SUPREME COURT OF THE UNITED STATES

No. 96–1590

FEDERAL ELECTION COMMISSION, PETITIONER *v.* JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 1, 1998]

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The provision of law at issue in this case is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party. Despite its liberality, the Administrative Procedure Act does not allow such suits, since enforcement action is traditionally deemed "committed to agency discretion by law." 5 U. S. C. §701(a)(2); *Heckler* v. *Chaney*, 470 U. S. 821, 827–835 (1985). If provisions such as the present one were commonplace, the role of the Executive Branch in our system of separated and equilibrated powers would be greatly reduced, and that of the Judiciary greatly expanded.

Because this provision is so extraordinary, we should be particularly careful not to expand it beyond its fair meaning. In my view the Court's opinion does that. Indeed, it expands the meaning beyond what the Constitution permits.

I

It is clear that the Federal Election Campaign Act does

not intend that *all* persons filing complaints with the Commission have the right to seek judicial review of the rejection of their complaints. This is evident from the fact that the Act permits a complaint to be filed by "[a]ny *person* who believes a violation of this Act . . . has occurred," 2 U. S. C. §437g(a)(1) (emphasis added), but accords a right to judicial relief only to "[a]ny *party aggrieved by* an order of the Commission dismissing a complaint filed by such party," 2 U. S. C. §437g(a)(8)(A) (emphasis added). The interpretation that the Court gives the latter provision deprives it of almost all its limiting force. *Any voter* can sue to compel the agency to require registration of an entity as a political committee, even though the "aggrievement" consists of nothing more than the deprivation of access to information whose public availability would have been one of the consequences of registration.

This seems to me too much of a stretch. It should be borne in mind that the agency action complained of here is not the refusal to make available information in its possession that the Act requires to be disclosed. A person demanding provision of information that the law requires the agency to furnish— one demanding compliance with the Freedom of Information Act or the Advisory Committee Act, for example— can reasonably be described as being "aggrieved" by the agency's refusal to provide it. What the respondents complain of in this suit, however, is not the refusal to provide information, but the refusal (for an allegedly improper reason) to commence an agency enforcement action against a third person. That refusal *itself* plainly does not render respondents "aggrieved" within the meaning of the Act, for in that case there would have been no reason for the Act to differentiate between "person" in subsection (a)(1) and "party aggrieved" in subsection (a)(8). Respondents claim that each of them is elevated to the special status of a "party aggrieved" by the fact that the requested enforcement action (if it was successful)

would have had the effect, among others, of placing certain information in the agency's possession, where respondents, along with everyone else in the world, would have had access to it. It seems to me most unlikely that the failure to produce that effect– *both* a secondary consequence of what respondents immediately seek, *and* a consequence that affects respondents no more and with no greater particularity than it affects virtually the entire population– would have been meant to set apart each respondent as a "party aggrieved" (as opposed to just a rejected complainant) within the meaning of the statute.

This conclusion is strengthened by the fact that this citizen-suit provision was enacted two years after this Court's decision in *United States* v. *Richardson*, 418 U. S. 166 (1974), which, as I shall discuss at greater length below, gave Congress every reason to believe that a voter's interest in information helpful to his exercise of the franchise was *constitutionally inadequate* to confer standing. *Richardson* had said that a plaintiff's complaint that the Government was unlawfully depriving him of information he needed to "properly fulfill his obligations as a member of the electorate in voting" was "surely the kind of a generalized grievance" that does not state an Article III case or controversy. *Id.*, at 176.

And finally, a narrower reading of "party aggrieved" is supported by the doctrine of constitutional doubt, which counsels us to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions. See *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As I proceed to discuss, it is my view that the Court's entertainment of the present suit violates Article III. Even if one disagrees with that judgment, however, it is clear from *Richardson* that the question is a close one, so that the statute ought not be inter-

preted to present it.

II

In *Richardson*, we dismissed for lack of standing a suit whose "aggrievement" was precisely the "aggrievement" respondents assert here: the Government's unlawful refusal to place information within the public domain. The only difference, in fact, is that the aggrievement there was more direct, since the Government already had the information within its possession, whereas here the respondents seek enforcement action that will bring information within the Government's possession and *then* require the information to be made public. The plaintiff in *Richardson* challenged the Government's failure to disclose the expenditures of the Central Intelligence Agency (CIA), in alleged violation of the constitutional requirement, Art. I, §9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a claim was a nonjusticiable "generalized grievance" because "the impact on [plaintiff] is plainly undifferentiated and common to all members of the public." 418 U. S., at 176–177 (internal quotation marks and citations omitted).

