Yarborough, George A. Smathers (D-Fla.), and Hiram L. Fong (R-Haw.). Wrote Senator Ervin, "Several of us who are sponsors of this bill feel there is no doubt as to the constitutionality of the programs which would be subject to review. Others of us feel that certain aspects of these programs fail to meet the test of the First Amendment. But one thing on which we all agree: the courts must be given the opportunity to decide."⁵³ Despite the letter of Senator Ervin, since the House Committee took no action on S. 2097 before Congress adjourned, the bill died in committee in the Eighty-ninth Congress.⁵⁴

NOTES

¹U. S., Congress, Senate, 89th Cong., 1st Sess., April 7, 1965, Congressional Record, CXI, 7334.

²One which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done. Black, Law Dictionary 497 (4th ed. 1951).

³The bill as amended applied to federal loans or grants made under terms of nine laws: Higher Education Facilities Act of 1963, Title VII of the Public Health Service Act, National Defense Education Act of 1958, Mental Retardation Facilities and Community Mental Health Construction Act of 1963, Elementary and Secondary Education Act of 1965, which added a new Title II to the 1950 law authorizing federal aid for operation of schools in federally impacted areas, Higher Education Act of 1965, Economic Opportunity Act of 1964. As amended, the bill deleted any other act administered by HEW and enacted after January 1, 1965.

⁴U. S., Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Report No. 85, 90th Cong. 1st Sess., 1967, 1-2.

⁵Besides Chairman Sam J. Ervin, Subcommittee members included Democrats John L. McClellan (Ark.), Edward V. Long (Mo.), Edward M. Kennedy (Mass.), Birch Bayh (Ind.), and George A. Smathers (Fla.) and Republicans Roman L. Hruska (Neb.), Hiram L. Fong (Haw.), and Jacob K. Javits (N.Y.). However, only Chairman Ervin and Senators Fong and Javits attended the hearings.

⁶U. S., Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings on S. 2097, 89th Cong., 2nd Sess., 1966, 1.

⁷Ibid., p. 4.

⁸Ibid., p. 5.

⁹Ibid., p. 498.

¹⁰Ibid.

¹¹Ibid., p. 499.

¹²Ibid., pp. 499-500.

¹³Frothingham v. Mellon, 262 U.S. 447 (1923).

¹⁴Hearings on S. 2097, p. 450

¹⁵Ibid., p. 448.

¹⁶Ibid., p. 496.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid., p. 497.

²⁰Ibid., p. 9.

²¹Ibid., p. 10.

²²Ibid.

²³Ibid.

²⁴Ibid., p. 14.

²⁵Ibid.

²⁶Ibid., p. 22.

²⁷Ibid., p. 10.

²⁸Ibid., p. 15.

²⁹Ibid., pp. 23, 26.

³⁰Ibid., pp. 28-29.

³¹Ibid., p. 89.

³²Ibid., p. 91.

³³Ibid., pp. 97-98.

³⁴Ibid., p. 98.

³⁵Ibid.

³⁶Ibid., p. 55.

³⁷Ibid.

³⁸Ibid., p. 58.

³⁹Ibid., pp. 299-300.

⁴⁰Ibid., p. 300.

⁴¹Ibid.

⁴²Ibid., p. 151.

43Ibid.

44Ibid., p. 206.

45Ibid., p. 207.

46Ibid., p. 210.

47Ones granted prior to the final hearing and determination of the matter in issue, and which is to continue until answer, or until the final hearing, or until the further order of the court. Black, Law Dictionary 712 (4th ed. 1951)..

48"Senate Favors Suits on Church-State Issue," Congressional Quarterly Almanac, XXII (1966), 517.

49Ibid., p. 518.

50U. S., Congress, Senate, 89th Cong., 2nd Sess., July 29, 1966, Congressional Record, CXII, 17660.

51Ibid., p. 17658.

52Ibid., p. 17656.

53Letter from Senator Sam J. Ervin to Representative Emanuel Celler, August 4, 1966.

54Ibid.

CHAPTER 4

THE GAMBLE THAT FAILED--

SENATOR ERVIN'S ATTEMPT TO ENACT S. 3

AS A RIDER

During the adjournment of the Eighty-ninth Congress, the Supreme Court on November 14, 1966, refused to review the decision of the Maryland Court of Appeals in Horace Mann League v. Board of Public Works¹ which invalidated three construction grants to three separate religiously affiliated colleges as unconstitutional under the First Amendment. Such an institution, said the Maryland Court, was not eligible for public funds if its governing structure and image were closely linked to an organized religion. During the ESEA debate in 1965, Senator Javits, in opposing Senator Ervin's judicial review amendment, cited this case as one which would end the controversy regarding the permissibility of aid to church schools under the Constitution.² Although the rejection of Horace Mann League by the Supreme Court did not indicate its approval or disapproval of the Maryland Court's decision, it did leave in doubt the constitutionality of similar federal programs.³ Shortly after the Supreme Court's action, U. S. Commissioner of Education Harold Howe II called upon the courts "to clarify which federally financed services could be given to students of church-related schools."⁴

Remarking that "events since Senate passage of S. 2097 last year have greatly compounded the need for its enactment,"⁵ Senator Ervin, with Senators Morse, Cooper, Clark, Yarborough, Smathers, Spessard L. Holland (D-Fla.), and Fong as co-sponsors, on January 11

introduced S. 3, identical to S. 2097, in the Ninetieth Congress.⁶

"Now, more than ever," declared the Senator, "the constitutionality of federal programs is in doubt, and review by the courts is imperative."⁷

The Supreme Court's action regarding Horace Mann League and Commissioner Howe's remarks pertaining thereto provided Senator Ervin with convenient weapons of persuasion. Referring to the Court's decision, the Senator pointed out, "These same three colleges which cannot constitutionally receive funds from the State of Maryland have each been recipients of federal grants during the last two years. The effect, then," he continued, "is that while the establishment clause was originally intended to apply only to Congress, today it is only enforced against state legislatures. On religion and the First Amendment," he concluded, "the law of the land is less majestic than ironic."⁸

In addition, court attacks in New York regarding the Elementary and Secondary Education Act supported the validity of Senator Ervin's assertion. A group of taxpayers had challenged the constitutionality of that Act in two separate actions--one in Federal District Court⁹ and the other in the New York State Supreme Court.¹⁰ "The plaintiffs in these two cases," said Senator Ervin, "assert their interest in the litigation as taxpayers and thus fall squarely within the ambit of this legislation. However," he pointed out, "a case handed down ten days ago¹¹ indicates they have no standing."¹² In summation, he contended, "If these plaintiffs are armed with legislation similar to the bill introduced today, the Supreme Court may be more responsive to their complaints and more willing to resolve this vitally important constitutional question."¹³

Because it conducted extensive hearings on S. 2097 in 1966, the Subcommittee on Constitutional Rights held no further hearings on S. 3 in 1967 and on February 28 reported the bill to the full Committee. The Committee on the Judiciary on April 4 reported S. 3 favorably and without amendment and recommended that the Senate consider it favorably. The Senate on April 11 by a voice vote passed S. 3 without objection and sent it to the House, where the bill was referred to the Committee on the Judiciary. Senator Ervin on April 26 sent a second letter to Chairman Emanuel Celler and members of his Committee, urging the Chairman to hold hearings on the measure as soon as conveniently possible. Colleagues who co-signed the letter included those six who had joined Senator Ervin in the earlier letter, with the addition of Senator Holland.¹⁴ "Our views differ widely on the legislation to be the subject of Judicial review under S. 3," wrote Senator Ervin, "but our joint sponsorship is evidence of our deep concern over the divisiveness among our citizens which has arisen as a result of the courts' inability to act in this area of constitutional law."¹⁵

Despite the letter of Senator Ervin, Chairman Celler and the House Judiciary Committee refused to act. Instead, using the failure of the Department of Justice to provide the Committee with a legal opinion regarding S. 3 as a pretense for its failure to hold hearings, the House Judiciary Committee pigeonholed the measure. Actually, Chairman Celler, a supporter of the Administration's legislation to aid education, in an effort to thwart any attempt which might jeopardize the 1965 Act, simply declined to schedule hearings.

