Taxpayers Lack Standing to Challenge Congressionally Appropriated Funds Spent by the President: *Hein v. Freedom From Religion Found.*, 127 S.Ct. 2553 (2007).

By: Mariana Gaxiola-Viss*

I. Introduction

Over time the Supreme Court of the United States has established and upheld a "general prohibition against taxpayer standing."[1] It is a principle rooted in tradition, and the power granted the judicial branch by the United States Constitution makes it co-equal with the legislative and executive branches of government.[2] The reasoning is that

* New Developments Editor, Rutgers Journal of Law & Religion; J.D. Candidate May 2009, Rutgers School of Law-Camden.

[1] *Hein v. Freedom From Religion Found.*, 127 S.Ct. 2553 (2007) (plurality opinion).

[2] The Court, according to the Constitution, does not have unlimited authority:

> "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;--

if taxpayers, and therefore the general population, were allowed to judicially challenge every expenditure made by the executive and legislative branches of government, then the judicial branch would in fact become an overseer of the executive and legislative branches. This clearly goes against the intent and wording of the Constitution. The Court however, has decided to make an exception to its general rule in challenges involving the Establishment Clause. In the most recent decision on the subject the Court has held on to the principle of prohibiting taxpayer standing in *Hein v. Freedom From Religion Foundation.* This article will contrast the different opinions put forth by the plurality, concurring, and dissenting opinions. It will also explain why, particularly Justice Scalia, had good reason to separate.

> between a State and Citizens of another State;--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."

U.S. CONST. art. III, § 2 cl. 1.

II. Statement of the Case & Procedural History

The general issue before the Court in *Hein*[3] was whether or not taxpayers had standing to challenge the use of federal funds appropriated by Congress to the executive branch. Specifically in *Hein* these funds were used to fund the President's "faith-based initiatives," which were created by executive order.[4] In a 5-4 decision the Court held that under constitutional law and the Court's own precedent taxpayers do not have standing to sue the federal government. Therefore, taxpayers are unable to seek the enforcement of a rigid separation of church and state under the Establishment Clause.

The plaintiffs in this case were the Freedom From Religion Foundation ("FFRF"). They sued the directors of the federal offices who implemented the President's faith-

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[3] *Id.*

[4] Exec. Order No. 13,199, 3 C.F.R. 8499 (2001 Comp.). The introduction states the Order's authority and purpose:

> By the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, and in order to help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations, and to strengthen their capacity to better meet social need in America's communities, it is hereby ordered . . . .

Id.

based initiatives. They claimed that conferences organized to encourage the fulfillment of the executive order "were designed to promote, and had the effect of promoting, religious community groups over secular ones."[5] Consequentially, they were in violation of the Establishment Clause. FFRF claimed they had standing to challenge these faith-based initiatives as federal taxpayers.[6] In addition, FFRF asked the Court to expand its holding in *Flast v. Cohen*.[7] In *Flast* the Court "carved out a narrow exception [to the] general prohibition against taxpayer standing."[8] This was for challenges brought under the Establishment Clause challenging "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation."[9] FFRF asked the Court in *Hein* to go a step further and grant standing to

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[5] *Hein*, 127 S.Ct. at 2561.

[6] *Id.*

[7] 392 U.S. 83 (1968). The challenge in *Flast* was based on the Elementary and Secondary Education Act of 1965, 79 Stat. 27, which was implemented at a time when many schools were created in conjunction with churches and granted funding for, among other things, "library resources, textbooks, and other instructional materials." *Hein*, 127 S.Ct. at 2565.

[8] *Hein*, 127 S.Ct. at 2567.

[9] *Id.* at 2565.

challenge expenditures made by the executive branch with the discretionary funds granted to it by Congress. The federal district court ruled against FFRF dismissing their claims for lack of standing.[10] However, the United States Court of Appeals for the Seventh Circuit in *Freedom From Religion Found., Inc. v. Chao*[11] reversed and held that under *Flast*, the taxpayers had standing to challenge the faith-based initiative conferences. This was because they were ultimately funded by congressional appropriation. In response, the majority found no relevant reason to make the distinction between the two branches of government.[12] It stated that "[t]he line proposed by the government would be artificial because there is so much that executive officials could do to promote religion in ways forbidden by the Establishment Clause . . . without making outright grants to religious organizations."[13]

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[10] *Freedom From Religion Found., Inc. v. Towey*, No. 04-C-381-S (WD Wis. 2004).

[11] 433 F.3d 989 (7th Cir. 2006).

[12] *Id.* at 996 (stating that "the fact that [the initiative] was funded out of general rather than earmarked appropriations – that it was an executive rather than a congressional program - does not deprive taxpayers of standing the challenge it.")*Id.*

[13] *Freedom From Religion Found., Inc.*, 433 F.3d at 995.

III. The Courts Analysis

In reaching its decision the plurality began by noting that in the past, the Court has "long established that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government."[14] The Court's stated reasoning for this principle was that "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm."[15] The Court goes on to outline the narrow exception created in *Flast*,[16] and proceeds to outline the challenge in *Hein* regarding the President's faith-based initiatives created by the executive office. The Court's plurality decision

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[14] *Hein*, 127 S.Ct at 2559.

[15] *Id.*

[16] *Flast* created a two-part test to determine taxpayer standing to challenge an unconstitutional federal expenditure:

> "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . . . [t]hus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution . . . .[s]econdly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged."