It was alleged in *Richardson* that the Government had denied a right conferred by the Constitution, whereas respondents here assert a right conferred by statute— but of course "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 576 (1992). The Court today distinguishes *Richardson* on a different basis— a basis that reduces it from a landmark constitutional holding to a curio. According to the Court, "*Richardson* focused upon taxpayer standing, ... not voter standing." *Ante*, at 10. In addition to being a silly distinction, given the weighty governmental purpose underlying the "generalized grievance" prohibition— viz., to avoid "something in

the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts," 418 U. S., at 179– this is also a distinction that the Court in *Richardson* went out of its way explicitly to eliminate. It is true enough that the narrow question presented in *Richardson* was "[w]hether a federal taxpayer has standing,'" *id.*, at 167, n. 1. But the *Richardson* Court did not hold only, as the Court today suggests, that the plaintiff failed to qualify for the exception to the rule of no taxpayer standing established by the "logical nexus" test of *Flast* v. *Cohen*, 392 U. S. 83 (1968).* The plaintiff's complaint in *Richardson* had also alleged that he was "'a member of the electorate,'" *Richardson*, 418 U. S., at 167, n. 1, and he asserted injury in that capacity as well. The *Richardson* opinion treated that as fairly included within the taxpayer-standing question, or at least as plainly indistinguishable from it:

> "The respondent's claim is that without detailed information on CIA expenditures– and hence its activities– he cannot intelligently follow the actions of Congress or the Executive, *nor can he properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.*
>
> "*This is surely the kind of a generalized grievance described in both Frothingham* and *Flast* since the impact on him is plainly undifferentiated and common to all members of the public." *Id.*, at 176–177 (citations and internal quotation omitted) (emphasis added).

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* That holding was inescapable since, as the Court made clear in another case handed down the same day, "the *Flast* nexus test is not applicable where the taxing and spending power is not challenged" (as in *Richardson* it was not). *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 225, n. 15 (1974).

If *Richardson* left voter-standing unaffected, one must marvel at the unaccustomed ineptitude of the American Civil Liberties Union Foundation, which litigated *Richardson*, in not immediately refiling with an explicit voter-standing allegation. Fairly read, and applying a fair understanding of its important purposes, *Richardson* is indistinguishable from the present case.

The Court's opinion asserts that our language disapproving generalized grievances "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature." *Ante*, at 12. "Often," the Court says, "the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Ibid*. If that is so– if concrete generalized grievances (like concrete particularized grievances) are OK, and abstract generalized grievances (like abstract particularized grievances) are bad– one must wonder why we ever *developed* the superfluous distinction between generalized and particularized grievances at all. But of course the Court is wrong to think that generalized grievances have only concerned us when they are abstract. One need go no further than *Richardson* to prove that– unless the Court believes that deprivation of information is an abstract injury, in which event this case could be disposed of on that much broader ground.

What is noticeably lacking in the Court's discussion of our generalized-grievance jurisprudence is all reference to two words that have figured in it prominently: "particularized" and "undifferentiated." See *Richardson, supra,* at 177; *Lujan*, 504 U. S., at 560, 560, n. 1. "Particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Id.*, at 560, n. 1. If the effect is "undifferentiated and common to all members of the public," *Richardson, supra,* at 177 (internal quotation marks

and citations omitted), the plaintiff has a "generalized grievance" that must be pursued by political rather than judicial means. These terms explain why it is a gross oversimplification to reduce the concept of a generalized grievance to nothing more than "the fact that [the grievance] is widely shared," *ante*, at 13, thereby enabling the concept to be dismissed as a standing principle by such examples as "large numbers of individuals suffer[ing] the same common-law injury (say, a widespread mass tort), or . . . large numbers of voters suffer[ing] interference with voting rights conferred by law," *ibid*. The exemplified injuries are widely shared, to be sure, but each individual suffers a particularized and differentiated harm. One tort victim suffers a burnt leg, another a burnt arm– or even if both suffer burnt arms they are *different* arms. One voter suffers the deprivation of *his* franchise, another the deprivation of *hers*. With the generalized grievance, on the other hand, the injury or deprivation is not only widely shared but it is *undifferentiated*. The harm caused to Mr. Richardson by the alleged disregard of the Statement-of-Accounts Clause was precisely the same as the harm caused to everyone else: unavailability of a description of CIA expenditures. Just as the (more indirect) harm caused to Mr. Akins by the allegedly unlawful failure to enforce FECA is precisely the same as the harm caused to everyone else: unavailability of a description of AIPAC's activities.

The Constitution's line of demarcation between the Executive power and the judicial power presupposes a common understanding of the type of interest needed to sustain a "case or controversy" against the Executive in the courts. A system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts, rather than of the President, are given the primary responsibility to "take Care that the Laws be faithfully executed," Art. II, §3. We do not have

such a system because the common understanding of the interest necessary to sustain suit has included the requirement, affirmed in *Richardson*, that the complained-of injury be particularized and differentiated, rather than common to all the electorate. When the Executive can be directed by the courts, at the instance of any voter, to remedy a deprivation which affects the entire electorate in precisely the same way– and particularly when that deprivation (here, the unavailability of information) is one inseverable part of a larger enforcement scheme– there has occurred a shift of political responsibility to a branch designed not to protect the public at large but to protect individual rights. "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty. . . ." *Lujan*, 504 U. S., at 577. If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper. This is not the system we have had, and is not the system we should desire.

* * *

Because this statute should not be interpreted to confer upon the entire electorate the power to invoke judicial direction of prosecutions, and because if it is so interpreted the statute unconstitutionally transfers from the Executive to the courts the responsibility to "take Care that the Laws be faithfully executed," Art. II, §3, I respectfully dissent.