Cognizant of the delaying tactic which the House Judiciary Committee had employed during the Eighty-ninth Congress and would adopt in the Nintieth Congress, Senator Ervin, during the adjournment of the Eighty-ninth Congress, on December 9 had sent a letter to Assistant Attorney General H. Barefoot Sanders, urging the Department of Justice to reconsider the position which it took in the Eighty-ninth Congress in the testimony of former Assistant Attorney General John W. Douglas on S. 2097 and to support S. 3. Noting that he had been a long and consistent supporter of federal aid to education--in fact, on occasion the lonely, single supporter in the North Carolina delegation--Senator Ervin declared that his affirmative votes were often cast with constitutional reservations. "We have reached a state of controversy over church-state issues in the legislation which endangers all of the Administration's education program," the Senator asserted, "and it is imperative that we have judicial guidelines."¹⁶ He sought the "support or, at least, the benevolent neutrality of the Justice Department."¹⁷ In reply, Mr. Sanders promised to "discuss the problem with Attorney General Ramsey Clark" and to "reply to the letter in the near future."¹⁸ This Senator Ervin interpreted as a commitment of the Department to notify him when it reached a position on S. 3.¹⁹

Perceiving that in the absence of a legal opinion from the Justice Department, the House Judiciary Committee would continue to refuse consideration of S. 3, Senator Ervin chose to gamble--in an attempt which for him came closest to success²⁰--and seized the opportunity to enact the measure by offering S. 3 as a rider to the House-passed Administration elementary and secondary education amendments bill (H.R. 7819), a two-year revised extension of the 1965 ESEA Act.

Only by adding S. 3 to a measure which had already passed the House, and thus bypassing the Committee on the Judiciary, did Senator Ervin and Senator Morse, the manager of H.R. 7819, feel the Senate could obtain prompt action by the other body.²¹ The Senate on December 1 adopted, by a 71-0 roll-call vote, with twenty additional favorable expressions of support recorded, the Ervin amendment. The Supreme Court on October 16 had agreed to hear the New York case²² which challenged the constitutionality of federal aid to parochial school children under the Elementary and Secondary Education Act of 1965. Even though this action by the Supreme Court ultimately proved the key to the success of Senator Ervin's efforts, its immediate effect was to lessen the urgency of enactment of S. 3. In an attempt to provide additional reasons for adoption of his amendment, the Senator said that if Congress did not "act immediately," the Court might hand down a ruling that would "create chaos in the (education) program and in many other ways in which the church-state issue is intimately involved."²³ He pointed out that the amendment stipulated that a suit had to be brought in the District of Columbia within sixty days of the time the grant or loan which was being challenged was made. Thus, it would permit only challenges of future grants or loans.²⁴

Having passed differing versions of the elementary and secondary education amendments bill, the house and Senate each appointed conferees to resolve the differences, among them the Senate authorization of S. 3 as an amendment. Composed primarily of members of the House Committee on Education and Labor²⁵ and the Senate Committee on Education and Welfare,²⁶ the Conference Committee membership did not include Senator Ervin; however, among the Senate conferees was Senator Yarborough,

whom Senator Ervin had convinced of the vital necessity of the provision and who represented his viewpoint in conference. Senator Morse, chairman of the Senate conferees, remained a proponent of judicial review legislation although in a previous conference he had outmaneuvered Senator Ervin to defeat a similar amendment.²⁷ Senator Ervin entered the conference with optimism, having received the solid support of the Senate in the adoption of his amendment. Although the Senate conferees may have differed concerning nonpartisan tactics at the conference's beginning--how long and hard to press the House conferees for the inclusion of the Ervin amendment--seemingly, they presented a united front when the showdown came at its end. In contrast, the House conferees, caucusing several times during discussion of the judicial review section, displayed a disunited front from the conference's start. An examination of the constituencies of several House conferees reveals the source of their opposition to S. 3; the congressional districts of at least four Democratic conferees included areas which contain many nonpublic sectarian schools--Representatives Roman Pucinski, Chicago; John Brademas, Gary; James O'Hara, Detroit; and Hugh Carey, New York. According to one spokesman, several Republican conferees simply did not wish a Supreme Court which they regarded as wholly unpredictable attempting to adjudicate ESEA, the viewpoint of Senator Ervin "to the contrary notwithstanding."²⁸ On the other hand, Representative Edith Green (D-Ore.), who as the education authority in the House exerts great influence among her colleagues, had herself previously sponsored judicial review legislation although she had failed in her effort.²⁹ Representative Carl Perkins, chairman of the House conferees, voiced the hostile sentiments of the Administration.³⁰

Soon after the Conference Committee met, the Department of Justice began to circulate among the House conferees an undated letter from Deputy Attorney General Warren Christopher to Chairman Emanuel Celler, stating that the Department was opposed to enactment of the judicial review bill. Infuriated that Senate conferee proponents and he did not receive the Justice Department memorandum as earlier promised, Senator Ervin placed a telephone call to Mr. Christopher during which he adm

the communique, "the only undated letter I ever got,"³¹ asserting that "it was customary in Washington, in official circles as well as in individual circles, to date letters."³² Immediately, the Senator on December 14 sent a personal communique to Senator Yarborough, to whom he confided, "The undated letter, Warren Christopher sheepishly tells me, was sent on December 7 immediately

Senate vote on judicial review. It has been Xeroxed and given to all of the House conferees, but to none of those of us who favor review."³³ He then summarized his attitude toward the Justice Department's tactics, "Because I had an agreement with the Justice Department to the effect that as soon as they arrived at a position on the bill that they would give me advance notice, I consider this the lowest kind of politics."³⁴ In an attempt to advise Senator Yarborough regarding a counterargument to House objections to the Ervin amendment, Senator Ervin noted that Congressman Benjamin Rosenthal (D-N.Y.) had a companion bill identical to S. 3 in the House hopper which was introduced on the first day of the Session. "Under the circumstances, I cannot possibly see how anyone could argue with a straight face that judicial review should be defeated on jurisdictional grounds. In the first place," the Senator

pointed out, "it is clearly germane to education; and, in the second place," he declared, "the House Judiciary Committee has lost any claim it has to this legislation because of its failure to exercise its jurisdiction."³⁵ In addition, Senator Ervin sent a personal communique to Senator Morse, in which he characterized the action of the Justice Department and HEW as "completely unconscionable,"³⁶ and sent a copy to his communique to Senator Yarborough to Representative Green, in the hope that she might persuade her House conferee colleagues to reverse their positions. In the mind of Senator Ervin, no doubt exists that the undated letter of Deputy Attorney General Christopher was in direct response to pressure from the top--from President Johnson, who had no desire to see his landmark 1965 education act rendered ineffective through court suits.³⁷

Although the extent of the influence of President Johnson in conference remains uncertain, the impact of the Justice Department's memorandum is clear: firsthand knowledge of the hostile Administration attitude toward the amendment acted as an instrument of cohesion among those House conferees who held adverse and indifferent sentiments. When the last day of the conference arrived, during the showdown on the Ervin amendment, the only item on which the conferees had failed to agree, the House conferees succeeded in amassing stiff opposition, feeling that the conferees should wait for the Judiciary Committee to act. Besides the constituency factor, then, the House conferees offered as a reason for their opposition respect for the prerogative and jurisdiction of the House Committee on the Judiciary, with whose position the Senate conferees disagreed. That Chairman Celler had not expressed enthusiasm for S. 3 and disagreed as to its ramifications

was widely known. At any rate, as a matter of comity, House committees do not take jurisdiction over a matter which falls within the jurisdiction of another committee. In fact, without a special rule from its Rules Committee, the House may not add a non-germane amendment to pending business on the floor. Possibly, too, the House conferees simply felt that with inclusion of the Ervin amendment, the House would fail to approve the Conference Committee report.³⁸

Faced with the unbending opposition of the House conferees, possibly more jurisdictional than substantial, Senator Morse, believing that Senator Ervin would not wish him to risk a break-up of the conference over the judicial review amendment, moved that the Senate recede from its position; only Senator Yarborough remained firm in his position to the end as the conferees deleted the amendment. In fact, Senator Yarborough read verbatim into the conference not only Senator Ervin's letter but also the position taken by the Justice Department in the undated letter that they had failed to send to Senator Ervin. Senator Morse explained his dilemma in these words:

I had to make a choice then because some of my Senate conferees were pretty adamant as to whether or not I was going to run the risk of sacrificing the bill for judicial review. I sat there with quite a few proxies. I told my colleagues I was going to use them, but to take all of the burden off of my colleagues, as the manager of the bill, I moved that the Senate recede, and I take full responsibility for it. I know I am right about it. I have proxies to show how right I was.