Flast, 392 U.S. at 102-103.

delivered by Justice Alito,[17] in deciding to not extend *Flast* to cover expenditures by the executive branch, gives two main reasons for its decision. First, the expansion of *Flast* would "raise serious separation of powers concerns."[18] This is because the judicial branch would have to oversee "at the behest of any federal taxpayer, the speeches, statements, and myriad [of] daily activities of the President, his staff, and other executive branch officials."[19] Second, the Court held that *Hein* raised a different issue than *Flast* because its expenditures were provided by Congress to the executive branch to "fund its day-to-day activities." Therefore they "resulted from executive discretion, not congressional action."[20] As a result, the challenge in *Hein* was missing the critical link to taxpayer standing granted under *Flast*. Consequently, the Court refused to apply *Flast* to the facts in *Hein.* Its reasoning for this was that the Seventh Circuit did not apply *Flast*, but expanded it. Finally, the Court held that

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[17] Justices Roberts and Kennedy joined Justice Alito's opinion; however Justice Kennedy also filed a concurring opinion.

[18] *Hein*, 127 S.Ct at 2569.

[19] *Id.* at 2570.

[20] *Hein*, 127 S.Ct at 2566.

in accordance with *stare decisis, Flast* should not be "expanded to the limit of its logic"[21] but left as is.

In a concurring opinion,[22] Justice Scalia joined by Justice Thomas, raised significant critique of the plurality's reasoning, and expressed disdain for the proposed reasoning of both the plurality and FFRF in *Hein*. Justice Scalia stated that in applying precedent[23] to *Hein* the plurality made "utterly meaningless distinctions"[24] between *Hein* and *Flast* that had no bearing on the "Article III criteria of injury in fact, traceability, and redressability."[25] The defacing continued as Justice Scalia accused the plurality of deciding *Hein* based on a "show of hands"[26] as opposed to established law. Justice Scalia's opinion declared that *Flast* should be overruled because it is "wholly irreconcilable with the Article III restrictions

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[21] *Id.* at 2572.

[22] Justice Kennedy also wrote a concurring opinion supporting *Flast* and emphasizing the fact that regardless of whether or not taxpayers are granted standing, each branch of the government is bound to obey the Constitution in their actions.

[23] As previously stated, the precedent the Court applied to *Hein* was not *Flast*.

[24] *Id.* at 2573.

[25] *Id.* at 2580.

[26] *Id.*

on federal court jurisdiction."[27] Or in the alternative, it should be applied to all constitutional taxpayer challenges to federal spending. Justice Scalia goes on to argue that there are two types of taxpayer injuries: "Wallet Injury" and "Psychic Injury."[28] Wallet Injury encompasses a taxpayer's claim that their "tax liability is higher than it would be, but for the allegedly unlawful government action."[29] Justice Scalia finds that because it is impossible to determine if the taxpayer's bill would have been different but for the challenged federal action, Wallet Injury arguments are very weak. Psychic Injury, the type Scalia finds is presented in *Hein* and allowed in *Flast*, is unrelated to tax liability. It "consists of the taxpayer's mental displeasure that money extracted from him is being spent in an unlawful manner."[30] Justice Scalia states that the weakness of Psychic Injury claims, though traceable, is rooted in the fact that to be granted

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[27] *Id.* at 2574. It should also be noted that in *Flast*, the Court granted special treatment to the establishment clause stating that it is "one of the specific evils" feared by the Framers. In doing so the Court relied on Madison's Memorial and Remonstrance Against Religious Assessments. *Flast*, 392 U.S. at 103.

[28] *Hein*, 127 S.Ct. at 2574.

[29] *Id.*

[30] *Id.*

standing for a mental displeasure injury is irreconcilable with the "concrete and particularized injury"[31]constitutionally required under Article III. Justice Scalia also criticizes the majority's failure to present any legitimate arguments as to why the differences between *Flast* and *Hein* are material, besides their argument of honoring *stare decisis*. In rebuttal of the plurality's *stare decisis* argument Justice Scalia reasons that the principle should only be invoked to support "reasoned decision-making," and therefore not the Court's decision in *Flast*.

The dissent written by Justice Souter was joined by Justices Stevens, Ginsburg, and Breyer. Like Justice Scalia, they argued that the executive-congressional distinction made by the plurality was unsupported by "logic or precedent."[32] However, unlike Justice Scalia they do not state that *Flast* should be overruled. On the contrary, they hold that it should have been applied to *Hein*. This is because the *Hein* injury - taxpayer money spent in violation of the Establishment Clause - was the same as the injury in *Flast*. Additionally, they argue that separation of powers

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[31] *Id.*

[32] *Hein*, 127 S.Ct. at 2584.

does not require the Court to make a distinction between congressional or executive expenditures because they are co-equal branches. Finally, they point to past Supreme Court decisions which applied *Flast* and eliminated this distinction, thus granting taxpayers standing in non-congressional apportionment Establishment Clause challenges.[33]

IV. Conclusion

Each of the three branches of government has an individual mandate to uphold the Constitution, and therefore the Establishment Clause, in everything they do. However, the ability to bring suit under the judicial branch is an additional check in place to allow the questioning of governmental decisions that may be in conflict with the Constitution. It follows that, removing taxpayer's ability to challenge executive branch discretionary expenditures is significant. However, what is most troubling about *Hein*, aside from the windfall it gives the President's faith-based initiatives, is the Court's inability to provide a convincing reason for its decision. The plurality simply clings to the principles of *stare*

[33] *See Bowen v. Kendrick*, 487 U.S. 589 (1988).

decisis, and separation of powers. This is done instead of either overruling their arguably faulty decision in *Flast*, or at least applying the principles in *Flast* with consistency.