There was a suggestion first that we have a roll-call vote, but to demonstrate the cooperation I received I said, "I do not think you should put the proxies in that position because I am going to vote them." So the suggestion for a roll-call vote was withdrawn. We agreed with the House.³⁹

Senator Morse, of course, as the bill's manager, had not only to consider the success of the Ervin amendment but also to insure the passage of the whole bill, responsible as he was to both his Labor and Public Welfare Committee and to the Senate. The extent to which Senator Morse supported the Ervin amendment diminished as evidence of its danger to non-controversial items mounted. Senator Ervin, however, discounted the notion that failure of the Senate to recede would have resulted in a conference break-up, pointing to the 71-0 Senate vote on the amendment as evidence to support his contention that Senate conferees might have been more adamant--for longer--in their stand. Later, the Senator, listening to Senator Javits' explanation and apology, remarked that the Senate conferees "didn't have to yield so quickly."⁴⁰ Basically, the stark truth is that when the showdown came, those proponents of S. 3 who regarded the separation of church and state as an inviolable wall in all respects and who doubted the constitutionality of certain provisions of the 1965 Act remained firm in their stand while advocates of S. 3 who did not regard the separation of church and state as a barrier in every respect and who hailed as aid to children constitutionally challenged provisions of the 1965 Act retreated from their insistence of a court test.⁴¹ As Representative Sam M. Gibbons (D-Fla.) a House conferee, aptly remarked, "A legislator almost has to be present at the conference in order to insure the retention of his 'pet amendment.'"⁴²

Prior to the submission of the conference report to the Senate on December 15, Senator Ervin on the Senate floor angrily expressed his disappointment over the failure of the House-Senate conference

to retain the Ervin amendment. Predicting that the Supreme Court in the New York case which challenged the constitutionality of the Elementary and Secondary Education Act of 1965⁴³ would hold that federal courts did have jurisdiction to entertain such suits, the Senator suggested that its decision would not clarify the subject and that the need for "a statute specifying who can invoke that jurisdiction and how that jurisdiction can be invoked"⁴⁴ would still persist. Charging that S. 3 had been "sleeping in the arms of Morpheus, so far as the House Judiciary Committee is concerned"⁴⁵ since its passage by the Senate, the Senator directed his attack to the Justice Department:

I sometimes think we have fallen into a very unfortunate circumstance in which the Department of Justice has departed, in large measure, from its role as an impartial enforcer of the federal laws, and has assumed the role of being a political agency rather than a quasi-judicial agency.⁴⁶

Senator ted that from April 1966 until the Senate added the judicial review bill as an amendment to the elementary and secondary education act, he received no response from the Department of Justice concerning its attitude toward the legislation; but after the amendment had been adopted, he pointed out, the Department immediately sent out the letter.⁴⁷ Referring to the attempt of the Department to conceal its intentions, the Senator declared, "I do not know what its motive is, but I think the Department of Justice, like every institution and individual that is not illiterate, knows that it is customary to date communications."⁴⁸ The letter, he charged, "was used as a weapon to bludgeon and persuade the house conferees not to agree to this amendment favored by ninety-one senators."⁴⁹

As ranking Senate Republican conferee, Senator Javits assured Senator Ervin that the Senate conferees "talked about breaking up the conference on this issue, because it was just that deadlocked and just that impossible to make the remotest impression upon the conferees from the other body."⁵⁰ Senator Javits explained that Senator Morse, unable at the moment to consult with Senator Ervin, "said that he divined that, as strongly as the Senator from North Carolina feels on the issue, he would not want us to make this issue the rock upon which the conference would founder and there would be no education bill at this session of Congress."⁵¹ Senator Ervin at that point readily admitted that he "would not be willing to sacrifice the bill merely on the basis of the rejection of this particular amendment."⁵² But it was Senator Morse himself who succeeded in soothing the ruffled feelings of Senator Ervin. Sharing Ervin's complete disapproval with respect to the strategy employed by the Department of Justice, Senator Morse announced that "on the basis of a source so reliable that I am willing to lead with my chin, so to speak, here on the floor of the Senate this afternoon, and say that I have every reason to believe that come the next session of Congress, we will have hearings in the House on the Ervin bill."⁵³ Evidently, the source of that assurance of House hearings early in 1968 was the President.⁵⁴ The House on December 15, by a 286-73 roll-call vote, adopted the conference report. Later that same day,⁵⁵ the Senate, by a 63-3 roll-call vote, adopted the conference report in the last vote taken before adjournment. Therefore, S. 3 was still pending without scheduled action in the House Judiciary Committee at the close of the First Session of the Nintieeth Congress.⁵⁶

As President Johnson reportedly promised senators, he asked for hearings in the House early in the Second Session of the Nintietth Congress. Accordingly, Subcommittee Number 3⁵⁷ of the Committee on the Judiciary held open hearings on S. 3 during 1968 on March 6, 21, 27, 28; April 3, 24, 25; and May 8 at which both proponents and opponents testified. Apparently, the irregular schedule of widely-spaced hearings Chairman Edwin E. Willis (D-La.) used as a device to minimize the chances of reaching a favorable Subcommittee consensus on S. 3. Moreover, the pendency before the Supreme Court of Flast v. Gardner,⁵⁸ the New York case which challenged the constitutionality of federal aid to parochial schools under the Elementary and Secondary Education Act of 1965, cast throughout the hearings a shadow of congressional doubt regarding the legitimacy of S. 3.⁵⁹

On the one hand, the Subcommittee heard the testimony of Senator Ervin, who declared that pendency of the case made congressional action on the judicial review measure imperative at that Session. "If the Court refuses to grant the plaintiffs' petition to challenge an alleged abridgment of the First Amendment's prohibition against establishment of religion," the Senator asserted, "millions of Americans will be left with no means of vindicating this constitutional principle unless this Congress passes enabling legislation. The arbitrary dictate of the Frothingham case would then remain a blight on the judicial process."⁶⁰ Conversely, Senator Ervin pointed out, "If the Court wisely grants standing to the plaintiffs in Flast, the provisions of S. 3 will be essential for the purpose of providing legislative guidance to the courts and to prospective litigants."⁶¹ In the event the Court granted standing in the absence of statutory

provisions, the Senator believed that lower courts might enjoin the continued administration of federal aid programs, thereby interrupting the education process across the country. He noted that S. 3 contained a number of procedural safeguards designed to prevent unnecessary disruptions in federal programs subject to First Amendment challenges.⁶²

On the other hand, the Subcommittee heard the testimony of Solicitor General Erwin N. Griswold, who stated that he had not had occasion to change the views which he had expressed in opposition to S. 2097 as an academician. "If the Supreme Court should decide the Flast case in favor of the taxpayers," the Solicitor General admitted, "legislative consideration of the matter of channeling such suits would be appropriate, though I do not regard S. 3 or H.R. 1198 as the desirable solution."⁶³ Conversely, Solicitor General Griswold asserted, "If the Court should decide against the taxpayers on the 'standing' ground, then, I take it that there would be little, if any, basis for supporting the constitutionality of S. 3."⁶⁴ However, he noted, "If the decision of the Supreme Court should be against the taxpayers on principles of separation of powers, the voice of Congress through such a bill as S. 3 would apparently be relevant."⁶⁵ Although he hoped that Congress would not speak with such a voice, if it did, the Solicitor General believed that S. 3 would be an appropriate factor for Court consideration in demarcating the separation of powers.⁶⁶

In contrast with the Chairman of the Subcommittee on Constitutional Rights, Senator Ervin, a sponsor and proponent of S. 3, the Chairman of Subcommittee Number 3, Representative Willis remained an opponent

of S. 3 throughout the hearings. To Senator Ervin, he declared, "I can't seem to rid my mind of the feeling that this bill, if enacted, will cause more mischief than it would cure."⁶⁷ An exchange with Solicitor General Griswold reveals the source of Chairman Willis' opposition to judicial review legislation:

MR. WILLIS: It appears to me that those who urge enactment of this legislation are taking that position because they have been against these basic acts to begin with. Don't you have a feeling on that?

MR. GRISWOLD: I have no doubt of that. That seems quite evident.

MR. WILLIS: My own view is that the Congress finally came to a very wise solution of a very difficult problem, and I find it difficult to see why Congress should now want to facilitate attacks on that solution.

MR. GRISWOLD: I would hope that the committee would conclude that Congress should not facilitate such attacks.⁶⁸

"Until the Flast case is decided, however it is decided, I don't see how Congress can legislate in a way which will meet the situation which will soon develop,"⁶⁹ declared Solicitor General Griswold. Sharing his sentiments, Chairman Willis declined to request a Subcommittee vote on S. 3. Senator Ervin expressed his belief that "had all members of Subcommittee Number 3 ever been present at one time, we had the votes--and in the full Committee, too."⁷⁰ Instead, the Subcommittee eagerly awaited a decision from the Supreme Court.⁷¹ As Tocqueville once observed, "Scarcely any political question arises in the United States that is not resolved sooner or later, into a judicial question."⁷²

NOTES

¹Horace Mann League v. Board of Public Works, 220 A 2d 51 (1966).

²Supra., Chap. 1, note 39.

³Horace Mann League v. Board of Public Works, 385 U.S. 97 (1966).

⁴"School Aid Issue Urged on Courts--Howe Asks Ruling on Help to Church-related Classes," New York Times, Nov. 19, 1966.

⁵U. S., Congress, Senate, 90th Cong., 1st Sess., January 11, 1967, Congressional Record, CXIII.

⁶Representative Benjamin S. Rosenthal (D-N.Y.) introduced a comparable bill, H.R. 1198, in the House.

⁷U. S., Congress, Senate, 90th Cong., 1st Sess., January 11, 1967, Congressional Record, CXIII.

⁸Ibid.

⁹Flast v. Gardner, No. 66, Civ. 4102.

¹⁰Polier v. Board of Education.

¹¹Flast v. Gardner, 271 F. Supp. 1 (1967).

¹²U. S., Congress, Senate, 90th Cong., 1st Sess., January 11, 1967, Congressional Record, CXIII.

¹³Ibid.

¹⁴Letter from Senator Sam J. Ervin to Representative Emanuel Celler, April 26, 1967.

¹⁵Ibid.

¹⁶Letter from Senator Sam J. Ervin to Assistant Attorney General H. Barefoot Sanders, December 9, 1966.

¹⁷Ibid.

¹⁸Letter from Assistant Attorney General H. Barefoot Sanders to Senator Sam J. Ervin, December 20, 1966.

¹⁹Rufus Edmisten, Associate Counsel, Senate Subcommittee on Constitutional Rights, private interview, March 21, 1969.

²⁰Besides Senator Ervin's unsuccessful effort in 1965 to add a judicial review provision as an amendment to the Elementary and Secondary Education Act, the Senator in 1963 attempted to add a similar provision as an amendment to the Higher Education Facilities Act.

Although the Senate accepted the amendment by a 45-33 roll-call vote, the House-Senate conference dropped the judicial review provision. Senator Ervin urged the Senate to reject the conference report and then to request another conference in order to insist on inclusion of the provision; however, the Senate, by a 54-27 roll-call vote, adopted the conference report on the college aid bill.

21 Senator Sam J. Ervin, Chairman, Subcommittee on Constitutional Rights, private interview, June 10, 1969.

22 Flast v. Gardner, 389 U.S. 895 (1967).

23 U. S., Congress, Senate, 90th Cong., 1st Sess., December 1, 1967, Congressional Record, CXIII.

24 Ibid.

25 House conferees included Democrats Carl D. Perkins (Ky.), Edith Green (Ore.), Roman C. Pucinski (Ill.), Dominick V. Daniels (N.J.), John Brademas (Ind.), James G. O'Hara (Mich.), Hugh L. Carey (N.Y.), Sam M. Gibbons (Fla.), and Carl Albert (Okla.) and Republicans William H. Ayres (Ohio), Albert H. Quie (Minn.), Charles E. Goodell (N.Y.), John M. Ashbrook (Ohio), Alphonzo Bell (Calif.), Marvin L. Esch (Mich.), and William L. Steiger (Wis.).

26 Senate conferees included Democrats Wayne Morse (Ore.), Ralph Yarborough (Tex.), Joseph S. Clark (Pa.), Jennings Randolph (W. Vir.), Robert F. Kennedy (N.Y.), and Harrison A. Williams (N.J.) and Republican Winston L. Prouty (Vt.), Jacob Javits (N.Y.), Peter H. Dominick (Colo.), and George Murphy (Calif.).

27 By refusing to file with the Senate the House-Senate conference report on the vocational education bill, in which Senator Ervin had a vital interest, Senator Morse used a legislative ploy to pressure Senate conferees on the Higher Education Facilities bill to recede on the Ervin judicial review amendment and to agree on a bill. Charles Lee, Legislative Assistant to Senator Wayne Morse, private interview, May 16, 1969.

28 Bill Radcliffe, Counsel for the Minority, House Committee on Education and Labor, private interview, May 22, 1969.

29 Representative Green, the sponsor of the Higher Education Facilities bill, had included a judicial review amendment in the original bill, but it was deleted by the full House Education and Labor Committee

30 Rufus Edmisten, private interview, April 18, 1969.

Bill Gaul, Counsel for the Majority, House Committee on Education and Labor, private interview, May 16, 1969.

Charles Lee, private interview, May 16, 1969.

Senator Ervin, private interview, June 10, 1969.

Ray Millenson, Counsel for the Minority, Senate Committee on Labor and Public Welfare, private interview, May 16, 1969.

Jack Jennings, legislative aid to Representative Roman C. Pucinski, private interview, May 13, 1969.

Bill Radcliffe, private interview, May 22, 1969.
 John Forsythe, Counsel for the Majority, Senate Committee on Labor and Public Welfare, private interview, May 16, 1969.

31 Senator Ervin, private interview, June 10, 1969.

32 U. S., Congress, Senate, 90th Cong., 1st Sess., December 15, 1967, Congressional Record, CXIII, 18951.

33 Personal letter from Senator Sam J. Ervin to Senator Ralph Yarborough, December 14, 1967.

34 Ibid.

35 Ibid.

36 Personal letter from Senator Sam J. Ervin to Senator Wayne Morse, December 14, 1967.

37 Letter from Deputy Attorney General Warren Christopher to Representative Emanuel Celler, (undated).

Senator Ervin, private interview, June 10, 1969.

38 Senator Ervin, private interview, June 10, 1969.

Bill Gaul, private interview, May 16, 1969.

John Forsythe, private interview, May 16, 1969.

Charles Lee, private interview, May 16, 1969.

39 U. S., Congress, Senate, 90th Cong., 1st Sess., December 15, 1967 Congressional Record, CXIII, 18994.

40 Senator Ervin, private interview, June 10, 1969.

41 U. S. Congress, Senate, 90th Cong., 1st Sess., December 15, 1967 Congressional Record, CXIII, 18953.

Rufus Edmisten, private interview, May 9, 1969.

Charles Lee, private interview, May 16, 1969.

Senator Ervin, private interview, June 10, 1969.

42 Representative Sam M. Gibbons, private interview, May 14, 1969.

43 Flast v. Gardner, 271 F. Supp. 1 (1967).

44 U. S., Congress, Senate, 90th Cong., 1st Sess., December 15, 1967 Congressional Record, CXIII, 18950.

45 Ibid., p. 18951.

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid.

50Ibid., p. 18953.

51Ibid.

52Ibid.

53Ibid., p. 18954.

54Rufus Edmisten, private interview, April 18, 1969.

55Jefferson's Manuel, Sec. 555: "And in all cases of conference asked after a vote of disagreement, etc., the conferees of the House asking it are to leave the papers with the conferees of the other..." The House agreeing to the conference acts on the report before the House requesting a conference.

56U. S., Congress, Senate, 90th Cong., 1st Sess., December 15, 1967, Congressional Record, CXIII, 18953.

57Besides Chairman Edwin E. Willis, Subcommittee members included Democrats William M. Tuck (Va.), Robert W. Kastenmeier (Wis.), William L. St. Onge (Conn.), Don Edwards (Calif.), and Herbert Tenzer (N.Y.) and Republicans Richard H. Poff (Va.), Edward Hutchinson (Mich.), and William V. Roth (Del.).

58Flast v. Gardner, 271 F. Supp. 1 (1967).

59Rufus Edmisten, private interview, May 9, 1969.

60U. S., Congress, House, Committee on the Judiciary, Subcommittee No. 3, Hearings on H.R. 1198 and S. 3, 90th Cong., 2nd Sess., 1968, 8.

61Ibid.

62Ibid.

63Ibid., p. 236.

64Ibid.

65Ibid.

66Ibid.

67Ibid., p. 18.

68Ibid., p. 243.

69Ibid., p. 242.

70Rufus Edmisten, private interview, May 9, 1969.

71Flast v. Cohen, 392 U.S. 83 (1968).

72Alexis de Toqueville, as quoted in Jack W. Peltason, Federal Courts in the Political Process, (New York: Random House, 1955), p. 1.

CHAPTER 5

ELAST V. COHEN--

THE SUPREME COURT GRANTS TAXPAYERS STANDING TO SUE TO TEST THE CONSTITUTIONALITY OF ESEA

The administration of the Elementary and Secondary Education Act provisions relating to non-public schools created during the first year both administrative and constitutional issues. For example, could Title I money be spent for programs conducted on parochial school premises? Could Title II library or text books be ordered directly by parochial school principals provided that the list had been approved by public education agencies and that a public school name plate was attached to each book? What constituted a "fair share"¹ of ESEA money for non-public school children? The guidance which federal officials gave state and local educational agencies dealt with appropriate mechanics for maintaining the assumed, but by no means assured, constitutionality of the Act. The provisions of Section 205 (a) (3) explicitly gave to public school officials responsibility for program administration and title to all property for which Title I funds were used.² But the ambiguous statutory language and conflicting viewpoints to be found in the legislative history made it difficult to interpret and develop criteria for judging compliance with the basic mandate of Section 205 (a) (2):

that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements in which such children can participate.³

By the end of the first year, a number of moves were underway to challenge the constitutionality of the ESEA programs as they related to church-affiliated schools. These moves were encouraged by the split 5 to 4 decision of the Maryland Court of Appeals in Horace Mann League v. Board of Public Works⁴ on June 2, 1966, on the constitutionality of state matching funds granted to church-related colleges. The Maryland ruling held that state matching grants, even for non-religious purposes, to Western Maryland, Notre Dame, and St. Joseph Colleges were in violation of the First Amendment as applicable to the states through the Fourteenth Amendment. Aid to a fourth institution of higher education in Maryland, Hood College, was upheld on the grounds that Hood's "stated purposes in relation to religion are not of a fervent, intensive, or passionate nature, but seem to be based largely upon its historical background."⁵ The Maryland case had been initiated by the Horace Mann League in the hope that the size of the organization would induce the Supreme Court to review Horace Mann League if appealed, on the grounds that whereas a single taxpayer might not have a substantial interest in the nature of federal spending, a large group of taxpayers might have such an interest. In that hope they were disappointed, for on November 14, 1966, the Supreme Court refused to review the Maryland decision.⁶ However, that hope had been present in the summer of 1966, and a number of suits challenging the constitutionality of the church-school provisions of ESEA had been prepared by organizations and groups in a number of states, including Ohio,⁷ Pennsylvania,⁸ and New York.⁹

The New York suits, formally brought in early December, 1966, were submitted to both a federal and a state court.¹⁰ The suits were brought by four organizations--American Jewish Congress, United Parents Association, United Federation of Teachers, and American Civil Liberties Union--who charged that state and local officials "...had taken advantage of the ambiguities in the ESEA to discriminate in favor of the religious schools...."¹¹ They charged that the New York City Board of Education had "...followed a 'double standard' in determining the need for special assistance...."¹²

The school board has decided that a parochial school qualifies for ESEA aid if ten per cent of its pupils get federally-funded free lunches; a public school qualifies if forty per cent of its pupils get free lunches.

The school board has decided to assign one remedial or special teacher for every 157 eligible parochial school students...and one for every 230 public school students. In addition, certain remedial programs have been instructed in the parochial schools but not in the public schools. Such services drain off public funds that are urgently needed by the city's schools.¹³

On its face, there is nothing unconstitutional in ESEA. There is no mention in it of parochial schools or church-related institutions. Just as in the Constitution, there is no reference to religion except in the last section, and there the reference is negative and exclusionary. The section provides, "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act, or under any Act amended by this Act, for religious worship or instruction."¹⁴ Throughout, the Act speaks of "private" schools, and theoretically there is nothing to prevent the Commissioner of Education from interpreting the law as limited to private secular schools.¹⁵ Professor Leo Pfeffer has contended:

The constitutionality of the Elementary and Secondary Education Act of 1965 may well depend upon its application. By steadfastly rejecting proposals to add a section permitting judicial review on constitutionality, Congress sought to ward off the threat to a court test. Yet, experience has shown that where the constitutionality of major laws is seriously questioned, sooner or later the question will be passed upon by the Supreme Court.¹⁶

The United Parents Association¹⁷ and the American Jewish Congress on December 1, 1966, filed a suit challenging the constitutionality of the inclusion of parochial school pupils in New York City's \$65 million program for disadvantaged students in the Federal District Court for the Southern District of New York. The plaintiffs¹⁸ filed the complaint

on their own behalf and on behalf of all others similarly situated for a temporary and permanent injunction against the allocation and use of the funds of the United States to finance, in whole or in part, instruction in sectarian schools, and to declare such use violative of the First and Fifth Amendments to the Federal Constitution.¹⁹

In particular, the seven plaintiffs brought the civil action to enjoin the use of federal funds, first, to finance instruction in reading, arithmetic, and other subjects in religious and sectarian schools and, second, for the purchase of textbooks and other instructional materials for use in such schools. They alleged that the defendants, Secretary of Health, Education, and Welfare John W. Gardner and Commissioner of Education Harold Howe II,²⁰ had been and were using federal funds for these purposes in administering Titles I and II of the Elementary and Secondary Education Act of 1965. Properly construed, the plaintiffs alleged, the Act does not authorize such federal expenditures.²¹ If it does, they further contended, the statute must be struck down under the First Amendment, both as a "law respecting an establishment of religion" and as a "law...prohibiting the free exercise thereof..."²²

A Federal District Court may not grant an interlocutory or permanent injunction restraining the enforcement, operation, or execution of any act of Congress contrary to the Constitution unless three judges hear and determine the case.²³ Federal District Judge Marvin E. Frankel²⁴ presided over a preliminary hearing, the purpose of which was to determine the existence of a sufficient basis to call a three-judge court.²⁵ In his decision of April 27, 1967, in Flast v. Gardner,²⁶ Judge Frankel considered Senate hearings on and congressional deliberation of judicial review legislation. "Taking altogether the work of the Senate and its Committee on this subject, we find in it enough suggestion of plausible doubt to add weight to plaintiffs' thesis that they have enough to justify the attentions of a three-judge court."²⁷ Accordingly, Judge Frankel granted the motion to convene a three-judge panel and referred the matter to the Chief Judge of the Second Circuit²⁸ for that purpose.²⁹

The three-judge court convened to hear the Flast case, consisting of Circuit Judge Paul M. Hays and District Judges Frank F. X. McGohey and Frankel,³⁰ received briefs and heard oral argument on May 25, limited to the issue of plaintiffs' standing. In its decision of June 19, the court, with Judge Frankel dissenting, held that plaintiffs had no standing to bring the action, that there was thus no justiciable controversy, and that the court, therefore, lacked jurisdiction of the subject matter. Writing for the 2 to 1 majority, Judge Hays stated that consideration of the standing of a federal taxpayer to sue must begin with the Supreme Court's decision in Frothingham. Plaintiffs contended that the Frothingham decision established a rule of judicial self-restraint rather than a limitation on the jurisdiction of the

federal courts under Article III, Section 2, of the Constitution. They argued that viewed as an expression of the policy of judicial self-restraint, the Frothingham rule had no application to issues regarding the establishment and free exercise clauses of the First Amendment. However, Judge Hays ruled, "Since the Frothingham decision is binding on this court regardless of whether it states a constitutional principle or a rule of policy, we need not consider the much-debated question whether the rule is one of constitutional dimension."³¹ Moreover, he argued, "Plaintiffs' attempt to distinguish Frothingham on the ground that the instant litigation involves rights protected by the First Amendment must be rejected in light of the Supreme Court's decision in Doremus."³² Judge Hays cited Senate passage of S. 3 for the express purpose of creating an exception to the Frothingham rule as further evidence in support of his conclusion.³³

Through his lengthy dissent, Judge Frankel laid the basis upon which the plaintiffs would appeal and upon which the Supreme Court ultimately rendered its decision. "There is no disagreement among us as to the principle that we ought almost invariably to follow rather than anticipate Supreme Court precedents,"³⁴ Judge Frankel asserted. "Unless the Supreme Court has made perfectly clear that one of its earlier cases is about to be overruled, or unless a decision has been eviscerated without benefit of Shepard's formal rites, we are to adhere faithfully to the precedents given us at our time of decision,"³⁵ he added. "Granting the force of these principles, I cannot agree that the course we should follow here is chartered by Frothingham or any other single decision. The Supreme Court has never confronted directly the troublesome question of standing we have in this case."³⁶ declared Judge Frankel. Contending that plaintiffs had standing to maintain

the suit, the Judge stated, "They allege the vividly personal, vital intimate, and grave hurt against which the establishment clause was meant to guard."³⁷ He continued, "Unless they can sue to redress this kind of grievance, the first of the 'preferred freedoms' safeguarded by the First Amendment is substantially unenforceable against federal violations, to which the Amendment was initially, and for a long time exclusively, directed."³⁸ Judge Frankel pointed out the anomaly in allowing a state taxpayer to attack a "law respecting an establishment of religion"³⁹ while denying the same right to a federal taxpayer "opposing intrusion into the forbidden area by the federal government, the power of which remains more fearsome today, as it was when it comprised the exclusive concern of the Framers."⁴⁰ Contrary to the majority, Judge Frankel believed that Frothingham neither required nor justified the conclusion that plaintiffs in Flast. "What Mrs. Frothingham claimed in an action that seems on its face so absurd today was nothing less than a roving commission, based upon her status as taxpayer, to have an adjudication concerning the validity of any appropriation of money by Congress,"⁴¹ he declared. In contrast, in Flast, the Judge asserted, "The taxpayers claim no general right as taxpayers to review federal action. What they invoke is a specific right, defined broadly but certainly by the establishment clause."⁴² He added, "As was not the case for Mrs. Frothingham, the substance of the statute in issue is for the plaintiffs before us the very heart of the matter."⁴³ In conclusion, Judge Frankel contended that hearing plaintiffs' First Amendment claims would not lower the barrier against standard taxpayers' suits erected by Frothingham. "Nobody could infer from such a holding any supposed right to roam

at large as a taxpayer and test impersonally the validity of any and every federal appropri^{ation}. The vital point," he stressed, "remains that the present case, where such an interest is urged, differs on this ground from the generalized power of supervision claimed for the taxpayer in Frothingham."⁴⁴

A party may appeal to the Supreme Court an order of a Federal District Court of three judges granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding.⁴⁵ Accordingly, the plaintiffs submitted to the Supreme Court this question: "Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of federal funds on the ground that it is in violation of the establishment and free exercise provisions of the First Amendment?"⁴⁶ The Supreme Court on October 16 noted probable jurisdiction⁴⁷ and scheduled oral argument on March 12, 1968. In the meantime, appellants, appellees, and amici curiae submitted briefs to the Court.

Both Leo Pfeffer, counsel for the appellants, and Solicitor General Erwin N. Griswold, counsel for the appellees, in their discussions of taxpayers' suits, focused their arguments, first, on the "case" or "controversy" requirement of Article III and, second, on the principle of separation of powers. Leo Pfeffer noted the suggestion in Frothingham that the acceptance of jurisdiction would have been inconsistent with the principle of separation of powers and that to issue an injunction against the expenditure authorized by Congress would be "to assume a position of authority over the governmental acts of another and co-equal department"⁴⁸ of the government. "This suggestion undoubtedly had substantial validity in the situation presented in Frothingham,

but only as a matter of judicial policy," Mr. Pfeffer asserted. "To hold it a matter of constitutional jurisdiction would require overruling of Marbury v. Madison, for whenever the Court exercises its responsibility of judicial review it is assuming 'a position of authority' over the acts of Congress, an authority based on the premise of the superiority of Constitution over statute."⁴⁹ In addition, Leo Pfeffer noted that although Solicitor General Griswold, in his capacity as Dean of Harvard Law School, opposed the broadening of S. 2097 to encompass non-First Amendment taxpayers' suits, he did not oppose enactment of the bill as introduced. Moreover, he pointed out, the Solicitor General's opposition to the broadening of the measure was not based upon constitutional grounds but only on policy.⁵⁰ On the other hand, Solicitor General Griswold argued that a federal taxpayer qua taxpayer lacks standing to challenge specific expenditures of federal revenues, a requirement of the case or controversy limitation of Article III. "Without such a rule, as this case demonstrates," he pointed out, "the federal courts would become in effect a council of revision, empowered to review virtually any act of Congress or the executive upon the request of any of seventy million potential 'plaintiffs.'"⁵¹ The Solicitor General insisted, "Such a conception is far removed from that of the Founders, who regarded each branch of government as being under a co-equal obligation to interpret and apply the Constitution within that branch's sphere of activity."⁵² He summarized his position as follows:

The ultimate power of judicial
only where executive or legislative action is relied
on to sustain or preclude a litigant's assertion of a
specific claim to relief. A judicial and justiciable
question is not presented simply because a taxpayer
disagrees with the uses to which tax money is put
unless he can show that the federal program has some
specific and definable impact on his private rights.⁵³

In addition, both Leo Pfeffer and Solicitor General Griswold relied upon commentaries of the proceedings of the Constitutional Convention of 1787 to bolster their arguments concerning the proper allocation of power among the co-equal branches. Leo Pfeffer pointed out that when James Madison was preparing for the introduction into the first Congress of a resolution for the addition of a bill of rights to the Constitution, he wrote to Thomas Jefferson outlining the arguments which he would present. Jefferson agreed but added "the legal check which it puts into the hands of the judiciary."⁵⁴ Madison accepted the suggestion, Mr. Pfeffer related, and in his speech accompanying his proposal for what was to become the Bill of Rights, he said:⁵⁵

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights.⁵⁶

On the other hand, Solicitor General noted that when Dr. Samuel Johnson, at the Convention, moved to extend the judicial power to cases arising under the United States, as well as under its laws and treaties, Madison "doubted whether it was not going too far to extend jurisdiction of the Court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution in cases of this nature ought not to be given to that department."⁵⁷ The motion passed, "it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature."⁵⁸ The Solicitor General

contended that this exchange underlies the sense of the Convention that each branch of the government has the "right of expounding the Constitution" in connection with the performance of its constitutional functions.⁵⁹ "This plan is necessarily controverted by appellants' position," he declared, "which assumes that a case 'of a judicial nature' must be presented by any governmental action involving a question of 'expounding the Constitution'."⁶⁰ He continued, "The Constitutional Convention itself deliberately rejected several efforts to provide in the Constitution for a Council of Revision, which would have included members of the federal judiciary and would have had the authority to 'examine every act of the national legislature before it shall operate.'⁶¹"⁶²

Senator Ervin submitted a brief as an amicus curiae on behalf of Americans for Public Schools and Baptist General Association of Virginia. He argued that although the enforced separation protects both church and state from the consequences of mutual involvement in each other's affairs, these benefits are only incidental. The primary purpose of the establishment clause, according to Senator Ervin, is to protect the individual in whose name these associations are inevitably made. "The injury done by encroachment upon the principle is, therefore, to every citizen and to all citizens,"⁶³ he declared. "It is a diminution of the citizen's freedom, and appropriate reason for him to seek redress in this Court."⁶⁴ The Senator argued that the nature of the rights protected by the establishment clause is such that the injury caused the citizen by their erosion cannot be comprehended in monetary terms. He suggested that as Judge Frankel pointed out in dissent, the injury is no less real because it "is not merely, or mainly, economic loss."⁶⁵

Thus, said the Senator, as Judge Frankel suggested, an economic analysis of the plaintiff's interest is inappropriate in a case of this kind.⁶⁶ Senator Ervin then presented his strongest argument:

The proper analysis must comprehend the nature of the rights confirmed by the establishment clause and the identity of the party upon whom these rights are conferred. When, through the act on of government, these rights are diminished, the citizen is injured and must be able to seek redress for that injury in court. The plaintiffs in this case, as citizens, contend that the Elementary and Secondary Education Act infringes the rights conferred upon them by the First Amendment. Their status as injured citizens, and nothing else, gives them requisite standing to maintain their suit.⁶⁷

Several interest groups submitted briefs as amici curiae in which they advanced differing organizational policy preferences regarding the church-state controversy, seeking to support their particular position with an advantageous interpretation of constitutional law,⁶⁸ just as they had in their testimony on S. 2097 before the Subcommittee on Constitutional Rights. The AFL-CIO contended that if the Court held that the plaintiffs had standing to maintain the suit, and if they ultimately prevailed on the merits, the solution of the church-connected school problem, which was worked out by Congress only after years of travail and delay, would be invalidated. Furthermore, the AFL-CIO believed that any holding banning all aid to any type of church-connected schools would probably destroy the entire program of federal aid to primary and secondary schools. POAU feared that if the Court ruled that taxpayers had no standing in federal courts to entertain their complaints, POAU-sponsored suits pending in lower federal courts seeking redress for alleged infringements against their constitutional right of freedom from establishment of religion would be dismissed.

The Council of Chief State School Officers claimed that if support from public funds for religious schools was unconstitutional, the Court should render its verdict before proscribed practices became so entrenched that necessary adjustment became needlessly difficult.⁶⁹

During oral argument before the Supreme Court on March 12, the Justices sought from both Leo Pfeffer and Solicitor General Griswold their perspectives regarding the separation of powers with respect to standing to sue. An exchange between Justice Fortas and Leo Pfeffer reveals the gist of appellants' argument:

MR. JUSTICE FORTAS: Mr. Pfeffer, as I read Frothingham, I would say that it is based squarely upon separation of powers. For the courts to entertain a taxpayer's action of this sort would be to invade the legislative prerogatives of the Congress, and that Court certainly talked in terms of the want of jurisdiction, absence of jurisdiction.

MR. PFEFFER: Mr. Justice Fortas, the separation of powers is not--ever since Marbury v. Madison--a jurisdictional barrier. Whenever this Court passes upon the constitutionality of an act of Congress, it is to that extent infringing, if you will, on the concept of separation of powers. But Marbury v. Madison said this is the responsibility of the Court.

MR. JUSTICE FORTAS: But Frothingham says there are certain types of actions, including that of the exercise of the appropriation of power and the determination of how federal moneys will be expended which are exclusively within the province of the legislative branch of the government.

MR. PFEFFER: Mr. Justice Fortas, I don't read Frothingham that way. I read Frothingham, the Court's determination that it will not issue, in effect, an advisory opinion, where it decides first as a court of equity that the plaintiff has no standing; therefore, dismiss the case as to him. There is, therefore, no controversy before it. There was simply an issue, but no litigation. Therefore, in that case there is no controversy.⁷⁰

Similarly, an exchange between Justice Black and Solicitor General Griswold reveals the thrust of appellees' contention:

MR. JUSTICE BLACA: Aren't you making the same arguments as made in Marbury v. Madison that the basis of your complaint is insufficient jurisdiction of the Court?

MR. GRISWOLD: No, Mr. Justice, I think I am not, because here the absence of a concrete case is what keeps this from being a suit to use Madison's phrase "of a judiciary nature." It is, of course, proper for this court to consider and pass upon the constitutionality of an act of Congress when that issue is presented to it in an actual controversy involving specific facts. I suggest that in this case what is sought is a simply general abstract declaration and that Frothingham v. Mellon is a great exemplar of the application of the doctrine of separation of power that this Court will not enter into such an undertaking.⁷¹

Solicitor General Griswold summarized his argument as follows:

Congress and the President are as much sworn to uphold the Constitution as are the court or government lawyers. I do not for a moment suggest that the action of Congress or of the President, though they were aware of their constitutional duties, is binding on this Court. This Court will, of course, not shrink from its judicial duty when a truly concrete case is presented by someone who is hurt in one way or another by the application such a case is presented, proper deference to the coordinate branches of government, proper regard for the great principle of separation of powers, requires, I submit, that the Court withhold its hand.⁷²

In a rare appearance for a Senator before the Supreme Court, Senator Ervin advanced the argument which he believed was the "clincher"⁷³ in the ultimate victory of the appellants. Said the Senator:

Under the First Amendment, every American has a constitutional right not to be taxed or to have his tax money expended for the establishment of religion in violation of the establishment clause. This is not some remote, indefinite right, but it is a direct interest. It is something in which he has a personal stake, just as the plaintiff in Baker v. Carr had a personal stake in not having his vote diluted.⁷⁴

The Supreme Court on June 12 delivered its opinion in Flast v. Coher⁷⁵--an adjudication for which Congress had waited throughout the 1960's--ruling in an 8 to 1 decision that appellants did have standing as federal taxpayers to maintain the action and that the judgment of the lower court must be reversed. Writing for the majority, Chief Justice Warren reasoned, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."⁷⁶ Citing Baker v. Carr,⁷⁷ the Chief Justice declared that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."⁷⁸ "In other words," he said, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."⁷⁹ Therefore, the Court found no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs. However, the Court still had not determined "the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that imparts the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer qua taxpayer consistent with the constitutional limitations of Article III."⁸⁰ Chief Justice Warren declared that in ruling on standing, "it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the

claim sought to be adjudicated."⁸¹ Such inquiries into the nexus which the litigant asserts and the claim which he presents, the Chief Justice explained, are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus, the point of reference in Flast, he pointed out, is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program.

"Whether such individuals have standing to maintain that form of action," the Chief Justice reasoned, "turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements."⁸² The Court ruled that the nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional powers under the taxing and spending clause of Article I, Section 8,⁸³ of the Constitution, Chief Justice Warren explained, as it will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. Second, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the Chief Justice explained, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Article III, Section 8. The Court held that the taxpayer-appellants

in Flast satisfied both nexuses to support their claim of standing. First, they challenged an exercise by Congress of its power under Article I, Section 8, to spend for the general welfare, the challenged program involving a substantial expenditure of federal tax funds. Second, they alleged that the challenged expenditures violate the establishment and free exercise clauses of the First Amendment. In contrast, the taxpayer in Frothingham, Chief Justice Warren pointed out, attacked a federal spending program and, therefore, established the first nexus required. However, she lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in Frothingham alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Article I, Section 8, and that Congress had thereby invaded the legislative province reserved to the states by the Tenth Amendment. Consequently, the result in Frothingham is consistent with the Flast test of taxpayer standing.⁸⁴ In conclusion, the Court held 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."⁸⁵ Accordingly, the Court ruled that plaintiffs' complaint "contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits."⁸⁶

Justice Douglas, concurring, joined in the Court's opinion but suggested that the tests laid down by the Court were not durable ones and that the court should be as liberal in allowing taxpayers standing to object to violations of the establishment clause of the First Amendment as it has been in granting standing of people to complain of any other invasion of their constitutional rights. Justice Stewart, concurring, joined in the Court's judgment but expressed his understanding that the Court was holding only that a federal taxpayer has standing to assert that a specific expenditure of federal funds violates the establishment clause. Justice Fortas, concurring, stated that he would confine the Court's ruling to the proposition that a taxpayer may maintain a suit to challenge the validity of a federal expenditure on the ground that the expenditure violates the establishment clause.⁸⁷

Justice Harlan, in a lengthy dissent, thought the federal courts unwise to accord standing to represent the public interest to individual litigants who, though suing as taxpayers, were challenging an expenditure rather than a tax. Justice Harlan protested, "Where no such tax is involved, a taxpayer's complaint can consist only of an allegation that public funds have been, or shortly will be, expended for purposes inconsistent with the Constitution."⁸⁸ He continued, "The interests he represents, and the rights he espouses, are, as they are in all public actions, those held in common by all citizens."⁸⁹ Public actions, Justice Harlan asserted, involve important hazards for the continued effectiveness of the federal judiciary. He declared, "Although I believe such actions to be within the jurisdiction conferred upon the federal courts by Article III of the Constitution, there surely can be little doubt that they strain the judicial function

and press to the limit judicial authority."⁹⁰ Indeed, the Justice contended that unrestricted public actions might well alter the allocation of authority among the three branches of the federal government and would go far toward the final transformation of the Court into the Council of Revision which was rejected by the Constitutional Convention.⁹¹ He summarized his position by restating his philosophy of judicial restraint:

I appreciate that this Court does not ordinarily await the mandate of other branches of the government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, make such judicial forbearance the part of wisdom.⁹²

In the judgment of Senator Ervin, the Supreme Court, through its decision in Flast v. Cohen, adequately lifted the barrier of "standing" which had long prevented taxpayers from suing in the federal courts to enjoin the administration of acts of Congress "respecting an establishment of religion." In fact, he has noted that senators once opposed to judicial review legislation have in the wake of Flast wished the procedural safeguards which S. 2097 and S. 3 would have insured existed; however, the Senator, at present, does not intend to reintroduce a judicial review bill. Rather, he considers his efforts a success in that hearings on S. 2097 served to focus attention on the anomalous "standing" situation and provided a reference source of scholarly opinion for both the Federal District Court and the Supreme Court in their consideration of the Flast case.⁹³

The impact of the Court's decision in Flast v. Cohen on cases pending in lower federal courts throughout the country was decisive. In Ohio,⁹⁴ plaintiffs had challenged Title II of the Elementary and Secondary Education Act, but the Federal defendants' motion to dismiss the suit on the ground that the plaintiffs had no standing to sue as taxpayers. However, the Sixth Circuit Court of Appeals, on the authority of Flast, reversed the District Court ruling and remanded the case. In Connecticut,⁹⁵ plaintiffs, on the authority of Flast, challenged the use of federal funds under the Higher Education Facilities Act to finance construction in sectarian educational institutions. Their request that a three-judge court be convened was granted. In the District of Columbia,⁹⁶ plaintiffs had challenged the issuance by the Post Office Department of a Christmas stamp showing part of a painting by the fifteenth century painter Hans Memling depicting the Madonna with Jesus on her lap, but the Federal District Court had denied an injunction on the ground that the plaintiffs lacked standing. However, the Court of Appeals for the District of Columbia, on the basis of Flast, reversed the District Court ruling and remanded the case for a hearing on the merits. In Maryland,⁹⁷ plaintiffs, on the authority of Flast, challenged the federal statute granting exemption from taxes on unrelated business income to churches. Their request that a three-judge court be convened was granted. And in Flast itself a trial on the merits will now proceed in the Federal District Court for the Southern District of New York.⁹⁸

NOTES

- 1Public Law 89-10, 89th Cong., 1st Sess. (1965).
- 2Stephen K. Bailey and Edith K. Mosher, ESEA: The Office of Education Administers a Law, (Syracuse, N.Y.: Syracuse University Press, 1968), p. 200.
- 3Public Law 89-10, 89th Cong., 1st Sess. (1965).
- 4Horace Mann League v. Board of Public Works, 220 A 2d 51 (1966).
- 5Ibid.
- 6Horace Mann League v. Board of Public Works, 385 U.S. 97 (1966).
- 7Protestants and Other Americans United for Separation of Church and State v. United States.
- 8Smith v. School District of Philadelphia.
- 9Bailey and Mosher, pp. 202-203.
- 10Polier v. Board of Education.
- 11Civil Liberties in New York, XV, January, 1967, 1-2.
- 12Ibid.
- 13Ibid.
- 14Public Law 89-10, 89th Cong., 1st Sess. (1965).
- 15Leo Pfeffer, Church, State, and Freedom, (Boston: Beacon Press, 1967), p. 603.
- 16Ibid., p. 604.
- 17Florence Flast is the immediate past president of the United Parents Association of New York City. Under her leadership the UPA filed suit to test the constitutionality of ESEA. Church and State, XXII, March 1969, 13.
- 18Plaintiffs included Florence Flast, Albert Shanker, Helen D. Henkin, Frank Abrams, C. Irving Dwork, Florine Levin, and Helen L. Butenwieser.
- 19Flast v. Gardner, 66 Civ. 4102, Complaint of the Plaintiffs, p. 5a.
- 20The Secretary of Health, Education, and Welfare, under whose direction the Commissioner of Education acts, must approve under ESEA grants to the states to aid private school children.

21Flast v. Gardner, 267 F. Supp. 351 (1967).

22Ibid.

2328 U.S.C. 2282.

24The Clerk of the Federal District Court assigns cases to judges in rotation. Conversation with Judge George L. Hart, Federal District Court for the District of Columbia, May 13, 1969

25Federal District Courts of three judges consist of one circuit judge and two district judges in all circuits except the District of Columbia Circuit, where two circuit judges and one district judge sit. Ibid.

26Flast v. Gardner, supra.

27Ibid.

28J. Edward Lumbard is the Chief Circuit Judge of the Second Judicial Circuit.

29Flast v. Gardner, supra.

30The Clerk of the Federal District Court and the Clerk of the Court of Appeals assign cases to judges in rotation, including in the three-judge court that judge who presided over the preliminary hearing. Conversation with Judge Hart.

31Flast v. Gardner, 271 F. Supp. 1 (1967).

32Ibid.

33Ibid.

34Ibid.

35Ibid.

36Ibid.

37Ibid.

38Ibid.

39U. S. Constitution, Amendment I.

40Flast v. Gardner, supra.

41Ibid.

42Ibid.

43Ibid.

44Ibid.

4528 U.S.C. 1253.

46Flast v. Gardner, supra., Jurisdictional Statement, p. 3

47Flast v. Gardner, 389 U.S. 895 (1967).

48Frothingham v. Mellon, 262 U.S. 447 (1923).

49Flast v. Gardner, supra., Brief of Leo Pfeffer for Flast, et. al., appellants.

50Ibid.

51Flast v. Gardner, supra., Brief of Solicitor General Erwin N. Griswold for Gardner, et al., appellees.

52Ibid.

53Ibid.

54Documentary History of the Constitution, V, 161, as quoted in Flast v. Gardner, supra., Brief of Leo Pfeffer.

55Flast v. Gardner, supra., Brief of Leo Pfeffer.

56Annals of Congress, I, 1st Cong., 1st Sess., 439, as quoted in Ibid.

57Max Farrand, The Records of the Federal Convention of 1787, II, 430, as quoted in Flast v. Gardner, supra., Brief of the Solicitor General.

58Ibid.

59Flast v. Gardner, supra., Brief of the Solicitor General.

60Ibid.

61Farrand, I, 21, as quoted in Ibid.

62Flast v. Gardner, supra., Brief of the Solicitor General.

63Flast v. Gardner, supra., Brief of Senator Sam J. Ervin for Americans for Public Schools and Baptist General Association of Virginia, amici curiae.

64Ibid.

65Flast v. Gardner, 271 F. Supp. 1 (1967).

66Flast v. Gardner, supra., Brief of Senator Ervin.

67Ibid.

68Amicus briefs in support of the right to sue were filed by the National Council of Churches; a group of Jewish organizations, including the American Jewish Committee and the American Jewish Congress; the American Association of School Administrators and other school groups; the United Americans for Public Schools; and Protestants and Other Americans United for the Separation of Church and State. Amicus briefs supporting the government's point of view were filed by the AFL-CIO; a group of Jewish organizations, including the National Jewish Commission on Law and Public Affairs and the Rabbinical Alliance of America; and a group of parents and guardians of children who were attending religious schools and receiving help under the statute.

69Flast v. Gardner, supra., Brief of AFL-CIO, p. 3.

Ibid., Brief of Protestants and Other Americans United for the Separation of Church and State, pp. 1-2.

Ibid., Brief of the Council of Chief State School Officers, p. 26.

70Flast v. Gardner, supra., Transcript of proceedings in the Supreme Court of the United States, (Hoover Reporting Co.), pp. 12-15.

71Ibid., pp. 61-62.

72Ibid., p. 67.

73Senator Ervin, private interview, June 10, 1969.

74Flast v. Gardner, supra., Transcript of proceedings, p. 31.

75Flast v. Cohen, 392 U.S. 83 (1968).

76Ibid.

77Baker v. Carr, 369 U.S. 186 (1962).

78Ibid.

79Flast v. Gardner, supra.

80Ibid.

81Ibid.

82Ibid.

83rd"The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States...."

84Flast v. Gardner, supra.

85Ibid.

86Ibid.

87Ibid.

88Ibid.

89Ibid.

90Ibid.

91Ibid.

92Ibid.

93Senator Ervin, private interview, June 10, 1969.

94Protestants and Other Americans United for Separation of Church and State v. United States.

95Tilton v. Cohen.

96Protestants and Other Americans United for Separation of Church and State v. O'Brien.

97Seversmith v. Machiz.

98"Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State," VIII, Commission on Law and Social Action, American Jewish Congress, January 15, 1969.

CONCLUSION

A central concern of both proponents and opponents of taxpayers' standing to sue to test the constitutionality of "laws respecting an establishment of religion" was the allocation of power among the three branches of the federal government. Just as their opinions regarding the advisability of taxpayer suits differed, their assessments concerning the impact of Flast v. Cohen on the separation of powers diverged. While, on the one hand, Senator Ervin believed the Supreme Court decision a restoration of judicial power which the Court had possessed prior to Frothingham, I, on the other hand, and, I suspect, Solicitor General Griswold, must "respectfully dissent." I assess Flast v. Cohen as an extension of judicial authority and an erosion of legislative domain--rightly so, in my opinion; wrongly so, in the Solicitor General's opinion. At any rate, even today, as in Flast v. Cohen, men become embroiled in a debate older than the Constitution itself--the sphere of judicial power which the case or controversy requirement outlines. Indeed, this unresolved debate of the Constitutional Convention helps to insure the living Constitution of today.

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Lee, Charles, Legislative Assistant to Senator Wayne Morse, May 16, 1969.

Millenson, Ray, Counsel for the Minority, Senate Committee on Labor and Public Welfare, May 16, 1969.

Radcliffe, Bill, Counsel for the Minority, House Committee on Education and Labor, May 22, 1969.

Salisbury, Franklin C., General Counsel, Americans United for the Separation of Church and State, April 15, 1969.